2024. I. évfolyam 1. szám

STUDIA IURIS

Jogtudományi Tanulmányok / Journal of Legal Studies

KÁROLI GÁSPÁR REFORMÁTUS EGYETEM
ÁLLAM- ÉS JOGTUDOMÁNYI DOKTORI ISKOLA

STUDIA IURIS

Jogtudományi Tanulmányok / Journal of Legal Studies

2024 I. évfolyam 1. szám

Károli Gáspár Református Egyetem
Állam- és Jogtudományi Doktori Iskola

A folyóirat a Károli Gáspár Református Egyetem Állam- és Jogtudományi Doktori Iskolájának a közleménye. A szerkesztőség célja, hogy fiatal kutatók számára színvonalas tanulmányaik megjelentetése céljából méltó fórumot biztosítson.
A folyóirat közlésre befogad tanulmányokat hazai és külföldi szerzőktől – magyar, angol és német nyelven. A tudományos tanulmányok mellett kritikus, önálló véleményeket is tartalmazó könyvismertetések és beszámolók is helyet kapnak a lapban.
A beérkezett tanulmányokat két bíráló lektorálja szakmailag. Az idegen nyelvű tanulmányokat anyanyelvi lektor is javítja, nyelvtani és stilisztikai szempontból.
A folyóirat online verziója szabadon letölthető (open access).

Kiadó: Károli Gáspár Református Egyetem Állam- és Jogtudományi Doktori Iskola
Székhely: 1042 Budapest, Viola utca 2-4
Felelős Kiadó: Tóth J. Zoltán
Olvasó szerkesztő: Giovannini Máté

A tipográfia és a nyomdai előkészítés Csernák Krisztina (L'Harmattan) munkája
A nyomdai munkákat a Robinco Kft. végezte, felelős vezető Gembela Zsolt

Honlap: https://ajk.kre.hu/index.php/jdi-kezdolap.html
E-mail: doktori.ajk@kre.hu
ISSN 3057-9058 (Print)
ISSN (Online)

TARTALOMJEGYZÉK

A GAZDASÁGI LEHETETLENÜLÉS SZABÁLYAI AZ 1945 ELŐTTI MAGYAR MAGÁNJOGBAN

Bodzási Balázs
közjegyző, egyetemi docens
Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, Polgári Jogi Tanszék

ABSZTRAKT ■ A gazdasági lehetetlenülés szabályait széles körben az I. világháború alatt kezdték alkalmazni a magyar bíróságok. A fő kérdések a fennálló szerződéses viszonyok megszüntetéséhez kapcsolódóan merültek fel. Tényállási elemmé vált, hogy az adós teljesítőképtelensége a háborúra legyen visszavezethető. Ezzel együtt a háború előtti magánjogban vétkesnek tekintett lehetetlenülés a háborús magánjog szerint akár vétlennek is minősülhetett.

A gazdasági lehetetlenülés tana a két világháború között tovább fejlődött, a bíróságok a gazdasági lehetetlenülés fogalmát tágabb értelemben kezdték alkalmazni. A jogintézmény szabályai utóbb a kodifikáció szintjén is megjelent.

ABSTRACT ■ The economical impossibility doctrine rules during the First World War began to be widely applied by Hungarian courts. The main issues were raised in relation to the termination of existing contractual relations. It became a factual element that the debtor's incapacity to perform should be led back to the war. At the same time the impossibility considered fault based liability according to the pre-war private law could even be considered non-fault based liable under private wartime law. The doctrine of economic impossibility continued to develop between the two world wars, and the courts began to apply the concept of economic impossibility in a broader sense. The rules of the legal institution subsequently also appeared at the level of codification.

Kulcsszavak: háborús magánjog, eredeti és utólagos lehetetlenülés, kimentési okok, erőhatalom, szerződéses kockázat,

Az utóbbi években az előre nem látható események (világjárvány, háborúk) és az azokkal járó gazdasági nehézségek az élet számos területét érintették, így a szerződések világát is. Különösen a hosszabb időre kötött, tartós szerződéses jogviszonyok kapcsán merült fel az a kérdés, hogy gyakorolhatnak-e hatást a megváltozott külső körülmények a szerződő felek jogaira és kötelezettségeire, illetve alapul szolgálhatnak-e a szerződés módosításához, egyoldalú megszüntetéséhez, vagy esetleg a törvény alapján bekövetkező megszűnéséhez?[1]

[1] Erről részletesebben ld. Bán Dániel: A világjárvány hatása a tartós szerződéses viszonyokra. In: Bodzási Balázs – Csehi Zoltán (szerk.): *A COVID-19 és a gazdasági jog. A koronavírus-járvány és a rendkívüli jogrend hatása a magyar gazdasági jogi szabályozásra*. Magyar Jogász Egy-

A lehetséges válaszok keresése során érdemes felidézni, hogy a 20. századi magyar történelemben voltak már ehhez hasonló helyzetek, és az akkori jogtudomány és jogalkalmazói gyakorlat által kimunkált megoldások számunkra is segítséget nyújthatnak. Ezek közül ebben az áttekintésben a gazdasági lehetetlenülésre vonatkozó szabályoknak az I. világháború alatt kialakuló, majd a két világháború között tovább fejlődő szabályait mutatjuk be. Az ehhez kapcsolódó kérdések az utóbbi években a hazai bírói gyakorlatban is újra felmerültek.[2]

1. A magánjogi jogviszonyok közjogiasodása

Az I. világháború alatt a magánjog jelentős mértékben közjogiasodott, számos magánjogi jogviszony közjogi elemekkel bővült. A háborús jogrend azonban ennél sokkal jelentősebb változást is hozott, mégpedig azt, hogy a magánjog intézményeinek az összessége, és valamennyi már fennálló jogviszony is a legfőbb állami (háborús) célnak lettek alárendelve. Ez azt is jelentette, hogy bármely fennálló magánjogi jogviszony a háború által meghatározott legfőbb állami cél elérése érdekében szükség esetén módosítható és megszüntethető is volt.[3]

Ezzel kapcsolatban elegendő a szerződő felek (pl. a kötelezett) állami igénybevételére (a hadseregbe történő behívására), bizonyos vállalkozási tevékenységek korlátozására, a hadiszállításokra, a rekvirálásra, az exportot és az importot korlátozó jogszabályi rendelkezésekre, és általában a hadigazdálkodásra történő átállásra utalni.[4]

Almási Antal a háborúnak a magánjogra gyakorolt hatásáról írt, 1917-ben megjelent művében egy további figyelemreméltó változásra is felhívta a figyelmet: a közjogi elemek bővülése a magánjogi kötelezettségek megszigorításával is együtt járt.[5]

let, Budapest, 2023, 13-31., Interneten elérhető: https://jogaszegylet.hu/tudastar/, valamint Bodzási Balázs: A válsághelyzetek hatásai a tartós szerződéses jogviszonyokra. In: Bodzási Balázs (szerk.): *Jogászegyleti Értekezések 2023. Válság és jog.* Magyar Jogász Egylet, Budapest, 2023, 13-34., Interneten elérhető: https://jogaszegylet.hu/2023-2/

2 A legújabb bírói gyakorlatból lásd: BH 2023. 215., BH 2022. 209., BDT 2022. 4541., BDT 2022. 4524.

3 Almási Antal: *A háború hatása a magánjogra*. A Magyar Jogászegylet magánjogi díját elnyert pályamunka. A Magyar Jogászegylet Könyvkiadó Vállalata, VIII. évfolyam, 1917. I. kötet. Budapest, Franklin-Társulat Nyomdája, 1917, 166.

4 Erre vonatkozó szemléletes példákat találunk a háború alatt született törvényekben és rendeletekben. Ld.: https://mek.oszk.hu/13100/13160/13160.pdf

5 Almási: i.m. 171.

2. A lehetetlenülési szabályok szélesebb körű alkalmazása

A háború előtti magyar magánjog (ezt nevezték a háború alatt békés magánjognak) a lehetetlenülés több esetét is ismerte.[6] Megkülönböztették egymástól a tényleges, a jogi, az erkölcsi[7] és a gazdasági lehetetlenülést.

A gazdasági lehetetlenülést eredetileg a jogi, illetve az erkölcsi lehetetlenülés egyik alfajtájának tekintették. Elsősorban azért, mert a szerződő fél teljes vagyoni kifosztását önmagába véve is erkölcstelennek tartották, főként akkor, ha azt előre nem látható események idézték elő.

Ehhez közel állt az a jogirodalmi álláspont is, amely szerint méltányosságból sem lehet kötelezni a felet a szerződés eredeti tartalom szerinti teljesítésére, ha a teljesítés ugyan nem vált lehetetlenné, de a szerződés alapja és előfeltételei a szerződő felek hibáján kívül gyökeresen megváltoztak és annak kikényszerítése az egyik felet előre nem látható károsodással sújtaná. A méltányosságra történő hivatkozás ebben az esetben azzal indokolható, hogy megdől a szerződés alapja és előfeltétele, amely folytán azt fenntartani már nem lehet.[8]

Különbséget tettek emellett eredeti és utólagos lehetetlenülés között. Az eredeti lehetetlenülés esetei semmisségi okok voltak.[9] Az eredeti gazdasági lehetetlenülést részben uzsorás ügyletnek is tekintették, a másik szerződő fél kizsákmányolása, szorult helyzetének kihasználása miatt. Almási ezzel kapcsolatban azt is kiemelte, hogy a békés magánjog alapján etikai okokból sem volt követelhető az adóstól aránytalan áldozatot feltételező, és az ő vagyoni erejét messze meghaladó szolgáltatás.[10]

6 A vizsgált időszakban Magyarországon a magánjog kodifikációjára – a kereskedelmi joggal szemben – nem került sor. Ugyan 1900-ban, majd 1913-ban is készültek tervezetek – ez utóbbiból törvényjavaslat is lett, amely a Képviselőház elé került –, a bírói gyakorlat döntően az Osztrák Polgári Törvénykönyvet alkalmazta. Ennek megfelelően a lehetetlenülésre vonatkozó szabályok is a bírói gyakorlatban fejlődtek ki, a korabeli jogtudomány aktív közreműködésével.

7 Almási szerint az erkölcsi okból beálló lehetetlenülés valójában a jogi lehetetlenülés egyik esete. Ezzel kapcsolatban utalt arra is, hogy a háborús erkölcs ugyanúgy különbözött a békebelitől, mint a háborús jogrend a békéstől. Ld. Almási: i.m. 169-170.

8 Gold Simon: A háború hatása a megkötött szerződésekre. *Jogtudományi Közlöny*, 1914/39. szám, 397.

9 A Kúria 1915. P. IV. 11.003. sz. ügy tényállása szerint az eladó kereskedő elmulasztotta közölni vevőjével, hogy a háború kitörésekor Angliából behozni kívánt rézgálic nem volt beszerezhető. A Kúria az eladót gondatlan mulasztása miatt kártérítésre kötelezte, kiemelve azt, hogy az ügylet ipso iure érvénytelenségéről az eladónak annak ellenére is haladéktalanul értesítenie kellett volna a vevőt, hogy az ügylet eredeti lehetetlenségéről ő maga is csak az ügyletkötést követően értesült.

10 Almási: i.m. 160., 173.

Az I. világháború alatt a polgári bíróságok számára a legnehezebb kérdések a fennálló jogviszonyok megszüntetéséhez kapcsolódóan merültek fel, melyek jellemzően a lehetetlenüléssel és a teljesítési képesség megszűnésével álltak kapcsolatban.[11] A jogviszonyok megszűnésének-megszüntetésének problémája nemcsak a dologszolgáltatásokra irányuló kötelmeknél, hanem más típusú szerződéseknél – így főként a használati kötelmeknél – is fokozottan jelentkezett.

A bíróságok már a világháború első éveiben elismerték a bérleti szerződések bérlő általi megszüntetésének a lehetőségét, ha a hadbavonult bérlő nem volt képes eleget tenni kötelezettségeinek. Lehetővé tette azonban a bíróság a bérleti szerződés megszüntetését akkor is, ha annak fenntartása és a bérletidíj-fizetési kötelezettség teljesítése esetén a bérlő vagyoni összeomlását valószínűnek látta.[12] Ugyancsak helyt adtak a bíróságok a haszonbérleti szerződés megszüntetése iránti kérelemnek a haszonbérlő hadba vonulása esetén.[13]

Almási ezzel kapcsolatban arra hívta fel a figyelmet, hogy ez a gyakorlat annál is inkább eltért a háború előttitől, mert annak alapján még a szakképzettséget feltételező haszonbérlet teljesítése sem minősült olyan legszemélyesebb tevékenységnek, amelyet más nem végezhetne. Így az arra vonatkozó szerződés nem is szűnt meg törvény erejénél fogva a haszonbérlő halálával. Ehhez képest a háború alatti bírói gyakorlat a haszonbérlő vétlen akadályoztatása esetén is megállapíthatónak tartotta a szerződés lehetetlenülés miatti megszűnését.[14]

Mindezek alapján felmerült a kérdés, hogy a háborús magánjog nagyobb terjedelemben alkalmazta-e a lehetetlenülésre vonatkozó rendelkezéseket, mint a békés?

A háborúra mint erőhatalomra történő hivatkozással a bíróságok olyan kötelezettségekre – a bérlő és a haszonbérlő pénzszolgáltatásaira – is kiterjesztették a lehetetlenülési szabályok alkalmazhatóságát, amelyekre a békés magánjog azt nem tette volna lehetővé. Emellett pedig a lehetetlenülés következményeit

[11] Ezzel párhuzamosan a korabeli jogirodalom azzal a kérdéssel is foglalkozott, hogy volt-e olyan jogszabály, amely a viszonyok lényeges változását a szerződésre visszaható körülménynek mondta ki. Ld. pl. Mandel Zoltán: A háború szerződésbontó hatása. *Jogtudományi Közlöny*, 1914/38. szám, 391-392.

[12] Almási: i.m. 150.

[13] A bérlőt, valamint a haszonbérlőt terhelő, lejárt bérleti-, illetve haszonbérleti díjtartozás – mint pénztartozás – kapcsán azonban a Kúria nem állapította meg a lehetetlenülést abban az esetben sem, ha a kötelezett hadbavonult. A pénztartozás megfizetésére irányuló kötelezettséget ugyanis más személy („helyettes rendelése") által is teljesíthetőnek tekintették.

[14] Almási ezzel kapcsolatban a Kúria egy másik döntését is idézi (1916. P.II.6043. sz.), amelyben a Kúria a rendes magánjogi alapelvektől eltérően a szakképzett gyógyszerész bevonulása miatt a gyógyszertár haszonbérbe vételére irányuló szerződést lehetetlenülés okából megszüntette. Ld. Almási: i.m. 151. 1. lábjegyzet

a kötelezett joggyakorlásától tették függővé akkor is, amikor a joggyakorlás akadályai nem a szerződés tárgyában merültek fel.[15]

Ezzel kapcsolatban Almási azt emelte ki, hogy a háborús magánjogban a háború okozta alanyi és tárgyi lehetetlenülés tömeges jelenséggé vált, míg a békés magánjogban ezek sokkal ritkábban fordultak elő, ezért a lehetetlenülési szabályokat is kivételesnek tekintették. Ennek egyik jeleként a háborús magánjog sokkal szélesebb körben tette lehetővé a lehetetlenülés felróhatóságának a vizsgálatát, mint a békés. A háborús magánjog így a kimentés (exkulpálás) elveit arra a kötelezettre is alkalmazta, aki azoknak a mentesítő következményeire a békés magánjogban nem hivatkozhatott. Így jutottak el a bíróságok a fenti esetekben a kötelezettnek a mentesítéséig olyan jogok személyes gyakorlásának a kizártsága („nem gyakorolhatása") esetén, amely jogok átruházhatóak és más által is gyakorolhatóak voltak.[16]

Kérdésként merült fel az is, hogy a szerződésben kikötött szolgáltatás teljesítésének a megváltozott háborús viszonyok következtében beállott aránytalan nehézsége lehetetlenülésnek minősült-e vagy sem. Egyes szerzők (pl. Szászy-Schwarz Gusztáv) ez ellen foglaltak állást.

A vitát tulajdonképpen a lehetetlenülési szabályok jelentőségének a háború alatti megnövekedése okozta, pontosabban az, hogy a békés magánjogban a lehetetlenülésre mint kivételes jelenségre koncipiált szűk elvek a háborús magánjogban – melyben a lehetetlenülés tömeges jelenséggé vált – már nem voltak alkalmazhatóak.

Ehhez szorosan kapcsolódva az is elismerést nyert, hogy minden jogügyletben – azokban is, amelyekben ez kifejezetten nem volt szabályozva – benne van a „rebus sic stantibus" klauzula. Úgy tekintették ugyanis, hogy a háború és a gazdasági életet felforgató más események kockázatának viselése a rendes árakba nem volt belekalkulálva. Mindkét fél azzal a feltevéssel kötötte meg az ügyletet, hogy a viszonyok lényegesen nem változnak. Ezt a vélelmet pedig csak kifejezett, az ügylet természetéből következő ellenkező megállapodás dönthette meg.[17]

3. A gazdasági lehetetlenülés

Gazdasági lehetetlenülés alatt a korabeli jogirodalom és bírói gyakorlat azt a tényállást értette, amikor az adós az egyébként ténylegesen teljesíthető szolgáltatást csakis aránytalan és az ő anyagi tönkretételét eredményező, túlságosan nagy

[15] Almási: i.m. 150.
[16] Almási: i.m. 149., 152.
[17] Mandel: i.m. 392.

vagyoni áldozatok árán tudta volna teljesíteni. Ezt az adós teljesítőképtelensége egyik kiterjesztett eseteként fogták fel. A háborús magánjog szerinti gazdasági lehetetlenülés fogalmához ezen kívül az is hozzátartozott, hogy annak oka a háborúra volt visszavezethető.[18]

Lényeges szempont volt tehát, hogy háborús körülmények között az adós teljesítőképtelensége a háborúval szervesen összefüggő, az egész nemzetgazdaságra kiható okok folytán következett be. Elismerést nyert az az elv, hogy a háborús lehetetlenülés eseteiben a szerződéses szolgáltatás teljesítése a háborúval összefüggő nemzetgazdasági okokból lehetetlen vagy méltánytalan. Ennek elsősorban a gazdasági lehetetlenülésnél volt jelentősége, de a tényleges és a jogi lehetetlenülés háborús alfajainál is megállapítható volt az, hogy a kötelezett szolgáltatásának a háborúval összefüggő akadályai egyformán előreláthatatlanok és elkerülhetetlenek voltak.[19]

Mint láttuk, a gazdasági lehetetlenülést már a háború előtti magánjog is elismerte, elveit azonban jóval szűkebb körben alkalmazta, mint azt a háború alatti joggyakorlat tette. Ezt tükrözte az is, hogy a háború előtti magánjogban a gazdasági lehetetlenülés mindig a kötelezett egyéni vagyoni-gazdasági viszonyaira volt visszavezethető. Emellett pedig ez az esetek többségében már az ügyletkötéskor fennálló, eredeti lehetetlenülésről volt szó, amely a szerződés érvénytelenségét eredményezte. A háború alatt azonban jellemzően olyan esetek kerültek a bíróságok elé, amelyekben a másik fél szorult helyzetének a kiaknázása – amely gazdasági lehetetlenüléshez vezethetett – nem az ügyletkötéskor, hanem az érvényesen létrejött szerződés teljesítésének a kikényszerítése során merült fel.[20]

A békés magánjogban a gazdasági és a tényleges lehetetlenülés joghatásai ugyanazok voltak, vagyis a lehetetlenülés valamennyi esetének joghatásai egységesen kerültek meghatározásra. Ezzel szemben a háborús magánjogban a gazdasági lehetetlenülés kapcsán előtérbe kerültek a tényálláshoz kapcsolódó kártérítési és gazdagodási kérdések. A háborús magánjogban így a gazdasági lehetetlenülés újabb, különleges tényálláselemekkel egészült ki.[21]

[18] Almási: i.m. 158-160.

[19] Almási: i.m. 177. A jogi lehetetlenülésre hozhatók példaként azok a jogszabályok, amelyek fennálló szerződések teljesítését tiltották meg.

[20] Almási: i.m. 174.

[21] Almási: i.m. 160-161. Almási ezeket a vétlen lehetetlenülés rendkívüli terhelő hatásainak nevezi, megkülönböztetve a békés magánjog szerinti vétlen lehetetlenüléshez kapcsolódó rendes terhelő következményektől. Ez abban nyilvánult meg, hogy a háború miatt lehetetlenült szolgáltatás adósának a terhére kártérítési, illetve gazdagodási kötelmet állapítottak meg, még abban az esetben is, ha a lehetetlenülés neki nem volt felróható, vagyis az nem volt visszavezethető az ő vétkességére.

4. A gazdasági lehetetlenülés tényállási elemei a háborús magánjog alapján

A háborús magánjogban a vétlen lehetetlenüléshez kapcsolódó újabb tényállási elemek célja a jogosult (hitelező) érdekeinek a védelme volt, összhangban azzal a bírói gyakorlatban kialakult jogelvvel, miszerint a háború következményeinek lehetőleg mindenkit egyaránt kell terhelniük.[22] Így bár a háborús magánjog egyrészt a terhesebbé vált gazdasági viszonyok miatt az adós helyzetének könnyítésére törekedett, nem hagyhatták figyelmen kívül a másik szerződő fél helyzetét sem, és nem háríthatták a háború miatt lehetetlenült szerződés minden negatív következményét és kockázatát a hitelezőre.

Tényállási elemmé vált a háború alatt az is, hogy az adós teljesítőképtelensége a háborúra legyen visszavezethető.[23] Emiatt pontosabb háborús gazdasági lehetetlenülésről beszélni és különbséget tenni a háborús és a békés magánjog szerinti gazdasági lehetetlenülés között. A békés magánjog szerinti gazdasági lehetetlenülésnek ugyanis nyilvánvalóan nem a háború volt az oka, hanem olyan körülmény, amely a kötelezett egyéni vagyoni-gazdasági viszonyaira volt visszavezethető.

Természetesen a békés magánjog szerinti gazdasági lehetetlenülés is feltételezte az adós vétlenségét, vagyis a lehetetlenülés neki nem volt felróható, az alól ki tudta magát menti. A háborús magánjog azonban újabb kimentési lehetőségeket is biztosított az adós számára, melyek a békés magánjogból hiányoztak.

Ezzel kapcsolatban merült fel az a kérdés, hogy a háborús magánjog szerinti lehetetlenülés alóli kimentéshez elegendő volt-e a békés magánjog szerinti feltételek fennállását bizonyítani, vagy ezen felül szükséges volt még az is, hogy a lehetetlenülés erőhatalomra legyen visszavezethető.

Almási szerint erre a rendes lehetetlenülés esetén nem volt szükség, mivel mind a békés, mind a háborús magánjog szerinti lehetetlenülés alóli kimentéshez az egyszerű vétlenség önmagában elegendő volt, és nem kellett azt vizsgálni, hogy a lehetetlenülés oka a háborúval vagy az erőhatalommal összefüggésben állt-e.[24] Ebben a körben tehát a kimentés tekintetében nem történt változás, az adós vétlenségének – a felróhatóság hiányának – a bizonyításához a háborús magánjog sem kívánt meg szigorúbb feltételeket, mint a békés.

[22] Kúria 1915. P.II.10.495. sz.

[23] Almási: i.m. 160.

[24] Almási azonban olyan döntéseket is idéz, amelyek önmagában az erőhatalomnak mentesítő hatást tulajdonítottak, az adós vétlenségét pedig nem is vizsgálták, holott a kellő gondosság hiánya miatt vétkes lehetetlenülés is fennállhatott.

Más volt azonban a helyzet a lehetetlenülés (elsősorban a gazdasági lehetetlenülés) azon eseteinél, amelyek kizárólag a háborúra voltak visszavezethetőek. Ahhoz ugyanis, hogy a háborús magánjog szerinti (gazdasági) lehetetlenülés rendkívüli terhelő hatásai is beálljanak, bizonyítani kellett, hogy a lehetetlenülés a háborúval összefüggő erőhatalomra volt visszavezethető. Amennyiben bizonyítást nyert, hogy a lehetetlenülés a háborúra volt visszavezethető, akkor azért az adós nem volt felelős.[25]

Kérdés volt ugyanakkor, hogy pontosan mit is jelentett valamely lehetetlenülésnek a háborúra való visszavezethetősége. Meddig, milyen mélységig kellett a bíróságnak vizsgálnia az okozati összefüggést? Almási ezzel kapcsolatos álláspontja szerint addig kellett a bíróságnak ezzel kapcsolatban elmenni, ameddig valamely teljesítés elmaradásának a háborúval való összefüggése átlagos gondosság mellett még felismerhető volt. Ha ugyanis a kártérítési felelősség alól elegendő mentesítő ok volt, hogy a károkozás (kártétel) a dolgok természetes rendje szerint és tekintettel a fennforgó különös körülményekre, előre nem volt látható, úgy ennek irányadónak kellett lenni akkor is, ha a szerződésben vállalt kötelezettség megszüntetéséről, illetve az annak terhe alóli szabadulásról volt szó.[26]

További kérdésként merült fel, hogy az adós tényleges akaratelhatározására visszavezethető lehetetlenülés vétkesnek vagy vétlennek minősült-e akkor, amikor az akaratelhatározás a háborúra utalt vissza. A kérdés elsősorban a visszterhes szerződéseket érintette, az ingyeneseket kevésbé.[27] Visszterhes szerződéseknél merült fel tehát úgy ez a kérdés, hogy a forgalmi gondosság alapján az adós önkéntes akaratelhatározásai következtében beálló (tényleges vagy gazdasági) lehetetlenülés mentesítette-e a kötelezettet vagy sem.[28]

Almási ezzel kapcsolatban úgy foglalt állást, hogy a háborúba cselekvő alanyként belépő kötelezettre ebből a cselekvéséből kifolyólag jogi hátrány nem származhatott, így az erre vonatkozó önkéntes akaratelhatározás vétkesnek vagy felelősséget megalapítónak nem volt tekinthető. Ebből következően pedig a háború által előidézett (tényleges vagy gazdasági) lehetetlenülés esetén a kötelezett vétlensége volt megállapítható akkor is, ha a szolgáltatás elmaradása a kötelezettnek a tág értelemben vett önkéntes akaratelhatározására (pl. hadba lépésére) volt visszavezethető.[29]

[25] Almási: i.m. 163-164.

[26] Almási: i.m. 165.

[27] Ingyenes szerződések megszegése esetén a kimentés könnyebb volt a kötelezett számára. Ezt az elvet rögzíti a hatályos Ptk. 6:147. §-a is.

[28] Nem mentesülhetett a kötelezett azokban az esetekben, amikor a szolgáltatáshoz szükséges nyersanyagot más úton beszerezhette, vagyis amikor jogi értelemben vett lehetetlenülésre nem is került sor. Ld. Almási: i.m. 166.

[29] Almási: i.m. 166.

Az adós vétlenségének a megállapítása természetesen nem jelentette azt, hogy a kötelezett a hadbalépést hitelezője kijátszására (in fraudem creditorum) használhatta volna fel. Az adós az önkéntes akaratelhatározása miatt beállott lehetetlenülésért ugyan nem volt ipso iure vétkes, azonban az ebből eredő károkért, vagy az ezzel elért hasznok erejéig felelős volt.[30]

Fontos tényállási elemnek tekintették a lehetetlenülésről való értesítési kötelezettséget is. Ennek alapján a szerződést megszegő fél – saját vétlenségének fenntartása céljából – köteles volt a másik felet a lehetetlenülésről külön is értesíteni. Jogi lehetetlenülés esetén ezt az a tény is indokolta, hogy a laikus számára amúgy sem túlságosan hozzáférhető joganyag a háborúban szinte áttekinthetetlenné vált. Ezért indokoltnak tartották, hogy a háborús jogrend rendkívüli bonyolultságából eredő zavarok eloszlatását az ügyletkötő felek közös kötelezettségévé tegyék. Jogi lehetetlenülés esetén ez az értesítési kötelezettség a jogszabályban foglalt tilalom közlésére is kiterjedt, amennyiben az az ügyletkötő fél előtt ismert volt.[31]

Az erről tudomással bíró fél terhére tehát közlési kötelezettség állt fenn a lehetetlenülés háborús tényállásainál. Ennek megszegése teljes kártérítést vont maga után. Ez utóbbi lényeges változás volt a békés magánjoghoz képest, amely alapján a közlési kötelezettség megsértése esetén csak a negatív interessét kellett megtéríteni. Ennek a helyébe lépett a teljes kár megtérítésének a kötelezettsége, amely nemcsak az utólagos, hanem az eredeti lehetetlenülés eseteire is kiterjedt.[32]

Almási ennek okát abban látta – amint erre már utaltunk –, hogy a háborús magánjog közjogiasodása a magánjogi kötelezettségek megszigorításával járt együtt. A közlési kötelezettségnél ez abban nyilvánult meg, hogy annak szankciója fokozódott, vagyis a szerződés megkötéséből eredő kártérítés (negatív interesse) helyett a szerződés teljesítésének elmaradásából eredő kár (vagyis a teljes kár) megtérítésére került sor.[33]

[30] Almási a vétlen lehetetlenüléssel okozott károkért való felelősség kifejezést használja. Ezzel kapcsolatban azonban nemcsak az objektív lehetetlenüléssel okozott károkért való felelősség, hanem a kárveszély kérdése is felmerül. A kárveszélyviselés ebben az esetben a teljesítési kockázat viselését jelenti. Ez a teljesítési kockázat akkor jelentkezik, ha bármelyik szerződő fél, olyan okból, amelyért nem felelős, egyáltalán nem vagy nem szerződésszerűen képes a saját szolgáltatásának a teljesítésére, és az így beálló szerződésszegési következményt (a szerződésszerű teljesítés elmaradásának következményeit) nem tudja áthárítani másra. A teljesítési kockázat, mint a teljesítés elmaradásának veszélye a kötelezettet terheli, de nem amiatt, mert ő a tulajdonos, hanem azért, mert ő a teljesítésre kötelezett. Ld. részletesebben Darázs Lénárd: Kárveszélyviselés és érvénytelen szerződés. *Magyar Jog*, 2017/10. szám, 624.

[31] Almási: i.m. 169.

[32] Almási: i.m. 170.

[33] Almási: i.m. 171.

5. Az erőhatalom

A lehetetlenülés felróhatóságához szorosan kapcsolódóan jelent meg a gyakorlatban a lehetetlenülés erőhatalom általi okozásának kérdése is. A lehetetlenülés oka ugyanis az erőhatalom is lehetett. Mivel azonban az erőhatalom más fajta szerződésszegésnek (pl. késedelem, hibás teljesítés) is lehetett az okozója, így az erőhatalmat tágabb körben ható jogi ténynek ismerték el, mint a lehetetlenülést.

Fontos azt is kiemelni, az erőhatalom joghatásai csak azt követően kerültek szóba, ha előzetesen már eldőlt, hogy a szolgáltatás lehetetlenülése az adósnak fel nem róható okra vezető vissza.[34] Kérdés ugyanakkor, hogy ha a lehetetlenülés az adósnak nem volt felróható, akkor miért kellett még az erőhatalom kérdését vizsgálni.

Az mindenesetre egyértelművé vált, hogy az erőhatalom által kiváltott törvényes joghatás a békés magánjogban lényegesen szűkebb körben érvényesült, mint a háborús magánjogban. Almási megfogalmazása szerint: „… a háborúban az erőhatalom a békés magánjognál tetemesen szélesebb joghatásokkal jár, hogy ügyleteket szüntet és kötelességeket függeszt fel, hogy teljesítési jogparancsokat tol félre és azokat ipso jure kártérítésiekkel pótolja."[35]

6. A gazdasági lehetetlenülés jogkövetkezményei

A jogkövetkezmények vizsgálata során vissza kell utalnunk arra, hogy a békés magánjog a lehetetlenülés valamennyi esetében egységesen szabályozta a jogkövetkezményeket.

A szerződés megkötésekor már fennálló, eredeti lehetetlenülés az ügyletet érvénytelenné (semmissé) tette. Az érvénytelenség nem függött a felek akaratától, illetve tudomásától, annak legfeljebb a szerződés megkötéséből eredő kár megtérítésénél lehetett némi szerepe.[36]

A szerződéskötés után, de még a teljesítés előtt beálló lehetetlenülés jogkövetkezményei azonban attól függtek, hogy a kötelezettnek a lehetetlenülés felróható volt-e vagy sem. Az adósnak fel nem róható utólagos (akkori kifejezés szerint:

[34] Almási: i.m. 153. Ezzel kapcsolatban helytelennek tartotta azokat a bírósági döntéseket, amelyek a vétlen lehetetlenülést, valamint a teljesítőképtelenség fel nem róhatóságát pontatlanul szintén erőhatalomnak nevezik, és így azt a látszatot keltik, mintha a háborúval járó gazdasági nehézségek, valamint az ezek folytán a kötelezettre háruló tetemes vagyoni áldozatok azonnal az erőhatalmi szabályok alkalmazásához vezetnének.

[35] Almási: i.m. 154.

[36] Almási: i.m. 172.

közbenjött) lehetetlenülés esetén az adós szabadult a szolgáltatás teljesítésének a kötelezettsége alól, a hitelező pedig ebben az esetben a teljesítés residuumára tarthatott igényt. Amennyiben azonban az utólagos lehetetlenülés a kötelezettnek felróható volt, a vétkes szerződő felet kártérítési kötelezettség terhelte, a másik felet pedig emellett elállási jog is megillette. A vétkes lehetetlenülés megítélésén és jogkövetkezményein a háborús magánjog sem változtatott.[37]

Ezeket a jogkövetkezményeket kellett alkalmazni a gazdasági lehetetlenülés eseteiben is, akár eredeti, akár utólagos lehetetlenülésről volt szó. Mivel azonban a gazdasági lehetetlenülés feltételezte az érintett szerződő fél vétlenségét, ezért a vétkes lehetetlenülés jogkövetkezményei valójában nem kerültek alkalmazásra.

A felróhatósággal (vétkességgel) kapcsolatban azt is ki kell emelni, hogy a háború hatására változtak a mentesítési tényállás (vagyis a felróhatóság alóli kimentés) tárgyi feltételei. Ez azt jelenti, hogy a békés magánjogban vétkesnek tekintett lehetetlenülés a háborús magánjog szerint vétlennek minősülhetett, amennyiben a lehetetlenülésre a háború miatt oly módon került sor, hogy annak okát a kötelezett a forgalomban megkívánt legnagyobb gondosság és körültekintés mellett sem láthatta előre. A háborús erőhatalomra visszavezethető lehetetlenülés esetén ennek alapján a kötelezett vétkessége nem merült fel. Másképpen megfogalmazva ez azt jelentette, hogy a háborús magánjog a békés magánjog nem exkulpálható kötelmeit exkulpálhatónak tekintette, és ehhez csupán azt a tényállásbeli szigorítást kívánta meg, hogy a lehetetlenülés háborús erőhatalomra legyen visszavezethető.[38]

A korabeli jogirodalomban többen vitatták, hogy gazdasági lehetetlenülés esetén megfelelő jogkövetkezmény-e az, hogy az adós ipso iure szabadul a szolgáltatás teljesítésének kötelezettsége alól. Volt olyan szerző, aki elállási jogot biztosított volna az adósnak, a hitelezőt megillető egyoldalú szerződésmódosítási joggal („ügyletformálási jog"),[39] valamint méltányos kártérítés iránti igénnyel együtt.[40]

A Kúria azonban következetes volt a gazdasági lehetetlenülés végső joghatása tekintetében, melyet egy ítéletben így foglaltak össze: „… gazdasági lehetetlenülés következménye, hogy a kötelezett a szolgáltatás alól szabadul." (Kúria 1915. P.II.10.495.).

[37] Almási: i.m. 172., 176.

[38] Almási: i.m. 179. Ezt Almási egységes elvként jogszabályi szinten is indokoltnak tartotta volna kimondani.

[39] Almási azonban a hitelezőt megillető egyoldalú szerződésmódosítási jog elismerésével szemben foglalt állást. Ld. Almási: i.m. 180.

[40] Gold: i.m. 398. A szerző szerint méltányosságból nemcsak a tényleges kárt, hanem a hasznot is meg kellett volna osztani a szerződő felek között. Előfordulhatott ugyanis, hogy a megváltozott körülmények (pl. áremelkedés) folytán az egyik fél olyan haszonhoz jutott, amelyre az ügyletkötéskor nem számított és kellő előrelátás mellett sem számíthatott volna.

Található azonban olyan korabeli bírósági ítélet is, amely az adós kötelem alóli szabadulását követően, a megváltozott viszonyokhoz igazodó új szerződést hozott létre a felek között.[41] Ettől természetesen eltért az a helyzet, amikor a felek – akárcsak hallgatólagosan is – újabb megállapodást kötöttek arra vonatkozóan, hogy a lehetetlenülés folytán megszűnt szerződéses jogviszonyt a megváltozott életviszonyoknak megfelelő tartalommal folytatják.[42]

Vétlen lehetetlenülés esetén a kötelezett szabadulása természetesen nem azt jelentette, hogy a hitelező semmilyen igényt nem érvényesíthetett az adóssal szemben. A jogosult részben kártérítési igényt, részben pedig a szolgáltatás alóli szabadulás folytán esetlegesen elért nyereségnek a felek közötti elosztására vonatkozó igényt támaszthatott a kötelezettel szemben.[43]

A vétlen lehetetlenülés következtében a kötelem alól szabadult adós ennek alapján köteles volt a hitelezőnek a szabadulása folytán okozott kárt – legalábbis részben – megtéríteni. Azt Almási is kiemelte, hogy ez a „méltányossági kártérítés" a vétlen lehetetlenülés háborús hatásainak „legszélsőbbike".[44] Alkalmazására ennek megfelelően csak akkor kerülhetett sor, ha a vétlen lehetetlenülés rendes szabályainak, elveinek alkalmazása a hitelezőre aránytalan és méltánytalan vagyoni hátránnyal járt volna. Ennek a méltányossági alapú kártérítésnek a megfizetésére az adós csak akkor volt köteles, ha a kötelemből való szabadulása a hitelező tetemes és aránytalan megkárosításával járt volna.[45]

A háborús magánjog szerinti gazdasági lehetetlenülés eseteiben – amint erre fent már kitértünk – az egyik szerződő fél jellemzően a háborúval összefüggő nemzetgazdasági okból nem tudta a saját szolgáltatását teljesíteni, gazdasági helyzetének kedvezőtlen változását tehát a háború idézte elő. Ezzel kapcsolatban azonban a gazdasági lehetetlenülésre hivatkozó félre hárult a bizonyítási teher, akár eredeti, akár utólagos gazdasági lehetetlenülésről volt szó. Ez egy lényeges

41 Az 1915. P.IV.10.149. sz. ügyben a Kúria úgy foglalt állást, hogy a kötelezett szabadulása után az ügyleti viszonyt folytató másik fél ezáltal a megváltozott viszonyoknak megfelelő ellenérték megfizetésébe is beleegyezett.

42 Almási: i.m. 181.

43 Almási szerint az adós szabadulása folytán elért nyereség valójában egészében a hitelezőt illette volna. Ld. Almási: i.m. 179. Ezzel kapcsolatban idézi a Kúria 1916. Rp.IX.3564. sz. döntését, amelyben a Kúria az elrekvirált borsónak a szerződési és a rekvirálási ára közötti árkülönbségét a vevőnek ítélte meg.

44 Ez azonban logikusan következett abból a bírói gyakorlat által is követett alapelvből, mely szerint a háború következményei lehetőleg mindenkit egyaránt terheljenek (ld. Kúria 1915. P.II.10.495. sz.).

45 Almási: i.m. 181.

különbség a lehetetlenülés más eseteihez képest, ugyanis sem tényleges, sem pedig jogi lehetetlenülésnél ilyen bizonyítási teher az érintett felet nem terhelte.[46]

7. A háború következtében előállott jogi akadályok minősítése

Az erőhatalom kérdésével is összefüggött az a további kérdés, hogy a háború következtében előállott jogi akadályokat véglegesnek vagy ideiglenesnek kellett-e tekinteni. Ez az ideiglenes és a végleges lehetetlenülés közötti különbségtételt is szükségessé tette.

Almási ezzel kapcsolatban – az 1912. évi LXIII. törvénycikkre[47] is utalva – azt emelte ki, hogy mivel a háborús intézkedések ideiglenesek, így kétség esetén a jogalkotói intézkedések is ideiglenes jellegűek. Ebből pedig az következik, hogy kétség esetén a szolgáltatásra vonatkozó háborús jogi vagy erkölcsi tilalom is csupán ideiglenesnek, nem pedig véglegesnek tekintendő.[48]

Az egy további kérdés, hogy az ideiglenes lehetetlenülés lehetetlenülésnek minősül-e egyáltalán, vagy késedelemnek kell tekinteni? Az a vélemény ugyanis a korabeli jogirodalomban is megjelent, hogy amíg a tényleges (végleges) lehetetlenülés be nem következett, addig a kötelmet nem lehetett megszűntnek tekinteni. Ezért hivatkozott több szerző is a gazdasági lehetetlenülés mellett a szerződés jogügyleti alapjának és előfeltételeinek megdőlésére vonatkozó nézetekre.[49] Ezek a 19. század közepén a német jogtudományban kidolgozott elméletekre nyúltak vissza, melyek Windscheid, majd Oertmann munkáiban kristályosodtak ki.[50]

[46] Almási: i.m. 174-175. Ez a bizonyítási kötelezettség az eredeti gazdasági lehetetlenülés esetén is terhelte az érintett felet, amit azért fontos kiemelni, mert ez a szerződés semmisségéhez vezetett, amit a bírónak hivatalból kellett észlelnie. Almási azonban ezzel kapcsolatban azt emelte ki, hogy bár az eredeti lehetetlenség ipso iure hat és a perben hivatalból észlelendő, ez az ipso iure hatás nem jelentette azt, hogy a semmisség minden esetben egyformán észlelendő hivatalból. Az eredeti gazdasági lehetetlenség eseteiben azért terhelte az érintett felet a bizonyítási kötelezettség, mert ez juttatta a bírót abba a helyzetbe, hogy a nemzetgazdaságilag lehetetlen vagy méltánytalan szolgáltatás erkölcstelenségére következtessen.

[47] 1912. évi LXIII. törvénycikk a háború esetére szóló kivételes intézkedésekről

[48] Almási: i.m. 157.

[49] Gold: i.m. 397. Erre utóbb Szladits Károly is hivatkozott, de nála ez összefonódott a gazdasági lehetetlenüléssel. Szladits szerint ugyanis a gazdasági lehetetlenülés alakjában a bíróság voltaképpen azoknak a gazdasági alapvetéseknek a felborulásával számol, amelyekre a felek szolgáltatásaik érdekegyensúlyát alapították. Ld. Szladits Károly: A kötelem lebonyolítása. In: Szladits Károly (szerk.): *A magyar magánjog.* Harmadik kötet. Kötelmi jog. Általános rész. Budapest, Grill Károly Könyvkiadóvállalata, 1941, 495.

[50] Részletesebben lásd Mathias Schmoeckel – Joachim Rückert – Reinhard Zimmermann (Hrsg.): *Historisch-kristischer Kommentar zum BGB., Band II., Schuldrecht: Allgemeiner Teil §§ 241-432. 2. Teilband,* Tübingen, Mohr Siebeck, 2007, 1713-1720. A clausula rebus sic stantibus

8. A gazdasági lehetetlenülés szabályai a két világháború közötti időszakban

A gazdasági lehetetlenülés szabályai a két világháború között tovább fejlődtek. Ehhez nagyban hozzájárult az is, hogy ez alatt a két évtized alatt a magyar gazdaságot két nagy válság is megrázta: az 1920-as évek elején, a világháborút követő összeomlás miatt,[51] majd pedig az 1930-as évek elején a nagy gazdasági világválság hatására.[52]

A kötelem gazdasági – vagy az ezzel szinte azonos megítélés alá eső erkölcsi – „túlnehezülése" alatt azt értették, amikor a szolgáltatás teljesítését az adóstól a józan ész, valamint a tisztesség és méltányosság elvének figyelembevételével nem lehetett elvárni. Ilyen esetben a szolgáltatás ugyan sem természetben, sem jogilag nem vált lehetetlenné, Szladits Károly kifejezésével élve azonban *„a kötelembetöltés körében uralkodó méltányosság szerint nem lehet az adóst megterhelni"*.[53]

A gazdasági lehetetlenség alapgondolata az volt, hogy az adóst – akinek a helyzete a rendes körülmények között figyelembe vehető kockázat mértékén túl megnehezült – a rendes szerződési kockázatot messze meghaladó áldozatra méltányosan nem lehetett kötelezni. Alkalmazására elsősorban akkor került sor, ha rendkívüli gazdasági viszonyok hatására a szerződéses szolgáltatás és ellenszolgáltatás értéke között a szerződés megkötése után olyan jelentékeny eltolódás állt elő, amelyre a felek a szokásos szerződési kockázat figyelembevételével semmiképpen sem gondolhattak, és az egyik fél ennek következtében aránytalan nyereségre tehetne szert a másik fél rovására.[54] A bíróság ennek alapján méltányosságból módosíthatta a felek közötti szerződést, vagy az egyik felet elállásra jogosíthatta fel és az előállott kárt a felek között megoszthatta.

A két világháború között a bíróságok a gazdasági lehetetlenülés fogalmát tágabb értelemben kezdték alkalmazni. Minden olyan esetben hivatkozni lehetett

elve azonban már jóval ezt megelőzően, a 16-17. században elterjedt, azonban csak a porosz Allgemeines Landrecht-ben került kodifikálásra (ALR I 5, § 378) egy kivételszabályként, amely az előre nem látható, megváltozott körülményekre tekintettel elismerte a szerződéses kötelemtől való szabadulást.

51 Ennek az időszaknak az egyik fő sajátossága a pénztartozások valorizációja, vagyis átértékelése volt. Erről ld. Czugler P. Áron: Hitelválságok kezelése egykor és most. A bethleni konszolidáció magánjogi válságjogának tanulságai a jelenkor számára. *Jogtudományi Közlöny*, 2015/1. szám, 37-48.

52 Részletesebben lásd: Pogány Ágnes: *A nagy háborútól a nagy válságig. Bank- és pénztörténeti tanulmányok a két világháború közötti Magyarországról*. L' Harmattan Kiadó, Budapest, 2023, 49-67.

53 Szladits: i.m. 494-495. Ezt érdekbeli vagy betöltési lehetetlenségnek is nevezték.

54 Szladits: i.m. 495.

erre, amikor a szerződésben szereplő szolgáltatások egyensúlya a rendkívüli gazdasági viszonyok folytán megbomlott.[55]

A bírói gyakorlat ezt a tágabb értelemben vett gazdasági lehetetlenülést fokozatosan egyre szélesebb körben alkalmazta. Így például alkalmazták a határozott időre kötött bérleti szerződések körében is akkor, amikor a bérlők a korábban megállapított magasabb bérleti díjat csak létfenntartásuk komoly veszélyeztetésével tudták volna megfizetni. A bírói gyakorlat ilyen esetben – a méltányosság követelménye alapján – elismerte, hogy a bérlő a megállapított bérleti díj mérséklését követelhesse, vagy ehelyett a bérleti szerződést a határozott idő letelte előtt felmondhassa.[56]

Kiemelkedő szerepe volt emellett a jóhiszeműség és méltányosság elvének is. Egyrészt az egyik szerződő fél esetleges aránytalan gazdagodása a másik fél rovására már önmagában sértette a magánjognak ezt az alapelvét. A méltányosság elve azonban ezen túlmenően is érvényesült a kötelem teljesítése során. Mint láttuk, ebből vezették le azt, hogy egy szerződéses szolgáltatás méltányosságból is lehetetlenné válhatott, annak ellenére, hogy természetbeni vagy jogi lehetetlenség nem állt fenn. Végül pedig a fennálló szerződéses jogviszonyba történő bírói – ezen keresztül valójában állami – beavatkozásra is a méltányosságnak megfelelően kerülhetett sor.[57]

A folyamatos jogfejlődés eredményeképpen a két világháború közötti időszakban a gazdasági lehetetlenülés szabályai már a kodifikáció szintjén is megjelentek. Az 1928-as Magánjogi Törvényjavaslat 1150. §-a – feldolgozva a bírói gyakorlat addigi eredményeit – külön is rendelkezett a lehetetlenülésnek ennek az esetéről.[58] Mint láttuk, erre Almási már az I. világháború alatt javaslatot tett.[59]

[55] Szladits: i.m. 495.

[56] Szladits: i.m. 495.

[57] Szladits: i.m. 495.

[58] Mtj. 1150. § Ha kétoldalú szerződés esetében a szerződés megkötése után az általános gazdasági viszonyokban a szokásos szerződési kockázatot tetemesen meghaladó olyan mélyreható változás állott be, amellyel a felek okszerűen előre nem vethettek számot s amelynek következtében a szolgáltatásnak és az ellenszolgáltatásnak a felek részéről szemelőtt tartott gazdasági egyensúlya felborult vagy a szerződés alapjául szolgáló másnemű feltételezés meghiúsult, úgy, hogy az egyik fél a jóhiszeműséggel és a méltányossággal ellentétben nem várt aránytalan nyereségre tenne szert, a másik fél pedig ugyanilyen veszteséget szenvedne (gazdasági lehetetlenülés): a bíróság a felek kölcsönös kötelezettségeit a méltányosságnak megfelelően módosíthatja vagy az egyik felet – esetleg a kár méltányos megosztásával is – elállásra jogosíthatja fel.

[59] Almási szerint a teljesítőképtelenség kimentésére vonatkozó elveket törvényi szinten kellett volna kiterjeszteni azokra a szerződésekre is, amelyeket a létrejöttükkor (a kötelezettségi alap létesülésekor) fennállótól – a háború okából – merőben eltérő viszonyok között kellett teljesíteni. Ld. Almási: i.m. 152.

A gazdasági lehetetlenülés elismerésével a bíróság voltaképpen azoknak a gazdasági alapvetéseknek a felborulásával számol, amelyekre a felek eredetileg a visszterhes szerződéses szolgáltatásaik érdekegyensúlyát alapították. Szladits azonban ezzel kapcsolatban azt is kiemelte, hogy a szerződéses jogviszonyokban való ilyen jellegű beavatkozás alapjaiban rendíti meg azt a szerződési hűséget, amelyre a gazdasági élet épül.[60] Ezért álláspontja szerint ezzel a végső eszközzel csak akkor szabad élni, ha a viszonyok változása olyan mértékű és annyira előre láthatatlan, hogy minden józan számítást felborít és minden értelmes kockázatvállalást messze meghalad.[61]

9. Kártérítési és gazdadogási igények a szolgáltatás lehetetlenné válása esetén

A lehetetlenülés általános – vagyis nemcsak a gazdasági lehetetlenülésre irányadó – szabályai kapcsán Szladits egy további fontos körülményre is felhívta a figyelmet. Kiemelte ugyanis, hogy meglehetősen tisztázatlan a szolgáltatás lehetetlenné válása esetén a kötelem eredeti tartalmát felváltó kártérítési, illetve gazdagodási igények jogi jellegének a kérdése.[62]

A kérdés lényege tulajdonképpen az, hogy a felváltó szolgáltatás az eredeti kötelmen alapul-e vagy ettől független, új jogcímen? Szladits – Grosschmid-ra hivatkozással[63] – úgy foglalt állást, hogy mind a kártérítési, mind a gazdagodási felváltó szolgáltatás a kötelem jogalapjának változatlansága mellett annak csupán kényszerű tárgycseréjét jelenti, a kötelmi causa azonban a régi marad.[64]

A lehetetlenülés tehát nem változtatja meg a kötelem jogalapját, az csupán a természetben való teljesítés átfordulását jelenti. A kötelem eredeti tárgya azonban

[60] Ez a kérdés természetesen a mai viszonyok között is felmerül. Erről lásd Leszkoven László: A világjárvány hatása a polgári jogi szerződésre: szerződési hűség és áldozati határ új megvilágításban. In: In: Bodzási Balázs – Csehi Zoltán (szerk.): *A COVID-19 és a gazdasági jog. A koronavírus-járvány és a rendkívüli jogrend hatása a magyar gazdasági jogi szabályozásra*. Magyar Jogász Egylet, Budapest, 2023, 299-316.

[61] Szladits: i.m. 496. Szladits szerint a gazdasági válságok enyhítése – többek között adósvédelmi intézkedésekkel – a törvényhozás feladata.

[62] Szladits: i.m. 491.

[63] Grosschmid Béni: *Fejezetek kötelmi jogunk köréből*. Második kötet, Budapest, Grill Károly Könyvkiadóvállalata, 1932, 222-223.

[64] *Glossza Grosschmid Béni Fejezetek kötelmi jogunk köréből című művéhez*. Második kötet, I. rész. Budapest, Grill Károly Könyvkiadóvállalata, 1933, 176.

továbbra is a kötelem szabályozója maradt és mintegy benne élt az átfordult, másodlagos szolgáltatásban.[65]

A felváltó szolgáltatásnak ehhez a jogi jellegéhez fontos gyakorlati következmények is fűződtek. Így például az, hogy az adós késedelmének következményeit az eredeti kötelem szerint kellett megítélni. Eszerint pedig az adós késedelmi kamatot tartozott fizetni a kártérítési összeg után a késedelembe esése időpontjától kezdve, tekintet nélkül arra, hogy a lehetetlenülés a késedelem előtt, azzal egyidejűleg, vagy azt követően történt. Az elévülés kezdő időpontja sem a lehetetlenülés ideje volt, hanem a kötelem eredeti lejáratának az időpontja.[66]

A kártérítési vagy gazdagodási igény terjedelme független volt a kötelezett ellenszolgáltatásának értékétől. Ennek alapján mivel a felváltó szolgáltatásra való jog az eredeti kötelmen alapult, a hitelező az elmaradt szolgáltatás értékét – vagyis a pozitív interessét – követelhette, tekintet nélkül arra, hogy volt-e, illetve, hogy mekkora volt a kikötött ellenszolgáltatás.[67]

Ezzel összefüggésben végül azt is fontos kiemelni, hogy a kezes – eltérő kikötés hiányában – a felváltó, másodlagos szolgáltatásért is köteles volt helytállni. Zálogjog esetén pedig a zálogtárgy az eredeti tartozás helyébe lépő kártérítési vagy gazdagodási követelést is biztosította.[68]

Összegzés

A gazdasági lehetetlenülés intézménye számos sajátossággal bír. Fő jellemzője, hogy létét és fejlődését alapvetően az I. világháborúnak és az azt követő gazdasági válságnak köszönheti. Ezzel összefüggésben Harmathy Attila megállapításaira utalunk, miszerint a régi jog nem állt vissza a háború befejeződése után sem, a joganyag átalakulásához pedig a gazdasági válságok is hozzájárultak.[69]

[65] Szladits: i.m. 492.
[66] Szladits: i.m. 493.
[67] Szladits: i.m. 493.
[68] Szladits: i.m. 494.
[69] Harmathy Attila: Szerződésmódosítás – devizaalapú kölcsönszerződés. *Jogtudományi Közlöny*, 2016/11. szám, 539.

A REVIEW OF THE "CUMULATIVE THREE STRIKES"

Zsanett Dorang[1]

ABSZTRAKT ■ Kutatásom során 43, a Kúria által felülvizsgálati eljárásban meghozott határozatot tekintettem át, csoportosítottam és kívánok bemutatni a tanulmányomban. Ezek a döntések a 23/2014. (VII. 15.) AB határozatot követően születtek, amelyben az Alkotmánybíróság megsemmisítette a korábbi és a jelenleg hatályos Büntető Törvénykönyv – a köznyelvben elhíresült megnevezéssel élve – halmazati három csapásra vonatkozó rendelkezését.

Kutatásom során olyan büntetőjogi és büntető eljárásjogi kérdésekkel foglalkoztam, mint hogy mely esetekben enyhítette a Kúria a büntetések tartamát és mikor tartott azokat indokoltnak, annak ellenére, hogy a büntetési tételkeretet az ügyekben eljáró bíróságok még a megsemmisített szakasz alapján állapították meg. Avagy, mely indokok és körülmények okán születtek ellentétes Kúriai döntések az alkalmazandó jogszabály tekintetében a felülvizsgálati eljárás során.

ABSTRACT ■ In my research, I reviewed and categorized 43 decisions made by the Curia in review proceedings. My findings are summarized in this study. These decisions were made after the Constitutional Court (in its decision 23/2014. (VII. 15.)) annulled the provisions related to cumulative three strikes in the Penal Code both in the previous and current versions.

This paper examines the following questions: when did the Curia reduce the duration of penalties? When did the Curia assess whether these penalties are justified, even though the penalty range had been determined by the lower courts based on the annulled provisions? The paper also examines the reasons and circumstances that led to conflicting decisions by the Curia regarding the applicable laws during the review proceedings.

Kulcsszavak: halmazati három csapás, halmazat, büntetéskiszabás, felülvizsgálati eljárás, Kúria, Alkotmánybíróság

1. Introduction

This study presents the concept of 'cumulative three strikes' introduced by Act LVI of 2010, amending Act IV of 1978 on the Criminal Code (in the following: amended law). The paper begins with discussing the circumstances and reasons

[1] Zsanett Dorang, second-year PhD student at Károli Gáspár Reformed University, Institute of Criminal Sciences, Department of Criminal Procedure. Supervisor: Prof. Dr. habil. Ágnes Czine, professor, Constitutional Judge.

for the introduction of this legal institution, as well as its brief judicial practice. Then, I will expound on the reasons for its annulment by the Constitutional Court and the subsequent review procedures. During my research, I analysed 43 review decisions found in the anonymized court decisions. The investigation is divided into two parts: the first part deals with criminal aspects. The examined judgments are categorized into eight different groups based on the decisions of the Curia.

1. The court that adjudicated the final decision imposed a life imprisonment sentence, but the Curia commuted it to a fixed-term imprisonment.
2. The court that adjudicated the final decision imposed a life imprisonment sentence, and the Curia deemed it proportionate, thus upholding the sentence.
3. The convicted are repeat offenders with a history of violence who committed at least three violent crimes against persons within an accumulation.[2]
4. The convicted are repeat offenders who committed at least three violent crimes against persons within an accumulation and the Curia found their punishment proportionate.
5. The convicted are repeat offenders who committed at least three violent crimes against persons within an accumulation and the Curia found their punishment unproportionate.
6. The court that adjudicated the final decision imposed a fixed-term imprisonment, and the Curia found the duration of the punishment proportionate, and thus upheld it.
7. The court that adjudicated the final decision imposed a fixed-term imprisonment, but the Curia found it to be severe and reduced the sentence.
8. The convicted individuals were juveniles.

The second part, related to the judgments, delves into criminal procedural issues. Specifically, I analyse why the practice of the Curia differed regarding the applicable legislation when –at the force of the examined judgments– the Act XIX of 1998 on the Code of Criminal Procedure (in the following: Criminal Procedure (1998)) clearly defined it.

My goal is to provide a detailed presentation about the entry into force, annulment, and subsequent review of the 'cumulative three strikes', thereby offering a comprehensive overview of its history in Hungary.

[2] Point 17. § 137 of Act IV. of 1978 on the Criminal Code and the Point 26. § 459(1) of Act C of 2012 on the Criminal Code specifies what violent crime against the person shall mean.

2. Circumstances of the legislation

According to the justification of the amended law, the legislator modified and tightened the rules due to the voters' preferences. Therefore, the National Assembly felt obligated to ensure that punitive measures supported by the voters in criminal policy were enacted as soon as possible. The law thus incorporated a significant tightening of penalties into the Hungarian criminal law system for repeat offenders who commit violent crimes against individuals, which in the most serious cases could lead to life imprisonment. At the same time, – for identical criminal policy considerations – the law reinstated the sentencing rules in place before March 2003, known as the 'median value penalty', which, as the legislative said, can guide the correct application of the Penal Code's sentencing system. Therefore, the law required that the median value of the penalty range be a starting point for the judges in the assessment of the crimes. However, this did not mean a narrowing of the penalty range or create a sentencing imperative. It also did not affect the provisions that provide possibilities for mitigating penalties like § 87. Act IV of 1978 on the Criminal Code (in the following: Criminal Code (1978)) or the § 82. Act C of 2012 on the Criminal Code (in the following: Criminal Code (2012)). According to the reasoning, the legislator wanted to provide only guidance for the courts. Moreover, it was emphasized after the amendment that "the possibility that the court will compare and evaluate individual circumstances at its discretion is not excluded, as the circumstances will not be exhaustively listed or weighted at the statutory level. Accordingly, the legislator merely creates a realistic reference point in the law for discussing the circumstances reflected in the court's assessment of the sentencing. In addition, the law also reflects the legislator's expectation that the court should provide a comprehensive reasoning for the use of the penalty range. The provisions of the law obviously do not affect the principled guidance of sentencing practice based on the experience of penalty imposition."[3]

The concept of the median value penalty can also be understood as a form of tightening, albeit a mild one, as it does not provide specific rules but only offers guidance to redirect court thinking. This was originally introduced by the Act LXXXVII of 1998 on the amendment of criminal laws, which was also suited to the requirements of the Constitutional Court. Therefore, this legal institution did not represent an innovation, especially since it continued to exist in judicial practice even after it was repealed.[4]

[3] General reasoning, and § 1. of the reasoning of the amended law.

[4] § 18 of the Act LXXXVII of 1998 on the Amendment of Criminal Laws, István Kónya: A három csapás bírói szemmel. *Magyar Jog*, 3/2011, 129–132.

The § 2. of the amended law established the 'three strikes law' into Hungarian criminal law, and § 3-4. contained provisions for tightening penalties for recidivists, particularly habitual recidivists, repeat offenders and repeat offenders with a history of violence. However, the justification did not provide any specifics and essential information about the rules, or the circumstances of the rules just repeated them.[5]

3. 23/2014. (VII. 15.) Constitutional Court decision

3.1. The motion

The standpoint of the motioning judicial council is that the provisions of Section 85(4) of the Penal Code (1987) and Section 81(4) of the Penal Code are incompatible with the Fundamental Law in several respects. Firstly, it is argued that, based on Article B) (1) of the Fundamental Law, the conditions for the mandatory imposition of life imprisonment as a cumulative penalty, according to the contested sections—taking into account the rules of the Criminal Procedure Code—are not clear and precisely predictable, thus violating legal certainty.[6] Secondly, the petitioning council contends that it is inconsistent with the principle of equal treatment and the prohibition of discriminatory treatment outlined in Article XV of the Fundamental Law since some offenders may find themselves in a more favourable or disadvantageous position solely depending on their procedural situation. Thirdly, the challenged provisions were considered contrary to Article I (3) and Article II of the Fundamental Law since, in their view, it does not follow the requirement of proportionality expected from constitutional criminal law to impose mandatory life imprisonment on an offender who commits non-life imprisonment crimes for the first time in an accumulation. Finally, the motioning judicial council found the challenged provisions incompatible with Article 25(2) (a), Article 26, and Article 28 of the Fundamental Law since, in their opinion, the application of the contested provisions unjustifiably limits judicial discretion and does not allow for judicial individualization.[7]

It is worth noting that this same law was the one that, through its amendment, had to exclude repeat offenders from the possibility of conditional sentences. This is also part of the legislative policy that began around 2008 and aims to take more serious action against repeat offenders.

5 The justification of the amend. law. § 3-4.

6 Decision 23/2014. (VII. 15.) of the Constitutional Court [3] reasoning.

7 Ibid. [4]-[6] reasoning.

3.2. International outlook and issues discussed

The Constitutional Court has reviewed the 'three strikes law' in the United States of America and Slovakia. In both countries, the application of cumulative three strikes is conditional on multiple convictions, which means the rules apply to repeat offenders and cannot be applied solely in the case of a cumulative sentence.[8]

The Constitutional Court examined two questions based on the motions:[9]

1. Whether, based on the contested provisions, the imposition of penalties complies with the requirement of legal certainty arising from the rule of law, specifically the criteria of foreseeability and predictability.[10]

2. To what extent the mandatory application of life imprisonment contained in the contested provisions comply with the constitutional criteria related to a rule of law penal system derived from Article B) (1) of the Fundamental Law.[11]

3.3. The criteria of predictability and foreseeability

The Constitutional Court briefly described the legal history of the Hungarian legislation on the stricter sanctioning of repeat offenders, then compared the contested rules of the Criminal Code (1978) and the Criminal Code (2012). The Constitutional Court found that one of the conditions for the application of the provisions of § 85(4) of the Criminal Code (1978) was that violent crimes against at least three persons should be tried in one proceeding. While the application of § 81(4) of the Penal Code (2012) was narrowed. The application of this sanction was possible in the case of at least three *completed* offences of violence against a person committed on *different dates*. Furthermore, the provisions of the general part (§ 82) allowing unlimited mitigation were applicable.[12]

According to the opinion of the Criminal College 5/2013 (XII.11.), since one of the conditions was that the offence had to be committed at different times, the stricter rules could only be applied in the case of an accumulation. However, an accumulation is achieved even if a relatively short period elapses between the offences. If so, the fact that the offences were committed immediately after

8 Ibid. [17]-[19] reasoning.

9 The Constitutional Court examined the legal issue only in connection with legal certainty because it could already establish unconstitutionality based on this, rendering further examination of the violations of other fundamental rights unnecessary.

10 Ibid. [43] reasoning.

11 Ibid. [55] reasoning.

12 Ibid. [46] reasoning.

each other would meet this requirement. On the other hand, the application of this section was excluded if the acts were part of a continuing offence, or if they constituted a multi-movement offence, or if they were partly formal aggregation, and partly accumulation.[13]

Overall, while the Criminal Code (2012) allowed the use of the aggravated cumulative penalties in a narrower range, there was no change in the fact that to use the contested provisions the crimes had to be judged in one procedure.[14] Several factors may influence whether offences are tried in one or separate proceedings. This may depend on whether law enforcement authorities or the courts are aware that all offences have been committed, or whether it is considered appropriate to group cases in criminal proceedings, as there are no binding rules on this. Furthermore, the possibility of joinder the cases at a later stage of the criminal proceedings is also available to the judge, which may thus create the possibility of applying stricter cumulative rules ex post.[15]

Thus, different procedural legal situations can lead to different penalties for those who commit three violent crimes against persons. The narrowing of the scope of the offences has not solved the problem, and it continues to lead to unpredictability in the application of the stricter cumulative rules. If the three offences of violence against persons were tried in a single proceeding, the punishment had to be determined based on the stricter cumulative sentencing provisions. On the other hand, if the same three offences were tried in separate proceedings and the offender had committed all the offences prior to the date when the first judgment was delivered, the sentence had to be imposed within the maximum of the penalty range of the Special Part of the Criminal Code, following the provisions on the merger sentences. This leads to different sentencing.[16] "The term of merged sentences shall be determined as if imposing a cumulative sentence. Nevertheless, the term of merged sentences shall be at least equal to the most severe sentence and the minimum penalty or one-third of all penalties combined, however, it may not exceed the combined duration of all sentences."[17]

In summary, the Constitutional Court found that the legislator had neglected to provide the substantive and procedural criteria to ensure that the conditions for imposing a sentence are the same regardless of the procedural status of the

13 5/2013. (XII. 11.) Criminal College opinion I.
14 Decision 23/2014. (VII. 15.) of the Constitutional Court [31], [50] reasoning.
15 Ibid. [47]-[48] reasoning.
16 Ibid. [50]-[53] reasoning.
17 Criminal Law (2012) § 94.

accused. So, there was a lack of consistency between the cumulative rules and the rules of merger sentences.[18]

3.4. Mandatory application of life imprisonment

The Constitutional Court has determined that the constitutional justification and even necessity of imposing more severe penalties for repeated offenders. Furthermore, it may be constitutional on its own when the law prescribes guiding or mandatory rules in the imposition of penalties. However, the condition for this is that it must occur in the interest of a constitutionally justifiable goal, respecting the criminal law guarantees specified in the Fundamental Law, as well as the fundamental principles of criminal law and basic rights.[19]

The Penal Code (2012) § 81(4), while narrowing the cases of applicability, does not change the instances where life imprisonment must be mandatorily applied. According to the Constitutional Court, the mandatory application of life imprisonment (in cases of different substantive criminal offenses) cannot be constitutionally justified even for repeat offenders, as the regulation does not allow the court to evaluate each committed act according to its actual gravity. Therefore, the court is unable to assess the crime, the danger the offender poses to society, the degree of guilt, and other aggravating and mitigating circumstances by the gravity of the offenses, thus disrupting the coherent unity of the current penal system.[20] The Constitutional Court also stated that the rules would have been constitutional if the legislator had provided for the possibility of judicial discretion between applying imprisonment for a term or life imprisonment, thereby allowing for the imposition of individualized penalties.[21]

Based on the reasons explained above, the Constitutional Court, under Article B) (1) of the Fundamental Law, established the unconstitutionality of Section 85(4) of the Penal Code (1978) and Section 81(4) of the Penal Code (2012). It annulled retroactively Section 81(4) of the Penal Code, declaring the provision null and void as of its inception, thus precluding its application. Furthermore, the Con-

18 Decision 23/2014. (VII. 15.) of the Constitutional Court [52], [54] reasoning.

19 Ibid. [58]-[60] reasoning.
According to the Penal Code (2012), under specified conditions, certain penalties (expulsion [§ 59(1)], deprivation of civil rights [§ 61(1)]) must be mandatorily imposed, or measures (suspension of a prison sentence or probation with mandatory supervision [§ 119]) must be applied.

20 Ibid. [62] reasoning.

21 Ibid. [63] reasoning.

stitutional Court ordered the review of final and binding criminal proceedings conducted with the application of the provisions deemed unconstitutional.[22]

3.5. Dissenting opinion

There was a dissenting opinion written by Egon Dienes-Oehm. According to the constitutional judge's standpoint, retroactive annulment was not justified; instead, the constitutional violation, manifesting as an omission, could have been remedied by establishing it without retroactive effect. The legislator should have been urged to eliminate the lack of harmony in cumulative and merger penalties and create the statutory conditions for uniform punishment. Constitutional Judge Béla Pokol also joined in the dissenting opinion.[23]

4. Review of cumulative sentences

A total of 49 references or mentions were made on the three strikes rules of the ones that I found. Out of these, in 7 cases, the defendant submitted the motion, relying on either the previous Penal Code § 416(1) a) or b), or the currently effective Penal Code § 648 a) or b). That is, for violation of substantive criminal law rules or procedural rule violations. However, both the previous and currently valid Penal Codes provide the possibility to initiate a review procedure based on a Constitutional Court decision.[24] The motions based on the other provisions of the Criminal Procedure Act – not under the previous Criminal Procedure Act § 416(1) e) or the current Criminal Procedure Act § 648 c) – were unfounded. The courts did not impose the penalties using the annulled section in those decisions, therefore, I exclude them from the classification.[25]

Thus, in the remaining 43 judgments examined, the applicants submitted their motions for review because the Constitutional Court ordered the review of the respective criminal proceedings.[26] In five cases of these decisions, the Curia conducted the proceedings in favour of both perpetrators, and in one case, in

[22] Ibid. [65]-[70] reasoning.

[23] Ibid. [72]-[75] reasoning.

[24] The previous Criminal Procedure Act § 416(1) e) paragraph and the currently effective Criminal Procedure Act § 648 c) paragraph.

[25] Curia Bfv.I.113/2018/5., Bfv.III.1776/2017/11., Bfv.II.737/2021/5., Bfv.I.1698/2016/5., Bfv.I.1235/2021/11., Bfv.II.33/2019/7., Bfv.II.9/2015/6.

[26] That is, the motion was based on either the previous Criminal Procedure Act § 416(1) e) paragraph or the currently valid Criminal Procedure Act § 648 c) paragraph.

favour of all three perpetrators. Since different decisions were made in several cases regarding the defendants, it will occur that one judgment will appear in multiple groups. Therefore, in the following, I present the results of decisions affecting 49 defendants.

4.1. Group 1. – Disproportionate life imprisonment

The first group includes judgments where life imprisonment was imposed solely based on the previous Penal Code § 85(4) or the current Penal Code § 81(4). Due to the annulment of these provisions, the Curia examined in the review procedure whether penalties can be considered legal and proportionate based on the previous Penal Code § 85(3) or the new Penal Code § 81(3). In a total of five judgments – involving six defendants – the decision was made that the originally imposed life imprisonment without the weighing required in the second part of the annulled section is disproportionately severe within the legal range, and therefore, they were reduced to fixed-term imprisonments. Additionally, the reference to the unconstitutional section was omitted from the judgment by the Curia.[27]

4.2. Group 2. – Proportionate life imprisonment

One judgment in the second group includes where the court –that rendered the final judgment – imposed a life imprisonment, referring to the previous Penal Code § 85(4) paragraph. However, the imposition of this sentence is possible independently of the annulled provision. Because the most serious crime committed by the convict was a qualified homicide, which is already punishable by life imprisonment on its own. The Curia considered the exceptional gravity of the criminal acts and the identified aggravating and mitigating circumstances and based on these, deemed the penalty proportionate in the review procedure.[28]

[27] Curia Bfv.I.1270/2014/6. (2 defendants), Bfv.III.1275/2014/4., Bfv.II.1349/2014/5., Bfv. III.1350/2014/4., Bfv.I.1705/2014/4.

[28] Curia Bfv.I.22/2015/5.

4.3. Group 3. – Repeat offenders with a history of violence

The following group belongs the repeat offenders with a history of violence. However, the Constitutional Court's decision did not affect the rules concerning repeat offenders with a history of violence, which means that "the minimum sentence for violent crimes against the person, if committed by repeat offenders with a history of violence and if carrying a higher sentence, the maximum penalty prescribed for such crimes, if punishable by imprisonment, shall be doubled. If the maximum penalty increased as per the above would exceed twenty years, or if either of the said offenses carry a maximum sentence of life imprisonment, the perpetrator in question must be sentenced to life imprisonment."[29] Therefore, for these offenders, the penalty range unchanged even after the annulled section. The Curia only examined whether the imposed sentences were disproportionately severe. In all five verdicts, where one imposed life imprisonment and the others fixed-term imprisonments, the Curia determined that the punishments were proportionate and thus upheld them.[30]

Let me highlight a decision where also a repeat offender with a history of violence committed three violent crimes against individuals in aggregate. However, due to the quality of being a repeat offender with a history of violence, the courts imposed the sentence solely based on 97/A(1) of the Penal Code (1978). During the review process, the Curia examined whether the provision applied by the lower courts was the section that the Constitutional Court later annulled. The Curia answered this question negatively, as the penalty range was altered by the perpetrator's status as a repeat offender with a history of violence. Therefore, the Curia deemed the motion by the Supreme Prosecution unfounded.[31]

4.4. Group 5. – habitual and repeat offenders, unproportionate punishment

In the fourth group, I placed habitual recidivists and repeat offenders. The rules are also stricter for repeat offenders. In that case, the upper limit of the penalty for the most serious crime in an accumulation must be increased by half.[32] Compared

[29] Current Penal Code § 90(2), 23/2014. (VII. 15.) Constitutional Court decision. It was regulated in the previous Penal Code § 97/A.(1) with the same content.

[30] Curia Bfv.II.1349/2014/5., Bfv.III.488/2014/6., Bfv.II.1487/2014/3., Bfv.I.1558/2014/8., Bfv. II.1677/2014/5.

[31] BH2015.145. (Curia Bfv. I.1751/2014/7.).

[32] Current Penal Code § 80-81, 89., previous Penal Code § 83, 85, 97.

to the penalty range established by the annulled provision, this was a reduction. Thus, the Curia examined whether the imposed penalties could still be considered severe under the changed penalty range. There were six decisions where not only were the reduced penalty range followed, but even within the range of median value, a proportionate punishment was handed down.[33] Therefore, the Curia upheld these decisions. In one decision, although the imposed imprisonment fell into the changed penalty range, the Curia reduced the punishment to align better with the median value of the penalty range due to a larger number and weight of mitigating circumstances.[34]

4.5. Group 6. – Fixed-term imprisonment, and the Curia upheld the punishment

The sixth can be the largest group, where courts imposed fixed-term imprisonments on offenders using the unconstitutional provision, but even ignoring this section, the Curia did not find the penalties excessive and, thus, upheld them. There is a total of 21 such decisions, out of which in 7 cases, the imposed penalties remain below the median value within the reduced penalty range.[35]

4.6. Group 7. – Fixed-term imprisonment, and the Curia mitigated the punishments

The judgments that belong to this category are those where in the final judgment, the court imposed a fix-term imprisonment using the annulled sections. In the review procedure, the Curia disregarded these sections and, thus, considered

[33] Curia Bfv.II.1580/2014/4., Bfv.I.1679/2014/3., Bfv.I.1324/2014/3., Bfv.I.1318/2014/7., Bfv.II.1553/2014/3., Bfv.I.1432/2014/4.

[34] Curia Bfv.II.1433/2014/7.

[35] Curia Bfv.II.1473/2014/7., Bfv.II.1583/2014/11. (contained a decision for three defendants, and each one is belonging to this group), Bfv.I.1516/2014/8., Bfv.III.1176/2014/6., Bfv.III.1551/2014/4., Bfv.II.1538/2014/4., Bfv.II.1271/2014/8., Bfv.III.1557/2014/5., Bfv.I.1465/2014/5., Bfv.III.2010/2015/4., Bfv.I.19/2015/8. (contained a decision for two defendants, and each one is belonging to this group).
The verdicts in this group where the imposed penalties remain below the median value within the reduced penalty range: Curia Bfv.III.1286/2014/4., Bfv.III.1410/2014/7., Bfv.I.1525/2014/3., Bfv.III.1554/2014/3., Bfv.II.1595/2014/4., Bfv.III.1608/2014/4., BH2015.270.

the imposed penalty to be unlawful or excessive in the reduced penalty range, and therefore mitigated them.[36]

4.7. Group 8. – Juveniles

The eighth group pertains to juveniles. Different provisions are found for juveniles in terms of the aggregate rules, however, as clarified by the Curia, it was not excluded that the annulled section could be applied to juveniles by the courts.[37] However, for crimes punishable by imprisonment exceeding five but not exceeding ten years, a maximum of five years of imprisonment can be imposed on a juvenile, and in the case of aggregate penalties, it is limited at seven years and six months. However, for example, the penalty range for an armed robbery is from five to ten years of imprisonment according to the current Criminal Code. Applying the unconstitutional provision, the upper limit of this penalty range would be twenty years. On the other hand, in the case of a juvenile, only seven years and six months can be imposed in this scenario, making it impossible to apply this provision to them. But there were possibilities to apply it, under the previous Penal Code if the upper limit of the most serious crime's penalty among the accumulated crimes not exceeding three years of imprisonment, or under the current Criminal Code, it is not exceeding two years of imprisonment.[38]

That being said, in the other two cases, the Curia found the prosecutor's motion justified. In both cases, a qualified form of robbery had occurred, which crime's penalty range is five to fifteen years of imprisonment under the previous Penal Code.[39] In cases where the punishment for the crime exceeded ten years of imprisonment, a maximum of ten years of imprisonment could be imposed on juveniles, which could be raised to fifteen years in the case of cumulative penalties. Therefore, the courts could not apply the annulled section because if they doubled the fifteen years, it would have exceeded twenty years, and a life sentence would have to be imposed. So, in my opinion, the motions for review were also excluded by the law for juveniles in these two cases. In the last case, where the most serious offense was aggravated battery, the special rules could

[36] Curia Bfv.II.1340/2014.5., Bfv.II.1544/2014/6., Bfv.III.1416/2014/6., Bfv.II.1409/2014/5., Bfv.III.1518/2014/4.

[37] Previous Criminal Code § 108, 110, 120. Current Criminal Code § 109, 123.

[38] Curia Bfv.III.1410/2014/7. 10., Bfv.III.1434/2014/7. 6.

[39] Curia Bfv.II.1595/2014/4., Bfv.I.1516/2014/8.

not prevent the upper limit of the penalty range from doubling. Thus, the three-year upper limit could be raised to six years, so it remained within the maximum penalty range of 7 years and 6 months.[40]

4.9. Conclusion

Of course, the Curia modified each verdict which it found justified, and omitted references to the annulled section. However, it can be stated that out of the total of 43 reviewed verdicts, encompassing decisions for 49 offenders, in 37 cases, the Curia did not find the imposed penalties severe or in violation of the law, even with the changed and reduced penalty range in effect. It can be stated that though the courts imposed penalties with this later annulled section and in 75.5% of the cases, the penalties were lawful and proportional even when the Curia disregarded the annulled section. When examining this percentage, it must also be considered that the annulled section's second part mandated, without discretion, the imposition of a life sentence under certain circumstances. It can be stated that the rules which lack judicial discretion in criminal law, especially in the sentencing most of the time, are not advisable.

5. The applicable law

In the next part of the paper, I discuss the issue of the Criminal Code to be applied in the review procedure. Moreover, I summarize the experiences from 42 judgments.[41] In this classification, each judgment will appear only once considering that it does not matter if a verdict contained decisions for multiple offenders, as the Curia determined the applicable law only once in each case.

Both, the Criminal Procedure Code (1998) and the Act XC of 2017 on the Code of Criminal Procedure (in the following: Criminal Procedure Code/Law [2017]) stipulate that if a request for review is submitted because of the annulment of a legal provision by the Constitutional Court and the review of the relevant criminal proceedings has been ordered, then the review request

[40] Curia Bfv.III.1434/2014/7.

[41] Of the 43 decisions, one was an order because the application was unfounded. Thus, the question of the law to be applied did not arise in that decision either, therefore I will take 42 judgments as a basis for the following.

must be adjudicated in accordance with the law in force at the time of the review.[42]

Out of the 42 verdicts, the Curia applied the Criminal Code in effect at the time of review in 10 cases, as prescribed by the Criminal Procedure Code.[43] Among these, in 3 cases, since the court established guilt based on the previous Criminal Code in the contested decision, but the law in effect at the time of review contained the same or milder rules for the convicted person, the Curia reclassified the crimes according to the new law, based on the temporal scope of the law. [44] In 31 cases, the Curia proceeded with the application of the law that the court used in the challenged decision.[45] However, out of these in one verdict the Curia also examined whether the court, which adjudicated the final decision, chose the applicable Criminal Code properly.[46] Naturally, the Curia in every case ignored the annulled provision.

5.1. The relevant legal provisions

It is important to note that the previous Criminal Procedure Act (1998) and the effective Criminal Procedure Act (2017) – in terms of the provisions relevant to the study – have the same content. However, at the time when all the examined judgments were rendered, the previous Criminal Procedure Act (1998) was in effect. Therefore, although the provisions of both laws apply to what is stated below, I still want to refer to the provisions of the previous law. However, in this paper, I quoted the sections of the Criminal Procedure Act (2017) because this law has an official English translation, so I can present the provisions most

[42] Previous Criminal Procedure Law § 423(2), Current Criminal Procedure Law § 659(2) With the exceptions specified in paragraphs (3) to (4), a motion for review shall be adjudicated based on laws in effect at the time when the challenged decision was passed.

[43] Curia Bfv.I.22/2015/5., Bfv.I.1318/2014/7., Bfv.I.1324/2014/3., Bfv.I.1432/2014/4., Bfv.I.1516/2014/8., Bfv.I.1558/2014/8., Bfv.I.1679/2014/3., Curia Bfv.I.1270/2014/6., Bfv.I.1465/2014/5., Bfv.I.1525/2014/3.

[44] Curia Bfv.I.1270/2014/6., Bfv.I.1465/2014/5., Bfv.I.1525/2014/3.

[45] Curia Bfv.III.1176/2014/6., Bfv.II.1271/2014/8., Bfv.III.1275/2014/4., Bfv.III.1286/2014/4., Bfv.II.1340/2014/5., Bfv.II.1349/2014/5., Bfv.III.1350/2014/4., Bfv.II.1409/3014/5., Bfv. III.1410/2014/7., Bfv.III.1416/2014/6., Bfv.II.1433/2014/7., Bfv.III.1434/2014/7., Bfv. II.1473/2014/7., Bfv.II.1487/2014/3., Bfv.III.1488/2014/6., Bfv.III.1518/2014/4., Bfv. II.1538/2014/4., Bvf.II.1544/2014/6., Bfv.III.1551/2014/4., Bfv.II.1553/2014/3., Bfv. III.1554/2014/3., Bfv.III.1557/2014/5., Bfv.II.1580/2014/4., Bfv.II.1583/2014/11., Bfv.II.1595/2014/4., Bfv.III.1608/2014/4., Bfv.II.1677/2014/5., Bfv.I.1705/2014/4., Bfv.I.19/2015/8., Bfv.III.210/2015/4., BH2015.270.

[46] Curia Bfv.II.1580/2014/4.

accurately. Furthermore, because the Criminal Procedure Act (1889) is no longer effective, in a similar legal situation – in connection with another Constitutional Court decision – the legal question will have to be decided by the Criminal Procedure Act (2017), therefore, the analysis of the provisions of this law may be more useful for the future.

The currently effective Criminal Procedure Code (2017):

Section 649 (1) A motion for review may be filed for violating the rules of substantive criminal law if a court

c) suspended the enforcement of a sentence despite a ground for exclusion specified in section 86 (1) of the Criminal Code.

(3) A motion for review may be filed based on a decision of the Constitutional Court if the Constitutional Court ordered the review of a criminal proceeding to conclude with a final and binding conclusive decision.

Section 659 (1) In a review proceeding, pieces of evidence may not be compared again or assessed differently, and evidence may not be taken; the facts established in the final and binding conclusive decision shall be observed when adjudicating a motion for review.

(2) With the exceptions specified in paragraphs (3) to (4), a motion for review shall be adjudicated based on laws in effect at the time when the challenged decision was passed.

(3) In a situation specified in section 649 (3), a motion for review shall be adjudicated by not applying the law that conflicts with the Fundamental Law or relying on the decision passed by the Constitutional Court.

(4) In a situation specified in section 649 (5), a motion for review shall be adjudicated by not applying the law that is inconsistent with an international treaty promulgated by an Act or relying on the decision passed by the international human rights organisation.

(5) With the exception specified in paragraph (6), the Curia shall review a final and binding conclusive decision only to the extent challenged in the motion for review and on the grounds stated in the motion for review.[47]

The main rule, as also stated in § 659 (2), is that the review procedure is conducted by the Curia based on the laws in effect at the time the contested decision was made. This means that even if the law has changed in favour of the accused after a final decision has been reached, or the legislator has eliminated the possibility of punishing the specific act, a review request cannot be based on that. Therefore, § 2 of the Criminal Code is not applicable in the review process. This is because the purpose of the review is to rectify substantive and procedural legal violations after the decision has become final.[48]

[47] These provisions are found in Criminal Procedure Act (1998) §416(1) e), §416(1)-(4).

[48] Tibor Bodor – Zsolt Csák – Erzsébet Máziné Szepesi – Gábor Somogyi – Gábor Szokolai – Zoltán Varga (eds.): *Commentary on Act XIX of 1998 on the Code of Criminal Procedure.* Budapest, Wolters Kluwer, 2016 (§ 423(2) of the Act).However, this exclusionary provision

However, there is an exception to these rules in cases where the review is based on a decision by the Constitutional Court in cases affected by the decision (§ 649 (3)).[49] According to the explanation of the law, in such cases, the Curia decides on the review request based on the laws in effect at the time of the review. In this situation, the Curia determines that the final decision was made in violation of the later declared unconstitutional law and makes its decision based on the law in effect at the time of the review.[50] The law also adds that if there is a basis for review according to a decision of the Constitutional Court, then the review motion must be considered based on the disregard of the law declared unconstitutional under the Fundamental Law, based on a decision of the Constitutional Court.[51]

It is worth emphasizing that § 659(5) determines the scope of the review procedure when it states that the "Curia shall review a final and binding conclusive decision only to the extent challenged in the motion for review and on the grounds stated in the motion for review."[52]

5.2. The law in effect at the time of the review

In some of the judgments, the Curia – and I emphasize that the Prosecutor General's Office as well – proceeded from the premise that the Criminal Procedure Law clearly determines that, in this case, the review must be conducted under the law in force at the time of the review.[53] However, this provision does not affect Section 2 of the Criminal Code, which states that the criminal law in effect at the time of the offense should be applied. Except if, when applying the new criminal law in effect at the time of review, the act is no longer considered a crime or

only applies to the decision made in the review procedure. In cases where the Curia decides to annul the contested decision and instructs a previously acted court to conduct a new proceeding, the application of § 2 of the Criminal Code is possible in this new proceeding.

49 Also, an exception when the motion for review may be filed based on a decision passed by a human rights organisation established by an international treaty. § 649(4) Criminal Procedure Act (2017).

50 Bodor et al. 2016, 29.

51 Criminal Procedure Act § 659(3), ibid.

52 Criminal Procedure Act § 659(5).

To be complete, it should be noted that the Curia examines procedural irregularities that justify the review even if the motion does not include them. Péter Polt – Barna Miskolczi – József Vida – Zsanett Karner (eds.): *Nagykommentár a büntetőeljárási törvényhez – Nagykommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez*. Budapest, Wolters Kluwer, 2022, at §659.

53 Criminal Procedure Act (1998) § 423(2).

should be judged more leniently, then the new criminal law should be applied. Accordingly, the Curia stated in one part of the judgments that it must compare the material legal provisions in force at the time of the defendant's commission of the crimes for which they are charged and at the time of reviewing the review request, disregarding the provisions annulled by the Constitutional Court. Thus, it must apply the law that provides more lenient rules for the perpetrator. The judicial practice has developed the following principles for assessing whether, at the time of the offense or at the time of judgment, the criminal code in effect is more favourable to the defendant:

1. First, it must be considered whether the actions to be judged are punishable under both laws and whether either law excludes the criminality of the action or the defendant's liability under any circumstances.

2. In the absence of the above, the court must then compare the provisions of the two laws regarding the punishment for the criminal act, determining which of the two laws contains the more severe provisions.

3. In addition, the court must take into account the legal institutions regulated in the general part of the criminal code that are significant in the assessment of the specific case. In these cases, this means comparing the rules of cumulative punishment, as well as the stricter legal institutions related to habitual and repeat offenders.

4. After considering these factors, further circumstances can be examined, such as the possibility of conditional release or the question of exclusion from it.

Following this analysis, in 7 cases,[54] the Curia concluded that the law in effect at the time of the offense, which was also applied in the challenged decision, which was the earlier Criminal Code, contained more lenient rules, and thus, they continued the review procedure according to its provisions.[55] However, in one case,[56] the upper limit of the penalty range for the committed crime was lower according to the new Criminal Code, and in two cases,[57] the rules for conditional imprisonment were more favourable according to the new law. Therefore, the Curia reclassified the defendant's guilt based on the new Criminal

[54] Curia Bfv.I.22/2015/5., Bfv.I.1318/2014/7., Bfv.I.1324/2014/3., Bfv.I.1432/2014/4., Bfv.I.1516/2014/8., Bfv.I.1558/2014/8., Bfv.I.1679/2014/3., Curia Bfv.I.1270/2014/6., Bfv.I.1465/2014/5., Bfv.I.1525/2014/3.

[55] I note that in the two compared Criminal Codes the punishment for the given offences was the same, – except in one case Curia Bfv.I.1324/2014/3 – while the new Criminal Code contained stricter rules for habitual and repeat offenders. For example, Curia Bfv.1679/2014/3., Bfv.1432/2014/4., 1318/2014/7.

[56] Curia Bfv.I.1270/2014/6.

[57] Curia Bfv.I.1465/2014/5., Bfv.I.1525/2014/3.

Code for the crimes that were originally determined according to the provisions of the previous Criminal Code.

5.3. The application of the law applied by the court which has given final judgment

The Curia, however, did not accept this interpretation in its other 30 judgments due to the requirement of the review application. This is because even when the Curia reviews criminal proceedings based on the decision of the Constitutional Court, the general rules of the review process must be adhered to, such as the fact that the Curia shall review a final and binding challenged decision only to the extent challenged in the motion for review and on the grounds stated in the motion for review.[58] The jurisdiction of the Curia aligns with its review authority and cannot extend beyond that. In all cases, the prosecutor referred solely to the invalidated provision in their application and did not dispute the correctness of the criminal code applied by the court. Therefore, the examination of it is not possible, even if the law applied at the time of judgment contains milder provisions. Without reclassifying the criminal offenses under the current criminal code, a combined law would have to be applied, which is also not permissible.

Furthermore, in these cases, according to the Curia the legislature by applying the Criminal Procedure Act (1998) § 423(2) second sentence – "a motion for review shall be adjudicated based onthe laws in effect at the time when the challenged decision was passed" – just wanted to refer that the legal provision that the Constitutional Court invalidated during the review cannot be applied, as its application would not lead to a different outcome.

6. Closing thoughts

In my opinion, the latter approach is more accurate as it aligns better with the general rules of the review proceeding. However, I cannot agree that this viewpoint could be derived from the legislator's intent, so from the Criminal Procedure Act (1998) § 423(2) or the Criminal Procedure Act (2017) § 659(2). In fact, in my opinion, a contrary interpretation can be reached linguistically. Furthermore, I cannot agree that the second sentence of § 423(2) was merely meant to indicate that which legal provision invalidated by the Constitutional Court

[58] Criminal Procedure Act (2017) § 659(5).

during the review cannot be applied anymore, because the legislator explicitly states this in the following paragraph. It would have been unnecessary to enforce the same meaning in successive paragraphs.[59]

Furthermore, as I see, the requirement imposed by the Criminal Procedure Act (2017) § 659(5) contradicts § 659(2), which determines the applicable law during the review procedure based on the Constitutional Court's decisions. This is because, regardless of whether the Curia adopts the first or the second interpretation, it cannot fully adhere to the statutory provisions. If the Curia applies the law in effect during the review procedure, it exceeds the review request and the scope of its jurisdiction, and if it applies the law in effect at the time of the challenged decision, it acts contrary to the provision of § 659(2) of the Criminal Procedure Act (2017).[60]

It is also possible that the legislator, during the review procedure ordered by the Constitutional Court, started from the premise of completely nullifying the applicable law. This is also why it belongs to the exceptions according to which the challenged decision must not be judged based on the legislation in force at the time of its adjudication.

Furthermore, regardless of grammatical interpretation, it cannot be concluded that the legislator wanted to apply the law adjudicated in the challenged decision in the review procedure because when the current Criminal Procedure Code (2017) was legislated, they could have clarified this intention in the wording of the law or explained it in the reasoning. However, this was not done; instead, the same wording of the law was adopted.

Literature

Tibor Bodor – Zsolt Csák – Erzsébet Máziné Szepesi – Gábor Somogyi – Gábor Szokolai – Zoltán Varga (eds.): *Commentary on Act XIX of 1998 on the Code of Criminal Procedure*. Budapest, Wolters Kluwer, 2016.

István Kónya: A három csapás bírói szemmel. *Magyar Jog*, 3/2011, 129–132.

Péter Polt – Barna Miskolczi – József Vida – Zsanett Karner (eds.): *Nagykommentár a büntetőeljárási törvényhez – Nagykommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez*. Budapest, Wolters Kluwer, 2022.

[59] Criminal Procedure Act (1998) § 423(3), Criminal Procedure Act (2017) § 659(3).

[60] The same is the case with the Criminal Procedure Act (1998) with the following provisions: § 423(2) and (5).

AZ ÉLETFOGYTIG TARTÓ SZABADSÁGVESZTÉS ÉS A HALÁLBÜNTETÉS EGYES NORMATÍV ÉS ERKÖLCSI KÉRDÉSEI

HIMPLI LÉNÁRD[1]

ABSZTRAKT ■ Jelen tanulmány az erkölcs és a jog közös természetét, valamint együttélését vizsgálja a büntetőjog tükrében. Történelmileg, az erkölcsés a jog közös tőről fakad, de a társadalmi fejlődés, különösen az állami intézmények megjelenése útjaikat elválasztotta. A büntetőjog – egyéb jogágak viszonylatában – különösen szembetűnő módon jeleníti meg a jogi és az erkölcsi normák kapcsolatát, hangsúlyozva a büntetési-paradigmák erkölcsi megalapozottságát. A tanulmány elemzi a büntetést, mint a büntetőjog egyik kulcselemét nyomon követve fejlődését a primitívtől a fejlett társadalmakig, tanulmányozva céljait a megtorlástól az elrettentésig. A tanulmány bemutatja a halálbüntetés és az életfogytiglani szabadságvesztés magyarországi szabályozását, azoknak a büntetési célokhoz való viszonyát. A kontinentális büntető törvénykönyvek önálló erkölcsiséggel rendelkeznek, hiszen a bennük foglalt cselekmények nagy része azon alapszik, hogy az erkölcs egy cselekményt rossznak ítél, és a törvény elkövetésükhöz negatív jogkövetkezményt fűz. A kontinentális büntető törvénykönyvek jogi struktúrába ágyazott etikai vonatkozással bírnak. A tanulmány az erkölcsi és jogi normák dinamikáját vizsgálja a társadalmi értékek, a büntetések, a büntetési célok és az igazságosság fogalmai körül.

ABSTRACT ■ This paper examines the interrelated nature of legality and morality and their coexistence in the field of criminal law. Historically, law and morality arose from a common normative source, but social development necessitated separate codification, especially with the creation of state institutions. Criminal law prominently reflects the convergence of legal and moral standards, emphasizing the moral underpinning of punishment paradigms. Punishment as a key element of criminal law is analyzed, tracing its development from primitive to advanced societies and studying its purposes, from retribution to deterrence. The study presents the Hungarian regulation of the capital punishment and life imprisonment and their connection with the purpose of punishment. Continental criminal codes are imbued with the moral evaluation of conduct, demonstrating the ethical implications embedded in legal structures. The discourse struggles with the dynamics between moral and legal norms in the formation of social values, forms of behavior, and the concept of justice and punishment.

[1] PhD hallgató, Károli Gáspár Református Egyetem Állam- és Jogtudományi Doktori Iskola

„A büntetés az ítélet koronája, és ez a korona akkor ragyog a legjobban, ha nem túl enyhe, de nem tükrözi a drákói szigorúságot sem."

1. Bevezetés

A jog és az erkölcs – mint klasszikus normarendszerek[2] – közel állnak egymáshoz, a múltban egy egységes normarendszert alkottak.[3] Az archaikus társadalmakban egyetlen szakrális szokásrend szabályozta a közösség életét, jog és erkölcs egyetlen szisztéma volt.[4] A jog és az erkölcs viszonyának történetileg első megjelenési formája a római jogi normatív mos szabályaiban manifesztálódott,[5] amely az idők során több jelentéssel is bírt. A censori jogalkalmazás alakította ki végül a mos önálló, sui generis fogalmát, amely olyan társadalmi normákat tartalmazott, amelyek sem a jog (ius), sem a vallási előírások (fas) körébe nem tartozott.[6] A társadalom, illetve a társadalmi igények differenciálódásával, a normák sajátos differenciálására is szükség volt, így a legjelentősebb új intézmény, az állam, a normák egy részét kiemelte, létrehozva ezzel a jog kategóriáját.

A jog és az erkölcs közös gyökerűsége a büntetőjog tekintetében különösen szembetűnő. Szemere Bertalan szerint a büntetéseknek erkölcsösnek kell lenniük,[7] amely megállapítás talán kapcsolatba hozható a modern demokráciákban elterjedt "embertelen büntetés" tilalmával, különös tekintettel arra, hogy Szemere ezt az állítását a halálbüntetés eltörlése kapcsán tette, és a magyar alkotmánybíróság a halálbüntetést eltörlő határozatában érvként hozta fel a halálbüntetés embertelen és erkölcstelen mivoltát [23/1990. (X.31.) AB határozat)]. Irk Albert szintén rámutatott az erkölcs és a büntetőjog szoros kapcsolatára, amikor azt

[2] Lásd.: Zámbó Károly József: *Hatályos magyar jogunk viszonya az erkölcsi és a vallási normákhoz*. Budapest, Károli Gáspár Református Egyetem Állam- és Jogtudományi Doktori Iskola, 2022. 9.

[3] Földesi Tamás: Jog, erkölcs, igazság. *Iskolakultúra, Az Országos Közoktatási Intézet folyóirata,* IV. évfolyam, 1994/18. szám, 2-11. 2.

[4] Erdő Péter: Jog – erkölcs – manipuláció. In.: *Erkölcs és jog, szakmai konferencia a Kúrián, a Budapesten megrendezésre kerülő 52. Eucharisztikus Kongresszushoz kapcsolódóan.* Budapest, HVG-ORAC Lap- és Könyvkiadó Kft., 2020. 15.

[5] Németh Imre: A közerkölcs büntetőjogi védelmének indokoltsága és történelmi előképei a kbtk. Rendszerében. *Pro Publico Bono – Magyar Közigazgatás,* 2020/3. szám, 108-117., 110., http://real.mtak.hu/123530/1/07_Nemeth_108-117_PPB_2020_3.pdf

[6] Földi András – Hamza Gábor: *A római jog története és institúciói. Huszonkettedik átdolgozott és bővített kiadás*. Eszterházy Károly Egyetem Oktatáskutató és Fejlesztő Intézete, 2018. 26-28.

[7] Domokos Andrea: A büntetőjogi felelősség erkölcsi vonatkozásairól. *KRE-Dit 2019/1.* szám, 6. http://www.kre-dit.hu/tanulmanyok/domokos-andrea-a-buntetojogi-felelosseg-erkolcsi-vonatkozasairol/

írta, hogy „a jogi és erkölcsi normák közös eredetét az összes jogágak közül természetesen a legszemléltetőbben a büntetőjog mutatja."[8] Finkey Ferenc szerint a büntetés legmélyebb taralmi eleme az erkölcsi elem, azaz a megtorláson túl, az elkövető erkölcsi nevelése és átalakítása.[9] Egy írásában Hans Heinrich Jescheck rögzíti, hogy a büntetőjog hagyományos megközelítése mindig is az volt, hogy a bűncselekmény egy olyan cselekedet, amely erkölcsileg helytelen.[10] Földesi Tamás hangsúlyozza, hogy a büntetőjog szabályainak meghatározó része jogi bűn mellett, erkölcsi bűnre is vonatkozik,[11] Bárd Károly rögzíti, hogy a büntetőjog erkölcsi tilalmakat állít fel.[12] Domokos Andrea szerint az erkölcsi nevelés elengedhetetlen része egy gyermek felnevelésének.[13] Az előző példákhoz kapcsolódva Garrath Williams így írja egy tanulmányában: „mindenekelőtt a büntetőjog erkölcsi tilalmakat ír elő".[14] Nagy Ferenc a bűnelkövetések számának növekedését erkölcsi válsággal is indokolja.[15]

Ami a római jogot illeti, a római jogi bűncselekményt[16] is áthatotta az erkölcs, azáltal, hogy az iniuriák és a közösség elleni cselekedeteknél is megjelenik a „jó erkölcsökbe ütköző magatartás" (adversus bonos mores), melyet az állam, azaz

[8] Irk Albert: A büntetés fogalma. In: Irk Ferenc (szerk.): *Irk albert emlékkötet*. Budapest, MTA Magyar Kriminológiai Társaság, 1981. 31-38. 31.

[9] Finkey Ferenc: *Büntetéstani problémák*. Budapest, Sylvester Irodalmi és Nyomdai Rt., 1933. 253.

[10] Hans-Heinrich Jescheck – Jerry Norton: *Criminal law* https://www.britannica.com/topic/criminal-law

[11] Földesi: i. m. 3.

[12] Bárd Károly: Erkölcs és büntető igazságszolgáltatás – a hallgatás joga. In: *Dolgozatok Erdei Tanár Úrnak*. Budapest, ELTE Állam- és Jogtudományi Kar, 2009. 12-26. 12.

[13] Az erkölcs meghatározó büntetőjogbeli szerepe a gyermeknevelésben is megnyilvánul, mert az etikai nevelés a bűnmegelőzés és a *re-szocializáció* egyik fontos garanciája, valamint a bűnelkövetésre különösen hajlamos fiatalkorúak bűnözéstől való megóvásának esszenciális eszköze. Lásd: Domokos (2019) i. m. http://www.kre-dit.hu/tanulmanyok/domokos-andrea-a-buntetojogi-felelosseg-erkolcsi-vonatkozasairol/ és Domokos Andrea: Református jogtudósok a bűnelkövetők neveléséről, valláserkölcsi tanításáról. In: Madai Sándor – Pallagi Anikó – Polt Péter (szerk.): *Sic itur ad astra – Ünnepi kötet a 70 éves Blaskó Béla tiszteletére.* Budapest, Ludovika Egyetem Kiadó, 2020. 141-150.

[14] Garrath Williams: What is Fundamental in Criminal Law? In: *Criminal Justice Ethics*, 2022. Vol. 41, No. 3, 278–290., https://www.tandfonline.com/doi/epdf/10.1080/0731129X.2022.2144059?needAccess=true&role=button

[15] Nagy Ferenc: Gondolatok az életfogytig tartó szabadságvesztésről. In: Homoki – Nagy Mária – Marvanek Judit (szerk.): Ünnepi kötet Dr. Blazovich László egyetemi tanár 70. Születésnapjára. Szeged, Acta Universitatis Szegediensis: acta juridica et politica, 2013. 493 – 503. 503.
http://acta.bibl.u-szeged.hu/37954/1/juridpol_075.pdf

[16] Terminus technicusként a *delictum* és a *crimen* kifejezést használták a bűncselekmény fogalmának megjelölésére. Lásd.: Molnár Imre: *Az ókori római jogi bűncselekmény-fogalom*

a közösség jó erkölcsének kell értelmezni, amely megsértése így lényegében kimeríti a „társadalomra veszélyességet". A római joghoz kapcsolódva Finkey a capitis deminutio intézményét hozza fel példaként az erkölcsi bűncselekmény kategóriájának elemzésekor.[17] A jogi moralista felfogás szerint az állam egyes cselekményeket pusztán azon indokból büntetendővé nyilváníthat, hogy az adott cselekmény súlyosan erkölcstelen. A moralista jogi paternalizmus pedig az elkövetőt saját morális sérülésétől kívánja megvédeni a kriminalizáció útján.[18] Szociológiai értelemben a büntetőjogi szabály egyszerűen valaki erkölcsi értékeinek formális megtestesülése.[19] Akár megelőző, akár büntető funkciót tölt be, a büntetőjog erkölcsi hangon szólal meg.[20]

A büntetőjog szerves része a büntetés, amely az elkövetett rosszra adandó válasz. Malum passionis quod infligitur propter malum actionis.[21] Hugo Grotius szerint a büntetés az elkövetett rossz miatt elszenvedett hátrány: aki rosszat cselekedett, viselnie kell a rosszat.[22] Hogy adott szituációban mi a jó, és mi a rossz cselekvési lehetőség, arra az etika keresi a választ. A római jog egyik definíciója szerint a jog a „jó és méltányos művészete" (ars boni et aequi).[23]

A hatályos büntető törvénykönyvnek is megvan a maga etikája, hiszen a Különös Részben foglalt cselekmények meghatározó része arra épül, hogy egyes magatartásokat az erkölcs rossznak ítél, és azok elkövetéséhez a törvény negatív jogkövetkezményt fűz. Az erkölcsi tartalom e tekintetben a „védett jogi tárgyban" jelenik meg, amely értéket az elkövető magatartásával sért, vagy – egyes esetekben – veszélyeztet. A védett jogi tárgy – etikai vonatkozásai mellett – egy emlékeztető is a büntetőjog ultima ratio jellegére, hiszen a védett érdek nem egyszer valamilyen alapvető emberi vagy állampolgári jogban testesül meg. A büntetőjog ultima ratio jellegénél fogva pedig képes arra, hogy az egyént (alap) jogaiban – a többi jogág viszonylatában a legsúlyosabban – korlátozza, sokszor egy másik alapjog védelmének legitimációja nyomán.

ismérvei. In: *Acta Universitatis Szegediensis*: *acta juridica et politica,* 2010. 73. kötet, 1-64. szám, 565-590. *566.*
http://acta.bibl.u-szeged.hu/7465/1/juridpol_073_565-590.pdf

17 Finkey: i. m. 253.

18 Németh: i. m. 111.

19 Richard C. Fuller: Morals and the Criminal Law. *Journal of Criminal Law and Criminology* 624 (1941-1942),
https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=3103&context=jclc

20 Garrath: i. m.

21 Hugo Grotius mellett Szent Ágoston és Szent Tamás is ezt vallja.

22 Domokos (2019): i. m., http://www.kre-dit.hu/tanulmanyok/domokos-andrea-a-buntetojogi-felelosseg-erkolcsi-vonatkozasairol/

23 Erdő: i. m. 15.

Egy adott államban egyfajta jog érvényesül, amely koherens szabályokat foglal magában, ugyanakkor számos, egymással ellentétes erkölcsiség is jelen lehet. Egy primitív társadalomban, ahol konszenzus van az erkölcsi értékeket illetően, az uralkodó közvélemény egy sor közös szokást érvényesít, amelyek lényegében a törzsön belüli kimondatlan "büntetőjogi"[24] szabályozást alkotják. E szerint az erkölcstelennek ítélt cselekedetek eredendően "bűncselekménynek" minősülnek. A primitív szakaszon túli társadalmakban, ahol a társadalmi változások minimálisak, az erkölcshöz nem illeszkedő bűnözői magatartás korlátozott marad. Azonban a fejlett társadalmakban, amelyeket a közös értékek szűkössége és az egymásnak ellentmondó viselkedési normák bősége jellemez, az egyöntetűen jogtalannak tartott cselekvések köre fokozatosan csökken, ahogy a társadalom összetettebbé és differenciáltabbá válik. [25]

1.1. A halálbüntetés és az életfogytig tartó szabadságvesztés rövid bemutatása Magyarország jelenlegi és korábbi büntető törvénykönyveinek tükrében

A halálbüntetés nem csak a legrégebbi büntetési nem,[26] hanem az egyik első, ma is fennálló jogintézmény. Manapság az államok közel egyharmada él még a kapitális szankció lehetőségével, nagyobb részben a „fejlődő" államok körében. A „fejlett", nyugati típusú államok az elmúlt évtizedekben teljesen eltörölték a halálbüntetést az Egyesült Államok és Japán kivételével.[27] A halálbüntetés a legsúlyosabb büntetési nem, és az esetek többségében rendkívüli büntetésnek minősül, amely jellemzőkkel közös vonásokat mutat az életfogytig tartó szabadságvesztéssel, hiszen a szankciórendszer „csúcsán" általában vagy az egyik,

[24] Például a halálbüntetés az egyik legősibb, már az ősközösségek által is alkalmazott „büntetés" volt. Az idézőjelet – ahogy a törzsszöveg hivatkozott részében is – az indokolja, hogy a büntetés – és a büntető törvénykönyv – valamiféle szervezett társadalmat feltételez: előfeltétele, hogy létrejöjjön az állam, amely jogi keretek közé szorítja az ősközösségekben jelen lévő magánbosszút és vérbosszút, amelyről az ősközösségek tekintetében még nem lehet beszélni. Lásd: Balázsy Péter: Velünk élő tálió – a halálbüntetés napjainkban. In: *MTA Law Working Papers*, 2018/7. 2., http://real.mtak.hu/121512/1/2018_07_Balazsy.pdf és Tóth J. Zoltán: A halálbüntetés az ókorban. In: *Jogelméleti Szemle*, 2004/4. szám., http://jesz.ajk.elte.hu/tothj20.html#_ftn1

[25] Fuller: i. m. https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=3103&context=jclc

[26] Lásd: Tóth J. (2004): i. m. http://jesz.ajk.elte.hu/tothj20.html#_ftn1

[27] Tóth J. Zoltán: *A halálbüntetés intézményének egyetemes és magyarországi jogtörténete*. Budapest, Századvég Kiadó, 2010. 7.

vagy a másik büntetés szerepel.[28] Természetesen e megállapítás is ismer kivételt.[29] A magyar alkotmánybíróság a 23/1990. számú határozatával mondta ki a halálbüntetés alkotmány-ellenességét, és eltörölte azt hivatkozván egyebek mellett arra, hogy az 1978. évi IV. törvény halálbüntetésre vonatkozó rendelkezései ütköznek az élethez és az emberi méltósághoz való jog lényeges tartalmának korlátozásának tilalmával. Az élettől és az emberi méltóságtól halálbüntetéssel való megfosztásra vonatkozó rendelkezések ugyanis az élethez és az emberi méltósághoz való alapvető jog lényeges tartalmát nemcsak korlátozzák, hanem az életnek és az emberi méltóságnak, illetve az ezt biztosító jognak a teljes és helyrehozhatatlan megsemmisítését engedik meg [23/1990. (X.31.) AB határozat]. Ezt megelőzően az 1978. évi IV. törvény főbüntetésként szabályozta a halálbüntetést, illetve kiszabását csak kivételes esetekben engedélyezte: „Halálbüntetést kivételesen és csak akkor lehet kiszabni, ha – a bűncselekmény és az elkövető kiemelkedő társadalomra veszélyességére, a bűnösség különösen magas fokára figyelemmel – a társadalom védelme csak e büntetés alkalmazásával biztosítható".

Az életfogytig tartó szabadságvesztés komoly hagyományokkal rendelkezik Magyarországon – amely korán sem számít általánosan elterjedt jelenségnek Európában –, rendelkezett róla az 1843-as büntetőjavaslat, az 1878. évi Csemegi kódex, az 1950. évi II. törvény, az 1961. évi V. törvény,[30] az 1978. évi IV. törvény és a hatályos büntetőkódex is. Az életfogytig tartó szabadságvesztés alapvetően a halálbüntetés alternatívája. A régi Btk.-ban az utóbbi volt, az új Btk.-ban az előbbi a legsúlyosabb büntetési nem és mindkét kódex az elkövetéskor huszadik életévét betöltött elkövetővel szemben tette, illetve teszi kiszabhatóvá. Ellentétben a halálbüntetéssel – a végrehajtás konkrét módját és eszközét leszámítva[31] – az életfogytig tartó szabadságvesztés sokrétű megvalósulási formákat ismer, nemes egyszerűséggel talán azon okból kifolyólag, hogy „időben" gyakorlatilag az ellentétje a halálbüntetésnek, lévén, hogy a büntetések végrehajtása e két

[28] Az 1961. évi V. törvény (egy kivétellel) nem ismerte az életfogytig tartó szabadságvesztést. A miniszteri indokolás szerint ez azért volt így, mert, ha valaki nem javítható, halálra kell ítélni, ha pedig javítható, értelmetlen egész életére bezárva tartani. Ld.: Tóth J. (2010): i. m. 298.

[29] Portugáliában már a 19. század végén eltörölték a halálbüntetést, nem sokkal azután pedig az életfogytig tartó szabadságvesztést is, hivatkozván annak antihumánus voltára. Lásd: Nagy (2013) i. m. 493.
http://acta.bibl.u-szeged.hu/37954/1/juridpol_075.pdf

[30] Az 1961. évi IV. törvény eredetileg mellőzte az élefogytig tartó szabadságvesztést, de az 1971. évi 28. számú törvényerejű rendelet bevezette. Lásd: Nagy (2013): i. m. 500., http://acta.bibl.u-szeged.hu/37954/1/juridpol_075.pdf

[31] Például: akasztás, sortűz, villamosszék, gázkamra, méreginjekció.

esetben a leghosszabb és a legrövidebb,[32] illetve, hogy az életfogytig tartó szabadságvesztés esetében e hosszú idő mellé egy aktív alany is járul. A hatályos Magyar büntetőkódex a határozott idejű szabadságvesztés mellett szabályozza az életfogytig tartó szabadságvesztést, határozatlan idejű szabadságvesztésként, lévén, hogy az elítélt haláláig tart, melynek időpontja határozatlan.[33] Az életfogytiglani szabadságvesztés végrehajtási fokozata Magyarországon a legsúlyosabb, a fegyház fokozat, valamint leghamarabb 25, legkésőbb 40 évben határozhatja meg a bíró a feltételes szabadlábra helyezést, mely legalább 15 évig kell, hogy tartson és melyet a 44.§-ban szabályozott, legsúlyosabb bűncselekmények esetén ki is zárhat (például népirtás, emberiesség elleni bűntett, terrorcselekmény). Utóbbi esetben beszélhetünk a tényleges életfogytig tartó szabadságvesztésről, amikor nincs lehetőség a feltételes szabadságra bocsájtásra. A szabadságvesztés az Európai demokratikus jogállamokon belül számos módon differenciálódik. Egyes államok csak a határozott (Portugália, Spanyolország, Norvégia), míg mások az életfogytig tartó szabadságvesztést is alkalmazzák (legtöbb európai állam), különbözhet a büntetési tételkeret, a feltételes szabadságra bocsájtás lehetősége, vagy éppen a végrehajtási fokozatok és azok jellemzői. Sőt, még a szankciótípusok között is lehet differenciákat találni, például nem büntetés, hanem intézkedés a svájci életfogytig tartó őrizet, vagy a Magyar hatályos büntető törvénykönyvben szabályozott kényszergyógykezelés, mely szükségessége esetén akár életfogytig is tarthat.[34]

A büntetési nemek mivolta, bevezetése, fenntartása vagy eltörlése nem csak büntetőjogi, hanem jogbölcseleti, kulturális és politikai[35] kérdés is. Földvári József szerint például „a halálbüntetés eltörlésének vagy fenntartásának kérdése: politikai kérdés.[36] A szankciók – mára már generálissá vált, specifikus büntetőjogi

[32] Érdemes ugyanakkor hangsúlyozni a halálbüntetéssel szemben kritikaként megfogalmazott „várokozási időt", amely az ítélet kihirdetése és végrehajtása közötti – gyakran irreálisan hosszú – idő.

[33] Vesd össze: Nagy Ferenc: A hosszú tartamú szabadságvesztés büntetőjogi kérdéseiről rövid hazai áttekintés és nemzetközi kitekintés alapján. In: *Börtönügyi Szemle*, 2005. Huszinnegyedik évfolyam, 2. szám, 7-18.

[34] Nagy (2013): i. m.: 499., http://acta.bibl.u-szeged.hu/37954/1/juridpol_075.pdf

[35] Nagy Ferenc írja, hogy a bűnelkövetések növekedése erkölcsi válsággal is indokolható. A bűnözési helyzetképet pedig a média felnagyítja és torzítja, amely következtében a társadalom bűnözéstől való félelme és biztonság iránti igénye nő, akár jogkorlátozás árán is. Ezt az igényt használja ki Nagy szerint a politika diszfunkcionális hatással, a biztonság és a szigorítás büntetőjogot is érintő ígéretével. Lásd: Nagy (2013): 503., http://acta.bibl.u-szeged.hu/37954/1/juridpol_075.pdf

[36] A büntetési célokkal mind a halálbüntetés fenntartását, mind annak megszüntetését meg lehet indokolni. Könnyen elő lehet venni olyan büntetési célokat, amelyek a halálbüntetés felesleges voltát bizonyítják, de éppen így hivatkozhatunk olyan célkitűzésekre is, amelyek

alapelvek szerint – törvényben jelennek meg: nulla poena sine lege. A törvényeket a demokratikus jogállamok esetében, a jogállamiság materiális követelményeként megjelenő hatalommegosztás elvének megfelelően a törvényhozó hatalom alkotja, amelyek az esetek többségében közvetetten vagy közvetlenül választott képviselőkből álló parlamenteket jelentenek. A parlamentek – meghatározott többséggel – az alkotmány és a nemzetközi, illetve az európai uniós kötelezettségvállalások keretei között bármilyen tartalommal alkothatnak törvényeket.[37] Egyes esetekben, a törvényhozó hatalmat keretek között tartó tényezők köréből az alkotmány kiesik, hiszen például Magyarország esetében is az Alaptörvény megfelelő parlamenti többséggel, egy kvázi törvényalkotási eljárás keretében módosítható, alkotmányjogi kifejezéssel élve, rugalmas alkotmánynak mondható. Tovább árnyalja a képet, hogy sok esetben a parlamenti képviselők politikai pártok tagjai, például Magyarországon a 199 képviselői helyből 106 egyéni körzetből kerül kiosztásra, ahol konkrét személyekre szavazhatnak a választópolgárok, 93 hely pedig pártlistáról kerül ki, ahol pártokra lehet szavazni, és amely listán a képviselők személyét a politikai pártok határozzák meg. Így például a magyar országgyűlésben kevéssé személyek, hanem inkább pártok vannak jelen, nem is beszélve a „frakciófegyelemről", amely röviden annyit jelent, hogy a képviselő a saját, vagy az általa képviseltek meggyőződését, illetve érdekeit a frakciója (vagyis gyakorlatilag a pártja) érdekeinek (legtöbbször politikai) alárendeli. A demokratikus jogállamok esetében – így Magyarországon is – a parlamenti képviselők tekintetében a szabad mandátum elve, illetve a mentelmi jog intézménye érvényesül, amely azt jelenti, hogy a képviselők nem hívhatóak vissza és bizonyos kivételektől eltekintve nem vonhatóak felelősségre (választási ígéreteikért sem). A „legrosszabb", ami történhet, hogy a következő ciklusra nem választják meg őket, ami olyan rendszerekben, mint például Magyarország, azért is kihívás, mert, mint már említésre került, a képviselők legtöbbször valamely relatíve népszerű politikai párt tagjai, és a választói elköteleződés leginkább a párt, és nem a képviselő személye felé irányul.[38] Ahol a törvényhozás a halálbüntetést, vagy az életfogytig tartó szabadságvesztést a büntetési nemek közé sorolja, vagy eltörli – de lege lata – jogossága felett nincs helye vitának. A szankciórendszert, annak céljaival és ne-

megalapozhatják a halálbüntetés meghatározását Lásd: Földvári József: *Kriminálpolitika.* Közgazdasági és Jogi Könyvkiadó, Budapest, 1987.

37 A tanulmány nem vállalkozik a különböző demokratikus jogállamok hatalommegosztási rendszerének bemutatására. A hatalommegosztás lényege a hatalmi ágak egyensúlya, az, hogy egyik se tudjon „túlhatalomra" szert tenni, amelynek az alkotmányon és nemzetközi, uniós kötelezettségvállalásokon túl számos és szerteágazó garanciája lehet, például az Alkotmánybíróság, az államfő, a bizalmatlansági indítványok intézménye, stb.

38 Lásd: Enyedi Zsolt – Körösényi András: *Pártok és pártrendszerek*. Budapest, Osiris kiadó, 2001.

meivel együtt, az állam alkotja meg,[39] és azt, hogy az állam ezt milyen elméleti és gyakorlati céllal, illetve célokkal tegye, a választópolgárok tudják befolyásolni. Ide nem illőnek tűnhet utóbbi alkotmányjogi szempontú levezetés, de ezzel is arra kíván utalni a tanulmány, hogy amikor még nincs is szó az egyes büntetési nemek mivoltáról, a büntetés céljáról és azok elérésének módjáról, már erősen jelen van az erkölcsi felelősség büntetőjogot is potenciálisan érintő kérdésköre a döntéshozókat megválasztók, illetve maguk a megválasztottak tekintetében is, kollektíven is, egyénileg is.

2. A büntetés célja

Eleinte, az ősközösségekben, amikor még nem beszélhettünk a szó mai értelmében vett büntetésről,[40] a két legelterjedtebb „szankció" a halálbüntetés és a száműzetés voltak,[41] és a cél a bosszú, azaz az elszenvedett sérelemért a sértett személy vagy hozzátartozói, esetleg nemzetsége vagy törzse részéről, a fájdalomkitörés, a harag, a szenvedély sugallta ösztönszerű elégtétel volt.[42] Tehát, általánosan elterjedt volt a közösség valamely tagját sértő cselekedetek, közösség általi megbosszulásának intézménye, amely akár nemzedékeken át tartó bosszúk és viszont-bosszúk sorozatát is jelenthette. Amikor a korábban laza kapcsolatban lévő közösségek állammá alakulása megkezdődött, kialakultak a főhatalmat gyakorló állami szervek, melyek célja a jogszolgáltatás tényleges gyakorlása volt. Így, a bosszú szokásjogilag kialakult formáit az államnak át kellett vennie, különben az állami szervek jogszolgáltató funkcióinak hallgatólagos elismerésére nem került volna sor. A sérelemokozások nagy részének „szankciója" pedig a halálbüntetés volt, így azt a kialakuló államok értelemszerűen széles körben alkalmazták.[43] A büntetés céljának organikus fejlődésének következő jelentős állomása a XIX. századi klasszikus büntetőjogi iskola által egyedüli célként hirdetett megtorlás volt.[44] A klasszikus iskola büntetéstana individuáletikai és formális jellegű, mert a rossz, egyéni rossz és a büntetés mértéke az elkövető egyéni bűnösségéhez, valamint

[39] Finkey: i. m. 253.
[40] Lásd.: 27. lábjegyzet.
[41] Lásd: Tóth J. (2004): i. m., http://jesz.ajk.elte.hu/tothj20.html#_ftn1
[42] Finkey: i. m. 24.
[43] Lásd: Tóth J. (2004): i. m., http://jesz.ajk.elte.hu/tothj20.html#_ftn1 (2023.08.20.)
[44] Irk Albert: A büntetőjog racionális és irracionális elemei. In: Dr. Lukinich Imre (szerk.): Értekezések a filozófiai és társadalmi tudományok köréből a magyar tudományos akadémia *II. osztályának rendeletéből*. Budapest, Magyar Tudományos Akadémia. V. kötet, 4. szám, 1938. 40.

cselekménye súlyához igazodik.[45] A büntetés magva ez esetben az „igazságosság ideájának egyik attribútuma". Megjegyzendő, hogy a halálbüntetést pártolók körében az egyik legelterjedtebb érv maga az igazságosság, az igazságos megtorlás évezredes büntetőjogi alapelve, miszerint a halálbüntetésre azért van szükség, mert ez az egyetlen büntetés, amely arányos az elkövetett tettel, amennyiben egy súlyos emberölésről van szó. Az igazságosság egyszerűnek tűnő fogalmi megragadása tekintetében jelen esetben az arisztoteleszi „osztó-igazságosság", azaz a „szemet-szemért, életet-életért" táliót idéző, mára már meghaladott értelmezése jelenik meg.[46] Mit jelent a megtorlás? A viszonzást, a „visszatorlást", a szemet-szemért, a büntetőjog-ellenes cselekmény „ellenszolgáltatását", a „bajjal sújtást", a rossz, hasonló rosszal való viszonzását, mely alapvetően az elkövető által megvalósított külső rosszat, a jogsértés mértékét veszi figyelembe, ezért – ahogy Finkey írja a 20. század első felében – erkölcsi felfogásunkat nem elégíti ki, mivel az többet és magasabb ismérveket lát az állami büntetésben.[47] Ugyanakkor, a jog és filozófia több szellemóriása mégis a megtorlásban látta a büntetés fő célját: a Szent Ágostontól származó, majd Szent Tamás és Hugo Grotius által továbbvitt „malum passionis quod infligitur ob malum actionis" tétele, a természetjogi és észjogi iskola a XVII-XVIII. században, de a XIX. század kiemelkedő alakjai is, hiszen Kant, a mai abszolút elmélet szerint úgy gondolta, hogy a büntetés mindig retrospektív, a múltba néz, a múltban elkövetett bűncselekményre ad arányos választ és célja az igazságos megtorlás:[48] „Hat er gemordet, so muss er sterben", vagy Hegel, aki szintén igazságossági szempontokból indult ki, de ő már relatív szempontok figyelembe vételét is elfogadta.[49] Említésre érdemes, hogy Beccaria alapvetően a büntetés céljának, annak igazságosságát tekintette,[50] ugyanakkor Beccaria fontos célnak tartotta a társadalomvédelmet és a generális prevenciót is,[51] mellérendelt, egyenrangú célokként tekintett rájuk, melyek, ha összhangban vannak az igazságosság elveivel, akkor még a halálbüntetést is indokolttá tehetik:[52] "Valamely állampolgár halálát csupán két okból lehet szükségesnek

45 Irk (1938): i. m. 40.

46 Lásd: Tóth J. Zoltán: Halálbüntetés: pro és kontra. In: *Jogelméleti Szemle*. 2003/2. szám, https://jesz.ajk.elte.hu/toth14.htm és Finkey: i. m. 61.

47 Finkey: i. m. 13.

48 Tóth J. Zoltán: *A halálbüntetés a XVIII-XIX. századi német filozófiai gondolkodásban*. In: *De iurisprudentia et iure publico – Jog- és politikatudományi folyóirat*. III. évfolyam 2009/3-4. szám. 7. http://dieip.hu/wp-content/uploads/2009-3-08.pdf

49 Tóth J. (2009): i. m. 7., http://dieip.hu/wp-content/uploads/2009-3-08.pdf (2023.08.15.) Lásd: Finkey: i. m. 253. o.

50 Cesare Beccaria: *Bűntett és büntetés*. Budapest, Révai Leo Kiadása 1887. 74-75.

51 Cesare Beccaria: *Bűntett és büntetés*. Budapest, Révai Leo Kiadása 1887. 47. és 111.

52 Tóth J. (2003): i. m. https://jesz.ajk.elte.hu/toth14.html

tekinteni. Az egyik az az eset, amikor az illetőnek még szabadságától megfosztva is olyan kapcsolatai vannak és olyan hatalommal bír, amelyek a nemzet biztonsága szempontjából nem közömbösek…" a másik eset Beccaria szerint, amikor indokolt a halálbüntetés, ha az elkövető: "halála az egyetlen valóságos fékező erő másoknak bűncselekmények elkövetésétől való visszatartására"[53]. Beccaria nézete tehát, a mai relatív büntetési teóriával áll összhangban, miszerint a büntetés célját tekintve a jövőbe néz.[54] A megtorlást – bár elválaszthatatlan eleme – helytelen egyedüli büntetési célként kezelni, hiszen ahogy Finkey írja, az a büntetés, amely csak sújt, csak fájdalmat okoz, csak megsemmisít, nem üti meg a helyesség mértékét, mert hiányzik belőle a legmélyebb tartalmi kellék, az erkölcsi elem. A büntetőjog „barabarizmusa" úgy törhető le, ha a büntetés a fenyítés[55] mellett alkalmas az elkövetőt erkölcsi hibáitól megtisztítani.[56]

A XIX. végén kialakult több „új irányzat" elveti a megtorlást, mint elsődleges büntetési célt, és a büntetést elsődlegesen az állam kezében lévő prevenciós eszköznek tartja.[57] A harmadik jelentős, közvetítő iskola néven ismert irányzat a megtorlásra, mint elméleti célra, a társadalomvédelemre, mint reális célra tekint, amely elválasztás egy fontos szempont rávilágítására ad alkalmat, miszerint különbséget érdemes tenni a büntetés célja, tartalma és alakja között. A büntetés tartalma, annak fő ismérveit és jellemvonásait, a büntetés célja a szankciórendszer gyakorlati rendeltetését, az azáltal megvalósítandó állami és társadalmi feladatokat, végül a büntetés alakja annak külső megjelenési formáját jelenti. A büntetés célja alatt tehát, a büntetés tartalmának gyakorlati megvalósulása értendő.[58] Irk Albert szerint a büntetés tartalmilag megtorlás, hatásában megelőzés: erkölcsi rosszalló értékítéletet tartalmazó, társadalomvédelmi célt szolgáló joghátrány.[59] Finkey szerint valamennyi büntetési nemre általánosan érvényes cél az általános visszatartás, az állam és a sértett felé nyújtott elégtétel, illetve a nevelés, az erkölcserősítő behatás.[60]

53 Cesare Beccaria: Bűntett és büntetés. Budapest, Révai Leo Kiadása 1887. 51.

54 Tóth J. (2009): i. m. 2. http://dieip.hu/wp-content/uploads/2009-3-08.pdf

55 A büntetésben foglalt *malum*, azaz a fenyítés Finkey értelmezésében a helyes erkölcsi felfogás szerint lelki fenyítést jelent, vagyis az elkövetőre olyan lélektani és pszichés befolyás gyakorlását, hogy érezze át a társadalom helytelenítését és a megtorlás kikerülhetetlen voltát. Lásd: Finkey: i. m.

56 Finkey: i. m. 15.

57 A különböző büntetőjogi iskolák részletes kifejtésére a tanulmány nem tér ki.

58 Finkey: i. m. 12.

59 Irk (1938): i. m. 45.

60 Finkey: i. m. 16-17.

2.1. A büntetés célja a magyar büntető törvénykönyvekben 1961 és 2023 között

A magyar jogrendszer – hol folytonos, hol újraszabályozott – elmúlt több mint fél évszázadában a büntetés célja nagyon hasonló, szinte ugyanaz volt. Az 1961. évi V. törvény és az 1978. évi IV. törvény a büntetés céljának meghatározásánál deklarálja, hogy a büntetés törvényben meghatározott joghátrány, célja a társadalom védelme, illetve a speciális és a generális prevenció. A hatályos büntető törvénykönyv a normaszövegben nem, de az indokolásban kitér arra, hogy a büntetés törvényben szabályozott joghátrány, illetve elődeihez hasonlóan, szinte szó szerinti pontossággal rögzíti, a társadalomvédelmi és a speciális, valamint a generális preventív funkciót a 78.§-ban: „A büntetés célja a társadalom védelme érdekében annak megelőzése, hogy akár az elkövető, akár más bűncselekményt kövessen el.". A fő cél tehát a társadalom védelme, amely cél megvalósulását két további normatív (rész)cél szolgálja, a speciális és a generális prevenció. A szankciót egyrészt úgy kell kiszabni, hogy az elkövető a jövőben ne kövessen el további büntetőjog-ellenes cselekményt, másrészt, hogy az egész társadalomnak, legfőképpen a potenciális normasértőknek közvetítsen egy üzenetet, hogy ne kövessenek el büntetendő cselekményt, mert akkor nem csak fenyegeti őket a büntetés kiszabása, hanem realitásként jelenik meg az arányos büntetés végrehajtása is. A speciális prevenció háromféleképpen valósulhat meg. Az első, és legideálisabb a reszocializáció, azaz az elkövető erkölcsi átnevelése és visszavezetése a társadalomba. Ez egy olyan javító-nevelő eljárás, amely ideális esetben pozitív irányba befolyásolja az elkövető személyiségét, felismeri, hogy amit tett az rossz, megbánja és elítéli azt, és törvénytisztelő állampolgárrá válik. A második kevésbé ideális, de még a társadalomvédelmi céllal összhangban álló módszer az elrettentés. Az elkövető ekkor bensőleg nem változik meg, nem tartja erkölcsileg rossznak, amit tett, ugyanakkor a szankciótól való félelme mégis visszatartja a bűnismétléstől.[61] A harmadik – a megvalósulási módok ideálisságának sorrendjében is – az elkövető ártalmatlanná tétele, amely halálbüntetés esetén a legdrasztikusabbat, azaz a fizikai megsemmisítést jelenti, az életfogytig tartó szabadságvesztésnél pedig a társadalomtól való elszigetelést.[62] A generális prevenció elérésével kapcsolatban szintén három módszer sorolható fel. Egyrészt a büntetés kilátásba helyezése, azaz a büntetéssel való fenyegetés, másrészt a büntetések tényleges kiszabása, harmadrészt a kiszabott büntetések tényleges végrehajtása. Mindhárom lépés

[61] Tóth J. (2003): i. m. https://jesz.ajk.elte.hu/toth14.html
[62] Irk (1939):. i. m. 40.

az „elrettentésre" vezethető vissza, amellyel a generális prevenció hasonlóságot mutat a speciális prevenció második megvalósulási módjával.[63]

A büntető törvénykönyvekben nem említett, de jelen esetben említésre érdemes további két célja a büntetésnek: a represszió, azaz a megtorlás, és a kárjóvátétel, a bűncselekménnyel megsértett társadalmi rend helyreállítása és az igazságosság elveinek érvényesítése a sértettek tekintetében.

2.2. A büntetés célja a halálbüntetés és az életfogytig tartó szabadságvesztés tükrében

A speciális prevenció három megvalósulási formája közül az első kettő automatikusan elvethető, amikor a halálbüntetésről beszélünk, hiszen a halott reszocializációja, illetve benne jövőbeni „büntetőjogi gát" kialakítása, amely visszatartja a büntetőjog-ellenes cselekedetek elkövetésétől, nem értelmezhető. Halálbüntetés esetén, egyből a harmadik megvalósulási formájához kerülünk a speciális prevenciónak, azaz az elkövető ártalmatlanná tételéhez, annak is legsúlyosabb formájához, a fizikai megsemmisítéshez, amelynek módja további erkölcsi dilemmákat vethet fel.[64] Ebből kifolyólag a halálbüntetést pártolók elvetik annak a lehetőségét, hogy a legsúlyosabb bűncselekmények elkövetőinek reszocializációja egyáltalán lehetséges lenne.[65] Ezzel szemben a halálbüntetést ellenzők álláspontja az, hogy a büntető törvénykönyvekben szabályozott büntetési célokból lehet és kell kiindulni,[66] amely felhívja a figyelmet a tanulmány korábbi fejezetében megjelenített döntéshozók, és azok megválasztásának jelentőségére tett utalásra. Hasonló a helyzet az életfogytig tartó szabadságvesztés azon változatánál, amikor nincs lehetőség a feltételes szabadságra bocsájtásra és kegyelemre sem. Ebben az esetben is az elkövető ártalmatlanná tétele jöhet csak szóba a speciális prevenció megvalósulási formái közül. Mi az erkölcsösebb büntetés? Vitatható, alapvető jogokat potenciálisan sértő végrehajtási módokon a halálbüntetés pártjára állni – amely a közvélekedéssel szemben például az USA-ban nagyobb költségeket jelent,[67] mint az életfogytig tartó szabadságvesz-

[63] Tóth J. (2003): i. m. https://jesz.ajk.elte.hu/toth14.html

[64] A halálbüntetés végrehajtási módjainak részletes bemutatására a tanulmány a rendelkezésekre álló keretekre tekintettel nem tér ki.

[65] Vesd össze: Finkey: i. m.

[66] Tóth J. (2003): i. m., https://jesz.ajk.elte.hu/toth14.html

[67] Lásd: https://deathpenalty.procon.org/questions/is-life-in-prison-without-parole-a-better-option-than-the-death-penalty/

tés[68] – vagy vitatható, alapvető jogokat potenciálisan sértő végrehajtási módokon élethosszig bezárni az elkövetőt a szabadulás reménye nélkül, de a szökés mindenkori lehetőségével együtt – Pálinkás József szavaival élve, az elkövetőt egy elhúzódó, csak korántsem olyan humánus kivégzésre" ítélve. Bár mind a halálbüntetés pártiak, mind az abolicionisták kizárják a reszocializációt a legsúlyosabb büntetési nem alkalmazása esetén[69] – amely utóbbiaknál az életfogytig tartó szabadságvesztés – meg kell jegyezni, hogy a hatályos magyarországi szabályozás ettől eltérő lehet. A hatályos büntető törvénykönyv Magyarországon megkülönbözteti az életfogytig tartó szabadságvesztést – amelynek esetén leghamarabb 25, legkésőbb 40 év elteltével feltételes szabadlábra helyezésnek van helye – és a tényleges életfogytig tartó szabadságvesztést, ahol feltételes szabadlábra helyezésnek nincs helye. Ugyanakkor, a tényleges életfogytig tartó szabadságvesztés sem „tényleges" teljes mértékben, hiszen 40 év elteltével kötelező kegyelmi eljárást kell lefolytatni, amely a szabadulást – feltételesen – lehetővé teheti. Ezek alapján, Magyarországon, még a legsúlyosabb büntetés, a tényleges életfogytig tartó szabadságvesztés esetén is érvényesülhet a speciális prevenció, hiszen van remény a szabadulásra, és ezáltal talán kiküszöbölhető az a népszerű érv is az életfogytig tartó szabadságvesztéssel szemben, miszerint azon rendszerekben, ahol e büntetés helyezkedik el a szankciórendszer csúcsán, az elítélt bármit megtehet, a végrehajtási intézményben bárkit bárhogyan megölhet, mert úgysem szabható ki rá súlyosabb büntetés.[70]

A társadalom védelmét szolgáló másik részcél a speciális prevenció mellett, a generális prevenció, azaz, annak az elérése, hogy a büntetés kiszabása, a társadalom többi tagját is visszatartsa büntetőjog-ellenes cselekedetek elkövetésétől. Finkey a 20. század első felében megállapította, hogy az általános megelőzés helyes cél, és hogy elvitathatatlan visszatartó erővel bír. Ugyanakkor felhívta a figyelmet a generális prevenció túlértékelésének veszélyére is, hiszen ha csak a megelőzés a cél, akkor a Feuerbach lélektani kényszer elméletének eszméje, az elrettentés elve érvényesül. Amennyiben a büntetés célja egyedül a minél több ember büntetőjog-ellenes cselekedetektől való visszatartása lenne, az az egyre szigorúbb és kegyetlenebb büntetési nemek és végrehajtási módok bevezetésének reális

[68] Le kell szögezni, hogy az emberi élet nem tehető mérlegre gazdasági szempontok mentén, azzal együtt, hogy ez a típusú érvelés folyamatosan jelen van a halálbüntetésről szóló irodalomban. Lásd: Tóth J. (2003): i. m. https://jesz.ajk.elte.hu/toth14.html. Megjegyzendő, hogy nem elvethető az a típusú érvelés sem, amely az adóforintokból finanszírozott büntetésvégrehajtásra, mint a társadalmi önvédelem, társadalom általi finanszírozására gondol. Ahogy az ember fizet a biztonsági berendezéseiért, a társadalom is fizet a biztonságáért.

[69] Tóth J. (2003): i. m., https://jesz.ajk.elte.hu/toth14.html

[70] A legtöbb, amit ilyen esetben meg lehet tenni, az a büntetésvéghehajtási intézmény belüli intézkedések, amellyel relatíve súlyosabbá, bizonyosan szigorúbbá tehető a kiszabott ítélet.

veszélyét jelentené.[71] Amit érdemes az elrettentő hatás kapcsán leszögezni, hogy máris kizárható a bűnelkövetés egy jelentős spektruma tekintetében, amely nem más, mint a beszűkült tudatállapotban[72] (hirtelen felindulás, erős stresszhelyzet, alkohol vagy kábítószer hatása, elmebetegség stb.) elkövetett bűncselekmények. Ilyenkor az elkövető tudatállapota beszűkült, átmeneti jelleggel képtelen arra, hogy indulatait irányítsa, nem képes teljes mértékben kontrollálni a magatartását. Amikor hirtelen felindulásról van szó, kiemelkedően fontos a „hirtelen" kifejezés jelentőségének megértése, amely arra utal, hogy az elkövető, valamilyen külső ingerre azonnal indulati tettmegnyilvánulással reagál, tehát a magatartás spontán, indulati és az előzetes mérlegelés, illetve a potenciális következmények számbavétele kizárható.[73] A múlt büntető törvénykönyveiben, amelyek tartalmaztak halálbüntetést, a legsúlyosabb büntetési nemként szabályozták, ezáltal súlyosságát tekintve megelőzte az életfogytig tartó szabadságvesztést.[74] Logikus gondolkodásnak tűnhet ez alapján tehát, hogy a halálbüntetésnek bizonyosan nagyobb elrettentő hatása kell, hogy legyen. Ezzel szemben Beccaria szerint egy kisebb, de elkerülhetetlen büntetés nagyobb visszatartó erővel bír, mint egy nagyobb, de potenciális megúszható büntetés. Albert Camus szerint az elrettentő hatás eleve csak a félénkekre hat, azokra, akik amúgy sem követnének el halálbüntetéssel büntetendő cselekményt.[75] Finkey szerint pedig az intelligens és magasabb erkölcsi színvonalon álló emberrel szemben az elrettentésre úgy sincs semmi szükség, a bűnre hajlamos vagy a „hivatásos" bűnelkövetőkkel szemben pedig teljesen eredménytelen és hiábavaló a legszigorúbb büntetés képzetével való fenyegetés.[76] Argumentum a minore ad maius, azok pedig, akik a büntetendő cselekmény elkövetése iránt elkötelezték magukat és a kevésbé súlyos büntetéstől nem rettennek meg, a jóval súlyosabbtól sem fognak. Ez az érvelés pedig az esetek széles spektrumára terjeszthető ki, leegyszerűsítve: aki súlyos, potenciálisan halálbüntetéssel büntetendő cselekményt előre kitervelten, a lehetőségeket számba véve el akar követni, az nagy valószínűséggel megkísérli.[77]

71 Finkey: i. m. 2.

72 Optimizmusra okot adó körülmény, hogy a Magyar Btk. az emberölés privilegizált eseteként külön tényállásban jeleníti meg az erős felindulásban elkövetett emberölés bűncselekményt.

73 Tóth J. (2003): i. m., https://jesz.ajk.elte.hu/toth14.html

74 Ezzel az állásponttal kapcsolatban is vannak viták, Pálinkás József szerint például "az életfogytig tartó büntetés nem más, mint egy időben elhúzódó kivégzés, csak korántsem olyan humánus".

75 Albert Camus: Gondolatok a halálbüntetésről. In: *A halálbüntetésről*. Medvetánc füzetek, Magvető Könyvkiadó, Budapest, 1990, 7-74.

76 Finkey: i. m. 18.

77 Tóth J. (2003): i. m., https://jesz.ajk.elte.hu/toth14.html

3. Záró gondolatok

A tanulmány megkísérelte bemutatni a jog – kiváltképp a büntetőjog – és az erkölcs szoros kapcsolatát, és közös eredetét. Ebből kiindulva a büntetés céljának, majd annak konkrét büntetési nemekre vetített mivoltának megragadását igyekezett felmérni az írás. Látható, hogy a büntetési nemek, és az azok végrehajtása által elérni kívánt célok – a jog egészéhez hasonlóan – szokásjogi eredetűek, melyek a közösség szokásaiból alakultak ki, így szoros kapcsolatot ápolnak az erkölccsel, hiszen az erkölcs a közösség által elfogadott szokásos és szabályok összessége.[78]

A büntető-jogalkotás jövőbeni kihívása a stabil erkölcsi keretek újra/ki-alakítása, a társadalom felkészítése, és a büntetőjog céljainak következetes megvalósítása, hiszen az európai kontinens elmúlt évtizedeinek relatíve válságmentes időszakát, az elmúlt években regionális és globális válságok sora fenyegette és fenyegeti, amelyek a történelmi tapasztalok alapján mindig a büntetőjog barabarizmusának katalizálásához,[79] az erkölcsi elvek fellazulásához, vagy éppen szélsőséges torzulásához vezetnek. Így, hogy a potenciális válságok negatív hatásai megelőzhetőek legyenek, elsődleges feladat a társadalom erkölcsi megerősítése a nevelés, a kultúra és témánk szempontjából indokoltan, a büntető-jogalkotás útján.

Irodalomjegyzék

Albert Camus: Gondolatok a halálbüntetésről. In: *A halálbüntetésről*. Medvetánc füzetek, Magvető Könyvkiadó, Budapest, 1990, 7-74.

Balázsy Péter: Velünk élő tálió – a halálbüntetés napjainkban. In: *MTA Law Working Papers*, 2018/7. 2., http://real.mtak.hu/121512/1/2018_07_Balazsy.pdf

Bárd Károly: Erkölcs és büntető igazságszolgáltatás – a hallgatás joga. In: *Dolgozatok Erdei Tanár Úrnak*. Budapest, ELTE Állam- és Jogtudományi Kar, 2009. 12-26.

Birher Nándor: Bevezetés az etika alapjaiba. In: Birher Nándor (szerk.): *Etika mint normarend*. Budapest, Patrocinium kiadó, 2022.

Cesare Beccaria: *Bűntett és büntetés*. Budapest, Révai Leo Kiadása 1887.

Domokos Andrea: A büntetőjogi felelősség erkölcsi vonatkozásairól. *KRE-Dit* 2019/1. szám, http://www.kre-dit.hu/tanulmanyok/domokos-andrea-a-buntetojogi-felelosseg-erkolcsi-vonatkozasairol/

[78] Birher Nándor: Bevezetés az etika alapjaiba. In: Birher Nándor (szerk.): *Etika mint normarend*. Budapest, Patrocinium kiadó, 2022. 5.

[79] Lásd: Finkey i. m. és Tóth J. (2003): i. m., https://jesz.ajk.elte.hu/toth14.html

Domokos Andrea: Református jogtudósok a bűnelkövetők neveléséről, valláserkölcsi tanításáról. In: Madai Sándor – Pallagi Anikó – Polt Péter (szerk.): *Sic itur ad astra – Ünnepi kötet a 70 éves Blaskó Béla tiszteletére.* Budapest, Ludovika Egyetem Kiadó, 2020. 141-150.

Enyedi Zsolt – Körösényi András: *Pártok és pártrendszerek*. Budapest, Osiris kiadó, 2001.

Erdő Péter: Jog – erkölcs – manipuláció. In.: *Erkölcs és jog, szakmai konferencia a Kúrián, a Budapesten megrendezésre kerülő 52. Eucharisztikus Kongresszushoz kapcsolódóan.* Budapest, HVG-ORAC Lap- és Könyvkiadó Kft., 2020.

Finkey Ferenc: *Büntetéstani problémák*. Budapest, Sylvester Irodalmi és Nyomdai Rt., 1933.

Földesi Tamás: Jog, erkölcs, igazság. *Iskolakultúra, Az Országos Közoktatási Intézet folyóirata,* IV. évfolyam, 1994/18. szám, 2-11.

Földi András – Hamza Gábor: *A római jog története és institúciói. Huszonkettedik átdolgozott és bővített kiadás*. Eszterházy Károly Egyetem Oktatáskutató és Fejlesztő Intézete, 2018.

Földvári József: *Kriminálpolitika.* Közgazdasági és Jogi Könyvkiadó, Budapest, 1987.

Garrath Williams: What is Fundamental in Criminal Law? In: *Criminal Justice Ethics*, 2022. Vol. 41, No. 3, 278–290., https://www.tandfonline.com/doi/epdf/10.1080/0731129X.2022.2144059?needAccess=true&role=button

Hans-Heinrich Jescheck – Jerry Norton: *Criminal law*, https://www.britannica.com/topic/criminal-law

http://acta.bibl.u-szeged.hu/37954/1/juridpol_075.pdf

http://acta.bibl.u-szeged.hu/7465/1/juridpol_073_565-590.pdf

Irk Albert: A büntetés fogalma. In: Irk Ferenc (szerk.): *Irk albert emlékkötet*. Budapest, MTA Magyar Kriminológiai Társaság, 1981. 31-38.

Irk Albert: A büntetőjog racionális és irracionális elemei. In: Dr. Lukinich Imre (szerk.): Értekezések a filozófiai és társadalmi tudományok köréből a magyar tudományos akadémia II. osztályának rendeletéből. Budapest, Magyar Tudományos Akadémia. V. kötet, 4. szám, 1938.

Molnár Imre: Az ókori római jogi bűncselekmény-fogalom ismérvei. In: *Acta Universitatis Szegediensis*: *acta juridica et politica,* 2010. 73. kötet, 1-64. szám, 565-590.

Nagy Ferenc: A hosszú tartamú szabadságvesztés büntetőjogi kérdéseiről rövid hazai áttekintés és nemzetközi kitekintés alapján. In: *Börtönügyi Szemle*, 2005. Huszinnegyedik évfolyam, 2. szám, 7-18.

Nagy Ferenc: Gondolatok az életfogytig tartó szabadságvesztésről. In: Homoki – Nagy Mária – Marvanek Judit (szerk.): Ünnepi kötet Dr. Blazovich László egyetemi tanár 70. Születésnapjára. Szeged, Acta Universitatis Szegediensis: acta juridica et politica, 2013. 493 – 503.

Németh Imre: A közerkölcs büntetőjogi védelmének indokoltsága és történelmi előképei a kbtk. Rendszerében. *Pro Publico Bono – Magyar Közigazgatás,* 2020/3. szám, 108-117. http://real.mtak.hu/123530/1/07_Nemeth_108-117_PPB_2020_3.pdf

Richard C. Fuller: Morals and the Criminal Law. *Journal of Criminal Law and Criminology* 624 (1941-1942), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=3103&context=jclc

Tóth J. Zoltán: *A halálbüntetés a XVIII-XIX. századi német filozófiai gondolkodásban*. In: *De iurisprudentia et iure publico – Jog- és politikatudományi folyóirat*. III. évfolyam 2009/3-4. szám., http://dieip.hu/wp-content/uploads/2009-3-08.pdf

Tóth J. Zoltán: *A halálbüntetés intézményének egyetemes és magyarországi jogtörténete*. Budapest, Századvég Kiadó, 2010. 7.

Tóth J. Zoltán: Halálbüntetés: pro és kontra. In: *Jogelméleti Szemle*. 2003/2. szám, https://jesz.ajk.elte.hu/toth14.htm

Zámbó Károly József: *Hatályos magyar jogunk viszonya az erkölcsi és a vallási normákhoz*. Budapest, Károli Gáspár Református Egyetem Állam- és Jogtudományi Doktori Iskola, 2022.

THE OMBUDSMAN – AT THE BORDERLINE BETWEEN LAW AND MORALITY

Edina Lajos[1]

ABSZTRAKT ■ Az erkölcs és a jog két különböző, egymástól elkülönülő szabályrendszernek tekinthető, amelyek mindegyike más-más funkcióval és eszközökkel rendelkezik. Ha körülnézünk a világban, egy- és többfejű ombudsmanokat látunk. Az alapjogi biztos nem hozhat olyan döntéseket, amelyeket a hatóság érvényesíthet – ez az ombudsman fogalmi meghatározása. Az ezt a pozíciót betöltő személyek világszerte a legkülönbözőbb titulusokat kapják. A hivatalt először az 1700-as évek elején Svédországban állították fel, bár hasonló állami funkciók már korábban is léteztek. Gabriele Kucsko-Stadlmayer három fő típust különböztet meg a felügyelet tárgya és szabályai, valamint hatásköre alapján: az alap- vagy klasszikus modellt, a jogállami modellt és az emberi jogi modellt. Különösen vizsgálhatja a hatóságokat, a közszolgáltató szerveket, a közigazgatást, például a közjegyzőket és a bírósági végrehajtókat. A jog 4 rétegből áll, a törvény szövegének rétegéből, a jogdogmatika rétegéből, az alkotmányos alapjogok rétegéből és a bírói jog rétegéből. A korábbi ombudsmanok többsége nagy tekintélyű szakember volt, többen közülük professzori fokozattal rendelkeztek. Nagyon kevesen voltak azonban közülük kifejezetten az alapvető jogok védelmére szakosodottak.

ABSTRACT ■ Morality and law can be seen as two distinct, separate sets of rules, each with its different functions and tools. Around the world, both single-headed and multi-headed ombudsmen can be found. He or she cannot make decisions that can be enforced by authority – this is the conceptual definition of the Ombudsman. This position is called in multiple titles worldwide. The office was first installed in early 1700s Sweden, though similar state functions had already existed earlier. Gabriele Kucsko-Stadlmayer differentiates three main types based on the subject and rules of supervision, as well as their scopes of authority: the basic or classical model, the rule of law model, and the human rights model. In particular, the Ombudsman can investigate public authorities, public service bodies, and public administration, such as notaries and bailiffs. The law consists of four layers: the layer of the text of law, the layer of legal doctrine, the layer of fundamental constitutional rights and the layer of judicial law. Most of the previous ombudsmen were highly respected professionals, several of them with a professorial degree. However, very few of them had a specific specialisation in the protection of fundamental rights.

Kulcsszavak: jog és erkölcs, ombudsman, alapvető jogok biztosa, emberi jogok, alapjogok, a jog négy rétege, visszásság, alapjogsértés, alkotmányjogi panasz

[1] LL.M, PhD student, Károli Gáspár University of the Reformed Church, Faculty of Law and Political Sciences.

1. Preface

This paper studies the relationship between ombudsman protection and morality. As for my methodology, primarily comparative constitutional law shall be applied.Traditionally, morality and law can be seen as two distinct, separate sets of rules, each with its own different functions and tools. However, the objectives are not far apart, so the two sets of norms are closely interlinked.[2] The relationship between law and morality ad absurdum has been questioned only in certain dictatorships.[3] It is through fundamental rights that the most basic moral categories are absorbed, that is to say, fused into law, or we could say human rights, which become fundamental constitutional rights from the moment they are incorporated into the constitution of a particular country. The organisation of fundamental rights protection therefore plays an extremely important role in the enforcement of morality.

The office was first installed in early 1700s Sweden, though similar state functions had already existed earlier.[4] International organisations advocating for human rights (among others) routinely call upon their member states to create such offices. Both the Council of Europe and its handbook dealing with administrative requirements touch upon the topic, with the Council having issued an official recommendation to establish ombudsmen.[5] A 2003 Council resolution, explicitly focusing on ombudsmen, emphasised the importance of such independent officials in protecting human rights and the rule of law alike.[6]

2. Ombudsman systems in international comparison

Around the world, we can find both single-headed and multi-headed ombudsmen. The single-headedness of the ombudsman means that the office is run by a single chief officer. There may be deputies to the ombudsman, but it is the head who gives the verdict on important matters. A multi-headed ombudsman, on the other hand, implies that some fundamental rights have separate, distinct defenders who are free to decide on matters within their competence. The international legal

[2] Péter Miskolczi-Bodnár: Az erkölcs és a jog szoros kapcsolata. *Polgári Szemle*, 4-6/2015, 27–33.

[3] Éva Jakab: Gondolatok Pólay Elemér korai tanulmányaihoz: a nemzeti szocializmus és a római jog. *Forum Acta Juridica et Politica*, 10/2020, 125–145. 127.

[4] András Zs. Varga: *Ombudsmanok Magyarországon*. Budapest, Rejtjel Kiadó, 2004. 14.

[5] Varga 2004, 30-31.

[6] Gabriele Kucsko-Stadlmayer: *Európai ombudsman-intézmények*. Budapest, ELTE Eötvös Kiadó, 2010. 29.

comparison recognises corporate ombudsmen, where one or other ombudsman has no independent power to act but can only act and decide by a corporate majority decision (for example, Greece or Austria).

It is of cardinal importance that ombudsmen are armed with recommendations and publicity. It cannot make decisions that can be enforced by authority – this is the conceptual definition of the Ombudsman. In the academic literature of constitutional law, the ombudsman has long constituted a widely accepted category. Persons holding this position are given a diverse array of titles worldwide. In Hungary, they are the Commissioner for Fundamental Rights, in the Ukraine the Parliament Commissioner for Human Rights. They are named High Commissioner for Human Rights in the Russian Federation and Azerbaijan, while Spain, Czechia and Slovakia use 'Defender of the People' or 'Public Defender of Rights'. In Albania and Croatia, it is the People's Advocate, and in Macedonia, the People's Attorney. Portugal refers to the post as 'Justice Provider'. France, Belgium and Luxembourg call it Mediator.[7]

The office was first installed in early 1700s Sweden, though similar state functions had already existed earlier.[8] International organisations advocating for human rights (among others) routinely call upon their member states to create such offices.Academic literature remains rather brief on the categorisation of ombudsmen. Kucsko-Stadlmayer (2010) differentiates three main types based on the subject and rules of supervision, as well as their scopes of authority.

– the basic or classical model
– the human rights model
– the rule of law model

In the first case, „soft" powers, such as recommendations are typical when overseeing administrative organisations. The second category sports a wider array of rights, while the third focuses specifically on human rights.[9]

Such a wide variety of the repertoire of powers worldwide is rather difficult to compress into three categories only. The borders between them would be hard to define and many additional types might arise.[10]

7 Kucsko-Stadlmayer 2010, 27.

8 Varga 2004, 14.

9 Kucsko-Stadlmayer 2010, 96-101. The author also alludes to the dichotomy of „classic" and „hybrid" espoused by Linda Reif, which is even more restrictive and difficult to differentiate. Under her system, the current Hungarian ombudsman would fall mainly under the human rights classification model. It is very interesting to note that in Israel, the ombudsman's tasks are effectively carried out by the state audit office.

10 An instrument of differentiation could be whether the ombudsman even possesses any powers regarding the human rights in question – and if so, are these rights dominant within the commissioner's scope of authority? The introduction of a „constitutional complaint on

Interestingly, the traditional ombudsman used to be a counterweight against the misdeeds and inequities of the public administration only.[11] These days – at least in the Hungarian public mind – it is a guardian of fundamental and constitutional rights. The extensive study of relevant academic literature supports the conviction that these two approaches are not only consistent with one another but strongly connected, since administrative acts violating fundamental rights are automatically unlawful and almost certainly entail an infringement on human rights.[12]

There are many nuanced theories on this topic. The subject matter for the procedures of the Commissioner for Fundamental Rights – with a general set of powers – is always a contravention (a violation of some legislation or the danger thereof) related to fundamental rights. *Administrative errors*, that is, faulty acts or rulings of the public administration not in violation of these rights, *do not give grounds for an ombudsman procedure*. „Constitutional contraventions" do not equal „maladministration", especially since it isn't the commissioner's task in Hungary to monitor the effective workings of the public administration. In spite of this, there have often been references to the fundamental right of citizens to legal certainty and fair proceedings, justifying such interventions from the ombudsman into administrative matters not strictly constitutional.[13] Once again, this only projects the appearance of a contradiction, since the human right to fair proceedings undoubtedly resembles the original function of the very first ombudsmen: that is, to detect and combat administrative errors.[14] The dilemma could be resolved by allowing the ombudsman to act only in cases where the contravention complained of would not only violate professional but also legal norms and the applicant's substantive rights. If the error has no consequence

grounds of a human right violation" could well serve as an additional power for ombudsmen organised under the aegis of the human rights model. The Hungarian system, for one, does not strictly belong to it.

11 Varga 2004, 32.

12 According to certain views, the right to a fair public administration is a fundamental right on its own. „Critiques of the office of the ombudsman have noted that commissioners have often established the violation of a 'right to legal certainty', as a contravention against a constitutional right. Citing Paragraph 1 of Article 2 in the Fundamental Law of Hungary, ombudsmen have interpreted the unlawful and erroneous rulings of the public administration as a breach of legal certainty and elevated them to the level of constitutional contraventions." And yet, they could not refer to a classical fundamental right in every case in this manner. See: Bernadette Somody: Hol húzódnak az ombudsman alapjog-értelmezésének határai? *Jogtudományi közlöny*, 59/2004, 317–328. 327.

13 Bernadette Somody: A húszéves országgyűlési biztosi intézmény: ki nem használt lehetőség. Új Magyar Közigazgatás, 2/2009, 2–11. 10.

14 See: Somody 2004, 328.

towards the individual, then an appeal within the internal framework of the public administration should suffice; be it addressed to the actor's immediate superior authority, the Government Control Office, the State Audit Office or, as a last resort, a prosecutor. If the applicant's personal freedom is infringed, but in a way that cannot be traced back to the violation of any single legal norm, then commissioners might still employ their „soft law" arsenal and request the amendment of current legislation to eliminate legal vacuums.[15]

The functions mentioned above are further complicated by the fact that aside from their task to protect fundamental rights. Some also consider ombudsmen to be the general-purpose guardians of the constitution itself,[16] while others firmly deny this position.[17]

A common denominator of all offices denoted as ombudsmen is the supervision of public administration in its broadest sense. Their main instruments are recommendations, which means they only employ „soft law" that cannot be enforced. This „weakness" of theirs is offset by their authority, their deep professional knowledge and their great manoeuvring space. The latter means that ombudsmen may sometimes put aside the rigid text of the law and make overtures to the world of *de lege ferenda* and ideal law. They can place a lot of things under scrutiny, but they often aren't mandated to, thus gaining even more room to assess and evaluate.

Independence can be considered another common trait of fundamental rights commissioners, which encompasses both organisational autonomy (including, preferably, an immunity to being recalled) and an election process by the parliament, although alternatives to the latter can certainly be found in practice. The European Union also opted to create such an office. Below, we shall analyse the systems of several especially influential ombudsmen.

[15] In other words, when it's „only" the applicant's freedoms under violation, but without the compulsion to take any action on the applicant's part, then the commissioner may step up. On the further differentiation of these two categories, see: Béla Pokol: *Autentikus jogelmélet*. Budapest-Pécs, Dialóg-Campus Kiadó, 2010. 188-196.

[16] Bernadette Somody: Ombudsmanok a magyar alkotmányos rendszerben. *Jogi tanulmányok*, 2001/7, 143–167. The author implies that – at least the first – general commissioner crossed the line from guardian of individual fundamental rights into that of the constitution itself.

[17] Varga 2004, 176. This also has to do with the author's notion that the ombudsman is no general supervisor; as a rule of thumb, the commissioner only acts upon citizen's complaints. See: Varga 2004, 81. And yet, when it comes to the applicants, individual provisions of the constitution have, by now, practically fallen under the same regard as constitutional rights.

The adoption of the Charter of Fundamental Rights has strengthened the position of the European Ombudsman, since the Charter contains an article specifically dedicated to the Ombudsman. At the same time, the Ombudsman, through her/his practice, contributes to the implementation in the everyday life of the provisions of the Charter and their further development. The consolidation and development of the provisions of the Charter by the European Ombudsman have proceeded especially rapidly since the Charter of Fundamental Rights received the status of a binding act.[18] Because the right to "good administration" contained in the Charter of Fundamental Rights has become one of the basic human rights in the EU since the Charter became legally binding, the competence of the European Ombudsman has acquired a new substantive and factual (functional) content, expanding her/his ability to positively influence the EU administration in the field of governance and respect for fundamental rights.[19]

3. Fundamental Law of Hungary

The work and the mandate of the Commissioner for Fundamental Rights and his Office are determined by the Article 30 of the Fundamental Law of Hungary adopted in 2011 and based on the Act CXI of 2011 on the Commissioner for Fundamental Rights, both of which entered into force on 1st January 2012. Following the relevant regulations, the Commissioner for Fundamental Rights is the legal successor of the Parliamentary Commissioner for Civil Rights, who ensures the effective, coherent, and most comprehensive protection of fundamental rights and to implement the Fundamental Law of Hungary.

The Commissioner for Fundamental Rights pays special attention to the protection of

– the rights of children,
– the rights of nationalities living in Hungary,
– the rights of the most vulnerable social groups,
– the values determined as 'the interests of future generations'.

The Commissioner for Fundamental Rights gives an opinion on the draft rules of law affecting his/her tasks and competences; on long-term development and land management plans and concepts, and plans and concepts otherwise directly affecting the quality of life of future generations; and he/she may make

[18] Alexei Avtonomov: Activities of the European Ombudsman under the Charter of Fundamental Rights: Promoting Good Administration through Human Rights Compliance. *Laws*, 10/2021, Iss. 3. 1-2.

[19] Ibid.

proposals for the amendment or making of rules of law affecting fundamental rights and/or the recognition of the binding nature of an international treaty.[20]

The Commissioner surveys and analyses the situation of fundamental rights in Hungary and prepares statistics on those infringements of rights which are related to fundamental rights. Therefore, the Commissioner submits his/her *annual report to the Parliament,* in which he/she gives information on his/her fundamental rights activities and gives recommendations and proposals for regulations or any amendments. The Parliament shall debate the report during the year of its submission. During his/her activities, the Commissioner cooperates with organisations aiming at the promotion of the protection of fundamental rights.

As a new mandate, the Commissioner for Fundamental Rights may initiate the review of rules of law at the Constitutional Court as to their conformity with the Fundamental Law. Furthermore, the Commissioner participates in the preparation of national reports based on international treaties relating to his/her tasks and competences, and monitors and evaluates the enforcement of these treaties under Hungarian jurisdiction.[21]

The history of the ombudsman-like institutions in Hungary is rather short. The institution of ombudsmen in Hungary is based on the political consensus of the National Roundtable (1989). The institution has been incorporated into the Constitution 2 since 1989 and an Act was adopted on the rules concerning the activities of the parliamentary commissioners in 1993. The first commissioners were elected in 1995. Tracing the role of ombudsmen and the efficiency of their actions in the context of the provisions of the Constitution and political reality should be based on the overview of legal rules, the decisions of the Constitutional Court, and the analysis of the abstract characteristics of the institution.[22] The basic legal background for the Hungarian parliamentary commissioners is the 5th chapter of the Constitution (Article 32/B), which mentions two commissioners: the Parliamentary Commissioner for Citizens' Rights and the Parliamentary Commissioner for the National and Ethnic Minorities Rights. The two commissioners should be elected by the majority of at least two-thirds of the votes of the Members of the Parliament, and the Parliament may also elect special ombudsmen for the protection of individual constitutional rights.[23]

[20] Act CXI of 2011 on the Commissioner for Fundamental Rights.

[21] Ibid.

[22] András Zs. Varga – András Patyi – Balázs Schanda (eds.): *The Basic (Fundamental) Law of Hungary. A Commentary of the New Hungarian Constitution*, Dublin, Clarus Press, 2015. 365.

[23] Ibid.

In the context of the Constitution the role of the parliamentary commissioners is to investigate or to have investigated infringements of constitutional rights (in general or in conformity with their special competence) if they know about them, and to initiate special or general measures for their remedy.[24] The role of the informal procedure of the parliamentary commissioners to protect human rights is different from the role of the Constitutional Court in controlling legal acts, thus the primary character of the procedure of the parliamentary commissioners is not the formal protection of the Constitution. Since the duty of protecting the fundamental rights prescribed in the Constitution is primary for every institution of the state, the role of the parliamentary commissioners is to complete and control the activity – including protection of rights – of other institutions.[25]

However, there was a hidden form of "reception" of the institution, which is not unknown in the legal literature of the countries of Central-Eastern Europe. The Russian Federation had explained the existence of the non-penal role of Russian prosecutors with this hidden reception. Its prosecution system – the "sovereign's eye" – can be traced back to Peter I. Also, it is a generally known fact that Peter I performed a reform of the state institutions after his study tour in other European countries. Among these countries, we find Sweden and its institution of the Iustitiekansler (Chancellor of Justice)– a "predecessor" of the Iustitieombudsman – set up in 1713. It is conceivable that the Soviet regime received the prosecution service of Peter I, and this model was "exported" after World War II to the countries in the sphere of interest of the USSR.[26]

If we look at the domestic status of the officeholder, we can observe that after the regime change, there were two other fully equivalent ombudsmen in addition to the parliamentary commissioner for citizens' rights. There was also a Minority Affairs Commissioner and a Data Protection Commissioner. On 1 January 2012, the system was made single-headed because of management uncertainty. Instead of the Parliamentary Commissioner for Civil Liberties, the title was changed to Commissioner for Fundamental Rights. He or she has 2 deputies: the Deputy Commissioner for Fundamental Rights, who protects the rights of nationalities living in Hungary, and the Deputy Commissioner for Fundamental Rights, who protects the interests of future generations. The Data Protection Commissioner is replaced by an autonomous state administration body, the National Authority for Data Protection and Freedom of Information. The Chief Ombudsman is a Minister, and the Deputy Chief Ombudsman is a State Secretary. Let us turn

[24] Varga 2015, 366.
[25] Ibid.
[26] Varga 2015, 367.

to what exactly the Ombudsman can do, what he or she can investigate, what his or her powers are. Generally, the Ombudsman can make recommendations, approach the body or supervisory body under investigation, initiate legislation in the event of a legal vacuum, file a criminal complaint, and request ex-post control of the law by the Constitutional Court. In particular, the Ombudsman can investigate public authorities, public service bodies (BKK, BKV), and public administration, such as notaries and bailiffs. It may not investigate the Parliament, the President of the Republic, the Constitutional Court, the State Audit Office, courts and prosecutors' offices, except for the investigating prosecutor's office.

Our main question is what the rights of the Ombudsman are? Our starting point is the theory of the layers by Béla Pokol. According to this theory, the law consists of four layers: the layer of the text of law, the layer of legal doctrine, the layer of fundamental constitutional rights and the layer of judicial law.[27] In relation to the sources of law, we can distinguish between external and internal sources of law. According to Cservák's (2013) distinctions, we can also distinguish between the layers of formal and substantive law, or external and internal layers of law. The questions are: where does the layer come from, and from what can we read what it contains? In concrete terms, obviously, the text layer of law comes from parliament, the layer of judicial law comes from the courts, and the layer of legal doctrine comes from the representatives of jurisprudence from universities and academia. The main question in my essay is what the inner layer of fundamental constitutional rights is, that is, what is the origin of fundamental constitutional rights.

As a rule, since the Basic Law only briefly explains them, their concrete content is left to the Constitutional Court to interpret. In addition to the Constitutional Court, several other bodies defend and interpret this layer of fundamental rights, including of course the Ombudsman.[28] The Ombudsman's interpretation of the law and his recommendations belong to the layer of constitutional fundamental rights, which is one of the four layers of law. What is the relationship between the two layers, the Constitutional Court and the Ombudsman's legal material? Since the Constitutional Court has the power of annulment and the decisions of the Ombudsman are binding on the decisions of the Constitutional Court, the Constitutional Court clearly has primacy in the relationship between the two bodies. The importance of the Ombudsman's right has been increased by

[27] Béla Pokol: *Jogelmélet*. Budapest, Századvég, 2005. 19-37.

[28] Csaba Cservák: *Az ombudsmantól az Alkotmánybíróságig – az alapvető jogok védelmének rendszere*. Debrecen, Lícium-Art Könyvkiadó, 2013. 22, 75.

the fact that there was previously no genuine constitutional complaint.[29] It was only possible to appeal to the Constitutional Court if the legislation applied was itself unconstitutional. The new Basic Law and the Constitutional Court Act have changed this. It is very important that, since a genuine constitutional complaint already has an impact on the Constitutional Court in terms of the application of the law, the gap in the interpretation of fundamental rights that was previously only filled by the Ombudsman could be filled. It, therefore, somewhat diminishes the role of the Ombudsman. Adding that the authority and knowledge of the specific holder of the office may also contribute to this. Obviously, the word of such an authoritative official, such a professor, carries more weight.

A minor official may not be able to express such a strong opinion. Not even for the following reasons. How is the law different from any other norm? It can be enforced by the state. I pointed out at the beginning of my presentation that the Ombudsman lacks coercion, and in this sense, the Ombudsman's acts are norms that are not enforceable, but by classical definition do not belong to the world of law, but almost to the world of morality. Of course, if there is voluntary compliance with the law, in whatever relationship, between a citizen and the administration, we can still say that it is impossible to know, because there is no enforcement, whether the citizen has obeyed morality or complied with the letter of the law if he has engaged in norm-control behaviour. This is particularly the case for the Ombudsman. I would like to highlight one other interesting point that we must make in this connection. If we start from the four layers of law and say that the Ombudsman's recommendations are to some extent of a jurisprudential, legal-dogmatic nature, but that they are made by a public official and not by a representative of science, then we could say, as several professors have done in their publications, that the Ombudsman's law is legal dogmatics elevated to the status of an official state. In this connection, I would like to point out that in the practice of the Constitutional Court, there is either a violation of fundamental rights or there is not.

The practice of the Independent Police Complaints Board, which has now been merged into the Ombudsman, was a serious or slight violation of fundamental rights.[30] Most importantly, the concept of maladministration arises in relation to the Ombudsman. It is important to stress that the Fundamental Rights

[29] About the constitutional complant see György Tamás Farkas: Az alkotmányjogi panaszok befogadása központi problémaköréről. *KRE-DIt,* 2/2021, 1–8., Dániel Csaba Lukácsi: A „közvetlen" alkotmányjogi panasz. *KRE-DIt,* 1/2020, 1–6., András Téglási: Az Alkotmánybíróság alapjogvédelmi gyakorlata az Alaptörvény hatálybalépése után. *Közjogi Szemle,* 2/2015, 17–23.

[30] Dániel Csaba Lukácsi: Az Országgyűlés ellenőrző szervei. *KRE-DIt,* 1/2019, 11–14.

Ombudsman must investigate and take initiatives concerning cases of the abuse of fundamental rights that come to his attention. An abuse is an improper, abnormal, inconvenient situation, a violation of fundamental rights or an imminent threat of such a violation. In other words, the Ombudsman may investigate a violation of a fundamental right that has not yet occurred. This also puts the officeholder somewhat on the borderline between law and morality. The soft legal instrument is the recommendation. The Ombudsman can act even where no specific breach of fundamental rights has occurred. In that case, the world of norms is not clearly the world of law, but some kind of borderline between law and morality. It is a curiosity that in Poland the moral values and social sensitivity of the candidate are also expected. In Slovakia, the ombudsman may be a person of integrity, which is also closely linked to morality. We might add that in our country professional standards are high. The Ombudsman must have ten years of explicitly outstanding experience in defending fundamental rights.

From an international perspective, I think it is adequate and somewhere in the middle. In the Swedish model, and in Portugal and Spain, which also have a strong ombudsman, there is no qualification criterion. In Romania, the Ombudsman is expected to have 18 years of adequate legal practice. There are some very interesting cases concerning the Ombudsman. The most striking is the series of infringements by the Budapest Transport Company (BKV). If a person does not buy a ticket for a vehicle, he is essentially entering into an implied contract to board the means of transport, but he is not fulfilling the main contractual obligation. In this respect, BKV and other transport companies tend to impose extremely severe penalties, even though this is not a matter of tort law but of civil law. It is a very strange diffusion relationship between civil and criminal law. Although the conditions for exemption under criminal law are not met, it is for this reason that it feels very exaggerated to say that the surcharge is a multiple of the ticket price. Moreover, if students can buy a season ticket and travel with it, and the inspectors find that their season ticket is not valid for some reason, or even that their student card is not valid, they will be deemed to have committed an offence. Very often, they act as authorities and restrain travellers. It is an interesting complex legal relationship with a small financial stake, yet it is an activity that causes moral damage to many people. It was precisely in this mediating role that the Ombudsman was shown to be in the transitional sphere between law and morality. It is no coincidence that in France, Belgium and Luxembourg this function is called mediator.

4. Monocratic or a „multi-headed" system?

The question of whether a monocratic or a „multi-headed" system is preferable is most likely the greatest matter of contention in our topic. The latter model, that is, the one operating with multiple commissioners has been gradually transformed into a single-ombudsman configuration due primarily to concerns arising from perceptions of command structure confusion. Yet, these reforms were also followed by professional criticism. „The deputy system possesses an inherent contradiction: on the one hand, this structure creates (deputy) commissioner offices with the expectation that they fulfil their mandates with the authority provided by them personally acting, but on the other hand, they receive no independence in doing so. A deputy commissioner would be hard-pressed to apply the force of personal persuasion to an argument that he or she only represents due to an agreement or an order coming from the higher echelons of the ombudsman system. In such a case, specialisation could provide a worthy alternative to the singular, general authority ombudsman, enabling us to bypass the disadvantages outlined above and enjoy the numerous benefits of a college of independent, specialised and differentiated professionals."[31] On the other hand, as András Zs. Varga expertly points out, a system of multiple and equal commissioners also carries further hazards. „It is incontestable that a commissioner elected to safeguard a certain constitutional right must first and foremost keep this specific right in sight. At first glance, this should not pose a problem, not even when every such right is allocated to a different individual commissioner: one constitutional right for one ombudsman, ergo, full-scale protection. *But we are falling into error if we consider fundamental rights nothing more than a set of independent legal values.* These rights are inseparable from the entities carrying them: that is, natural persons. As such, the rights natural persons are entitled to also cannot be separated from each other, for their proper interpretation requires joint scrutiny."[32] A further problem of the „multi-headed" system is that by establishing which fundamental rights are entitled to a commissioner of their own, legislators unwittingly begin to rank these rights in an order of importance. Only those they deem important enough will receive their own ombudsman, effectively sweeping the rest under the purview of the general commissioner.

[31] Somody 2009, 7. citing László Majtényi, Somody argues against the hierarchical model, considering it vulnerable to criticism and noting that any potential influence on the main commissioner's person would affect the whole office.

[32] András Zs. Varga : A magyar ombudsmani intézményrendszer továbbfejlesztéséről. In: Nóra Chronowski – József Petrétei (eds.): *Tanulmányok Ádám Antal professor emeritus születésének 80. évfordulójára*. Pécs, PTE Állam- és Jogtudományi Kar, 2010. 427–439. 433.

The most difficult dilemma tends to be when two fundamental rights collide. For instance, upon the conflict of the right to human dignity and the right to free expression, the question is whose ombudsman would get to act, out of the two. According to András Jakab, a singular ombudsman also works better with the media, able to utilise publicity with effectiveness, whereupon multiple commissioners would not only be needless, but outright counterproductive. This is also why, out of the 49 ombudsman systems currently operating in Europe, 40 can be classified as monocratic.[33] „It comes without a doubt, however, that the true counterpart to the singular ombudsman model is the collective ombudsman body, working as a panel.[34]

Under such a constellation, the various duties of an ombudsman are not distributed between multiple commissioners, be they independent or cooperative, hierarchical, or equal in standing. In a collective body, one single ombudsman office is held by multiple persons who cannot normally act independently; only in certain cases specified by the entire panel."[35] Instead of multiple specialists on an equal standing concerning themselves with one fundamental right each, members of the collective ombudsman also are each other's equivalents, but their scope of authority is general and all-encompassing. While a multi-commissioner ombudsman can turn out chaotic, a monocratic office threatens to diminish the significance of deputy commissioners who, under the shadow of their superiors' charisma, with limited authority, cannot effectively protect of rights. In the author's view, the current Hungarian system succeeds in at least partially remedying these problems. The command structure is stable and coherent, and in addition, the fact that the deputies cannot be replaced prevents them from becoming the soulless enforcers of their boss. *De lege ferenda*, it might be beneficial to empower them even further[36], at least providing them with a larger staff and department. Another matter that would benefit from greater emphasis is that the current deputies are not only the ombudsmen of the specific human rights area allocated to them but also secondary general commissioners with proper interpretation. This is quite evident from the very text of the law. Collective ombudsmen certainly carry numerous advantages. Two heads are indeed better than one, and if singular ombudsmen have their authority to rely

[33] András Jakab: *Az új Alaptörvény keletkezése és gyakorlati következményei*. HVGORAC, Budapest, 2011. 138.

[34] Such as the Austrian and Greek systems.

[35] Bernadette Somody: Az ombudsman-intézmények jogállási jellemzői. In: Márta Dezső – István Kukorelli (eds.): Ünnepi kötet Sári János egyetemi tanár 70. születésnapja tiszteletére. Budapest, Rejtjel Kiadó, 2008. 303–310. 303.

[36] Bernadette Somody considers the Swedish model to partially fall under this classification. See: Somody 2008, 304.

on, this power is only multiplied when there is an entire panel of them. On the other hand, the efficiency of this system is not guaranteed. One of the main tasks of an ombudsman is to provide fast and informal assistance against the unlawful actions of state actors, as opposed to a regular, usually far slower, appeal system. Traditionally, morality and law can be seen as two distinct, separate sets of rules, each with its different function.

5. The Office of the Ombudsman

The Office is responsible for the administration and preparation of the work of the Commissioner for Fundamental Rights. The Office shall be headed by the Commissioner for Fundamental Rights and managed by the Secretary-General.

The Rules of Procedure of the Office shall be laid down by the Commissioner for Fundamental Rights in a standard order.

The Office shall be a separate chapter in the structure of the central budget and the powers of the head of the body managing the chapter shall be exercised by the Secretary-General.

In Hungary, therefore, there is a guaranteed share of the State budget, similar to that in the Czech Republic, Spain, Lithuania, Ireland and Belgium. An even stronger model would be for the Ombudsman himself to propose his budget directly to the Parliament (Denmark, Slovenia, Israel, Kyrgyzstan, Ukraine), the President of the State (Bosnia and Herzegovina) or at least the Minister of Finance (Austria, Latvia).[37](In my view, it is very peculiar that the so-called chapter holder is not the Ombudsman himself but his Secretary General. In this way, at most, dignitaries such as, say, the President of the Republic should be independent. However, it could also be argued that the legislation frees the Ombudsman from administrative burdens to facilitate the main substantive tasks.)

The Commissioner for Fundamental Rights may delegate the power to issue documents to deputies in the Rules of Procedure or, in the case of documents not containing measures, to the Secretary-General or the head of the autonomous department either on an ad hoc or permanent basis.

A Commission Secretariat shall be set up to facilitate the work and tasks of the Commissioner for Fundamental Rights.

The Commissioner for Fundamental Rights shall direct

a) the Secretary-General;

b) the Deputy Commissioners, and

[37] Kucsko-Stadlmayer 2010, 40.

(c) the Secretariat of the Commission
the activities of the Secretariat of the Commissioner.

The Commissioner for Fundamental Rights shall exercise the powers of the employer over the Secretary-General. The Secretary-General shall be entitled to the salary and allowances of a Permanent Secretary and to 40 working days' leave per calendar year. The new Obtv. therefore, gives the Head of the Office a higher rank, as the previous legislation granted him the status of Deputy State Secretary.

The Commissioner for Fundamental Rights may delegate the power to issue documents to deputies in the Rules of Procedure or, in the case of documents not containing measures, to the Secretary-General or the head of the autonomous department on an ad hoc or permanent basis.

The Commissioner for Fundamental Rights shall direct
a) the Secretary-General;
b) the Deputy Commissioners, and
(c) the Secretariat of the Commission
the activities of the Secretariat of the Commissioner.

The Commissioner for Fundamental Rights shall exercise the powers of the employer over the Secretary-General. The Secretary-General shall be entitled to the salary and allowances of a Permanent Secretary and to 40 working days' leave per calendar year. The new Obtv. therefore gives the Head of the Office a higher rank, as the previous legislation granted him the status of Deputy State Secretary.It is interesting to note, in relation to the above-mentioned question by the chapter holder, that the civil servants employed in the Office are appointed and dismissed by the Commissioner for Fundamental Rights himself, and that the Secretary-General exercises the other rights of an employer over them.

The organisational and operational rules should specify the number of civil servants who are under the authority of the Deputy Commissioner for Fundamental Rights (appointed and dismissed by the competent Deputy, of course).

6. An interesting case from the Ombudsman's practice

The Commissioner for Fundamental Rights has made many recommendations against Budapest Transport Company (BKV). He recommends that passengers boarding the vehicle should be checked for tickets before entering the metro area and not afterwards. Inspectors are not allowed to touch passengers; they can

only ask them to show their passes and tickets.[38] In my view, this is extremely important. This was one of the positive roles played by the Ombudsman, alongside the many legendary legal cases. Here we are clearly showing that the Commissioner for Fundamental Rights in Hungary, although a high-ranking legal official, is operating on the borderline between law and morality.

7. International examples

In Germany, there is no national ombudsman-like body comparable to Germany's, alongside a constitutional court with strong powers.

The Bundestag has a special Committee on Petitions, whose function is comparable to that of the institution in question. Its members are explicitly members of parliament, but it is of guaranteed importance that they may not hold any other office.[39] Citizens may approach the body with written complaints, and the courts and administrative bodies have a duty of cooperation. The body can make its recommendations public; naturally, the most effective way of acting is to initiate legislation, as the body is in fact part of the Parliament.

Looking at the system as a whole, is there a definite lack of an ombudsman-type body with national powers and jurisdiction? It would make the institutional system of legal protection more effective, but not necessarily irreplaceable.

Commissioners with a "de lege ferenda" mindset can have little more influence on future legislation than an explicit parliamentary committee.

In addition, the huge role of German jurisprudence should be underlined. This is why it is important to examine the effectiveness of the various models in context, and whether there is a 'vacuum' in the overall system of legal protection. German jurisprudence is notoriously intertwined with the organisation of the judiciary. Many judges teach at universities, and many jurists are appointed to higher courts. The prevalence of an excessively rigid, textualist interpretation of the law would lead to a pressing need for a national ombudsman. However, the traditional culture and practical impact of legal doctrine, by infiltrating the judiciary, softens the bureaucratic mindset and citizens, protected by the ultimate remedy of individual constitutional complaint, are not vulnerable to 'formally correct but deeply unconstitutional' decisions.

Although there is no ombudsman in the *French Constitution*, a specific law provides the basis for the body's operation.The institution operates on a single-

[38] Balázs Arató – Csaba Cservák: Részvénytársaság – egy hatóság képében. *Jogelméleti Szemle,* 2/2003.

[39] Kucsko-Stadlmayer 2010, 207.

headed model, but in a specific way, the Ombudsman appoints delegates for the whole administrative territory of France (including overseas territories) to investigate and carry out tasks on his behalf. Interestingly, the above-mentioned delegates carry out their activities on a social basis, for which they are paid. The mediator is appointed by the Head of State by decree of the Council of Ministers. It is noteworthy that there is no educational criterion. The post is usually filled by former senior politicians. However, it is impossible to perform the task alone, but only by a special body. The latter is composed of the President of the Republic, the Vice-President of the Council of State, the President and First Vice-President of the Court of Cassation and the President of the Court of Audit.[40]The Ombudsman acts not only against the public administration in the strict sense of the term, but also against public bodies in general, based on breaches of the principles of good administration and fairness. It cannot investigate the activities of the courts.

The complainant does not have to exhaust the available remedies, but only take the necessary steps in advance to the body concerned. Consequently, there is no time-limit for referring the matter to the Commissioner.[41]

The traditional duty of cooperation remains in relation to the bodies contacted: provision of information, provision of files, and obligation to answer questions. Specifically, each ministry has a contact person for the Ombudsman to facilitate any inquiries.

The Commissioner's tool is, as usual, the recommendation. He has no formal power to initiate the drafting of specific rules, but he has the power to make recommendations. He publishes his experience in his annual report, so this is his main method of exerting pressure.

It should be mentioned that a special law has created a special institution of the Children's Rights Commissioner.

It should be noted that the Constitutional Council, which is a quasi-constitutional court, used to have only a preliminary review function, so the role of the Ombudsman was even more important. Following an amendment to the law, it now also has the means of ex post control. The highly textualist practice of the French courts and their lack of connection with academic life and legal doctrine should be highlighted. For this reason, in my opinion, the existence of an ombudsman institution is particularly important, whose authority could be enhanced by some strict qualification criteria.

[40] Kucsko-Stadlmayer 2010, 161-162.
[41] Kucsko-Stadlmayer 2010, 164.

Cyprus was also relatively late (compared to the AB) in establishing a significant ombudsman body. Its role was mainly to monitor maladministration based on complaints from citizens. The relevant norm was that the area to be investigated was "improper attitudes" towards the client". The Cypriot Ombudsman's approach attaches equal importance to general compliance with the law and individual fairness. The institution's scope has been extended over time to include the examination of the application of human rights and fundamental freedoms.In its context, paper law has provided a reassuring model. The question is how the states of emergency and armed conflicts affecting the country will allow the written norms to prevail in the long term.[42]

Italy does not have a national ombudsman. There are institutions at the regional level. The legal basis for their activities is mainly legislation adopted by regional parliaments. Interestingly, some provinces (e.g. Tuscany) have several ombudsmen, while Valle d'Aosta has none. In general, they cannot act in matters of justice and public security. The Commissioners have a national umbrella organisation, the National Conference of Ombudsmen, which is a non-governmental organisation. Despite the existence of a relatively strong Constitutional Court, the fragmented ombudsman model is unlikely to provide a coherent approach to fundamental rights protection.[43]

The Ombudsman is one of the independent institutions established relatively late in *Malta* to deal with citizens' complaints and to adjudicate infringements in the public administration.

It is a rare exception among relatively recent institutions in that, generally, it does not protect human rights but checks maladministration (it protects against irrational, unfair, oppressive, and discriminatory behaviour).It has several strong powers, such as setting its time limits for the requested body's obligation to reply. Specific criminal sanctions are imposed on persons who do not cooperate.All in all, all the necessary means of legal protection are available, to some extent. The Ombudsman, although not classically a human rights body, can exercise considerable powers, while the very specific constitutional court structure (a hybrid system mixed with ordinary courts) also offers the possibility in principle to protect human rights.[44]

The Austrian Ombudsman is a three-person body, with the chairmanship rotating between them. The members are elected by a simple majority in parliament, with the largest parliamentary parties nominating one member each. The term of office is 6 years, renewable once.

[42] Kucsko-Stadlmayer 2010, 63-69.
[43] Kucsko-Stadlmayer 2010, 222.
[44] Kucsko-Stadlmayer 2010, 75-79.

Commissioners do not enjoy parliamentary immunity, but their salary is 160% of the parliamentary allowance.

The ombudsmen supervise not only the administration of justice, but also the observance of judicial deadlines and even administrative activities in the field of private law. The ombudsmen have the special power to apply to the Supreme Court for a time limit to be set for a court that is delaying proceedings. This control covers not only the specific legality but also the fairness of the proceedings. Preliminary remedies must be exhausted by the petitioner unless he is claiming undue delay in the proceedings. There are no other formal criteria, no procedural time limits and no fees.[45]

The powers of investigation and recommendation are broadly in line with international practice. The supervisory body of the investigated authority must respond to the Ombudsman's allegations within 8 weeks.

Legislative proposals can be made in the framework of the annual parliamentary report, but this is not binding.The Commissioners have powers to initiate proceedings and bring criminal charges. They have the power to refer federal regulations to the Constitutional Court. However, it should be noted that they do not have this power concerning laws.

In addition to the above, it should be mentioned that there are also regional ombudsmen in Austria, such as the regional commissioners in Vorarlberg and Tyrol.

Overall, the Austrian system of fundamental rights protection appears to be adequate. What is lacking is a requirement that ombudsmen be qualified and the possibility of monitoring the law. It also depends on the specific individuals to what extent the special rotating body can develop a consistent practice.[46]

8. Previous ombudsmen

My personal view is that a lot depends on the personality, authority and expertise of the Ombudsman. Following the entry into force of the relevant law, it was very difficult to agree on the persons to be nominated. One of the reasons for the difficulties was that neither side had two-thirds support in Parliament.In 1995, Katalin Gönczöl, a professor of criminology, was elected Ombudsman for the first time. She solved many important cases. Her candidacy was left-wing,

[45] Kucsko-Stadlmayer 2010, 108-110.

[46] Csaba Cservák: Ombudsmanok a közérdek védelmében. *Glossa Iuridica*, 1-2/2017, 51–71. 61.

but her activism earned her the respect of many, as she also took up politically neutral cases of citizens. (Later, she was considered as a candidate for the MSZP.)

He was succeeded in 2001 by Barnabás Lenkovics, a professor at the Department of Civil Law at ELTE. Generations have grown up on his textbook on the law of law. He was nominated by his former professor, President Ferenc Mádl. Lenkovics is also highly respected. President László Sólyom, however, did not support the civil lawyer and did not re-nominate him for the post. (It is a matter of satisfaction that Barnabás Lenkovics almost immediately became a constitutional judge and later became President of the Constitutional Court.)

In 2007, László Sólyom nominated Máté Szabó as Ombudsman. In that term, it was particularly difficult to reach a consensus in Parliament, so it took a long time to find a suitable candidate. Máté Szabó was a highly respected professor. However, his area of expertise had previously been political science, not fundamental rights. In comparison, he was considered by the professional public to have acquired the necessary skills for the post. His extraordinary activity earned him the respect of almost everyone. He also took on many 'unpleasant' cases. It was during his mandate that the Ombudsman structure was restructured. In 2012, when the new Fundamental Law came into force, the Parliamentary Commissioner for Citizens' Rights became the Commissioner for Fundamental Rights.In 2013, the two-thirds majority of the government did not re-nominate the professor, and László Székely, an adjunct professor at ELTE, was elected to the post. He was also a civil lawyer. In addition to his university work, he had previously worked as a lawyer. He holds a PhD in the field of personal rights. He has also been confronted by the right-wing which supports him on several issues (for example, the Józsefváros needle exchange programme on drugs).

Székely's replacement, Ákos Kozma, was elected ombudsman in 2019. He was previously an adjunct professor at Pázmány Péter Catholic University. His main field of expertise is constitutional law, but he holds an academic degree. In the years preceding his nomination, he was a member of the Independent Law Enforcement Complaints Board. (The Independent Law Enforcement Complaints Board was merged into the Ombudsman's Office shortly afterwards.) International organisations have criticised Kozma's inactive activities. How much of this is political opinion and how much objective criticism will be determined by the professional lessons of the years to come. Later, he went to the field several times on the reception and care of war refugees at the borders.In conclusion, most of the previous ombudsmen were highly respected professionals, several of them with a professorial degree. However, very few of them had a specific specialisation in the protection of fundamental rights.

9. Summary

In summary, we can conclude the following. In principle, there can be immoral but lawful actions and moral but unlawful actions. If law and morality go together in lawmaking and law enforcement, there is no legal concern. The same applies to the other extreme. If both lawmaking and law enforcement are immoral, then we are faced with an almost irremediable legal problem. If the legislation is moral, but the application of the law is immoral, then a remedy system can eliminate the problem. If a moral problem arises in the course of lawmaking, the constitutional complaint procedure may be the solution. If there are legal gaps in a country, the Ombudsman can remedy the problem.

Literature

Alexei Avtonomov: Activities of the European Ombudsman under the Charter of Fundamental Rights: Promoting Good Administration through Human Rights Compliance. *Laws*, 10/2021, Iss. 3.

Balázs Arató – Csaba Cservák: Részvénytársaság – egy hatóság képében. *Jogelméleti Szemle,* 2/2003.

Csaba Cservák: *Az ombudsmantól az Alkotmánybíróságig – az alapvető jogok védelmének rendszere*. Debrecen, Lícium-Art Könyvkiadó, 2013.

Csaba Cservák: Ombudsmanok a közérdek védelmében. *Glossa Iuridica*, 1-2/2017, 51–71.

Farkas György Tamás: Az alkotmányjogi panaszok befogadása központi problémaköréről. *KRE-DIt,* 2/2021, 1–8.

András Jakab: *Az új Alaptörvény keletkezése és gyakorlati következményei*. HVGORAC, Budapest, 2011.

Éva Jakab: Gondolatok Pólay Elemér korai tanulmányaihoz: a nemzeti szocializmus és a római jog. *Forum Acta Juridica et Politica*, 10/2020, 125–145.

Dániel Csaba Lukácsi: A „közvetlen" alkotmányjogi panasz. *KRE-DIt*, 1/2020, 1–6.

Dániel Csaba Lukácsi: Az Országgyűlés ellenőrző szervei. *KRE-DIt,* 1/2019, 11–14.

Péter miskolczi-bodnár: Az erkölcs és a jog szoros kapcsolata, *Polgári Szemle*, 4-6/2015, 27–33.

Béla Pokol: *Autentikus jogelmélet*. Budapest-Pécs, Dialóg-Campus Kiadó, 2010.

Béla Pokol: *Jogelmélet*. Budapest, Századvég, 2005.

Bernadette Somody: A húszéves országgyűlési biztosi intézmény: ki nem használt lehetőség. Új Magyar Közigazgatás, 2/2009, 2–11.

Bernadette Somody: Az ombudsman-intézmények jogállási jellemzői. In: Márta Dezső – István Kukorelli (eds.): Ünnepi kötet Sári János egyetemi tanár 70. születésnapja tiszteletére. Budapest, Rejtjel Kiadó, 2008.

Bernadette Somody: Hol húzódnak az ombudsman alapjog-értelmezésének határai? *Jogtudományi közlöny*, 59/2004, 317–328.

Bernadette Somody: Ombudsmanok a magyar alkotmányos rendszerben. *Jogi tanulmányok*, 7/2001, 143–167.

Gabriele Kucsko-Stadlmayer: *Európai ombudsman-intézmények*. Budapest, ELTE Eötvös Kiadó, 2010.

András Téglási: Az Alkotmánybíróság alapjogvédelmi gyakorlata az Alaptörvény hatálybalépése után. *Közjogi Szemle*, 2/2015, 17–23.

András Zs. Varga: A magyar ombudsmani intézményrendszer továbbfejlesztéséről. In: Nóra Chronowski – József Petrétei (eds.): *Tanulmányok Ádám Antal professor emeritus születésének 80. évfordulójára*. Pécs, PTE Állam- és Jogtudományi Kar, 2010. 427–439.

András Zs. Varga: *Ombudsmanok Magyarországon*. Budapest, Rejtjel Kiadó, 2004.

András Zs. Varga – András Patyi – Balázs Schanda (eds.): *The Basic (Fundamental) Law of Hungary. A Commentary of the New Hungarian Constitution*, Dublin, Clarus Press, 2015.

"BUT I AM A CITIZEN BY BIRTH." PAUL'S ROMAN CITIZENSHIP FROM A LEGAL POINT OF VIEW

Rita Lengyel[1]

Keywords: St Paul, Paulus, Roman citizenship, Roman law, Apostle, Paul of Tarsus, Acts, missionary, Philippi, Casarea, Jerusalem, Festus, Felix, Herod, Lysias, Saul, Saulus

1. Introduction

It must have been nice to be a Roman citizen.
Even at the beginning, Roman citizenship included important rights that we take for granted nowadays but the lack of which would be unfortunate. To name but a few, it included the right to vote (*ius suffragii*), the right to hold office (*ius honorum*), the right to be a soldier (*ius militia*), the right to participate in religious ceremonies (*ius sacrorum*), the capacity to hold property (*ius commercii*), the right to marry under civil law (*ius conubii*).[2] The *ius exulandi*, the right to voluntary exile in lieu of the death penalty, was also a fairly civilised public right in Rome. Thus, we can see how important the advantages of citizenship were in the Empire before the *Constitutio Antoniana*,[3] especially in the provinces, when Romans were still clearly separated according to their status from the *peregrini*,[4] and where the mere fact of being a citizen could elevate a person from the ranks of commoners.

1 PhD student, Károli Gáspár University of the Reformed Church in Hungary, Doctoral School of Law and Political Sciences.

2 András Földi – Gábor Hamza: *A római jog története és institúciói*. Budapest, Nemzedékek tudása, 2014. 208.

3 In AD 212 Caracalla granted Roman citizenship to every free man in the Empire. Although the official reason was to honour the people of the Empire, the real purpose was probably to increase tax revenues on inheritances. See more: Alex Imrie: *The Antonine Constitution: An Edict for the Caracallan Empire*. Leiden, Brill, 2018.
Arnaud Besson: Fifty Years before the Antonine Constitution: Access to Roman Citizenship and Exclusive Rights. In: Lucia Cecchet – Anna Busetto: *Citizens in the Graeco-Roman World: Aspects of Citizenship from the Archaic Period to AD 212*. Mnemosyne, Supplements, Vol. 407. Leiden, Brill, 2017.

4 Éva Jakab: Law and Identity: Considerations about Citizenship and Succession in Provincial Practice. In: Kaja Harter-Uibopuu (ed.): *Symposion 2019*. Wien, Austrian Academy of Sciences Press, 2021. 335.

Although some suspect that Simon of Cyrene was a Roman citizen as well,[5] I believe that the fact that Paul was not only an apostle but also a Roman citizen creates a rather unique case , and offers important points for discussion. My aim in this paper is to highlight the significance of Roman citizenship in Paul's life and to underline some of its characteristics through – a rather short – biblical exegesis. Moreover, I shall present certain aspects of Paul's Roman citizenship that still may be of interest in light of modern constitutional law.

2. Highlights

The main source of information on Paul's life and works is the New Testament. According to Acts, Paul lived as a Pharisee and participated in the persecution of early disciples of Jesus. After his conversion,[6] he went on three great missionary journeys. One of the three episodes I discuss in this paper happened during his second missionary journey was in Philippi. The two others happened after his successful return to Jerusalem.

Before we go any further, a few words about Paul's citizenship.

Most scholars agree that Paul was a Roman citizen. However, some,[7] including Albert Harrill, repeatedly express doubts by arguing that Paul's letters do not refer to the citizenship at all and the privilege is only mentioned in the Acts of the Apostles.[8] According to Harrill: *„Paul's Roman citizenship in Acts functions as a literary device to heighten dramatic suspense and to move the main character, Paul, to his ultimate destination of the imperial capital."*[9]

On the other hand, O'Connor explains why there is no mention of his citizenship in the Pauline letters. First, he had no reason to boast about his privilege to others, when the main goal was to convince a community that their citizenship was in heaven. Second, during his journeys, he probably did not carry the invaluable document with him, therefore, he would not have any chance to prove his claim.[10]

5 Richard Westfall: Simon of Cyrene, a Roman citizen? *Historia. Zeitschrift für Alte Geschichte*, 59/4, 2010. 489–500.

6 Walenty Prokulski: The Conversion of St. Paul. *The Catholic Biblical Quarterly*, 19/4, 1957. 453–473.

7 For more information see: Wolfgang Stegemann: War der Apostel Paulus ein römischer Bürger? *Zeitschrift für die neutestamentliche Wissenschaft,* 78/1987. 200–229.

8 Albert J. Harrill: *Paul the Apostle: His Life and Legacy in Their Roman Context*. Cambridge, Cambridge University Press, 2012. 98.

9 Harrill 2012, 99.

10 Jerome Murphy-O'Connor: *Paul: A Critical Life*. Oxford, Clarendon Press, 1996. 40.

I agree with Adams, who states that denying Paul's Roman citizenship "*is not sustainable because of the fact that the entire final sequence of Acts, namely Paul's appeal, protection and travel to Rome, hinges entirely on Paul's Roman citizenship.*"[11]

3. Legal, and historical foundations

The current concept of citizenship was developed in the 19th century. It is a public law bond between a person and the state, the content of which is made up of rights and obligations.[12] However, it carries a similar meaning and content to its Roman legal archetype. In modern states, two approaches to citizenship by birth can be distinguished. In the Americas, the principle of *ius soli* – i.e. the principle of birth in the territory – prevails, whereby a child born in Brazil, or the USA acquires local citizenship regardless of the nationality of his or her parents. In Europe, on the other hand, the *ius sanguinis*, the principle of blood prevails. It means that a child born to a Hungarian mother or father is a Hungarian citizen.[13]

Paul was a Roman citizen by birth, as we would say today, by *ius sanguinis*. On more than one occasion – which will be discussed in more detail later – we can see how the very existence of Roman citizenship had a profound influence on his fate. Had he not disclosed his citizenship to the soldier (who was about to flog him in Jerusalem) and then to *chiliarch* Claudius Lysias, he would not have been transferred to Caesarea to face the governor Felix and then, his successor, Portius Festus. We may also assume that if he had stayed in Jerusalem, he would have been likely to be assassinated by the forty conspirators mentioned in the Acts.[14] Furthermore, we can see later on, that the mere fact of citizenship led to an audience with King Herod Agrippa himself.[15] In Caesarea, if he had not exercised his right of appeal[16] which he was entitled to due to his citizenship, he would never have made it to Rome (and, by shipwreck, to Malta, where he spent two years establishing a local community)[17]. Also, his case would not have

[11] Sean A. Adams: *Paul the Roman citizen: Roman citizenship in the ancient world and its importance for understanding Acts 22:22–29*. In: Paul: Jew, Greek, and Roman. Leiden, Brill. 2009. 315.

[12] Balázs Schanda: Államalkotó tényezők. In: Trócsányi László et al. (ed.): Bevezetés az alkotmányjogba. Budapest, HVG-orac, 2020. 105.

[13] Schanda 2020, 106.

[14] Acts 23.

[15] Acts 25, 13–26, 32.

[16] For more information see: Peter Garnsey: The Lex Iulia and Appeal under the Empire. *The Journal of Roman Studies*, 56/1-2., 1966. 167–189.

[17] Mario Buhagiar: St. Paul's Shipwreck and Early Christianity in Malta. *The Catholic Historical Review*, 93/1, 2007. 1–16.

been brought before Emperor Nero, nor would his trial have taken place. We can see, then, how the possession of citizenship influenced the course of his life.

Before proceeding any further, let us look at the legal status of the persons of ancient Rome.

Et quidem summa divisio de iure personarum haec est quod omnes homines aut liberi sunt aut servi.[18] – wrote Gaius in his *magnum opus*. The Institutes of Iustinian adds to this passage: *"In the condition of slaves there is no distinction; but there are many distinctions among free persons; for they are either born free, or have been set free."*[19]

Further classification is needed for the freedmen, who could have been either peregrines, Latins or Roman citizens. The natural way to become a Roman citizen was to be born of a valid marriage to a Roman citizen,[20] in which case the child would assume the status of Roman citizen, even if the father married a peregrine or a Latin woman.[21] If there was no valid marriage between the parents in the Roman legal sense, the child did not follow the status of the father,[22] but that of the mother. If the mother was a Roman citizen, the child would have the same status.[23]

There were many ways of acquiring Roman citizenship. As a rule, manumitted slaves[24] became Roman citizens, as did either Latins or Peregrines, if they were adopted by a Roman citizen. Ulpian lists several cases in which the Latins were able to become Roman citizens. *"Latins acquire the right of Roman citizenship in the following ways: by the favor of the Emperor, by children, by repetition, by service in the night-watch, by ship-building, by the construction of houses, by milling; and, in addition to this, a freeborn woman who has brought forth children three times, is entitled to this right under the Decree of the Senate."*[25]

The cases mentioned by Ulpian require some clarification. By shipbuilding, he was referring to an edict of Claudius by which Latins acquire the right of citizenship, if they build a ship which holds 10,000 *modii* of corn and the ship or another imports corn to Rome for six years.[26] By constructing houses, he was citing the decision of Nero, who further enacted that if a Latin owns property

18 Gai. 1, 9: The main legal division of all people is that they are either free or slaves.

19 Inst. 1, 3, 1: *In servorum condicione nulla differentia est, in liberis multae differentiae sunt: aut enim ingenui sunt aut libertini.*

20 See below: *ius sanguinis*

21 Gai. 1, 56.

22 Gai. 1, 80.

23 Gai. 1, 78.

24 Inst. 1, 5, 2; Ulp. 1, 6.

25 Ulp. 3, 1: *Latini ius Quiritium consequuntur his modis: beneficio principali, liberis, iteratione, militia, nave, aedificio, pistrino; praeterea ex senatus consulto mulier, quae sit ter enixa.*

26 Gai. 1, 32c.

worth 200,000 sesterces or more by building a house at Rome on which he expends not less than half his property, he shall acquire the right of citizenship.[27] Furthermore, Emperor Traian ordered that if a Latin carries on the business of miller in Rome for three years and grinds each day not less than a hundred measures of wheat, he shall attain Roman citizenship.[28] Another means of acquiring citizenship was to purchase it (likely illicitly and at a very high price).[29]

Moreover, Roman citizenship was conferred on Latins, who completed six years in the service of the night-watch,[30] or after three years of active military service[31] which was a very popular way of acquiring citizenship for the inhabitants of provinces. Roman soldiers were forbidden by law from marrying during their military service, at least until the time of Septimius Severus.[32] This restriction caused problems not only for soldiers and their families during long provincial service, but also in terms of property law. More than one papyrus records the struggle of illegitimate children to obtain their inheritance.[33] Interestingly, the illegitimate children of Roman citizens, whose father entered into military service, and got married during that time illegally, did not become Roman citizens after the end of their father's service. However, those non-citizens, who joined the army already having a family, acquired the citizenship not only for themselves but also for their family respectively.[34]

4. Origin of Paul's citizenship

Scholars disagree on how Paul's family acquired Roman citizenship.
Paul came from a wealthy family in Tarsus, and we know from his own attestation that he did not acquire his citizenship in one of the ways listed above but was born a Roman citizen under the principle of *ius sanguinis*.[35] Tajra believes that it was through military service that Paul's father or grandfather gained Roman citizenship.[36] Another theory is that his wealthy family purchased the citizenship

27 Gai. 1, 33.
28 Gai. 1, 34.
29 As we see later: Acts 22, 28.
30 Ulp. 3, 5.
31 Gai. 1, 32b.
32 Brian Campbell: The Marriage of Soldiers under the Empire. *The Journal of Roman Studies*, 68/1978. 153–166.
33 BGU 1 140, M.Chr. 373, Sel. Pap. II 213, Alexandria, 119.
34 John Anthony Crook: *Law and Life of Rome*. Ithaca, Cornell University Press, 1967. 41-42.
35 Acts 22, 28.
36 Harry W. Tajra: *The Trial of Paul*. Tübingen, Mohr, 1989. 83.

illegally. Others suggested his father (or grandfather) was a slave, who acquired citizenship by manumission.[37] Peter van Minnen believes that one of Paul's ancestors was a freedman of the synagogue of the Libertini in Jerusalem. It can explain why Paul appears there during the stoning of Stephen.[38] Although others are very quick to dismiss van Minnen's theory, I find that one rather intriguing.

Adams argues that all the above reasons are highly unlikely: his theory is that his citizenship is strongly related to his city, Tarsus. Piracy developed into a large problem on the Cilician coast, which drew the attention of Pompey, who crushed the marauders in 67 BC and set up Tarsus as the new Roman capital of the province of Cilicia. Adams claims that it is possible that Paul's family, being part of the upper class of the city, was offered citizenship upon the capture of the city by Pompey, or that the privilege was gained through a service to Pompey at this time.[39]

Ramsay points out that, given Paul's public status, he was first and foremost a Roman citizen, whose *"character superseded all others before law, and in general opinion in society, and placed him amid the aristocracy of any provincial town."*[40] He also highlights the fact, that the citizenship in the first century (before the Antonine Constitution) was still jealously guarded, and probably meant that his family was (at least) of moderate wealth.[41] Secondly, Paul was a Tarsian, not just a simple resident, but he also had citizenship rights.[42] Although it may have had some traditional significance, or carried some meaning for the common people, but by the law of the nature, Roman citizenship preceded all. Thirdly, he was a Jew, which combined with Roman citizenship was quite a rarity.

Tarsus was a *civitas libera* located in Asia Minor, and therefore its citizens were exempt from normal provincial jurisdiction.[43] Tarsus is Paul's city, and he is proud of it.[44] The distinctive features of his hometown may have influenced his character. Tarsus was unique in the way that it successfully combined Western and Eastern influences and was able to create a unified society despite their

37 O'Connor 1996, 39-41.

38 Peter van Minnen: Paul the Roman Citizen. *Journal for the Study of the New Testament*, 56/1994, 43-52.

39 Adams (2009), 309-326.

40 Sir William Mitchell Ramsay: *St. Paul: the traveller and Roman citizen.* New York, G. P. Putnam's Sons, London, Hodder & Stoughton, 1898. 30.

41 Ramsay 1898, 31.

42 Ramsay 1898, 31.

43 Adrian Nicolas Sherwin-White: *Roman Society and Roman Law in the New Testament*. Oxford, Clarendon Press, 1963. 56-57.

44 Sherwin-White 1963, 180.

differences.[45] According to Strabo, *"the people at Tarsus have devoted themselves so eagerly, not only to philosophy, but also to the whole round of education in general, that they have surpassed Athens, Alexandria, or any other place that can be named where there have been schools and lectures of philosophers."*[46]

Above all, Paul considers himself a citizen of Tarsus.[47] Interestingly, as we see in Acts 22, 3, while addressing the crowds in Hebrew,[48] he only mentions his Tarsian citizenship and that he is a Jew to create sympathy among his peers. On the other hand, he displayed his Roman citizenship to the provincial authorities only when it was necessary.

5. Beating in Philippi

Acts records the moment Paul first mentions his citizenship. During Paul's second journey, while walking the streets of Philippi he encountered and exorcised a slave girl, *"who had a spirit of divination and brought her owners much gain by fortune-telling."*[49] This angered the owners. They grabbed Silas and Paul, took them to the forum before the magistrates, and accused them of causing a disturbance.[50] The city's Roman magistrates ordered Paul and Silas to be publicly beaten, thrown into prison overnight, and be shackled.[51] In prison, Paul converted his jailer, and expressed disapproval of their mistreatment.[52] In the morning, the officials came by and told them that they have been let go. Instead of leaving, however, Paul lectured them on their rights as Roman citizens: "*but Paul said to them, "They have beaten us publicly, uncondemned, men who are Roman citizens, and have thrown us into prison; and do they now throw us out secretly? No! Let them come themselves*

45 Sir William Mitchell Ramsay: *The cities of St. Paul: their influence on his life and thought: the cities of eastern Asia Minor*. London, Hodder & Stoughton, 1907. 88-89.

46 Strab. 14, 5, 13: τοσαύτη δὲ τοῖς ἐνθάδε ἀνθρώποις σπουδὴ πρός τε φιλοσοφίαν καὶ τὴν ἄλλην παιδείαν ἐγκύκλιον ἅπασαν γέγονεν ὥσθ' ὑπερβέβληνται καὶ Ἀθήνας καὶ Ἀλεξάνδρειαν καὶ εἴ τινα ἄλλον τόπον δυνατὸν εἰπεῖν, ἐν ᾧ σχολαὶ καὶ διατριβαὶ φιλοσόφων γεγόνασι. Transl. Horace Leonard Jones.

47 Sherwin-White 1963, 179.

48 According to the Bible, he spoke to the crowd in Hebrew, which is highly unlikely; it was probably Aramaic. See more: Kornélia Koltai*: A targumok – Elmélet és gyakorlat, különös tekintettel a bibliafordítási és interpretációs eljárásokra.* Targum, 1/2022, 2–29.

49 Acts 16, 16.

50 Acts 16, 19-20.

51 Acts 16, 22-24.

52 Acts 16, 27-36.

and take us out.""[53] After the officials reported these to the magistrates, they got afraid and apologized to Paul and Silas.[54]

The magistrates' fear can be easily explained by the contents of the citizenship rights. The Porcian laws prohibited the whipping, scourging and crucifixion of Roman citizens. They also established the *Provocationsrecht* which we will see later.[55] Mommsen confirms that Roman citizens are supposed to be exempt from arrest and chastisement.[56] Barnes adds that the Greek word used in this episode for the seizure of Paul and Silas (ἐπιλαμβάνεσθαί) throughout Acts (Corinth, Jerusalem etc.) usually refers to violence.[57]

As we can see, this is the first time Paul mentioned his citizenship. He successfully asserted his privileges and earned a formal apology from the Roman magistrates of Philippi.

6. Flogging in Jerusalem

The next occasion when we can witness Paul's successful enforcement of his citizenship rights happens after his third missionary journey when he is arrested upon returning to Jerusalem.

"Is it lawful for you to flog a man who is a Roman citizen and uncondemned?" – he asked the soldier, when they had stretched him out for the whips.[58] *'When the centurion heard this, he went to the tribune and said to him, "What are you about to do? For this man is a Roman citizen."*[59]

From these words we can clearly understand the centurion's surprise and fright which is also a strong argument for the importance of Roman citizen's rights in the province. The centurion's worry is completely understandable in light of the *lex Iulia de vi publica:*[60] *[...] damnatur, qui aliqua potestate praeditur civem*

53 Acts 16, 37.

54 Acts 16, 38-39.

55 Liv. 10, 9, 4: *Porcia tamen lex sola pro tergo civium lata videtur, quod gravi poena, si quis verberasset necassetve civem Romanum, sanxit.* Yet the Porcian law alone seems to have been passed to protect the persons of the citizens, imposing, as it did, a heavy penalty if anyone should scourge or put to death a Roman citizen. Trasnl.: Benjamin Oliver Foster.

56 Theodor Mommsen: *Römisches Strafrecht*. Leipzig, Duncker & Humblot, 1899. 309[1].

57 Timothy D. Barnes: An Apostle on Trial. *The Journal of Theological Studies*, 20/2., 1969. 414.

58 Acts 22, 25.

59 Acts 22, 26.

60 Ulp. D. 48, 6, 7: *Lege Iulia de vi publica tenetur, qui, cum imperium potestatemve haberet, civem Romanum adversus provocationem necaverit verberaverit iusseritve quid fieri aut quid in collum iniecerit, ut torqueatur. Item quod ad legatos oratores comitesve attinebit, si quis eorum pulsasse et sive iniuriam fecisse arguetur.*

Romanum antea ad populum, nunc imperatorem appellantem necaverit necarive iusserit, torserit verberaverit condemnaverit inve publica vincula duci iusserit. Cuius rei poena in humiliores capitis in honestiores insulae deportatione coercetur.[61]

It is noteworthy that, although not mentioned in the verse, it is likely that Paul's claim to be a citizen was not merely believed based on his testimony but verified, since they probably kept lists and records of local Roman citizens.[62] Furthermore, it was clear to everyone that it was not worth pretending to be a Roman citizen, as an insightful passage from Suetonius attests: "*Those who falsely pretended to the freedom of Rome, he (Emperor Claudius) beheaded on the Esquiline.*"[63]

After this episode, we can witness a rather interesting exchange between Paul and the *chiliarch* Lysias: "'*So the tribune came and said to him, "Tell me, are you a Roman citizen?" And he said, "Yes." The tribune answered, "I bought this citizenship for a large sum." Paul said, "But I am a citizen by birth."*'[64]

This short dialogue is rather unique, because not only can we experience the astonishment Paul's aristocratic status causes, but witness an explicit status comparison.[65] As Harrill puts it: "*Paul holds the greater claim to be Roman than even a senior legionary commander does.*"[66] Harrill believes that it is Luke's conscious effort to defend the legitimacy of Christianity in the Roman Empire and portray the leaders of the early Church as model imperial citizens.[67]

Regarding Lysias' purchased citizenship, it is worth mentioning, that during Claudius' first year as an Emperor, the value of the citizenship started to decrease rapidly. Dio even makes a snarky comment that a man could become a citizen

Also liable under the lex Julia on vis publica is anyone who, while holding imperium or office, puts to death or flogs a Roman citizen contrary to his [right of] appeal or orders any of the aforementioned things to be done, or puts [a yoke] on his neck so that he may be tortured. Again, so far as relates to ambassadors, pleaders, or those who accompany them, anyone who is proven to have beaten or done them an injury. Transl.: Alan Watson.

61 Paul. 5, 26, 1: Anyone invested with authority who puts to death or orders to be put to death, tortures, scourges, condemns, or directs a Roman citizen who first appealed to the people, and has now appealed to the Emperor to be publicly placed in chains, shall be condemned under the Lex Julia relating to public violence. The punishment for this crime is death, where the parties are of inferior station; deportation to an island, where they are of superior rank. Transl.: Samuel Parsons Scott.

62 Sherwin-White 1963, 146-149. Adrian Nicolas Sherwin-White: *The Roman Citizenship*. Oxford, Oxford University Press, 1973. 314-316.

63 Suet. Cl. 25, 3: *ciuitatem R. usurpantes in campo Esquilino securi percussit*. Transl: Alexander Thomson.

64 Acts 22, 27-28.

65 John Clayton Lentz Jr.: *Luke's portrait of Paul*. Society for New Testament Studies Monograph Series Vol. 77. Cambridge, Cambridge University Press, 1993. 44.

66 Harrill 2012, 100.

67 Harrill 2012, 101.

for a price of a broken glass.[68] However Sherwin-White dismisses this as an over-exaggeration.[69]

After Paul had barely escaped flogging, a conspiracy of forty Jews took place, who swore that they would neither eat nor drink until they had killed Paul.[70] To rescue Paul from the violence of this assassination attempt (which was told to the *chiliarch* by Paul's nephew), Lysias had prepared two hundred soldiers, seventy horsemen, and two hundred spearmen to safely escort of him to Felix, the governor of the province.[71] While the number of escorts may seem somewhat exaggerated and doubtful, we can clearly see the haste and concern for Paul's physical well-being (due to the fact of his "aristocratic" status) that prompted Lysias to get Paul safely to Felix as soon as possible. Although many point out that the main reason may have been his desire to get rid of Paul ("the troublemaker" as soon as possible), I believe that the *chiliarch*'s worry for his safety was a real consideration in this case. Had not been the case, the assassination plot would have served him well.

7. Appeal in Caesarea

In addition to the aforementioned verses, the most important biblical passage is, in which Paul explicitly exercises his civil rights in Caesarea to appeal to Emperor Nero. *'But Festus, wishing to do the Jews a favor, said to Paul, "Do you wish to go up to Jerusalem and there be tried on these charges before me?" But Paul said, "I am standing before Caesar's tribunal, where I ought to be tried. To the Jews I have done no wrong, as you yourself know very well. If then I am a wrongdoer and have committed anything for which I deserve to die, I do not seek to escape death. But if there is nothing to their charges against me, no one can give me up to them. I appeal to Caesar."'*[72]

We can see that in this verse Paul exercises the *ius provocationis*, the right of appeal to the Emperor whom he was entitled to as a Roman citizen. Mommsen

[68] Dio 60, 17, 5-6: συχνοὺς δὲ δὴ καὶ ἄλλους καὶ ἀναξίους τῆς πολιτείας ἀπήλασε, καὶ ἑτέροις αὐτὴν καὶ πάνυ ἀνέδην, τοῖς μὲν κατ᾽ ἄνδρα τοῖς δὲ καὶ ἀθρόοις, ἐδίδου. ἐπειδὴ γὰρ ἐν πᾶσιν ὡς εἰπεῖν οἱ Ῥωμαῖοι τῶν ξένων προετετίμηντο, πολλοὶ αὐτὴν παρά τε αὐτοῦ ἐκείνου ᾐτοῦντο καὶ παρὰ τῆς Μεσσαλίνης τῶν τε Καισαρείων ὠνοῦντο: καὶ διὰ: τοῦτο μεγάλων τὸ πρῶτον χρημάτων πραθεῖσα, ἔπειθ᾽ οὕτως ὑπὸ τῆς εὐχερείας ἐπευωνίσθη ὥστε καὶ λογοποιηθῆναι ὅτι κἂν ὑάλινά 4 τις σκεύη συντετριμμένα δῷ τινι πολίτης ἔσται.

[69] Sherwin-White 1963, 155.

[70] Acts 23, 12-22.

[71] Charles B. Williams: The Caesarean Imprisonment of Paul. *The Biblical World*, 34/4., 1909. 271–280.

[72] Acts 25, 9-12.

confirms that the Praetorian *imperium* was not competent to inflict the most severe means of punishment on Roman citizens: could not impose the death penalty, flogging or shackling on them, and had to grant the *Provocationsrecht* in the capital court proceedings.[73] Once the request for *ius provocationis* has been lodged, Festus was no longer entitled to deliver a verdict, not even an acquittal.[74] Nevertheless, the concentration of capital jurisdiction over Roman citizens in the city of Rome was probably not sustainable in the long term, and the more widespread the Roman citizenship became in the provinces, the more it became necessary to extend the criminal jurisdiction of the governors.[75]

Garnsey mentions that the so-called *reiectio Romam* (the choice between local courts or trial in Rome) could have been associated with Roman citizenship in earlier times. However, at the time of the Roman Empire, *"the governor was not compelled to grant the request for reference to Rome, and that only members of the Roman aristocracy domiciled or with interests abroad, and a few individuals who had received the right as a special privilege, were likely to lodge a successful petition."*[76] This also reinforces the idea of Paul's aristocratic status in his province. Lentz adds that, although the Roman citizens were privileged people in the province, in practice they did not always benefit from the protection of the law, only when they had not only citizenship but also wealth and influence.[77]

Needless to say, it was not only Paul who defended himself with the plea of citizenship *'civis Romanus sum'*, but there are not many other known examples. It is probable, that the right of appeal was more commonly exercised in the Eastern parts of the Empire than in the West.[78] According to Schwartz Paul's objection was not only out of fear for his life as a result of the earlier assassination attempt, but also Paul, as mentioned earlier, was planning to visit Rome anyway.[79]

[73] Mommsen 1899, 242.
[74] Mommsen 1899, 243.
[75] Mommsen 1899, 243.
[76] Peter Garnsey: *Social status and legal privilege in the Roman Empire*. Oxford, Clarendon Press, 1970. 263-264.
[77] Lentz 1993,127.
[78] Sherwin-White 1973, 273.
[79] Earl Schwartz: The Trials of Jesus and Paul. *Journal of Law and Religion*, 9:2. 1992. 501-513.

8. Conclusions

In conclusion, let me underline Adams' insightful words: "*it is clear that Roman citizenship in the ancient world was a coveted treasure that afforded its possessor numerous rights and privileges that were unattainable to the typical provincial*."[80]

Without doubt, Paul successfully utilizes these rights during his arrests in Philippi, in Jerusalem, and later at the office of Governor Festus in Caesarea.

Moreover, the great importance of Roman citizenship is evident not only from the effective use of Paul's rights but also from the reactions of those who interact with him. It is worth mentioning the apology of the Philippian magistrates, the shock of the soldier with the whip, the entourage to Caesarea, or the audience around Herod Agrippa.

But let us look again at this particular exchange.'*So the tribune came and said to him, "Tell me, are you a Roman citizen?" And he said, "Yes." The tribune answered, "I bought this citizenship for a large sum." Paul said, "But I am a citizen by birth*."'[81]

Beyond the belief in the objective content of rights, we can observe something else, something subjective, namely, the self-esteem of a Roman citizen. Moreover, Paul's response reveals not only an underlying pride in his citizenship but also in the way he acquired it, i.e. the fact that he was born into it, which is in stark contrast with the visible embarrassment of Lysias.

Indeed, it seems that Paul's statement reflects pride. Is it possible that Paul, who went from persecutor to persecuted, from Jew to Christian, from soldier to missionary, from wealthy to pauper, still clung to the only part of his old life, namely, that he was a Roman citizen?

Literature

Adrian Nicolas Sherwin-White: *Roman Society and Roman law in the New Testament*. Oxford, Clarendon Press, 1963.

Adrian Nicolas Sherwin-White: *The Roman Citizenship*. Oxford, Oxford University Press, 1973.

Albert J. Harrill: *Paul the Apostle: His Life and Legacy in Their Roman Context*. Cambridge, Cambridge University Press, 2012.

Alex Imrie: *The Antonine Constitution: An Edict for the Caracallan Empire*. Brill, Leiden. 2018.

[80] Adams 2009, 326.
[81] Acts 22, 27-28.

András Földi – Gábor Hamza: *A római jog története és institúciói*. Nemzedékek tudása, Budapest. 2014.

Arnaud Besson: Fifty Years before the Antonine Constitution: Access to Roman Citizenship and Exclusive Rights. In: Lucia Cecchet – Anna Busetto: *Citizens in the Graeco-Roman World: Aspects of Citizenship from the Archaic Period to AD 212*. Mnemosyne, Supplements, Vol. 407. Leiden, Brill, 2017.

Brian Campbell: The Marriage of Soldiers under the Empire. *The Journal of Roman Studies*, 68. 1978. 153-166.

Charles B. Williams: The Caesarean Imprisonment of Paul. *The Biblical World*, 34:4. 1909. 271-280.

Earl Schwartz: The Trials of Jesus and Paul. *Journal of Law and Religion*, 9:2. 1992. 501-513.

Éva Jakab: Law and Identity: Considerations about Citizenship and Succession in Provincial Practice. In: Kaja Harter-Uibopuu (Hrsg.): *Symposion 2019*. Wien, Austrian Academy of Sciences Press, 2021. 335-358.

Harry W. Tajra: *The Trial of Paul*. Mohr, Tübingen, 1989.

Jerome Murphy-O'Connor: *Paul: A Critical Life*. Oxford, Clarendon Press, 1996.

John Anthony Crook: *Law and Life of Rome*. Cornell University Press, Ithaca, 1967.

John Clayton Lentz Jr.: *Luke's portrait of Paul*. Society for New Testament Studies Monograph Series Vol. 77. Cambridge, Cambridge University Press, 1993.

Kornélia Koltai*: A targumok – Elmélet és gyakorlat, különös tekintettel a bibliafordítási és interpretációs eljárásokra.* Targum, 1, 2022. 2–29.

Mario Buhagiar: St. Paul's Shipwreck and Early Christianity in Malta. *The Catholic Historical Review*, 93:1, 2007. 1-16.

Peter Garnsey: *Social status and legal privilege in the Roman Empire*. Oxford, Clarendon Press, 1970.

Peter Garnsey: The Lex Iulia and Appeal under the Empire. *The Journal of Roman Studies*, 56:1-2. 1966. 167-189.

Peter van Minnen: Paul the Roman Citizen. *Journal for the Study of the New Testament* 56, 1994. 43-52.

Richard Westfall: Simon of Cyrene, a Roman citizen? *Historia: Zeitschrift für Alte Geschichte*, 59:4, 2010. 489-500.

Schanda Balázs: Államalkotó tényezők. In: Bevezetés az alkotmányjogba, ed: Trócsányi László et al. HVG-orac, Budapest, 2020.

Sean A. Adams: *Paul the Roman citizen: Roman citizenship in the ancient world and its importance for understanding Acts 22:22–29*. In Paul: Jew, Greek, and Roman. Brill, Leiden. 2009. 309-326.

Sir William Mitchell Ramsay: *St. Paul: the traveler and Roman citizen*. New York, G. P. Putnam's sons, London, Hodder & Stoughton, 1898.

Theodor Mommsen: *Römisches Strafrecht*. Leipzig, Duncker & Humblot, 1899.
Timothy D. Barnes: An Apostle on Trial. *The Journal of Theological Studies*, 20:2. 1969. 407-419.
Walenty Prokulski: The Conversion of St. Paul. *The Catholic Biblical Quarterly*, 19:4, 1957. 453-473.
Wolfgang Stegemann: War der Apostel Paulus ein römischer Bürger? *Zeitschrift für die neutestamentliche Wissenschaft* 78, 1987. 200-229.

THE ESSENTIAL STATE FUNCTIONS' IMPACT ON THE EU'S INTEGRATION

MÓNIKA MERCZ[1]

ABSZTRAKT ■ Amikor az Európai Unió integrációjának kérdéseiről beszélünk, gyakran találkozunk eltérő nézőpontokkal annak szorosabbra fűzése vagy lazítása kérdésében. Függetlenül a jelen lévő politikai véleményektől, a legfontosabb megvitatandó kérdés az, hogy mit hoz a jövő, és milyen változásokra van szükség ahhoz, hogy olyan hatékony jogi keretet hozzunk létre, amelyben a tagállamok sikeresen együttműködhetnek, és elérhetik a béke, a biztonság és a gazdasági fejlődés közös célját. Az egyik eszköz, amelyet manapság gyakran használnak a szuverén tagállamok döntő fontosságú jellegének hangsúlyozására, az EUSZ 4. cikkének (2) bekezdésére, konkrétan az alapvető állami funkciókra való hivatkozás. Ezen funkciók közül csak néhányat nevesít a szöveg, de több olyan is van, amelyek úgy azonosíthatók, mint a legalapvetőbb funkciók, amelyeket egy államnak el kell látnia ahhoz, hogy létét igazolja, és amelyek nem oszthatók meg, illetve nem adhatók át az EU-nak. Melyek ezek a funkciók? Hogyan hatnak az EU integrációs folyamatára? Ezekben a kérdésekben kívánok elmélyedni ebben a tanulmányban, ahol is végül arra a következtetésre jutok, hogy ezek hatása az EU jövőjére nagyobb, mint azt bárki előre látta volna.

ABSTRACT ■ Concerning the issues of integration in the European Union, one might take different perspectives on the direction of this process. Regardless of any political opinion, the most important matter to discuss is what the future holds, as well as what kind of changes are necessary to create an effective legal framework in which Member States can successfully cooperate and reach the common goals of peace, security, and economic development. Nowadays, the crucial importance of sovereign Member States is often underlined by referring to Article 4(2) of TEU, specifically to the essential state functions. Among them, only a few are named in the text. However, several functions can be identified as the most basic ones that a state must execute to justify its existence and which cannot be shared or given over to the EU. This essay dives into the questions of what these functions are, and how they impact the integration process of the EU. Eventually, the paper concludes that the impact of them on the future of the EU is bigger than anyone could have foreseen.

[1] PhD student, Károli Gáspár University of Reformed Church in Hungary.

1. Introduction

The European Union's integration process has a lengthy history.[2] We can only understand its intricacies if we can map out its origins, the intent and reason behind its existence and its standing in our current time. For this reason, I shall use a historic approach to the concept of essential state functions with a particular emphasis on how its current understanding emerged in the European Union.

To fully understand how the EU developed, what influence it had in the history of its Member States' essential state functions, and what they are like, we must briefly examine the process of integration. In addition, it is vital to discuss 2004's failed attempt at drafting and enforcing a constitution for the EU.

It is important to note that when the idea of European integration was first formulated,[3] it was intended to be grounded at the political and cultural level.[4] Of course, there were many earlier attempts to unify Europe,[5] but these all failed[6] or were quite short-lived.[7] Robert Schuman's speech in 1950[8] opened the way to true integration. In 1957 the Treaties of Rome were signed, creating the European Economic Community and the European Atomic Energy Community.[9] Throughout the history of integration, cooperation has grown even closer. In recent years, we have reached a point where a collective consciousness has emerged that can be identified with Europe, its values, and its diversity.[10] Today, EU membership is also a secondary identity, especially mostly among

[2] Zoltán Angyal: Az Európai Alkotmányszerződés ratifikációs válsága, avagy a közvetlen demokrácia és az integráció kollíziója. *Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica*, Tomus XXV/1. 2007. 175–190.

[3] Jean Monnet: az Európai Unió megszületése mögött meghúzódó egyesítő erő, https://european-union.europa.eu/principles-countries-history/history-eu/eu-pioneers/jean-monnet_hu.

[4] Tibor Pintér: Az európai integráció – gazdasági és politikai alapú elméleti megközelítések. *Polgári Szemle,* 13/2017. Iss. 4-6, 341–364., DOI: 10.24307/psz.2017.1225.

[5] Abbot Charles de Saint-Pierre initiated the creation of a borderless union of 18 sovereign states, with a common treasury and a single economy. Charles de Saint-Pierre: "Projet pour perfectionner l'éducation". *Journal littéraire,* Vol. 14, 1729, 170.

[6] Winston Churchill az „Európai Egyesült Államok" szorgalmazója, https://european-union.europa.eu/principles-countries-history/history-eu/eu-pioneers/winston-churchill_hu.

[7] Attila Fábián: *Az integráció elmélete*. Sopron, Nyugat-magyarországi Egyetem Kiadó, 2011.

[8] Schuman Plan – European history, https://www.britannica.com/event/Schuman-Plan.

[9] Péter Halmai: *Európai gazdasági integráció*. Budapest, Dialóg Campus, 2020.

[10] Borbála Göncz: Európai identitás?! *Pro Minoritate,* 23/2013, 79–95. http://www.prominoritate.hu/folyoiratok/2013/ProMino-1301-05-Goncz.pdf., Molnár Alíz: Az európai és a nemzeti identitás formálódó szerepe, *Prosperitas, 5 (1).* 2018. 114-124.

the young and the more formally educated.[11] The only thing that is missing in discussions about a constitutional identity for the EU is the constitution itself. From some points of view, the EU's Treaties, its primary sources of law, could be described as a quasi-constitution.[12] However, there have been attempts at constitutionalism in the EU,[13] which sought to create a de facto cartel document.[14] If a single European constitution were to be created in the future – the possibility of which is questioned by many – all the conditions for the creation of a constitutional identity for the EU would be met. In that case, however, the constitutional identity of the EU would conflict with the identity of the states. This would create further difficulties for the assertion of the sovereignty of the Member States.

At present, the European Union appears as a specific form of an international organisation, whose legal and political reality differs in several important respects from the order of international organisations.[15] From a legal perspective, the unconditional application of EU standards is essential for the effectiveness of international cooperation in the current framework.[16] One has to wonder to what extent supranationalism and the primacy of EU law[17] in a constitution would push back the constitutions of the Member States, and whether the current sense of the EU as a source of secondary identity for young people could be strengthened to the point where it is on a par with the sense of national

11 Neil Fligstein – Doug McAdam: The Field of Theory. *Contemporary Sociology: A Journal of Reviews, Volume 43, Issue 3,* https://doi.org/10.1177/0094306114531283a.

12 Judgment of the Court of 23 April 1986 Parti écologiste "Les Verts" v European Parliament. Action for annulment – Information campaign for the European Parliament elections. Case 294/83, https://eur-lex.europa.eu/legal-content/HU/TXT/?uri=CELEX%3A61983CJ0294.

13 Treaty establishing a Constitution for Europe, https://www.europarl.europa.eu/Europe2004/index_en.htm.

14 Krisztina Arató – Ágnes Lux: Az Európai Unió alkotmányozási kísérlete. In: András Jakab – András Körösényi (eds.): *Alkotmányozás Magyarországon és máshol*. Budapest, Új Mandátum Könyvkiadó, 2012. 177–200.

15 Simon Denys: Les fondements de l'autonomie du droit communautaire in acte du colloque. *Droit international et droit communautaire, perspectives actuelles,* Bordeaux, Párizs, A Pedone, 2000. 209–249.

16 Péter Kruzslicz: *A nemzeti alkotmányosság tagállami alapjai: a nemzeti szuverenitás és a nemzeti alkotmányos önazonosság, különös tekintettel a francia jogelméletre és a magyar joggyakorlatra*. Doktori értekezés, Szeged, 2019. 52-53.

17 As stated in Costa v. ENEL (Judgment of the Court of 15 July 1964. Flaminio Costa v E.N.E.L. Reference for a preliminary ruling: Giudice conciliatore di Milano – Italy. Case 6-64.) or Internationale Handelsgesellschaft (Judgment of the Court of 17 December 1970. Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel. Reference for a preliminary ruling: Verwaltungsgericht Frankfurt am Main – Germany. Cases 11-70) The Court of Justice of the European Union.

identity. This would also have a clear negative impact on Article 4(2) TEU,[18] as the identity of the Member States could become secondary to a federal Europe. There is a separation between the external and internal aspects of identity. The relevant provision of the TEU is better understood as the external aspect of constitutional identity.[19]

The protection of the national identity of the Member States was already introduced by the Maastricht Treaty. Also, the equality of Member States before the Treaties and the respect for the fundamental functions of the State are specific to the Lisbon Treaty.[20] In addition, the original idea was that more should have been included in the Treaty. However, at the end of the day, fewer examples from the proposal were listed in the actual provision.[21]

Integration has been an increasingly pressing issue over the decades. Steps were taken to a political cooperation in addition to an economic one. After the 1951 signing of the ECSC Treaty,[22] a new beginning was upon Europe. While this specific Treaty expired on 23 July 2002 at the end of the 50-year validity period laid down in its Article 97, the European Economic Community (EEC) and the European Atomic Energy Community (EAEC, or 'Euratom'), the Treaties of Rome[23] are still in force since 1 January 1958. The first institutional change happened when the Merger Treaty of 8 April 1965 merged the executive bodies into a single Council and Commission of the European Communities.[24] The United Kingdom joined on 1 January 1973, together with Denmark and Ireland.[25] Since then, the UK has taken an electorate vote in 2016 to leave and left the EU on 31 January 2020 (known as "Brexit").[26] Consequently, there are

[18] For scholarly views on the interpretation of this, see: Patrik Szabó: A felszín alatt. Adalékok az alkotmányos identitás elméleti és dogmatikai problémáihoz. *Közjogi Szemle,* 3/2019, 43.

[19] Norbert Tribl: *Az alkotmányos identitás funkciója és alkalmazhatósága a szupranacionális térben*. Doktori értekezés, Szegedi Tudományegyetem, 2020. 104.

[20] For the origin of the term, see: Angyal 2007, 175-190.

[21] Hermann – Josef Blanke – Stelio Mangiameli (eds.): *The Treaty on European Union (TEU) A Commentary*. Heidelberg–New York–Dordrecht–London, Springer, 2013. 195.

[22] https://eur-lex.europa.eu/EN/legal-content/summary/treaty-establishing-the-european-coal-and-steel-community-ecsc-treaty.html

[23] https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/treaty-of-rome

[24] https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/merger-treaty

[25] https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)698877

[26] Paul Whiteley: Insight. Why Britain really voted to leave the European Union, University of Essex, https://www.essex.ac.uk/research/showcase/why-britain-really-voted-to-leave-the-european-union (2023.11.10.)

currently 27 Member States of the EU.[27] Greece became a member in 1981. Portugal and Spain joined in 1986.[28] On 17 February 1986 nine Member States signed the Single European Act (SEA),[29] which extended EU's powers. This was further extended by the Treaty on the European Union (signed in Maastricht on 7 February 1992, entered into force on 1 November 1993) created three pillars for the EU. These pillars include: the European Community, the common foreign and security policy (CFSP), and the cooperation in the fields of justice and home affairs.[30] The powers of the EU were further increased by the Treaty of Amsterdam amending the Treaty on European Union. Treaties establishing the European Communities and certain related acts signed in Amsterdam on 2 October 1997, and they entered into force on 1 May 1999.[31] The Treaty of Nice was signed on 26 February 2001 and entered into force on 1 February 2003,[32] followed by the Convention on the Future of Europe.[33] This Convention shall be followed by another one in the coming years which will hopefully answer some of the questions on what path the EU should take.[34]

The Treaty of Lisbon amended the Treaty on the European Union. The Treaty entered into force on 1 December 2009, established the European Community and gave the EU a full legal personality. It is made up of two Treaties: The Treaty on the European Union[35] and the Treaty on the Functioning of the European Union.[36] For the first time, the Lisbon Treaty clarified the powers of the Union. Union competence can now be handed back to the Member States during a treaty revision. The Lisbon Treaty originally started as a constitutional project at the end of 2001. It was followed up in 2002 and 2003 by the European Convention which drafted the Treaty and attempted to establish a Constitution for

27 https://european-union.europa.eu/principles-countries-history/country-profiles_en

28 José M. Magone: *The Politics of Southern Europe: Integration into the European Union*. Westport Conn: Praeger. 2003.

29 https://www.cvce.eu/en/education/unit-content/-/unit/02bb76df-d066-4c08-a58a-d4686a-3e68ff/6d24b681-9251-4e31-8246-6f6ada5bc5e9

30 https://eur-lex.europa.eu/EN/legal-content/summary/treaty-of-maastricht-on-european-union.html

31 https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/treaty-of-amsterdam

32 https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/treaty-of-nice

33 https://pace.coe.int/files/10200/html

34 Stefano Fella: The Conference on the Future of Europe: proposals and next steps, 2022. https://commonslibrary.parliament.uk/research-briefings/cbp-9551/ (2023.02.20.)

35 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT

36 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT

Europe.[37] The failure of the ratification of the Constitution is important from our broader perspective of the integration as a whole and the role of Article 4(2) of the TEU in particular.

The Treaty that attempted to establish a constitution of Europe was signed on 29 October 2004 by the representatives of the 25 Member States at the Rome European Council. It was made necessary by the rapid enlargement of the EU, in particular the largest expansion of the EU in 2004.[38] The ultimate failure was due to the referendums held in the Netherlands and in France, which decided against its ratification, and, thus, effectively blocked the process.[39] The origins of art. 4(2) TEU actually lie in Articles I-5 of this Treaty establishing a Constitution for Europe.[40] The final report of Working Group V on complementary

[37] https://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon

[38] https://eur-lex.europa.eu/EN/legal-content/summary/the-2004-enlargement-the-challenge-of-a-25-member-eu.html

[39] Robert Podolnjak: Explaining the Failure of the European Constitution. A Constitution-Making Perspective, *Collected Papers of Zagreb Law Faculty, Zagreb Law Faculty,* 57/2007, Iss. 1. 57.

[40] Article 1
Establishment of the Union
1. Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competence to attain objectives they have in common. The Union shall coordinate the policies by which the Member States aim to achieve these objectives and shall exercise in the Community way the competence they confer on it.
2. The Union shall be open to all European States which respect its values and are committed to promoting them together.

Article 2
The Union's values.
The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity, and non-discrimination.

Article 3
The Union's objectives
1. The Union aims to promote peace, its values, and the well-being of its people.
2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and a single market where competition is free and undistorted.
3. The Union shall work for the sustainable development of Europe based on balanced economic growth, a social market economy, highly competitive and aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advances.

competence[41] supports reading the national identity clause and the essential state function clause as having a close relationship.[42] Under the title of "Principles of the Exercise of Union Competence", the Working Group formulated an aim to clarify the EU "respects certain core responsibilities" of the Member States by "elaborating the fundamental principle" with respect to their national identities.[43]

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of children's rights.
It shall promote economic, social, and territorial cohesion, and solidarity among Member States.
The Union shall respect its rich cultural and linguistic diversity and shall ensure that Europe's cultural heritage is safeguarded and enhanced.
4. In its relations with the wider world, the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and protection of human rights and in particular children's rights, as well as to strict observance and development of international law, including respect for the principles of the United Nations Charter.
5. These objectives shall be pursued by appropriate means, depending on the extent to which the relevant competence is attributed to the Union in the Constitution.
Article 4
Fundamental freedoms and non-discrimination
1. Free movement of persons, goods, services and capital, and freedom of establishment shall be guaranteed within and by the Union, in accordance with the provisions of the Constitution.
2. In the field of application of the Constitution, and without prejudice to any of its specific provisions, any discrimination on grounds of nationality shall be prohibited.

Article 5
Relations between the Union and the Member States
1. The Union shall respect the national identities of the Member States, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including those for ensuring the territorial integrity of the State, and for maintaining law and order and safeguarding internal security.
2. Following the principle of loyal cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Constitution. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the objectives set out in the Constitution.

41 Online access: at: https://ec.europa.eu/dorie/fileDownload.do;jsessionid=jhJXJy2Wp3jhylywDtTQBbm2TkD1Q2MpPwnnzFyQcqm4GGKlH7qw!469751194?docId=281339&cardId=281339 (2023.02.20.)

42 B. Guastaferro: Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause. *Yearbook of European Law 263*, 2012. 271–285.

43 Final Report of Working group V cit. 10.

The Working Group has defined two areas of core national responsibilities,[44] with "fundamental structures and essential functions of the Member States, notably their political and constitutional structure. Most importantly, it includes regional and local self-government, their choices regarding language, national citizenship, territory, the legal status of churches and religious societies, national defence and the organization of armed forces".[45]

2. Essential state functions

As has been stated in Article 4(2) of the Treaty on the European Union, examples of essential state functions are *„ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.".* Interestingly, territorial integrity was also a part of the definition of sovereignty. While the two concepts are also strongly related, essential state functions manifest powers derived from sovereignty. One example of essential state functions can be found in one of the decisions of the Conseil d'État (Council of State) in 2020. The function plays an important role in curbing the growing powers of the European Union, and Member States use it as a shield against fulfilling an obligation imposed by the EU. The Council of State has established that the national constitution is the highest norm of the national legal order,[46] and it can "clarify" situations in which EU law does not include guarantees according to national constitutional requirements. This shows how important the specified essential state functions have become. In my view, their importance will only grow after the Convent[47] is about to take place in the EU.

In the context of the European Union, the concept of essential state functions is presented in Article 4(2) of TEUA few of them are named as examples of ensuring the territorial integrity of the State, maintaining law and order, and safeguarding national security. It is stressed that, in particular, national security remains the sole responsibility of each Member State. While the case law relating to these issues is not particularly broad, the advocate general has had thoughts about the concept of essential state functions on several occasions. The open-ended

[44] Some believe that national identity and essential state functions are part of the same concept and goals.

[45] Final Report of Working group V cit. 12.

[46] Decision n° 393099, https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2021-04-21/393099

[47] https://www.europarl.europa.eu/news/en/press-room/20220603IPR32122/parliament-activates-process-to-change-eu-treaties

nature of essential state functions makes it an interesting subject to research, particularly when it comes to how cases could grab certain aspects of the issue against federal aspirations or just as a basis for disapplying EU regulations.

Related to these named examples of functions which are deemed essential on the EU level, I shall examine their current standing and meaning one by one. Firstly, I shall focus on national security, as it is stressed twice in the text of the regulation. Afterwards, territorial integrity will take center stage as a topic of discussion. To close these named examples, I shall discuss the state's duty of maintaining law and order.

The EU is currently facing increasing threats and challenges, ranging from conventional to transnational threats including hybrid threats, cyber-attacks and conflicts in its immediate vicinity and beyond. Unfortunately, these are not the only issues that which the EU must respond to. Climate change is exacerbating conflicts and instability.[48] This is why working together has taken precedence.

Until recently, the goal has been that the EU must be able to act autonomously without the United States. This meant that the primary aim of strategic sovereignty should be protecting EU Member States and asserting common European interests. However, this has been incredibly difficult due to Europe's new confrontational security order and the fact that its strategic dependence on the US is likely to grow. Strategic sovereignty must therefore include the pursuit of Europe's collective defence capability in close cooperation and coordination with the EU and the North Atlantic Treaty Organization (NATO).

As for the current occurrences: EU Member States as well as European NATO partners will have to shoulder considerable costs to decouple themselves from Russia in terms of energy policy. This will leave significantly less attention and fewer resources for policy areas that are not directly related to this challenge.[49] The EU and the NATO must clarify how they will adapt their respective enlargement processes under the conditions of a confrontational security order. Primarily, Sweden and Finland are debating whether to join the alliance.[50] So far, there has been little indication that other non-aligned EU states such as Ireland, Malta, and Austria are also seriously reconsidering their status.[51]

[48] EU security, defence and crisis response, A Security and Defence policy fit for the future, 24.08.2021.

[49] See more: Gustav Gressel: In Europe's defence: *Why the EU needs a security compact with Ukraine, European Council on Foreign Relations*. Policy Brief, 30 September 2022.

[50] Minna Ålander – Michael Paul: Moskau bedroht die Balance im hohen Norden Angesichts der russischen Kriegspolitik rücken Finnland und Schweden näher an die Nato. *Stiftung Wissenschaft und Politik Comment*, 2022/C 24, 31.03.2022, doi:10.18449/2022A19.

[51] Nicolai von Ondarza – Marco Overhaus: Rethinking Strategic Sovereignty German Narratives and Priorities for Europe after Russia's Attack on Ukraine. *Stiftung*

The Commission's ambition in this field has a long history. Between the 1960s and 1980s, there were several proposals, mainly in the defence-industrial field.[52] In the late 1990s and early 2000s intergovernmental development[53] became the central theme. It was only with the Commission's 2009 'Defence Package'[54] that which the Commission's new role became a viable option. The Package's two directives, combined with the 2007 European Security Research Programme,[55] made the development of the European Defence Fund possible. By 2017 the Commission launched its work on Military Mobility.[56]

However, national security comes first for all Member States, as they view it as a part of their sovereignty. The concept of sovereignty is complementary to constitutional identity, but it also means much more than that. A sovereign state governs itself independently of any foreign power.[57] Sovereignty is defined as a state having inviolable territorial integrity and political independence, the right to freely choose and shape its political, social and cultural system, as well as the obligation to fulfil its international obligations in good faith to live in peace with other states.[58] This concept has both an external and an internal side. The internal side of state sovereignty means the ability of the state to create and apply its own legal order, as well as to exercise supreme authority over the persons and objects within its territory.[59] External sovereignty, on the other hand, provides that the state is an independent actor in international life, there is no other authority above it, and its decisions do not depend on the approval

Wissenschaft und Politik Comment, 2022/C 31, 28.04.2022, doi:10.18449/2022C31.

52 Jochen Rehrl (ed): *Handbook on CSDP The Common Security and Defence Policy of the European Union*. Fourth Edition, Federal Ministry Republic of Austria, Volume I, ISBN: 978-3-902275-51-6.

53 Amelia Hadfield – Simon Lightfoot: Shifting priorities of the EU as a development actor: context and consequences. *Global Affairs,* 7:4, 2021, 487–504, DOI: 10.1080/23340460.2021.1985400.

54 New Directive on defence and security procurement enters into force, 25 August 2009.

55 D. Bigo – J. Jeandesboz – M. Martin-Maze – F. Ragazzi: *Review of Security Measures in the 7th Research Framework Programme FP7 2007-2013.* Brussels, European Parliament, 2014. DOI:10.2861/62647

56 The European Union is stepping up efforts to improve military mobility, 10 November 2017.

57 John Bouvier: *A Law Dictionary Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union; with References to the Civil and Other Systems of Foreign Law,* Childs & Peterson, 1856.

58 András Back (ed.): *Közigazgatási szakvizsga: Kül- és biztonságpolitikai ágazat*. Budapest, Magyar Közigazgatási Intézet, 2002.

59 Nóra Chronowski – József Petrétei: *Szuverenitás*. In: András Jakab – Miklós Könczöl – Attila Menyhárd – Gábor Sulyok (eds.): *Internetes Jogtudományi Enciklopédia Alkotmányjog rovat*, rovatszerkesztő: Bodnár Eszter, Jakab András, 2020.

or agreement of others.[60] These concepts and questions will be further explored in the section dealing with the concept of constitutional identity.

The basic political and constitutional structures of a Member State form a framework within which the issue of essential state functions can be interpreted.[61] The exact nature of these functions is important when it comes to the Member States' competence in which the transfer of competence is involved about EU decision-making processes.[62]

Additional essential state functions besides national security include ensuring the territorial integrity of the State and maintaining law and order.

Territorial integrity and political independence are the two core elements of statehood. Territorial integrity refers to the territorial 'oneness' or 'wholeness' of the State. It protects the territorial framework of the independent State and is an essential foundation of the sovereignty of States.[63] This concept is ultimately tied to the principle of the right of nations to self-determination.[64] The State, to exercise its sovereignty to the fullest extent, should possess the following qualifications: a permanent population, a defined territory, a government, and the capacity to enter into relations with other states.[65] Of these requirements, a defined territory is what this function protects.

It is especially important to mention this specific essential state function when we talk about EU integration issues. It is because there are real-life disputes even today on the question to which nation a certain territory belongs to. For example, since the 1991 break-up of Yugoslavia, there has been a dispute over the contested northern Adriatic waters and a sliver of land between Croatia and Slovenia. The two sides eventually agreed to hand the matter over to the international tribunal in The Hague and the agreement allowed Croatia to join the EU in 2013. The deal was included in Croatia's accession agreement to stop

60 Barnabás Kiss: A nemzetközi jog hatása a szuverenitás „klasszikus" közjogi elméletére Szabó József munkássága tükrében. *Acta Universitatis Szegediensis, Acta juridica et politica,* 77/2014. 313–322.

61 Stelio Mangiameli: The European Union and the Identity of Member States. *L'Europe en Formation,* 369/2013, Iss. 3. 151–168.

62 Sacha Garben – Inge Govaere (eds): *The Division of Competences between the EU and the Member States Reflections on the Past, the Present and the Future*. London, Hart Publishing, 2017.

63 Samuel K.N. Blay: Territorial Integrity and Political Independence. *The Max Planck Encyclopedia of Public International Law Volume IX,* 2012. 859–870.

64 Ağalar Abbasbeylí: The territorial integrity of the states and the principle about "the right of nations to self-determination" in the modern era. *The Journal of International Social Research,* 10/2017, Iss. 49. 62–67.

65 Francis Anselm: Threats to territorial integrity. In: A.T. Bryan – J.E. Greene – T.M. Shaw (eds.): *Peace, Development and Security in the Caribbean*. London, Palgrave Macmillan, 1990. 224–240.

Slovenia from vetoing its membership. However, the recommendation by the arbitration tribunal was never implemented by Zagreb. In 2017 Slovenia argued that Croatia was violating EU law and as such could be sued.[66]

The third essential state function that was named in the text of the Treaty on the European Union is maintaining law and order. Law and order denote a negative form of peace secured among the members of a given social or political order. Minimally, it is an appeal to restore public order to conditions classed as disordered or to defend it against potential or articulated threats. Although social and political scientists tend to concur that it is determined by tradition and convention, for some, the fact of disorder is sufficient to uphold projects for law enforcement and order maintenance. Others emphasize that facts about disorder are socially made. Law and order are not neutral categories for the interpretation of disorder, let alone for intervention. It is an ideological or discursive construct that warrants scrutiny. For still others it is not just an element of ideology but a component in the technology of neoliberal government which needs to be studied in terms of its functions and structural effects. Some question whether law ought to be conjoined with order at all. They argue that no stable or necessary relation exists between the two and that the very idea of law and order is incongruous, that is to say, law and disorder or law and order are opposed to one another. Law and order is not on this account a solution to all disorder, only those types that call for a specific policy response because they disturb or threaten to disturb the public peace, or involve face-to-face conflict among two or more persons.[67] This function of the state ties back to the idea of a social contract, whereby the most important reason behind the existence of a state is to facilitate the ability of its citizens to live together in peace.[68]

3. Further possible essential state functions

A general overview of the most basic state functions has been presented. Now, let me identify what else could be counted among these functions. We must

[66] Christopher M. Hartley: Under the Istrian Sun: Navigating international law solutions for the Slovenia-Croetia Maritime Border Dispute. *Boston University International Law Journal,* 38/2020, Iss. 2. 286–321.

[67] Nick Cheesman: Law and Order. *Annual Review of Law and Social Science,* 18/ 2022. 263–281.

[68] G. Burnyeat – M. Sheild Johansson: An anthropology of the social contract: The political power of an idea. *Critique of Anthropology, 42(3)* 2022. 221–237. https://doi.org/10.1177/0308275X221120168.

distinguish between necessary, optional, essential, and non-essential functions.[69] The necessary functions are those that all governments must perform to justify the existence of the state they effectively govern. In other words, they capture the essence of statehood, so they could be called essential state functions. These include, for example, the maintenance of peace, order and security, the protection of persons and property, and the preservation of external security. These are the original primary functions of the state.[70] Meanwhile, the optional, or non-core, functions of the state are aimed at improving the general welfare – and can be performed by private organisations. These include public welfare, public education, industrial regulation and health and safety standards. Above all, the functions of the state are to preserve legal order and to protect all rights of individuals, families, private associations, and the church. It shall also aim to promote, by positive means, the general welfare of all those goods which contribute to the attainment of this end.[71]

Based on this classification, the question is what could be identified as necessary.

In my opinion, we should look at those functions that heavily affect the integration process of the EU when we attempt to find an answer to the relevant questions. First of all, due to the increasing importance of media, especially social media, the effective regulation of this area within the framework of necessary legal frameworks should be considered an essential function of the state. Similar tasks of countries include protecting the privacy and personal data of their citizens as well as protecting them from misinformation. An interesting further question is posed by the rapid spread of Artificial Intelligence, which could be used and used to spread false information to the public. In this case as well as in the aforementioned two phenomena, the problem is global. This is why we must create solutions on an international level. However, the actual effective action must be taken on the level of each state, as they are the ones who have information about the way their citizens think, consume media, approach issues of privacy, etc. This point of view is unfortunately largely overlooked in the process of integration and sharing competence in the European Union. However, we must consider in our discussion what the concept of essential state functions might entail.

[69] James Wilford Garner: *Introduction to Political Science: A Treatise On the Origin, Nature, Functions, and Organization of the State*. Sagwan Press, 2018. 318.

[70] Lucius Hudson Holt: *An Introduction to the Study of Government*. Forgotten Books, 2017. 285–305.

[71] Theodor Meyer: *Institutiones Iuris Naturalis, Seu, Philosophiae Moralis Universae*: Ius Naturae Generale Editio 2. Emendata. 1906, Nabu Press, 2010.

These are new problems but will require cooperation. Therefore, it is worth illustrating that while Member States should become stronger in performing their functions and exercise their sovereignty, it is necessary that their integration and shared responsibility remain on an EU level.

4. Conclusion

The answer to the questions imposed by new challenges in the EU requires a strong common answer from all Member States. To achieve the best possible scenario of cooperation and positive integration, we should lay down the groundwork of what Member States must carry as their own responsibility and right, how they can effectively perform their duties to their citizens and what the complicated concept of essential state functions even entails. With the Convent approaching and discourse strengthening around the issue of the European Union's future, our only solution is to move forward with specifying the goals of states as well as of the EU itself. This is why essential state functions may just come to the forefront of undoubtedly influential discussions during the next few years.

Literature

Ağalar Abbasbeylí: The territorial integrity of the states and the principle about "the right of nations to self-determination" in the modern era. *The Journal of International Social Research,* 10/2017, Iss. 49. 62–67.

Zoltán Angyal: Az Európai Alkotmányszerződés ratifikációs válsága, avagy a közvetlen demokrácia és az integráció kollíziója. *Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica*, Tomus XXV/1. 2007. 175–190.

Krisztina Arató – Ágnes Lux: Az Európai Unió alkotmányozási kísérlete. In: András Jakab – András Körösényi (eds.): *Alkotmányozás Magyarországon és máshol*. Budapest, Új Mandátum Könyvkiadó, 2012. 177–200.

Minna Ålander – Michael Paul: Moskau bedroht die Balance im hohen Norden Angesichts der russischen Kriegspolitik rücken Finnland und Schweden näher an die Nato, *Stiftung Wissenschaft und Politik Comment*, 2022/C 24, 31.03.2022, doi:10.18449/2022A19

András Back (ed.): *Közigazgatási szakvizsga: Kül- és biztonságpolitikai ágazat*. Budapest, Magyar Közigazgatási Intézet, 2002.

D. Bigo; J. Jeandesboz; M. Martin-Maze; F. Ragazzi: *Review of Security Measures in the 7th Research Framework Programme FP7 2007-2013,* Brussels: European Parliament, 2014. DOI:10.2861/62647

Samuel K.N. Blay: Territorial Integrity and Political Independence, *The Max Planck Encyclopedia of Public International Law Volume IX,* 2012. 859-870.

John Bouvier: *A Law Dictionary Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union; with References to the Civil and Other Systems of Foreign Law,* Childs & Peterson, 1856.

Hermann – Josef Blanke – Stelio Mangiameli (eds.): *The Treaty on European Union (TEU) A Commentary*. Heidelberg–New York–Dordrecht–London, Springer, 2013. 195.

G. Burnyeat – M. Sheild Johansson: An anthropology of the social contract: The political power of an idea. *Critique of Anthropology, 42(3)* 2022. 221-237. https://doi.org/10.1177/0308275X221120168

Nick Cheesman: Law and Order. *Annual Review of Law and Social Science,* 18/ 2022. 263–281.

Nóra Chronowski – József Petrétei: *Szuverenitás*. In: András Jakab – Miklós Könczöl – Attila Menyhárd – Gábor Sulyok (eds.): *Internetes Jogtudományi Enciklopédia Alkotmányjog rovat*, rovatszerkesztő: Bodnár Eszter, Jakab András, 2020.

Attila Fábián: *Az integráció elmélete*. Sopron, Nyugat-magyarországi Egyetem Kiadó, 2011.

Stefano Fella: The Conference on the Future of Europe: proposals and next steps, 2022. https://commonslibrary.parliament.uk/research-briefings/cbp-9551/

Neil Fligstein – Doug McAdam: The Field of Theory, *Contemporary Sociology: A Journal of Reviews, Volume 43, Issue 3,* https://doi.org/10.1177/0094306114531283a

Francis Anselm: Threats to territorial integrity. In: A.T. Bryan – J.E. Greene – T.M. Shaw (eds.): *Peace, Development and Security in the Caribbean*. London, Palgrave Macmillan, 1990. 224–240.

Sacha Garben – Inge Govaere (eds): *The Division of Competences between the EU and the Member States Reflections on the Past, the Present and the Future*, London, Hart Publishing, 2017.

James Wilford Garner: *Introduction to Political Science: A Treatise On the Origin, Nature, Functions, and Organization of the State*, Sagwan Press, 2018. 318.

Göncz Borbála: Európai identitás?! *Pro Minoritate, 22(1).* 2011. 79–95. http://www.prominoritate.hu/folyoiratok/2013/ProMino-1301-05-Goncz.pdf.

Gustav Gressel: In Europe's defence: *Why the EU needs a security compact with Ukraine, European Council on Foreign Relations*. Policy Brief, 30 September 2022.

B. Guastaferro: Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause, *Yearbook of European Law 263*, 2012. 271–285.

Amelia Hadfield – Simon Lightfoot: Shifting priorities of the EU as a development actor: context and consequences, *Global Affairs,* 7:4, 2021, 487-504, DOI: 10.1080/23340460.2021.1985400

Péter Halmai: *Európai gazdasági integráció*. Budapest, Dialóg Campus, 2020.

Christopher M. Hartley: Under the Istrian Sun: Navigating international law solutions for the Slovenia-Croetia Maritime Border Dispute. *Boston University International Law Journal,* 38/2020, Iss. 2. 286–321.

Lucius Hudson Holt: *An Introduction to the Study of Government*, Forgotten Books, 2017. 285-305.

Barnabás Kiss: A nemzetközi jog hatása a szuverenitás „klasszikus" közjogi elméletére Szabó József munkássága tükrében. *Acta Universitatis Szegediensis, Acta juridica et politica,* 77/2014. 313–322.

Péter Kruzslicz: *A nemzeti alkotmányosság tagállami alapjai: a nemzeti szuverenitás és a nemzeti alkotmányos önazonosság, különös tekintettel a francia jogelméletre és a magyar joggyakorlatra*. Doktori értekezés, Szeged, 2019.

José M. Magone: *The Politics of Southern Europe: Integration into the European Union*. Westport Conn: Praeger. 2003.

Molnár Alíz: Az európai és a nemzeti identitás formálódó szerepe, *Prosperitas, 5 (1).* 2018. 114-124.

Jean Monnet: az Európai Unió megszületése mögött meghúzódó egyesítő erő, https://european-union.europa.eu/principles-countries-history/history-eu/eu-pioneers/jean-monnet_hu

Nicolai von Ondarza – Marco Overhaus: Rethinking Strategic Sovereignty German Narratives and Priorities for Europe after Russia's Attack on Ukraine, *Stiftung Wissenschaft und Politik Comment*, 2022/C 31, 28.04.2022, doi:10.18449/2022C31.

Tibor Pintér: Az európai integráció – gazdasági és politikai alapú elméleti megközelítések. *Polgári Szemle,* 13/2017. Iss. 4-6, 341–364.

Robert Podolnjak: Explaining the Failure of the European Constitution. A Constitution-Making Perspective, *Collected Papers of Zagreb Law Faculty, Zagreb Law Faculty,* 57/2007, Iss. 1.

Jochen Rehrl (ed): *Handbook on CSDP The Common Security and Defence Policy of the European Union*, Federal Ministry Republic of Austria, Volume I Fourth Edition, ISBN: 978-3-902275-51-6

Denys Simon: Les fondements de l'autonomie du droit communautaire in acte du colloque, *Droit international et droit communautaire, perspectives actuelles,* Bordeaux, Párizs, A Pedone, 2000. 209-249.

Stelio Mangiameli: The European Union and the Identity of Member States, *L'Europe en Formation, vol. 369, no. 3,* 2013, 151-168.

Theodor Meyer: *Institutiones Iuris Naturalis, Seu, Philosophiae Moralis Universae*: Ius Naturae Generale Editio 2. Emendata. 1906, Nabu Press, 2010.

Patrik Szabó: A felszín alatt. Adalékok az alkotmányos identitás elméleti és dogmatikai problémáihoz. *Közjogi Szemle,* 3/2019.

Norbert Tribl: *Az alkotmányos identitás funkciója és alkalmazhatósága a szupranacionális térben*. Doktori értekezés, Szegedi Tudományegyetem, 2020.

Paul Whiteley: Insight: Why Britain really voted to leave the European Union, University of Essex, https://www.essex.ac.uk/research/showcase/why-britain-really-voted-to-leave-the-european-union

CHALLENGES POSED BY DIGITAL PLATFORMS AND ACTIONS TAKEN BY THE EU AND TURKEY

Fatma Ceren Morbel[1]

ABSZTRAKT ■ A digitális platformok folyamatos fejlődésével párhuzamosan ez a dokumentum az általuk jelentett számos kihívást vizsgálja, különös tekintettel az Európai Unióra (EU) és Törökországra. A globális piacokat továbbra is a digitális gazdaság alakítja, ami megköveteli a döntéshozóktól, hogy egyensúlyt teremtsenek az innováció, a verseny és a fogyasztóvédelem, valamint a szabályozás között. Miután a digitális platformok különálló kihívásokkal szembesültek, mind az EU, mind Törökország megpróbálta szabályozni őket, ami rávilágít a tisztességes és versenyképes digitális környezet fenntartásának összetettségére. A kutatás konkrétan két kulcsfontosságú szabályozási kezdeményezésre összpontosít: a DMA és a hasonló problémákkal foglalkozó török módosítástervezetre. A DMA eredményeként a fogyasztók és a vállalkozások védelmet élveznek az ilyen platformok által támasztott tisztességtelen feltételekkel szemben. E tanulmány célja a DMA és a török versenytörvény javasolt módosításának összehasonlítása.

Kulcsszavak: Digitális piacok, uniós versenyjog, digitális piacokról szóló törvény, török versenyjog, 4054. számú törvény a verseny védelméről, kapuőrök, digitális gazdaság.

ABSTRACT ■ As digital platforms continue to evolve, this paper examines many challenges they present, with a special focus on the European Union (EU) and Turkey. Global markets continue to be shaped by the digital economy, which requires policymakers to balance innovation, competition and consumer protection with regulation. Having faced distinct challenges from digital platforms, both the EU and Turkey have attempted to regulate them, exposing the complexity of maintaining a fair and competitive digital environment. Specifically, the research focuses on two key regulatory initiatives: the EU's Digital Markets Act (DMA) and the Turkish draft amendment that addresses similar concerns. As a result of the DMA, consumers and businesses are protected from unfair conditions imposed by such platforms. The paper aims to compare the Digital Markets Act with the proposed amendment to the Turkish Competition Law.

Keywords: Digital markets, EU competition law, Digital Markets Act, Turkish competition law, Law No. 4054 on the Protection of Competition, Gatekeepers, Digital economy.

[1] PhD student, Faculty of Law, Károli Gáspár University of the Reformed Church in Hungary, fcerenmorbel@gmail.com.

1. Introduction

Digital platforms have revolutionised the way societies interact, conduct business, and share information in the dynamic landscape of the digital age. As digital ecosystems have grown rapidly, they have introduced severala number of new challenges, requiring regulatory bodies worldwide to reevaluate and adapt their approaches.

The digital economy has proven its transformative power, fostering innovation, global connectivity, and economic growth. Nevertheless, concerns have been raised about the concentration of power among a few dominant players, anti-competitive practices, and potential exploitation of user data. As a result, companies hold power that can be misused unfairly. This will likely lead to several undesirable consequences such as economies of scale, network effects, and high switching costs that may keep users locked into these platforms.[2]

As reported by *The Economist* in 2017, the world's most valuable resource is no longer oil, but data, since Big Data can be used to acquire customers, analyse competition/pricing, and optimise distribution, marketing and branding efforts. Due to this change, monopolies have also changed. During the 1800s, railway and subway companies dominated the landscape, whereas today big tech companies hold these positions.

Several EU countries have begun a legislative process in this area to address the challenges posed by big tech companies, but since these platforms provide services both within and across borders, a European instrument is needed to address these challenges. Consequently, these efforts created the DMA.

Other than the DMA, other countries are also taking steps to regulate digital platforms. As an example, Turkey's new proposal to amend its Competition Law (Law No. 4054 on the Protection of Competition) has a strong similarity to the DMA.

There are two primary objectives of the DMA, namely, contestability and fairness. Nevertheless, contestability is not solely about the ability of new competitors to enter markets and challenge incumbent firms. Rather, it also refers to the ability of markets to remain open and competitive. In this evaluation, the main objective differs from that of current competition law assessments,

[2] Francesco Ducci: Gatekeepers and Platform Regulation Is the EU Moving in the Right Direction? *SciencesPo Chair Digital, Governance and Sovereignty* (2021) 4. https://www.sciencespo.fr/public/chaire-numerique/wp-content/uploads/2021/04/GATEKEEPERS-AND-PLATFORM-REGULATION-Is-the-EU-moving-in-the-Right-Direction-Francesco-DUCCI-March-2021-2.pdf.

which are designed to determine whether a particular behaviour adversely affects consumer welfare.[3]

As in the DMA, the Draft Amendment to Turkish Competition Law ("Draft Amendment") stated that one of the objectives of the Turkish Competition Law is to ensure that fair and contestable markets are established and protected.[4] Similar to the DMA, the Draft Amendment was drafted to keep the regulations current with the new business models that emerge from technological advancements and digitisation.

The DMA draws significant inspiration from past cases of competition law as complementary legislation to the EU competition framework. In addition to its explicit objectives, the DMA aims to foster more competition and innovation within the digital market to address market failures. The goal is to maintain coherence and legal certainty throughout the European Union, recognising the evolving nature of the digital landscape. Furthermore, the Draft Amendment expands the scope of Turkish competition law in a parallel manner. To prevent any potential abuse of power, it encompasses prohibited conduct and mandates obligations for entities with substantial market power in core platform services. By comparing the DMA and Draft Amendment, it is evident that both have similar objectives which reflect on a concerted effort to address the challenges associated with digital technology and to promote fair competition and innovation.[5]

This article aims to analyse comprehensively the DMA and its potential impact on the digital economy, through a comparison of its key provisions with those articulated in the Draft Amendment. The paper explores the intricacies of both regulatory frameworks. It aims to shed light on their intended purposes and potential impact on businesses and consumer protection in the European Union as well as in Turkey. Within this context, the article will define and elaborate upon the concept of a gatekeeper and outline the responsibilities assigned to them under the DMA. In this paper, a comparative analysis will be provided, outlining both the criteria established by the DMA and by Turkish law. Additionally, the

[3] Wolfgang Kerber – Louisa Specht-Riemenschneider: *Synergies between Data Protection Law and Competition Law*. Berlin, Verbraucherzentrale Bundesverband e.V., 2021, 65.

[4] Karaduman & Esin: Part 2: The Draft Amendment to the Law No. 4054 on the Protection of Competition in the footprints of the DMA?, 2022, https://www.lexology.com/library/detail.aspx?g=d67bdbcf-6f58-4dad-ba27-b44c0594211b.

[5] Bahadir Balki – Nabi Can Acar – Helin Yüksel – Mehmet Mikail Demir – Seda Eliri, Erdem Aktekin: *A New Age for Digital Markets in Turkey? The Draft Amendment to the Law No. 4054 on the Protection of Competition*. 2022, https://competitionlawblog.kluwercompetitionlaw.com/2022/10/25/a-new-age-for-digital-markets-in-turkey-the-draft-amendment-to-the-law-no-4054-on-the-protection-of-competition/.

article sheds light on the consequences of non-compliance and the measures envisaged by both legislations in response to such non-compliance.

2. Defining "Gatekeepers" and "Undertakings holding a significant market power" in both law

Article 3 of the DMA defines a gatekeeper as a company that has a significant impact on its internal market and provides a core platform service that allows business users to access the end user market. Furthermore, it has an entrenched and durable position in its business operations. Alternatively, it is foreseeable that such a position will be achieved in the near future.

The relevant company must meet the following quantitative thresholds to meet these three qualitative criteria:

"(a) it had annual EU turnover of at least EUR 7.5 billion in each of the last three financial years, or where its average market capitalisation or its equivalent fair market value was at least EUR 75 billion in the last financial year, and it provides the same core platform service in at least three Member States; (b) it provides a core platform service that in the last financial year has at least 45 million monthly active end users and at least 10,000 yearly active business users in the EU; and (c) the thresholds in (b) were met in each of the last three financial years."

To be defined as a gatekeeper, the company should provide one of the core platform services below:

"(a) online intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services; (e) number-independent interpersonal communications services; (f) operating systems; (g) web browsers; (h) virtual assistants; (i) cloud computing services; (j) online advertising services provided by an undertaking that provides any of the other core platform services.[6]*"*

In the Draft Amendment, the core platform services are described in the same manner.

The term "gatekeeper" is not used in it. Instead, it is referred to as "an undertaking holding significant market power". Under the Draft Amendment, such an undertaking is able to provide one or more core platform services on a large scale and operates in a manner that significantly impacts end user or business user activities. Also it has the power or is expected to be able to maintain

[6] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), Article 2 (2).

this impact over the long run. However, the Draft Amendment anticipates that the Competition Board will issue a further communiqué to determine the thresholds of the concept of "undertakings holding significant market power".[7]

Under the Draft Amendment, there are qualitative and quantitative criteria that should be considered in the designation of "an undertaking holding significant market power". The quantitative criteria can include the annual gross revenue, the number of end-users, or the number of business users. On the other hand, qualitative criteria can be network effects, ownership of data, vertical integration and conglomerate structures, economies of scale and scope, lock-in and tipping effects, switching costs, multihoming, user trends, and mergers and acquisitions that are conducted by the undertaking.

Both the DMA and the Turkish Draft Amendment exhibit notable convergence in their definitions of the term "gatekeeper" or "undertaking holding significant power", especially regarding quantitative and qualitative criteria such as size, durability, and gateway status. There exists a striking alignment between these regulatory frameworks concerning the parameters used to designate an entity as a "gatekeeper" or an "undertaking holding significant power" in digital markets. By applying this parallel approach, both the EU and Turkey stress the recognition of the nuanced challenges presented by entities with significant market power, while also establishing a harmonised framework for identifying and regulating gatekeepers, reflecting a collaborative approach to manage the complex dynamics of the digital landscape today. Therefore, the only difference seems to be the use of different terms to describe the same concept.

3. Similar core obligations in the DMA and the Draft Amendment

Both the DMA and the Draft Amendment have very similar objectives, which can be seen in interoperability, access to data, advertising, contracts outside the platform, and self-preferencing.

According to the Draft Amendment, interoperability should be effective and free between core platform services and related products or services.[8] Due to the importance of interoperability to the EU, Articles 6 (7) and 7 define the

[7] Balki et al. 2022, 5.

[8] Gen Temizer: Turkish Competition Law 2.0: Would you like your DMA with some Hot Turkish Spice?, 2022, https://www.lexology.com/library/detail.aspx?g=59256170-eb9a-44ce-9a91-b6691417d9d8.

obligations related to interoperability which regulate both interoperability in general and interoperability of messenger services.

In terms of non-public data, the two regulations are similar, as the DMA highlights in Article 6 (2):

"The gatekeeper shall not use, in competition with business users, any data that is not publicly available that is generated or provided by those business users in the context of their use of the relevant core platform services or of the services provided together with, or in support of, the relevant core platform services, including data generated or provided by the customers of those business users."

Both regulations require gatekeepers (in the DMA) and undertakings with significant market power (in the Draft Amendment) to refrain from making the products and services they provide to businesses or end users dependent on other products and services they provide. It is also prohibited for business users and end users to be required to register or subscribe to any core platform services if this undertaking holds significant market power over accessing, logging in, or registering for these services.[9]

The Turkish amendment imposes separate obligations on advertisers, publishers, advertising intermediaries, and third parties authorised by them providing online advertising services. It is therefore necessary to have access to information regarding pricing conditions, auction processes, and pricing principles as well as to free, continuous, and real-time information regarding the visibility and usability of the advertising portfolio.[10]

According to Article 5 (9) gatekeepers must provide, "on request, advertisers and publishers to which it supplies advertising services with information about the price paid by the advertiser and publisher, as well as the amount or remuneration paid to the publisher for the publishing of a given ad; this must be provided for each of the relevant advertising services provided by the gatekeeper."[11]

Under the Draft Amendment, an undertaking holding a significant market power should allow business users to make agreements with other channels. Similarly, according to the DMA, a gatekeeper should allow their business users to conclude contracts outside the gatekeeper's platform.

Furthermore, regarding self-preferencing, the Draft Amendment requires undertakings with significant market power to refrain from discriminating against their products and services (whether by ranking, scanning, or indexing),

[9] Balki et al. 2022, 5.

[10] Temizer 2002, 8.

[11] Rosenauer Philipp – Jung Claudia: Concrete implication of the Digital Markets Act on "Big Tech". https://www.pwc.ch/en/insights/regulation/dma-implication.html

and to ensure fairness and transparency in the relevant circumstances.[12] Moreover, by Article 6 (5) of the DMA, gatekeeper platforms are prohibited from self-preferencing when self-preferencing involves a better treatment of first-party products and services in ranking and indexing and crawling as compared to third-party products and services.[13]

The Turkish amendment states that undertakings with significant market power should allow end users to easily uninstall software, applications or app stores that have been preinstalled into the operating system of the devices. Also, end users should be able to switch to another application, software, or app store, install and use third-party software, applications, or app stores effectively, to provide default settings to be easily changed. Furthermore, users are allowed to choose third-party software, applications or app stores by default according to their preferences and to fulfil technical requirements.[14] It is required under Article 6 (3) and (4) of the DMA to allow the uninstallation of pre-installed software and the modification of default settings as well as the installation of applications. Moreover, Article 6 (6) prohibits restrictions on the possibility of switching.

As stated above, it can be seen that the DMA and Draft Amendment share many similar objectives and obligations. It is because both laws seek to achieve fair, open, and beneficial markets for businesses and consumers.

4. Sanctions in case of non-compliance in the DMA and the Draft Amendment

The commission is responsible for enforcing the DMA. Gatekeepers who violate their obligations may be fined up to 10% of their worldwide annual turnover or up to 20% if they commit the same violation repeatedly. In addition, the gatekeeper may be required to pay a periodic penalty of up to 5% of its average daily turnover.[15]

An administrative fine may be imposed by the Ministry on providers of electronic commerce intermediary services in Turkey. Furthermore, if an

[12] Balki et al. 2022, 5.
[13] Peitz Martin: The Prohibition of Self-Preferencing in the DMA. *Cerre Issue Paper*, 2022, 5.
[14] Balki et al. 2022, 5.
[15] European Commission, The Digital Markets Act: ensuring fair and open digital markets, 12 October 2022.

undertaking violates the Competition Law, it may be subject to an administrative fine of up to 20% of its annual gross revenue.[16]

5. Conclusion

In conclusion, the DMA in the EU and the Draft Amendment share a common purpose in addressing the escalating dominance of digital platforms within the digital economy, emphasising the imperative of fostering fair competition. Despite being tailored to their respective jurisdictions, both regulatory frameworks share a commitment to ensuring fair and contestable markets. Their shared emphasis on defining core obligations that reflect on the unified goal of creating a regulatory environment that benefits both businesses and end users alike. This effort aims to ensure that consumers are protected from exploitation, platforms are held accountable for avoiding unfair bias, and businesses can engage in fair competition on an even playing field.

Literature

Bahadir Balki – Nabi Can Acar – Helin Yüksel – Mehmet Mikail Demir – Seda Eliri, Erdem Aktekin: *A New Age for Digital Markets in Turkey? The Draft Amendment to the Law No. 4054 on the Protection of Competition*. 2022, https://competitionlawblog.kluwercompetitionlaw.com/2022/10/25/a-new-age-for-digital-markets-in-turkey-the-draft-amendment-to-the-law-no-4054-on-the-protection-of-competition/.

Francesco Ducci: Gatekeepers and Platform Regulation Is the EU Moving in the Right Direction? *SciencesPo Chair Digital, Governance and Sovereignty*, 2021. https://www.sciencespo.fr/public/chaire-numerique/wp-content/uploads/2021/04/GATEKEEPERS-AND-PLATFORM-REGULATION-Is-the-EU-moving-in-the-Right-Direction-Francesco-DUCCI-March-2021-2.pdf.

Karaduman & Esin: Part 2: The Draft Amendment to the Law No. 4054 on the Protection of Competition in the footprints of the DMA?, 2022, https://www.lexology.com/library/detail.aspx?g=d67bdbcf-6f58-4dad-ba27-b44c0594211b.

Wolfgang Kerber – Louisa Specht-Riemenschneider: *Synergies between Data Protection Law and Competition Law*. Berlin, Verbraucherzentrale Bundesverband e.V., 2021.

Martin Peitz: The Prohibition of Self-Preferencing in the DMA. *Cerre Issue Paper*, 2022.

[16] Karaduman & Esin 2022.

Philipp Rosenauer – Claudia Jung: Concrete implication of the Digital Markets Act on "Big Tech". https://www.pwc.ch/en/insights/regulation/dma-implication.html
Gen Temizer: Turkish Competition Law 2.0: Would you like your DMA with some Hot Turkish Spice?, 2022, https://www.lexology.com/library/detail.aspx?g=59256170-eb9a-44ce-9a91-b6691417d9d8.

GYPSIES WITHOUT SUPPORT: REPRESENTATION OF THE ROMA MINORITY IN THE HUNGARIAN PARLIAMENT

Zoltán Orsós[1]

ABSZTRAKT ■ A nemzetiségek parlamenti képviseletére irányuló kérdéshalmaz a rendszerváltás óta kiemelt szerepet kap a politikai arénában. Számos olyan kísérlet volt arra vonatkozóan, hogy a nemzetiségek képviseletre egy egységes, átfogó, strukturális szabályozást hozzanak létre, azonban a vonatkozó jogalkotás hiányát igazán csak a 2010-es parlamenti ciklus új ideológiája igyekezett megoldani. Az új választási törvény megteremtetésével egyidejűleg a Kormány létrehozta a nemzetiségi, preferenciális mandátum intézményét, valamint az előző hiányában a nemzetiségi szószóló útján biztosítja a nemzetiségek parlamenti képviseletét. A tanulmány a nevezett két jogintézmény alkotmányjogi dilemmáit kívánja feltárni és vizionálni kívánja a jogalkotókra váró jogrendszer átalakítással összefüggő kihívását megoldási javaslatokkal segítségül hívva a magyar szakirodalom leggyakrabban hivatkozott szerzőinek gondolatait.

Kulcsszavak: nemzetiségi szószóló, kedvezményes mandátum, alkotmányjog, parlamenti képviselet, roma

ABSTRACT ■ Since the change of regime, a set of questions concerning the parliamentary representation of nationalities has become prominent in the political arena. There have been many attempts to create a unified, comprehensive, structural regulation for the representation of nationalities. However, based on a new ideology, in the 2010 term the Parliament tried to remedy the lack of relevant legislation. Simultaneously with the framing of the new election law, the government established the institution of the preferential mandate of nationalities. Also, in the absence of such a mandate, the law ensured the parliamentary representation of ethnic minorities through the advocates of nationalities. This study aims to explore the constitutional dilemmas of the two legal institutions mentioned and examines the challenges of the transformation of the legal system awaiting the legislators. The paper utilizes the ideas of the most frequently cited authors of the Hungarian literature to propose a solution.

Keywords: Nationalities Advocate, preferential mandate, constitutional law, parliamentary representation, Roma

[1] PhD Student, Doctoral School of Law and Political Sciences, Károli Gáspár University of the Reformed Church in Hungary

1. Introduction

Hungary was among the first countries to create a system to protect minority rights. Moreover, the official representation of minorities offers an individual approach to promoting Roma participation in Hungarian public life. In the 1990's Roma affairs were not represented in a comprehensive institutional framework. Since the change of the political system, the question of the parliamentary representation of national minorities has been given priority in public life. There was no official representation in Parliament that ensured the preservation of the identity and culture of the minorities. There were many attempts to create a unified, comprehensive, structural regulation for their official representation. More than twenty years have passed since then, and the political climate in Hungary has ensured the advancement and representation of its national minorities. The legislative solution was proposed in 2010. The system of preferential quotas was introduced, and the National Advocacy Institution of the Representation of Minorities was created.[2]

Many questions arise regarding the constitutional right to exist of the mentioned institutions, which may call into question the reality of the political goodwill.

In this essay, I will explain the background of this institution starting from its formation. Also, by analysing the case of Bakirdzi and E.C v. Hungary brought by the European Court of Human Rights (ECHR), I will illustrate why the institution does not meet the constitutional requirements. With concrete examples, I present the activities of the Roma nationality advocate as well as examine the consequences of the lack of a Roma minority advocate.

2.1. National Advocacy Institution

Nationalities that are included in the list of minorities and recognized by the Parliament, but do not obtain the number of votes necessary for a preferential mandate, are entitled to send an advocate to the Parliament to be represented.

Originally, the primary task of the nationality advocate was to represent the given nationality in the Parliament. The advocated rights of the nationalities were mainly grouped around policies and parliamentary bills that affected their interests and rights. Due to the legal status of the official representative of a

[2] Zoltán Orsós*:* Roma nemzetiségi szószóló az Országgyűlésben: se vele, se nélküle? *Parlamenti Szemle*, 2/2022. 139–147.

given national minority, the advocates of nationalities do not have the right to vote in the Parliament. He or she can only speak at its sessions if, according to the opinion of the House Committee, the item on the agenda affects the interests and rights of the given minority. With the permission of the Speaker of the House – according to the general rules, after the speeches of factions – the nationality's advocate can make a speech before the parliamentary session's agenda. In addition, in extraordinary cases, he or she can also speak after the speeches of factions. They can also address questions to the Government and the members of the Government, as well as to the Commissioner of Fundamental Rights, the President of the State Audit Office and the Chief Prosecutor in matters affecting the interests and rights of nationalities within their scope of responsibilities. The nationalities advocate can also submit a proposal to the National Assembly for a resolution concerning nationalities. He or she is entitled to the rights above after taking the oath.[3]

2.2. Activities of the Roma nationality advocate

The first national advocate of the Roma minority was Félix Farkas. In the beginning, the legal institution was created to represent the nationalities. The Roma Advocate was not considered to be substantively active. Overall, the advocates were characterized by little interactivity. In particular, the Roma national advocate was strikingly inactive. He should have represented the cause of the largest nationality at the level of the Parliament, but instead, he used his institutional opportunity to speak only three times in four years. His first speech dates back to half a year after his election, where, in almost two minutes, he asked the government on behalf of the National Self-Governments living in our country (including all 13 nationalities) to disburse the increased funding as soon as possible. To fulfil his increased duties, and confirm the German advocate Imre Ritter, he asked for the government's support to increase the budget of ethnic municipalities.

In December 2017, JOBBIK called on a former member of the National Assembly to resign due to immoral and inhumane behaviour, namely, the member and her fellow party members joked about the victims of the Holocaust. This incident was called for punishment, or at least an apology.[4]

[3] https://www.parlament.hu/

[4] Date of meeting: December 11, 2017, speaking time: 2 minutes 18 seconds, Topic: Revealed statements of JOBBIK representatives. Speeches after the agenda. https://www.parlament.hu

Furthermore, on behalf of the Roma nationality, he expressed his gratitude to the government[5] for not using the idea of equal opportunities and the concept of catching up for propagandistic aims, but rather the government took real steps and made serious opportunities to integrate Roma people. In his evaluation speech, he thanked the government for the programs (e.g. scholarship programs, Christian Roma Vocational College Network) that created the opportunity to catch up.

The advocacy activities of Félix Farkas in the period between 2014 and 2018 are neither representative in number nor content. More than three years passed between the first and the second speech. During this period he should have proposed a speech on behalf of the Roma in many cases, and it would have been necessary for him to represent himself on behalf of the nationalities.

The activity of the Roma advocate between 2018-2022 was a productive period. He spoke a total of 26 times, touching on several topics. He spoke about the importance of defending against attacks on Gypsies, and the support for domestic Gypsies. He explained his position on the issues arising in relation to the 2020 budget and emphasized the importance of nurturing and preserving Roma culture. Also, in many of his speeches, he expressed his gratitude to the government for its moral and financial support, as well as the Parliament's commitment to Roma issues.

From a constitutional point of view, however, his speech in the debates related to the 2021 census, is questionable. Félix Farkas made it mandatory to answer questions related to his nationality, mother tongue and language use. According to him, it is necessary to assess the nationalities living in Hungary from the point of view of the tasks related to the national self-government system and the determination of the future budget, since the legitimacy of the national self-governments is determined by knowing numerically how many Hungarians belong to a certain nationality. In the census, which was postponed until 2022 due to the pandemic in 2020, the questions asked about mother tongue, nationality and language use were finally allowed to be answered voluntarily. According to him, in Hungary today, even as a private individual – not only as an advocate – one can proudly assume Gypsy origin. The KSH data related to nationality generated during the 2022 population census will be a good mirror to support or possibly refute the statement.

Félix Farkas repeatedly emphasized that, thanks to the government's policy, the Roma no longer must fear discrimination, the anger of the majority society,

[5] Date of meeting: December 12, 2017, speaking time: 4 minutes 43 seconds, Topic: The current situation of public education. Speeches after the agenda. https://www.parlament.hu

and discrimination against the Roma in the labour market. The advocate's policy was characterized by the defence of the government and the derogation of the opposition. According to the president of the ORÖ (National Roma Self-Government), he did not seek consensus and problem-solving on Gypsy issues, which mostly affect the Roma, but rather presented an image that compromised the government's position. The advocate spoke about the government's commitment to anti-segregation. In his speech before the agenda, he called on the opposition to "not try to incite the Gypsies with hate speech wrapped in sympathy". Meanwhile, in 2020, in the "Gyöngyöspata Segregation Trial", Prime Minister Viktor Orbán called the decision made by the Court in the review procedure deeply unfair, according to which "members of an ethnically dominant ethnic group will receive a large amount of money without any kind of work".[6]

2.3. Why does the system not meet the constitutional requirements?

Advocates represent minorities in the Parliament. The institution of advocates differs from an "ordinary" parliamentary representation in terms of its legal status, since advocates have fewer rights. From a constitutional point of view, the question of whether the legal institution can be considered as an effective representation in the Parliament has been raised. Based on the research so far, it can be said that the legislator did not necessarily create parliamentary representation by introducing the institution of advocates, since they do not have the necessary authority to implement representation, as they do not have the right to vote.[7]

A representative institution that does not have the right to vote, excludes interpellation at the meetings of the National Assembly, and can only speak if, according to the Judgment of the House committee, the item on the agenda affects the rights or interests of minorities cannot be called representation. They have the right to consult in the work of the standing committee, but only if the topic affects the rights or interests of the nationalities, or if the Speaker decides so.[8]

[6] Press Secretariat https://www.kuria-birosag.hu/hu/sajto/gyongyospatai-szegregacios-nem-vagyoni-karok-megteritesenel-karterites-megitelesenek-egyetlen

[7] See more details: Sándor Móré: A nemzetiségi szószólói intézmény jogi kerete és működésének első két éve. *Parlamenti Szemle*, 2/2016. 30–51, 38-39. https://parlamentiszemle.hu/wp-content/uploads/2017/09/parlamentiszemle-parlamentiszemle-20162-lapszam-2016-02-02cikk.pdf

[8] Móré (2016), 38-39.

If the advocate's most important task is to represent the given nationality in the Parliament, then their participation in the vote is very essential. It is impossible to represent a nationality in the Parliament without the right to vote. Nationalities are state-forming factors, which also presuppose the equality of rights of minorities. If minorities are state-creating factors and integral parts of the Hungarian nation, their right to vote in the Parliament should be guaranteed regardless of their nationality.

Although the existence of the right to vote would not necessarily solve the serious problems affecting nationalities, it could be aimed at creating legal equality relevant from a constitutional point of view and could provide a serious step forward in the political interests of nationalities. The primary purpose of the Basic Law was to ensure the participation of nationalities in the work of the National Assembly. It ensured participation in parliamentary work with the legal institution of nationalities advocates and the preferential quota system, but the actual representation of nationalities remained unresolved. It is not necessarily the stated goal of politics to give voting rights to representatives of nationalities with serious influence.

3. Case of BAKARDZI AND E.C. v. HUNGARY

Since 2014 the implementation of the electoral legislation created an individual solution for the minorities living in Hungary. By providing preferential rules, the government tried to create the possibility of specific political participation for the minorities. It should be emphasized that the new political ideology has managed to solve the set of legal questions regarding the choice of minorities that have arisen since the regime change. The Basic Law introduced in 2011 created and provided an opportunity for the political interests of the nationalities to be represented in the Parliament. In the National Creed, the government declared that the nationalities living in Hungary are an immanent part of the Hungarian political community, and expressed that they are state-forming factors.[9] The law gives the minorities the opportunity to establish local and national self-governments, and ensures the participation of the nationalities living in Hungary in the work of the Parliament[10], regulated in a separate pivotal law.[11]

[9] Basic Law of Hungary (April 25, 2011) National creed https://net.jogtar.hu/jogszabaly?docid=a1100425.atv#lbj57id5406.

[10] CASE OF BAKIRDZI AND E.C. v. HUNGARY (Applications nos. 49636/14 and 65678/14).

[11] A nemzetiségek jogairól szóló 2011. évi CLXXIX. törvény https://net.jogtar.hu/jogszabaly?docid=a1100179.tv.

After nearly ten years, the judgment of the European Court of Human Rights (hereafter: ECHR) on November 10, 2022, called for a reconsideration of the previously created nationality election legal model. According to the board's findings, the Hungarian regulations limit the possibility of the voters of national minorities to participate meaningfully in political decision-making, and the current electoral law affecting Hungarian nationalities does not sufficiently ensure the free expression of the people's opinion during the election of the legislative body.

The court started the proceedings nearly ten years ago (2014) at the initiative of a Hungarian citizen of Greek and Armenian nationality.[12] The ethnic minorities objected that the legal institutions for the election of nationalities introduced in 2014 have had a disenfranchising effect on them because, based on the nationalities statistical data, it is practically impossible for some nationalities to obtain a mandate during the parliamentary elections. There are ethnic groups in Hungary whose numbers do not even reach 20,000, thus, from their point of view, they are unable to obtain the preferential mandate in the Parliament provided by the government.

In addition, they complained that as some voters belonged to nationalities, the created legal system excluded them from the possibility of voting on the national party list. Additionally, they objected that they could only vote on the list drawn up by the assemblies of the National Self-Government representing the interests of the given nationalities. The right to secrecy of the election was also violated by the plaintiffs, due to the recording of the fact of voting on the list and the possibility of voting on a single list. Moreover, the nationality list is a closed list, which does not provide sufficient opportunity for the true expression of the voters' will.

According to ethnic minorities, the Hungarian national election regulatory system is also illegal, as it causes discrimination against minority voters compared to other "ordinary" parliamentarians. When the procedure was initiated, 140 voters were registered as Greek voters and 184 were Armenian, while 22,000 votes would have been needed to obtain a parliamentary mandate. It is also clear from the indicated data that those belonging to the nationality do not reach even 1% of the number of votes required by law and it would have been mathematically impossible to obtain the required preferential quota.[13]

[12] See the list of applicants in the annex to the Bakardzi and E.C. v. Hungary (App. no. 49636/14 and 65678/14) ECtHR (2022) (hereinafter: Judgment).

[13] 2014. évi országgyűlési választási szabályok. https://www.valasztas.hu

3.1. The government's position

According to the government, their primary task is to ensure political representation for the nationalities and to increase the participation of the nationalities in political life. The government's further argument was that the principle of equal suffrage would be violated if it ensured that a voter belonging to a nationality could vote for both the nationality list and a party list at the same time. The government emphasized that it is the free decision of every voter to register as a nationality voter or not, and that this can be changed afterwards before the elections are held. The government drew attention to an important point during the procedure, namely that the plaintiffs did not exhaust their domestic legal remedies. They would have had the opportunity to appeal to the local Electoral Commission, and in case of rejection, they could have filed a constitutional complaint.[14]

However, the jurisprudence of the last ten years shows that the legal regulation has had the opposite effect on the desired goal, since the majority of the 13 nationalities did not even have a chance to get close to the required number of votes defined by law for the parliamentary representatives representing the nationalities' interests to be elected to the Parliament. It should be noted, however, that in 2018 the advocate of the German nationality managed to obtain a mandate for the German nationality, and since then he has been representing the nationalities' constituents in the National Assembly.

3.2. Court position[15]

One might argue that the ECHR provides the state with wide discretion when it comes to creating its election rules. It does not follow from the requirement of the principle of equal treatment provided by the European Union and laid down in the Treaty of Rome that all votes must have the same weight during the elections, just as all candidates must have the same chances of winning. He came to the same conclusion during the proceedings of the ECHR when it came

[14] 35/1992. (VI. 10.) AB határozat: 2011 CLI on the Constitutional Court. Act § 26 (1) para. § 26 (1) Pursuant to Article 24, paragraph (2) point c) of the Basic Law, the person or organization involved in an individual case may file a constitutional complaint with the Constitutional Court if, in the court proceedings in the case, due to the application of a law contrary to the Basic Law, a) his rights guaranteed by the Basic Law have been violated, and b) he has already exhausted his legal remedies, or no legal remedies are available to him. https://net.jogtar.hu/jogszabaly?docid=a1100151.tv

[15] Orsós 2022.

to the fact that the Hungarian regulations violated Article 3 of the Convention. According to the Right to Free Elections, the High Contracting Parties undertake to hold free elections at simple intervals, by secret ballot, under conditions that ensure the election of the legislative body and the expression of the opinion of the people. The article does not impose a mandatory obligation, which means the introduction of a special system. States have a wide range of discretion in this regard. "Ensures the expression of the opinion of the people" means that all citizens receive equal treatment in their right to vote and exercise it. However, it does not follow that all votes must have equal weight in the outcome of the election, or that all candidates must have an equal chance of winning.[16]

Based on these points, the court examined whether the applicant's right to vote was really limited and whether the election rules created by the government excluded nationalities from political representation.

The court deemed preferential seat acquisition to be a legitimate solution. Electoral rules require parliamentary representation to achieve a certain level of reduced support and differentially prescribe a threshold of fewer votes compared to "ordinary" parliamentarians. However, the court pointed out that, considering the number of nationalities living in Hungary, the law still prescribed a higher preferential election threshold. Legally, the regulation seemed to be an excellent solution, but, in practice, it did not facilitate the actual representation of nationalities.

The court considered it worrisome that voters who vote for the nationalities list must renounce voting for the party list. The fact that voters can only vote for a single nationality list, which does not necessarily reflect their political views, hinders the true expression of the voters' will. The judgment declared that the right to the secrecy of the election is violated, as the persons present in the polling station obviously become aware that the nationality voter casts his vote for the persons on the nationality list due to the possibility of voting for a single list. Moreover, the nationality list is a closed list, which does not provide an opportunity to express the voters' will.

Based on these points, the ECHR did not accept the government's position and its arguments put forward and found that, overall, the Hungarian legal regulations aimed at this specifically limit the possibilities of the nationalities to meaningfully participate in political life. Also, the system hinders the participation of the nationalities in political decision-making. Based on the ECHR's declaration

[16] European Convention on Human Rights First Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 3. Paris, March 20, 1952. https://www.echr.coe.int/documents/convention_hun.pdf

that the Hungarian legislator violated Article 14 on freedom of expression, it was highlighted that, according to the judgment of the Court, the term "free expression" means that elections cannot be held under any pressure and voters cannot be forced to choose to vote for this or the other party list.[17]

The government requested that the case should be examined by the Grand Chamber of the ECHR to change the decision of the ECHR on November 10, 2022. However, the government failed to obtain a review of the decision, and thus the original decision of the European Court of Human Rights became final on May 19, 2023, which found the part of the Hungarian electoral system concerning nationality voting to be illegal and required its change. According to this, the part of the Hungarian electoral system regulating minority and nationality voting must be rewritten. On May 23, the Parliament voted to change the electoral procedure rules, but the amending package does not include the rewriting of the parts of the electoral system affecting nationalities based on the Strasbourg ruling. The government is obliged to do so by the Strasbourg judgment, so it must comply with the legal regulations for the representation of nationalities created in 2014 until the next parliamentary elections in 2026.

4. De lege ferenda

The ECHR decision created a challenge for the Hungarian legislators, since the justification of the judgment did not formulate any substantive positions regarding which legislative method and guarantee system should be used to ensure the image of nationalities without discrimination. The decision did not substantiate with specifics why the possibility of choosing between the nationality list and the party list would count as a deprivation of rights. It is because in the government's argument, they specifically drew attention to the fact that it is only the nationality voter's free decision to register himself in the nationality electoral register, which also provides the possibility to withdraw it before the elections are held. The solution lies in the hands of the Hungarian legislator and the political will of the government.

Based on the judgment, the most ideal legislative solution seems to be that the government provides the possibility of voting for the nationality list and for the

[17] European Convention on Human Rights Article 14. Freedom of expression: Everyone has the right to freedom of expression. This right includes the freedom to form an opinion and the freedom to learn and communicate information and ideas regardless of national borders and without the intervention of an authority. This Article does not prevent states from making the operation of radio, television or motion picture companies subject to licensing.

national party lists at the same time for those belonging to the nationality. From a voter's point of view, the following questions arise: why does belonging to a nationality have such a privilege and why additional rights are granted? It could create a violation of the principle of equal suffrage among the electorate, since the electorate belonging to the nationalities could thus send a representative to the legislature from two types of lists. This would result in the discrimination of voters who do not identify themselves as belonging to a nationality.

A prominent problem is the statistical impossibility of the preferential quota. That is to say, it is mathematically impossible for the 13 nationalities recognized in the law to obtain a mandate, since the number of certain minorities barely reaches 20,000. In conclusion, it can be considered a simple solution, the number of preferential quotas prescribed by law is reduced, thereby meeting the expectations supported by the ECHR. Based on the census data of the nationalities living in Hungary, the legislator should define the preferential quota as unrealistically low. To find a solution for the parliamentary representation of nationalities, the creation of a bicameral system has been formulated several times in the scholarship. It would mean a transformation of the Hungarian legislature into a bicameral one, where the second chamber would be the representative body of nationalities and other groups. However, in 2011, the legislator expressly and clearly distanced himself from this idea.[18]

In the end, it would not necessarily be considered a solution. It would be a solution without any reality if the institutional form of nationalities' parliamentary representation were to be abolished. Although the judgment emphasized that there is no international obligation to ensure the parliamentary representation of nationalities, based on Hungarian historical traditions this would be a step backwards, and the quoted provisions of the Basic Law exclude this option.

Overall, the decision of ECHR posed a serious challenge to the Hungarian legislators. Specific changes can be expected in connection with the regulation of the representation of nationalities. The election rules affecting nationalities and their legal institutions should be reconsidered and included in another regulatory aspect.

[18] Sándor Móré: Újból a kétkamarás parlamentről mint intézményes megoldásról. In: Nóra Chronowski – Zoltán Pozsár-Szentmiklósy – Péter Smuk – Zsolt Szabó (eds.) *A szabadságszerető embernek. Liber Amicorum István Kukorelli*, Budapest, Gondolat Kiadó, 2017. 685–694.

Literature

Sándor Móré: A nemzetiségi szószólói intézmény jogi kerete és működésének első két éve. *Parlamenti Szemle*, 2/2016. 30–51.

Sándor Móré: Újból a kétkamarás parlamentről mint intézményes megoldásról. In: Nóra Chronowski – Zoltán Pozsár-Szentmiklósy – Péter Smuk – Zsolt Szabó (eds.) *A szabadságszerető embernek. Liber Amicorum István Kukorelli*, Budapest, Gondolat Kiadó, 2017. 685–694.

Zoltán Orsós*:* Roma nemzetiségi szószóló az Országgyűlésben: se vele, se nélküle? *Parlamenti Szemle*, 2/2022. 139–147.

THE DISCIPLINARY LIABILITY OF JUDGES BETWEEN 1936 AND 1948 IN THE HUNGARIAN LEGISLATION

Boglárka Lilla Schlachta[1]

ABSTRACT ■ The disciplinary liability of judges was initially regulated by Act VIII of 1871 which was in force until the 16th of January in 1936. During the period referred to in the title, disciplinary proceedings against judges were governed by Act III of 1936. The new law dealt with the disciplinary liability, transfer and retirement of royal magistrates and members of the royal prosecution service and the disciplinary liability of the royal court and royal prosecution service officials. In this study, I examine the rules of judicial disciplinary liability and disciplinary proceedings under the provisions of Act III of 1936. The final date of the analysis is 1948 since on the 23rd of March 1948 Act XXII came into force which brought new changes in the field of judges' liability reflecting the changing spirit of the times. I will present the practice of the implementation of the relevant law with the help of archival sources newly discovered in the Capital Archives of Budapest.

Keywords: judicial profession, the liability of the judges, the disciplinary liability of the judges

1. The disciplinary offence

Below, I review the normative changes that are relevant to the study.[2] Section 20 of Act VIII of 1871 defined the offence of disciplinary misconduct. Section 18(a) covered misconduct in office, while section 18(b) covered scandalous conduct.

[1] PhD student, Károli Gáspár University of the Reformed Church in Hungary, Doctoral School of Law and Political Sciences.

[2] For more information on the main steps in the drafting of the article of 1936, see Kinga Bódiné Beliznai: A bírák és a bírósági tisztviselők felelősségének szabályozása [Rules on the liability of judges and court officials]. (1936). *Kúriai Döntések Bírósági Határozatok*. 2/2022. (hereinafter referred to as Bódiné Beliznai 2022.); Zsófia Patyi: A bírák fegyelmi felelősségének bő évszázados alakulása [The development of the disciplinary liability of judges over more than a century] 1868–1954. *Acta Universitatis Szegediensis. Forum: Publicationes Doctorandorum Juridicorum*. Szeged, 2016. Iss. 6., 156–160.

The new rules have removed the phrase "scandalous behaviour"[3]. The disciplinary offence under Section 5 of Act III of 1936 is committed by:

1. who negligently and seriously or intentionally violates his/her official duties;

2. who by his/her conduct or behaviour seriously damages or endangers the authority of his/her position (employment), whether intentionally or negligently.

Act VIII of 1871 also provided for the category of administrative offences, as there was no penal code in force at that time. However, Act III of 1936 no longer dealt with misconduct in office, as the Code of Criminal Procedure had come into force which laid down the detailed rules of criminal liability.[4]

According to Article 22 of Act VIII of 1871, the following types of punishment were to be applied in the case of disciplinary offences: censure, reprimand, fine and loss of office. Besides, Article 8 of Act III of 1936 provided the following types of punishment: censure, fine, and loss of office. Censure was removed from the new legislation because it was merged with the offence of reprimand due to the same moral content.[5]

The Act also regulated the possibility of transfer, which was previously regulated by a separate norm, Article 9 of Act VII of 1912 amending certain rules of judicial organisation and procedure. If it was found during disciplinary proceedings that the employment of the accused at the place where he had been employed was incompatible with the interests of justice, the disciplinary court could, in its judgment, order him to be transferred to another place of employment or another court.[6] The transfer could be ordered without a finding of a disciplinary offence.

[3] According to the original text of the bill on the liability of judges and court officials, only the provision "whoever by his conduct becomes unworthy of respect and trust" would have been included in Article 20(b) of the Act (see: Assembly Papers, 1869, Vol, However, following a motion by Dániel Szakácsy, the provision was supplemented by the adjective "scandalous behaviour", which was adopted by the Chamber of Deputies without debate (Chamber of Deputies' Diaries, Vol. III, 16 October – 2 December 1869, 60th National Session, 28 October 1869. 118.). Boglárka Lilla Schlachta: *A bírák és bírósági hivatalnokok felelősségéről szóló 1871. évi VIII. tc. képviselőházi vitája* [Debate in the Chamber of Deputies on Act VIII of 1871 on the liability of judges and court officials]. In: Miskolczi-Bodnár Péter (ed.)*: XXIII. Jogász Doktoranduszok Országos Konferenciája*. Károli Gáspár Református Egyetem, Állam- és Jogtudományi Kar, Budapest, 2022. 212.

[4] Bódiné Beliznai 2022, 305.

[5] Explanatory Memorandum to Act III of 1936 on the disciplinary liability, transfer and retirement of royal judges and members of the royal prosecutor's office, and the disciplinary liability of royal court and royal prosecutor's office officials. Laws of the Thousand Years (hereinafter referred to as the Explanatory Memorandum of Act III of 1936).

[6] Article 15 of Act III of 1936.

2. Loss of office

In the following, I will present the disciplinary case of Albert Tomcsányi, a royal court judge in the Pest region, against whom the Royal Curia, as a disciplinary court, upheld the suspension imposed by the disciplinary court of first instance in its judgment on 25th of June in 1938. The first instance of the disciplinary court delivered its judgment on the 11th of March in 1938, against which both the accuser and the accused appealed. The prosecution was represented by Ferenc Finkey, Crown Prosecutor. The facts of the case are as follows:

"The accused was living in very unsettled financial circumstances, according to a written statement made in a lawsuit in 1929, which he declared to the authorities, and which he was ready to confirm by oath, he had debts exceeding 14,000 pengő. Amid these unsettled financial circumstances, Melánia Sendlein, a lawyer's clerk, – with whom he had a relationship at the end of 1925 or in 1926 that turned into a love affair according to the injured party – had disbursed a loan to him. He accepted loans of several hundred pence over years from Melania Sendlein, and from her family, although he knew their modest financial circumstances and the source of the loans which loans were obtained by the Sendleins from others, including their daughter, a dancer, and another dancer, and sometimes by pawning their linen and jewellery, and which loans were made in the belief that Melania Sendlein could be the wife of the incumbent."[7]

At the time the loans were taken, the accused began an affair with the divorced wife of a "general practitioner" – Mrs. Mesterházy – who worked as a midwife. He lived with the divorced woman, first in a private home and then in a "garni hotel" in Kőbánya, from whom he received 1,900 pence in 1934 for "treatment".

The partly simultaneous relationship with the two women "was the cause of scandalous scenes between the two women in the apartment of the debtor, and during the cohabitation, Mrs. Mesterházyné confronted the debtor twice, calling him a robber, a cheater, a scoundrel while the windows were open, and the noise could be heard in the street."[8]

In 1931 and 1932, the judge in the case received a loan of almost an "entire fortune", 2,400 pengő, from an elderly, sickly seamstress. In the absence of repayment, he was sued, defending himself in bad faith and denying the contents of the receipts he had written and signed himself.

The Curia, which ruled on the disciplinary case, "considers that the guilt of the accused can be established about the money loans that he took from individuals of modest social class, who were themselves dependent on the money

7 BFL. VII. 1. b. 82. small box of disciplinary documents of the Court of Justice (1937), 10/1937, disciplinary case of Albert Tomcsányi, judge of the royal court of Pest.

8 Ibid.

lent, or from one of the victims with whom he was more intimately acquainted as a man, and which loans he could not know when would be able to repay. In particular, his conduct in accepting loans under the terms of this confidential relationship was not manly, but in none of the cases in the indictment was his conduct befitting a judge, for the higher rank of his office requires of a judge, in both his official and private life, irreproachable gentlemanly conduct, and a judge must therefore be particularly vigilant to ensure that the trust and respect which his office commands are not undermined."[9]

The Royal Curia pointed out that:

"By his conduct and behaviour, the accused has deliberately and seriously undermined the authority of his position, and since this conduct of the accused constitutes the elements of the disciplinary offence, his disciplinary culpability must be established here too."[10]

In relation to the imposition of disciplinary sanctions, the Curia stated that "it is in the nature of disciplinary offences that they cannot be limited to certain, carefully selected, separable facts, but by their very nature they encompass the whole conduct of the individual concerned. Therefore, following the position taken by the court of first instance, the Minor Disciplinary Board of the Curia took as its object of assessment the whole of the conduct of the accused in the incidents in question and reviewed the totality of the interconnected acts of the accused throughout the whole course of the incidents. From such an assessment of the cases examined, the Curia also concluded that the conduct of the accused and the consequences thereof, taken as a whole, constituted a serious disciplinary offence which precluded the accused from remaining in the court and holding judicial office. The disciplinary court of first instance should therefore uphold the sentence of disqualification from holding office."[11]

The disciplinary court considered, as a special circumstance, that the claim of the accused for benefits from the state had already been granted by the court of first instance.

In addition, "the provision on the amount of the benefit claim had to be left in place because a substantial further reduction of the total benefit claim could plunge the already very financially hard-pressed debtor into a complete financial ruin."[12]

9 Ibid.
10 Ibid.
11 Ibid.
12 Ibid.

3. The new type of disciplinary procedure

3.1. The surveillance investigation

Act III of 1936 made it compulsory to conduct a judicial supervisory examination in the course of disciplinary proceedings.[13] Act VIII of 1871 did not yet provide details for a supervisory inquiry, but instead Chapter IV of Decree 4291 of 1891 I.M.E. on the Rules of Supervisory Procedure, issued on the Rules of Judicial Administration, was applied.[14] However, according to Article 28 of the Act, in the case of minor irregularities, the President could formally reprimand the members of the judiciary and court officials employed by the tribunal or within its territory. Under Article 29, the person concerned had to be asked to make a statement before being reprimanded. The reprimand was in writing and the party who was aggrieved by the reprimand could appeal to the disciplinary court. [15]

According to the explanatory memorandum of Act III of 1936, the purpose of the supervisory investigation was to reveal the facts of the disciplinary offence. In line with this principle, it gave the supervisory authority the same powers to obtain evidence as the investigating judge under the Code of Criminal Procedure.[16]

The mandatory supervisory inquiry has therefore created a new type of disciplinary procedure. In the framework of the supervisory inquiry, it was still possible to apply the measure provided by Decree No 4291/1891 I.M.E. against the complained judges.

An example of this is the supervisory proceedings against István Bodnár, President of the Royal District Court of Törökszentmiklós.[17] The successor of the Dévaványa Savings Bank R.T. filed a disciplinary complaint against the complainant on 3rd of June in 1943. According to the facts, in one real estate auction case, the complainant judge did not issue the orders for the auction of real estate to the Dévaványa Savings Bank R.T. as bailiff. Therefore, the bailiff

[13] Article 32 of Act III of 1936 „Disciplinary proceedings shall always be preceded by a supervisory inquiry."

[14] János Marschalkó: *A bírósági ügyvitel szabályai* [Rules for the administration of justice]. Az új büntető ügyvitel szabályaival kiegészített második kiadás. Budapest, Grill Károly, 1900. 58–76.

[15] Kinga Bódiné Beliznai: A bírói felelősség szabályozása Magyarországon 1871-ben. [The regulation of judicial liability in Hungary in 1871] *Jogtörténeti Szemle*, 2/2019. 23.

[16] Explanation of Act III of 1936.

[17] BFL. VII. 1. b. 87. small box of disciplinary documents of the court of justice (1944-1945), 3/1944, disciplinary case of István Bodnár, president of the royal district court of Törökszentmiklós.

did not attend either the auction or the order hearing, as he was not aware of them. In the end, the creditor did not obtain satisfaction from the auction sale price. The complainant lodged a disciplinary complaint against the judge for his gross misconduct.

According to the complaint, if the complainant had been aware of the auction in time, he could have made an appropriate bid, in which case the auction price would have covered his claim. "In the absence of such an offer, however, the first mortgage creditor only made an offer to purchase up to the amount which the disciplinary tribunal, which was partly responsible for initiating the disciplinary proceedings against the complainant, – without deciding the question whether the complainant or his predecessor in title had suffered any damage, which is a matter for the compensation proceedings – was convinced that the omission was the consequence of the very fact […]. In substantive terms, the misconduct committed cannot be regarded as serious enough to give rise to a disciplinary offence, since a similar error can occur even in the most diligent work and the fact that the complainant was ill at the time of the first misconduct also reduces the seriousness of the misconduct committed, as can be seen from the complainant's unrebutted defence. Although it is an objectionable and erroneous procedure if, in a land register case, the judge acting in a subsequent action takes the list of persons to be notified automatically from the previous action, it is understandable if he does not establish the list of persons to be notified anew for each action: the fact that the complainant had not yet fully recovered from his illness at the time of the first omission is therefore of some significance. It should also be pointed out, however, that the cumulative nature of the omissions committed increases the seriousness of the misconduct of the complainant, which, in the opinion of the King's Chamber, can be adequately remedied using supervision. However, the disciplinary court did not rule on the question of whether the supervisory reprisal already imposed was sufficiently severe."[18]

In the decision on the presidential admonition, we read:

"As there is no evidence that the complainant's failure to act as district court president was intentional or due to gross negligence, given this, Article 5(1) of Act III of 1936, there can be no basis for a finding of disciplinary misconduct, and the disciplinary proceedings against the complainant should not be instituted. However, the complained President had infringed the procedural rules, by his omissions, laid down in the above-mentioned provisions of the law and his omission could not therefore be left without supervisory action. […] in the present case, […] because of the irregularities and omissions which appeared to

[18] Ibid.

be committed by him, he was to be reprimanded 'orally' under Article 86(5) of Decree 4291 of 1891 I.M.E. on the Rules of Supervisory Procedure, issued on the Rules of Judicial Administration, by not initiating disciplinary proceedings."[19]

Based on the documents examined so far, it can generally be said that in contrast to the case presented, there were more disputes in the supervisory investigation phase which were initiated by lawyers because of a decision which was unfavourable to them, but which could not be the basis for disciplinary proceedings. In these cases, the lawyers often used the complaint as an "appeal" against the decision of the judge in the interest of their clients. In most of these cases, the disciplinary court rejected such requests. Such decisions were usually justified by the disciplinary court because the judicial interpretation of the law could not serve as a basis for finding a disciplinary offence.[20]

From judicial practice, we can highlight that "The disciplinary tribunal must decide the question whether the conduct described by the complainant can be classified as intentional or negligent serious misconduct"[21], and that the determination of whether "[…] the decision of the disciplinary tribunal is correct on the merits is outside the scope of disciplinary proceedings."[22]

3.2. The substitute private prosecution

Article 27 of Act III of 1936 also regulated private prosecution. According to the explanatory memorandum of the statute, it regulates private prosecution in the form of substitute private prosecution, in the form in which the provisions of the Code of Criminal Procedure[23] and the disciplinary law are structured. In essence, the justification for the right of private prosecution was to ensure that the victim of a real injury is not left without a legal remedy. The law provided

[19] Ibid.

[20] Szonja Navratil: *A jogászi hivatásrendek története Magyarországon* [History of the legal professions in Hungary] *(1868/1869–1937)*. Budapest, ELTE Eötvös Kiadó, 2014. 131–132.; Tamás Antal: Fejezetek a Szegedi Ítélőtábla történetéből [Chapters from the history of the Szeged Court of Appeal] III. In: *A Szegedi Királyi Ítélőtábla története 1921–1938 között*. Országos Bírósági Hivatal. Budapest–Szeged, 2017. 42.

[21] The disciplinary case of Kálmán Zsöllei. BFL. VII.1.b. 86. small box of disciplinary documents of the court (1942), 6/1942.

[22] The disciplinary cases of István Gémesi, Lajos Sajó, and Ádám Szent-Iványi. BFL. VII.1.b. 86. small box of disciplinary documents of the court of justice (1943), 9/1943.

[23] Under Article 43 of Act XXXIII of 1896 on the Code of Criminal Procedure, the chief and the substitute private prosecutor shall exercise the rights of the public prosecutor's office in general in the representation of the prosecution, and under Article 99 the substitute private prosecutor may in all cases only file a motion for the ordering of an investigation.

for a right to make a supplementary private prosecution where the disciplinary offence constituted an individual offence.[24] An important measure of Act III of 1936 was the possibility of a substitute private prosecution, in which the disciplinary court looked for individual legal injury in all elements of the facts.

4. Changes in legislation after 1945

"There is a need for lawyers, but for a new type of socialist lawyers. The main duty of the lawyer apparat is construing new legislation and applying it in alignment with the changed conditions."[25]

From 1945 the independence of the judiciary began to be abolished[26] which had a significant impact on the disciplinary liability of the judges. At that time Act III of 1936 was still in force but practically it was less likely to be applied. As György Uttó said: "Its maintenance in force can be considered more of a formal legal fact".[27]

The composition of the Disciplinary Court regulated by section 19 of Act III of 1936 was amended by section 1 of Decree 6.760/1945. ME. on the amendment of the organization of the Supreme Disciplinary Court[28] whereas section 23 of the Act was abolished by section 2 of the Decree. It entered into force on the 22nd of August in 1945.

Act XXII of 1948 temporally regulated the relocation of the judges and, also, included the retirement of the judges and state prosecutors.[29]

[24] Explanation of Act III of 1936.

[25] „There is a need for new socialist lawyers." *Nyírségi Magyar Nép*, 56/1949/56. 2.

[26] See in detail: Zsuzsanna Peres: A bírói függetlenség felszámolása [Eliminating judicial independence] (1945-1989). *Kúriai Döntések, Bírósági Határozatok*, 5/2023. 952–965.

[27] György Uttó: Az igazságügyi alkalmazottakkal szembeni fegyelmi eljárás múltja, jelene és jövője [The past, present and future of disciplinary proceedings against judicial staff]. *Magyar Jog*, 11/2011. 584.

[28] "According to section 19 of Act III of 1936, the Supreme Disciplinary Tribunal shall consist of thirty-six members in addition to the President, namely the eighteen to eighteen most senior Presidents of Chambers or Judges of the Curia and the Administrative Court." Decree No. 6.760 M. E. 1945 of the Provisional National Government amending the organisation of the Supreme Disciplinary Court section 1. List of decrees, 1945, 635.

[29] Kinga Bódiné Beliznai: A bírói függetlenség és garanciái [Judicial independence and its guarantees]. (1848–1948). *Kúriai Döntések, Bírósági Határozatok*, 5/2023. 946-948. p.; Kinga Bódiné Beliznai: A bírói fegyelmi felelősség szabályozása 1945 után [Regulation of judicial disciplinary liability after 1945]. In: Nándor Birher – Péter Miskolczi-Bodnár – Péter Nagy – Zoltán J. Tóth (eds.): *Studia in honorem István Stipta*. Budapest, KRE ÁJK, 2022. 123–125.

According to the first section of the Act, the Minister of Justice is entitled to relocate any of the judges under his supervision – without the consent of the certain judge – to another court."

As per the justification of the Act: "In time of significant organizational changes, the need to temporarily suspend the non-transferability of the judges has already arisen in the past. This need – considering the territorial changes and the aspects of the democratic transformation – still exists…"

The Minister of Justice was allowed to carry out relocations until the 31st of December in 1949.[30] The judge who already turned 50 years old when he was informed about his relocation, was allowed to request retirement within 30 days of receiving the notice instead of undertaking the appointed position.[31] The judge who had not turned 50 years old when he received the notice of relocation and did not undertake the newly appointed position, shall be considered as if he renounced his public employment and need for care, and all claims based on duty.[32]

Section 14-16 of statutory decree 46 of 1950 on the amendment of the authority and proceedings in respect of the judicial organization declared the regulation of disciplinary and supervisory power. The statutory decree laid down that "the disciplinary council of the county court has the jurisdiction to act at first instance in the disciplinary case of the president, vice-president, and the judges of the district court. For the establishment of the disciplinary council and its proceedings, those regulations shall be applied that are in alignment with the regulation of the disciplinary council of the superior court laid down by Act III of 1936. The minor disciplinary council of the Supreme Court is assigned to act at a second instance in these disciplinary cases."[33]

The Decree 107/1950 (IV. 15.) M. T. on the amendment of certain sections of Act III of 1936 amended the regulations of the suspension regarding the persons subjected to disciplinary proceedings.[34]

Subsequently, the framework of the disciplinary proceedings was laid down by Act II of 1954 and the detailed rules were declared by the Council of Ministers of the Hungarian People's Republic decree 1.051/1954 (VI. 30.). Act III of 1936 and Act II of 1954 are the results of two political eras which are significantly different in content. This study focused on these differences.

*

30 Section 1 point 4 of Act XXII of 1948 on the temporary regulation of the relocation of the judges and the retirement of the judges and state prosecutors.

31 Section 2 point 2 of Act XXII of 1948.

32 Section 2 point 3 of Act XXII of 1948.

33 Section 14 point 1 of Statutory Decree 46 of 1950.

34 Magyar Közlöny, Minisztertanácsi és miniszteri rendeletek tára, 64/1950. 552.

The content of the legal norms of the time and their application show that, to protect the authority of the judiciary, judges were subject to strict ethical rules during this period, and therefore these key participants in the administration of justice had to demonstrate exemplary behaviour that did not infringe upon the authority of the judiciary. On the contrary, the regime changes after 1945 and, especially, after 1948, utilized the official pragmatics in the field of jurisdiction to select the apparatuses of the jurisdiction and considered the disciplinary proceeding as a tool of the new socialist judges.

Sources and bibliography

Archival sources

BFL. VII. 1. b. 82. small box of disciplinary documents of the court (1937)
BFL. VII.1.b. Small box 86. disciplinary files of the Court of Justice (1942-1943)
BFL. VII. 1. b. 87. small box of disciplinary documents of the Court of Justice (1944-1945)

Literature

Tamás Antal: *Fejezetek a Szegedi Ítélőtábla történetéből III. A Szegedi Királyi Ítélőtábla története 1921–1938 között* [Chapters from the history of the Szeged Court of Appeal]. Országos Bírósági Hivatal, Budapest–Szeged, 2017.

Kinga Bódiné Beliznai: A bírói függetlenség és garanciái [Rules on the liability of judges and court officials] (1848–1948). *Kúriai Döntések, Bírósági Határozatok*, 5/2023.

Kinga Beliznai Bódiné: A bírák és a bírósági tisztviselők felelősségének szabályozása (1936). *Kúriai Döntések Bírósági Határozatok*. 2/2022.

Kinga Bódiné Beliznai: A bírói fegyelmi felelősség szabályozása 1945 után [Regulation of judicial disciplinary liability after 1945]. In: Nándor Birher – Péter Miskolczi-Bodnár – Péter Nagy – Zoltán J. Tóth (eds.): *Studia in honorem István Stipta*. Budapest, KRE ÁJK, 2022.

Kinga Beliznai Bódiné: A bírói felelősség szabályozása Magyarországon 1871-ben [The regulation of judicial liability in Hungary in 1871]. *Jogtörténeti Szemle*, 2/2019.

János Marschalkó: *A bírósági ügyvitel szabályai* [Rules for the administration of justice]. Az új büntető ügyvitel szabályaival kiegészített második kiadás. Budapest, 1900.

Zsuzsanna Peres: A bírói függetlenség felszámolása [Eliminating judicial independence] (1945-1989). *Kúriai Döntések, Bírósági Határozatok*, 5/2023.

Szonja Navratil: *A jogászi hivatásrendek története Magyarországon* [History of the legal professions in Hungary] *(1868/1869–1937).* Budapest, ELTE Eötvös Kiadó, 2014.

Zsófia Patyi: A bírák fegyelmi felelősségének bő évszázados alakulása [The development of the disciplinary liability of judges over more than a century] 1868–1954. *Acta Universitatis Szegediensis. Forum: Publicationes Doctorandorum Juridicorum*, Szeged, 2016. Iss. 6.

Boglárka Lilla Schlachta: *A bírák és bírósági hivatalnokok felelősségéről szóló 1871. évi VIII. tc. képviselőházi vitája* [Debate in the Chamber of Deputies on Act VIII of 1871 on the liability of judges and court officials]. In: Péter Miskolczi-Bodnár (ed.): *XXIII. Jogász Doktoranduszok Országos Konferenciája*. Károli Gáspár Református Egyetem, Állam- és Jogtudományi Kar, Budapest, 2022.

György Uttó: Az igazságügyi alkalmazottakkal szembeni fegyelmi eljárás múltja, jelene és jövője [The past, present and future of disciplinary proceedings against judicial staff]. *Magyar Jog*, 11/2011.

CERTAIN ISSUES IN THE FIELD OF PROFESSIONAL SPORTS

Botond Székely[1]

ABSZTRAKT ■ A sport döntő szerepet tölt be a társadalom hétköznapi működését illetően, ugyanis összeköti az egyéneket, biztosítja a szellemi feltöltődést és a szórakozás egyik alappillére. Ez utóbbi miatt a sport hatalmas üzleti iparággá fejlődött, amely részben a hivatásos sportolókra épül, akiknek a szerződéses jogviszonyai érdekes és vizsgálandó aspektusokból tevődnek össze. Ezért jelen tanulmányban a hivatásos sportolók sporttevékenységét és foglalkoztatását érintő kérdéseket veszem górcső alá. Tehát a vizsgált szempontok mind a szerződéses kötelezettségek teljesítéséhez és az általános magatartási szabályokhoz kapcsolódnak. Ezért a tanulmány elején áttekintő jelleggel összefoglalom a sportipar fejlődését, hogy átfogó képet kapjunk a problémák forrásáról, amelyek főként a kommercializált folyamatokból fakadnak. Ezt követően a hivatásos sportszféra szerződéseinek teljesítésére irányuló magatartások kérdését vizsgálom meg. Végül pedig a hivatásos sportolók szólásszabadságának keretrendszerét elemzem, ugyanis ezek a szempontok határozzák meg a felek magatartásának alapvető irányelveit.

Kulcsszavak: szerződés teljesítése, általános magatartási szabályok, hivatásos sportszféra

ABSTRACT ■ Sports have a crucial role in society: they bond individuals, cultivate their spirit and serve as the main source of amusement. The latter one caused sports to develop into a simultaneously evolving industry that is partially built on the professional athletes whose contracts provide some interesting aspects to be examined. In this study, I look at some of the issues posed by the activity and employment of professional athletes. The examined aspects are all related to the performance of the contractual obligations and the common rules of conduct. Therefore, to begin with, the paper provides a summary of the development of the sports industry to understand the source of the problems that mainly derive from the commercialized progress. Furthermore, I examine the issue of interpreting the performance of contracts in professional sports. Lastly, I observe the questions related to the freedom of speech of professional athletes as these aspects constitute the basic guidelines for the conduct of the parties.

Keywords: performance of the contract, general rules of conduct, professional sport

[1] PhD student, Károli Gáspár University of the Reformed Church in Hungary, Postgraduate Doctoral School of Law and Political Sciences.

1. The rise of economic aspects in sport

The business sector has played a significant role in the development of the current structural organisation of sports organisations and clubs, as sporting activities have also become profit- driven. It is interesting to note in this context that sport was originally a completely private activity which developed independently of the business sector and that the main purpose of the initial associations was therefore to provide sporting facilities for natural persons as their members. Consequently, most associations did not have legal personality, a trend which was reversed in the second half of the 20th century. The emergence of private sporting organisations and their specialisation in a particular sport initiated the process of autonomous self-regulation of sport, to which the creation of their own statutes and rules of organisation and operation also contributed significantly.[2]

As for the norm-setting activities of sports organisations, it is also necessary to look at the rise of the business sector, as the process shows the growing demand for sports, which has also led to a corresponding rise in the status of sports organisations. Indeed, the "commercialisation"[3] of sports organisations has significantly changed the nature of sport. This has led to the prioritisation of the need for companies employing sportspeople to look first and foremost at the "usefulness" or "usability" of the worker when selecting their staff, as it is by assessing these two criteria that they can decide whether the employment of a particular sportsperson will sufficiently advance their business plans.[4]

As a result, the focus has noticeably shifted away from sporting activities, as it is no longer only the athlete's performance that plays a major role in business processes, but also the indirect impact of athletes on the various factors of the sports economy. The commerciality of sports products depends almost entirely on the athletes. Indeed, the success of sports products is also influenced by the athlete's off-the-field activities and behaviour. This aspect increases the uniqueness of sports products, since they are unique goods that can be consumed by fans at the moment of production (matches) and also have a strong emotional attachment (fans). Therefore, in the light of merchandising and the enthusiasm for the sportsman or sportswoman, it is easy for a fan to enjoy even a sporting event

[2] Tamás Sárközy: A sport, mint az állami-jogi és az önszabályozás határterülete. Állam- és Jogtudomány, 3-4/2000. 212-213.

[3] Tamás Sárközy: A hivatásos sport gazdasági jogi alapkérdései Magyarországon. *Gazdaság és Jog*, 7-8/2000. 38.

[4] John Solow – Peter von Allmen: Performance expectation, contracts and job security. In: *Research Handbook of Employment Relations in Sport*. Cheltenham, Edward Elgar Publishing, 2016. 47.

that would be essentially boring in itself.[5] Thus, the players may not necessarily have any influence on the outcome of the sporting event, but they can nevertheless generate a profit for the sporting enterprise if the athlete himself is presented as a product to be sold in other respects. Therefore, the players continue their activity as an intangible asset of the sports organisation within the organisational structure of their employer.[6] It is therefore not surprising that sporting employers may treat athletes as "goods" or "tools" in certain cases, if the interests of the sporting enterprise so require in terms of the saleability of a sporting product. This means that it may even be easy to do without putting an athlete into play in a particular match.[7] This is important to underline because in this way sport offers an undeniable opportunity to build a business, giving sports organisations a significant economic dominance. It is therefore no wonder that only persons who unilaterally agree to be bound by these rules and to be subject to the rules of competition established by the sporting organisation can be members of these legal entities.[8]

In light of this, it is reasonable to ask how the state intervenes and what limits it imposes on the sportsmen's relationship with the sporting organisations, given their advantage and dominance as employers. The growing demand for sport on the part of both consumers and market players has made legal regulation inevitable, even though the State had initially chosen not to intervene in the spirit of laissez-faire. This move is even more obvious if we look at the national sports federations that have started to associate themselves, creating international sporting federations, in the process of which competition rules have been internationalised and have become the "supranational" norms of the sport concerned.[9]

2. Basic considerations on the right to give instructions

In my view, when examining the performance of contracts for sporting activities, it is useful to consider the questions of contractual performance along the lines of the law of instruction, since the instruction of the principal or employer determines the conduct and performance of the service expected of the

5 Kevin K. Byon: Consumer Behaviour. In: Paul M. Pedersen (ed.): *Encyclopedia of Sport Management*. Cheltenham, Edward Elgar Publishing, 2021. 98.

6 See: Zsuzsanna Gősi: A sportoló mint a sportszervezetek különleges erőforrása. In: Enikő Korcsmáros (ed.): *Selye János Egyetem 2018-as X. Nemzetközi Tudományos Konferenciájának tanulmánykötete*. Komárno, 2018.

7 John Solow – Peter von Allmen 2016, 53.

8 Sárközy 2000, 213.

9 Sárközy 2000, 214-216.

sportsperson. Therefore, in relation to the contractual context of the activity, it is important to address the types of contracts used for the employment of sportsmen and sportswomen and their nature. It is not the specific purpose of this study to distinguish between the different types of contracts, as the present analysis is mainly focused on the specific requirements for performance. However, a brief overview of the specificities of the two types of contracts is essential, as the typology implies that there are certain differences between certain aspects of the two legal relationships. The tangential overview of the nature of the employment relationship and the agency relationship about the right to instruct serves the purpose of providing an approximate framework for assessing the cornerstones of contractual performance. After a comparison in the light of sporting activity, we will be able to take a general, consolidated view of the issue for both types of contracts, since we will see the impact of the sporting sphere on the classical private law institutions, which will consequently be applied unusually.

2.1. Exercise and interpretation of the right to instruct

The activity of the party performing the task depends largely on the exercise of the rights of the party with the power to instruct, since it is the party with the power to instruct who determines the task to be performed. Thus, the power to instruct is an essential element of employment contracts in the business sphere and is, one might say, an essential content element.

Paragraph (2) of Article 6:63 of Act V of 2013 on the Civil Code (hereinafter the Civil Code) sets out the criteria in the light of which a given contractual term is deemed to be an essential element of the content. According to this provision, a substantive aspect is important if the party expresses clearly that he or she does not intend to conclude the contract in the absence of agreement on the matter. Pursuant to 6:63 (4), the parties do not have to agree on a matter which is regulated by law, but under paragraph (2) the parties must agree on any matter which they both consider to be material to conclude the contract. Thus, the Civil Code. Although the provisions of Article 6:273 of the Civil Code do regulate the principal's power to give instructions, it is nevertheless necessary to agree on the scope and exercise of this power by clear criteria if either party considers it to be essential. Furthermore, it is important to agree on the cornerstones of the exercise of this right in a contract for an activity in the business sphere, since the scope and manner of exercise of the right have a significant impact on the classification of the contract and the content of the obligations.

Regarding the provisions of the Civil Code that address the relevant issue, it is important to point out that Article 42 (2) of Act I of 2012 on the Labour Code (hereinafter referred to as the Labour Code) sets out one of the most essential elements of the employment contract concerning performance, namely that the employee is obliged to perform work under the direction of the employer. Under Article 20 (1) and (2), the person exercising the employer's authority is entitled to make legal declarations on behalf of the employer and the employer determines the way the employer exercises the employer's authority. In addition, under Article 46(1), the employer is obliged to inform the employee of the identity of the person exercising the employer's authority. Compared to the power to instruct under the Civil Code, the Labour Code seeks to define the employee's obligation in this respect *expressis verbis*. In this way, the provisions on instruction in the context of the employment contract are *ipso iure* a clearer circumstance in the legal relationship. Therefore, while this aspect is an essential substantive element, the more explicit provisions of the law may make it appear that it is not necessarily necessary for the parties to negotiate in detail on the issue, since the circumstances are clear to them in advance.

Therefore, the principal also has the power to instruct in the case of an agency relationship, but the principal's power is not as detailed, whereas the employer has full control over the employee. This means that the employer has the right to give instructions to the employee on any detail of the work (how, where, when).[10] All these elements derive from the power of management, which can be interpreted in several ways, and therefore, because of the different interpretations from one discipline to another, the legislation is not necessarily consistent in its use of the concept.[11] In the employment relationship, the interpretation of the term "management" is closest to the content of the administrative sciences, which consider management to be a system of powers consisting of several elements. This system includes the power to make rules, give instructions and exercise control. However, these three concepts cannot be sharply delimited in terms of labour law. In the context of labour law, both rule-making and instruction derive from the right to control, and therefore both powers reflect the dominance of the employer in the context of the legal relationship.[12] In this respect, rule-making and instruction provide a form of process control within the employer's organisational system, which defines the basic conduct and work

[10] Anna Kozma – György Lőrincz – Lajos Pál – Zoltán Petrovics (eds.): *A munka törvénykönyvének magyarázata*. Budapest, HVG Orac, 2020. 151.

[11] Lajos Bosánszky: Az igazgatás, irányítás, vezetés, felügyelet, ellenőrzés, vizsgálat fogalmakról. Állam és *igazgatás*, 6/1986. 503.

[12] György Lőrincz: A munkaszerződés teljesítésének egyes kérdései. *Munkajog*, 3/2020. 5.

expected in the workplace. Instruction and, in a broader sense, direction is therefore an intrinsic element of an organisation, as it is the only way to ensure coherent and coordinated functioning. However, precisely because of this, the aforementioned organisational direction – the exercise of organisational power, so to speak – cannot necessarily be regarded as a specific feature of the employment relationship, since the establishment of a system of interdepartmental relations is not only observed in organisations with the status of employer (e.g. the relationship between an orchestra and a conductor).[13] However, in the context of a mandate, the principal has broad powers of direction, which would seem to suggest that the mandate and the employment relationship share elements of the same power of direction in a broad sense. It is important to note, however, that the broad power of direction that comes with the status of principal also entails greater risk-taking.[14] Thus, the concept of direction in the context of the agency relationship, as opposed to the employment relationship, is primarily one of the principal's mediation or assertion of his interests.[15]

In the light of this, the special circumstance arising from the nature of the sporting activity must be considered, namely that there may be a situation during the performance of the task when the athlete is unable to carry out the given instruction through no fault of his/her own, because he/she is prevented from doing so by his/her opponent. The question, therefore, arises as to whether the failure to carry out the task as instructed was due to a lack of diligence on the part of the athlete or whether the skills of the other player were in fact far superior at the time and the failure to perform cannot, therefore, be attributed to the athlete, since it was not reasonable to expect him to overcome the difference in quality in the circumstances prevailing at the time.

Similar situations and facts arising in the context of professional sports activities create a particularly interesting conflict, since it is an essential element of the employment relationship that the employer can control its employees to ensure that they perform their work properly and can act and impose sanctions against employees who fail to comply with their obligations. These aspects are intrinsic qualifying features of the employment relationship, without which there is a possibility that the purpose of the relationship would be lost and that a different type of contractual relationship would therefore exist between the parties. Nevertheless, account must also be taken of the interests of the

[13] Lőrincz 2020, 6.

[14] Sándor Takó: A filmkészítés során alkalmazott egyes szerződések ismérvei és specifikumai. *In Medias Res,* 1/2023. 190.

[15] See: László Kovács: Változások a fuvarozási és a szállítmányozási szerződés szabályozásában II. *Céghírnők,* 1/2018. 11.

subordinate party, i.e. the employee, which, in the light of the above-mentioned aspects, cannot be prejudiced, since this is not only an individual interest but also a social interest. It is therefore necessary to define the limits to the employer's exercise of his rights in such a way that they are not restricted to such an extent that the employer is deprived of the possibility of taking the necessary measures.[16]

The power to give instructions is also an important circumstance in that the principal or the employer's instruction determines the partial obligation to be performed, which implies the definition of the parameters of contractual performance. It is the task to be performed, designated in the form of an instruction, which constitutes the subject matter of the contract or part of it, the performance of which is to be carried out by the obligated party. In this connection, it is worth recalling that Tamás Prugberger, in examining the differences between the two legal relationships,[17] invokes the theory of Hugo Sinzheimer, a jurist who has studied labour law,[18] according to which a certain economic dependence and vulnerability can be detected in the relationship of the employment relationship. In this respect, a view has also emerged that the specific nature of the employment relationship prevents the employer from determining the content of future duties and obligations.[19] In my view, a narrow interpretation of this theory applied to sporting activities would mean that, in the case of professional sportsmen and sportswomen employed in the context of an employment relationship, the sports club would not be able to determine the expected performance, which would also mean a failure to perform, since, in the absence of clear instructions, the sportsman or sportswoman would not be able to define the task to be performed or the objective to be achieved.

So, in both relationships, the athletes are performing the tasks set out in the sports club's instructions in a fiduciary relationship. Some of the subtasks and activities required for performance arise from the power of direction exercised by the principal or employer, the dynamics of which are different in the case of an employment contract and a contract of entrustment.However, the unusual nature

[16] Tivadar Miholics: Problémák, javaslatok a munkaviszonyt érintő egyes szabályok körében. *Munkajog*, 5/2021. 289-290.

[17] Tamás Prugberger – Bernadett Szekeres: Az új típusú foglalkoztatási formák és azok kihatása a tevékenységgel összefüggő szerződések dogmatikájára. Állam- és Jogtudomány, 2/2022. 69.

[18] See: Hugo Sinzheimer: *Arbeitsrecht und Rechtssoziologie: Gesammelte Aufsätze und Reden*. Frankfurt, Europäische Verlagsanstalt, 1976.

[19] See: Mark Freedland: *The Personal Employment Contract*. Oxford University Press, 2005; Simon Deakin: The Comparative Evolution of the Employment Relationship. In: Guy Davidov – Brian Langille (eds.): *Boundaries and Frontiers of Labour Law.Goals and Means in the Regulation of Work*. Hart Publishing, 2006. 89–108.

of sporting activities blurs the boundaries between the two legal relationships, thus bringing the interpretation of the instruction closer together, as in the case of activity-based contracts allowing for longer-term cooperation, the relative interoperability between the employment contract and the contract of engagement arises. For this reason, the issue of the instruction can be examined from almost the same perspective in both types of relationship, since in the relationship of both the agency and the employment contract a fiduciary duty to perform a sporting activity is created, in the context of which it is difficult to interpret the performance of the instruction. The athlete is prevented by his opponent from performing his contractual obligations during the match, the object of which is to win the competition and the tasks which are part of the performance of that competition.

The failure to comply with a particular instruction raises the question of the athlete's liability, in which cases the failure to comply is due to no fault of the athlete – that is, the athlete's obstruction of the opponent – and in which circumstances the athlete can be held responsible for the failure to comply. In this context, it is important to note from the athlete's point of view that, given the unique content of his/her obligation, the performance of the activity requires specific knowledge, skills and abilities which make it difficult to substitute.[20] Given this, the possibilities of excusing the athlete seem to be reduced, but it should not be overlooked that the other professionals in the sports club also have a responsibility in the preparation, as it is their work that ensures, in part, the effective training work which, by its very nature, is intended to help the athlete to perform effectively, i.e. to fulfil the contract. They also have a key role to play in the selection process for competition and transfer, as they have to assess the athlete's ability and potential performance.[21] Therefore, even before the sporting activity is contractually performed, there is a certain liability for the sporting club if it has not properly assessed the athlete's abilities. Therefore, in my view, the failure to instruct and perform as contractually required also gives rise to a failure of the sporting club to perform as contractually required in terms of the selection processes and training work.

[20] Peter J. Bosch: Enforcement Problems of Personal Service Contracts in Professional Athletics. *Tulsa Law Journal,* 6/1969. 46-48.

[21] Abdulsamad Olajide Yusuf – Oladele Isiaka Oladipo: Talent evaluation. In: : Encyclopedia of Sport Management. Northampton, 2021. 484.

3. Issues concerning the expression of the views of athletes

Another important issue arising from the contractual relationship of professional sportsmen and women is the issue of expression of opinion. This is because, in addition to the conduct aimed at the performance of the contract, there are other aspects to be examined which are manifested in the verbal or non-verbal acts of the sportsmen or sportswomen. The non-verbal conduct of sportsmen and sportswomen can often have significant consequences, as it may harm the legitimate economic and organisational interests of employers acting as sports organisations. The lack of a concrete delimitation of the interests of sports organisations to be protected makes it difficult to assess the situations that arise. Consequently, the assessment of the conduct of sportsmen and sportswomen is also on shaky ground, since the employer's interest to be protected is not clear. The question is how we can determine whether it is indeed harmed.

The problem has several components, as the subject matter under consideration involves aspects of constitutional law, labour law and the specific status of sportsmen and sportswomen. In other words, we are talking about a three-layered problem. The first step in analysing this issue is to review the constitutional law aspects, since this area constitutes the broadest layer. The next step is to look at the labour law aspects, which form a narrower layer than the previous one. The third step of the analysis is to examine the additional aspects arising from the status of sportsmen and sportswomen.

3.1. Constitutional aspects

As a first step, it is essential to examine the constitutional aspects, since the behaviour of sportsmen and sportswomen, which could potentially threaten the interests of employers in sports organisations, most often takes the form of employee expression. This legal instrument is referred to by various names in the literature, which, among other things, indicate that the expression of an opinion may take place at several levels of communication. The terms "freedom of expression", "freedom of speech", "freedom of thought", "Meinungsfreiheit" or "freedom of opinion", all show that the protection of the fundamental right guaranteed by this legal instrument and the examination of its framework can be relevant to several different forms of communication.[22] Everyone has a certain

[22] András Koltay: A véleménynyilvánítás szabadsága. In.: András Jakab – Balázs Fekete (eds.): Internetes Jogtudományi Enciklopédia (Alkotmányjog rovat, rovatszerkesztő: Bodnár Eszter,

kind of internal conviction, world view or outlook. This inner conviction rarely remains in the inner world of the individual because it usually always breaks out from there.[23] This is when conflicts or collisions can arise between members of society.

The problem arises from the fact that it is a fairly important and broad fundamental right, the entitlement to which people by their very nature enjoy almost every day. This is also declared in the Fundamental Law, which states that everyone has the right to freedom of opinion and expression [Article IX(1) of the Fundamental Law], but that the exercise of this right must not violate the human dignity of others [Article VI(1), IX(4) and (5) of the Fundamental Law]. The role of this legal institution is therefore of paramount importance. This is also indicated by the Constitutional Court's formulation that freedom of expression is the mother right of fundamental communication rights,[24] but this does not mean that it is unrestricted.[25] The right to freedom of expression must nevertheless be allowed[26] in the event of a conflict with other fundamental rights.[27] Restrictions may be imposed based on a strict criteria subject to a necessity-proportionality test,[28] which sets limits to unjustified or excessive restrictions on fundamental rights. Interestingly, the mere offensive or insulting nature of a particular expression does not justify a restriction on expression.[29]

Regarding the above, an important question that arises is how the constitutional aspects of the conduct of a potential employee – particularly his right to freedom of expression – are reflected in the employment relationship and how they are enforced. An overview of the principles of constitutional law is not in itself

Jakab András) http://ijoten.hu/ szocikk/a-velemenynyilvanitas-szabadsaga (2023.12.02.), 2018. 2.

23 György Kiss: Managerial prerogative és a véleménynyilvánítás szabadsága. In: Lajos Pál (ed.): *A véleménynyilvánítás szabadsága és korlátai a munkajogviszonyban: A Magyar Munkajogi Társaság 2021. június 23-i vitaülésén elhangzott előadások, hozzászólások*. Budapest, HVG-ORAC, 2022. 11.

24 30/1992 (26.V.) AB, reasoning [III. 2.2].

25 Bernát Török: A munkavállaló szólásszabadságának alkotmányjogi keretei. In: Lajos Pál (ed.): *A véleménynyilvánítás szabadsága és korlátai a munkajogviszonyban: A Magyar Munkajogi Társaság 2021. június 23-i vitaülésén elhangzott előadások, hozzászólások*. Budapest, HVG-ORAC, 2022, (hereinafter referred to as Török 2022), 32.

26 Decision 30/1992 (V. 26) AB, reasoning V.1, ABH 1992, 167, 178.

27 András Koltay: A véleménynyilvánítás szabadsága. In: Lóránt Csink – Balázs Schanda – András Zs. Varga (eds.): *A magyar közjog alapintézményei*. Budapest, Pázmány Press, 2020, (hereinafter referred to as Koltay 2020), 570.

28 See for more information Zoltán Pozsár-Szentmiklósy: Az arányossági teszt a jogalkalmazásban. *Alkotmánybírósági Szemle*, 2/2016. 98-100.

29 Koltay 2020, 569-570.

sufficient, since the question of horizontal scope arises even before the specific features of labour law are analysed.

3.2. Transposition of constitutional law into the employment relationship

Before reviewing the labour law aspects, it is important to mention the horizontal scope, i.e. the effect of the *"third party effect" to* get a comprehensive picture of why provisions on the legitimate economic and organisational interests of the employer appear in the employment relationship (and in the more specific sports employment relationship).Fundamental rights were originally intended to regulate the scope of the state's action vis-à-vis private individuals, thereby protecting human and civil liberties against public authority. However, the protection of fundamental rights is not limited to private individuals against the State.[30] This is because, due to the horizontal scope of constitutional law, which is accepted to varying degrees in the European Union, constitutional law does not directly shape private legal relationships between private individuals, but does impose constitutional obligations on the parties individually, which has an indirect effect on legal relationships between private parties.[31] The constitutional rules therefore act as a kind of interpretative guide which must be taken into account when interpreting the content of private-law obligations.[32]

Using this analogy, we can observe that, as stated in Article 10 of the Convention on Human Rights, which in turn is reflected in Article 11 of the Charter of Fundamental Rights of the European Union, *"everyone has the right to freedom of expression"*. The exercise of this right may be restricted in a democratic state only if justified, for example, on grounds of national security, territorial integrity, the reputation of others or the protection of their rights. This principle is also reflected in the Constitution, so a kind of cross-over between norms can be observed in this case too. This perspective is confirmed by the position of the Constitutional Court[33] that the norms of the Fundamental Law must have an effect throughout the entire legal system.

It is therefore important to stress that public law norms can indirectly shape private legal relations between individuals, as constitutional law norms "spill

30 Török: 2022, 24.

31 Stephen Gardbaum: The Horizontal "Effect" of Constitutional Rights. *Michigan Law Review*, 102/2003, Iss. 3. 388-389.

32 Eric Engle: The Third Party Effect of Fundamental Rights (third party effect). *Hanse Law Review*, 5/2009, Iss. 2. 166.

33 8/2014 (III. 20.).

over" into the provisions governing other areas of law. This happens in such a way that the public law norm in question is stretched and compressed across the interfaces between the branches of law, thereby taking on new frameworks and terminology adapted to the specificities and nature of the field of law in question, thus facilitating its applicability in the more specific context of that field. In this way, for example, the constitutional rules relating to freedom of expression and reputation are also embodied in the employment relationship.

3.3. General standards of conduct in labour law

Thanks to the transposition of constitutional law, the employment relationship also contains provisions on the fundamental conduct of the parties. Article 6(1) of Act I of 2012 on the Labour Code (hereinafter referred to as the Labour Code) refers to the conduct to be expected in the performance of the employment contract in the given situation. It is a broad provision which is partly objective and partly subjective. It is objective in the sense that it sets an average standard for the assessment of the conduct of a party. Also, it is subjective in the sense that this yardstick has different aspects in different situations and life situations.[34] Since each case, dispute or factual situation that raises the question is unique and different in its details, it is difficult to define a precise, taxonomically demarcated yardstick for the conduct that can generally be expected. Furthermore, in the case of a consideration based on the standard of reasonableness, the position of the employee in the work organisation plays a significant role,[35] so the subjective side of the above-mentioned principle is more likely to be given greater weight, since a given employer may have a wide variety of positions in the organisational hierarchy, which further nuances the weight to be given to the conduct of all employees.

From all this, it can be deduced that in Mt. the more specific criteria of conduct contained in § 8, which are naturally derived from the standard of expectations. The employee may not, during the employment relationship, engage in conduct which would jeopardise the legitimate economic interests of the employer [Art. 8 (1) of the Labour Code]. This provision is supplemented by a further section of the Labour Code. Section 8 (2) of the Labour Code, according to which an employee may not, outside working hours, engage in conduct which is directly and likely to damage the reputation or legitimate economic interests of the employer, in

[34] Kozma et al. 2020, 15.
[35] Ibid.

particular about the employee's position in the employer's organisation [Section 8 (2) of the Labour Code]. Furthermore, the employee may not exercise his right to freedom of expression in such a way that the employer would damage his reputation or his legitimate economic and organisational interests. [Mt. § 8 (3)].

The three provisions referred to above are closely interrelated, as they are all intended to limit the conduct of the employee. In this sense, the law requires from the employer a passive conduct that is generally expected. Looking at these provisions, it can be concluded that the freedom of the employee's conduct, particularly the freedom of expression, which derives from fundamental rights, is constrained by the legitimate economic and organisational interests of the employer.

However, part of the problem with the labour law aspect is that while the limits of the employee's conduct are to some extent more precisely defined by labour law than by the basic principles of constitutional law, the limits for the employer are vague and nebulous. It is difficult to define what is meant by the employer's organisational interest. There is no precise definition of the employer's organisational interest,[36] and its determination depends for the time being on the case-by-case work of the legislator.[37] In disputes relating to the expression of employee opinions, the court must necessarily assess and evaluate whether the dubious communication in question is capable of causing harm to the employer's interests and what constitutes the employer's legitimate economic and organisational interests in the case in question. In addition, it should be examined whether there is a risk of harm to the employer's interests. After all, under the rules governing the subject matter of this question, the actual occurrence of harm is not a prerequisite, i.e. the real possibility of harm is simply sufficient.[38]

It is also worth looking at the issue from a different angle and examine cases that do not harm the employer's interests in question. The basis for this line of thinking is the question of the scope of freedom of expression, which determines which communications are communications of a kind that fall within the scope of freedom of expression. Certain communications do not necessarily fall within the scope of freedom of expression, even from the point of view of constitutional law. To decide this question, we must examine which

[36] See: Mt. § 8 Commentary (Wolters Kluwer Law Library Commentary).

[37] Jácint Ferencz – Éva Nyerges: A munkavállalói véleménynyilvánítás versus munkáltatói érdek. In: Lajos Pál (ed.): *A véleménynyilvánítás szabadsága és korlátai a munkajogviszonyban: A Magyar Munkajogi Társaság 2021. június 23-i vitaülésén elhangzott előadások, hozzászólások*. Budapest, HVG-ORAC, 2022. (hereinafter referred to as Ferencz – Nyerges 2022) 57.

[38] Ferencz – Nyerges 2022, 58.

communications have relevant attributes.[39] Three types can be identified: the creation of new knowledge, individual autonomy, and democratic self-government.[40] If an attribute can be identified in a communication of an opinion, it can be included in the freedom of expression. Thus, when examining an employee's expression of opinion, we must look for a representation of these elements to distinguish an employee's expression from the sharing of an opinion that is merely intended to cause harm.

A further point of examination of the question is to determine the criteria according to which the communication of an opinion should in no case be protected. In this context, the Constitutional Court has laid down as a yardstick in its decision that freedom of expression does not apply to communications by employees whose sole *"purpose is merely to use abusive or destructive language which is damaging to the employer's good name, business reputation, favourable market or commercial image or which is offensive or insulting to the private or family life of a representative of the employer."*[41] In addition, it is worth mentioning the test applied by the Constitutional Court, based on ECHR case-law, which sets out important considerations concerning the protection of the fundamental rights of the opinion giving rise to the dispute.[42] Accordingly, the following five points should be taken into account: (1) the public and professional nature of the communication which is the subject of the dispute; (2) the factual nature of the communication and the nature of the value judgement; (3) whether the communication has caused detriment or adversely affected the employer's perception; (4) the good faith of the person exercising his freedom of expression; (5) and the seriousness of the employer's action taken as a result.[43]

In the light of the aspects reviewed, the employer's legitimate economic and organisational interest is, to a certain extent, clarified in employee's conduct. It must not harm the employer's commercial and market image, i.e. the employee's conduct must not be detrimental to the employer's success in the business sphere. This approach makes it easier to assess whether a legitimate economic interest has been harmed, but it should be noted that, because of the different market segments

[39] Török 2022, 26.

[40] Robert C. Post: Participatory Democracy And Free Speech. *Virginia Law Review*, 97/2011, Iss. 3. 478.

[41] Decision 14/2017 (30.VI.) AB [33].

[42] Attila Kun: A munkavállaló szólásszabadságának alkotmányjogi keretei. In: Lajos Pál (ed.): *A véleménynyilvánítás szabadsága és korlátai a munkajogviszonyban: A Magyar Munkajogi Társaság 2021. június 23-i vitaülésén elhangzott előadások, hozzászólások*. Budapest, HVG-ORAC, 2022. 86.

[43] For more information, see AB Decision 14/2017 (30.VI.) [34.].

and the variety of business activities across sectors, it is not possible to make a black-and-white determination of whether an employer's economic interest has been harmed in the light of market power. However, it is likely to be simpler to examine the issues involved than to resolve the organisational interest issues. In my view, to some extent, uncertainty can be minimised by trying to delimit the organisational interest in the light of the economic interest. Accordingly, it is worth asking what the employer should do organisationally to achieve the protected economic interest. In this way, there is, in my view, a realistic chance that the employer's interests in question, which arise precisely from the specific nature of the employment relationship of sportsmen and sportswomen, can be defined in a more transparent manner in the sports sector.

3.4. Employer's economic and organisational interests in the light of the expression of sportspersons' opinions

Professional sportsmen and women are also subject to the requirements of labour law, so the general conduct clause discussed above also raises relevant issues in this area. This is because in Hungary, according to Act I of 2004 on Sport (hereinafter referred to as the Act on Sport), the provisions of the Labour Code apply to the employment relationship of sportsmen and sportswomen, with the taxative exceptions set out in the Act. At the beginning of this study, it was mentioned that the status of sportsmen and sportswomen constitutes a third layer of issues related to the employer's interest, which is rather specific, as this form of employment differs significantly in certain aspects from the employment relationship in the "classical sense". The possibility therefore arises that the freedom of expression of sportspeople and the economic and organisational interests of employers in the form of sports organisations may need to be treated in an atypical way. One of the main reasons for this relates to the role of athletes in society and their vulnerability to the media. Accordingly, it is necessary to look at this phenomenon first to examine it more comprehensively.

If we look at media platforms, it is clear that they have become one of the main tools of communication and have long been an integral part of our everyday lives, which technological advances have made increasingly indispensable to our daily routines. This is supported by surveys in our country, according to which 73.5% of the population were users of social media in January 2021, which shows a clear trend that nowadays anyone can capture attention and communicate their thoughts widely, creating new formats of expression, which also have their

drawbacks.[44] After all, we may not be able to control the spread of the ideas we share, so they may reach people or platforms that we did not originally intend. Even more to consider is the fact that by reacting to and consuming public events that spread as news, we can be identified with a few clicks and our person instantly associated with any organisation or group of dubious ideology.[45] All this is important for professional sportsmen and women because sporting performance plays a significant role in the organic development of the status of sportsmen and women, a role that is amplified in a major way by the media phenomenon.

Therefore, it is at this point that the social role of sports should be addressed, since the main social-cultural function of sports is to build identity and emotional attachment in all sports. The direct expression of this is the participation in sporting events as a competitor in a sport. The indirect manifestation of this aspect is the consumption of a sporting event as a fan. The key point is the embedding of the latter activity in media culture.[46] For this reason, we can talk about sports and sporting activities as sports products, which are of particular interest to employers. Indeed, two types of sport-related advertising can be distinguished: the advertising of the sporting event itself and the marketing of sporting activity to sell another product through media platforms. The business sector has recognised the potential of these tools, and the latter strategy has become one of the most popular marketing tools, even for companies whose economic activity is not based on sport.[47]

Athletes are identified as key points for major sporting events and other related products. The athlete as a "celebrity" is an integral part of sporting activity, which is a major product of the media and the entertainment industry, and around which globalisation processes of undeniable importance are built. Furthermore, the sporting "celebrity" phenomenon is also reflected in a highly complex business model based on the relationship between the athlete and various political stakeholders and investors in the sporting industry. This is a performance-based

[44] Anita Vereb: Facebook-posztok és munkáltatói riposztok: A közösségi média és a véleménynyilvánítás a munka világában esetjogi megközelítésben. In: Lajos Pál (ed.): *A véleménynyilvánítás szabadsága és korlátai a munkajogviszonyban: A Magyar Munkajogi Társaság 2021. június 23-i vitaülésén elhangzott előadások, hozzászólások*. Budapest, HVG-ORAC, 2022 (hereinafter referred to as Vereb 2022), 36-37.

[45] Vereb 2022, 37-38.

[46] Ádám Guld: Sportolók, rajongók, influencerek. Szurkolói szokások változása az online térben. *Szabad piac.* Gazdaság- Társadalom- és Bölcsészettudományi folyóirat, 2/2021 (hereinafter referred to as Guld 2021), 78.

[47] Mynkio Lee: Advertising. In: Paul M. Pedersen (ed.): *Encyclopedia of Sport Management*. Cheltenham, Edward Elgar Publishing, 2021. 12.

profit-oriented approach in a capitalist context, which has its potential but also its dangers. These drawbacks lie mainly in the diminishing performance over time.[48] A further contribution to the status of the athlete is the interdependence between the media and the athlete. On the one hand, to maintain or possibly gain exposure as a "celebrity", it is essential for the athlete to maintain interest in himself or herself by appearing in the media. On the other hand, the media present the athlete's persona along different narratives to appeal to consumers' emotions by exploiting social and cultural factors.[49]

It is therefore easy to see that professional athletes are at the centre of the aforementioned media habits and business strategies, thanks to their easy followability, which supports significant community-building and cohesive power, a phenomenon that unsurprisingly extends beyond national borders. The popularity of the media products built around them in this way, which is partly based on their personality, is influenced by the quality and attractiveness of the content.[50] It is therefore not surprising that they are under enormous pressure, as their actions can have a significant impact on the demand for sports products and they are almost constantly monitored (i.e. their behaviour and any other manifestations are widely visible). Also, one of the main characteristics of the media product is the character of the athlete. It is therefore clear from this approach that, from an employee perspective, sportsmen and sportswomen are typically subject to a broader and more serious responsibility for the expression of their opinions, which raises the question of whether the restriction of their conduct, and particularly their freedom of expression, to such limits is proportionate to the legitimate economic and organisational interests of sports organisations.

This is not the subject of this paper, but it is worth considering the idea that the employment relationship between sportsmen and sportswomen does not necessarily restrict the fundamental rights of workers (in this case sportsmen and sportswomen) by the necessity-proportionality test, which may be due to the self-regulatory nature of the sporting world. [51]

Furthermore, the everyday responsibilities associated with the influencer role, which are to a large extent linked to the employment relationship, raise the question of to which extent the athlete's personal and private sphere can be intruded upon by the employer. Another question is to which extent the

[48] Timothy Robeers: Celebrity. In: Paul M. Pedersen (ed.): *Encyclopedia of Sport Management*. Cheltenham, Edward Elgar Publishing, 2021. 69.

[49] Ibid.

[50] Guld 2021, 78.

[51] See Tamás Sárközy: Regulation in Sport as a Borderline Case between State and Law Regulation and Self-Regulation. *Acta Juridica Hungarica,* 42/2001. Iss. 3-4.172-173.

employer can, even absurdly, assert its legitimate economic and organisational interests outside working hours and outside the workplace to the detriment of the athlete's private life. With a certain amount of paraphrasing, this tendency suggests that professional sportsmen and women are under constant control, even in their own homes or elsewhere outside working hours.

Literature

Abdulsamad Olajide Yusuf – Oladele Isiaka Oladipo: Talent evaluation. In: Paul M. Pedersen (ed.): Encyclopedia of Sport Management. Northampton, 2021.

Ádám Guld: Sportolók, rajongók, influencerek. Szurkolói szokások változása az online térben. *Szabad piac.* Gazdaság- Társadalom- és Bölcsészettudományi folyóirat, 2/2021.

András Koltay: A véleménynyilvánítás szabadsága. In: Lóránt Csink – Balázs Schanda – András Zs. Varga (eds.): *A magyar közjog alapintézményei*. Budapest, Pázmány Press, 2020.

Anita Vereb: Facebook-posztok és munkáltatói riposztok: A közösségi média és a véleménynyilvánítás a munka világában esetjogi megközelítésben. In: Lajos Pál (ed.): *A véleménynyilvánítás szabadsága és korlátai a munkajogviszonyban: A Magyar Munkajogi Társaság 2021. június 23-i vitaülésén elhangzott előadások, hozzászólások*. Budapest, HVG-ORAC, 2022.

Anna Kozma – György Lőrincz – Lajos Pál – Zoltán Petrovics (eds.): *A munka törvénykönyvének magyarázata*. Budapest, HVG Orac, 2020.

Attila Kun: A munkavállaló szólásszabadságának alkotmányjogi keretei. In: Lajos Pál (ed.): *A véleménynyilvánítás szabadsága és korlátai a munkajogviszonyban: A Magyar Munkajogi Társaság 2021. június 23-i vitaülésén elhangzott előadások, hozzászólások*. Budapest, HVG-ORAC, 2022.

Bernát Török: A munkavállaló szólásszabadságának alkotmányjogi keretei. In: Lajos Pál (ed.): *A véleménynyilvánítás szabadsága és korlátai a munkajogviszonyban: A Magyar Munkajogi Társaság 2021. június 23-i vitaülésén elhangzott előadások, hozzászólások*. Budapest, HVG-ORAC, 2022.

Eric Engle: The Third Party Effect of Fundamental Rights (third party effect). *Hanse Law Review*, 5/2009, Iss. 2.

György Kiss: Managerial prerogative és a véleménynyilvánítás szabadsága. In: Lajos Pál (ed.): *A véleménynyilvánítás szabadsága és korlátai a munkajogviszonyban: A Magyar Munkajogi Társaság 2021. június 23-i vitaülésén elhangzott előadások, hozzászólások*. Budapest, HVG-ORAC, 2022.

György Lőrincz: A munkaszerződés teljesítésének egyes kérdései. *Munkajog*, 3/2020.
Hugo Sinzheimer: *Arbeitsrecht und Rechtssoziologie: Gesammelte Aufsätze und Reden*. Frankfurt, Europäische Verlagsanstalt, 1976.
Jácint Ferencz – Éva Nyerges: A munkavállalói véleménynyilvánítás versus munkáltatói érdek. In: Lajos Pál (ed.): *A véleménynyilvánítás szabadsága és korlátai a munkajogviszonyban: A Magyar Munkajogi Társaság 2021. június 23-i vitaülésén elhangzott előadások, hozzászólások*. Budapest, HVG-ORAC, 2022.
John Solow – Peter von Allmen: Performance expectation, contracts and job security. In: *Research Handbook of Employment Relations in Sport*. Cheltenham, Edward Elgar Publishing, 2016.
Kevin K. Byon: Consumer Behaviour. In: Paul M. Pedersen (ed.): *Encyclopedia of Sport Management*. Cheltenham, Edward Elgar Publishing, 2021.
Lajos Bosánszky: Az igazgatás, irányítás, vezetés, felügyelet, ellenőrzés, vizsgálat fogalmakról. Állam és *igazgatás*, 6/1986.
László Kovács: Változások a fuvarozási és a szállítmányozási szerződés szabályozásában II. *Céghírnők,* 1/2018.
Mark Freedland: *The Personal Employment Contract*. Oxford University Press, 2005.
Mynkio Lee: Advertising. In: Paul M. Pedersen (ed.): *Encyclopedia of Sport Management*. Cheltenham, Edward Elgar Publishing, 2021.
Peter J. Bosch: Enforcement Problems of Personal Service Contracts in Professional Athletics. *Tulsa Law Journal,* 6/1969.
Robert C. Post: Participatory Democracy And Free Speech. *Virginia Law Review*, 97/2011, Iss. 3.
Sándor Takó: A filmkészítés során alkalmazott egyes szerződések ismérvei és specifikumai. *In Medias Res,* 1/2023.
Simon Deakin: The Comparative Evolution of the Employment Relationship. In: Guy Davidov – Brian Langille (eds.): *Boundaries and Frontiers of Labour Law.Goals and Means in the Regulation of Work*. Hart Publishing, 2006. 89–108.
Stephen Gardbaum: The Horizontal "Effect" of Constitutional Rights. *Michigan Law Review*, 102/2003, Iss. 3.
Tamás Prugberger – Bernadett Szekeres: Az új típusú foglalkoztatási formák és azok kihatása a tevékenységgel összefüggő szerződések dogmatikájára. Állam- és Jogtudomány, 2/2022.
Tamás Sárközy: A hivatásos sport gazdasági jogi alapkérdései Magyarországon. *Gazdaság és Jog*, 7-8/2000.
Tamás Sárközy: A sport, mint az állami-jogi és az önszabályozás határterülete. Állam- és Jogtudomány, 3-4/2000.
Tamás Sárközy: Regulation in Sport as a Borderline Case between State and Law Regulation and Self-Regulation. *Acta Juridica Hungarica,* 42/2001. Iss. 3-4.

Tivadar Miholics: Problémák, javaslatok a munkaviszonyt érintő egyes szabályok körében. *Munkajog*, 5/2021.

Zoltán Pozsár-Szentmiklósy: Az arányossági teszt a jogalkalmazásban. *Alkotmánybírósági Szemle*, 2/2016.

Zsuzsanna Gősi: A sportoló mint a sportszervezetek különleges erőforrása. In: Enikő Korcsmáros (ed.): *Selye János Egyetem 2018-as X. Nemzetközi Tudományos Konferenciájának tanulmánykötete*. Komárno, 2018.

ADDITIONAL EXPERIENCE AND WARRANTY AS QUALITY ASSESSMENT CRITERIA

Szabolcs Szöllősi-Baráth[1]

ABSTRACT ■ In several cases, the authorities controlling public procurement procedures object to the use of an additional criterion for the evaluation of the excess warranty in the award criteria. The present study seeks to answer the question of whether this jurisprudence is correct.

Keywords: public procurement, excess warranty, additional experience

1. Problem statement

According to Recital 89 of Directive 2014/24/EU, the best value for money is the most appropriate criterion for selecting the most economically advantageous offer.[2] With this provision, the legislator intended to seek to achieve various environmental, social, and other objectives through public procurement procedures, for which it considered the methods of awarding the contract to be the most appropriate.

The award of the contract, or in other words the selection of the successful tenderer, may be based on several criteria, which, according to the current public procurement law, are the lowest price, the lowest cost, and the best value for money. The latter evaluation criterion, in which quality as an element is included in the specific provisions.[3] The notion of quality is not defined in the legislation, which seeks to fill in the meaning of the term using a list of examples. However, it is the application of the law and, in particular, the control practices of the bodies responsible for monitoring that determines the criteria currently used by contracting authorities in the award of contracts financed by the Community.

Most of the time, the requirements of the control bodies are not reflected in public audit reports or legal opinions, which makes referencing difficult.

[1] PhD student, Károli Gáspár University of Reformed Church in Hungary.

[2] Directive 2014/24/EU of the European Parliament and the Council on public procurement and repealing Directive 2004/18/EC.

[3] See § 76 of the Public Procurement Act (referred to as PPA).

However, the Guide of the Public Procurement Authority (25.03.2020) specifically highlights two aspects to be avoided.[4] These two aspects are the imposition of excess warranties and indemnities.

The present study examines the application of quality evaluation criteria in public works tendering procedures, comparing the experience of professionals and the use of additional warranties as a condition for quality. The study is based on the current practice that the use of additional warranties in community-funded tenders has met with marked resistance from the control bodies, which significantly limits the room for manoeuvre of contracting authorities. An interesting aspect of this practice is that audit risks are invoked in the control process, even though, according to the European Commission, the public procurement directives give contracting authorities considerable flexibility to make their purchases on the basis of cost-effectiveness and quality criteria.[5] This effectively limits the selection process to the additional experience of quality professionals (in addition to price) as the basis for evaluation.

In the performance of contracts awarded under public procurement procedures, the contracting authority has a particular responsibility to verify the fulfilment of the contractual obligations which it has taken into account in the evaluation of the procedure. The obligation to do so is set out in the specific provisions and principles of the current public procurement law[6]. The importance of the above thought is underlined by the fact that the subheading of Part Five, Chapter XX of the Tender Act is: 'Application of the principle of sound management of public funds in the performance of the contract'. Without provisions of a warranty nature, the regulation of the evaluation criteria in addition to price, and the evaluation criteria themselves, would become void, leading to a conceptual crisis.

The question is how much more effectively the control of the surplus experience of professionals in the delivery of services, in its current form, ensures quality and thus the principle of responsible management of public funds, than the much stronger warranty of a statutory warranty.

The paper gives a sketch of the criteria for awarding a contract (a detailed analysis would be beyond the scope of this paper) and then tries to clarify the concept of quality. It then compares the criteria used (professional) with those that the study considers to be less risky (warranty, liquidated damages) and

[4] Guide of the Public Procurement Authority on the application of the evaluation criteria for the selection of the winning bidder (OJ No 60 of 2020; 25 March 2020) 10.

[5] https://commission.europa.eu/system/files/2019-11/2019.3911_hu_03.pdf

[6] See §142 (1) and § 2 (4) of the PPA.

concludes with several conclusions which may provide effective criteria for the application of the law.

2. Evaluation of tenders and award criteria

The process of evaluating tenders and drawing conclusions from the findings of the evaluation is a culmination of the procurement process. During this procedural step the contracting authority determines which of the tenders should be submitted on the basis of which one is the most advantageous and awards the contract to the contractor mostly.[7] The present study cannot deal with the award procedure in detail but can only highlight the main principles.

The criteria for selecting the most economically (i.e. overall) advantageous offer fall into three categories: lowest price, lowest cost, and best value for money.[8] It is essential to define the criteria in such a way as to warrant an objective assessment, in relation to the subject of the contract and taking into account the principle of non-discrimination (in particular to ensure equal treatment) and transparency.[9] In addition, 'the award criteria chosen must not confer unrestricted freedom of choice on the contracting authority and must ensure effective and fair competition and be accompanied by rules allowing effective control of the information submitted by tenderers. Contracting authorities must be able to verify the accuracy of the information and evidence submitted by tenderers in case of doubt.'[10]

To facilitate the correct and effective application of the evaluation criteria system, the Public Procurement Authority has issued a guide on the methods and the evaluation of tenders under Article 76(9)(d) of the Public Procurement Procedure Act (hereinafter referred to as the "Guide") and Article 76(12) of the Public Procurement Procedure Act. The Guide stipulates that the system of conditions for the verification of commitments under the evaluation criteria must be designed in such a way as to ensure that the commitments are complied with beyond the evaluation stage and during the performance of the contract concluded under the procurement procedure. Such conditions are typically included in the contractual provisions.

7 Sue Arrowsmith: *The Law of Public and Utilities Procurement*. 2nd Edition, London, Sweet and Maxwell, 2005. 489.

8 See § 76 of the PPA.

9 Arrowsmith 2005, Ibid.

10 See Article 67(4) of Directive 2014/24/EU of the European Parliament and of the Council.

The Court of Justice of the European Union has made it clear that the public procurement procedure is not a mere process but that each procedural step is aimed at ensuring that the parties conclude a contract which fully complies with the principles of public procurement and the specific legislation. 'Where a contracting authority sets award criteria for which it does not intend, nor is it able, to verify the accuracy of the information provided by tenderers, it infringes the principle of equal treatment, since such criteria do not ensure the transparency and objectivity of the tendering procedure. Therefore, award criteria that impose requirements which do not allow for effective verification of the information provided by tenderers are contrary to the principles of Community public procurement law'.[11]

The rules set out in Article 142 (1) of the Public Procurement Act shall ensure the enforcement of the provisions of Article 76 of the Public Procurement Act during the performance of the contract. The obligation to provide documentation under that section was not included in the previous public procurement legislation. These are important provisions, as they contain both the principle of the liability of contracting authorities (as referred to in the title of the Chapter 1 problem statement) and the possibility for control bodies to intervene under public law in what is essentially a private contractual relationship.[12] On this basis, the Public Procurement Authority may verify the performance of the contract in question, during which the contracting parties are obliged to cooperate with the monitoring bodies.[13]Under Article 142 (1) of the Public Procurement Act, 'the contracting authority shall document the data relating to the performance of the contract, including the verification and documentation of the performance of the contractual obligations taken into account in the evaluation of the public procurement procedure, as well as any non-performance of the contract, the reasons for such non-performance and, where appropriate, the enforcement of claims for breach of contract'. As indicated, the verification of the performance of the obligations taken into account in the evaluation is not a problem in most cases. One reason for this is that the current audit practice, by being over-active, has significantly limited the scope for evaluation.[14] It can be said that, in a very high percentage of public works contracts, the additional experience of the

[11] See the judgment of the Court of Justice (Sixth Chamber) of 4 December 2003. EVN AG and Wienstrom GmbH v Republic of Austria. Case C-448/01.

[12] Attila Dezső (ed.): *Nagykommentár a közbeszerzésekről szóló 2015. évi CXLIII. törvényhez*. Budapest, Wolters Kluver Hungary, 2021. 30.

[13] See Article 187 (2) (j) of the PPA.

[14] On the control, see Government Decree 272/2014 (5.XI.) and Government Decree 256/2021 (18.V.).

professionals involved in the execution of the works is the main quality criterion that contracting authorities assess, in addition to the net lump sum tender price.[15] The participation of professionals in the performance of the contract can be easily verified and the method of verification can be simply set out in the contract. The question in this context is to what extent the additional, otherwise uncontrollable, experience of the professionally presented warranties – in an objective manner – the quality of the performance.

2.1 On the issue of quality

According to Philip B. Crosby, quality is nothing more than meeting requirements.[16] Since requirements may vary from service to service, a single concept can only be given at the level of a generic clause.[17] The Civil Code defines the intended purpose as a measure of quality, which may be derived from the needs of the rightsholder, from the characteristics of services intended for a similar purpose or from legal requirements.[18] In regulating defective performance, the Civil Code stipulates that performance is defective (the debtor performs defectively) if the service does not meet the quality requirements laid down by contract or by law at the time of performance.[19] The legal consequences of non-conformity include, inter alia, the warranty of performance, the warranties and the liquidated damages for non-conformity. Exemption from such remedies may be granted by employing a proof or faultless performance.

From the point of view of the subject, the warranty requires special emphasis, the reason for which is the provision of Article 6:187 (2) of the Civil Code, according to which the rightful claimant may not assert a warranty claim in addition to the liquidated damages for defective performance. In such a case, it is up to the parties to agree on the legal consequence of the defective performance in their contract. This cannot apply without limitation to public works contracts.

[15] The question is to what extent this empties the institution of the qualitative evaluation criterion. The offer of additional experience of professionals is not verifiable in the least, and therefore in many cases, the lump sum bid price is the decisive factor in the procedure. This runs counter to the directive's efforts to ensure that contracting authorities seek to select quality (rather than price as the sole criterion).

[16] Cited in Bill Creech: *The Five Pillars of TQM: How to Make Total Quality Management Work for You*. New York, Truman Talley Books, 1994. 478.

[17] György Bíró et al.: *Az új Ptk. Magyarázata V/VI.: Kötelmi jog, első és második rész*. Budapest, HVG-ORAC, 2014. 283.

[18] See § 6:123 § (1) of the Hungarian Civil Code.

[19] See 6:157 § (1) of the Hungarian Civil Code.

In the case of public works contracts, the warranty claims are for repair or replacement. If the holder of the public contract decides to claim liquidated damages instead of a warranty claim, the repair of the defect must be carried out by a third party. This circumstance leads to an insoluble problem, in the light of the provision of the Tender Regulation prohibiting the dismantling of the contract into parts.[20] In practice, this would mean that the part affected by the repair would have to be subject to the same procedure and the same contracting regime as the underlying contract. Compared with the average 60-120 (sometimes 180) days for public procurement procedures, a contract for the correction of a defect makes it virtually impossible to perform the underlying contract.

Given the above thoughts, in public works contracts, the liquidated damages for non-performance are not applied by contracting authorities. Therefore, warranty claims can be enforced without limit.[21] Because of the reversed burden of proof, greater care is required on the side of the debtor, as it is for the debtor to prove that the cause of the defect (duly notified) detected during the warranty period arose after the performance. Given the strict regulation, the link between the warranty obligation and faultless, quality performance is clear. Another important circumstance is that under the current legislation, the basic obligation of the rightsholder is to satisfy himself that the performance is adequate.[22]

2.2. Quality aspects in practice

The Guide of the Public Procurement Authority states that '…the evaluation criteria relating to liquidated damages, warranties or other warranties, the number of instalments, the amount of the advance requested, are not explicitly considered as quality criteria.'[23] The quoted statement of the Guide is taken over by the Public Procurement Supervision Department of the Deputy State Secretariat for Public Procurement Supervision of the Prime Minister's Office and, in this respect, requests a review of such evaluation criteria in ex ante controlled procedures and a detailed justification in ex post controlled procedures.

[20] See § 19 (3) of the PPA.

[21] Nevertheless, in the case of contracts for the supply of goods and services concluded under framework agreements, it is noticeable that the contract applies both the liquidated damages for non-performance and the warranty claims as a legal remedy. The reason is the practice that was established under the old Civil Code and the complete lack of review of draft contracts.

[22] Gábor Török – Ádám Boóc: *Észrevételek a Ptk. 316. §-a vonatkozásában. Jogtudományi Közlöny*, 9/2012, 331–337.

[23] Guidance 10.

It can be agreed that the level of the liquidated damages, the number of partial performances and the amount of the advance requested are not related to the quality of the performance. At the same time, aspects of competitive tendering procedures other than public procurement are operational and can enhance competition but have no direct relevance. However, the provision of additional warranty requires a different approach, which can be better demonstrated by comparing the additional experience of professionals as an evaluation criterion.

The link between the surplus experience of professionals and quality is reflected in the quality management principles developed by Crosby. According to the 'Do It Right First Time' and 'Zero Defect' programs, if a worker knows what to do and how to do it, and if they care about the work, they will not make a mistake.[24] However, quality management principles developed for mass production cannot be directly implemented for all services. The relevant experience of the professionals responsible for quality assurance has an impact on quality. The responsible technical managers can successfully use the knowledge accumulated during the previous performance to reduce the risk of construction errors, thus warrantying quality. This statement is true if past performance contributes in a meaningful and positive way to the acquisition of experience. Participation in a defective or delayed execution, based on which the client subsequently claims a warranty, is not necessarily suitable for being cited as a reference.

In public procurement procedures, the proof of additional experience is provided by the professional's declaration, typically a CV, indicating the subject and period of previous performance and the tasks they have carried out.[25] A detailed check is often impossible, since the proof of additional experience may include past performance not covered by a public contract. On this basis, the (most) claims made by the professional in his CV can only be refuted in the course of a preliminary dispute resolution or appeal procedure initiated by the non-winning party.[26] These calls into question whether the additional experience presented contributes objectively to the quality of the performance.

An interesting situation in this context is the obligation to document under Section 142 (1) of the Public Procurement Act. It is worth returning to the Chapter 1 problem statement on this point. The fact that the professional has the additional experience offered is verified by the contracting authority during the procurement procedure based on the CV. It is possible to check that the professional is involved in the performance of the contract, but it is more

[24] Philip B. Crosby: *Quality is Free: The Art of Making Quality Certain. How to Manage Quality – So That It Becomes A Source of Profit for Your Business*, New York, McGraw-Hill, 1979.

[25] See Government Decree 321/2015 (X.30.) § 21 (1) (f).

[26] See § 80 and § 148 of the PPA.

difficult to check whether his additional experience contributes to quality. This can only be measured afterwards, based on the defects record taken during the acceptance of the handover and the claims reported during the warranty period. The question is whether the performance in this case, which shows many defects, is a 'quality' professional offer, as a contractual obligation, fulfilled by the tenderer. As the Jury has noted, the quality of staff can have a significant impact on the quality of the performance of the contract, it can have a significant impact on the quality of the performance of the contract but setting it above a certain level no longer contributes to improving the quality of the activity, it only distorts competition[27]. The reason is that tenderers, knowing the above characteristics, can make maximum bids for professionals without any consequences and can win the tender with the lowest price, thus eliminating the quality evaluation criterion.

2.3 Relationship between warranty period and quality

As stated above, the legal concept of warranty is closely linked to the concept of faultless performance, i.e. quality. This is simply because of the length of the period between the taking-over of the goods and the expiry of the warranty period. This period may be determined by the parties or may be laid down by law in the form of mandatory warranty periods.[28] Of particular relevance to the present topic is the Government Decree 181/2003 (5/11/2003) on mandatory warranties about housing construction (hereinafter: Government Decree), which covers a large percentage of contracts concluded on public procurement procedures.

From 9 April 2014, the Government Decree applies to the warranty of public buildings in respect of the building structures defined in Annexes 3 and 4 and certain products and materials used in their construction.[29] Without claiming to be exhaustive, a public use building is a building whose use is not restricted or cannot be restricted (e.g. parts of buildings for education, health, social, cultural, cultural, sports, financial, commercial, insurance, services, etc.), whose use is mandatory or unavoidable in certain cases (e.g. parts of buildings for public administration, justice, prosecution) and which is defined as public use by law or government decree.[30] Warranty periods are set by the Government Decree

27 D.362/16/2019.

28 Government Decree No. 151/2003 (IX. 22.) on the mandatory warranty for certain consumer durables.

29 Government Decree § 1 (3) para.

30 See Act LXXVIII of 1997 on the Shaping and Protection of the Built Environment, § 2, point 9.l.

at three, five and ten years for the building structures listed in the annexe. The Government Decree provides the legal consequence of nullity for a contractual agreement to the detriment of the customer. The parties may of course agree on more favourable terms.

The debtor has an elementary interest in faultless performance, as the consideration for the performance of the warranty obligation is included in the contractor's fee by analogy, i.e. he cannot claim a fee for work performed afterwards.[31] This means that the cost of the subsequent repairs reduces the result obtained, which was already taxed at that time. The longer the time elapses from the date of taking over, the greater the likelihood of failures due to poor quality of the work. Therefore, any additional offer beyond the warranty periods set out in the Government Regulation requires great caution on the part of the debtor. In practice, the extension of the 36-month warranty period is usually appreciated by extending it by a maximum of 24 months (60 months in total).[32] In addition, the assessment of the additional warranty is in line with the requirements set out in the Public Procurement Code. The warranty is directly linked to the subject matter of the contract, is based on factors that can be evaluated based on quantitative (i.e. objective) criteria, is not linked to the ability to perform the contract and is distinguishable from other elements of the tender.[33] The obligation to check and document the warranty under Section 142 (1) of the Public Procurement Act is emphatically fulfilled. This is because the warranty claim is made in writing. In the case of construction contracts, the handover documentation includes, among other things, the warranty certificates issued for the materials, components and accessories installed, through which the claim is enforced.[34] In practice, the contracts precisely regulate the process of enforcing the warranty claim.[35]

[31] This is also true for flat-rate contracts with itemised billing.

[32] The 36-month warranty period applies to the structures in Annexes 1-2 of the Decree, as the legislation provides for a significantly longer warranty period for items in Annexes 3-4. https://net.jogtar.hu/jogszabaly?docid=a0300181.kor.

[33] See § 76 (6) of the PPA.

[34] Government Decree No. 191/2009 (IX. 15.) § 33 (3) para.

[35] For example: 'the Contractor shall, during the warranty period, start the repair within 3 working days of the notification of the defect and continue the work with adequate staff until its completion. The final deadline for rectification of the defect is 10 working days after notification'.

3. Conclusions

The Directive aims to achieve a high level of quality in the performance of public contracts, which can be ensured by the evaluation criteria used in the award procedure. The Directive and the Tender Regulation provide sufficient flexibility to establish evaluation criteria. This is not necessarily supported by the current practices and needs to be taken into account in the application of the law.Two substantially different qualitative assessment criteria have been presented above. According to current audit practice, the offer of additional experience of professionals is the least risky, and auditors allow the criteria to be used without comment, with a maximum weight of 10 or less. In all cases, the additional experience as an evaluation criterion will require justification.

On the contrary, it can be outlined above that an objectively verifiable obligation (warranty) is contrasted with a commitment containing subjective elements (additional experience), which in some respects contradicts the ambitions of the Directive. The subjective element can be identified in the absence of a set of criteria for what constitutes additional experience that contributes to quality performance, and in the fact that in many cases the offers (CV statements) are not verifiable. In addition, there are no direct consequences if, despite the additional experience offered, the beneficiary is forced to make several claims within the warranty period. The indirect consequence is the correction of defects under the warranty itself, but this is (also) an independent legal consequence, i.e. the situation under Article 142(1) of the Public Procurement Act remains unsanctioned in respect of the offer of additional warranty.[36]In light of this, it may be worth considering reviewing inspection practices and allowing the use of objectively verifiable, qualitative criteria for construction works as a general rule, rather than as an exception. The ACPC rightly noted that a longer warranty period is a greater advantage for the contracting authority and that the evaluation of the warranty period meets the requirement of efficient use of public funds. The Jury agreed with the contracting authority's argument that if tenderers bid with lower quality materials rather than the basic warranty period, and instead bid with the higher warranty period for the additional points available, thereby committing to use higher quality products, there is a correlation between quality and warranty.[37]

[36] The contracting authority is required to document the data relating to the performance of the contract, including the verification and documentation of the fulfilment of the contractual obligations taken into account in the evaluation of the procurement procedure, any non-performance of the contract, the reasons for non-performance and, where appropriate, the enforcement of claims for non-performance.

[37] D.582/8/2017 point [46].

Literature

Sue Arrowsmith: *The Law of Public and Utilities Procurement*. 2nd Edition, London, Sweet and Maxwell, 2005.

György Bíró et al.: *Az új Ptk. Magyarázata V/VI.: Kötelmi jog, első és második rész*. Budapest, HVG-ORAC, 2014.

Bill Creech: *The Five Pillars of TQM: How to Make Total Quality Management Work for You*. New York, Truman Talley Books, 1994.

Philip B. Crosby: *Quality is Free: The Art of Making Quality Certain. How to Manage Quality – So That It Becomes A Source of Profit for Your Business,* New York, McGraw-Hill, 1979.

Attila Dezső (ed.): *Nagykommentár a közbeszerzésekről szóló 2015. évi CXLIII. törvényhez.* Budapest, Wolters Kluver Hungary, 2021.

Gábor Török – Ádám Boóc: *Észrevételek a Ptk. 316. §-a vonatkozásában. Jogtudományi Közlöny*, 9/2012, 331–337.

SOME LABOUR LAW ASPECTS OF PSYCHOLOGICAL CONTRACT THEORY

KRISTÓF TÓTH[1]

ABSZTRAKT ■ A tanulmány célja a pszichológiai szerződés, mint elméleti koncepció központi témáinak bemutatása, a releváns munkajogi összefüggésekre fókuszálva. Az alkalmazott fő kutatási módszer a témában született releváns tanulmányok, cikkek, monográfiák vizsgálata, ezek szerzői által rendszerezett empirikus kutatási adatok másodelemzése, valamint ennek során a főbb munkajogi vonatkozások és összefüggések feltárása. A munkaszerződés és a pszichológiai szerződés viszonyát vizsgálva megállapítható, hogy míg az előbbi egy írásos formában létező, jogi kötőerővel rendelkező szerződés, addig az utóbbi egy elméleti, absztrakt konstrukció, amely a felek kölcsönös és hallgatólagos elvárásait tartalmazza. Ebből adódóan tehát „jogon túli" kategóriának minősül, bizonyos esetekben azonban, főként annak megsértése esetén lehetnek jogi relevanciái.

KULCSSZAVAK: munkaszerződés, pszichológiai szerződés, kölcsönös elvárások, jogi háttérnormák, erkölcsi normák

ABSTRACT ■ This paper aims to present the central topics of psychological contract theory, focusing on the relevant labour law contexts. The main research method used is an examination of relevant studies, articles and monographs on the topic, a secondary analysis of empirical research data systematically compiled by the authors, as well as an exploration of the main labour law aspects and contexts. The difference between an employment contract and a psychological contract is that while the former is a written, legally binding contract, the latter is a theoretical, abstract construct that contains the mutual and implicit expectations of the parties. A psychological contract therefore falls into the category of *„extra-legal"* contracts, but in certain cases, especially in the event of a breach of contract, it may have legal relevance.

KEYWORDS: employment contract, psychological contract, mutual expectations, legal background norms, moral norms

[1] PhD student, Doctoral School of Law and Political Sciences, Károli Gáspár University of the Reformed Church in Hungary.

1. Introduction

This paper aims to present the central topics of psychological contract theory, focusing on the relevant labour law contexts. In the first part of the paper, the concept and brief history of the psychological contract, the distinction between an employment contract and a psychological contract, and the role of legal and moral requirements are presented. In the second part of the paper, the content, performance, and breach of psychological contracts will be discussed, drawing attention to the relevant labour law aspects.

2. Concept and a brief history of the psychological contract

The psychological contract is a theory developed by work and organisational psychology.[2]

The first research on the psychological contract appeared in the 1960s, to describe the psychological factors influencing the employee-employer relationship. The first research on this topic was carried out by Chris Argyris and Harry Levinson. Argyris described the *„psychological work contract"* as the relationship between the employer and the employee, the purpose of which is to ensure the continuity of the employment contract. The employer understands the employee's expectations of high salary, job security, etc., but expects the employee to perform the job accurately. The relationship is limited to ensuring the progress of the work and there is no room for deeper intimacy between the parties. Levinson developed his theory by analysing interviews with American employees and was the first to define the phenomenon as *„psychological contract."*[3]

Although Chris Argyris and Harry Levinson were the first to use the concept of the psychological contract, it has been a really „popular" research topic since the work of Denise M. Rousseau.[4] In a study published in 1989, Rousseau defines the concept of a psychological contract as follows: *„[t]he term of psychological contract refers to an individual's beliefs regarding the terms and conditions of a reciprocal exchange agreement between that focal person and another party. Key issues here include*

[2] Mónika Gubányi: A pszichológiai szerződés szakirodalmi összefoglalója. *Vezetéstudomány*, 10/2020, Iss. 40.

[3] Gubányi 2020, 41.

[4] László Balogh: *A teljesítményt befolyásoló szervezetpszichológiai tényezők vizsgálata interaktív sportcsapatoknál.* PhD disszertáció. Pécsi Tudományegyetem, Bölcsészettudományi Kar, Pszichológiai Doktori Iskola, 2008. 12.

the belief that a promise has been made and a consideration offered in exchange for it, binding the parties to some set of reciprocal obligations."[5]

A psychological contract is distinct from mere expectations. Expectations simply refer to what the employee expects to receive from his/her employer. The psychological contract, by contrast, refers to mutual obligations that characterize the employee's relationship with his or her employer. The psychological contract, unlike mere expectations, entails a belief in what the employer is obliged to provide, based on perceived promises of reciprocal exchange.[6]

3. Distinguishing a psychological contract from an employment contract

In some ways, a psychological contract is very similar to an employment contract. Both aim to include the basic terms of the „exchange". A psychological contract is not just about bare promising, but rather it refers to the parties' expectations of one another in a mutually beneficial deal.[7]

That being said, a psychological contract is in many ways very different from an employment contract. One difference is that the content of a psychological contract is subjective, as it contains the parties' expectations of mutual commitment in terms of what they are obliged to give and what they can expect in return from the other party. These expectations arise from the belief that both parties have made a promise and both parties have accepted the same contractual terms. This belief, however, is not based on a written contract. Thus, the parties only assume that they interpret the terms of the contract in the same way. However, the two parties may interpret the content of the contract differently, so they are likely to have slightly different views on what they are obliged to perform. The content of a psychological contract is therefore determined by the parties' interpretation of the agreement, which has no objective content.[8]

Another difference is that the psychological contract is constantly changing depending on the circumstances. A psychological contract, unlike an employment contract, is not made once but rather it is revised throughout the employee's

5 Denise M. Rousseau.: Psychological and implied contracts in organizations. *Employee Responsibilities and Rights Journal*, 2/1989, Iss. 2. 123.

6 Sandra L. Robinson – Denise M. Rousseau: Violating the Psychological Contract: Not the Exception but the Norm. *Journal of Organizational Behavior*, 15/1994, Iss. 3. 246.

7 Tess Wilkinson-Ryan: Legal Promise and Psychological Contract. *Wake Forest Law Review*, 47/2012. 847.

8 Robinson – Rousseau 1994, 246.

tenure in the organization. For example, events in the form of relocations and organizational restructuring may overlay new terms upon old ones.[9] By contrast, the content of an employment contract is permanent. Under Act I of 2012 on the Labour Code (hereinafter: Labour Code), the parties can only amend the employment contract by mutual consent.[10]

A further difference is that, unlike an employment contract, a psychological contract does not exist in written form and its contents cannot be enforced directly in court. For example, if the employer has promised the employee that he/she will be promoted if he/she performs at work well, but the employer does not do so, this is a breach of the psychological contract, even though the promotion is not legally enforceable.[11]

3.1. Features of the employment relationship

At this point, it is worth distinguishing employment relationships based on an employment contract from other civil employment relationships. Although the employment relationship is created by (employment) contract, unlike civil employment relationships, the employment relationship is characterised by subordination.[12] Three major theories have emerged to explain this subordinate relationship.[13] The first theory was developed in the 19th century, which is the theory of „economic dependence".[14] According to this theory, the dependence of the employee results from the economic power of the employer, since the employer has the money, infrastructure, network, etc. necessary to continue the economic activity, without which the employee would not be able to appear on the market independently.[15]

However, after the industrial revolution, groups of employees emerged for whom economic dependence was no longer so significant.[16] In light of all these

9 Robinson – Rousseau 1994, 246.
10 Labour Code Section 58.
11 Wilkinson-Ryan 2012, 849.
12 Gábor Kártyás: XXI. század és munkajog: megőrizni vagy megreformálni? In: Lajos Pál – Zoltán Petrovics (ed.): *Visegrád 17.0. A XVII. Magyar Munkajogi Konferencia szerkesztett előadásai*. Budapest, Wolters Kluwer, 2020. 43.
13 Katalin Dudás – Szilvia Halmos – Gábor Kártyás: *A munkajog szerepe a munkaerőhiány kezelésében*. Kutatási zárótanulmány. Budapest, Közösen a Jövő Munkahelyeiért Alapítvány, 2018. 11.
14 György Kiss: A munkajog fogalma. In: György Kiss (ed.): *Munkajog*. Budapest, Dialóg Campus, 2020. 21.
15 Kártyás 2020, 43.
16 Kiss 2020, 21.

developments, labour law has developed the theory of „personal dependence". According to this theory, in the employment relationship, employees add their personality to their performance, and thus become dependent and vulnerable to their employer.[17]

Theories of economic and personal dependence have sought to explain the essence of subordination in terms of non-legal factors.[18] However, the employee's subordination can also be explained by legal factors. A fundamental feature of the employment relationship is the abstract definition of the subject of the employment contract, which is the job function. Within the framework of the job function, the employer is entitled to determine the employee's performance based on the right of instruction.[19] The employee's subordination therefore derives from labour law itself, since labour law gives the employer the right to instruct.[20]

According to the modern conception of labour law, the subordination between the parties is not primarily explained by non-legal factors but related to the abstract definition of the subject of the employment contract (job function) and the employer's right to instruct. At the same time, as Katalin Dudás, Szilvia Halmos and Gábor Kártyás pointed out, the subordination between the parties in the establishment, modification and termination of employment relationships can be explained to a significant extent by non-legal factors, mainly by the employee's vulnerable position in economic terms. The main motivation for the employee to accept the terms and conditions of the employment contract and to perform the employment relationship is to avoid termination of the employment relationship, which would put him in a crisis in economic and social terms.[21]

4. Types of psychological contract

Rousseau distinguished two types of psychological contracts: transactional and relational contracts.[22] Their different characterization is based on their different orientation towards time frames and tangibility. Transactional contracts are characterized by a short-term employment relationship in which the performance requirements or mutual obligations can be clearly specified.

17 Dudás – Halmos – Kártyás 2018, 11-12.
18 Dudás – Halmos – Kártyás 2018, 12.
19 Kártyás 2020, 44.
20 Attila Kun: Munkajogi elvi kérdések: a felek (munkáltató és munkavállaló) egyéni megállapodásainak mozgásteréről. *Glossa Iuridica,* 7/2020, special issue. 150.
21 Dudás – Halmos – Kártyás 2018, 13-14.
22 Denise M. Rousseau: New hire perceptions of their own and their employer's obligations: A study of psychological contracts. *Journal of Organizational Behavior,* 11/1990, Iss. 5. 390.

They are quite specific and economic in nature. The employee does not want to be a committed member of the employer's organisation. In contrast, relational contracts are characterized by long-term employment relationships in which mutual obligations cannot be clearly specified. They are both economic and social-emotional in nature, less clearly specified and to a degree open-ended.[23] The employer expects the employee to take on more and more tasks, so the employee's skills are constantly improving, and the employer contributes to this by providing training. Employer and employee rely on each other in the long term.[24] In terms of the nature of employment, a typical employment relationship is more likely to lead to a relational contract between the parties than atypical or „non-standard" employment (e.g. gig economy, platform work, etc.). For example, in most cases, in a fixed-term employment relationship neither party is seeking to establish a long-term commitment, the employee is less likely to receive on-the-job training, etc. Therefore, in an atypical employment, the relationship between the parties is more likely to be characterised by a transactional contract.

Lynn M. Shore and Kevin Barksdale distinguished four types of psychological contracts based on the degree of balance and level of obligation. With this model, Shore and Barksdale sought to cope with the problem of the content of psychological contracts and shift the focus to more general characteristics which are less situation-bound. They used the two underlying dimensions of the degree of balance in employee and employer obligations, as well as the level of obligations. The authors considered psychological contracts as balanced if the perceived obligations of the employee and those of the employer are at the same level. They defined the level of obligation as the extent to which the employee and the employer feel obligated to fulfil a particular contract term.[25] Following these two dimensions, Shore and Barksdale identified four types of psychological contracts: mutual high obligations, mutual low obligations, employee over-obligation, and employee under-obligation.[26]

In the case of mutual high obligations, the psychological contract is balanced and both parties have high obligations. This type of psychological contract yields the best results in terms of the employees' affective involvement, their intention to stay or leave, their perception of their future with their employer and the

[23] Maddy Janssens – Luc Sels – Inge Van Den Brande: Multiple types of psychological contracts: A six-cluster solution. *Human Relations*, 56/2003, Iss. 11. 1351.

[24] Balogh 2008, 12.

[25] Janssens – Sels – Van Den Brande 2003, 1352.

[26] Lynn M. Shore – Kevin Barksdale: Examining degree of balance and level of obligation in the employment relationship: a social exchange approach. *Journal of Organizational Behavior*, 19/1998, Iss. 1. 733-735.

perceived support that they receive from the employer. In contrast, a psychological contract of mutual low obligations is characterized by balance but with both parties having low obligations. Due to the low perceived employee obligations, this type of psychological contract yields poorer results for the employer than the previous one. The two other types of contracts are not balanced: employee over-obligation and employee under-obligation. Because of the unbalanced and low employee obligations, this type of contract is expected to yield the poorest results of all types.[27]

The level of commitment between the parties may be influenced by several external factors, such as the state of the labour market. If there is a labour shortage in a particular sector, employees can change jobs easily. An employee may decide to continue his or her career with an employer that offers a higher salary and better conditions. As a result, the relationship between the parties may become asymmetric due to the low commitment of the employee. However, if there is a labour surplus in each sector, employees are more likely to be committed to their employer to maintain the employment relationship. In this case, there may also be an asymmetric relationship between the parties if the employer does not reciprocate the employee's commitment. The lack of commitment is due to the employer's awareness that he or she can easily find another employee to replace the current one. Thus, from a labour market perspective, a relatively balanced labour supply-demand situation is most likely to lead to some form of balanced contract (mutual high obligations or mutual low obligations) between the parties.

Inge Van den Brande et al. categorised the types of contracts according to the power distance and the level of the contract. The authors distinguished between *„high"* and *„low"* psychological contracts in terms of power distance. The authors defined power distance as *„the degree of inequality in power between a less powerful individual and a more powerful other, or the potential to determine or direct (to a certain extent) the behavior of another person/ other persons more so than the other way round."*[28] Expectations concerning the degree of power distance may be shaped both by the employer and by the employee. Unequal treatment of employees through privileges or differential status treatment, a formal relationship between different hierarchical levels, formal ways of addressing people, and a paternalistic management style are all employer practices which shall create expectations of a high-power distance relationship. The employee can also promote a high-

[27] Janssens – Sels – Van Den Brande 2003, 1352-1353.

[28] Inge Van Den Brande – Luc Sels – Maddy Janssens – Bert Overlaet: *Assessing the nature of psychological contracts: conceptualization and measurement*. DTEW Research Report 0241. Leuven, Katholieke Universiteit Leuven, 2002. 10.

power distance relationship by accepting the authority of hierarchy, adopting a conformist attitude and respecting orders.[29]

The authors also distinguished between *„individual"* and *„collective"* psychological contracts based on the levels of the contract. This distinction is based on whether individual employment contracts or collective bargaining is more prevalent in a country's industrial relations and labour law practice. An individually regulated employment relationship refers to the possibility of individual negotiation or, in other words, individual arrangements that can be made which deviate from the norm. In contrast, in a collectively regulated employment relationship, little or no individual negotiation is possible because all employment aspects have been collectively regulated. An individually regulated employment relationship may be further reinforced by individualized HRM practices such as individual performance-based pay, flexible benefit plans or individual complaint procedures. In contrast, a collectively regulated employment relationship is reinforced through the application of collective personnel practices, such as the use of generally applicable rules and procedures, agreements at the group level and the same or similar treatment of all employees. In a collectively regulated employment relationship, trade unions usually play a more prominent role than in an individually regulated employment relationship.[30]

The coverage rate of collective agreements varies widely from country to country. In Hungary this rate is quite low, estimated at 30% at most.[31] In many *„post-socialist countries"*, including Hungary, trade unions have a *„mobilization deficit"*, which means that they have difficulties responding to employee discontent.[32] According to some views, the Hungarian society is „very individualised, highly segmented and lacks a strong grassroots institutional network […]",[33] which does not favour the trade union movement.[34]

[29] Van Den Brande – Sels – Janssens – Overlaet 2002, 12.
[30] Van Den Brande – Sels – Janssens – Overlaet 2002, 12.
[31] Kiss 2020, 403.
[32] Attila Kun: International Research Project DIADSE (Dialogue for Advancing Social Europe), National Report-Hungary, 2014. 4. https://aias-hsi.uva.nl/en/projects-a-z/diadse/reports/reports.html?cb (2023. 11. 11.).
[33] András Tóth – László Neumann – Hortenzia Hosszú: Hungary's full-blown malaise. In: Steffen Lehndorf (ed.): *A triumph of failed ideas. European models of capitalism in the crisis.* Brussels, ETUI, 2012. 152.
[34] Kun 2014, 4.

5. The role of moral norms regarding the psychological contract

5.1. Promise in the employment relationship

In an article, György Kiss discusses in detail the significance of the promise in the context of the employment contract. The author notes that the analysis of the promise is one of the most complex tasks in contract law. This is because the relationship between promise and contract is perceived in quite different ways, and the binding force of promises and different types of promises is interpreted in different ways.[35]

In the employment relationship, in addition to the employment contract and the collective agreement, the employer's unilateral commitment may be, for example, a promise made by the employer to the employee. A commitment is a specific unilateral act under which the carrying out of the commitments may be demanded irrespective of the beneficiary's acceptance.[36] Commitments can also be made by the employer in internal policy, such as bonus policy or cafeteria policy.[37]

In line with the doctrine of clausula rebus sic stantibus, the Labour Code significantly limits the possibility of terminating or amending a unilateral commitment. Under the Labour Code, „[a] commitment may be amended to the beneficiary's detriment, or may be terminated effective immediately in the event of subsequent major changes in the circumstances of the person making the commitment whereby carrying out the commitment is no longer possible or it would result in unreasonable hardship."[38] In this case, the objective circumstances need to be examined, i.e. those from which the major change can be identified. If the employer cannot prove such an exceptional circumstance, the commitment may be amended or terminated only upon the employee's consent.[39]

35 György Kiss: A munkaszerződés tartalmának összetettségéről. *Jogtudományi Közlöny*, 3/2017. 105.

36 Labour Code Section 16, Subsection (1).

37 Tamás Gyulavári – Attila Kun: A munkáltatói szabályzat az új Munka Törvénykönyvében. *Magyar Jog*, 9/2013. 558.

38 Labour Code Section 16, Subsection (2).

39 Zsolt Cselédi: *Egyoldalú kötelezettségvállalás a munkáltató részéről.* Munkajog Portál, 2014. 12. 11., https://munkajogportal.hu/egyoldalu-kotelezettsegvallalas-a-munkaltato-reszerol/

5.2. Equity, good faith, and fairness

The requirement of good faith and fairness is not only a moral but also a legal requirement. Under the Labour Code, *„[i]n exercising rights and discharging obligations, the parties involved shall act in the manner consistent with the principle of good faith and fairness, they shall be required to cooperate with one another, and they shall not engage in any conduct to breach the rights or legitimate interests of the other party."*[40]

The moral requirement of equity is also a legal obligation. According to the Labour Code, „[e]mployers shall take into account the interests of employees under the principle of equitable assessment; where the mode of performance is defined by unilateral act, it shall be done so as not to cause unreasonable disadvantage to the employee affected."[41] The principle of equitable assessment seeks to create a balance between the employer's right of instruction and the protection of the employee's interests.[42] The employer can take several measures that may be disadvantageous to the employee (for example, ordering overtime work), but the Labour Code only prohibits measures that are unreasonable disadvantageous. The Labour Code does not specify which interests of the employee must be taken into account by the employer in the context of the principle of equitable assessment, but these may include, among others, the employee's personal (even social) circumstances, health, marital status, age, etc.[43] Therefore, it may be a violation of this principle, for example, if the employer schedules the employee's working time in such a way that the employee cannot care of his or her child.[44]

It is important to note that the principle of equitable assessment is not the same as other statutory rules of equity (where the law grants judicial discretion[45]), nor is it the same as the ordinary meaning of equity.[46] At the same time, concerning the psychological contract, it is also of great importance that the employer exercises equity in the ordinary sense of the word. This equity can take many

[40] Labour Code Section 6, Subsection (2).

[41] Labour Code Section 6, Subsection (3).

[42] Attila Kun: A méltányos mérlegelés elve a magyar munkajogban – méltánytalanul mellőzve? *Magyar jog*, 12/2017. 735.

[43] Kun 2017, 736.

[44] Gábor Fodor T.: *A méltányos mérlegelés elve – új elem a Munka Törvénykönyvében.* Jobline, 2016. 10. 18., https://karrierplusz.jobline.hu/allaskinalok/20161018_A_meltanyos_merlegeles_elve__uj_elem_a_Mu

[45] For example: Labour Code Section 190 *The court, under special and equitable circumstances, may grant partial exemption from liability to the employee held liable for damages, upon weighing the financial standing of the parties, the gravity of the infringement and the consequences of providing compensation.*

[46] Kun 2017, 739.

forms, such as tolerating minor delays by the employee, letting the employee off a few minutes before the end of the working day to catch the train, etc. The employer is not obliged to take such measures under the Labour Code, but the exercise of equity in such situations can strengthen the employee's commitment to the employer, increase the level of trust and have other positive effects on the psychological contract.

5.3. „Bounded Self-Interest": the economic aspects of the requirement of good faith and fairness

The contractual relationship between the parties is governed by numerous moral and legal rules. One of the most important norms is the requirement of good faith and fairness. Researchers on the economic aspects of the psychological contract have made an interesting observation about this requirement. Daniel Kahneman, Jack Knetsch and Richard Thaler examined the economic aspects of good faith and fairness in a hypothetical company and its employees. In their research, they described two hypothetical cases and then asked the research participants to give their opinions on them. The first case was the following: *„[a] small company employs several workers and has been paying them average wages. There is severe unemployment in the area and the company could easily replace its current employees with good workers at a lower wage. The company has been making money. The owners reduce the current workers' wages by 5 percent."* Seventy-seven percent of respondents thought this was unfair. However, when respondents read in the other hypothetical case that *"[t]he company has been losing money. The owners reduce the current workers' wages by 5 percent,"* only thirty-two percent thought that the wage cut was unfair.[47]

This research concludes that the general public believes that a company is allowed to break its earlier promise (pay less than it promised) to protect its original profits. In this case, there is less chance of a breach of the psychological contract, as employees will not necessarily feel that their wages have been unfairly reduced. On the other hand, it is unfair and a breach of the psychological contract if a company wants to increase its income at the expense of its employees.[48]

[47] Daniel Kahneman – Jack L. Knetsch – Richard Thaler: Fairness as a Constraint on Profit Seeking: Entitlements in the Market. *The American Economic Review*, 76/1986, Iss. 4. 733.

[48] Wilkinson-Ryan 2012, 861–862.

6. The content of the psychological contract, with a particular reference to lifelong learning

Rousseau formulated seven expectations and eight obligations on the content of the psychological contract. Examples of employee expectations include promotion, rewards, training, job security and career opportunities. Employer expectations include, for example, willingness to work overtime, loyalty, knowledge of internal rules and compliance with the employer's interests. Herriot et al. also examined the content of the psychological contract. They distinguished between seven categories of employee obligations (e.g. honesty, loyalty, flexibility) and twelve categories of organisational obligations (training, fairness, rewards, etc.).[49]

Several studies have highlighted the need for education and training of employees. In connection with this expectation, it is worth referring to the tendency of so-called *„lifelong learning."* Lifelong learning is the concept of pursuing additional education and the development of further skills beyond an individual's formal or compulsory education. It is generally voluntary and self-motivated based on a pursuit to learn more, gain new skills or support professional development. Examples include taking part in an online skills course or even enrolling in a re-training scheme. These forms of learning are now being viewed as increasingly vital to employers, future growth, as well as the development of the further education and skills sector. With the future of the workplace looking to change dramatically with automation, AI, Big Data, and the growth of new industries, retraining and skill development will be critical to ensure skills needs are met.[50] Thus, lifelong learning is essential for competitiveness, employability, social inclusion, and personal improvement. Furthermore, flexicurity is a key concept within the employment policy of the European Union, which contains the strategies connected to lifelong learning.[51]

[49] Gubányi 2020, 44.

[50] Callum Clark: What is Lifelong Learning and Why is it Important? Higher Education, 2021. February 18., https://blog.insidegovernment.co.uk/higher-education/what-is-lifelong-learning

[51] Attila Kun: Executive summary. In: Attila Kun (ed.): *Az egész életen át tartó tanulás (lifelong learning) jogi keretei a munka világában, különös tekintettel a munkaviszonyra.* Budapest, Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, 2017. 11.

7. Breach of the psychological contract

If the employer fulfils the psychological contract, this is reflected, for example, in the employee's job satisfaction, commitment, good behaviour, improved performance, etc.[52] A breach of psychological contract occurs when one party fails to fulfil its obligations.[53] The reaction to a breach of the contract may be, for example, to initiate a discussion, passivity or, in extreme cases, termination of employment. If the employer breaches the psychological contract, it undermines the other party's commitment to the contract, which may lead to the employee putting less effort into his or her work or terminating the employment relationship.[54] Breaching the psychological contract therefore has serious consequences for the employee's attitudes and behaviour: it reduces the level of satisfaction and trust.[55]

An example of a breach of the psychological contract by an employer is when there is an unwritten rule in the organisation that if the employee does the job well, he or she will be promoted. The employer, however, is not obliged to promote the employee under the Labour Code, but only under the psychological contract. However, if a promotion is not granted, the employee will sooner or later terminate the employment relationship. Of course, it is also possible that the employee breaches the psychological contract. For example, the employee may breach the contract by abusing the „home office" option allowed by the employer and failing to work, treating this form of work as paid leave. In this case, the psychological contract is breached, and the employer must prohibit the home office.[56]

7.1. The schema of employment contract

A schema is a mental model of a concept or category, sometimes described as *"a theory of reality."* It *"refers to cognitive structures of organized prior knowledge, abstracted from experience with specific instances"* and guides both the encoding of new information

[52] Charissa Freese – René Schalk: How to measure the psychological contract? A critical criteria-based review of measures. *South African Journal of Psychology*, 38/2008, Iss. 2. 276.

[53] Wilkinson-Ryan 2012, 847.

[54] Sandra L. Robinson.: Trust and Breach of the Psychological Contract. *Administrative Science Quarterly,* 41/1996, Iss. 4. 574.

[55] Balogh 2008, 14.

[56] Zsolt Péter Szabó: *Bizalom, ha sérül – pszichológiai szerződés a koronavírus idején*. Karrier Trend, 2020.11.19., https://karriertrend.hu/munkavedelem-es-egeszseg/bizalom-ha-serul-pszichologiai-szerzodes-a-koronavirus-idejen/

and the retrieval of existing knowledge and memory. The schema of a given contract includes prior beliefs about the nature of the domain as well as explicit rights and obligations iterated during the agreement stage. As regards the employment contract, the „cashier" schema presumably includes the handling of money and being polite to customers but does not include cleaning tasks. It would not be surprising that an employee hired to be a cashier would feel taken advantage of if it turned out that his/her responsibilities included cleaning toilets.[57]

The obligation to perform tasks outside the scope of job function also raises concerns from a labour law perspective. Although the job function is the general definition of the tasks that the employee is obliged to perform under the employment contract, the job function cannot be defined too broadly,[58] and the employee can only be instructed to perform tasks (except in case of derogation from the employment contract[59]) that fall within his/her job function.[60]

8. Summary

The moral norms play a significant role in terms of the psychological contract. Some of these moral requirements are also reflected as legal norms in the Labour Code. Thus, labour law provides a degree of protection for the enforcement of the employee's interests that are not included in the employment contract and therefore cannot be enforced.[61]

The types of psychological contracts can be grouped according to several criteria. Rousseau distinguished two types of psychological contracts: transactional and relational contracts. Their different characterization is based on their different orientation towards time frames and tangibility. As we saw, transactional contracts are characterized by a short-term employment relationship in which the performance requirements or mutual obligations can be clearly specified because they are quite specific and economic in nature. The employee does not want to be a committed member of the employer's organisation. In contrast, relational contracts are characterized by long-term employment relationships

[57] Wilkinson-Ryan 2012, 848.

[58] BH 2015. 78.

[59] Labour Code, Section 53, Subsection (1) *Employers shall be entitled to temporarily reassign their employees to jobs and workplaces other than what is contained in the employment contracts, or to another employer.*

[60] Mária Hajdu-Dudás: *Mi tartozik bele a munkakörbe, meddig mehet el a munkáltató?* Adózóna, 2020. 07. 06. https://adozona.hu/munkajog/Mi_tartozik_bele_a_munkakorbe_Meddig_mehet__2ND6IP

[61] György Lőrincz: A munkaszerződés teljesítésének egyes kérdései. *Munkajog*, 3/2020. 12.

in which mutual obligations cannot be clearly specified because they are both economic and social-emotional in nature, less clearly specified and degree open-ended.[62] The employer expects the employee to take on more and more tasks, so the employee's skills are constantly improving, and the employer contributes to this by providing training. Employers and employees rely on each other in the long term.

Lynn M. Shore and Kevin Barksdale distinguished four types of psychological contracts based on the degree of balance and level of obligation: mutual high obligations, mutual low obligations, employee over-obligation, and employee under-obligation. In the case of mutual high obligations, the psychological contract is balanced and both parties have high obligations. This type of psychological contract yields the best results in terms of the employees' affective involvement, their intention to stay or leave, their perception of their future with their employer and the perceived support that they receive from the employer. In contrast, a psychological contract of mutual low obligations is characterized by balance but with both parties having low obligations. Due to the low perceived employee obligations, this type of psychological contract yields poorer results for the employer than the previous one. The two other types of contracts (employee over-obligation and employee under-obligation) are not balanced. Because of the unbalanced and low employee obligations, this type of contract is expected to yield the poorest results of all types.

Inge Van den Brande et al. categorised the types of contracts according to the power distance and the level of the contract. The authors distinguished between *„high"* and *„low"* psychological contracts in terms of power distance. Expectations concerning the degree of power distance may be shaped both by the employer and by the employee. Unequal treatment of employees through privileges or differential status treatment, a formal relationship between different hierarchical levels, formal ways of addressing people, and a paternalistic management style are all employer practices which shall create expectations of a high-power distance relationship. The employee can also promote a high-power distance relationship by accepting the authority of the hierarchy, adopting a conformist attitude and respecting orders. The authors also distinguished between *„individual"* and *„collective"* psychological contracts based on the levels of the contract. This distinction is based on whether individual employment contracts or collective bargaining is more prevalent in a country's industrial relations and labour law practice. An individually regulated employment relationship refers to the possibility of individual negotiation or, in other words, individual arrangements

[62] Janssens – Sels – Van Den Brande 2003, 1351.

that can be made which deviate from the norm. In contrast, in a collectively regulated employment relationship, little or no individual negotiation is possible because all employment aspects have been collectively regulated. An individually regulated employment relationship may be further reinforced by individualized HRM practices such as individual performance-based pay, flexible benefit plans or individual complaint procedures. In contrast, a collectively regulated employment relationship is reinforced through the application of collective personnel practices, such as the use of generally applicable rules and procedures, agreements at the group level and the same or similar treatment of all employees. In a collectively regulated employment relationship, trade unions usually play a more prominent role than in an individually regulated employment relationship.

Although there are significant similarities between a psychological contract and an employment contract, the two contracts are substantially different. The main difference is that the elements of a psychological contract are not part of a written employment contract, as it does not define rights and obligations. In the words of György Lőrincz, it is more of a *„virtual agreement",* which sets out the expectations of the parties in terms of the employment relationship.[63] However, these expectations are not legally enforceable, so their fulfilment or non-fulfilment has no direct legal consequences.

At the same time, it is in the interest of both parties that the expectations defined in the psychological contract are met. Consequently, the parties will seek to include these expectations in the employment contract or other legal agreement.[64] Several studies have highlighted the need for education and training of employees, as well as the need for loyalty and organisational commitment on the part of employers. A study contract is an excellent way of mutually satisfying these two needs and „converting them into a right", under which „the employer undertakes to provide support for the duration of studies while the employee undertakes to complete the studies as agreed and to refrain from terminating his employment by way of notice following graduation for some time commensurate for the amount of support, not exceeding five years."[65]

However, most psychological contract requirements cannot be converted into rights by agreement or legislation, thus they remain „extra-legal" categories. These requirements are not legally enforceable, therefore their fulfilment is based on trust. Nevertheless, if trust is lost, it can have a negative impact not only on the psychological contract but also on the employment relationship.[66]

63 Lőrincz 2020, 11.
64 Lőrincz 2020, 12.
65 Labour Code Section 229, Subsection (1)
66 Lőrincz 2020, 12.

Literature

András Tóth – László Neumann – Hortenzia Hosszú: Hungary's full-blown malaise. In: Steffen Lehndorf (ed.): *A triumph of failed ideas. European models of capitalism in the crisis.* Brussels, ETUI, 2012.

Attila Kun: A méltányos mérlegelés elve a magyar munkajogban – méltánytalanul mellőzve? *Magyar jog*, 12/2017. 735.

Attila Kun: Executive summary. In: Attila Kun (ed.): *Az egész életen át tartó tanulás (lifelong learning) jogi keretei a munka világában, különös tekintettel a munkaviszonyra.* Budapest, Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, 2017.

Attila Kun: International Research Project DIADSE (Dialogue for Advancing Social Europe), National Report-Hungary, 2014. 4. https://aias-hsi.uva.nl/en/projects-a-z/diadse/reports/reports.html?cb (2023. 11. 11.).

Attila Kun: Munkajogi elvi kérdések: a felek (munkáltató és munkavállaló) egyéni megállapodásainak mozgásteréről. *Glossa Iuridica,* 7/2020, special issue.

Callum Clark: What is Lifelong Learning and Why is it Important? Higher Education, 2021. February 18., https://blog.insidegovernment.co.uk/higher-education/what-is-lifelong-learning

Charissa Freese – René Schalk: How to measure the psychological contract? A critical criteria-based review of measures. *South African Journal of Psychology*, 38/2008, Iss. 2.

Daniel Kahneman – Jack L. Knetsch – Richard Thaler: Fairness as a Constraint on Profit Seeking: Entitlements in the Market. *The American Economic Review*, 76/1986, Iss. 4.

Denise M. Rousseau.: Psychological and implied contracts in organizations. *Employee Responsibilities and Rights Journal*, 2/1989, Iss. 2.

Denise M. Rousseau: New hire perceptions of their own and their employer's obligations: A study of psychological contracts. *Journal of Organizational Behavior*, 11/1990, Iss. 5.

Gábor Fodor T.: *A méltányos mérlegelés elve – új elem a Munka Törvénykönyvében.* Jobline, 2016. 10. 18., https://karrierplusz.jobline.hu/allaskinalok/20161018_A_meltanyos_merlegeles_elve__uj_elem_a_Mu

Gábor Kártyás: XXI. század és munkajog: megőrizni vagy megreformálni? In: Lajos Pál – Zoltán Petrovics (ed.): *Visegrád 17.0. A XVII. Magyar Munkajogi Konferencia szerkesztett előadásai*. Budapest, Wolters Kluwer, 2020.

György Kiss: A munkajog fogalma. In: György Kiss (ed.): *Munkajog.* Budapest, Dialóg Campus, 2020.

György Kiss: A munkaszerződés tartalmának összetettségéről. *Jogtudományi Közlöny*, 3/2017.

György Lőrincz: A munkaszerződés teljesítésének egyes kérdései. *Munkajog*, 3/2020. 12.

Inge Van Den Brande – Luc Sels – Maddy Janssens – Bert Overlaet: *Assessing the nature of psychological contracts: conceptualization and measurement*. DTEW Research Report 0241. Leuven, Katholieke Universiteit Leuven, 2002.

Katalin Dudás – Szilvia Halmos – Gábor Kártyás: *A munkajog szerepe a munkaerőhiány kezelésében*. Kutatási zárótanulmány. Budapest, Közösen a Jövő Munkahelyeiért Alapítvány, 2018.

László Balogh: *A teljesítményt befolyásoló szervezetpszichológiai tényezők vizsgálata interaktív sportcsapatoknál.* PhD disszertáció. Pécsi Tudományegyetem, Bölcsészettudományi Kar, Pszichológiai Doktori Iskola, 2008.

Lynn M. Shore – Kevin Barksdale: Examining degree of balance and level of obligation in the employment relationship: a social exchange approach. *Journal of Organizational Behavior*, 19/1998, Iss. 1.

Maddy Janssens – Luc Sels – Inge Van Den Brande: Multiple types of psychological contracts: A six-cluster solution. *Human Relations*, 56/2003, Iss. 11.

Mária Hajdu-Dudás: *Mi tartozik bele a munkakörbe, meddig mehet el a munkáltató?* Adózóna, 2020. 07. 06. https://adozona.hu/munkajog/Mi_tartozik_bele_a_munkakorbe_Meddig_mehet__2ND6IP

Mónika Gubányi: A pszichológiai szerződés szakirodalmi összefoglalója. *Vezetéstudomány*, 10/2020, Iss. 40.

Sandra L. Robinson – Denise M. Rousseau: Violating the Psychological Contract: Not the Exception but the Norm. *Journal of Organizational Behavior*, 15/1994, Iss. 3.

Sandra L. Robinson.: Trust and Breach of the Psychological Contract. *Administrative Science Quarterly,* 41/1996, Iss. 4.

Tamás Gyulavári – Attila Kun: A munkáltatói szabályzat az új Munka Törvénykönyvében. *Magyar Jog*, 9/2013.

Tess Wilkinson-Ryan: Legal Promise and Psychological Contract. *Wake Forest Law Review*, 47/2012.

Zsolt Cselédi: *Egyoldalú kötelezettségvállalás a munkáltató részéről.* Munkajog Portál, 2014. 12. 11., https://munkajogportal.hu/egyoldalu-kotelezettsegvallalas-a-munkaltato-reszerol/

Zsolt Péter Szabó: *Bizalom, ha sérül – pszichológiai szerződés a koronavírus idején*. Karrier Trend, 2020.11.19., https://karriertrend.hu/munkavedelem-es-egeszseg/bizalom-ha-serul-pszichologiai-szerzodes-a-koronavirus-idejen/

HUNGARIAN EXECUTION LAW IN THE PAST AND NOW

Kordélia Tóth[1]

ABSZTRAKT ■ Tudományos tanulmányomban a korábbi magyar végrehajtási jogszabályokat a jelenlegi hatályos magyar végrehajtási jogszabályokkal hasonlítom össze. A korábbi magyar végrehajtási jogszabályok tekintetében a XVIII. és XIX. századi magyar végrehajtási jogra fektetem a hangsúlyt. Véleményem szerint egy jogász sokat tanulhat a történelmi jogesetekből, jogszabályokból, és ezekből sok hasznos és gyakorlati és elméleti következtetést tud levonni a jelenlegi jogi esetekre nézve is. A jogfejlődés, beleértve a végrehajtási jogot is, történelmi alapokon nyugszik, és a múltból származó jogintézményekre épül. Ha megértjük a történeti jog lényegét és kritikus szemmel vizsgáljuk, valamint a hatályon kívül helyezett jogszabályokba mélyen belepillantunk, akkor jó válaszokat kaphatunk a hatályos jog új kihívásaira éppúgy, mint az aktuális jogi problémákra a végrehajtási jog terén.

Kulcsszavak: végrehajtási lap, adósvédelem, ellenőrzés, alapelvek

ABSTRACT ■ This paper aims to compare the former Hungarian execution law to the current Hungarian execution law by Hungarian Legal Cases. As for the former Hungarian execution law, I focus on the historical Hungarian execution law in the 18th and 19th centuries. I argue that a lawyer can learn a lot from historical legal cases and can adopt useful and practical parts from these legal cases to the current law and current legal cases. The evolution of law, including execution law, is based on history and builds on elements of legal fragments that originated from the past. If we understand the essence of the historical law and examine it with critical eyes, having a deep look at historical legal fragments, we can receive good answers to new challenges in law as well as to current legal problems including problems in the Hungarian execution law.

Keywords: enforcement sheet, debtor protection, control, principles

[1] PhD student, Doctoral School of Law and Political Sciences, Károli Gáspár University of the Reformed Church in Hungary.

1. The enforcement in the 18th century

The institution of enforcement has a long history. Broadly interpreted, since the formation of society, and the emergence of property and private property, we can speak of some kind of enforcement of customary law. In Hungary, acts of promissory notes were introduced in the 18th century. At that time the following legal institutions, which are still well-known today, were introduced in Hungary for the first time: foreclosure, insurance measures, enforcement of satisfaction, reservation rules, determination of market value, cases of community of property, auction, order of satisfaction and division, failure, execution of foreign decisions. These concepts form are the basics of our enforcement law today. Considering the significance of the switch and its high frequency of use, until the beginning of the Second World War was very large.[2] Promissory note law is an extremely dynamic area of law that requires very flexible judgment and, at the same time, also very flexible enforcement. The development of enforcement law started precisely on the track of this area of law in the 19th century. Another prominent point in the development of the Hungarian enforcement law was the adoption of the Article of 1836 on the manner of execution of judicial judgments involving monetary convictions. The subsequent milestone was the entry into force of the Act No. LX of 1881. It was the first comprehensive independent enforcement law. The emergence of an independent and comprehensive regulatory nature clearly shows the importance of enforcement, which is still regulated by an independent law today.[3]

2. Period before the Statutory Regulation No. XXI of 1955

After the Second World War the Hungarian legal system, including enforcement law, underwent a radical ideological change. The Statutory Regulation No. XXI of 1955 until it entered into force, the execution of court decisions was carried out by state administrative bodies. This was, for example, tax collection.[4] More than fifty laws were entered into force that limited or excluded judicial enforcement. Enforcement legal regulations adopted Soviet enforcement law almost entirely. However, the Statutory Regulation No. XXI of 1955 already regulated the enforcement of movable and immovable property, blocking, and

[2] Statutory Regulation No. XXI of 1955 with justification on judicial enforcement.

[3] Ferencz Császár: *Promissory note examples in litigious and non-litigious cases*. Pest, Gusztáv Heckenast, 1842.

[4] Erzsébet Kormos: *Basic principles in the court enforcement procedure.* Miskolc, 2002.

execution of specific acts, and legal remedies. The criticism of this regulation is that it completely excluded the legal possibility of real estate enforcement.[5]

3. The innovation of the Statutory Regulation No. XXI of 1955, which is still in force today, is the enforcement sheet

The Statutory Regulation No. XXI of 1955 introduced the institution of the enforcement sheet, which, as a Hungarian peculiarity, has survived even today. An enforceable deed has not been issued with such a name anywhere else in the world, since it became common and known to all concerned during the period of socialism, it has not been born to this day. The first section of the effective Hungarian Enforcement Act records the distinction between "decisions" and "documents" that goes back to Statutory Regulation No. XXI of 1955. According to this regulation, an enforceable document was the "execution form" issued by the court and the document that the notary public had with an "execution clause" made.[6] The execution form was always issued based on the Statutory Regulation No. XXI of 1955, that is, a domestic court decision / an approved settlement, or a decision made by an arbitration court, an arbitration committee, a conciliation committee or a foreign court. However, the current regulation is by no means consistent, since there are documents that can be caused and subsumed under the concept of "decision of another body adjudicating the legal dispute". An example of this is the notary's binding decision to compensate for lost profits, damages and costs made in the property dispute.[7]

4. Enhanced debtor protection, which is limited in our current law

Statutory Regulation No. XXI of 1955, the balance of debtor and creditor protection was radically shifted in the direction of debtor protection by introducing the enforcement notice, which stated that as a result of a notice. The debtor was expected to demonstrate voluntary law-abiding behaviour without any coercion.

[5] István János Pataki: *Thoughts on the judicial enforcement system*: http://jesz.ajk.elte.hu/pataki53.pdf, 9-10, (Download time: 09. 22. 2023.).
[6] Statutory Regulation No. XXI of 1955 with justification on judicial enforcement.
[7] Statutory Regulation No. XXI of 1955 1-2 §.

We consider this regulation unthinkable today. The socialist enforcement law primarily tried to persuade debtors to fulfil their obligations using persuasion.[8]

5. The antecedent of our effective enforcement remedy system

Statutory Regulation No. XXI of 1955 against the action of a bailiff, if it was illegal, there was room for a complaint to the court where the bailiff operated. This complaint is the predecessor legal institution of the enforcement objection based on the regulations in force today. At that time, the legislator had not specifically separated the legal remedies related to the initiation of enforcement and ordering of enforcement. Statutory Regulation No. XXI of 1955 made it possible to withdraw the writ of enforcement and cancel the clause only if the issuance of the writ of execution and the recording of the writ of execution clause were done in violation of the rules contained in Statutory Regulation No. XXI of 1955. At that time, it was not yet possible to revoke the enforcement sheet due to a violation of another law, as it is in our current law. The legality supervision was performed by the public prosecutor's office regarding the enforcement phase of the enforcement.[9] The prosecutor could exercise protection against unlawful or groundless decisions of a bailiff. On the other hand, supervision of legality is carried out today by the Enforcement Faculty, which consists of bailiffs rather than an independent law enforcement body. According to my standpoint, returning to legality supervision of the prosecutor's office would somewhat improve the existing legal remedy system, as an institutionally independent body would supervise bailiffs.[10]

6. The significance of the amendment of the Statutory Regulation No. XVIII of 1979 in the effective Hungarian Enforcement Act

The Statutory Regulation No. XVIII of 1979 amended the rules of the Statutory Regulation XXI of 1955 but did not amend its structure, and the socialist approach remained. Perhaps the most significant amendment of the Statutory Regulation

[8] Statutory Regulation No. XXI of 1955 29 §.

[9] István Vida: *The judicial enforcement*. Budapest, Economic and Legal Book Publisher, 1978.

[10] Eszter Czagány: *Theoretical and Practical Issues of Seizure of Movable and Immovable Property Items in Enforcement Procedures*: http://uni-miskolc.hu/document/18267/11756.pdf (Download time: 09. 22. 2023.).

No. XVIII of 1979 is that, with its entry into force, general principles that apply comprehensively to the entire judicial enforcement procedure will be formulated and introduced from the perspective of creditor and debtor protection. From the perspective of a creditor protection position, it is an obligation for a bailiff to achieve fast and efficient fulfilment of obligations.[11] From the perspective of debt protection, provisions appearing as general principles of today's significant principles valid for court enforcement procedure appear. On the debt protection side, the general principles also mean that the bailiff can only use financial coercion to the extent necessary.[12] Furthermore, in addition to measuring the debtor's income and the amount of the claim, the extent of enforcement is also determined. The inclusion of the basic provisions in the effective Hungarian Enforcement Act therefore, at the beginning, was an innovation of the Statutory Regulation No. XVIII of 1979. Chapter I of the Statutory Regulation No. XVIII of 1979 entitled "Basic Provisions" contained the purpose of the statutory regulation and the general principles under a separate heading. Chapter I of the Effective Hungarian Enforcement Act, on the other hand, contains three subheadings: "Scope of application of the law", "Application of enforcement compulsion" and "Application of civil procedure".[13]

7. The effective Hungarian Enforcement Act

The change of system, the change of attitude, the placing of property relations on a new basis, and the transition to a market economy proved that a radical amendment is also needed in the field of judicial enforcement. The main reason for the creation of the effective Hungarian Enforcement Act was that the number of enforcement cases increased, while the effectiveness of enforcement decreased. Additionally, the procedural rules of court enforcement were outdated, and they did not meet the requirements of the social market economy and the rule of law. The court enforcement organization was professionally unprepared and financially undermotivated. The main objective of the Effective Enforcement Act was the comprehensive modernization of court enforcement.[14] As a result of a change of system, regulation of enforcement was adjusted to the changed social and economic conditions. New regulations were intended to make court enforcement more effective by simplifying and speeding up the procedure. They

[11] Statutory Regulation No. XVIII of 1979 with justification on judicial enforcement.
[12] Vida 1978.
[13] Great comment Act. No. LIII of 1994 on judicial enforcement of the law.
[14] Great comment Act. No. LIII of 1994 on judicial enforcement of the law.

prevent the evasion of debt collection, eliminate unjustified debt protection, make the seizure and sale of assets subject to enforcement more effective, and at the same time, make the procedure fairer with the new arrangement of immunity from enforcement possible. One of the significant amendments of the law is that it widened the scope of data collection by a bailiff and, at the same time, defined the concept of a bailiff in a way that directly affects and influences the organizational system of bailiffs.[15]

8. Summary

My review of legal history showed that the current and effective Hungarian enforcement law is based on a very old institution. It has been present in different periods, since the appearance of property, and its social, economic, and political role is very large. The Hungarian past, development, peculiarities, and analogies of the institution of enforcement became known about the present. I have argued that throughout the history of the institution of enforcement, the issue of enforceability and effectiveness has been enhanced. The state structure, politics, and property relations have a direct impact on the institution and organization of enforcement. The Hungarian comparative study presented elements that can still be considered milestones in judicial enforcement law. The turning points in Hungary's history, as well as the effects of social, property, and ideological changes characterized by turning points on implementation, were described in my presentation. In sum, today's enforcement law is a result of Hungarian history. Even though the period of socialism had a great impact on enforcement law, many effective legal institutions can be traced back to the historical past of Hungary.

Literature

Ferencz Császár: *Promissory note examples in litigious and non-litigious cases*. Pest, Gusztáv Heckenast, 1842.

Eszter Czagány: *Theoretical and Practical Issues of Seizure of Movable and Immovable Property Items in Enforcement Procedures*: http://uni-miskolc.hu/document/18267/11756.pdf (Download time: 09. 22. 2023.).

[15] Kormos 2002.

Erzsébet Kormos: *Basic principles in the court enforcement procedure.* Miskolc, 2002.
István János Pataki: *Thoughts on the judicial enforcement system*: http://jesz.ajk.elte.hu/pataki53.pdf, 9-10. p., (Download time: 09. 22. 2023.).
István Vida: *The judicial enforcement*. Budapest, Economic and Legal Book Publisher, 1978.