III. Konferenciakötet

A pécsi jogász doktoranduszoknak szervezett konferencia előadásai

UNIVERSITAS QUINQUEECCLESIENSIS 13 67

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A pécsi jogász doktoranduszoknak szervezett konferencia előadásai

Pécsi Tudományegyetem Állam- és Jogtudományi Doktori Iskola

Pécs, 2022.

III. Konferenciakötet

A pécsi jogász doktoranduszoknak szervezett konferencia előadásai

Szerkesztőbizottság:

Bendes Ákos László
Diósi Szabolcs
Gáspár Zsolt
Gáti Balázs
Projics Nárcisz
Tóth Dávid

Kiadja: Pécsi Tudományegyetem Állam- és Jogtudományi Kar
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Tartalomjegyzék / Table of content

Idegen nyelvű tanulmányok

Magyar nyelvű tanulmányok

Előszó

2018 és 2019-et követően – a pandémiás időszak miatt egy év kihagyással – 2021. április 07-én szerveztünk harmadik alkalommal konferenciát a Pécsi Tudományegyetem Állam- és Jogtudományi Kar doktoranduszainak. A konferenciát ezúttal online felületen a teams alkalmazáson keresztül bonyolítottuk le.
2018 őszén doktoranduszokban és fiatal oktatókban felmerült az ötlet, hogy a pécsi jogász doktoranduszoknak szervezzünk konferenciát. Korábban is voltak erre pozitív kezdeményezések, ilyen volt például az ún. JoDoPet (Jogász Doktoranduszok Pécsi Találkozója) című PhD konferencia, amely szintén több alkalommal került megrendezésre a Pécsi Tudományegyetem Állam- és Jogtudományi Karán. JoDoPet Konferenciát legutóbb 2015-ben rendeztek, azóta pedig kizárólag pécsi jogász doktoranduszoknak szervezett konferencia nem volt.
2018 november 30-án szerveztük meg az első konferenciát, ahol tizenöt előadó három szekcióban ismertette kutatási eredményeit 15 perces előadásokban. Így újra lehetősége nyílt jogász doktoranduszoknak és doktorjelölteknek, hogy helyben a Pécsi Tudományegyetem Állam- és Jogtudományi Karán adjanak elő. Az előadásokat követően lehetőség volt a résztvevőknek kérdéseket, hozzászólásokat intézni a prezentálókhoz.
A hagyományt folytatva egy évvel később újabb konferenciát szerveztünk 2019. november 15-én. A második konferencián már 18 előadó vett részt, külön idegen nyelvű szekcióval. A konferenciákon elhangzott előadásokból ezt követően egy tanulmánykötetet terveztünk készíteni, egy bővített szerkesztői bizottsággal. Ezúton is, mint szerkesztőbizottsági tag, szeretném megköszönni valamennyi előadónak a részvételt, és külön azoknak, akik tanulmányukkal hozzájárultak a konferenciakötet létrejöttéhez.
Remélhetőleg a jövőben is tudjuk folytatni a hagyományt, és újabb konferencia lehetőséget biztosíthatunk a pécsi jogász doktoranduszoknak és doktorjelölteknek.

Tóth Dávid

Szerkesztő

Idegen nyelvű tanulmányok

Ákos, Bendes[*] – Gábor, Kocsmárik[*] – Imputato nel Codice Penale in Italia e Ungheria

Lektorálta: Prof. Dr. Herke Csongor

Abstratto

Confronto tra i sistemi di procedura penale italiano e ungherese. Analizzo le correlazioni, le somiglianze e le differenze tra le stesse sezioni e poi traggo una conclusione. Analizzando la struttura del sistema, posso avere un quadro preciso delle somiglianze e delle differenze tra i due ordinamenti.

Parole chiave: procedura penale, imputato, procedimento, diritto,

1. Rilessioni introduttive sullo svolgimento del procedimento penale in italia

All'inizio del procedimento penale le indagini possono svolgersi contro "ignoti" oppure contro un "indagato".
La maggior parte delle denunce sono presentate contro ignoti in quanto lo stesso denunciante molto spesso non è in grado di indicare colui che ritiene responsabile del reato. La polizia giudiziaria trasmette la denuncia al pubblico ministero e questo ordina alla segreteria del suo ufficio di scriverla nell'apposito registro, denominato "registro delle notizie di reato".[1]
Svolte le indagini, può darsi che gli elementi raccolti consentano di addebitare il reato alla responsabilità di una determinata persona. Allora il pubblico ministero ordina alla segreteria del suo ufficio di scrivere nel registro, accanto all'indicazione della denuncia, il nome del soggetto al quale il reato è attribuito. Costui è ilsoggetto che, nel codice di procedura penale italiano, viene denominato "persona sottoposta alle indagini preliminari" e che la prassi comunemente chiama "indagato."
Soltanto al termine delle indagini preliminari e nel momento in cui il pubblico ministero deciderà di esercitare l'azione penale e rinviarlo a giudizio, il soggetto assumerà la qualifica di "imputato". Questo perché la qualità di imputato siacquista al momento dell'esercizio dell'azione penale. Difatti, l'imputato vienedefinito nella giurisprudenza Italiana come: "La persona nei cui confronti viene attribuito un determinato reato nell'imputazione formulata dal pubblico ministero con la richiesta di rinvio a giudizio".
L'imputazione è composta:

- dall'enunciazione in forma chiara e precisa del fatto storico di reato;
- dall'indicazione delle norme di legge violate;
- dalla persona alla quale il reato è addebitato.

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[*] Dottorando presso il Dipartimento di Diritto Processuale Penale e Civile dell'Università di Pécs
[1] Art 335 c.p.p. Italiano

La qualità di imputato si conserva, ai sensi dell'articolo 60 comma 2 c.p.p italiano, in ogni stato e grado del processo e si perde quando la sentenza di condanna o di proscioglimento diviene irrevocabile.[2]
Ai sensi dell'art **61** c.p.p. italiano: " I diritti e le garanzie dell'imputato si estendono alla persona sottoposta alle indagini".[3] Naturalmente, l'equiparazione non è totale, perché risente del fatto che la fase delle indagini preliminari è, di regola, segreta non consentendo neppure all'indagato di sapere di essere indagato, salvo i casi di:

- applicazione di una misura cautelare;
- flagranza di reato. In caso di Flagranza di reato il soggetto è sottoposto all'arresto immediato.

compimento di atti garantiti ossia atti che necessitano della presenza del difensore che deve essere preavvisato almeno 24 ore prima dal compimento dell'atto. Si pensi all'interrogatorio svolto dal pubblico ministero;

- avviso di conclusione delle indagini preliminari. Tale "atto" consente all'indagato nonché futuro imputato, di venire a conoscenza delle indagini che si sono svolte a suo carico e viene notificato solamente nel momenti in cui il pubblico ministero decide di esercitare l'azione penale erinviare al giudizio il soggetto nei cui confronti viene addebitato un determinatoreato.[4]

Mentre, le successive fasi dell'udienza preliminare e dell'udienza dibattimentale si svolgono in contraddittorio tra le parti (pubblico ministero e difensore dell'imputato assieme all'imputato). L'imputato in giudizio viene assistito e rappresentato dal suo difensore legale munito di procura che gli conferisce la rappresentanza tecnica.
Dal punto di vista dell'imputabilità è di particolare importanza l'**età** al momento della commissione del reato. L'imputabilità viene definita nel codice penale italiano come un "presupposto della colpevolezza" e presuppone ai sensi dell'art85 c.p. italiano la capacità di intendere e di volere.
Per quanto riguarda il regime dell'imputabilità, il legislatore italiano ha distinto:
1.nel caso di minore età:

- il periodo che va fino ai 14 anni, nella quale vige la "presunzione assoluta" dell'assenza di capacità di intendere e di volere e di conseguenza il soggetto non è punibile.[5]

Tuttavia, se il minore fino a 14 anni è considerato un soggetto socialmente pericoloso, il giudice, tenendo specialmente conto della gravità del fatto, può applicare una misura di sicurezza di ricovero in un riformatorio giudiziario olibertà vigilata.

- il periodo che va dai 14 ai 18, nella quale l'imputabilità deve essere accertatacaso per caso dal giudice, in riferimento alle singole violazioni compiute dal minore. Si parla, al riguardo, di "presunzione relativa" dell'assenza di capacità di intendere di volere e di conseguenza e imputabile

[2] Codice di Procedura Penale 60 comme 2 c.p.p
[3] Codice di Procedura Penale 61 c.p.p
[4] Herke Csongor – Bendes Ákos László: Procedura penale in Ungheria. Baufirma, Pécs, 2022. pp. 298
[5] Art 97 c.p. italiano

ma la pena è diminuita.[6]

2.nel caso di età adulta, l'imputato che ha compiuto 18 di età al momento della commissione del reato, è punibile.

Il legislatore Italiano prevede anche un regime particolare per gli infermi di mente e la loro punibilità è dipesa dai "gradi di infermità". Al riguardo il legislatore ha distinto:

- vizio totale di mente**:** l'infermità è tale da comportare un'assoluta mancanza della capacità di intendere e di volere e il soggetto non è punibile.[7]

Tuttavia, se l'infermo totale è considerato un soggetto socialmente pericoloso, il giudice, tenendo specialmente conto della gravità del fatto, può applicare una misura di sicurezza di ricovero in un ospedale psichiatrico.[8]

- vizio parziale di mente**:** in cui la capacità di intendere di volere non manca deltutto ma è gradualmente scemata e il soggetto è punibile ma con una diminuzione della pena.[9]

Nel corso del processo l'imputato è rappresentato ed assistito da un difensore legale munito di procura. Al difensore viene conferita, mediante la procura, la rappresentanza tecnica al fine di agire nel esclusivo interesse dell'imputato.

Nel processo italiano, all'imputato vengono riconosciuti una serie di diritti e obblighi. L'imputato:

- ha il diritto di difesa
- ha diritto di rimanere in silenzio (diritto al silenzio),
- ha diritto di essere informato in caso di mutamento dell'imputazione;
- ha diritto di intervenire e di porre osservazioni;
- ha diritto di essere presente in udienza;
- ha la possibilità di mentire in quanto non ha l'obbligo penalmente sanzionato di rispondere secondo verità. Di contro, risponde di calunnia e simulazione di reato;
- non viene sottoposto a testimonianza ma ad un'altro istituto denominato "esame delle parti".[10]
- durante la fase delle indagini preliminari può essere sottoposto ad interrogatoriodal Pubblico ministero con la presenza del suo difensore.

Ha un solo obbligo ossia quello di non mentire sulle proprie generalità. Inoltre, l'imputato, durante le indagini preliminari o nel corso del processo, può rendere delle " dichiarazioni spontanee". Al riguarda, il codice di procedura penale italiano prevede:

le dichiarazioni spontanee dell'indagato tali dichiarazionivengono rese dopo che l'indagato è venuto a conoscenza di essere indagato e possono essere rese ad iniziativa dell'indagato alla Polizia giudiziaria. Tuttavia, tali dichiarazioni posso

[6] Art 98c.p. italiano
[7] Art 88 c.p. italiano
[8] Herke Csongor – Bendes Ákos László: Procedura penale in Ungheria. Baufirma, Pécs, 2022. pp. 298
[9] Art 89 c.p. italiano
[10] Codice di Pocedura Penale 208 c.p. italiano

essere utilizzate in giudizio solo per delle eventuali “contestazioni”.[11]
le dichiarazioni spontanee dell’imputato italiano: tali dichiarazionipossono essere rese, nel corso del processo, dall’imputato soltanto se si riferiscono all’oggetto dell’imputazione e non intralciano il giudizio. Se, nelcorso delle dichiarazioni, l’imputato non si attiene all’oggetto del processo, il giudice lo ammonisce e se, l’imputato persiste, il giudice è tenuto a toglierli la parola.[12]
Infine, nell’ordinamento giuridico italiano vige un principio fondamentale sancito nell’art **27** comma **2** della Costituzione italiana: “ l’imputato non è considerato colpevole sino alla condanna definitiva.”. Questa disposizione è uno dei principi basilare del processo penale italiano. Tale principio mira a tutelare l’imputato in quanto quest’ultimo non può essere trattato come colpevole nel corso del processo fino a quando non interviene una sentenza di condanna nei suoi confronti.
Nei confronti dell’imputato posso essere emessi i seguenti provvedimenti:

- sentenza di condanna con limitazione delle libertà che varia a seconda del tipodi reato;
- sentenza di proscioglimento;
- pena pecuniaria (ammenda o multa).[13]

2. Somiglianza con la figura dell’imputato in Ungheria

In Italia, come in Ungheria, vige un principio fondamentale che pone le base del processo penale secondo cui: "l’imputato non è considerato colpevole fino aquando non è intervenuta una sentenza di condanna nei suoi confronti”.[14]
In Italia, come in Ungheria, un minore con età inferiore 14 anni non è punibile così come un minore di età superiore ai 14 ma inferiore ai 18 può essere sottoposto a procedimento penale. Tuttavia, in Italia, viene diminuita la pena del minore.
In Italia, come in Ungheria, l’imputato agisce tramite il suo rappresentante legale munito di procura.
In Italia, come in Ungheria, all’imputato vengono riconosciuti una serie di diritti come il diritto di difesa, di essere presente in udienza, di preparazione alla difesa, di intervento e di osservazioni.
In Italia, come in Ungheria, l’imputato della procedura penale militare ha unregime particolare e la legge penale militare si applica ai militari in servizio, ai membri delle forze armate alleate e a quelli considerati tali.

3. Differenze con la figura dell’imputato in Ungheria.

In Italia, l’indagato non riceve la comunicazione del **fondato sospetto** in quanto le indagini sono coperte dal segreto investigativo. Un soggetto non sa di essere “indagato” fino a quando:
non gli viene notificato l’avviso di conclusione delle indagini preliminari. Tale “atto”

[11] Codice di Procedura Penale art 350 c.p.p. italiano
[12] Codice di Procedura Penale art 350 c.p.p. italiano
[13] Codice di Procedura Penale
[14] Art **27** comma **2** cost

consente all'indagato nonché futuro imputato, di venire aconoscenza delle indagini che si sono svolte a suo carico e gli viene notificato soltanto nel momento in cui il pubblico ministero decide di rinviarlo a giudizio esercitando l'azione penale;

- non gli viene applicata una misura cautelare come la "custodia in carcere"
- flagranza di reato;
- non viene compiuto un "atto garantito" ossia un atto che necessita della presenza del difensore legale che deve essere preavvisato almeno 24 ore prima dal compimento dell'atto. Si pensi, all'interrogatorio svolto dal pubblico ministero.[15]

In Italia, l'imputato non può essere sottoposto a testimonianza ma viene interrogato con l'istituto "esame delle parti" (art 208 c.p.p. italiano) e ha un solo obbligo: quello di non mentire sulle proprie generalità. Pertanto in Italia, l'imputato può rendere delle dichiarazioni spontanee sia nel corso delle indagini e sia durante il processo.

In Italia, l'imputato non può proporre lui stesso le prove ma soltanto per mezzo del difensore. Le prove possono essere ammesse soltanto entro gli "atti introduttivi al dibattimento" mediante il deposito delle liste testimoniali. Terminata tale fase, non è consentito più ammettere prove.[16]

In Italia, l'imputato e il suo difensore hanno diritto di conoscere tutti gli atti di indagini soltanto al termine delle stesse. A differenza, dell'imputato in Ungheria che può conoscere, nel corso delle indagini, soltanto gli atti che il codice di procedura ungherese gli consente di conoscere. In Italia questo non avviene.[17]

[15] Art 415 bis

[16] Herke Csongor – Bendes Ákos László: Procedura penale in Ungheria. Baufirma, Pécs, 2022. pp. 298

[17] 2017. évi XC. Procedura Penale in Ungheria

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Balázs, Gáti* - The main types of cybercrime during the COVID-19 pandemic

Reviewer: Prof. Dr. habil. Kőhalmi László

Abstract

This article aims to provide insight into relationship between COVID-19 pandemic and cybercrime with special attention to related changes.
The last major pandemic was the Spanish flu that erupted exactly a hundred years ago. Restrictions caused by the coronary virus that caused the pandemic in 2020 - scientifically known as COVID-19 - accelerated the digital switchover, which had to take place in a very short time in many areas, such as education, a significant part of jobs, and the entertainment industry. Currently, the COVID 19 pandemic is present in more than 200 countries around the world. This has an impact on social and economic life as well as on people's privacy. As part of the fight against the coronary virus epidemic, governments have been forced to lockdown, which has changed the socio - economic environment.
Criminals have quickly seized the opportunities to exploit the crisis by adapting their modes of operation or developing new criminal activities. Organized crime groups are notoriously flexible and adaptable and their capacity to exploit this crisis means we need to be constantly vigilant and prepared. The higher number of users has also significantly increased the number of potential victims.
All these changes are accompanied by a change in the modes of crime, the perpetrators react quickly to the changes, and the number of acts committed in cyberspace has increased significantly. The unprecedented coronavirus pandemic is profoundly affecting the global cyber threat landscape. This article provides an overview of the statistics on the main types and characteristics of crimes committed in the context of a pandemic.

Keywords: cybercrime, COVID-19, lockdown, cyber-attacks, cyber security

1. Introduction

The proliferation of computers, high-speed internet networks, development of digitalization with expanding number of electronic devises, which have become able to communication with the digitalized systems have spread worldwide. This dramatic change in the communication is referred to as the Fourth Industrial Revolution.[1] This

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[1]Klaus Schwab "The Fourth Industrial Revolution: What it Means, how to Respond" WEF, 2016, www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond. Accessed 15.01.2021

revolution has resulted in many positive changes in all are of life, as expanded and accelerated the flow of information, created jobs, supported the education, economy and social life, etc. On the other side, this revolution opened a wide range of opportunities for the criminals to exploit the advantages of the digital technology, what activity is called as cybercrime.

The cybercrime violates individuals' privacy and the data security by different types of threat, among many others, by hacking, malware, identity theft[2], financial fraud, medical fraud, and by other different offences against persons. In these offences the data is the primary target of the criminals[3], [4]The COVID-19 pandemic enormously accelerated the digitalization and created a new way of life by enhancing the online communication. Currently, the COVID 19 pandemic is present in more than 200 countries around the world. This has an impact on social and economic life as well as on people's privacy. As part of the fight against the coronary virus epidemic, governments have been forced to lockdown, which has changed the socio - economic environment. The higher number of users has also significantly increased the number of potential victims. All these changes are accompanied by a change in the modes of crime, The unprecedented coronavirus pandemic is profoundly affecting the global cyber threat landscape. In this publication we have intended to demonstrate the main types of cybercrime observed in the COVID-19 pandemic.

2. Traditional modes of crime have been pushed into the background

Over the course of just a few weeks during the first few months of 2020, the COVID-19 pandemic radically changed the nature of social interaction and economic activity in all regions across the world. One of the earliest studies was by Shayegh and Malpede which identified an overall drop in crime in San Francisco of 43% and Oakland of about 50% following city issuance of some of the most restrictive and early stay-at-home orders in the US, beginning March 16th, 2020, and the two weeks after[5].

Gerell, Kardell, and Kindgren examined crime during the five weeks after government restrictions on activities began, observing an 8.8% total drop in reported crime despite the country's somewhat lax response - when compared to other countries' policies on restricting the public's movement. Specifically, the researchers found residential burglary fell by 23%, commercial burglary declined 12.7%, and instances of pickpocketing were reduced by a staggering 61% - however, there was little change in robberies or narcotics crime[6].

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[2]Dávid Tóth,"Személyiséglopás az interneten", *Büntetőjogi Szemle* 9: 1. (2020) 113-119. 7 p.

[3]Marie-Helen Maras, *Cybercriminology* (Oxford University Press,2016)

[4]Csaba Fenyvesi*, "Future Developments and Challenges in Criminalistics as Part of Criminal Justice" Journal* of *Eastern-European Criminal Law* 6. 2 *(2019)* 2360-4964, 72-85.

[5]Soheil Shayegh, Maurizio Malpede, "Staying home saves lives, really! 2020. Staying Home Saves Lives, Really!" https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3567394, accessed: 06.01.2021

[6]Manne Gerell, Johan Kardell, Johanna Kindgren, "Minor COVID-19 association with crime in Sweden, a five week follow up" *Crime Sci 9,* 19 (2020). https://doi.org/10.1186/s40163-020-00128-3

Halford et al. examine crime effects for one UK police force area in comparison to 5-year averages. There is variation in the onset of change by crime type, some declining from the WHO 'global pandemic' announcement of 11 March, others later. By 1 week after the 23 March lockdown, all recorded crime has declined ( ) by 41%, with the following variations: shoplifting 62%, theft 52%, domestic abuse 45%, theft from vehicle 43%, assault 36%, burglary dwelling 25% and burglary non-dwelling 25%[7].

Stickle and Fergus contains similar statements regarding COVID-19 , - significant decline in crime rates - argue that the single most salient aspect of the steep fall in crime rates during the COVID-19 pandemic are the legal stay-at-home orders (i.e., lock-down, shelter-in-place) implemented to slow the spread of the virus by promoting social distancing.[8]Cause of decrease of traditional crime, lockdowns have changed everyday life, which caused the absence of the three offender conditions: a motivated perpetrator, a lack of the right target, and the right protection. Even though it has to be noted that this is just a correlation and more long-term research is needed in my opinion to conclude that the restrictions caused the fell in traditional crime rates.

3. Change in modes of crimes - Cybercrime has come to the fore and is showing significant growth

The modes of crime have been changed in the COVID-19 pandemic, as the frequency of the traditional form of crime has decreased, and most of the acts have been transferred to the online space. On the other hand, the potential for organized crime did not show a decrement[9].

During the last few decades, digitalization has undergone a significant development. High-speed internet networks have spread worldwide. Parallel to this, number of electronic devices have become capable to communicate with these systems. This development used to be referred to as the Fourth Industrial Revolution.[10] It became apparent the growth of digitalization itself is also a factor among many others that leads to the growth of cybercrime. Restrictions related to the COVID-19 pandemic very quickly and intensively accelerated this digital switchover, which opened a sudden, big opportunity for the criminals. As early as March 2020, the Council of Europe drew attention to the dangers of cybercrime in connection with the epidemic. The COVID-19 pandemic renders individuals and society extremely vulnerable in all respects.[11]

Several authorities, researchers have made examinations into how crime rates have fluctuated in the of COVID-19 pandemic.

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[7]Eric Halford et. al. "Crime and Coronavirus: Social Distancing, Lockdown, and the Mobility Elasticity of Crime" *Crime Science* 1 (2020) 11.

[8] Ben Stickle, Marcus Felson "Crime Rates in a Pandemic: The Largest Criminological Experiment in History" *American Journal of Criminal Justice* 4 (2020) 526–527.

[9]László Dornfeld "A koronavírus-járvány hatása a kiberbűnözésre" *In medias res: Folyóirat a sajtószabadságról és a médiaszabályozásról*, v 9 : 4 p. (2020) 193

[10]Schwab, *The Fourth Industrial Revolution: What it Means, how to Respond*, WEF, 2016.

[11]"Cybercrime and COVID-19" Council of Europe https://www.coe.int/en/web/cybercrime/-/cybercrime-and-covid-19, accessed: 07.01.202

3.1. Data from INTERPOL report[12]

The increasing rate of cyberattacks during COVID-19 demonstrated in the INTERPOL report. Key findings highlighted by the INTERPOL assessment of the cybercrime landscape in relation to the COVID-19 pandemic include Online Scams and Phishing, Disruptive Malware (Ransomware and DDoS), Data Harvesting Malware, Malicious Domains and Misinformation.

In a four-month period of COVID-19 pandemic some 907,000 spam messages, 737 incidents related to malware and 48,000 malicious URLs were detected by one of INTERPOL's private sector partners. The highest rate of phishing scam and fraud showed 59%, while malware/ransomware incidents rate was 36%, malicious domains 22% and fake news attacks was 14% of all incidents.

Regarding the phishing and scam fraud**,** the cybercriminals impersonating government and health authorities, entice victims into providing their personal data and downloading malicious content. There was a spike in ransomware attacks by multiple threat groups in the first couple of weeks of the pandemic. There was an increase of cybercriminals registering domain names containing keywords, such as "coronavirus" or "COVID" taking advantage of the increased demand for medical supplies. In February and March 2020, a 569 % growth in malicious registrations, including malware and phishing and a 788 % growth in high-risk registrations were found and reported. An increasing amount of misinformation inadequately understood threats, and conspiracy theories have contributed to anxiety in communities and, in some cases facilitated the execution of cyberattacks.

Interpol also reports a significant increase in Child Sexual Exploitation (CSAM) Offenders are likely to attempt to take advantage of emotionally vulnerable, isolated children through grooming and sexual coercion and extortion. Children allowed greater unsupervised internet access will be increasingly vulnerable to exposure to offenders through online activity such as online gaming, the use of chat groups in apps, phishing attempts via e-mail, and unsolicited contact in social media and other means.

[12] *"INTERPOL report shows alarming rate of cyberattacks during COVID-19,* INTERPOL" 2020, https://www.interpol.int/News-and-Events/News/2020/INTERPOL-report-shows-alarming-rate-of-cyberattacks-during-COVID-19, accessed: 07.01.2021

3.2. Cybercrime report of EUROPOL during pandemic COVID-19 [13]

In its reports, Europol focuses on the various elements of crimes since the beginning of the Covid-19 pandemic. This report analyzes criminal conducts, economic crime, organized crime, terrorism and cybercrime furthermore, drug trafficking, migrant smuggling, and deception. This latter can cause significant damage especially in the health system.

The report presented the main characteristics of cybercrimes related to COVID-19 pandemic:

- *Counterfeit and sub-standard goods:* Counterfeit product offerings appeared on the dark web but, these remain limited compared to surface offerings. Primarily, sanitary- and pharmaceutical products were found on the dark web. Targeted advertisements also appeared to increase sales of counterfeit or non-existent goods on social media platforms[14].
- *Cybercrime - Phishing*: The purpose of phishing emails is to collect credentials and sensitive data and to infect users. Phishing emails often came from organizations that focus on disease prevention and treatment furthermore, the number of phishing emails used to be increased during funding campaigns[15].
- *Malware, ransomware, and malicious applications*: Malicious software has appeared in the second quarter of 2020. They appeared on video conferencing software-related domains[16], parallel to this, the number for ransomware-targeted attacks against public health organizations decreased.
- *Dark web*: The numbers of overall criminal listings on dark markets have fluctuated over time as a result of vendors' decreased ability to source and/or deliver goods. It can be found by specialized search engines, Tor, I2P and Freenet etc. The number of masks, fake test kits and pharmaceuticals on dark web platforms was increased, on the dark web surface furthermore, it also became extensively used to carry out fraud, illicit products purchased, etc.[17].

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[13] Europol 2020, "*Catching the virus: cybercrime, disinformation and the COVID-19 pandemic*" https://www.europol.europa.eu/sites/default/files/documents/catching_the_virus_cybercrime_disinformation_and_the_COVID-19_pandemic_0.pdf, accessed: 07.01.2021

[14] „*Viral marketing – counterfeits, substandard goods and intellectual property crime in the COVID-19 pandemic*" Europol2020, https://www.europol.europa.eu/newsroom/news/viral-marketing-counterfeits-in-time-of-pandemic, accessed: 07.01.2021

[15] „*COVID-19: Phishing and smishing scams*" Europol 2020, https://www.europol.europa.eu/COVID-19 "COVID-19-phishing-and-smishing-scams, accessed: 07.01.2021

[16] Andrea Kraut, László Kőhalmi, Dávid Tóth „Digital Dangers of Smartphones" *Journal of Eastern-European Criminal Law* 7 : 1 (2020) 36-49. 14 p.

[17] „*Catching the virus – cybercrime, disinformation and the COVID-19 pandemic*" Europol 2020, https://www.europol.europa.eu/newsroom/news/catching-virus, accessed: 07.01.2021

- *Child sexual exploitation*[18]: Since children spend more and more time online, they especially easy and sensitive target of cybercriminals. The COVID-19 pandemic offered more opportunities for sexual abuse and sexual exploitation of children. Emotionally vulnerable child through grooming, sexual coercion, and blackmail might easily become sexually exploited. The sexual exploitation was also evaluated by the National Center for Missing and Exploited Children (NCMEC) to Europol. During the March-April lockdown in Member States, the number rose, but returned to usual levels when the measures were lifted. However, towards the end of summer, referrals again increased throughout the EU. The new partial lockdown measures re-instated in several Member States from October further sustain this rise in the spread of CSAM and related referrals. The number of exploitations presented a moderate increase in the last few month of the year 2020, throughout the EU.[19,20]

3.2.1. Five takeaways from the Europol's 2020 cybercrime report. Internet Organized Crime Threat Assessment (IOCTA)[21]

Ransomware remains at the center of concerns:

- 1.**Ransomware as one of the main threats in the virtual world** [22]. The difference now is that this type of threat evolves into other forms of extortion. Cybercriminals threaten victims by saying that they will auction off compromised data on the dark web, which could have legal implications. "*The number of targeted ransomware cases has increased over the past year, which has led to a significant increase in threat actor capability as well as a higher impact on victims*", says the report.
- 2.Advanced forms of malware have been widely used. In addition to ransomware, other types of malware have caught the attention of authorities,

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[18] „*Exploiting isolation – Offenders and victims of online child sexual abuse during the COVID-19 pandemic"* Europol 2020, https://www.europol.europa.eu/publications-documents/exploiting-isolation-offenders-and-victims-of-online-child-sexual-abuse-during-COVID-19-pandemic,accessed:07.01.2021

[19] "*How COVID-19-related crime infected Europe during 2020" EUROPOL",* 11 November 2020

"Fig.1 NCMEC referrals to EU, April-December 2019 vs 2020, including projection" Source: NCMEC, https://www.europol.europa.eu/publications-documents/how-covid-19-related-crime-infected-europe-during-2020 accessed: 07.01.2021.

[20] "*COVID-19 Sparks Upward Trend in Cybercrime*" EUROPOL 2020. https://www.europol.europa.eu/newsroom/news/covid-19-sparks-upward-trend-in-cybercrime, accessed: 07.01.2021

[21] "5 takeaways from the Europol's 2020 cybercrime report" IOCTA, https://gatefy.com/blog/takeaways-cybercrime-report-iocta-europol-2020/, accessed: 07.01.20

[22] "Ransomware named top 2019 cyber threat, according to Europol" Gatefy, https://gatefy.com/blog/ransomware-top-2019-cyber-threat-europol-iocta/, accessed: 07.01.2021

such as **trojans** [23] ."*Criminals have converted some traditional banking Trojans into modular malware to cover a broader scope of collection of PC digital fingerprints collection and are being sold to cover different needs (e.g. droppers, exfiltration, etc.)." As in the case of ransomware, other types of malware[24] have been used for targeted scams. In this scenario, third-party providers and partners have been targeted.*

"In one case, a private sector respondent reported one of their third-party service providers had been targeted by Emotet malware which led to a high-risk situation at the respondent's organization. Attackers were studying old email threads between the targeted company and the respondent carefully, trying to embed themselves into the conversation naturally using highly tailored messages to gather information."

- 3. CaaS, MaaS e RaaS ,fuel the cybercrime, Crime as a Service (CaaS)[25] is a business model that turns crime into commodity, facilitating access to threats and scams. Malware-as-a-Service (MaaS)[26] and Ransomware-as-a-Service (RaaS)[27] are examples. "*Simultaneously, European law enforcement has reported a rise in less tech-savvy cybercriminals in the context of widely available CaaS solutions… Where specialist skills are needed (e.g. malware-coding, malware-distribution), criminals are able to hire developers or consultants to fill this need. This highlights increased professionalisation in the cybercrime threat landscape*."
- 4.Social engineering and phishing scams have increased.
  The report explains that **due to COVID-19, social engineering and phishing stood out**[28], exploiting the social vulnerability that involves the search for reliable information and data.
  "*Targeting human weakness in the security chain, **social engineering**[29] and phishing have a high impact on society and enable the majority of cybercrimes, ranging from scams and extortion to the acquisition of sensitive information and the execution of advanced malware attacks*". "*Phishing has become more difficult to detect, with many phishing emails and sites being almost identical to the real ones. At the same time, phishing campaigns have*

[23]"What is trojan?" Gatefay, https://gatefy.com/blog/what-is-trojan/, accessed: 07.01.2021

[24]"11 real and famous cases of malware attacks" Gatefay, https://gatefy.com/blog/real-and-famous-cases-malware-attacks/, accessed: 07.01.2021

[25] Derek Manky „Fortiguard Labs Cybercrime as a Service: a very modern business" Computer *Fraud and Security*, (June 2013).

[26] Mary Atamaniuk," *Malware as-a-Service: Who Can Put an End to It?"* Clario blog (June, 2020). https://clario.co/blog/malware-as-a-service/ accessed: 07.01.2021

[27]Edward Kost," What is Ransomware as a Service (RaaS)? The dangerous threat to world security" UpGuard (May 2021), https://www.upguard.com/blog/what-is-ransomware-as-a-service, accessed: 17.05.2021.

[28]"Crooks take advantage of Coronavirus outbreak to spread cyber threats, such as phishing and malware"Gatefy,https://gatefy.com/blog/coronavirus-covid19-scam-spam-phishing-malware/ accessed: 07.01.2021

[29] "4 tips to protect your business from social engineering attacks" Gatefy, https://gatefy.com/blog/tips-protect-your-business-social-engineering/ accessed: 07.01.2021

become faster and more automated, forcing respondents to act quicker than before as in some cases it takes one day from a credential leak to an attack". Increasing cybersecurity has therefore become of paramount importance not only at the social and economic level, but also at the level of individuals.

- 5. BEC (Business Email Compromise) causes more concern. Regarding BEC attacks, the report points out to more advanced and even more targeted scams, which causes huge concern[30]."BEC causes enormous losses and disruption to livelihoods and business operations. Often following spear phishing emails, BEC is highly tailored and very effective with targets ranging from governments, international organizations, small to large businesses and individuals."
  "*The two most common types of BEC are CEO fraud (criminals impersonating a high-level executive requesting urgent bank transfers) and invoice fraud (criminals impersonating suppliers asking for legitimate payments to be directed to a bank account under the criminal's control, or creating new, fraudulent invoices*)".
  The Europol's cybercrime report also discusses the topics of Distributed Denial-of-Service attacks (DDoS), the questions of Crypto currencies, and the problem of child sexual exploitation on the web, and the fight against the SIM swapping

3.3. COVID-19 Cyber Threat Analysis by UNODC[31]

This report of UNODC presented and explained the widely used threats that has attacked the digital world within this crisis. Malicious campaigns, as phishing e-mail are the biggest threat. This includes the impersonating an official website, spreading malware, and the fake campaigns. Increased use of disinformation and social media is typical based on the data from the study.
The main threats by UNODC: Malicious Campaigns, Disinformation, and the Social Media Enhanced Usage

- *Malicious Campaigns contains:* Phishing e-mail, Malicious Domains - Spreading Malware and the Fake campaigns.

[30] "10 real and famous cases of BEC (Business Email Compromise" Gatefy, https://gatefy.com/blog/real-famous-cases-bec-business-email-compromise/accessed: 07.01.2021

[31]„ Several dark web malicious websites are advertising COVID-19 Phishing Email Kits using an infected email attachment disguised as a map of the virus's outbreak for various prices that can range from 150$ up to 1000$. Cybercriminals purchasing these "kits" can then use them to start their email campaigns targeting anyone from individuals to large scale organizations. These infections are made possible by unpatched operating systems and the infected attachment will exploit the weaknesses of the computer it is visualized on."
„United Nations Office on Drugs & Crime, COVID-19: Cyber Threat Analysis" UNODC, https://www.unodc.org/documents/middleeastandnorthafrica/2020/COVID19/COVID19_MENA_Cyber_Report_EN.pdf, Accessed: 08.01.2021

Phishing e-mail is the biggest threat for individuals and organizations. Several dark web malicious websites are advertising COVID-19 Phishing Email Kits using an infected email attachment disguised as a map of the virus's outbreak Most of these campaigns will include malware which takes advantage of unsuspecting victims to gather personal credentials that can be used in many types of criminality.

What are the main threats by UNODC survey? Malicious Campaigns - like phishing e-mail: the biggest threat vector for individuals and organizations. This includes the impersonating an official website, spreading malware, and the fake campaigns. Increased use of disinformation and social media is typical based on the data from the study.

Malicious Domains – how is it work?

- Impersonating an official website: The National Cyber Security Centre (NCSC) in the United Kingdom (UK) has reported that cyber criminals have impersonated the US Center for Disease Control (CDC), creating domain names like the CDC's web address to request passwords and even bitcoin donations to fund a fake vaccine.
- Spreading Malware: Many of these domains will create webpages that are loaded with various malwares designed to exploit the weaknesses of specific operating systems. These malwares can steal credentials of any kind; credit card numbers, banking data, sensitive browser data and export the acquired information for criminal usage.
- Fake campaigns: Websites will also advertise a multitude of services and products and often will request the assistance of the general population to do so. As an example, a website will ask users to donate their computing power to dedicate it towards COVID-19 research, only to deliver information-stealing malware in return.

- *Disinformation:* The techniques are very complex, and it has got many forms. What are the objectives of disinformation? Usually, the intention is to mislead in order to damage an agency, entity, or person, and/or gain financial or political advantage. Regarding this specific pandemic, as it is on every headline across the world, the creators of disinformation are running malicious and covert campaigns by creating stories and misguidance across every sector and every social platform to attain their objective. It has become exceedingly difficult to keep up with the amount of misinformation related to the current situation. Considering this, it has become more important than ever to ensure that the source of the information is verified, credible and corroborated before any action is undertaken in relation to the news.
- *Social Media Enhanced Usage*: - WhatsApp, Facebook, Instagram, WeChat and Weibo

  The application WhatsApp has seen a 40% increase in usage overall. At the beginning of the crisis it jumped 27% in usage. During the mid-phase of the pandemic, that number reached 41% and finally for countries already in the later phase of the pandemic, WhatsApp usage has jumped by 51%. In specific countries, the usage can even represent a much higher value. For example, WhatsApp usage in Spain was up to 76%. However, this application is not

alone in its enhanced usage; the study found that Facebook, Instagram, WeChat and Weibo also witnessed a 40% increase in their interaction time.[32]

3.4. COVID-19 Benchmarking Report December 2020[33]

In November 2020, 84,399 ACFE members were invited to participate in a 12-question survey. Survey responses were collected anonymously. 1,712 survey responses were usable for purposes of this report. The participants of this investigations were interviewed about their observations and expectations regarding 12 different categories of fraud risks. (Cyberfraud, Payment fraud, Identity theft, Unemployment fraud, Fraud by vendors and sellers, Health care fraud, Insurance fraud, Loan and bank fraud, financial statement fraud, Bribery and corruption, Bankruptcy fraud, Employee embezzlement) This study demonstrated that in November 2020, 79% of respondents said they observed an increase in the overall level of fraud as compared to 77% in August and 68% in May. This increase was found to be significant. This trend was expected by the participant to persist toward 2021. 90% of participants anticipated a further increase in the overall level of fraud over the next 12 months, with 44% saying this change will likely be significant.
The majority of the respondents noted that preventing, detecting, and investigating fraud have all become more difficult in the wake of COVID-19. More than three-quarters (77%) indicated that fraud prevention and fraud investigation are more challenging now than they were previously—with 26% and 31%, respectively, saying that these activities are significantly more difficult. Similarly, 71% of survey participants see fraud detection as more challenging (20% significantly so) than it was before the pandemic.
Several of these 12 fraud risks are affecting organizations more significantly than others. Specifically, Cyberfraud (e.g., business email compromise, hacking, ransomware, and malware) is the most heightened area of risk. 85% of respondents already seeing an increase in these schemes, and 88% expecting a further increase. Other significant fraud risks in terms of both observed and expected increases include payment fraud (e.g., credit card fraud and fraudulent mobile payments), identity theft, and unemployment fraud.

3.5. IBM Security X-Force[34]

IBM drew billions of data points collected from their customers and public sources between January and December 2020 to analyze attack types, infection vectors, and

[32] Sarah Perez *„Report: WhatsApp has seen a 40% increase in usage due to COVID-19 pandemic*" https://techcrunch.com/2020/03/26/report-whatsapp-has-seen-a-40-increase-in-usage-due-to-COVID-19-pandemic/accessed: 08.01.2021

[33] „*FRAUD IN THE WAKE OF COVID-19: Benchmarking Report*" ACFE, December 2020 Edition, COVID-19%20Benchmarking%20Report%20December%20Edition%20(1).pdf, accessed: 08.01.2021

[34] "*X- Force Threat Intelligence Index, Summary Report,2021*" IBM Security https://www.ibm.com/downloads/cas/AWJ3PE1M, accessed: 08.01.2021

global and industry comparisons. The X-Force Threat Intelligence Index presented the data. Ransomware was the most popular attack method found in 2020, making up 23 % of all incidents. Estimated profit from top ransomware that Sodinokibi ransomware actors alone made at least $123 million in profits in 2020 and stole round 21,6 terabytes of data.

3.6. Cybersecurity Statistics and Trends for 2021 by VARONIS[35]

Cybersecurity issues are becoming a day-to-day struggle for businesses.
Recent trends, side effects of a global pandemic and cybersecurity statistics reveal a huge increase in hacked and breached data from sources that are increasingly common in the workplace, like mobile and IoT devices. On top of this, COVID-19 has ramped up remote workforces, making inroads for cyber-attacks Varonis have compiled over 100 cybersecurity statistics for 2021, grouped according to the following criteria: 2021 Trends, Top Facts, Breaches and Hacking, Crime by Attack Type, Compliance, By Industry, Costs and Spending, and COVID-19 Specific statistics.
There are a few of the most impactful cybersecurity statics related to the pandemic-COVID-19 specific. Since the pandemic began, the FBI reported a 300% increase in reported cybercrimes[36]. Confirmed data breaches in the healthcare industry increased by 58% in 2020[37]. 27% of COVID-19 cyberattacks target banks or healthcare organizations and COVID-19 is credited for a 238% rise in cyberattacks on banks in 2020[38]. Cloud-based cyberattacks rose 630% between January and April 2020[39].
Google blocked 18 million daily malware and phishing emails related to Coronavirus[40].
Half a million Zoom user accounts were compromised and sold on a dark web forum in April 2020[41].

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[35] "134 Cybersecurity Statistics and Trends for 2021 "VARONIS, https://www.varonis.com/blog/cybersecurity-statistics/ accessed: 08.06.2021

[36] „*COVID-19 News: FBI Reports 300% Increase in Reported Cybercrimes*" IMC Groupo, https://www.imcgrupo.com/COVID-19-news-fbi-reports-300-increase-in-reported-cybercrimes/ accessed: 08.01.2021

[37] „*Data Breach Investigations Report, 2020"* https://enterprise.verizon.com/resources/reports/2020-data-breach-investigations-report.pdf. accessed: 08.01.2021

[38] "*The 2020 Cybersecurity stats you need to know*" Fintech News, https://www.fintechnews.org/the-2020-cybersecurity-stats-you-need-to-know/ accessed: 08.01.2021

[39] „*The 2020 Cybersecurity stats you need to know*" February 16, 2020 https://www.fintechnews.org/the-2020-cybersecurity-stats-you-need-to-know/, accessed:09.01.2021

[40] Neil Kumaran, Sam Lugani" *Protecting businesses against cyber threats during COVID-19 and beyond"* 2020, Identity and Security, https://cloud.google.com/blog/products/identity-security/protecting-against-cyber-threats-during-covid-19-and-beyond, accessed:08.01.2021

[41] Ikeda Skott "*Half a Million Zoom Accounts Compromised by Credential Stuffing, Sold on Dark Web*" April, 27, 2020. https://www.cpomagazine.com/cyber-security/half-a-million-zoom-accounts-compromised-by-credential-stuffing-sold-on-dark-web/, accessed:08.01.2021

52% of legal and compliance leaders are concerned about third-party cyber risks due to remote work since COVID-19[42].
33,000 unemployment applicants were exposed to a data security breach from the Pandemic Unemployment Assistance program in May[43]Americans lost more than $97.39 million to COVID-19 and stimulus check scams[44]. Remote work has increased the average cost of a data breach by $137,000[45]. 47% of employees cited distraction as the reason for falling for a phishing scam while working from home[46].
81% of cybersecurity professionals have reported their job function changed during the pandemic [47] .Remote workers have caused a security breach in 20% of organizations[48].These data highlight the importance of cyber security. "*2020 brought with it several trials and triumphs. COVID-19 has forced companies to create remote workforces and operate off cloud-based platforms. The rollout of 5G has made connected devices, well, more connected than ever. All this to say, the cybersecurity industry has never been more important*".

[42]"*Gartner Says 52% of Legal & Compliance Leaders Are Concerned About Third-Party Cybersecurity Risk Since COVID-19*" Arlington Va. April 24, 2020, https://www.gartner.com/en/newsroom/press-releases/2020-04-24-gartner-says-52-percent-of-legal-and-compliance-leaders-are-concerned-about-third-party-cybersecurity-risk-rince-COVID-19, accessed:08.01.2021

[43]Kevin Collier "*Four states warn unemployment benefits applicants about data leaks*" May 21, 2020. https://www.nbcnews.com/tech/security/four-states-warn-unemployment-benefits-applicants-about-data- leaks-n1212431, accessed: 08.01.2021

[44] Masahudu Ankiilu*"Over 150,000 COVID-related fraud reports submitted to the US Government*" , IT Security, Technology,August 4,2020, https://africaneyereport.com/over-150000-covid-related-fraud-reports-submitted-to-u-s-government/accessed: 08.01.2021

[45]„*Cost of a Data Breach Report 2020*" IBM, https://www.ibm.com/security/data-breach, accessed:08.01.2021

[46] "*Understand the mistakes that compromise your company's cybersecurity*" Tessian Research, The Psychology of Human Error, https://f.hubspotusercontent20.net/hubfs/1670277/%5BTessian%20Research%5D%20The%20Psychology%20of%20Human%20Error.pdf?__hstc=170273983.3ca31fe6a9bd3fbf4df8356b4498939c.1595357368274.1595357368274.1595357368274.1&__hssc=170273983.1.1595357368274&__hsfp=2623516125&hsCtaTracking=f5dae75c-eda9-4caa-9175-b4afb88be295%7Cf0cafcb0-1663-44c9-ab7d-b15cd7cd4423, accessed:08.01.2021

[47] *(ISC) ² Survey Finds Cybersecurity Professionals Being Repurposed During COVID-19 Pandemic"* Clearwater FL April 28, 2020. https://www.isc2.org/News-and-Events/Press-Room/Posts/2020/04/28/ISC2-Survey-Finds-Cybersecurity-Professionals-Being-Repurposed-During-COVID-19-Pandemic, accessed:08.01.2021

[48]„*Enduring from home: COVID-19's impact on business security*" Malwarebytes, 2020. https://resources.malwarebytes.com/files/2020/08/Malwarebytes_EnduringFromHome_Report_FINAL.pdf, accessed:08.01.2021

3.7. Studies describing some characteristics of cybercrime in the COVID-19 pandemic

David Buil-Gil and his co-workers[49] found that cybercrime increased during the lockdown period, in the online environment. Frauds associated with online shopping, and the hacking of social media and email presented the largest increases in the UK. These crimes mainly were experienced by individuals rather than organizations.
Stickle and Fergus emphasized that primary background of these crime changes were the stay-at-home mandates, which impacted the routine activities of entire populations. The paper discussed the theoretical implications, the specificity of crimes, furthermore they encouraged researchers to embark on in-depth explorations of the data made available from the pandemic[50]. Lawrence E. Cohen and Marcus Felson presented a "routine activity approach" for analyzing crime rate trends and cycles, in 1979. The authors hypothesized that the dispersion of activities away from households and families increases the opportunity for crime and thus generates higher crime rates[51]. It is interesting to discuss the current changes in our entirely opposite life circumstances, since the digitalization what has been promoted by the COVID-19 pandemic changed the everyday life, which caused the absence of the three offender conditions: a motivated perpetrator, a lack of the right target, and the right protection, which is the presumed cause of the decline in traditional crime during a pandemic. Theories of criminology are also suitable for a theoretical approach to cybercrime. This is just one of many theories. In my opinion, opportunistic theory[52,53] is best suited to approach

[49] David Buil-Gil, Fernando Miró-Llinares, Asier Moneva, Steven Kemp and Nacho Díaz-Castaño: "Cybercrime and shifts in opportunities during COVID-19: a preliminary analysis in the UK*" European Societies*, Vol. 23, NO. S1, (2021) S47–S59 https://doi.org/10.1080/14616696.2020.1804973

[50] „Stay-at-home orders were issued by most states and legally required residence to stay within their homes except for authorized activities. Commonly, these activities included seeking health care, purchasing food and other necessary supplies, banking, and similar activities. The orders either outright closed or by de-facto closed broad swaths of the economy and impacted schools, private social gatherings, religious activities, travel, and more. In short, these orders disrupted the daily activities of entire populations and was the only variable that changed abruptly, just days before double-digit drops in crime around the world. As such, we believe, the Environmental Criminology suite of perspectives including; Rational Choice (Clarke & Felson, 1993) and Routine Activity (Cohen & Felson, 1979) will emerge as frontrunners in understanding the crime changes during COVID-19 and will provide insight how to influence crime in the future."
Ben Stickle, Marcus Felson "Crime Rates in a Pandemic: The Largest Criminological Experiment in History" *American Journal of Criminal Justice* 4 (2020) 526–527.

[51]Lawrence E. Cohen, Marcus Felson "Social Change and Crime Rate Trends: A Routine Activity Approach." *American Sociological Review*, vol. 44, no. 4, (1979) 588–608.

[52]Frank Stajano Paul Wilson, "Understanding scam victims: seven principles for systems security," *Communications of the ACM*, vol. 54, no. 3, 70–75, 2011

[53] Ken Tysiac, "*How cybercriminals prey on victims of natural disasters*," September 14, 2018,
https://www.journalofaccountancy.com/news/2018/sep/cyber-criminals-prey-on-natural-disaster-victims-20189720.html,

the present situation. Crime opportunity theory suggests that offenders make choices and choose targets that offer a high reward. All crimes require opportunity, and a motivated offender is necessary for the commission of a crime. The digitalization opened a safe, wide, sophisticated environmental opportunity for the offenders. Lifestyle and routine activities also affect the opportunities, especially natural disaster, crisis, or public event are significantly able to influence these conditions. In the COVID-19 pandemic, working from home, lack of social interactions and physical activity, it is not surprising that criminal attacks have significantly emerged during this period.

Harjinder Singh Lallie and his colleges[54] analyzed of cyber-crime and cyber-attacks during the pandemic. The analysis highlighted a common modus-operandi of many cyber-attacks during this period. Many cyber-attacks begin with a phishing campaign. To increase the of success, the phishing campaign leverages media and governmental announcements, what recommends that governments, the media- and other institutions should be aware that announcements are likely to give rise to the perpetration of associated cyber-attack campaigns which leverage these events. This article promotes further research to investigate this phenomenon. Criminological theories such as triangle theory, routine activity theory, and opportunistic theory are also mentioned in this article.

Zainab Alkhalil and his co-worker publication[55] emphasizes the threat and danger of the phishing attacks. This remains one of the major threats to individuals and organizations to date. The paper highlighted the human and technical vulnerabilities in the phishing cycle. The susceptibility to phishing between people is affected by age, gender, internet addiction, and many other factors. In addition to traditional phishing channels new types of phishing mediums are on the increase (voice- SMS phishing, social media, etc.). This article was intended to describe the complete life cycle of phishing attacks. It highlights that human education is the most effective defense for phishing but, it is difficult to remove the threat due to the sophistication of the attacks and social engineering elements. The authors emphasized the importance of further investigations and research connected to the phishing threat, on several territories, as to investigate the susceptibility to phishing among users, to conduct research on social media-based platform, Voice Phishing, and SMS Phishing, to investigate the Laws and legislations that apply for phishing, since these are still at their infant stage, furthermore, to determine the source of the attack before the end of the phishing lifecycle.

[54] Harjinder Singh Lallie, Lynsay A. Shepherdb, Jason R.C. Nursec, Arnau Erolad, Gregory Epiphanioua, Carsten Maple, Xavier Bellekense "Cyber security in the age of COVID-19: A timeline and analysis of cyber-crime and cyber-attacks during the pandemic" *Computers & security* 105 (2021)

[55]Zainab Alkhalil, Chaminda Hewage, Liqaa Nawaf, Imtiaz Khan,"Phishing Attacks: A Recent Comprehensive Study and a New Anatomy" *Front. Comput. Sci*.,(09 March 2021) https://doi.org/10.3389/fcomp.2021.563060

István Gál studied the Hungarian cybercrime trends in the middle period of the COVID-19 pandemic[56]. Gál also discussed the possible effects of the global economic crisis on crime tendencies[57].

4. Social-, property- and human factors that influence cybercrime during the pandemic

Cybercrimes are often regarded as technical offenses that require technical solutions. However, these crimes are committed by individuals or networks of people furthermore, the crimes are detected and prosecuted by criminal justice personnel. This is why human decision-making plays an essential role in the course of an offence, the justice response, and policymakers' attempts to legislate against these crimes.
This UNODC short report was aimed to provide initial observations about the impact of the COVID-19 pandemic on four types of crime: homicide, robbery, theft and burglary. On the other hand, this report tried to answer the question, how is crime expected to evolve during a pandemic. This study primarily evaluated the social and economic impact for the crime tendencies and discussed a short-term - and a long-term effects of COVID-19 pandemic for the crime.
In the short term, crime can be affected by lockdown restrictions in combination with preexisting factors, such as the presence of organized crime and gang violence, which vary across countries. Restrictive measures not only reduce opportunities to commit street crime but also limit the possibility of criminals breaking into private homes.
In the longer term, the closure of businesses and subsequent unemployment and loss of income may affect crime, acquisitive and profit-oriented crime, where economic and social safety nets are not sufficient to ensure livelihoods.
The short- and long-term impact on crime can be viewed in the context of criminological theories known as “opportunity theory” and “strain theory”, as it is presented on the figure.

[56]László István Gál, “The Possible Impact of the COVID-19 On Crime Rates in Hungary” *Journal of Eastern-European Criminal Law*, 7: 1 (2020): 13.
[57]László István Gál “A koronavírus (COVID-19) és az általa okozott gazdasági világválság lehetséges hatásai a bűnözésre” *Magyar Jog*, 67. no. 5. (2020): 9.

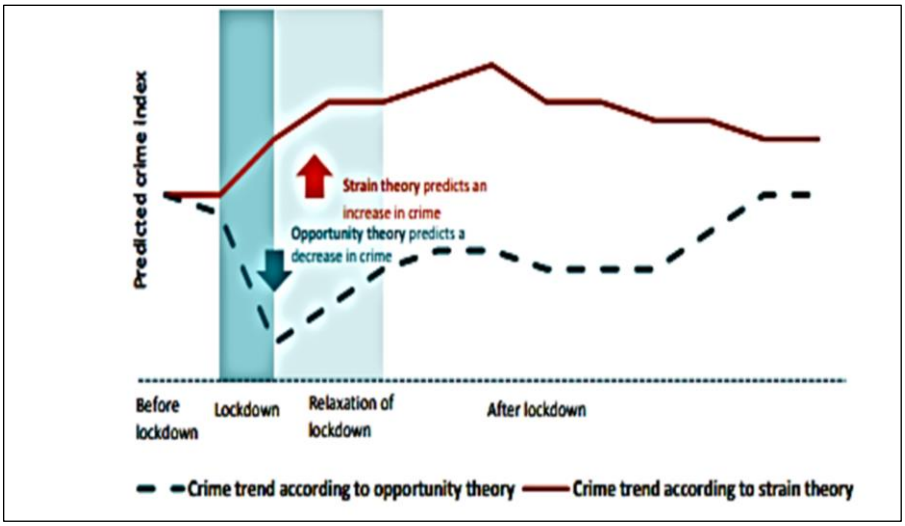

Fig.1 Simulation of crime trends based on causal mechanisms that influence crime during a pandemic[58]

These theories predict two diverging trends for crime: opportunity theory posits that lockdown measures can potentially reduce the possibility of criminal offences being perpetrated because of the restrictions imposed on mobility and social interaction; strain theory argues that socioeconomic strains that affect a large stratum of the population, especially the most vulnerable groups, have the potential to create an atmosphere of pressure that drives individuals to commit crime.

Thus, from a theoretical point of view, lockdown measures can trigger different dynamics, with the predominant trend likely to depend on a variety of factors, including the nature of the restrictions, the socioeconomic support provided by Governments to overcome the challenges and pre-existing conditions in terms of crime and governance. In general, a reduction in certain types of crime can be expected in conditions of strict confinement due to the subsequent reduction in opportunities to commit crime. As opposed to opportunity reduction, strain is expected to manifest itself well after the introduction of lockdowns and curfews, as people become negatively affected by dire economic circumstances caused by the lockdown and may begin to lose faith in government measures to contain the pandemic. The impact of the latter causal mechanism is likely to have a more long-lasting effect, even after lockdown measures are lifted[59].

[58] "*Violence and the pandemic – Urgent questions for research*" UNODC, Based on, Manuel Eisner and Amy Nivette https://www.hfg.org/violence-and-the-pandemic

[59]"*Effect of the COVID-19 pandemic and related restrictions on homicide and property crime*" UNODC ,https://www.unodc.org/documents/data-and-analysis/covid/Property_Crime_Brief_2020.pdf

Lee Hadlington[60] investigated and discussed the human factors in cybercrime and cybersecurity. The publication presented the relationship between risky cybersecurity behaviors, in a business environment. In the prevention of digital attacks and cybercrime the significance of the human factors increased as compared to the technological factors. This research highlights how aspects of personality, problematic Internet use and employee attitudes can impact on the potential to engage in effective information security behaviors. The paper cites the opinion of Bada and his colleges that information has to be targeted, has to be actionable, relevant, and there must be the provision of feedback so that individuals can assess how well they are performing[61]. Such measures also present the possibility for identifying those individuals who present a higher risk to an organization.

Scott Monteith, and colleges investigated the role of psychological factors in the cybercrime in the COVID-19 pandemic[62].

The study suggested that mental illness increase vulnerability to cybercrime. People suffering from mental disorder, persons who are psychologically vulnerable, and adults may become victims of many types of financial fraud[63]. Social isolation and the change to daily routines may disrupt the social connections[64]. People with different mental disorders might go online irregularly, they usually lack technical training and skills, which may increase vulnerability to fraud[65].

Ahmed Alzahrani emphasized the significance of the Social Engineering Attacks related to the COVID-19 pandemic[66].

Social engineers manipulate users to gain sensitive information. Cybercriminals use psychological and analytical techniques to manipulate users, especially often in COVID-19 pandemic. This study presents the most common coronavirus social engineering attacks and provides recommendations to respond to them.

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[60]Lee Hadlington, "Human factors in cybersecurity; examining the link between Internet addiction, impulsivity, attitudes towards cybersecurity, and risky cybersecurity behaviours" *Helyion*, Vol. 3, (2017)Issue 7,e00346,ISSN 2405-8440, https://doi.org/10.1016/j.heliyon.2017.e00346.
http://dx.doi.org/10.1016/j.heliyon.2017.e00346,

[61]Maria Bada, Angela M. Sass, Jason R. C.Nurse "Cyber Security Awareness Campaigns Why do they fail to change behaviour?" Global Cyber Security Capacity Centre: *Draft Working Paper*, (2014) 118–131.

[62]Scott Monteith, Michael Bauer, Martin Alda, John Geddes,Peter C. Whybrow, Tasha Glenn "*Increasing Cybercrime Since the Pandemic: Concerns for Psychiatry*" https://doi.org/10.1007/s11920-021-01228-w / Published online: 3 March 2021.

[63]Peter A. Lichtenberg, Michael A. Sugarman, Daniel Paulson, Lisa J.Ficker, Annalise R. Filipiak "Psychological and functional vulnerability predicts fraud cases in older adults: results of a longitudinal study" *Clin Gerontol*. (2016) 39:48–63.

[64]Mark Costa, Anthony Pavlo, Graziela Reis, Katherine *Ponte*, Larry *Davidson* "COVID-19 concerns among persons with mental illness" *Psychiatr Serv*. (2020) 3: appips202000245. https://doi.org/10.1176/appi.ps. 202000245.

[65] Seata P. Gangadharan "The downside of digital inclusion: expectations and experiences of privacy and surveillance among marginal Internet users" *New Media Soc* (2017)19: 597–615.

[66]Ahmed Alzahrani" Coronavirus Social Engineering Attacks: Issues and Recommendations "*International Journal of Advanced Computer Science and Applications*, Vol. 11, No. 5, (2020)

Cybercriminals make use of people's fear and anxiety about coronavirus by spreading malicious attachments, coronavirus-related phishing, and smishing, what can increase the chances of distributing malicious code, stealing sensitive information, and ransomware attacks. The paper discussed the cybersecurity related to working remotely and provides recommendations to avoid security breaches. The author recommends future work to analyze these coronavirus-related security issues to reduce the success of social engineering attacks and to implement proper social engineering awareness.
Venkatesha Sushruth and colleges also discussed the significance of the Social Engineering Attacks During the COVID-19 Pandemic[67].
The authors emphasize that rise in the presence of people on the Internet is not accompanied by cyber security education. They discuss a variety of these kinds of attacks and propose a few guidelines as to how to avoid and counter these, furthermore, they presented an analysis of the steps taken by these attackers. This paper also presents a detailed analysis of COVID-19 themed attacks, and guidelines to avoid these targeted attacks like Phishing attacks, Healthcare related fraudulent calls, Health history based attacks.

5. Some aspects of the Post - Covid era

During the COVID-19 crisis, it has become necessary to rely on computer systems, mobile devices and the Internet to work, communicate, shop, share information and mitigate the impact of social distancing. These changes resulted in an increase of cybercrime, and on the other side, these changes made the individuals and population very vulnerable to criminal attacks.
Law enforcement agencies play significant role in both supporting the implementation of public health measures and in preventing specific criminal activities. INTERPOL issued Guidelines for Law Enforcement in the beginning of COVID-19 pandemic, which must be useful for criminal justice practitioners [68]. These guidelines were intended to raise awareness among law enforcement agencies and should be in accordance with national legislations.
The Convention on Cybercrime of the Council of Europe (CETS No.185) [69], known as the Budapest Convention serves as a guideline for any country developing comprehensive national legislation against Cybercrime. With the Budapest Convention a framework for cooperation with the necessary rule of law safeguards is available to 65 States. It has been realized that capacity building for criminal justice authorities must be further enhanced.
Based on their investigations, UNODC made the following recommendations.

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[67]Venkatesha Sushruth,K. Rahul Reddy, B. R. Chandavarkar "Social Engineering Attacks During the COVID-19 Pandemic" *SN Computer Science* (2021) 2:78 https://doi.org/10.1007/s42979-020-00443-1

[68] „COVID-19 Pandemic – Guidelines for Law Enforcement" https://www.interpol.int/content/download/15014/file/COVID19_LE_Guidelines_PUBLIC_26mar2020.pdf, accessed: 08.01.2021

[69] „*Council of Europe, Budapest Convention and related standards*" https://www.coe.int/en/web/cybercrime/the-budapest-convention, accessed: 08.01.2021

Cybercrime MENA Program has different activities planned for the following months that will strengthen countries' capacities to respond more efficiently to the COVID-19 crisis from a Digital World's perspective**.**
The MENA Program:[70]

- *Enhanced Cybersecurity for the Critical Infrastructures at the country level.*
- *Development of Standard Operating Procedures to ensure a proper digital response.*
- *Procurement of internationally recognized training for first responders and government officials.*
- *Procurement of digital forensics equipment to ensure proper investigation of various cyberattacks in the current context.*
- *Assessment of needs and regional coordinated assistance response.*
- *Cybercrime investigations specialized interventions to prevent further attacks.*
- *Digital Forensics response to various crime scenes or data tracking.*
- *Legislative review and counsel.*
- *International Cooperation assistance.*
- *Social Media Awareness campaign on specific pandemic issues*."

As evidently indicated by UNODC's Cybercrime Global Program initiative*, "Now is not the time to de-invest in specialist cybercrime law enforcement. The capability and capacity to counter cybercrime are vital components for protecting Critical National Infrastructure, keeping children safe online, empowering industry, securing hospitals and supporting economic recovery from COVID-19*".[71]
Zainab Alkhalil and colleges[72] gave some suggestions for further investigations and research to prevent cybercrime, and also emphasized the important role of Law and legislation. 1. To study and investigate susceptibility to phishing among users. 2. Research on social media-based phishing, Voice Phishing, and SMS Phishing is sparse and these emerging threats are predicted to be significantly increased over the next years. 3. Laws and legislations that apply for phishing are still at their infant stage. There are no specific phishing laws in many countries. 4. Determining the source of the attack before the end of the phishing lifecycle and enforcing law legislation.

[70]"MENA Regional Programme,COVID-19: How to stay safe from cybercriminals exploiting the pandemic" UNODC, (March 2020),https://www.unodc.org/middleeastandnorthafrica/en/web-stories/COVID-19_-how-to-stay-safe-from-cybercriminals-exploiting-the-pandemic.html, Accessed: 08.01.2021
[71]"*Global Programme on Cybercrime, CYBERCRIME AND COVID19: Risks and Responses*" UNODC (2020),www.unodc.org/documents/Advocacy-Section/UNODC CYBERCRIME_AND_COVID19_-_Risks_and_Responses_v1.2_-_14-04-2020_-_CMLS-COVID19-CYBER1_-_UNCLASSIFIED_BRANDED.pdf , accessed: 08.01.2021
[72] Zainab Alkhalil, Chaminda Hewage, Liqaa Nawaf, and Imtiaz Khan, "Phishing Attacks: A Recent Comprehensive Study and a New Anatomy" *Front. Comput. Sci.,* 09 (March 2021) https://doi.org/10.3389/fcomp.2021.563060

Milenko Bogdanović and colleges[73] discussed the significance of the forensic medical investigations in the fight against the COVID-19 pandemic. These investigations could provide a significant contribution to science. Could contribute to determine the exact cause of death, furthermore, could contribute to the accuracy of mortality statistics and to understand the pathological mechanisms of COVID-19. A detailed multidisciplinary analysis of autopsy samples would undoubtedly help understand this new illness and its clinical management. Therefore, autopsies during the COVID-19 pandemic should not be an exception, but certainly a rule.
How the lockdown has transformed the nature of cybercrime was published by Philip Virgo [74]. The study discussed several questions related to the Post COVID era, as 1. Opportunities opened by Lockdown, 2. Opportunities opened by Government Response Programs, 3. Evolving public-private predator supply chains. 3. Why legacy guidance is no longer adequate. 4. Areas where improvement will make a difference and 5. Local, national and international co-operations. The author concluded that large organizations who are serious about protecting themselves and their customers need to take collective action. He also announced the next online meeting of the DPA Cybersecurity Group. scheduled for Monday 14 September at 14.00 on Zoom**, is** due to "*discuss the role of authorities in addressing cyber risk, building on its previous discussion of its growing significance, and changing nature as those working remotely connect to the networks of their organizations and return to their offices. Remote working and growing reliance on information technology and digital communication have significantly increased the attack surface for any would-be adversaries.*
The meeting, chaired by Baroness Neville-Jones, will include discussion on planned work with business and academia through Cyber Resilience Centres with Andrew Gould, National Cybercrime Programme Lead for the National Police Chiefs' Council, who will brief members on a current technical project."

6. Conclusion

The COVID - 19 pandemic is a social, economic, health crisis, with all its challenges. It is also a challenge for all fields of science in terms of developing both research and coping strategies. In this paper we examined the main types of cybercrime during COVID-19 pandemic, relationships between digitalization and crime/cybercrime in connection to coronavirus epidemic, what environment caused a further development in the digitalization and opened new challenges for the criminal investigations.
Statistics show that "traditional" crime patterns have declined as a result of the epidemic, while the number of online crimes has increased significantly. Based on INTERPOL statistical data was identifiable the distribution of cyberthreats and their main types: the highest rate of phishing scam and fraud, malware and ransomware, malicious domain, and fake news, and the sexual child exploitation. Europol, UNODC

[73] Milenko Bogdanović, Tatjana Atanasijević, Vesna Popović, Zoran Mihailović, Bojana Radnić, Tijana Durmić, "Is the role of forensic medicine in the COVID-19 pandemic underestimated?" *Forensic Science, Medicine and Pathology* (2021) 17:136–138
[74] „Tackling the Post Covid Cybercrime Pandemic" Computerweekly. com https://www.computerweekly.com/blog/When-IT-Meets-Politics/Tackling-the-Post-Covid-Cybercrime-Pandemic, accessed: 08.01.2021

and other research, such as the Benchmark study, are also in line with Interpol's data. The top five fraud risks are cyberfraud, payment fraud, unemployment fraud, fraud by vendors and sellers and the health care fraud. The increase in digitalization processes is also a unique way to increase the opportunities for the rapidly adaptable criminal layer in this area, especially in cyberspace.

The COVID-19 pandemic has been a catalyst for digitalization across the globe. This, in turn, has resulted in increased cybercrime activity. With so many of us now depending on digital platforms for our work, groceries and social interactions daily, there are more avenues for cyber-criminals to explore than ever before. Once authorities can adequately defend themselves and all of us from cybercrime, the recent increases in digitalization will continue to grow as users will feel secure and protected. *These digital platforms can then be used as powerful channels to fight the spread of COVID-19.*

Protection against cyberattacks has become more important now than ever, requiring further improvements in many areas of digitalization, enhancing cybersecurity, because criminals themselves use these methods. Several technologies are awaiting further development, such as Blockchain (BC) Internet of things (IoT) and Artificial intelligence (AI).

However, the protection needs to be applied more widely than ever before, as it affects users of supercomputers as well as simple users of telephones.

Examining the statistics of cybercrime, this article intended to draw the attention to the actual tendencies in modes and the risk of further growth of cybercrime, and the key role of the United Nations and the European Union in the fight against cybercrime.

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Huyn Thi Truc Giang[*] – Evidence gathering in criminal procedure in child abuse cases in Vietnam and Hungary

Reviewer: Prof. Dr. Csabáné Herger

Abstract

To able to handle criminal cases with accurate and objective truth, protect the victim's interests, and ensure the right person and righteous trial, the criminal investigation in the process of resolving the criminal case is one critical phase. Therefore, the criminal procedure laws of most countries have provisions on this issue, including Vietnam and Hungary. A unique feature is that the criminal investigation activities in two countries have many similarities, even though they have different geographical locations and socio-economic conditions. Many reasons can explain it, but most importantly, perhaps Vietnam and Hungary are countries originating from the socialist bloc. The primary purpose of this paper is to provide an inside look at evidence gathering activities in Vietnam and Hungary. In light of the synthesis and analysis method, the author compares the legal regulations on criminal investigation in Vietnam and Hungary. At the same time, clarify some tactics to carry out such activities in practice in Vietnam.

Keywords: criminal investigation, criminal procedure code, the accused, witness

1. Introduction

"When a criminal case occurs, there are always traces that are presented in different forms. These traces are essential for determining whether the offence is committed. The competent authorities will base on such traces to prosecute or adjudicate a person who has committed a crime. According to the provisions of the criminal proceedings, such traces are called evidence, and the competent authorities' activities gather evidence to resolve the criminal case"[1].

The evidence collecting methods in this study are analyzed under the 2015 Vietnam Criminal Procedure Act[2] (hereinafter CPA) and the 2017 Hungarian Criminal

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[1] Le Minh Truong, "Chứng cứ, vai trò của chứng cứ trong vụ án hình sự" (Evidence, the role of evidence in criminal cases), accessed 17 April 2021, https://luatminhkhue.vn/chung-cu--vai-tro-cua-chung-cu-trong-vu-an-hinh-su.aspx).

[2] Vietnamese National Assembly, "The Criminal Procedure Act number 101/2015/QH13" (was issued on 27 November 20115, accessed 01 May 2021, https://thuvienphapluat.vn/van-ban/Trach-nhiem-hinh-su/Bo-luat-to-tung-hinh-su-2015-296884.aspx.

Procedure Code (hereinafter CPC)[3]. These legal documents have similar content when providing that there are many evidence gathering methods to deal with criminal cases. However, only three of the methods of evidence gathering are considered in this paper. That is taking testimonies of witnesses, interrogating the accused and investigating. The reason for the author's choice is the order of such measures in investigating criminal cases. Specifically, after taking testimonies of witnesses about facts that happened in the case, the police officer will interrogate the accused. These are two stages that must be taken if the case can identify the witness and the accused.
However, in some cases, there are no witness or witnesses' testimony had many questionable points, the police must conduct the experimental investigation. Thus, it can be seen that the experimental investigation is not a mandatory stage, but if it is deemed necessary to conduct it, it must be done after taking the witness's testimony and interrogating the accused. Therefore, in this study, witnesses' testimonies, the accused's interrogation and an experimental investigation will also be presented in the order mentioned above. At the same time, in each measure of evidence collection, the author will examine the following issues: legal concept, order and implementation strategy. In addition, the author will utilize child abuse cases in Vietnam to clarify the stages and tactics for implementing evidence gathering.

2. Take testimony of the witness

2.1. Witness concept

Clause 1, Article 66 of the 2015 Vietnamese CPA stipulates: "Witness testifiers possess knowledge of facts relating to the crime and lawsuit and receive competent procedural authorities' subpoena to testify".
In practice, many people know the facts of the case but do not become witnesses because the authorities deem it unnecessary to summon them, or according to the criminal procedure law, they cannot become witnesses. Specifically, according to Clause 2, Article 66 of the 2015 Vietnamese CPA: "the following persons cannot testify: a) Defense counsels of accused persons; b) Persons not conscious of facts pertaining to criminal information and lawsuit or not capable of giving judicious testimonies due to their mental or physical impairment."
Hungarian CPC states at § 168 (1) as follows: "A person who may be aware of the fact to be proved may be heard as a witness". This concept shows parallels with Vietnamese law, where the competent authority can hear a person who may be aware of an event as a witness. Besides, CPC does not admit all those who know the incident as witnesses, which is similar to CPA. Specifically, section § 170 (1) CPC Hungary stipulates as follows: "He may not be heard as a witness: a) the defence of what he perceives as an advocate or what he has communicated with the defendant in his defence, b) a person in a church and a city professional practitioners of religious associations who perform religious services professionally, subject to an obligation to

[3] Act No XC of 2017 on Criminal Proceedinh (in Hungarian), accessed 9 June 2021, https://njt.hu/jogszabaly/2017-90-00-00.3.

keep professional secrets by their profession, (c) people, because of their physical or mental condition, obviously not expected to give an exact statement".

2.2. The order of taking testimonies of witnesses

The steps to taking witness testimony are not specified in the 2015 Vietnamese CPA but are explored in Vietnamese professional literature. Accordingly, the taking of witness testimonies will be done through three main stages: First, identifying the witness's identity before taking testimony; second, explain the reasons for summoning, the rights and obligations of witnesses in the process of taking testimony; third, proceeding to testify about the details of the case that they have known.

2.2.1. Identify witnesses before taking their testimony

"An examination of the identity of a witness is essential and plays a crucial role in determining whether a witness belongs to the group of people who are not allowed to be a witness under the Criminal Procedure Code"[4].
Although it is not regulated as detailed as Hungarian CPC, in Clause 4 Article 186 of the Vietnamese CPA has the following provisions: "Investigators, before inquiring into the case, must ask about the relationship of the witness testifiers, suspects and defendants and personal information of the witness testifiers. Investigators, before raising questions, shall ask the witness testifiers to speak or write their knowledge of the case in honest and voluntary manners." Meanwhile, section §178 (2) of the Hungarian Criminal Procedure Code states the following: "At the beginning of the questioning, the identity of the witness will be established. In doing so, the witness must state the following information: a) name, birth name, b) place and date of birth, c) mother's name, d) nationality, e) identification document number, f) address, notification address, physical location residence, g) shipping address, telephone contact, h) occupation."

2.2.2. Explain the reasons for summoning, the rights and obligations of witnesses in the process of taking testimony

According to Le Minh Hung, "explaining the reason for summoning the rights and obligations of witnesses is a job that is both compulsory and tactical in taking testimonies of witnesses. Therefore, the officers taking testimonies need to find the content and method of explanation suitable for each specific witness. When explaining, should not be too emphasized on the law but underestimate the persuasion; Emphasis is made on principles that take feelings lightly"[5].
Point a, Clause 3, Article 66 of the 2015 Vietnamese CPA define: "Witness testifiers are entitled to: "Be informed or explained about their rights and duties as per this

[4] Le Minh Hung, *Giáo trình Khoa học điều tra hình sự (Curriculum on Criminal Investigation Science)* (Ha Noi: Education publishing house, 2017), 133.
[5] Le Minh Hung, *Giáo trình Khoa học điều tra hình sự (Curriculum on Criminal Investigation Science*),133.

Article". The rule requiring the police officer to disclose the rights and obligations before taking testimony is also set out in §179 (2) of the Hungarian CPC as follows: "Witnesses will be informed of the witness's warning and his rights regarding the interrogation".

2.2.3. Proceeding to ask witnesses about details of the case they already know

Under the provisions of Clause 4, Article 186 of the 2015 Vietnamese CPA: "Investigators, before inquiring into the case, must ask about the relationship of the witness testifiers, suspects and defendants and personal information of the witness testifiers. Investigators, before raising questions, shall ask the witness testifiers to speak or write their knowledge of the case in honest and voluntary manners."
This regulation shows that the testimony of witnesses under Vietnamese law can be done in two ways: first, the witness testifies in writing, second, the investigator will ask questions for the witness to answer.
Analysis of section §180 and section §181 of the Hungarian CPC can explore similar provisions in which witness testimony is taken. However, Hungarian law is different from Vietnamese law when it has detailed provisions on the content of questions that a police officer should use to witness testimony. Specifically, in §180 (4) of CPC states the following: "The witness shall not ask any questions: (a) include a response or instruction regarding the response, (b) contains a non-conforming promise with law, or (c) in connection with a claim of fact."

2.3. Tactic to take testimonies

2.3.1. Using documents and evidence to expose conflicts forces the witnesses to give true statements

Due to many different reasons, the witness testifies incorrectly, thereby creating conflicts. In this case, the police officer should deeply question the conflict issue to reinforce the content of their testimony once more. If they still confirm that the content of the testimony is correct, then give the appropriate documents and evidence and ask them to explain.
Example 1: Child abuse at a preschool
Investigator (I): Please tell us from 11 a.m. to 4 p.m. on 15 February 2018, where were you doing?
Witness (W): I took care of the student in the class of Muoi kindergarten. Around that time, I would feed the student.
I: Did you witness what happened when Mis L gave the student lunch?
W: Since we did not face each other when we feed the student, I do not know what happened.
I: You should honestly report. According to the evidence we are holding, you turned to look at Ms L a few times during the process when you fed your student.
W: be quiet.

2.3.2. Emotional manipulation to overcome the way of lying and get the true testimony

Emotional manipulation is how investigators use various manipulations to arouse the witnesses need feelings or take advantage of the dynamic characteristics of the witness to manipulate their behaviour.
For witnesses, the study of grasping existing emotional needs and using family and friends' emotional resources to influence their testimonies are considered essential requirements of the strategy.
Example 2: is the next stage of Example 1
I: According to my research, you have a 2-year-old daughter. You are also a mother, so I hope you understand M's pain and her mother. M's family has denounced M L's behaviour. I hope you sincerely testify to avoid similar cases occurring in the future.
W (Pausing): That day, Ms L and I were feeding the student lunch. I heard M crying loudly...

3. Interrogating the accused

3.1. Concept of interrogation of the accused

Interrogation of a defendant is a criminal investigation conducted by an investigator using tactics to influence the accused to obtain accurate testimony about issues to be proved in the criminal case and other necessary issues to fight to protect national security, maintain social order, and safety.
Regarding the interrogation of the accused, section §183 (1) of the Hungarian CPC states as follows: "The accused's testimony is considered the defendant's testimony in the criminal proceedings, after the scene. report, in advance or to a court, prosecutor's office or agency investigating a verbal or written exchange stating factual about the subject of evidence. "
Besides, the literature also states interrogation's concept in Hungary as follows: "interrogation includes a re-enactment of past events, a presentation of what the interrogator has seen or received. through reviving their memories"[6].

3.2. The order of conducting interrogation of the accused

Except for the rule "interrogation of a defendant must be conducted immediately after deciding to prosecute a defendant" defined in Clause 1, Article 183 of the 2015 Vietnamese CPA, in the Vietnamese CPA, there are no detailed regulations stages of conducting an interrogation.
According to the pieces of literature, "the interrogation of the accused will be conducted in three phases as follows: first, research on criminal acts and identify the

[6] Csilla Hati, "The risks of interrogation with the help of an interpreter in the criminal procedure" *(Studies in logic, grammar and rhetoric*, 2017), 125-139.

identity of the accused; second, explain the reasons for summoning, the rights and obligations of the accused, third, conduct interrogation of the accused"[7].

3.2.1. Study the defendant's criminal behaviour

Usually, before interrogating the suspect, the investigation agency has some documents reflecting the suspect's criminal behaviour collected by the investigation activities. Based on studying the documents mentioned above, investigators must identify issues that need to be clarified and additionally collected or checked and re-verified and used in the interrogation process; evidence materials that can be used to combat the accused, the methods, and procedures for which they are used.
In one of his studies, Eric Beauregard stated that: "we propose that both offender and criminal event characteristics - what actually goes on outside the interrogation room and before the interrogation starts - is as important as interrogation strategies themselves." [8] The reason is that "evaluation and consideration of these pre-interrogation factors allow the investigator to more accurately estimate the likelihood of obtaining a confession"[9].
Example 3: in a lewd child case
When the accused Luong Tan X was lewd to A (8 years old) he was discovered and chanted by B (9 years old). At the same time, A resisted fiercely, so she managed to escape. After that, the two children informed their parents about X's behaviour. Investigators, when studying the case file, must learn about the victim's testimony that child A and the witness's testimony - B to determine the tactics, the content of the interrogation is X to ensure the principle of innocence, and at the same time for the accused to give factual statements.

3.2.2. Explain the reason for summoning the accused

According to Clause 2 Article 183 of the 2015 CPA of Vietnam: "Investigators, before conducting the first session of interrogation, must explain to the suspect his rights and duties as defined in Article 60 of this Law. Such activities shall be recorded in writing". Also in this law, there are additional provisions that: "A suspect may be permitted to write his statements."
Section §185 (1) The Hungarian CPC also provides a similar provision when it notes that*:* "After verifying his identity, the defendant will be informed of his / her rights and warned that: (a) is not required to report the matter may refuse to testify or answer specific questions at any time during the hearing, but at any time it is possible to decide to report the facts, even if they have previously refused to testify, (b) the refusal to report does not preclude the proceeding from proceeding and does not affect the

[7] Ha Noi University, *Khoa học điều tra hình sự (Science of criminal investigation)* (Police Publishing house, 2017), 133.
[8] Eric Beauregard and Tom Mieczkowski, "Outside the Interrogation room: The Context of Confession in Sexual Crimes" (*Policing: An International Journal of Police Strategies and Management*, 2011), 246-264.
[9] Beauregard and Mieczkowski, "Outside the Interrogation room: The Context of Confession in Sexual Crimes", 246-264.

defendant's right to question, comment and petition, (c) if he gives evidence, he can use it as evidence for what he says or gives, d) He must not falsely accuse another person of a crime, he must not invade the right to be pitied with a false testimony".

3.2.3. Conducting interrogation of the accused

When conducting interrogation of the accused, according to Clause 2, Article 183 of the 2015 CPA stipulate: "If there are several suspects, they shall be separately interrogated and prevented from interacting with each other".
Section §183 (3) The Hungarian CPC also states that: *"the defendants will be questioned separately".*
The Vietnamese CPA does not have regulations on how to question the defendant; however, this issue is mentioned in academic documents in Vietnam. Accordingly, usually the accused free will not clarify the nature of the problem that investigators want. There are many different reasons for the incomplete and inaccurate the accused's declaration. It is necessary to have appropriate strategies and questions for each reason.
Concerning the questions used by the police officer to impregnate the suspect, Hungarian CPC states under §186 (3) as follows: "The accused shall not be asked any questions Which: (a) includes a response or instruction about the response, (b) contains a promise that is not following the law, or (c) involves a statement of fact."

3.3. The strategy of interrogating the accused

3.3.1. Sensitization and education tactics

The tactic of sensitization and education is to conquer the accused, by policy, law, real-life, emotion, social morality, and even the investigator's example, to change the accused's reporting attitude is conducive to the investigation.
Example 4: interrogating a suspect in a child sexual abuse case
Investigator (I): Please tell us what you did on 20 June 2020 and where you were from 7:00 a.m. to 9:00 p.m.?
The Accused (A): I delivered the goods to the customer.
I: Do you went Thanh Mau Street, the Dalat city?
A: No, I delivered the goods near Xuan Huong Lake.
I: Has anyone testified for you?
A: Yes, my client is Ms Nguyen Thanh H.
I: Did you meet this girl? (Show the victim's picture and observe the accused's expression and attitude)
A: I didn't.
I: The girl in this picture is only nine years old. A few days ago, on the way, an unknown young man raped her. Currently, mentally, she is very panicked and scared. Her family is also poor. Her parents often have to earn money, so they don't have much time to care for her. According to her testimony, she did not know the person who committed the rape. Perhaps, the perpetrator only performed the act in a moment of thoughtlessness, not with prior intention.

A: Be silent!
According to Eric Beauregard, "sex offenders appear more likely to confess when police interviewing was characterized by: an emotional strategy including appeals to humanity and morality; the interrogator making no attempt at power dominance; and the showing of an empathetic display of understanding of the suspect's cognitive distortions"[10].

3.3.2. Tactics using documents and evidence

The tactic of using documents and evidence is the investigator's initiative to let the accused know the documents and evidence to have influenced the accused's thoughts and psychology. From then, the investigator forcing the accused to declare facts about his criminal activities and his accomplices.
Example 5: this is the continuation of Example 4.
I: What time did you deliver the goods to Ms Nguyen Thanh H?
A: Around 7:00 pm on 20 June 2020.
I: You should tell the truth, don't be crooked, according to the security cameras of families near the Thanh Mau cemetery, had identified you there from 6:58 pm to 7:30 pm on 20 June 2020, so you cannot deliver the goods to Ms Nguyen Thanh H at Xuan Huong lake at 7 pm.
A: Maybe I remember wrongly.
I: Furthermore, Ms H also said that she had not returned from work at 7:00 pm on 20 June 2021. Therefore, she cannot receive your goods at the above time. How do you explain this?
A: Actually, I did pass the area of the Thanh Mau Cemetery ...
Indeed, "research examining motives to confess report that between 55 percent and 60 percent of suspects say that they confessed because they were convinced that police had evidence against them"[11]. In a study in 1992, Mosto also concluded that: "suspect confessions rose steadily as the strength of the evidence increased"[12]. "However, the suspect may or may not accept the truth of what the police claim. The belief that the suspect places on police evidentiary claims is a critical and dynamic element of the interview. This belief itself can be mediated in multiple ways. For example, the suspect who is experienced may be more confident in analyzing and assessing police claims than the nalve suspect). Or the suspect may have substantial cognitive

[10] Kebbell, M., Hurren, E. and Mazerolle, P. (2006), *"An investigation into the effective and ethical interviewing of suspected sex offenders"*, (*Final Report, Criminology Research Council, Australian Government*,2016) ctied from Beauregard and Mieczkowski: "Outside the Interrogation room: The Context of Confession in Sexual Crimes", 246-264.
[11] Gudjonsson, G.H. and Bownes, I, "The reasons why suspects confess during custodial interrogation: data for Northern Ireland" (*Medicine, Science and the Law*, 1992), 204-12 cited from Beauregard and Mieczkowski: "Outside the Interrogation room: The Context of Confession in Sexual Crimes", 246-264.
[12] Moston, S., Stephenson, G.M. and Williamson, T.M, "The effects of case characteristics on suspect behaviour during police questioning" (*British Journal of Criminology*), 23-40 cited from Beauregard and Mieczkowski: "Outside the Interrogation room: The Context of Confession in Sexual Crimes", 246-264.

knowledge about the facts of the crime, and therefore may enjoy an advantage in evaluating the police claims. The suspect may have great or diminished analytic or logical skills that contribute to their assessment. Since police use varying interrogation, depending on the strategic choices of the police the suspect may gain or lose an advantage in assessing the police's case and its strength or weakness."[13]

4. Experimental investigation

4.1. Experimental investigative concept

For documents and details that have been collected during the investigation stage but have not yet determined their objectivity and reliability, the investigating agency may organize an experimental investigation to check and illustrate those documents and details.

Clause 1, Article 204 of the 2015 CPA of Vietnam stipulates: "Investigation authorities, in order to inspect and verify documents and acts significant to solve the case, may conduct experimental investigation by reproducing a crime scene, replaying acts, situations or other facts of a certain event and by performing other experimental activities deemed necessary. An experimental investigation requires measurements, photographs, video recording, sketches. Results of the experimental investigation shall be specified in writing."

Experimental investigative activities were also noted in the Hungarian CPC at §208 on on-site interrogation and in §209.

4.2. Order of implementing investigation experiment

4.2.1. Preparation phase

Investigators need to do some of the following tasks before going to the experimental site of the investigation:

First, study case files and related situation. Investigators should carefully study all documents in the case files collected through various investigative methods or reconnaissance documents. The investigative experiment is related to politics, economy, society, expertise, science, technology, culture, and art. Therefore, the study of related situations is an indispensable requirement to develop an appropriate experimental investigation plan.

Second, expected participants of experimental investigation and prepared necessary facilities for experimental investigation. According to Article 204 of the 2015 CPA of Vietnam, the composition of the forces conducting and participating in the experimental investigation include investigators, criminal science staff, criminal techniques, witnesses.

[13] Leo, R.A, "Inside the interrogation room" *(Journal of Ciminal Law and Criminology*), 266-303 cited from Beauregard and Mieczkowski: "Outside the Interrogation Room: The Context of Confession in Sexual Crimes", 246-264

Example 8: Case of Luong Tan X, child rape and lewdness happening on 11 April 2019 at a park along the street of Vo Van Kiet - Ham Tu, Ward 6, District 5, Ho Chi Minh City.
In gathering evidence, the investigator only got the testimonies of the two victims (8 and 9 years old) and the accused. Hence, to clearly define the whole criminal behaviour of Defendant Luong Tan X, the investigator decided to conduct an experimental investigation. Therefore, in the preparation phase, the investigator needs to perform the following specific tasks: determine the time and place of the experiment, expected person conducting and participants of experimental investigation (investigators, defendants and witnesses).

4.2.2. The stage of conducting investigation experiments

After completing all the preparations, the investigator who led the investigative experiment asked everyone to be in the correct position. At the scheduled time, the host gave the order to begin the experiment according to the planned plan. By order, experimental participants performing specific experimental activities were assigned. Pay attention not to model, force, suggest people who directly repeat or try to make their subjective inference wishes.
While conducting an experimental investigation, if, for some reason, it is found that there is no objective guarantee for the experiment, it cannot be overcome, the chair can order the investigation to be suspended.
Besides, when conducting an experimental investigation, investigators need to pay attention to the safety of the experiment, not let the accused or the detainee flee, intercept, threaten, or restrain the victim harm, witness, or destroy evidence of the case.

4.3. Experimental investigation strategy

Investigation experiments must be conducted under similar conditions to circumstances in which the behaviours or events that need to be inspected have occurred before, leading the investigative results to experiment to be objective and reliable. Therefore, the investigating agency should consider this critical tactical condition that significantly affects the value of the investigation result.

5. Conclusion

Provisions on measures to investigate crimes in general and three measures: witness testimony, interrogation of the accused, and experimental investigation of the Vietnamese CPA and the Hungarian CPC have many similarities. However, the issues such as the question's content to take witness testimony, interrogate the accused, the personal information of witnesses and the accused, and the conditions and circumstances of the experiment are stipulated in detail in the Hungarian criminal procedure code. Therefore, it will create a clear and transparent legal basis in criminal investigation to resolve the case and help protect the rights of witnesses, defendants and investigators more effectively. They are the contents that, in the future, should be

detailed in the Vietnamese CPA. Besides, from the perspective of investigation tactics, through the analysis of child abuse cases in Vietnam, it has been shown that tactics can only be effective when investigators understand the criminal acts, the identity of the accused, and understand the witness's family situation. Simultaneously, choosing the right tactics and the combination of tactics during use also brings better results.

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Kodiyo Kenneth Kaunda* – Development and Importance of international judicial and criminal law in the world

Reviewer: Dr. Dávid Tóth PhD.

Abstract

War has brought untold sorrow to humankind, lives and properties have been lost due to wars, every continent inhabited by humans have had some experienced with war, but war does not happen on a vacuum , it is planned and executed by human beings for various agendas, some are for world dominance, others just want to take over the government of a country and other wars have been to control mineral reserve of a territory but for whatever reason for the war, the suffers are generally the innocent humans who might not even know the reason behind the war, in some cases the entire tribe or race is targeted for elimination, all these atrocities have been going on for years, since time in memorial and yet the regulations of the actions of humans that lead to the destruction have for a long time, hadn't been considered, the crimes like war crimes or crimes against humanity have just recently been given attention. The rules and regulations governing the area of international war, especially the one regarding women, children, sick, and prisoners can be traced to the ancient customary law of China, India, Greece, and Rome, however, respecting the international rules has been an uphill task until recently.[1]

The development of international criminal law is needed to reflect the modern society and the changes that occur, this article is about the historical and assessments of development of international laws and the tribunals that have been created to handle offenses that are considered to be within the ambit of international criminal law. This article also shows that the jurisdiction of the International Criminal Court which was established by the Rome statute is an outcome of history. The article covers the history of international criminal laws, the creation of the court, the functions of the court, and the conclusion.

Keywords: International criminal law; transnational criminal law; International Criminal Court; international crimes; International Criminal Tribunal at Yugoslavia (ICTY), and International Criminal Tribunal Rwanda.

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[1] See generally Timothy L H McCormack, 'War Crimes and the Development of International Criminal Law', (1997) 60 Albany Law Review, pp 681-732.

1. Introduction

International criminal law is a body of public international law that establishes individual criminal responsibility for international crimes, such as war crimes, crimes against humanity, genocide, and aggression. According to the 2010 Kampala amendments to the statute of International Criminal Court; international crime is defined as 'an act of aggression that constitutes a manifest violation of the prohibition to use force.[2] International Criminal Law also consists of the rule customs that deal with human rights laws and humanitarians.

Human beings are the subjects of international law, beyond the state responsibility and the veil of it when lifted, individual (natural persons) exists and the crimes against humanity are not committed by states but by individuals. Westlake was on point when he said that the responsibilities and rights of States are only the duties and rights of the humans (natural persons) who are citizens of that states.[3]

International Criminal law is quite a complex branch of public law that has adopted the complexity of national criminal laws and fused them with international public laws, it is extensive enough to encompass human rights and humanitarian laws, the important part of it, is taking the individual responsibility part of international crime an area that for a long time was seen to be dealing with independent states, not individuals,[4] which simply means, the rights and responsibilities accorded to states, are indirectly and collectively given to the individuals/ citizens of that state.[5] It is worth noting that, individual human beings are also direct subjects of international laws who are also directly accorded international duties and rights without the interposition of the legal personality of a corporate entity of the country they belong to and the individual is directly responsible for the international laws and sanctions that comes with it.[6]

International criminal law can be traced from the customary that governed international engagements during the piracy crimes. With coming to an end of the 19th-century, *delicta Juris Gentium*, which is "other international offenses", were added to the definition and at the end of the second world war, the list grew longer with other additional offenses added to it,[7] which are piracy, war crimes, genocide, crimes against humanity, a crime against peace.

Following the creation of Nuremberg and Tokyo International Military Tribunal after the Second World War and further Ad hoc International Criminal Tribunal at Yugoslavia (ICTY), Ad hoc International Criminal Tribunal Rwanda (ICTR), after the second world war, have shown fully international recognition of criminal laws, and to further create an avenue for the prosecution of international criminals, which is the International Criminal Court following the signing of the Rome Statute, 2000,

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[2] ICC Act 2010, (Kampala amendment), part.2, sec. 7-10

[3] John Westlake, Collected Papers (Cambridge U.P., edited by Oppenheim, 1914)vol. 1, p. 78.

[4] Douglas Guilfoyle, InternationalCriminal Law (Oxford UniversityPress, 2016) 436.

[5] See Kelsen, Principles of International Law (New York, Rinehart & Co., 1st ed.,1952) 114.

[6] Yoram Dinstein, 'International Criminal Law' OSCOLA 4th ed. (1985) 20 Isr L Rev 206, page1

[7] Yoram Dinstein, 'International Criminal Law' OSCOLA 4th ed. (1985) 20 Isr L Rev 206, p. 3.

has cemented the need for punishment of international crime beyond the boundary of the state.[8]
The article, covers the historical development of international criminal law, it assess the recent developments that have occurred at the international level regarding the criminal matter, it explains the aims of the prosecution, it covers in the explanation the rights and burden which is the rights of the anonymous witness and those of the accuse to know the witnesses, this articles goes ahead to cover the responsibility and purpose of non-state actors in the progress of international law: the instance of international criminal law and ends with the conclusion

2. Historical development of international criminal law

The development of international criminal law and its practice has brought to book several violators of human rights[9] to justice and brought about the debate on the best way to deal with the violators and crimes that are considered to be within the ambit of international criminal law, should they be dealt with at the domestic courts, international courts, criminally or civilly? And if the enforcers should pay attention to individuals, states, or corporations? The kind of special charges that are within the jurisdiction of the international criminal court, the relationship between national and international courts.
The term international criminal law was unheard of, not even considered, in the space of international law before the 19th century, in the 18th century, international law consisted of state actions, and only independent states had international legal personalities,[10] which meant that individuals had no rights and responsibility under international law, the rights that were given to individuals were those that a state had against another state.
On the way to the end of the 19th century, Europe consolidated and codified some of the customs of international laws. The treaties like the "The *Laws of the Hague*,"[11] which carries several treaties, deals with the way wars are conducted, "*The Laws of Geneva*" was put in place to deal with those who were hurt and got sick, during the war,[12] even though, Europe, codified some of the international norms, they did not follow them in most cases. After the first world war, the winners of the war, proposed prosecuting those who lost the war, like Kaiser Wilhelm II, and some military

[8] Rashmi Salpekar, International Criminal Law, Bluebook 21st ed.16 ISIL Y.B. INT'l HUMAN. & REFUGEE L.
405 (2016-2017) 2
[9] Steven R. Ratner & Jason S. Abrams, accountability for human rights atrocities in international law: beyond the Nuremberg legacy 9 (I997)
[10] Ibidem
[11] Two Hague Peace Conferences produced the 1899 Hague Conventions I-III and the 1907 Hague Conventions I-XIII
[12] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, i864, 22 Stat. 940, I Bevans 7.

personnel from German and Turkey for genocide in Armenia, and attempts that were made to create a tribunal for their trials failed to occur.[13]

Between the first and second world wars, the consolidation and writing of international humanitarian laws persisted. The 1929 Geneva Convention, extended the protection to the wounded and those captured during the war,[14] and *Kellogg-Briand Pact*, declared, initiating war as an act of aggression, hence, illegal,[15] however, these two very protective treaties, failed to hold individuals accountable for war crimes, this caused a lot of damages and horrors that were witnessed in the second world war and the Holocaust, this opened the eyes of the international communities, which led to the push for the punishment of the Nazi armies and in 1945, the International Military Tribunal was established in Nuremberg,[16] which opened the door for the trial of 22 German leaders, and convicting 19 of them for crimes against humanity and peace.[17] This led to rapid development in the international criminal laws, and protection of human rights, which led to the signing and adoption of the Universal Declaration of Human Rights, the Genocide Convention,[18] the Geneva Conventions of 1949.[19]But the mechanism for the prosecution of international war crimes was stalled due to the cold war between Union of Soviet Socialist Republics (U.S.S.R.) and United States of America (U.S.A).

At the end of the cold war, the world saw many violent internal conflicts which awoken the world's need for individual accountability,[20] in particular, the genocides that occurred in Rwanda and Yugoslavia, the resulting war among Serbs, Croats, and Bosnian Muslims for ethnic cleansing, led to many people losing their lives and saw a forced migration of non-Serbs, which brought the concentration camps again in the

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[13] Jules Deschenes, Toward International Criminal Justice, in the PROSECUTION OF INTERNATIONAL CRIMES 29, 30-32 (Roger S. Clark & Madeleine Sanneds., 1996)

[14] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 27, 1929, 118 L.N.T.S. 303.

[15] General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928 arts. I-II, 94 L.N.T.S. 57, 63.

[16] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 2 79.

[17] Steven R. Ratner & Jason S. Abrams, accountability for human rights atrocities in international law: beyond the Nuremberg legacy 4 (I997) 163-164

[18] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9,U.N.T.S. 277 (entered into force Jan. 12, 1951).

[19] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. I2, I949, 6 U.S.T 3316, 75 U.N.T.S. I35; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 32I7, 75 U.N.T.S. 85; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T 3114, 75, U.N.T.S. 31.

[20] Martha Minow, Between Vengeance And Forgiveness: Facing History After Genocide And Mass Violence 53-90 (I998)

continent of Europe.[21] The plane crash that killed both Burundi and Rwandan presidents, in 1994, led to genocide meted on Tutsi and moderate Hutus.[22]
The international security council, created a body to investigate the atrocities that happened in Rwanda and Yugoslavia, which were the International Criminal Tribunal for Former Yugoslavia [23]and International Criminal Tribunal for Rwanda (ICTR).[24]
In 1998, representatives of 150 nations met in Rome to discuss the possibility of forming an international criminal court[25] , and out of that number, 120 nations[26] supported the treaty by voting for the creation of the international criminal court, whose jurisdiction is to try and punish international crimes like, genocide, a war crime, crime against humanities and aggression.[27] Immediately after ratification of the treaty, a prosecutor from Spain, requested England, to extradite, the former leader of Chile, while getting treated in Britain[28], for crimes against humanities most so torture, that he did to his people while he was in office, and after a thorough debate at the house of Lords, the request was accepted and General Augusto Pinochet was extradited, this was a great stride towards accountability in international criminal matters, the special rule made by the house of Lord, against granting war criminals, immunities against prosecution,[29] it suffices to say that, General Augusto Pinochet, after a lot of back and forth legal battles and his health deteriorating, he was not brought to book for his crimes, but the recent, development of the international laws, has seen countries, adopting international criminal laws, and customs, by various ratification.

2.1. An assessment of the recent development

Over the past 50 years, the world has focused its attention on war criminals, through the media, non-governmental organization and by various international bodies such as United Nations Organization branches, the focus has been to watch, pursue and

[21] David M. Kresock, Note, "Ethnic Cleansing" in the Balkans: The Legal Foundations of Foreign Intervention, 27 CORNELL INT'L L.J. 203, 22 I-25 (I994)
[22] Alain Destexhe, Rwanda And Genocide In The Twentieth Century, App. 2,At 81 (Alison Marschner Trans., N.Y.U. Press 1995) (1994)
[23] Statute of the International Tribunal, 32 I.L.M. II92, available at http://www.un.org/icty/basic/statut/statute.htm, adopted by S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 6,U.N. Doc. S/RES/827 (I993), 32 I.L.M. 1203.
[24] Statute of the International Tribunal for Rwanda, 33 I.L.M. i602, available at http://www.ictr.org/ENGLISH/basicdocs/statute.html, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (I994), 33 I.L.M. 1600.
[25] Alessandra Stanley, *Conference Opens on Creating Court To Try War Crimes*, N.Y. TIMES, June 15, I998, at Ai.
[26] 2 Press Release, United Nations, UN Diplomatic Conference Concludes in Rome with Decision To Establish Permanent International Criminal Court, at http://www.un.org/icc/pressrel/lrom22.htm (july 17, 1998)
[27] Rome Statute of the International Criminal Court, July 17, i998, U.N. Doc. A/CONF.i83/9 (1998), 37 I.L.M. 1003 [hereinafter Rome Statute], available at http://www.un.org/law/icc/statute/romefra.ht.
[28] Clifford Krauss, Britain Arrests Pinochet To Face Charges by Spain, N.Y. TIMES, Oct. 18,I998, at I.
[29] Bow St. Metro. Stipendiary Magistrate, [19991 2 W.L.R.

prosecute criminals, in 2000, over fourteen people from different parts of the world were being prosecuted for violating international human right laws and some of the accused were former leaders in their countries.[30]

2.1.1. Overview of the International Criminal Court (ICC)

The preamble introducing the Rome statute gives its main function as 'to establish a permanent international criminal court with jurisdiction over the most serious crimes of concern to the international community as a whole[31]
Within four years after the coming into effect of the Rome statute,[32] the statute that deals with the International Criminal Court (ICC) started operation, by July 1, 2002, it had over 86 states signed to it,[33] and currently, there are 123 members countries to the ICC.[34] With the coming into force of the ICC, crimes such as genocide,[35] a crime against humanity, a war crime, whether committed within a state or beyond a boundary of one state, and by a state or an individual are subject to the permanent international criminal tribunal.[36] This has opened a novel perspective for international criminal law in general, based on the fact that following the creation of Nuremberg and Tokyo Trials,[37] and with the security council creation of the two ad hoc tribunals

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[30] David Stoelting, Enforcement of International Criminal Law, 34 INT'L LAW. 669, 669-72 (2000) (Chile, Ethiopia, Haiti); Roger Boyes & Nigel Glass, Judge Rules That Nazi Doctor Is Unfit To Stand Trial, TIMES (London), Mar. 22, 2000, at 15 (Austria); Rajiv Chandrasekaran, U.N. Names II in E. Timor Violence, WASH. POST, Dec. 12, 2000, at A40 (Indonesia); Douglas Farah, Chad's Torture Victims Pursue Habre in Court: Pinochet Case Leaves Ex-Dictator Vulnerable, WASH. POST, NOV. 27, 2000, at A12 (Chad) Philip Gourevitch, Forsaken, NEW YORKER, Sept. 25, 2ooo, at 53, 59 (Democratic Republic of Congo); Tom Long, Obituary, Aleksandras Lileikis, 93; Indicted in WWII Genocide, BOSTON GLOBE, Sept. 28, 2000, at Bii (Lithuania);Pole Charged in Aiding Nazis at a Holocaust Death Camp, N.Y. TIMES, Nov. 5, 2000, at 18 (Poland); Brian Whitmore, Latvian Courts Thy To Sort Tagic History, BOSTON GLOBE, Apr. 25, 2000, at A1 (Latvia); Int'l Crim. Trib. for Former Yugoslavia, Outstanding Public Indictments, at http://www.un.org/icty/glance/indictlist-e.htm (Mar. 29, 2001) Bosnia, Croatia, Serbia); Int'l Crim.Trib. for Rwanda, Cases, at http://www.ictr.org/ENGLISH/cases/index.htm (last visited Apr. i8,2001) (Rwanda).

[31] Rome Statute of the International Criminal Court, 17July 1997, 2187 UNTS 3, preamble [Rome Statute]

[32] As to the success of the conference see, interalia, Hans-Peter Kaul, Durchbruch in Rom, Vereinte Nationen (VN), vol. 46, 1998, 125-130.

[33] Andreas Zimmermann, 'Role and Function of International Criminal Law in the International System after the Entry into Force of the Rome Statute of the International Criminal Court ' OSCOLA 4th ed. (2002) 45 German YB Int'l L 35, page 1

[34] The current list of contracting parties is available at https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx

[35] See generally as to the crime of genocide in international law William A. Shabas, Genocide in International Law:The Crimes of Crimes, 2000.

[36] See, as to the historical development of international criminal law Heiko Ahlbrecht, Geschichte der vi5lkerrechtlichen Strafgerichtsbarkeit im 20. Jahrhundert, 1999.

[37] See generally as to the criminal proceedings before the International Military Tribunal in Nuremberg and before the International Military Tribunal for the Far East, Benjamin B.

to try crimes that occurred in Yugoslavia and Rwanda, the creation of ICC as a permanent court, with absolute geographical jurisdiction was a move in the right direction.

It is a permanent international criminal court having jurisdiction to try the most atrocious offenders of human rights. The main reason for its creation is to end the impunity for the commission of the worst crimes against humanity and to try the organizers of those crimes to deter the would-be violators of international crimes.[38] It was created in 1998 when over 160 nations voted to create the Rome statute which are regulations and rules that governs the ICC. After the 60th country ratified[39] the Rome statute, it gave the ICC the mandate to start operating, and also gave the ICC, the independence it needed to operate, it was delinked from the UNO, making it not part of the Organization of the united nations, even though the two operates closely and the court also works well with the UN security council.[40]

The court has four departments, that's the presidency, the chamber, the registry, the office of the prosecutor; the presidency, deals with the administrative work, like the appointment of the judicial staffs, the following up on the enforcement of the court's decision, the function given to the registry is the protection of the witness, prosecutor, and the victims, and ensuring that the trial is fair and when done, it is broadcast to the public; the chamber has 18 judges, appointed for the sake of trial, appeals, and pretrials, these judges are elected by the members' states; and lastly, the office of the prosecutor has a job of investigation, analysis and prosecuting crimes that the court, has jurisdiction over.[41] The main office of the court is in The Hague, Netherlands.

A case can be taken to the ICC by a member state reporting, the way it occurred in Mali,[42] the UN security council has the power to refer a matter or ask for it be investigated and possibly tried by the ICC as it occurred in Libya and lastly, the office

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Ferencz, Crimes Against Humanity, in: Rudolf Bernhardt (ed.), Encyclopedia of Public International Law (EPIL), vol. I, 1992, 869-871; Hans-HeinrichJescheck, Nuremberg Trials, in: Rudolf Bernhardt (ed.), EPIL, vol. 111, 1997, 747-754; Bert V A. R8ling, Tokyo Trial, in: Rudolf Bernhardt (ed.), EPIL, vol. IV, 2000, 863-845.

[38] ICC - CPI, "ICC - About the Court," ICC - CPI, 2010, http://www.icccpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx.

[39] A group of 10 states ratified the statute together in a special UN ceremony and therefore were all designated the
th60 State Party.

[40] ICC-CPI, "Understanding the ICC" (ICC Outreach, 2013), 3–7.

[41] ICC-CPI, "Understanding the ICC" (ICC Outreach, 2013), 5–9.

[42] The UN Security Council referred the situation in Libya to the ICC in 2011 following the international upheaval triggered by human rights abuses, especially against civilians, in the Libyan armed conflict. The United Nations Security Council has recommended that the Lawyer report to the Council every six months on the actions taken by the ICC in Libya. On the other hand, the situation in Mali, a State party, was responded to by the nation itself. The Minister of Justice wrote to the Prosecutor of the ICC in July 2012 seeking help in prosecuting those responsible for the significant human rights abuses that had taken place since and in particular since January 2012 in the north of the country, calling on Article 14 of the Rome Statute to ensure that the States Parties to the Statute must refer cases to the ICC. The Mali war erupted between the government and rebel forces, just as the Libyan conflict.

of the prosecutor can also decide to investigate a matter and bring it for trial, this is referred to as *proprio motu* powers. Article 15 of the Rome Statute, gives the power to the Pre-Trial chamber, of deciding whether the investigation on a matter should continue or be halted,[43] the first case to be taken to the ICC by the prosecutor were the cases for the crimes that happened in Kenya.

The cases in Kenya that were referred to the ICC, were due to a disputed election in which the opposition candidate, Mr. Raila Odinga lost to Mr. Kibaki which was not following the report released by the international community in which it was shown that Mr. Raila Odinga had defeated, Mr. Kibaki, this led to a violent protest,[44] which resulted in over 1,200 people losing their lives and over 600,000 other people getting displace and losing their homes.[45] The atrocities done, prompted an investigation by various bodies, including, *the Waki Commission, otherwise called, the Commission of Inquiry on Post-Election Violence*, the outcome of the investigation, gave out the names of the people involved, but because most of them were politicians, the government of the day, failed to act on the advice of the commission which promoted the investigators to submit their findings to Mr. Kofi Anan who then forwarded it to the ICC prosecutor who was Mr. Luis Moreno Ocampo at that time.[46]

Prosecutor Ocampo through the Court's *proprio motu* powers, referred the cases to the ICC,[47] after identifying six people[48] who were involved in the post-election violence in Kenya, the three accused among six were eventually confirmed by the trial chambers,[49] and they were, the current president and deputy president of the Republic

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[43] "Rome Statute of the International Criminal Court," United Nations, November 10, 1998, 11–12, http://www.un.org/law/icc/.

[44] In the 2007-2008 elections, Mwai Kibaki, was reported to have won. Many foreign observers have admitted that bribery, vote-rigging and ballot stuffing have occurred on both sides. The Independent, a UK newspaper that followed the race for months, stated that even with bribery from both sides, Kibaki did not win the election (Bloomfield, 2008).

[45] "Municipalities and IDPs Outside of Camps," 3, accessed March 7, 2021, http://www.brookings.edu/~/media/research/files/reports/2013/05/kenya%20displacement/idp%20municipal%20authorities%20kenya%20may%202013%20final.

[46] "Cases and Situations - Kenya," Coalition for the ICC, 2013, http://www.coalitionfortheicc.org/?mod=kenya&idudctp=2&order=titleasc.18 William Schabas, An Introduction to the International Criminal Court (Cambridge, UK; New York: Cambridge University Press, 2007), 160.

[47] William Schabas, An Introduction to the International Criminal Court (Cambridge, UK; New York: Cambridge
University Press, 2007), 160.

[48] These elites became the "Ocampo Six." Uhuru Kenyatta, Francis Muthaura and Mohammed Hussein Ali who opposed members of the Orange Democratic Movement (ODM) political group and William Ruto, Joshua Arap Sang and Henry Kosgey who were members of the ODM and orchestrated violence against members of the National Unity Party (PNU). 20 Originally Henry Kosgey, fourth, had his charges confirmed by the Pre-Trial Chamber, but his prosecution was dismissed soon afterwards.

[49] "Kenya ICC-01/09," ICC - CPI, accessed June 15, 2014, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/Pages/situation%20index.as
px.

of Kenya Mr. Uhuru Kenyatta and his deputy, Mr. William Ruto and Joshua Arap Sang, the crimes the three were accused of, included, crimes against humanity such as rape, murder, deportation, persecution, and other inhumane acts, the cases have been either summarily dismissed or suspended due to fabrication and exaggeration of evidence and witness tampering.[50]

3. The Aims of Prosecution

3.1. Prevention

The main aim has been the need to prevent future crimes or the ones being prosecuted from repeating themselves. Public statements made by ICTY and ICTR suggested the following ways of prevention; incapacitation, general deterrence, moral education, and substitution for vigilantism.

3.2. Incapacitation

Through **incapacitation** which according to the ICTY, is done by imprisoning the offenders, help incapacitate them from repeating the same offense,[51] incapacitation also including shaming the offenders and embarrassing them from holding any political office and or making them run away from the areas they allegedly committed the offense, this does not involve imprisonment.[52]This has however, failed in some counties, where the accused have gone to use their situation to win sympathy votes from their country's citizen and holds high end political offices, like the situation in Kenya, where the two accused for crimes against humanity and while theirs cases were still alive at the ICC, they managed to win an election to become president and deputy president, one could argue that they eventually were freed or trial of their cases postponed but still it seems the cases against them help propel them to the presidency.

[50] Originally, the "Ocampo Six" were Uhuru Kenyatta, Francis Muthaura and Mohammed Hussein Ali who opposed members of the Orange Democratic Movement (ODM) political group and William Ruto, Joshua Arap Sang and Henry Kosgey who were members of the ODM and who orchestrated violence against members of the National Unity Party (PNU). After the pre-trial trials, all charges were dismissed, save those against Kenyatta, Ruto and Sang. Apart from Sang, all of the suspects were high-ranking officials of the army, political parties, and tribes when the violence took place. In the case of Muthaura, a primary witness has confessed to lying in their testimony, and the case has been dismissed. Both Kosgey's and Ali's cases were dropped due to insufficient evidence as ruled by the judges.

[51] See Prosecutor v. Kunarac, Case Nos. IT-96-23-T, IT-96-23/I-T, 1 843 (Int'l Crim. Trib for Former Yugoslavia Trial Chamber II Feb. 22, 200i), available at http://www.un.org/icty/foca/trialc2/judgement/kun-tjoIo222e.pdf.

[52] See Richard J. Goldstone, Exposing Human Rights Abuses - A Help or Hindrance to Reconciliation?, 22 HASTINGS CONST. L.Q. 607, 619-20 (I995) (discussing this effect)

3.3. Deterrence

By punishing the offenders, the would-be offenders are deterred from doing the same for fear of suffering the same fate, this can be done by following the ICTR's formulation.[53]However, at the risk of sounding like a pessimist, as it can be seen across the world, trials have been conducted, perpetrators, punished but there are still similar crimes going. There have been civil tension in Cameroon for over 4 years now, which has claimed 4000 lives, displaced 765000 people , the matter is now under investigation by the UN[54]

Another possible way of preventing future crimes is by dispensing ***moral education on humanitarian norms and respect for the rule of law***,[55] this aims at educating the masses, to an extent that the need for judicial / prosecution threat is no longer necessary. One of the aims of the ICTY and the ICTR is to fully promote the rule of law beyond the territories of a state.[56]

Prosecution of offenders and punishing them is also seen as a form of promoting alternatives to vigilantism, that the victim's desires for revenge can be control by giving them justice which involves punishing the offenders.[57]

3.4. Retribution

Punishing the violators of international humanitarian laws serves as retribution to the consciousness of the international community absolving them of any guilt to fail to act when a crime is committed at any corner of the world.[58]

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[53] Cf Prosecutor v. Kunarac, Case Nos. IT-96-23-T, IT-96-23/I-T, 1 842 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber II Feb. 22, 200I) (noting similar concerns for the resolution that established the ICTY), available at http://www.un.org/icty/foca/trialc2/judgement/kun-tjoIo222e.pdf.

[54] "Cameroon's Anglophone Crisis at the Crossroads."

[55] 3 U.N. SCOR, s5th Sess., 4i6ist mtg. at 3, U.N. Doc. S/PV.4i6i (2000) (statement of Judge Claude Jorda). Judge Jorda continues: "Perhaps this weapon was not in and of itself sufficient, or perhaps it was too tentative, to succeed in driving away the deadly fumes of nationalism by threat alone." Id. In the short term, a stronger show of military force may be necessary to deter continuing atrocities; the tribunals may be able to cultivate local deterrence only in the long

[56] Minna Schrag, The Yugoslav Crimes T7bunal: A Prosecutor's View, 6 DUKE J. COMP. & INT'L L. 187, 195 (1995).

[57] Prosecutor v. Kupregkid, Case No. IT 95-i6-T, ? 530 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber II Jan. 14, 2000), http://www.un.org/icty/kupreskic/trialc2/judgement/index.htm (explaining the ICTY's intention to pre-vent vigilantism); Antonio Cassese, Reflections on International Criminal Justice, 6i MOD. L. REV. 1, 6 (I998) ("[When the Court metes out to the perpetrator his just deserts, then the victims' calls for retribution are met.").

[58] See Claude Jorda, The International Criminal Tribunal for the Former Yugoslavia: Its Functioning and Future Prospects, 3 HOFSTRA L. & POL'VY SYMP. 167, 201 (1999) ("If . .. much international crime [goes] unpunished, [it] will blemish the international community ...."); Gabrielle Kirk McDonald, Address at War Crimes Tribunals: The Record and the Prospects Conference at the Washington College of Law (Mar. 3i-Apr. i, i998), in International

3.5. Restorative Justice

Prosecution of the offenders of international criminal laws necessitates national reconciliation and rebuilding the relationships that might have been ruined by the civil unarrest.[59]

3.6. Historiographic Accuracy

By prosecuting the offenders, the truth regarding historical injustices is clear and brought to life.[60] The prosecution also helps archive records that otherwise would be lost at a place where the crime occurred.

3.7. Future prosecution.

Prosecution of offense creates precedents that can be used as references for future prosecutions,[61] it also helps build a strong base for humanitarian laws and human rights recognitions which is very much part of international criminal laws. This is an achievable objective by the tribunals (ICTY and ICTR) and ICC, since the creation of the tribunals, the world has seen varieties of prosecution at that level.[62]

4. Rights and burdens

Anonymous witness and fair trial: In ***Prosecutor v. Tadic,***[63] the first trial under the ICTY, the question was whether the anonymity of a witness is in agreement with the defendant's fair trial. *Dusko Tadic*, arrested in 1984 and charged with a crime that

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Support for International Criminal Tribunals and an International Criminal Court, I3 AM. U. INT'L L. REV. I413, I436
(1998) ("[T]he failure to act effectively implicates us all.").

[59] Cf Prosecutor v. Kunarac, Case Nos. IT-96-23-T, IT-96-23/I-T, 1 842 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber II Feb. 22, 200I) (noting similar concerns for the resolution that established the ICTY), available at http://www.un.org/icty/foca/trialc2/judgement/kun-tjoIo222e.pdf. pp. i962-63.

[60] Interview with Judge Richard Goldstone, Chief Prosecutor for the ICTY and the ICTR (Dec. I3, 1995), in Living History Interview, 5 TRANSNAT'L L. & CONTEMP. PROBS. 373, 377-78 (I995) [hereinafter Goldstone Interview] (asserting that the public record alone would justify the tribunals)

[61] See, e.g., Goldstone, supra note 48, at 227-28 (declaring that the ICTY is primarily useful in serving as precedent for the ICC); Press Release, supra note 88 (emphasizing the tribunals' precedential value for Sierra Leonean and Cambodian prosecutions)

[62] Djiena Wembou, The International Criminal tribunal for Rwanda: Its Role in the African Context, INT'L REV. RED CROSS, Nov.-Dec. 1997, at 685, 691 (noting that the ICTR has "sparked an in-depth discussion of humanitarian law" in academic and political circles)

[63] Case No. IT-94-I-T, 112 I.L.R. 1 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber II May 7, 1997) (Tadic Trial Judgment), available at http://www.un.org/icty/tadic/trialc2/judgement/index.htm.

occurred in the *Omarska prison camp* in 1992,[64] when transferred by Germany to ICTY, Dusko was charged with over 132 counts including crimes against humanity and those relating to war.[65] The witness for the prosecution refused to testy in open court, so they were allowed to be anonymous for their protection.[66]

Shifting the Burden; easement of the prosecutor's burden of proof and relaxation of the procedural requirements like anonymity and hearsay of the witness has helped ICTY and ICTR to fulfill their mandate. In following the laid down rules by the Rome statute, that is, a person must be deemed innocent until proven guilty and the guilt of the accused would be so if the majority of the chamber finds that guilt has been approved beyond reasonable doubt[67]

5.International Criminal Law and the Concept of Domestic Jurisdiction

Article 2 paragraph 7 of the United Nations Organization's Charter,[68] prohibits interference by one state of another state's internal affairs, especially on matters that form part of domestic jurisdiction of another state, however, by extending the operation for the protection of humanitarian rights, this principle of non-interference has been limited, because the protection of human rights is an area that is beyond the domestic boundaries *Domaine reservie* of a specific State.[69]

The 1920 Treaty of Sevres,[70] was the beginning of the encroachment on the criminal offenses that can be tried in a domestic court but have been taken over by an international tribunal, in which Turkey was obligated to surrender to a military tribunal created by the Allied Powers persons responsible for crimes committed against citizens of the then Ottoman Empire during World War1.[71]

Article 2 paragraph 7 of the United Nations Charter, also extends the power of interference into domestic criminal matters which touches on international criminal

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[64] MICHAEL P. SCHARF, BALKAN JUSTICE 95-97 (1997)

[65] 8 Indictment, Prosecutor v. Tadi6, Case No. IT-94-I (Int'l Crim. Trib. for Former Yugoslavia Feb. i3, 1995), http://www.un.org/icty/indictment/english/tad-ii95o2 13e.htm

[66] ICTY Statute. art. 22, 32 I.L.M. at ii99. Against this statutory backdrop, the majority found that Rules implicitly permitted witness anonymity

[67] ICTY R.P. & EVID. 89(C), http://www.un.org/icty/basic/rpe/IT32-revIgcon.htm (Dec. 13,2000) [hereinafter ICTY R.P. & EVID.]; ICTR R.P. & EVID. 89(C), http://www.ictr.org/ENGLISH/rules/031 1100/index.htm

[68] In regarding the content of Art. 2 para. 7 of the Charter see generally Felix Ermacora,Art. 2para. 7, in: Bruno Simma (ed.), The Charter of the United Nations: A Commentary, 1994,139-154.

[69] Preamble of the Document of the Moscow meeting of the Conference on the human dimension of the CSCE, 3 October 1991, available at: http://www.osce.org/docs/english/1990-1999/hd/mosc9le.htm.

[70] Treaty of Peace between the Allied and Associated Powers and Turkey, Sevres, 10 August1920, available at: http://www.lib.byu.edu/-rdh/wwi/versa/sevindex.html.

[71] The relevant provision of the Treaty of Sevres reads: "The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914" (Art. 230paragraph. 1).

law, by it is the wording *'the principle of domestic jurisdiction as contained in Article 2 para. 7 shall not prejudice the application of enforcement measures under Chapter VII.'*
It is worth noting that, the power of ICC is not absolute as to disregard the domestic courts' jurisdiction over some criminal offenses committed within a territory of a state, before referring a matter or a person to ICC, a lot of consideration has to be done.

6.Responsibility and Purpose of Non-State Actors in the Progress of International Law: The Instance of International Criminal Law

Non-governmental organizations (hereinafter NGOs) have played a very important role in drafting and pushing for the adoption of various treaties that members of UNO have ratified or agreed to abide by, the treaties like Ottawa treaty, United Nations Framework Convention for Climate Change, which created Kyoto Protocol,[72] NGOs also took a central role in negotiating for the from and adoption of Rome statute, which shows how important the non-state actors' roles are in the world stage.[73]
In comparison with other actors, the NGOs' participation and influence are not so much dependent on their formal status, but their expertise which puts them in a position to influence the states and indirectly the structure and sometimes the contents of the treaties. It is, however, worth noting that even though the NGOs can at times be invited to participate in the negotiation and debate on a treaty document, the decisions are made without their presence.

7.Conclusion

After so many years from Nuremberg, the world has made a great stride towards the creation of international criminal laws and avenues for executing them which include enforcing the laws in a way that ensures that justice is delivered by punishing the culprits, however, the laws and structures in place are still not fully developed to respond to the need of the modern international crimes, there are still challenges to fairness and justice to both the victims and the accused, fortunately, there are personnel committed to improving the application of International Human right laws. They will continue to make significant strides in stemming down the international crime by punishing the criminals, the would-be criminals are afraid they are being

[72] United Nations Framework Convention on Climate Change, 9 May 1992, reprinted in: ILM, vol. 31, 1992, 851; Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, reprinted in: ILM, vol. 37, 1998, 22. See also Karsten Nowrot, Saving the International Legal Regime on Climate Change?: The 2001 Conferences of Bonn and Marrakesh, German Yearbook of International Law (GYIL), vol. 44, 2001, 396.
[73] See generally as to the role of NGOs in the development and enforcement of international environmental law Sonja Riedinger, Die Rolle nichtstaatlicher Organisationen bei der Entwicklung und Durchsetzung internationalen Umweltrechts, 2001; and with regard to the Rome Statute William R. Pace/Mark Thieroff, Participation of Non-Governmental Organizations, in: Roy S. Lee (ed.), The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results, 1999, 391 et seq.

watched and could at anytime be punished and or embarrassed, so they are treading carefully. However, the development of the international criminal laws still has a long away to go, to ensure that the world is made safer from crimes, but there is hope for the future of the development of international criminal laws.

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László, Schmidt[*] – The legal practice of the cisg

Reviewer: Prof. Dr. Tibor Nochta

Abstract:

The United Nations Convention on Contracts for the International Sale of Goods (CISG), sometimes known as the Vienna Convention is a multilateral treaty that establishes a uniform framework for international commerce.
It was implemented into the Hungarian legal system by the decree law 20 of 1987. The Article 74 states that damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.
In my presentation and in my article, I would like to show you the legal practice of the CISG in particular the application of the Article 74.

Keywords: CISG, foreseeability, damages, mitigation

1. Introduction

The United Nation Convention on Contracts for the International Sales of Goods (hereinafter: CISG or Convention) was adopted in 1980 and entered into force in 1988. It provides a set of uniform substantive law rules to govern international contracts for the sale of goods and the rights and obligations of sellers and buyers.[1] As of September 28, 2020 more than 90 countries were contracting states.[2]
The process of achieving agreement in international sales law evolved in three steps. The first step was in 1928 at the Sixth Session of the Hague Conference on Private International Law. During this first step, virtually all the participants came from the industrialized, capitalist countries of western Europe. The draft was specific to the civil law tradition, to the neglect of the common law tradition and other world legal traditions. This first draft failed to gain worldwide approval. The second step of the project began in 1951 when the Government of the Netherlands convened a conference at The Hague which produced two drafts. Encouraged by the favorable reactions which the drafts received; a Diplomatic Conference was convened at The Hague in 1964. Two Conventions were adopted: The Uniform Law of International

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[1] Wethmar - Lemmer, „Applying the CISG via the rules of private international law: Articles 1(1)(b) and 95 of the CISG – analysing CISG Advisory Council Opinion 15" 2016 De Jure 58-73, May 20, 2021, http://dx.doi.org/10.17159/2225-7160/2016/v49n1a4
[2] May 20, 2021, https://iicl.law.pace.edu/cisg/page/cisg-list-contracting-states

Sale (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF). Member states of the United Nations disapproved both the ULIS and the ULF, describing these sets of laws as too dogmatic, complex, and predominantly of the European civil law tradition. The third and final step began in 1966, when the United Nations Commission on International Trade Law (UNCITRAL) set out to create a draft that would include the perspectives of a wider array of countries. This UNCITRAL body was widely represented, including nine countries from Africa, seven from Asia, six from Latin America, five from Eastern Europe, and nine from Western Europe. In all, representatives from 62 states and eight international organizations convened in Vienna in 1980. The outcome of the Vienna Conference was the enactment of the CISG which today is the system of laws regulating international sales contracts in over 90 countries. The final draft of the Convention reflected a wide diversity in legal traditions.[3]

2. Sphere of application and general provisions of the CISG

The Article 1 (1) of the CISG states that this Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State.[4] It also states that nationality of the parties or the civil or commercial character of the parties or the contract shall not be considered whether the Convention shall be applied.[5] If, for example one contracting party's business place is in Hungary, the other's is in China and the goods will be transferred from Budapest to Beijing the Convention shall be applied. Business place means the place where the business is registered.[6] The Article 10 (a) states that for the purposes of this Convention if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.[7] For example, if the seller has place of business both in Hungary and in Germany, the buyer has place of business in Hungary and the conclusion and the performance of the contract are more closely related to Hungary, then CISG will not be applied.[8]
The International Chamber of Commerce (ICC), International Court of Arbitration in the case no. 7531/1994. delivered a judgement about the application of the CISG. The

[3] James P. Quinn, „The Interpretation and Application of the United Nations Convention on Contracts for the International Sale of Goods", May 21, 2021, http://classic.austlii.edu.au/au/journals/IntTBLawRw/2004/9.html
[4] Article 1 (1) of CISG, May 20, 2021, http://www.cisg-online.ch/__temp/CISG_english.pdf
[5] Article 1 (3) of CISG
[6] Islam Zahidul, "Applicability of the Convention on Contracts for International Sale and Goods (CISG)". IOSR Journal Of Humanities And Social Science. 14. 78-81. 10.9790/1959-1437881., May 20, 2021, https://www.researchgate.net/publication/271256183_Applicability_of_the_Convention_on_Contracts_for_International_Sale_and_Goods_CISG
[7] Article 10 (a) of the Convention
[8] Zahidul, "Applicability of the Convention."

facts of the case were that the defendant, a Chinese seller sold scaffold fittings to the plaintiff, an Austrian buyer. The buyer claimed lack of conformity of the goods and declared the contract avoided. Subsequently, the buyer sold the goods and sued the seller for damages, as such goods had been sold only partially and at a lower price. The arbitral tribunal determined the CISG to be applicable to the contract in accordance with article 1(1)(a) CISG).[9]

Under the Article 1(1)(b) of the Convention it shall be applied when the rules of private international law lead to the application of the law of a Contracting State.[10] In one case where the plaintiff was a Swiss seller sold lambskin coats to the defendant, a Liechtenstein buyer which were to be delivered in Belarus. After some of the coats were delivered, the buyer gave notice of lack of conformity to the seller, who had not previously seen the goods and therefore examined them at the buyer's request, and declared the contract avoided. The defendant demanded reimbursement of payments that had been made and the plaintiff sued for the remainder of the full contract price. The court of Zurich held that under the Article 1(1)(b) "CISG was applicable even though Liechtenstein is not a Contracting State. Under the rules of private international law in Switzerland, in conjunction with article 3(1) of the Hague Convention of 15 June 1955 on the Law Applicable to International Sales of Goods, the contract was governed by the law of the State of the seller's habitual residence, so that in this case the CISG as a part of Swiss law was applicable".[11]

According to Article 2 the Convention shall not be applied to sales of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use; by auction; on execution or otherwise by authority of law; of stocks, shares, investment securities, negotiable instruments or money; of ships, vessels, hovercraft or aircraft; of electricity.[12] This provision requires courts to determine whether the sale compares to one of the kinds excluded from the Convention's sphere of application before applying the CISG.[13] According to this article, a sale falls outside the CISG's sphere of application when it relates to goods which at the time of the conclusion of the contract are intended to be used exclusively for personal, family or household use. It is the buyer's intention at the time of the conclusion of the contract that is relevant, rather than the buyer's actual use of the goods. So, for example the purchase of a car, a motorcycle or a recreational trailer for exclusive personal use may fall outside the CISG's sphere of application as may the sale of leisure boats. The same is true as regards the purchases by tourists, border

[9] ICC Arbitration case 7531 of 1994., May 20, 2021, https://documents-dds-ny.un.org/doc/UNDOC/GEN/V00/509/00/PDF/V0050900.pdf?OpenElement

[10] Article 1(1)(b) of the CISG

[11] Handelsgericht des Kantons Zürich; HG930634, May 20, 2021, https://documents-dds-ny.un.org/doc/UNDOC/GEN/V99/892/77/PDF/V9989277.pdf? OpenElement

[12] Article 2 of CISG

[13] UNCITRAL: Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods—2016 UNITED NATIONS 2016 Edition, May 22, 2021, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cisg_digest_2016.pdf

inhabitants, or by mail order for the purposes of personal, family or household use.[14] However, if the goods are purchased by an individual for a commercial or professional purpose, CISG shall be applied. So, for example the following situations are governed by CISG: the purchase of a camera by a professional photographer for use in his business; the purchase of a soap or other toiletries by a business for the personal use of its employees; the purchase of a single automobile by a dealer for resale.[15] If goods are purchased for the aforementioned personal, family or household use purposes, the CISG shall not be applicable unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use. This means that the CISG does not apply only if the personal, family or household use was known to the seller or was apparent. To determine whether the intended personal, family or household use was apparent, resort is to be had, inter alia, to objective elements, such as the nature of the goods, the quantity of the goods and the delivery address.[16]

In one case when an Austrian seller of imported Italian cars, the defendant sold a Lamborghini Countach to the plaintiff, a Swiss buyer, and the seller, however, could not deliver the car to the buyer. The court held that since the car was purchased for personal use, in accordance with its article 2(a), the CISG was not applicable to the case. However, the court stated that the CISG could have been applied to the case if the fact that the seller "neither knew nor ought to have known that the goods were bought for any such use" had been proved by the seller.[17] In another case a Dutch appellate court judged that the Convention cannot be applied. The plaintiff and the two defendants entered negotiations for the sale of a yacht co-owned by the defendants. Parties drew up a document arranging for the yacht to be sold to the plaintiff, which was signed by all three of them. One day later the defendants sold the yacht to a third party for a higher price. The first defendant informed the plaintiff of the rescission of the contract stating it was not authorized by the second owner to sell the yacht for the price agreed. Subsequently the plaintiff requested the seizure of the vessel to ensure it would be delivered to it. The plaintiff then commenced proceedings before the Court of First Instance, claiming several forms of damages resulting from the breach of contract. The Court of First Instance rejected the claim. The plaintiff appealed that decision. In the proceedings the CISG was argued to be applicable to the case. In this regard, the Court of Appeals simply considered that the case

[14] UNCITRAL: Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods—2012 UNITED NATIONS 2012 Edition, May 22, 2021, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cisg-digest-2012-e.pdf

[15] UNCITRAL: Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods—2008 UNITED NATIONS 2008 Edition, May 22, 2021, https://iicl.law.pace.edu/cisg/page/2008-uncitral-digest-case-law-united-nations-convention-international-sale-goods-digest-10

[16] UNCITRAL: Digest of Case Law -2016

[17] Oberster Gerichtshof; 10 Ob 1506/94, May 22, 2021, https://documents-dds-ny.un.org/doc/UNDOC/GEN/V98/506/26/PDF/V9850626.pdf?OpenElement

concerned the sale of a yacht, or at least a preliminary agreement regarding the sale thereof, and that according to article 2 cannot be ground for apply the Convention.[18]

3. Breach of contract under CISG

Article 25 of the Convention states that a breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.[19] The breach of contract under the Convention is categorized into two categories: the fundamental breach and the non-fundamental breach. The different categories of breach entitle the aggrieved party to different remedies: the fundamental breach gives the right to avoid the contract, to require the substitution of the goods or to claim damages; and the non-fundamental breach gives the right to require specific performance, for example by the repair of or price reduction of the goods, or to claim damages.[20] The Convention focuses on the consequences of a breach rather than on its origin. The starting point is a failure to perform any of obligations under the contract or the Convention. This failure to perform may consist of late performance, lack of conformity of the goods, of a breach of duties of information or duties of care, etc. The Convention uses one single formula to describe the violation of contractual obligations. The only additional element used to qualify the breach of contract relates to its severity: if the breach is 'fundamental', the aggrieved party may choose from a larger palette of remedies than if the breach is a 'simple' one.[21]

The origins of fundamental breach have at times been attributed to English law. The phrase has indeed been employed in English law. Fundamental breach emerged in the 1950s as a judicial device for controlling exclusion and related clauses, the idea being that no words of exclusion or limitation of liability would be effective to protect from liability one who committed a fundamental breach of contract. The determination of fundamental breach for this purpose was never very precise and, as a device for the control of exclusion clauses, fundamental breach was abandoned at the end of the 1970s, after legislation had been introduced to deal with the excesses presented by clauses that were drawn in immoderately wide terms.[22]

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[18] The Netherlands: Court of Appeals of Arnhem No. 2000/605, May 22, 2021, https://documents-dds-ny.un.org/doc/UNDOC/GEN/V08/585/98/PDF/V0858598.pdf?OpenElement

[19] Article 25 of the Convention

[20] Yan Li, „Remedies for Breach of Contract in the International Sale of Goods – A Comparative Study between the CISG, Chinese Law and English Law with reference to Chinese Cases" (University of Southampton, School of Law, Doctoral Thesis, 253 pp.), May 24, 2021, https://eprints.soton.ac.uk/188007/

[21] Christiana Fountoulakis, „Remedies for breach of contract under the United Nations Convention on the International Sale of Goods", May 24, 2021, https://link.springer.com/content/pdf/10.1007/s12027-010-0179-3.pdf

[22] Bridge Michael (2010), „Avoidance for fundamental breach of contract under the UN Convention on the International Sale of Goods." International and Comparative Law

Article 25 of the Convention measures the fundamentality of a breach by reference to the effect on the creditor. The breach is significant if the creditor does not get substantially what he or she could have expected under the contract. The German delegation in Vienna had pressed the subjective interest of the creditor as determinative factor and not the objective extent of the resulting (or threatened) damage. The ad hoc working group and later the plenum followed the view of the German delegation. Thus, it is not the objective weight of the breach of contract, and not the extent of the damage, that determines whether a breach is fundamental, preferably the significance for the creditor is the main deliberation. Of course, the creditor must suffer a disadvantage. The creditor does not need to prove how much damage occurred or will occur because of the breach, although this could be achieved by for example, the creditor's purchases and the agreed purchase price.[23]

A fundamental breach requires that one party has committed a breach of contract. Breach of any obligation under the contract can suffice—provided the other requirements for a fundamental breach are present—irrespective of whether the duty was specifically contracted for between the parties or if, instead, it followed from the provisions of the CISG. Even the breach of a collateral duty can give rise to a fundamental breach. For example, where a manufacturer had a duty to reserve goods with a particular trademark exclusively for the buyer, and the manufacturer displayed the trademarked goods at a fair for sale (continuing to do so even after a warning by the buyer), the manufacturer was found to have committed a fundamental breach.[24]

To rank as fundamental, a breach must be of a certain weight and nature. The aggrieved party must have suffered such disadvantage as to substantially deprive it of what it was entitled to expect according to the contract. The breach must therefore nullify or essentially depreciate the aggrieved party's justified contract expectations. What expectations are justified depends on the specific contract and the risk allocation envisaged by the contract provisions, on customary usages, and on the provisions of the Convention. For example, buyers cannot normally expect that delivered goods will comply with regulations and official standards in the buyer's country.[25] So, the delivery of mussels with a cadmium content exceeding recommended levels in the buyer's country has not been regarded as a fundamental breach (or, indeed, as a breach at all) since the buyer could not have expected that the seller would meet those standards and since the consumption of the mussels in small portions as such did not endanger a consumer's health. However; the court in that case stated three exceptions from the rule that the seller need not know and observe the standards in the buyer's country if the standards in both countries are identical; if, before or at the conclusion of the contract, the buyer informed the seller about these standards, or if due to special circumstances the seller knew or should have known about those standards because,

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Quarterly., May 24, 2021, https://www.researchgate.net/publication/48910665_Avoidance_for_fundamental_breach_of_contract_under_the_UN_Convention_on_the_International_Sale_of_Goods

[23] Part III of the CISG. In: UN Law on International Sales. Springer-Lehrbuch. Springer, Berlin, Heidelberg, May 24, 2021, https://doi.org/10.1007/978-3-540-49992-3_3

[24] UNCITRAL: Digest of Case Law -2016

[25] UNCITRAL: Digest of Case Law - 2016

for example, it particularly specialized in exports to the buyer's country or has a branch office there.[26]
In another case the court found that the failure to perform of the seller was not a fundamental breach (only serious), so it could not lead to a declaration of avoidance of the contract. In that case a Ukrainian (plaintiff) and an Italian company (defendant) concluded a purchase agreement in 2002 whereby the plaintiff was to buy a machinery manufactured by a German firm but overhauled and sold by the defendant. Soon after the conclusion of the contract divergences concerning its performance arose between the parties: delivery, installation and operation of the machinery turned to be very problematic. The plaintiff complained about the delayed delivery and installation of the machinery, its non-compliance with the technical and quality standards agreed by the parties as well as its running defects. The plaintiff declared the agreement avoided for fundamental breach of the seller, thus it claimed reimbursement of the purchase price and compensation for damages due to the seller's failure to comply with the agreed obligations, also considering that it did not provide any technical assistance. The court stated that a breach of contract occurred since at least for one year the buyer could not rely on the performance it was entitled to. However, the court held that this breach was not fundamental, so it delivered the aforementioned judgement.[27]
A German buyer had ordered clothes for the autumn season from an Italian seller. The delivery was supposed to occur in several part-deliveries between July to September. The seller failed to meet the deadline for the first delivery and only offered the last delivery on 10 November. The buyer refused to accept the late deliveries. The court found that the buyer specifically wanted fashion for the autumn season which the Italian seller knew. The seller should have known that the buyer would not have entered the contract if she or he knew at the time of contract formation that the clothes would only arrive near the end of the autumn season. The court, therefore, found a fundamental breach and a valid declaration of avoidance.[28]

4. Damages under the CISG

The Articles 74 -77 of the Convention deals with the rules of damages. These articles states that damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.[29]
If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the

[26] Bundesgerichtshof (Germany) VIII ZR 159/94, May 24, 2021, https://documents-dds-ny.un.org/doc/UNDOC/GEN/V96/842/23/IMG/V9684223.pdf?OpenElement
[27] Arbitral Tribunal - Chamber of National and International Arbitration of Milan Case 1190, May 24, 2021, https://documents-dds-ny.un.org/doc/UNDOC/GEN/V12/561/64/PDF/V1256164.pdf?OpenElement
[28] Part III of the CISG. In: UN Law on International Sales.
[29] Article 74 of the Convention

goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.[30]

If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance. (2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.[31]

Only material damage which can be calculated in monetary terms has to be compensated in money. Damages for emotional harm and damages for pain and suffering are not recoverable under the Convention.[32]

The basis of total reparation applies: all damage caused by the breach must be compensated. A limitation of the damages which can be compensated through limiting causal theories like the German principle that only damages which can be "adequately" linked to a breach of duty are not applicable under the CISG and are not necessary. Limitations of the damages which will be compensated under the Convention are achieved through the requirement of foreseeability. The requirement of foreseeability limits damages to those which are in general to be expected at the time of the conclusion of the contract or which could at the time of the conclusion of the contract be foreseen by the debtor. The basis of total reparation means that the creditor's economic situation after the breach of contract must be compared with the situation the creditor would have been in if the breach would have not occurred. Usually positive developments for the creditor, caused by the breach of contract, must be considered, for example, saved expenses for the erection of a conveyer belt which the seller has not delivered. However, the subtraction of economic advantages should only be allowed if it is consistent with the aim and object of the duty to recompense for the breach.[33]

Most civil law jurisdictions request that, to be able to claim damages, the other party must have been at fault. The CISG follows another approach, so it does not require fault on behalf of the party in breach. The injured party can claim all sorts of damages suffered because of the breach if the loss was foreseeable as a potential result of the breach. The provision aims at putting the injured party in as good a position as if the party in breach had properly performed the contract. The calculation of damages available in case of breach raises many questions, such as what kind of loss should be compensated or where the limits of foreseeability of the loss are. The Convention

[30] Article 75 of the Convention
[31] Article 76 of the Convention
[32] Part III of the CISG. In: UN Law on International Sales
[33] Part III of the CISG. In: UN Law on International Sales

provides for special rules for the calculation of damages where the contract has been avoided and a cover purchase has been undertaken or where a cover purchase has not been undertaken but a current market price exists. There is a duty to reduce damages. No damages shall be paid if the debtor is exempt from liability due to an obstruction which lies beyond its control.[34]

The breaching party is liable for the losses which he foresaw, and the losses which is ought to be foreseen or could reasonably have foreseen. The Convention does not expressly exclude the cases of intentional, reckless, or grossly negligence non-performance from the application of foreseeability rule. The foreseeability principle under the Convention does not allow compensation for the losses which are unforeseeable even the non-performance is due to willful misconduct or gross negligence. The legal policy behind Article 74 is to allow the parties to calculate the risks and potential liability of the particular contract, to protect themselves from the unforeseeable risk of losses caused by a breach. It also can encourage prior disclosure during the contract negotiation.[35]

The Article 74 provides both subjective and objective standards for the foreseeability test. These standards connect to the knowledge of the party in breach. The subjective foreseeability depends on the actual knowledge of the party in breach, the objective is what that person ought to have had.[36]

Regarding the Article 74 in one case the court held that „loss of profit is always foreseeable in the case of failure to take delivery of the goods." Stated that "if the conclusion of contracts of the same type as the contract in question is a part of the daily business of the party claiming damages, the assessment of damages is to be made according to Art. 75 CISG, if any sale after the avoidance of the contract was meant to be a covering transaction, which in the case at hand had not been proved by the buyer. The Court observed, though, that Art. 76 CISG does not exclude the assessment of damages according to Art. 74 CISG, which entitles the seller to claim the difference between the costs of manufacturing and the contract price, provided that this difference does not exceed the loss which the party in breach foresaw or ought to have foreseen."[37]

Regarding the so-called consequential damages, the court held that if the party's (in breach) standard terms exclude the compensability of the consequential damages the injured party "was entitled to recover the expenses it had incurred in repairing the goods, but not the other losses it had suffered in its relationship with its costumer as a consequence of the seller´s non-performance".[38]

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[34] Christiana Fountoulakis, „Remedies for breach of contract."

[35] Niu Z, „The law of damages in Chinese contract law: A comparative study of damages calculation in Chinese law, English law and the CISG, with empirical results from Chinese practice", May 24, 2021, https://research.tilburguniversity.edu/en/publications/the-law-of-damages-in-chinese-contract-law-a-comparative-study-of

[36] Niu Z, „The law of damages."

[37] Oberster Gerichtshof (Austria) 1 Ob 292/99v, May 26, 2021, http://www.unilex.info/cisg/case/481

[38] Oberster Gerichtshof (Austria) 7 Ob 301/01t, May 26, 2021, http://www.unilex.info/cisg/case/858

A Polish court of appeal (in a case where a Poland seller and a Danish buyer concluded a contract to sale of pellets but the Polish seller were made the goods of forbidden substances) held that costs related to contract negotiations would have been incurred even without any non-conformity of the goods, thus they could not be treated as losses on the basis of Article 74 of the Convention and it was not possible for the seller to foresee the costs incurred by the buyer during negotiations. However, the Court decided that the costs of transport and unloading the goods shall be reimbursed because it was reasonably foreseeable by the seller. The court of appeal also stated that the costs regarding the storage of the pellets were foreseeable, thus reimbursable but the insurance fee of the warehouses (where the buyer kept the pellets) was not foreseeable by the seller, thus shall not be reimbursed.[39]

A Finnish court of appeal stated that "in determining damages the starting point is the economic position where the aggrieved party would have been if the contract had been performed correctly. Hence, the Court stated that the amount of damages can be higher than the face value of the contract. According to the Court, the seller knew that the buyer would incorporate the powder into its own products that would be sold onwards to the buyer's customers. As damages, the buyer claimed compensation it gave to its own customers for pulling the tainted products from the market, expenses resulting from buying back the tainted products from its customers, expenses resulting from destroying the tainted goods and related inventory write-downs, and expenses relating to examining the issue including wages, travel expenses, freight costs, chemical analysis costs, and destruction costs. The court determined that each of the items claimed by the buyer is recoverable under Article 74 CISG."[40]

5. Mitigation

Article 77 of the Convention states that a party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.[41]

Two theories exist regarding the legal character of the mitigation of damages: the first takes it as an obligation and the second as a duty. The mitigation of damages in the international sale of goods is not a contractual obligation as the obliged party cannot turn to the remedies that the Convention has established for the situations in which there has been non-execution of the parties' obligations. It is, instead, a duty. Nonperformance with this duty will bring about consequences for the creditor in terms of his inability to claim complete damages for the other party's breach.[42]

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[39] Szczecin Court of Appeal (Poland) I ACa 637/12, May 26, 2021, http://www.unilex.info/cisg/case/1984

[40] Court of Appeal of Turku S 04/1600, May 27, 2021, http://www.unilex.info/cisg/case/2019

[41] Article 77 of the Convention

[42] Jorge Oviedo-Albán, „Mitigation of Damages for Breach of Contract for the International Sale of Goods", May 27, 2021, https://www.redalyc.org/jatsRepo/825/82556549010/movil/index.html

If the creditor's obligation to mitigate damages was breached than the damages claim is reduced on demand of the debtor to the amount which was lost because the creditor did not fulfil his or her obligation to mitigate. The burden of proof for the existence of an obligation to mitigate and its breach, including the reasonableness of a possible mitigation measure lies with the debtor. The obligation to mitigate damages is only taken into consideration if the debtor raises it as a defense since the creditor is the one who must claim damages.[43]

In one case the Federal Court of Australia held that "it would be contrary to commercial commonsense if the burden of proof cast upon the party in breach by the second sentence of Art. 77 could be cast off by that party simply asserting non-compliance by the innocent party with the obligation created by the first sentence of the provision. Since no evidence had been shown by the seller regarding its right to have the amount of damages payable to the buyer reduced, its claim had to be rejected."[44]

Regarding the reasonable time to mitigate damages in one case a Belgian seller and a German buyer concluded a contract for the supply of construction materials. The contract was exclusively regulated by the seller's standard terms. According to those terms, the goods should have been delivered in three different months. Since the buyer accepted and paid only for some of the shipments, the seller announced to the buyer that it would resell the goods within seven days but failed to do so. Nearly six months later, after granting the buyer a final period of time in which to perform, the seller invoked avoidance of part of the contract, and entered into a cover sale and claimed damages. The Belgian court held that "the seller had failed to meet his duty to mitigate damages under Art. 77 CISG. Although the seller had notified the buyer of its intention to enter into a cover sale in April, the resale did not take place within a reasonable time thereafter (in the opinion of the Court, three months) but only six months later. Nevertheless, the Court held the seller entitled to recover the difference between the unpaid invoices and the income from the resale, the buyer having failed to demonstrate that a higher price could have been obtained if the resale had been timely."[45]

The Supreme Court of Spain for example held that "the seller's refusal to accept the buyer's offer to buy the remaining goods for a lesser price than contractually agreed - yet higher than the price obtained by the seller a few days later from the substitute sale to a third party - was unjustified.
The Court observed that the seller should have accepted the said buyer's offer, as a reasonable measure to mitigate the loss of profit suffered from the buyer's breach of contract, as required by Art. 77 CISG.
The Court finally held that the seller was entitled to damages only for the difference between the contract price and the price offered successively by the buyer, reducing

[43] Part III of the CISG. In: UN Law on International Sales

[44] Federal Court of Australia VID 1080 of 2010 (Castel Electronics Pty. Ltd. v. Toshiba Singapore Pte. Ltd.), May 27, 2021, http://www.unilex.info/cisg/case/1641

[45] Hof van Beroep, Antwerpen 2002/AR/2087 (GmbH Lothringer Gunther Grosshandelsgesellschaft für Bauelemente und Holzwerkstoffe v. NV Fepco International), May 27, 2021, http://www.unilex.info/cisg/case/1152

the damages for the loss of profit suffered by the seller in the amount by which the loss should have been mitigated."[46]

The U.S. 11th Circuit Court of Appeal held that the "seller reasonably mitigated its losses. The buyer, as the party in breach, needed to show that the seller did not take reasonable steps to mitigate its losses. However, not only did the buyer fail to present any such evidence, but the court also found, through evidence provided by the seller, that the seller had both sought to reduce its losses as soon as possible (its first sale of the powder occurred only 17 days after receiving the buyer's letter of denial) and had also sold the goods in question at the highest prices possible."[47]

In one case a Russian commercial tribunal held that "the seller did not submit evidence that it had taken reasonable measures to mitigate the loss, as required by the CISG, in particular to sell the goods as they were subject to rapid deterioration. A significant part of the goods in storage spoiled and the rest was given free of charge to charity organizations. The Tribunal found that insofar as the seller had breached the contract it was entitled to recover only 25% of the price (after deducting expenses for insurance and transportation costs)."[48]

These kind of measures by aggrieved buyers usually considered reasonable: concluding cover sales within a reasonable time and at reasonable prices to replace goods that were not delivered; contracting with a third-party supplier because of the inability of the breaching party to deliver moulds in time; proposing to a sub-buyer that the goods the seller delivered late should be accepted with a 10 per cent reduction in price; taking reasonable steps to have a stolen car released from an insurance company; accepting a reduction in the purchase price instead of sending the goods back; requesting permission from the buyer to re-sell goods marked with the buyer's trademark, which permission was not given.[49]

6. Conclusions

As it can be seen the Convention can be properly used to decide legal disputes arose from cross-border sales of goods. The Convention shall be applied between parties whose places of business are in contracting states and it also shall be used if the rule of international private law provides so. The Convention shall not be used if the parties' places of business is in the same country nor when the goods bought for personal, family or household use. Regarding the breach of contract, the first and most important question is whether the breach of contract was fundamental or not. If the breach was non-fundamental then the injured party entitled to require specific performance if the breach was fundamental then the aggrieved party is entitled to avoid the contract, to require the substitution of the goods or to claim damages. The injured party can only claim damages what was reasonably foreseeable (or should

[46] Tribunal Supremo (Internationale Jute Maatschappij, BV v. Marín Palomares, SL), May 27, 2021, http://www.unilex.info/cisg/case/431

[47] U.S. Court of Appeals (11th Circuit) 05-13995 (Treibacher Industrie, A.G. v. Allegheny Technologies, Inc.), May 27, 2021, http://www.unilex.info/cisg/case/1136

[48] Tribunal of International Commercial Arbitration at the Russian Federation 340/1999, May 27, 2021, http://www.unilex.info/cisg/case/876

[49] UNCITRAL: Digest of Case Law - 2016

have foreseen) by the party who later breach the contract as the possible consequence of the breach. The injured party has the duty to mitigate the damages.

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Nárcisz, Projics* – The fight against terrorism and its limitations

Reviewer: Dr. Dávid Tóth PhD.

Abstract

In recent years, terrorism has become a global threat. With the rapid development of technology, state-of-the-art techniques can be used in the commission of an offense. In this study, I basically examine the fight against terrorism and its limitations. However, I believe that a brief review of the history of terrorism is needed before I investigate countering terrorism. It would also be good to clarify the concept of terrorism, that is, what it is necessary to fight against. To date there is no uniform concept of terrorism, so I outline the difficulties in creating a uniform concept. The fight is taking place at both Union and Member State level. It is important to determine, there are some values during action that must be taken into account and to respect.

Keywords: terrorism, fight, concept, strategy, war

1. Introduction

The fight against terrorism has become one of the most pressing security policy issues today. One of the most fundamental issues in effective counter-terrorism is to determine which behaviors fall into this category. This requires a definition of the concept of terrorism, which has been a goal for decades, resulting in several definitions in both national and international law. Terrorism is addressed by several disciplines that approach it from different perspectives. Based on these, it is important to note that terrorism is capable of renewal and new forms are always emerging. Cross-border terrorism poses a serious threat to societies, making it a current, common problem for the rule of law. Terrorism combines criminal, criminological and, of course, political science style features at the same time. In this study, I first briefly outline the historical development of terrorism, then present some definitions that I consider relevant, and then I focus on the fight against terrorism and its limitations.

2. A brief historical overview of terrorism

Terrorism as an international phenomenon has a millennial history, so it could even be called a constant accompanying phenomenon in history. Violence and terror coincide with the formation of the state. "It has existed since there were governments to be overthrown."[1] In the struggle of thesis-antithesis-synthesis drew up by Hegel,

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[1] Conor Gearty, *Terror* (Budapest: Holnap Kiadó, 1994), 31.

aggressive, "terrorizing" behaviors always played a dominant role. Terrorism has been and continues to be fundamental and essential in this process. In this subject, the first written traces are from ancient Rome. Examples of terrorist acts in ancient Egypt include the assassination of Pharaoh Ramses, while in ancient Rome the assassination of Julius Caesar. The most shocking form of the medieval appearance of terror was the institution of the Inquisition. The crusades were also manifestations of terror. The first event of the modern age to perpetuate terror over an entire country was the Great French Revolution. The Jacobin leadership resorted to revolutionary terror as a result of its convulsive clinging to power.[2]
Until the 19th century, in most cases we can speak of state terror. Prominent examples of royal murders 3rd and 4th assassinations of Henry the French kings. In the 20th century, the ideological foundations of an act of terrorism were anarchism and nationalism.
By the end of the 20th century, due to the growing use of computers and internet, terrorism has taken a new form, cyberterrorism has emerged.[3]
Based on these, it is important to note that terrorism is not a new phenomenon. Social injustices, the irreconcilable tensions between individual political opponents were the breeding ground for terror as a specific political behavior.[4] According to experts on the subject, as summarized in Conor Gearty's book "Terror," five historical movements can be distinguished from each other based on written sources that roughly illustrate the historical development of terrorism.

3. The concept of terrorism[5]

In my view, defining the concept of terrorism is an essential element of the effective fight against terrorism and, even its starting point. Effective action against terrorism would fundamentally require clarification and knowledge of what we are facing. There are a very large number of definitions of terrorism in the literature, but only a

[2] Róbert Bartkó, *A terrorizmus elleni küzdelem kriminálpolitikai kérdései (Criminal policy issues in the fight against terrorism)* (Győr: UNIVERSITAS-GYŐR Nonprofit Kft., 2011), 60.
[3] Dávid Tóth, „A terrorizmus típusai és a kiberterrorizmus (Types of terrorism and cyberterrorism)," in *XII. Országos Grastyán Konferencia előadásai (Presentations of 12th National Grastyán Conference)* ed. Virág Rab (Pécs: PTE Grastyán Endre Szakkollégium, 2014), 286-296.
[4] Géza Finszter, „Az alkotmányos jogállam esélyei a terrorizmus elleni küzdelemben (The chances of a constitutional of rule of law in the fight against terrorism)," *Belügyi Szemle,* no. 6-7 (2002): 159.
[5] Many authors deal with this topic, for example:
Róbert Bartkó, A terrorizmus elleni küzdelem kriminálpolitikai kérdései (Criminal policy issues in the fight against terrorism), 17-55.
László Korinek, „A terrorizmus (The terrorism)," *Belügyi Szemle,* no. 7-8 (2015): 7-11.
Melánia Nagy, *A női terrorizmus (Female terrorism),* PhD dissertation, Pécs 2020, 6-14.
Márton Tibor Serbakov, „A terrorizmus definíciójának kérdése (The question of the definition of terrorism)," *Büntetőjogi Szemle*, no. 2 (2019): 87-100.

few of these definitions are considered relevant to the extent necessary to examine the main subject of my study (the fight against terrorism and the limits of action).
The Latin noun "terror" means fright, the word "terreo" comes from the scary verb. Máramarosi and Szűcs made the following statement about the unified concept of terrorism: "So far, no terrorist group has done the favor of defining itself."[6]
According to Bartkó, the recognition of the "symbiotic" relationship between the concept of terrorism defined by three sub-fields (political science, criminal / international law, criminology) can lead to the ability to effectively combat all terrorist groups and terrorist organizations around the world.[7] However, according to Bartkó, terrorism in a criminological sense: "a typically state or cross-border (transnational) social phenomenon which seeks to achieve its sociopolitical objectives with unlawful attack on civilians and high-value property, legitimacy of the violence used, characterized by invisibility, diversity, unexpectedness, criminological characteristics of high mobility and excellent reproductive skills."[8]
According to the political science definition: "in the political science sense, terrorism is a social phenomenon that using deliberate and systematic violence, attempts to commit, or threatens to commit assassinations that may be used by terrorist organizations to make decisions that are adequate for their socio-political goals."[9]
If we want to define the concept of terrorism in a criminological approach, the most comprehensive definition is given by Korinek: "The emerging behavior in the audience, in the state, in society.
The terrorism consists of different systems of ideas. It aims to achieve political aspirations by developing compromising behavior in the victim, in society, in the state. The announced goal is usually to force radical change with political, ideological, religious, ethnic content, a series of actions used to achieve the goal. On the other hand, the instrument is a violent crime under public law."[10]
Based on the above, it can be stated that nowadays, the concept of terrorism has been defined in many ways, but none of it is internationally accepted. The way of offense it is extremely varied. The diversity that terrorism has as a social phenomenon may be an obstacle to the creation of a single concept. However, from the many conceptual definitions, 4 main elements can be identified on which each definition is based:

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[6] Zoltán Máramarosi and László Szűcs, „A terrorizmus kihívásai (The challenges of terrorism)," *Rendészeti Szemle*, no. 5 (1992): 21.
[7] Bartkó, A terrorizmus elleni küzdelem kriminálpolitikai kérdései (Criminal policy issues in the fight against terrorism), 55.
Róbert Bartkó, „A terrorcselekmény mint nemzetközi bűncselekmény (The act of terrorism as an international crime)," *Rendészeti Szemle*, no. 5 (2010): 73-87.
[8] Bartkó, A terrorizmus elleni küzdelem kriminálpolitikai kérdései (Criminal policy issues in the fight against terrorism), 54.
Róbert Bartkó, „Gondolatok a terrorizmus fogalmáról (Thoughts on the concept of terrorism)," *Belügyi Szemle*, no. 6 (2005): 88.
[9] Bartkó, A terrorizmus elleni küzdelem kriminálpolitikai kérdései (Criminal policy issues in the fight against terrorism), 27-28.
[10] László Korinek, „A terrorizmus (The terrorism)," in *Kriminológia – Szakkriminológia (Criminology-Specialist Criminology)* ed. Katalin Gönczöl and Klára Kerezsi and László Korinek and Miklós Lévay (Budapest: Complex Kiadó, 2006), 447.

- "implemented by non-state actors,
- unarmed citizens are the target,
- used for political purposes,
- act of violence".[11]

However, the lack of a uniform concept makes it difficult to fight terrorism effectively, as in the absence of this it can be said that they do not even know what they are facing. According to Vass, the lack of this concept makes it difficult to cooperate between the four disciplines (political, military, judicial, financial) of the fight against terrorism.[12] Bartkó finds the difficulty of conceptualization in the following: the role of politics, the basic features of crime, cultural misunderstanding, the diversity of terrorism and the complexity of the fight.[13]

4. The fight against terrorism in Hungary

The role of the European Union in the fight against terrorism is complementary to that of the Member States, and the primary responsibility lies with the Member States. Criminal action is an essential tool in the fight against terrorism.

Act IV of 1978 on the Penal Code regulated the act of terrorism as a new criminal offense. The reason for declaring it a separate crime was that organized crime created a qualitatively new form of coercion and extortion than was known in the previous period.

In Hungary, Act C of 2012 on the Penal Code (hereinafter: Btk.) regulates the facts of terrorist act (314. §, 315. §, 316. § 316/A. §), the facts of failure to report a terrorist offense (317. §) and the facts of terrorist financing (318. §, 318/A. §) in XXX chapter which title is "Crimes against public security".

Section 314 "(1) Who, for the purpose of
(a) compel a public body, other State or international organization to do, refrain from or tolerate something,
b) intimidate the population,
(c) to alter or disrupt the constitutional, social or economic order of another State or to interfere with the functioning of an international organization,
commits a violent, public danger or weapon-related offense against a person as defined in paragraph 4, punishable by a term of imprisonment of ten to twenty years or life imprisonment for the offense.
(2) A person shall be punished in accordance with paragraph 1 who:
(a) seizes significant tangible property for the purposes set out in paragraph 1 (a) and makes their abandonment or return conditional on the fulfillment of a claim against a public body or an international organization, or
(b) organizes or directs a terrorist group."

[11] János Béres, „A nők és az öngyilkos terrorizmus (Women and suicide terrorism)," *Felderítő Szemle* VI, no. 3 (2007): 15.
[12] György Vass, „Egységes meghatározás a terrorizmusra (Uniform definition of terrorism)," *Hadtudományi Szemle,* no. 4 (2009): 10.
[13] Bartkó, A terrorizmus elleni küzdelem kriminálpolitikai kérdései (Criminal policy issues in the fight against terrorism), 17-23.

The legal object of the crime is public security, which is manifested in the smooth operation of state bodies, other states and international organizations, the need for these organizations to be able to enforce their own, non-coercive decision in the course of their activities. The perpetrator of the crime can be anyone, the age limit of criminality is 12 years in Btk. (1) – (4) paragraph of section 314, if the child had the discretion necessary to recognize the consequences of the offense at the time of the offense. Attention to the purpose, all variants of a crime can only be committed intentionally (with direct intent). The primary object of the crime is any natural living person, something to be assessed as an object of crime, material property seized during the realization. The secondary object of the offense is the addressee of coercion, intimidation or claim; a public body, another state or international body, or the population.[14] Due to the prevailing international trends, the Criminal Code already regulates the financing of terrorism as a separate criminal offense (318. §, 318/A. §).

5. The fight against terrorism at international level

5.1. NATO's and EU's concept of terrorism

Among the international organizations, the North Atlantic Treaty Organization (hereinafter: NATO) and the European Union (hereinafter: EU) play a key role in the fight against terrorism. I consider it important to review the concepts of terrorism they have created, which are as follows:
According to the Parliamentary Assembly of the Council of Europe, these are among the terrorist acts:"… during the offense, individuals or groups use or threaten to use violence country, institution, population driven by extreme ideological perceptions, fanaticism or irrational and subjective factors in order to create an atmosphere of terror among the authorities, specific individuals or social groups or the community as a whole." (No. 1426 (1999) Recommendation)
The Directive of the European Parliament and of the Council of the European Union on combating terrorism also uses a different concept: "Terrorist acts constitute one of the most serious violations of the universal values on which the Union is founded, namely human dignity, freedom, equality and solidarity, and human rights and fundamental freedoms. Terrorism is also one of the most serious attacks on democracy and the rule of law; these are the principles shared by the Member States on which the Union is based."[15]
The concept created by NATO in a military approach: "terrorism means unlawful use or threat of force or violence against persons or property for the purpose of influencing or intimidating governments or societies for any political, religious or ideological purpose."[16]

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[14] Erik Mezőlaki, „Terrorcselekmény (Terrorist act)," in *Nagykommentár a Büntető Törvénykönyvről szóló 2012. évi C. törvényhez (Great commentary on Act C of 2012 on the Penal Code)* ed. Krisztina Karsai (Budapest: Wolters Kluwer Kft., 2019), 708-714.
[15] https://eur-lex.europa.eu/legal-content/HU/TXT/?uri=CELEX%3A32017L0541 May 31, 2021
[16] Vass, „Egységes meghatározás a terrorizmusra (Uniform definition of terrorism)," 11.

5.2. The anti-terrorist fight

Key elements of the counter-terrorism strategy:

1. seek to eliminate the social, political, ethnic and religious tensions that give rise to terrorism in a democratic way,
2. increase the number of security forces and strengthen their training and technical equipment,
3. the risks of social room for maneuver must be reduced,
4. increased control of members of society,
5. reasonable self-restraint with the media should be accepted in order to make it more difficult for terrorists to reach the desired public
6. special anti-terrorist laws must be enacted,
7. strengthen international cooperation,
8. the protection of potential terrorist targets must be strengthened,
9. the terrorist bases must be dismantled,
10. national databases should be merged.[17]

Among the international organizations, the NATO and the EU play a key role in the fight against terrorism. The EU action in this area includes:

1. expanding the exchange of information
2. stricter controls at the external borders
3. prevention of online radicalization
4. improving the control of firearms
5. digitization of judicial cooperation
6. criminalization of terrorist offenses
7. prevention of terrorist financing
8. harmonization of the use of air passenger data
9. strengthening cooperation with non-EU countries.[18]

5.3. Action by the European Union

5.3.1. The European Union's counter - terrorism strategy

The European Union's counter-terrorism strategy is based on four pillars. In the spirit of the prevention strategy, the Union aims to develop programs and action plans that help prevent people from moving towards extremism. Another goal in this area is to deepen democratic values among society. The defense strategy includes protecting citizens and infrastructure and reducing their vulnerability to attack. The activities included in the fight strategy are aimed at preventing terrorists from organizing and planning, and bringing them to justice. EUROJUST, EUROPOL has a key role to play

[17] Korinek, „A terrorizmus (The terrorism),” 458-459.
[18] https://www.consilium.europa.eu/hu/policies/fight-against-terrorism/ May 31, 2021

in this fight. Coordinating the response, responding to terrorist acts, dealing with and minimizing their consequences, and supporting the victims' families.[19]

5.3.2. The Counter-Terrorism Coordinator

In the fight against terrorism in the European Union, the terrorist attacks in Madrid on 11 March 2004 added a new chapter, the European Council adopted a declaration on the fight against terrorism and measures included the establishment of a Counter-Terrorism Coordinator's Office. The tasks of the Counter - Terrorism Coordinator:

- coordinate the Council's activities in the fight against terrorism,
- make policy recommendations and propose priority areas for action to the Council,
- monitor the implementation of the EU Counter-Terrorism Strategy,
- continuously monitor all EU instruments, report to the Council and take action on Council decisions,
- consult the relevant Council preparatory bodies, the Commission and the EEAS (European External Action Service),
- ensure that the EU plays an active role in the fight against terrorism,
- improve communication between the EU and third countries.[20]

6. Limitations of the fight against terrorism

The main constraint on effective action against terrorism is the democratic state and the range of fundamental human rights that the rule of law is obliged to respect, even in the fight against terrorism. This means that in the implementation of penal policy, the application of solutions and measures that are accompanied by unnecessary and disproportionate restrictions on fundamental human rights must be refrained from. They also provide a democratic safety net for all persons prosecuted for their involvement in a terrorist organization.[21]
The main feature of the prohibition of torture and inhuman or degrading treatment or punishment is that it is not aware of any exceptions on the part of the state, even in the fight against terrorism, which would automatically provide an exemption from the rule for a country to exceed the above fundamental rights limit.[22] Another organizing

[19] Bartkó, A terrorizmus elleni küzdelem kriminálpolitikai kérdései (Criminal policy issues in the fight against terrorism), 165-178.
[20] https://www.consilium.europa.eu/hu/policies/fight-against-terrorism/counter-terrorism-coordinator/
[21] The requirement to respect and fully enforce human rights and fundamental freedoms was set out by the United Nations itself in a General Assembly resolution of 16 December 2005 (A/RES/60/158 Protection of human rights and fundamental freedoms while countering terrorism)
[22] András Grád, *A strasbourgi emberi jogi bíráskodás kézikönyve (Handbook on Human Rights Judging in Strasbourg)* (Budapest: Strasbourg Bt., 2005), 109.

principle of grouping cases is the right to a fair trial and its possible violation[23] and guarantees include the right to a defense.[24] Another category of terrorist cases in the case law of the Court of Justice is cases relating to respect for the freedom and security of the person concerned.[25]

Counter-terrorism policy aims to prevent terrorist attacks, defeat terrorists and eradicate terrorism. The goal can be achieved with limited resources due to the political set-up. There are a number of cases where a Member State is referred to the European Court of Human Rights for breach of the Convention for the Protection of Human Rights and Fundamental Freedoms (right to life, right to privacy, right to a fair trial) and will determine.[26]

Ireland was sued in 1997 by the European Court of Human Rights. A bomb exploded in one province of Ireland, killing seven people. Following the assassination, Irish police broke into a house where, based on physical evidence, seven people were arrested. During the interrogation, two did not answer the questions asked. Defendants acquitted of assassination and IRA membership charges but sentenced to six months imprisonment for failing to report what they had done during the assassination. The convicts lodged an appeal alleging that they had been deceived about their right to remain silent, but their request was rejected in all forums. They then complained to the European Commission of Human Rights that the Republic of Ireland had violated Articles 6 (right to a fair trial), 8 (right to privacy) and 10 (right to privacy) of the Convention for the Protection of Human Rights and Fundamental Freedoms. The court ruled that Ireland had infringed Article 6 but had no grounds for applying Articles 8 and 10. According to the court, the right to be heard should be considered part of the right to a fair trial.[27]

In the fight against terrorism, care must be taken not to overreact, it is important that the reaction is directed only at terrorists. Cost-effectiveness must be taken into account when selecting instruments. Most importantly, we must strive to protect the fundamental values of democracy.[28]

[23] Vid. Universal Declaration of Human Rights Article 7-8, International Covenant on Civil and Political Rights Article 14, Convention for the Protection of Human Rights and Fundamental Freedoms Article 6

[24] Vid. Universal Declaration of Human Rights Article 11, International Covenant on Civil and Political Rights Article 14, Convention for the Protection of Human Rights and Fundamental Freedoms Article 6

[25] Vid. Universal Declaration of Human Rights Article 3, International Covenant on Civil and Political Rights Article 9, Convention for the Protection of Human Rights and Fundamental Freedoms Article 5

[26] Ágnes Vadai, „A terrorizmus elleni fellépés és az emberi jogok tiszteletben tartása (Fight against terrorism and respect for human rights)," *Fundamentum,* no. 4 (2001): 132-134.

[27] Vadai, „A terrorizmus elleni fellépés és az emberi jogok tiszteletben tartása (Fight against terrorism and respect for human rights)," 132-133.

[28] Korinek, „A terrorizmus (The terrorism)," 463-464.

7. The "war" on terrorism

In the United States, the two goals set by the government following the terrorist attacks of 11 September 2001 were to broaden the toolbox for gathering information on terrorism and to restrict the fundamental rights of those suspected of committing a terrorist act. The danger of new goals set in connection with the fight against terrorism is that they will bring about a change in the spectrum of the exercise of power and coercive measures that restricts freedoms and undermines the rule of law, and not only when counter-terrorism is the goal.[29]
There is a tendency to consider the fight against terrorism as a war, according to this principle, those who come into contact with terrorism are not governed by law enforcement and criminal proceedings, but by the rules of war. This raises the question of whether terrorists should be considered criminals or warriors. The state has a duty to protect its citizens, and can accordingly act in two ways. If terrorists are considered criminals, the state can resort to limited means. However, in the other course of action, soldiers from the enemy state can be killed and detained without a special procedure.[30]
In the fight against terrorism, the aim is to choose a sensible strategy that is appropriate, reliable and proportionate. The appropriate indicator can be interpreted as meaning that the response to a terrorist act must be acceptable to society or the public. Suitability refers to a thorough examination of the social causes of terrorism. Credibility must be a feature of all counter-terrorism policy. Proportionality means that the response of the state must be proportionate to the harm.[31]

8. Dogmatic analysis from a criminal policy perspective

The terrorist attacks of 11 September 2001 have made governments aware that terrorism is trying to stifle democracies from within. From a criminal policy perspective, terrorism is a serious threat to society. Terrorism or rather international terrorism is a transnational crime because it crosses borders and undermines peaceful relations between states. The international communities must work together to combat this phenomenon. An act can be considered an international crime if its gravity threatens the international community and its persecution stems from international law, or the criminality of the act stems from domestic law but does not remain within the borders of the state due to globalization. As described, international terrorism is considered an international crime. There is a traditional link between sovereignty and criminal monopoly. Max Weber articulated that legitimate violence belongs to the state. However, it is not enough to take action at national level against terrorism, but international action and cooperation between states are needed to combat this phenomenon. The United Nations established the International Criminal Court with the Rome Statute in 1998, and then the so-called 'Hybrid' tribunals have been set up

[29] Zoltán Miklósi, „A terrorizmus elleni „háború" és az emberi jogok (The „war" on terrorism and human rights)," *Fundamentum,* no. 3 (2004): 44-45.
[30] Miklósi, „A terrorizmus elleni „háború" és az emberi jogok (The „war" on terrorism and human rights)," 47.
[31] Korinek, „A terrorizmus (The terrorism),"457.

by the UN Security Council (e.g. the Special International Tribunal for Lebanon, 2007).[32] A number of conventions have been concluded in the fight against terrorism, one of which aims to set out the facts of terrorism. Based on these, the factual elements of terrorism can be divided into objective and subjective reasons. Objective reasons include criminal conduct, which may be punishable by national law alone or conduct which is punishable in the context of terrorist organizations. Other objective reasons are the boundary of the victim / victim circle and the cross-border nature. The group of subjective reasons consists of purpose and motive. The goal is to intimidate the public and force the government or international organization to behave or tolerate some kind of behavior. The motive for a terrorist act can be political, ideological or religious.[33]

Another group of conventions concluded in the course of the fight against terrorism seeks to identify and prosecute the special facts of international terrorism. A uniform system of obligations under international law to be established by UN resolutions, to be followed by the States party to the rule of law. Based on this system:

1. states are obliged to do everything possible with due diligence to prevent a terrorist act,
2. states must criminalize the act of terrorism and related conduct in their domestic law,
3. extensive cooperation should be established with other states,
4. to refrain from express or implied support for terrorism.

9. Summary

The concept of terrorism has not been uniformly defined to date, despite efforts to do so. Investigations point in the direction that no international definition will emerge in the near future. And that would be very necessary to know what we are up against and what we are fighting against. An unprecedented wave of terrorism has swept across Europe in recent years, drawing Europeans' attention to security and highlighting shortcomings in EU cooperation and information exchange in this area. Terrorists are increasingly taking advantage of the opportunities offered by information technology. Fortunately, Hungary is a less infected area in terms of terrorism. However, the importance of defense must be taken seriously, as terrorism continues to spread around the world. It is important that we work as closely as possible with the various counter-terrorism services and the international organizations that also fight terrorism.

[32] Bartkó, A terrorizmus elleni küzdelem kriminálpolitikai kérdései (Criminal policy issues in the fight against terrorism), 103-111.

[33] Vid. Dávid Tóth and Melánia Nagy, „The types of terrorism – with special attention to cyber and religious terrorism," *JURA*, no. 1 (2019): 413-422.

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Nguyen, Thi My Linh* – Parental responsibility: managing and respecting of Children's property rights in Vietnam

Reviewer: Prof. Dr. Csabáné Herger

Abstract

Children's property rights are an under-researched area that spans the humanitarian and development gap. Access to the property is essential for adult life choices and financial well-being. However, the ability to claim ownership of adults can be significantly compromised by humanitarian emergencies that occur at a young age.[1] *Therefore, paying attention to the protection of property rights for children is necessary for the development of the personal property at different stages of life. The article emphasizes that children have the right to own property and are protected under Vietnamese law. Children's property can be formed from many sources such as through income from labor, inheritance, gifts and other lawful sources as prescribed by law. The article also analyzes the role of parents in ensuring their children's performance on the property through civil transactions. Do all civil transactions related to the property of minor children have to be done through the legal representative who is normally the parent? If parents performing their responsibilities to their offspring's property lead to the destruction of their children's property, what are the legal sanctions? These questions will be analyzed and answered in the body of this paper. The second goal of this article is to compare the regulations on parental responsibility for offspring's assets from the perspective of international, European and Hungarian laws to have a comprehensive and multi-dimensional view.*

Keywords: parental responsibility, children's property rights, children's rights, Vietnamese law.

1. Introduction

Historically, a child is a human being between birth and puberty[2] that is a general thought from a social perspective. According to some medical information, puberty varies between girls and boys. For girls, the age of puberty is 15 years of age for boys,

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[1] Sandra F. Joireman, "Protecting Future Rights for Future Citizens: Children's Property Rights in Fragile Environments," *Oxford Development Studies* 46, no. 4 (2018): 470–82, https://doi.org/10.1080/13600818.2017.1416073.

[2] Nguyễn Thanh Huyền, "Policy Analysis Of Supporting Children With Disabilities Access To Social Security," *Science & Technology Development Journal - Economics - Law and Management* 5, no. 1 (December 18, 2020): first, https://doi.org/10.32508/stdjelm.v5i1.697.

16 years. The United Nation Convention on the Rights of the Child[3] also addressed that a child is a human under the age of 18. Hence, age is considered a criterion to determine whether that person is a child. It means below that age limit is regarded as a child and from that age limit upwards is no longer considered a child. The age limit noted in the Convention is 18 years old.[4] Based on this short definition of the child, the article could have a narrow examination on the scope and object of research issue. The article emphasizes the importance of parents' responsibility in ensuring their children's ownership of property. The article also finds and analyzes how the regulations on the management and disposition of property of children including who have full 18 years old but lost their civil act capacity. The next goal of the article is to analyze how parents can manage their children's assets fairly and without scattering their children's assets.

2. Children's property: a fundamental right

Generally, Clause 1, Article 75 of the 2014 Law on Marriage and Family addressed that children have the right to have their property including property separately inherited by or given to them, incomes from their work, yields and profits arising from their property and other lawful incomes. Property created from children's property is also their property. If they have incomes, children who are full 15 years or older and live with their parents have the obligation to attend to the family's common life and make contributions to meeting the family's essential needs. Children must contribute their incomes to meeting the family's essential needs according to Clause 4, Article 70 of the 2014 Law on Marriage and Family.

The provision that children have the property right continues to be affirmed in the Law on Children. Article 20 of the 2016 Law on Children stipulates that *"Children have the right to own, inherit and other rights to property as prescribed by law."*[5] These provisions show that children have the right to have their property regardless of whether they are an adult or a minor, have full civil act capacity or have lost their civil act capacity, live with or do not live with parents. However, it can be seen that, almost implicitly, that when a child is an adult and no longer lives with his or her parents, all the property that the child has from legal sources is acquired by the family and society recognizes it as the child's property. The problem only really needs to be clarified when the child is a minor, or has lost the civil act capacity and is still living with parents.

Based on the 2015 Civil Code, the 2014 Law on Marriage and Family and the 2015 Law on Children, the minor's asset is derived from various sources as follow:

First, the child's property is bound by a property being inherited and given separately which can be seen as two common bases for creating wealth. According to the 2015

[3] United Nations General Assembly, *Convention on the Rights of the Child, 20 November 1989*, n.d., https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/540.

[4] Huynh Thi Truc Giang, "The Legal Concept of 'Child' and Children's Rights in Vietnam from 1945 until Today," *Accepeted to Publishing in Jura Law Journal, Pécs, Hungary*, 2021.

[5] Law No. 102/2016/QH13 was issued by The National Assembly on Children on dated on 2016, May 04, gazette number 102/2016/QH13, https://thuvienphapluat.vn/van-ban/Giao-duc/Luat-tre-em-2016-303313.aspx.

Civil Code, when a minor is less than 6 years old, all civil transactions related to them must be established and performed by the legal representative. However, with a daily needs transaction, the less than 6-year-old minor can carry out the contract by itself without parental agreement manifestly based on Point b, Clause 2, Article 125 of the 2015 Civil Code stipulates that transactions performed by minors will not be invalid. In addition, when giving property to a minor, if the property is donated to be real estate, it is necessary to comply with additional provisions on the form of the contract. Specifically, Clause 1, Article 459 of the 2015 Civil Code has the following provisions: *"Donating real estate must be made in writing, notarized, authenticated or registered, if the real estate must register for ownership rights following the law."* In succession, it can be contributed to separate property according to wills or inheritance according to law. The inherited property shall be considered as the minored asset only when the testator specifies the name of the minor and the part of the estate. The grandfather, for example, makes a will to leave all of his estates to his grandchildren. After the grandfather's death, his part of the estate will be transferred to his grandchildren's property, even though they are minor.

Second, age-appropriate income and compliance with labor law are the private assets of the minor based on Article 161 of the 2012 Labor Code mentioning that a minor employee is an employee under 18 years old. Therefore, the offspring living with parents can still have income from their working capacity.

However, the fact that children have their property through income is not much and common in Vietnam. According to a survey[6] of the job market in Vietnam,[7] the 16-19 age groups (36%) have fewer job opportunities than the 25-30 age group (48%). The reason may be because they have more practical experience in the labor market.

[6] This study was conducted by Love Frankie, a regional social change and research organization, and research firm IRL (Indochina Research Ltd) in 2019.

[7] British Council, "Báo Cáo Nghiên Cứu Thế Hệ Trẻ Việt Nam - Research Report on Young Vietnamese Generation Trẻ," 2020, accessed: ?https://www.britishcouncil.vn/sites/default/files/nghien-cuu-the-he-tre-viet-nam.pdf.

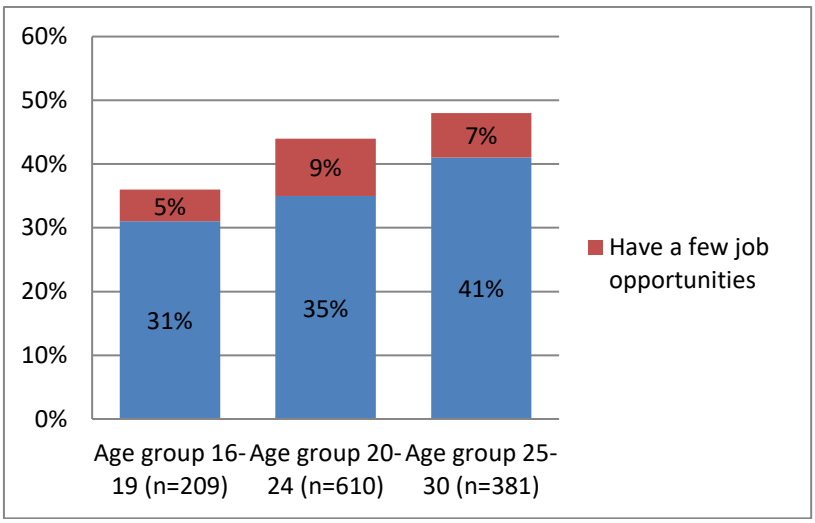

Figure 1: Percentage of workers by age group who think that there are a few and many job opportunities

Third, children's property is the yield and income arising from their property. Article 109 of the 2015 Civil Code states: *"1) Yields are natural products that an asset brings; 2) Income is the profit earned from the exploitation of property."* The benefits arising from a child's property are natural products produced from an asset that is his or her property. Taking an example, a child is given a cow by his/her maternal grandparents whom later the cow gives birth to veal. Thus, since the veal is the yield of the cow, which is inherently the property of the minor, this veal is also part of the child's property. An income arising from a child's property is an income earned from the exploitation of a child's property. For example, a child is given money by relatives and friends on Tet holiday[8] to hope the child eating well and growing up healthy. Parents create a bank account based on this child saving with an interest rate of 8%/year. The saving interest earned from the bank is also the profit having from the initial asset of the minor.

Fourth, property formed from children's property is also their property. The formation of children's property to continue to become their property can be understood as the formation through civil transactions. For example, having a separate amount of money being from work and accumulation, the children use that money to buy an apartment. Thus, the house purchase takes place during the time the children are living with the parents, it is still considered their property.

[8] Tet is the Vietnamese New Year and is the most important festival and public holiday in Vietnam. The Vietnamese people give lucky money not only for children but also for their older. For children, "lucky money" means giving money to children to welcome the new age on the first day of the Lunar New Year. In other words, the adults hope their children eating well and growing up healthy". See Vietnam's Tet holiday: Lucky money, accessed: ?http://holidaytoindochina.com/holiday-to-indochina-blog/vietnam-s-tet-holiday-lucky-money.html.

3. Children's rights to perform civil transaction by parental responsibility

Parental responsibility is a statutory concept, filled with common law material, which is met by certain obligations by law. Those words are double as a situation for some but not for all parents. Responsible parents and caregivers, on the other hand, provide care, regardless of their legal status, in countless ways and without reference to legal rights and obligations. They consider the many complexities of their children's lives and tailor them to their potential and opportunities.[9]

What is the content of parental responsibility in respect of minors' contracts? Parents are not liable under their children's contracts unless they expressly do not undertake such liability, nor can they validate them on the minor's behalf. Generally speaking, if the child was given any property under the condition that his/her parents should be deprived of access to such property, the guardian authority shall appoint a trustee - taking into consideration the recommendation of the settlor - for the administration of such property (hereinafter referred to as trustee). If the third person granting the property excluded one of the parents from managing the property, the other parent otherwise entitled to manage the property shall manage the property. In connection with contracts of minor importance, the parent acting on the child's behalf may be considered by bona fide third parties as acting in the name of the other parent as well. Moreover, a minor is bound by a contract for services if it is for his or her benefit, and therefore contracts of employment are valid—including apprenticeships, but also the paper round, the Saturday job in shops and the full-time job of a minor who has left school.

The fact that parents perform civil transactions for their minor children including who have 18 years old but lost their civil act capacity is specified in Clause 2, Article 73 of the 2014 Law on Marriage and Family. It is said that parents are representatives at law of their children, except when the children have other persons to be their guardians or representatives at law. A parent has the right to make transactions on his/her own to meet the essential needs of their minor or children who have full 18 years old but lost their civil act capacity or have no working capacity and no property to support themselves. Transactions related to real estate or movable assets with registered ownership or use rights or property used for business activities of children must obtain their parents' consent. Parents shall take joint responsibility for making transactions related to their children's property prescribed by the Civil Code and the Law on Marriage and Family. Parents shall pay compensation for damage caused by their minor following the Civil Code.

Provisions on allowing parents to "carry out civil transactions by themselves to meet the essential needs of their minor children and their children with disabilities" can be applied when parents are the legal representative for the children. If the parents are not in that role, the children already have a legal representative performing civil transactions for the minor or children who fully have 18 years old but losing civil act capacity.

[9] Probert Rebecca, Gilmore Stephen, and Herring Jonathan, eds., *Responsible Parents and Parental Responsibility* (Poland: Hart, 2008).

A parent has the right to conduct transactions by himself to meet the essential needs of the minor and children who have lost their civil act capacity but fully 18 years old, or unable to work and have no assets to support themselves according to Clause 2, Article 73 of the 2014 Law on Marriage and Family. Transactions are meet the essential needs can be understood as common living in terms of clothing, accommodation, study, medical examination, treatment, and other common living need indispensable for the life of children.

Under the 2015 Civil Code, the establishment of civil transactions of minor is specified as follows:

Firstly, if the minor is under 6 years old, all transactions of the minor will be made by the legal representative. When the parents are the legal representatives for the minor child under 6 years old, the parents will be the ones to perform all civil transactions for the minor child. Transactions made by parents or other legal representatives, in this case, can be just small transactions serving the daily essential needs of the minor such as: buying food, food drinking, school supplies, but can also be large transactions involving real estate or property subject to the ownership of the minor, such as transfer of land use rights of the minor children inherited from paternal grandfather to others. Thus, when the minor is less than 6 years old, the provisions of Clause 2, Article 73 of the above Law on Marriage and Family and the provisions of the Civil Code 2015 is compatible.

Secondly, if the minor establishing and performing transactions is from full 6 years old to less than 15 years old, the consent of the legal representative must be obtained, except for transactions serving daily life needs and age-appropriate. This provision shows that adolescents in the period from full 6 years old to less than 15 years old can perform transactions to serve the needs of daily births by themselves.

Finally, Clause 4, Article 21 of the 2015 Civil Code stipulates: *"A person from full 15 years old to less than 18 years old shall enter in and perform civil transactions by himself/herself, except for civil transactions related to real estate and movables required registration and other transactions as prescribed by law that is subject to the consent of his/her legal representative."*

4. Parental obligation to manage and dispose of their offspring's property

Regarding parental responsibility in management to children's property, Clauses 1 and 2, Article 76 of the 2014 Law on Marriage and Family address some regulations on the management of minor's asset-based on age and cognitive ability as follow: 1) Children aged full 15 or older may themselves manage or ask their parents to manage their property; 2) Property of children who are under 15 or children who have lost their civil act capacity shall be managed by their parents. Parents may authorize other persons to manage their children's property. Unless otherwise agreed by parents and children, children's property managed by their parents or other persons shall be given to them when they are full 15 years or older or have fully restored their civil act capacity. In some cases, parents shall not manage their children's property when their children are under the guardianship of other persons as prescribed by the Civil Code; or when the persons giving or bequeathing under testament property to their children have designated other persons to manage such property, or in other cases, as

prescribed by law. In case parents are managing the property of their minor who are assigned to other guardians, the children's property shall be delivered to the guardians for management under the Civil Code.

In the first case, a minor child who is full 15 years old can manage his/her property because lawmakers have recognized the cognitive ability of people aged 15 years who deserve to be able to manage their property. This regulation also shows that the law does not limit the value of assets that minors can manage. This means that any property that is privately owned by the minor has the right to manage it on his or her own. According to the Vietnamese dictionary, management is understood as "to look after, take care of, and preserve something" which can be done by the minor itself.[10] With this understanding, it is completely appropriate for the minor to look after, take care of, and preserve ordinary assets of little value and associated with the daily living needs of the minor such as computers, telephones, jewelry, motorbikes. If the property is real estate such as houses, land, businesses, or real estate of great value, the law allows the minor to be managed by them.

In addition to managing the property on their own, minors who are full 15 years old can ask their parents to manage their property. This provision is not compulsory but is just another option to broaden legal directions in managing private property for the minor. As far as the scope of application is concerned, since the law has no limits, we can deduce that, whenever there is an agreement between the juvenile that the minor children's custodian is the parent, parents can represent for their children. In other words, parental management can even perform in cases where the minor is unable to manage his/her property, even though the children are from full 15 to less than 18-year-olds. It is also consistent with the psychology and lifestyle of Vietnamese people because children at those ages in Vietnam still taking care of by parent from small things like eating, daily activities to managing property.

To actively manage their assets and actively participate in transactions, the law on banking allows people from full 15 years old to fewer than 18 years old to set up a bank card if they have their assets to secure the implementation and obligations in the use of the card. The cards they use are debit cards without an overdraft, prepaid cards with the word as the primary cardholder. However, people from full 6 years old to fewer than 15 years old can only make a supplementary card through the legal representative who is the main cardholder.[11] This is also basically consistent with the spirit of the Civil Code and the Law on Marriage and Family on property management of minors under the age of 15.

Concerning disposition of property of children, Article 76 of the 2014 Law on Marriage and Family clarified some rules as follow: 1) Parents or guardians who manage under-15 children's property have the right to dispose of such property in the interests of the children and shall take into account the children's desire if they are full 9 years or older; 2) Children aged between full 15 and under 18 have the right to

[10] "Definition of Management," VDict, accessed June 9, 2021, https://vdict.com/management,1,0,0.html.

[11] Lê Thị Kiều Nga , "Trẻ Em Có Được Mở Tài Khoản ATM Không? - Can Children Open an ATM Account?," accessed June 9, 2021, https://danluat.thuvienphapluat.vn/tre-em-co-duoc-mo-tai-khoan-atm-khong-154649.aspx.

dispose of their property other than real estate, movable assets with registered ownership and use rights or property used for business activities the disposal of which is subject to the written consent of their parents or guardians: 3) Guardians of children who have lost their civil act capacity but fully 18 years old may dispose of the latter's property.[12]

Generally speaking, when the minor child is under 15 years old or the child is a person with a loss of civil act capacity, the child's property is managed by his or her parents. Unlike the first case, in this case, parents must manage the minor child's property because at this time the minor child is less than 15 years old. The ability to know right and wrong in the implementation of the act as well as the consequences of the act that they perform is still limited, so the law does not allow them to manage the property by themselves. This provision also recognizes the management of parents as an obligation to their children, but the ability to perceive and control behavior is no longer due to mental illness or some other illness. According to civil law, this is the case where the adult child loses the civil act capacity.

In addition to the property management for their children, parents can authorize another person to manage the parents' behalf. It can be seen that parents will delegate the management of their children's property to others when the parents do not have the conditions to manage those assets by them. Authorization can be any person the parents find best at performing this task. For example, a minor (12 years old) inherits from his grandfather a perennial orchard in a village far from the city center. However, the child and the parents are living in the city center, which is not convenient in taking care of and keeping the garden. Therefore, the parents of the juvenile decided to ask the minor's uncle, who is living next to the orchard, to manage.

The management of the minor child's property by the parent or other person, the adult child loses the civil act capacity in this second case will end when the minor child is full 15 years old or older or the child has the adult has lost his/her civil act capacity and has fully restored his/her civil act capacity, unless otherwise agreed.

Clause 4, Article 76 of the 2014 Law on Marriage and Family stipulates: *"In cases where parents are managing the separate property of their minor children or the children aged above 18 years old but lose the civil act capacity that the child is assigned to another guardian, the children's property shall be handed over to the guardian for management according to the provisions of the Civil Code."*

When a minor child has a parent and is still placed in custody, the parent is still eligible to care, educate and protect the legal rights of the child even though no longer management their offspring's asset.

Under Clause 1, Article 47 of the 2015 Civil Code, a child will become a ward when: 1) there is no parent or an unidentifiable parent; 2) having parents but both parents have lost their civil act capacity; Both parents have difficulties in cognition and behavior control; Both parents have limited civil act capacity; dad; both mothers have

[12] Lan Bkd, "Con Cái Được Quản Lý, Định Đoạt Tài Sản Riêng Như Thế Nào? - How Do Children Manage and Dispose of Their Property?," accessed June 9, 2021, https://danluat.thuvienphapluat.vn/con-cai-duoc-quan-ly-dinh-doat-tai-san-rieng-nhu-the-nao-180661.aspx.

been declared restricted by the Court to their children's rights; Both parents have no conditions to care for and educate their children and have a guardian requirement.
Thus, the Law on Marriage and Family has recognized the management of the minor child's property through the role of guardian as a legal proposition when the minor's parents are still lived but was unable to continue with property management for the children. When the child has a guardian, the parents must hand over the minor child's personal property to the guardian for management according to the provisions of the Civil Code.
In case a child loses civil act capacity, according to civil law, the guardian of such person is determined as follows: 1) The first is their spouse; 2) The second is their child; 3) The third is their parents. When the parents are also the guardians of the child, in this case, the handover of property is not required.
In addition, to ensure the unified management of the child's property, Clause 3, Article 76 of the 2014 Law on Marriage and Family also stipulates: *"Parents do not manage their children's property in case the child is under the guardianship of another person by the civil law."* This means that, when a minor child or an adult child loses his/her civil act capacity under the guardianship of another person and has the additional property of his own, the newly arising property will be under the management of guardian.
Regarding the disposition of separate property of the minor who is full 15 years old, according to the provisions of Clause 2, Article 77 of the 2014 Law on Marriage and Family, he/she can dispose of property under his ownership, except for immovable estate. This provision of the 2014 Law on Marriage and Family is compatible with Clause 3, Article 21 of the 2015 Civil Code which mentions that *"A person from full six to less than fifteen years of age when establishing and performing delivery civil transactions must be approved by the legal representative, except for civil transactions serving the needs of daily living by age."*
For the children who lose civil act capacity, the person with the right to dispose of property is his/her guardian.[13]

5. Restricting parents' rights toward their offspring's asset

Regarding obligations of parents toward their children, the Law on marriage and family also contains provisions restricting parents' rights toward their minor which are reasonable and necessary rules. Having legal provisions to review parents' rights to their children will create a legal corridor reducing the situation as well as protecting the legitimate rights and interests of children.

5.1. Bases for limiting the rights of parents toward their minor children

The restriction on parents' rights toward their minor is imposed when the parents fall into the cases specified in Clause 1, Article 85 of the 2014 Law on Marriage and Family as follow: 1) He/she is convicted of one of the crimes of intentionally infringing upon the life, health, dignity or honor of this child or commits acts of

[13] Clause 3 Article 77 The 2014 Law on Marriage and Family.

seriously breaching the obligations to look after, care for, raise and educate children; 2) He/she disperses property of the child; 3) He/she leads a depraved life; 4) He/she incites or forces the child to act against law or social ethics. According to a case-by-case basis, a court shall itself, or at the request of the persons, agencies or organizations prescribed in Article 86 of t the 2014 Law on Marriage and Family, issue a decision disallowing a parent to look after, care for and educate a child or manage the child's property or act as the child's representative at law for between 1 and 5 years. The court may consider shortening this period.

5.2 The person has the right to request a restriction on parental rights

The Court may, on its own or at the request of an individual, agency or organization with decision-making authority to limit some of the rights of a parent over a minor child. These authorities are divided into two groups:
The first is the group of subjects that are allowed to directly request the Court to restrict the parents' rights including 1) Parents, guardians of the minor children, according to the provisions of law, the civil procedure law has the right to request the Court to limit the rights of parents and minors; 2) Next of kin; 3) The state management agency in charge of families; 4) The state management agency in charge of children; 5) Women's Union;
The second group of subjects only has the right to request competent agencies and organizations to ask the Court to limit the rights of parents, including individuals, agencies, organizations. Other when detecting that a parent commits a violation specified in Clause 1, Article 85 of this Law, have the right to request, the organization or organization specified at Points b, c and d, Clause 2, Article 86 of the 2014 Law on Marriage and Family requested the Court to limit the rights of parents.
Detecting a parent committing violations, other persons, agencies and organizations have the right to request the agencies and organizations such as the state management agency in charge of families, The state management agency in charge of children, and Women's Union to propose a court to restrict this parent's rights toward the minor child.
However, it is very difficult for the above subjects to detect and request the Court to limit parental rights over their children, because of the privacy of the transactions that parents make on their children's property. The children themself are not aware enough to be able to act to protect their property from being dispersed by parents. According to a survey conducted by the Research Institute for Management and Sustainable Development and Save the Children in Vietnam[14] , 9 out of 10 children think that they

[14] The survey "Voices of Vietnamese Children" by the Institute of Management Research and Sustainable Development and Save the Children in Vietnam conducted based on the Organization's "Young Voices" survey guideline framework Save the Children Sweden incorporates the needs and context of practice implementation of the International Convention on the Rights of the Child and the 2016 Law on Children in Vietnam. The survey was conducted with the participation of 1,740 Vietnamese children aged 11 to 16 years old in 7 provinces/cities in the North, Central and South regions. Survey includes the participation of children in rural and urban areas; a group of children in schools and groups of out-of-school children; Children of Kinh and children of ethnic minorities. Survey uses information

have no or little opportunity to express their opinions with the decision-making authority. The survey shows that 86.6% of children think that it is very important for decision-makers to listen to children's opinions.[15] However, up to 88.3% of the children participating in the survey said that they have little or no opportunity to express their opinions to decision-makers.[16]

Thereby, it shows that state management agencies need to pay attention to policy implementation solutions to help children participate, to express their opinions, to be heard and the children's opinions to be taken into account all issues related to children in general and in the protection of property rights for children in particular. State management agencies need to promote communication and raise awareness knowledge for departments, social organizations, schools, families and communities community to take timely action if children are violated in terms of property, health from parents and others. Strengthening awareness education for children to protect their rights if violated is extremely necessary. According to a study[17], children have a sense of protection of property rights from a very young age between the ages of 4 and 5. Therefore, families and schools must focus on educating children to protect their property rights from the earlier stages of life.

collection method information through questionnaires, combined with focus group discussions in localities to Children expressed personal views about the initial results of the survey to collect more evidence, voices as well as solutions for the Issues that concern.

[15] Competent people include senior management in Central government, province, district, ward/commune, residential group, school principal, teacher, teachers, parents…

[16] The subjects of the survey were children under the age of 18.

[17] Catherine H. McDermott and Nicholaus S. Noles, "The Role of Age, Theory of Mind, and Linguistic Ability in Children's Understanding of Ownership," *PLoS ONE* 13, no. 10 (October 1, 2018): e0206591, https://doi.org/10.1371/journal.pone.0206591.

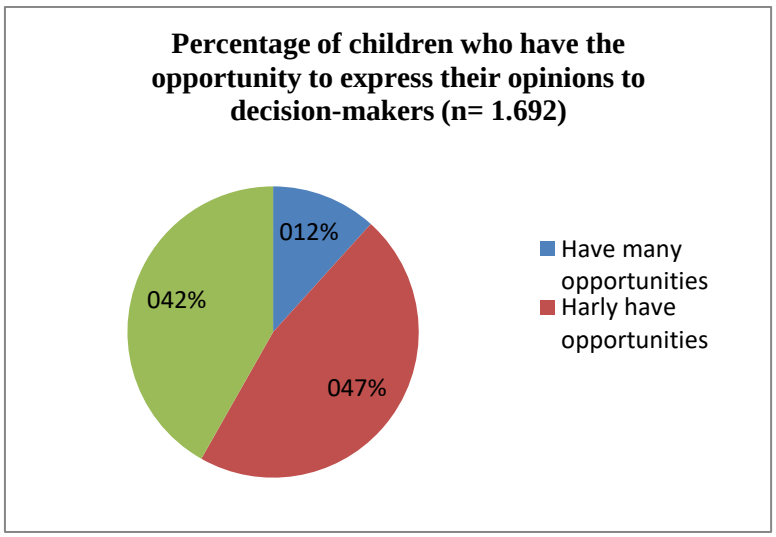

Figure 2: Percentage of children who have the opportunity to express their opinions to decision-makers[18]

5.3 Legal consequences of restricting parents' rights

In cases where a parent is restricted by a court on his/her rights toward the minor child, the other person exercises the right to look after, care for and educate the child, manage their property and represent the child at law.

The custody, care, education of a minor and management of a minor child's personal property are assigned to guardians by the 2015 Civil Code and the 2014 Law on Marriage and Family in the following cases: 1) parents have restricted rights toward their minor children; 2) a parent is not restricted in his/her rights toward the minor child but is ineligible for the exercise of rights and obligations toward the child; 3) a parent has restricted rights towards the minor child and the other parent has not been identified yet. Parents, whose rights toward their minor children have been restricted by a Court, must still perform their child support obligations.

From the perspective of international law on the protection of children's rights in general, there are many organizations and agencies established on a global or regional scale to ensure the full development of children in society. UNICEF is the UN organization mandated to protect the rights of every child, everywhere, especially the most disadvantaged, and is the only organization specifically named in the Convention on the Rights of the Child as a source of expert assistance and advice. There is a profound idea in this Convention: those children are not just objects and objects owned by their parents and for which decisions are made, or adults. Instead, they are people and individuals with their rights. The convention says

[18] Phương Linh Nguyễn, "Báo Cáo Kết Quả Khảo Sát Tiếng Nói Trẻ Em Việt Nam- A Research Report on Young Voice in Vietnam," 2020, 49–52,
accessed:
https://resourcecentre.savethechildren.net/node/17792/pdf/young_voices_in_vietnam_full_report_viet_final.pdf.

childhood is different from adulthood and until the age of 18 it is a special, safe time in which children are allowed to grow, learn, play, develop and prosper with pride. The convention became the most comprehensive certified human rights treaty in history and helped transform children's lives. [19] The European Convention on Human Rights is an international treaty that only member States of the Council of Europe may sign. The Convention, which established the Court and lays down how it is to function, contains a list of the rights and guarantees which the States have undertaken to respect, among those are the right to respect for private and family life.[20] The European Convention on Human Rights has had plenty of judgments recognizing private and family life. Family relationship is connected between family members who have a blood relationship, an adoption or a marriage event. ECHR found that respect for family life did not protect the desire to start a family, but they acted as parents of children (not legally or genetically related). Therefore, in the ECHR sense, it seems that due to close social relationships, it is possible to form an adult and child family without kinship.[21]

Specifically, concerning the Hungarian law on the protection of children's property rights, the law has adequate mechanisms to ensure that children have their property and methods to protect these assets. There are several similarities between Hungarian and Vietnamese laws on parental responsibility to children's property rights.

Similarly, in Section 4:159 of The 2013 Hungarian Civil Code, parents will be restricted their rights if they destroy their children's property in the process of managing their children's assets.[22]

6. Conclusion

In summary, Children's rights in general and property rights for children are always an area that needs attention from the state, society and family because it is the future generation. Based on analyzing current regulations on parents' responsibilities for their children's property rights in Vietnam, the article has pointed out basic issues. Parents are the representatives of their children's property if the children are minors or have reached adulthood but have lost their civil act capacity. However, not all children need the consent of their parents when making transactions with their property if the transactions are appropriate for their age and the necessity of such transactions. Real-life shows that, sometimes, when parents exercise the right to manage and dispose of their children's private property, it can lead to the destruction of their children's property through detection and request by individuals or

[19] "What Is the Convention on the Rights of the Child? | UNICEF," accessed May 28, 2021, https://www.unicef.org/child-rights-convention/what-is-the-convention.

[20] European Court of Human Rights and Council of Europe, "Questions and Answers European Court of Human Rights," 2018, 9, https://www.echr.coe.int/Documents/Questions_Answers_ENG.pdf.

[21] Fareda Banda and John Eekelaar, "International Conceptions of the Family," *International and Comparative Law Quarterly* 66, no. 4 (2017): 833–62, https://doi.org/10.1017/S0020589317000288.

[22] Section 4:155 -4:163 of The 2013 Hungary Civil Code– Book Four (Family Law)

organizations. However, the relationship between parents and children within the narrow and private scope of the modern family model can hardly allow other individuals and organizations to protect the children. Therefore, it is always necessary to strengthen propaganda and dissemination of the law to help communities, families and children understand their rights and responsibilities. From the perspective of comparative law, there does not seem to be too much difference between national, regional, and international laws in the spirit of protecting children's property rights.

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Olena Demchenko* – Legal framework applicable to the developer versus user relationships in the gaming industry

Reviewer: Dr. László Gergely Szőke PhD.

Abstract:

The present paper explains existing the legal approach to the in-game transactions and developer versus user relationships in gaming industry, particularly, focusing on the pros and cons of the intellectual property rights framework application to both game access aquisition and in-game transactions. The present research examines the nature of legal relationships between the game developer and the user and uses the actual examples from popular video games, valid End User Licence Agreements, international and European case-law and provisions of the European legal regulations. The present paper focuses on gaps in existing legal procedures regulating (or not regulating) transactions on virtual items, stresses on the necessity of new legal models application in the gaming industry and underlines the importance of amendments to current European legislation with the focus on video games commoditisation in order to protect consumer rights, free movement of digital goods and to secure European public policy.

Keywords: video games, electronic commerce, intellectual property, derivative works

1. Introduction

A virtual world is an online community taking place in a three-dimensional simulated physical space.[1] The participants of a virtual world use it to socialize, take part in adventures, network, play, or even work.[2] Virtual worlds are used not only for entertainment, but as well as for military training, medical treatment, and e-commerce.[3]

Free-to-play virtual world games, or massively multiplayer online games, share characteristics with traditional computer software games: the virtual environment is represented graphically on a computer monitor, however, unlike traditional single-player free-to-play or pay-to-play video games, virtual worlds allow users to customize their avatar's appearance and participate in social interaction.[4]

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[1] Joshua Fairfield, , "Anti-Social Contracts: The Contractual Governance of Virtual Worlds", *McGill Law Journal*, Vol. 53, 2008, Washington & Lee Legal Studies Paper No. 2007-20, https://ssrn.com/abstract=1002997.

[2] Ibid.

[3] Ibid.

[4] Erez Reuveni, , "On Virtual Worlds: Copyright and Contract at the Dawn of the Virtual Age", Indiana Law Journal, Vol. 82, No. 261, 2007, https://ssrn.com/abstract=1113334.

The border between virtual and "real life" worlds is not so clear in the modern society. In virtual world users create new electronic identity, economic activity in the virtual worlds affects "real life" economy.[5] There are various business models in the virtual world – customers invest "real life" money into virtual world in order to obtain intangible virtual items, or convert virtual world currency, tokens into "real life" money to earn for living.[6] For example, a player sold virtual property for more than half of million U.S. dollars[7]. Some countries, (for example, Korea and China), classify crimes in a virtual world are as cyber crimes and investigated it in a "real life".[8]

Notwithstanding the variety of technological solutions for the video games available in the market, for example, Blockchain-based video games like CryptoKitties[9], massively multiplayer 3D online games like AceOnline[10], augmented reality games like PokemonGo[11], from the legal perspective all video games are regulated based on the provisions stated in the End User Licence Agreement (hereinafter referred to as - the "EULA").

Apart of the regulation of contractual relationships between "real life" parties – trader and the consumer – majority of EULAs are regulating virtual world rights and obligations. The EULA would partially regulate software licensing rights and obligations and partially social behaviour between parties.[12]

The present paper will examine legal approach to the gaming company versus consumer relationships including but not limited to the doctrine view and the legal regulations applicable to the EULA as well as post-contractual relationships, such as in-game transactions. The author will use example from the existing video game EULAs in order to analyse the applicable legal norms and to determine the legal nature of developer versus user relationships in video games available in the market.

Considering the specific features and the position of video games e-commerce, it is important to understand where is the place of virtual items traded in virtual world on online platforms in existing legal framework in order to protect consumers, to secure rights of minors and to support the European Digital Single Market Strategy.

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[5] Fairfield, 'Anti-Social Contracts: The Contractual Governance of Virtual Worlds'.

[6] Ibid.

[7] Oliver Chiang, , "Meet The Man Who Just Made A Half Million From The Sale Of Virtual Property", *Forbes*, November 13, 2010, https://www.forbes.com/sites/oliverchiang/2010/11/13/meet-the-man-who-just-made-a-cool-half-million-from-the-sale-of-virtual-property/#5a2e766c21cd.

[8] Mark Ward,. 'Does Virtual Crime Need Real Justice?', *BBC New*s, September 29, 2003, http://news.bbc.co.uk/2/hi/technology/3138456.stm; Knight, Will, 'Gamer Wins Back Virtual Booty in Court Battle', *New Scientist*, December 23, 2003, http://www.newscientist.com/article/dn4510-gamer-wins-back-virtualbooty-in-court-battle.html.

[9] Information on CryptoKitties video game: https://www.cryptokitties.co/

[10] Information on AceOnline video game: https://ace.subagames.com/

[11] Information on PokemonGo video game: https://pokemongolive.com/en/

[12] Fairfield, "Anti-Social Contracts: The Contractual Governance of Virtual Worlds"

2. Current regulation or intellectual property law approach

The access to video game is granted through accepting standard term contract – EULA. [13] Standard EULA or "Terms of Service" agreement has mixed nature involving characteristics of different types of contracts - EULA can include instruments transferring property, license on intellectual property rights and characteristics of a purchase or service provision agreements, therefore, during the practical legal application different views on the law applicable are possible[14]. In majority of the cases, the virtual-world EULAs intend to create pseudo-property, pseudo-tort, and even pseudo-constitutional and pseudo-criminal systems out of a standard term contracts regulating not only intellectual property rights, but as well social behaviour and property rights.[15]

Indeed, virtual items, including virtual in-game currency, which were created by the video game company (the developer), are usually considered as intellectual property of this company. For example, according to EULA of the Rocket League video game company, the trader grants:

"…the nonexclusive, non-transferable, non-sublicensable, limited and revocable right and license to use Virtual Currency and Virtual Goods obtained by you for your personal non-commercial gameplay exclusively within the Software. Except as otherwise prohibited by applicable law, Virtual Currency and Virtual Goods obtained by you are licensed to you, and you hereby acknowledge that no title or ownership in or to Virtual Currency and Virtual Goods is being transferred or assigned hereunder. This Agreement should not be construed as a sale of any rights in Virtual Currency and Virtual Goods. [16]"

The gaming company provides no property rights to virtual goods created, purchased or obtained on the video game platform by user. Moreover, on conditions usually prescribed in the EULA, the developers can on their own consideration delete purchased property or exclude player from the game[17]. When the player spends 6 million U.S. dollars for a virtual item (example discussed above), and such player is facing the risk of being deleted from the game, the risk of non-delivery of item and

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[13] Ibid.

[14] Christina Mulligan, "Licenses and the Property/Contract Interface", *Indiana Law Journal* Vol. 93 : Iss. 4 , (Winter 2018) Article 4.; Brooklyn Law School, Legal Studies Paper No. 544, December 2017, https://ssrn.com/abstract=2987325.

[15] Fairfield, "Anti-Social Contracts: The Contractual Governance of Virtual Worlds"; Joshua Fairfield, , "Virtual Property", *Boston University Law Review*, Vol. 85, 2005, *Indiana Legal Studies Research Paper* No. 35, at: 1050, https://ssrn.com/abstract=807966;
Jennifer Z. Gong,"Defining and Addressing Virtual Property in International Treaties", Boston University *School of Law Journal of Science & Technology Law* ., Vol. 17, (2015), at: 20, https://www.bu.edu/jostl/files/2015/02/Gong_Web_171.pdf;
Julian Simon Stein, "The Legal Nature of Video Games – Adapting Copyright Law to Multimedia", *Press Start*, Vol 2, No 1, (2015), at: 44, https://press-start.gla.ac.uk/index.php/press-start/article/view/25/11.

[16] EULA of the RocketLeague, https://www.rocketleague.com/eula/.

[17] Brian Ashcraft, "China's first 'virtual property' insurance launched", July 07, 2011 https://kotaku.com/5818906/china-launches-virtual-property-insurance.

the risk of the destruction of such item due to event in the game or sole decision of the developer. Such situation can be considered as a violation of consumer rights and e-commerce regulations.

2.1. Intellectual property on virtual items

The existing intellectual property law approach to regulate developer-user relationships was doubted in a court. In well known Atari, Inc. versus Amusement World, Inc historical case, the US court held that certain visual component of the work could not fall under the copyright protection framework.[18] Indeed, in 1981 the video game elements were more an engineering work than a creative work. However, almost 30 years later in United States versus Clark case, the court ruled similarly.[19]

In United States versus Clark case the defendant "stole" in-game tokens (intangible virtual items) from EA Games Company.[20] In the present case, the issue of monetary value of in-game tokens and intellectual property for particular virtual items was examined by the court. In order to prove fraud, the developer has to claim that the revenue was lost by the gaming company as a result of the defendants action, however in FIFA's (video game discussed in the present case) EULA the gaming company stated that virtual items has no monetary value[21]. Therefore, the gaming company claimed that revenue was lost as a result of a player's actions, when he acquired the intangible virtual items without paying the remuneration cost, however, the binding "Terms of Service" agreement, concluded between the player and the gaming company, directly stated that such intangible virtual items has no monetary value in the respect to the trader versus consumer relationships. Therefore, it can be seen, that gaming companies de facto obtain remuneration from in-game transactions as for digital service consumer contract, but de jure are trying to hide behind intellectual property law provisions.

In the discussed case, EA Games failed to prove that FIFA in-game tokens constitute its intellectual property, as no trademark, copyright or patent evidence particularly for such tokens was provided by the company[22]. Therefore, the intellectual property approach towards intangible virtual items sold on gaming platforms cannot reflect the realities of such legal relationships and cannot protect the rights of the both parties – the trader, in cases like the above mentioned, when the intangible virtual items are acquired by the users without paying the price of the contact, or the consumer, in cases, when the intangible virtual item is defected, not in conformity with the contract or has different functionality then described in the advertisement by the gaming company.

On the other hand, the virtual reality and video games, indeed, include the element of creativity and fall under the intellectual property law protection framework. Indeed,

[18] "Atari, Inc. v. Amusement World, Inc." Civ. No. Y-81-803, November 27, 1981, accessed: https://casetext.com/case/atari-inc-v-amusement-world-inc#.VAdFllWSxv4.

[19] United States v. Clark, o. 4:16-cr-00205-O, 2016, accessed: August 08, 2019 https://regmedia.co.uk/2016/11/14/fifafraudindictment.pdf,

[20] Ibid.

[21] Ibid.

[22] Ibid.

there are views that virtual world per se can be copyright protected works. For example, in Atari Games Corp. versus Oman case, the court held that a video game can be considered as a copyright protected compilation of audiovisual elements.[23] In Nintendo of Am., Inc. versus Elcon Indus case, the court stated that the computer-operated graphical elements, backgrounds, non-user created elements of a virtual world can be considered as copyrighted works.[24] Therefore, the virtual world as a whole can be considered as an original copyrighted work created by the video game developer that is falling under the scope of intellectual property law protection.
Copyright protection of a virtual world as a whole is not resulting of a copyright protection of its separate elements, including virtual items and virtual tokens - elements which trigger the most disputes in free-to-play video games as obtained by players in exchange for fiat money (see above FIFA case). As well as the user content should be excluded from such copyright protection and can be considered as derivative work, which will be explained further.

2.2. Creative element in video games

There is a widely accepted approach to treat video games as computer software, which can be explained following the Atari, Inc. versus Amusement World, Inc. case. In this case video game was considered by a court as an engineering work done by developers as in majority of times such a code is not an original work, but was already used previously (for example, Battlefield and Need for Speed: the Run video games share the same source code).[25] Thus, apart the originality of audiovisual content in a game, or a visual representation of virtual elements in a game, the originality of a game code should be assessed.
In accordance with the provisions of the Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, computer software and its preparatory design material is protected as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works subject to originality of such a software or a program.[26]

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[23] Case Atari Games Corp. v. Oman, 979 F.2d 242, 247, D.C. Cir. 1992, accessed:? https://casetext.com/case/atari-games-corp-v-oman.
[24] Case Nintendo of Am., Inc. v. Elcon Indus., 564 F. Supp. 937, 943, accessed:? https://law.justia.com/cases/federal/district-courts/FSupp/564/937/1407344/.
[25] Andy Ramos, et al., "The Legal Status of Video Games: Comparative Analysis in National Approaches", WIPO study, July 29, 2013 https://www.wipo.int/export/sites/www/copyright/en/activities/pdf/comparative_analysis_on_video_games.pdf. Ramos, Andy, de la Haza, Gil, 'Video Games: Computer Programs or Creative Works?', Bardají & Honrado, Abogados, Madrid, Spain, WIPO magazine, 2014, https://www.wipo.int/wipo_magazine/en/2014/04/article_0006.html.
[26] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version) (Text with EEA relevance), OJ L 111, 5.5.2009, p. 16–22; 'Copyright Law in the EU, Salient features of copyright law across the EU Member States', European Parliamentary Research Service, Comparative Law Library Unit, June 2018 - PE 625.126,

Therefore, originality is a crucial element in order to classify a game or gaming element (for example, virtual goods) as intellectual property of a game developer.
Generally, video games can include following creative elements:[27]

- Audiovisual elements:
  - Animation;
  - Images;
  - Sound recordings;
- Computer code:
  - Source code;
  - Ancillary code;
  - Plug-ins.

While assessing audiovisual or graphical content on a subject of derivative work can be an easier case due to the visual or audio resemblance of derivative work to the original, with computer codes or software the situation is different.
Based on the findings of the Nova Productions Limited versus Mazooma Games Limited & Others case, the court stated that not all elements of the game are covered under the copyrights protection framework as most if not every work derives from another work, particularly, there is no effective protection for games against copying of the game where a party copies the rules of a game but not its graphics.[28] The above-described approach focusing on unique creativity of each element of the game is valid not only for audiovisual elements of the game (its graphics), but as well for gaming software (its computer code).
In the United States (Computer Associates International versus Altai case) the abstraction-filtration-comparison approach (or a creativity test) was developed in order to determine whether particular software elements were copied.[29] Later the same method was used in Europe in Sonera Systems Oy versus VF Partner Oy case.[30]
The abstraction-filtration-comparison approach consists of three steps:

1) Abstraction – the elements of a computer software is extracted in a reverse manner in order to map sequence of developer's actions while creating a computer code;

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https://www.europarl.europa.eu/RegData/etudes/STUD/2018/625126/EPRS_STU(2018)625126_EN.pdf.

[27] Ramos et al., "The Legal Status of Video Games: Comparative Analysis in National Approaches"; van der Velden, Stephan. "Playing the game of video game classification Game Over for Europe?", Master Thesis 2016 – 2017, Tilburg University, Faculty of Law, LL.M. Law and Technology, https://arno.uvt.nl/show.cgi?fid=144375.

[28] Case Nova Productions Limited v. Mazooma Games Limited & Others, 2007, EWCA Civ 219, para 31, accessed? https://www.casemine.com/judgement/uk/5a8ff71260d03e7f57ea71d6.

[29] Case Computer Associates International v. Altai, 1992, 982 F.2d 693, 2d Cir., accessed? https://caselaw.findlaw.com/us-2nd-circuit/1233733.html

[30] Case 3571, Sonera Systems Oy v. VF Partner Oy, (1999), R 99/661; Ave-Liis Saluveer, , "The Concept of Derivative Works Under the European Copyright Law in Relation to the Digital Era: Free and Open Source Software Licencing", (Master Thesis, Lund University, 2014), http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=4461961&fileOId=4461970.

2) Filtration – the substantial elements of the computer code are filtered in order to exclude code elements that are dictated by the external factors, interface etc.;
3) Comparison – the substantial code elements of an original work are compared to the substantial code elements of the allegedly infringing work.[31]

Thus, in order to determine whether particular video game element is protected under the intellectual property protection framework, the element of originality and creativity or each separate element needs to be accessed.[32]

2.3. User-created content

Most of the virtual items are created on virtual platforms by the developer and exist only on these virtual platforms, however, in some video games virtual items can be created by users (for example, skins) or third parties (market places for virtual items). Developers create a virtual word base and the players can populate such a world with virtual items and own-made avatars.[33] Interaction between user-made and developer-made game elements is fluid and continuous.[34] In such cases, if to regulate all in-game relationships applying the intellectual property rights framework it is unclear who will have the intellectual property rights related to particular virtual objects.

Following the intellectual property law approach, the binary nature of intellectual property rights requires strict determination of the copyright owner or author and a copier.[35] Indeed, there are legal provisions regarding collaborative authorship, however, in shared authorship the creative work is representing final element that is copyrights protected, however, in video games where the virtual world is constantly evolving with an input from both developer and mass of users, there is no final creative work produced.[36] Therefore, the collaborative nature of creative elements in a virtual world does not fit in such a binary framework of intellectual property rights approach.[37]

There is a view in the doctrine, that the above-mentioned collaboration can be explained through derivative works concept.[38] The term of "derivative works" is initially coming from the legal framework of the United States and is defined as the "*work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, consideration, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial*

[31] Case Computer Associates International v. Altai;
Saluveer, "The Concept of Derivative Works Under the European Copyright Law in Relation to the Digital Era: Free and Open Source Software Licencing".
[32] Ramos et al., "The Legal Status of Video Games: Comparative Analysis in National Approaches"; Andy Ramos Gil de la Haza, "Video Games: Computer Programs or Creative Works?"
[33] Reuveni, "On Virtual Worlds: Copyright and Contract at the Dawn of the Virtual Age"
[34] Ibid.
[35] Ibid.
[36] Ibid.
[37] Ibid.
[38] Ibid.

revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a derivative work".[39]

At the same time, according to the Berne Convention for the Protection of Literary and Artistic Works, "*translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work*."[40]

While issuing guidance to the previous European Copyright Directive, the Foundation of Information Policy Research defined the derivative works as works that were based on the original work, on the elements of the original work or any other pre-existing works, existing in any form in which the original work may be "*recast, transformed or adapted*".[41]

The original author (the game developer in our case) of the code entitles secondary creator (players) to develop creative elements of the game based on the developer's code. However, even following derivative work concept in such a case is not sufficient to regulate all rights and obligations arising from the game participation. In derivative work a rightful owner of the original work, thus, a developer, needs to grant permission to the secondary creator to use original work in order to create a derivative work, and such permission would give full scope of independent intellectual property rights for the derivative work to the secondary owner.[42] When a secondary creator utilizes original creative work (game code) without the permission the secondary creator loses any rights to the new work.[43]

Thus, a player who creates derivative work (new avatar, for example, skin of virtual weapon) based on the permission granted by the developer, has a right to forbid a developer or any third party to use such a derivative work or use this derivative work on its own discretion. However, the complexity of a case influences that fact that such a derivative work can exist on or on particular video game platform solely or in connection to such a gaming platform, and the fact that majority of EULAs, indeed, make users to abolish any rights on a derivative works created while using gaming platform.

For example, Blizzard Entertainment EULA states:

"*You hereby grant Blizzard a perpetual, irrevocable, worldwide, fully paid up, non-exclusive, sub-licensable, right and license to exploit the User Content and all elements thereof, in any and all media, formats and forms, known now or hereafter*

[39] U.S Code Title 17 Chapter 1 § 101.; Saluveer, "The Concept of Derivative Works Under the European Copyright Law in Relation to the Digital Era: Free and Open Source Software Licencing".

[40] Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979), WIPO Lex No. TRT/BERNE/001.

[41] Ian Brown, "Implementing the EU Copyright Directive", (Foundation for Information Policy Research, 2003), http://www.fipr.org/copyright/guide/eucd-guide.pdf; Saluveer, "The Concept of Derivative Works Under the European Copyright Law in Relation to the Digital Era: Free and Open Source Software Licencing".

[42] Reuveni, '"On Virtual Worlds: Copyright and Contract at the Dawn of the Virtual Age".

[43] Ibid.

devised… Blizzard may remove any User Content and any related content or elements from the Platform at its sole discretion".[44]

The above-mentioned provisions are included in a standard form one-click contract that a player signs in order to access the game before creating any derivative works or secondary content. Such a mass EULAs provisions cannot fulfil players expectations in guaranteed minimum of the intellectual property rights protection and consumer guarantees, which will be investigated further in chapter III of the present thesis following the reasons explained in the part on the property law approach of the present chapter.

Notwithstanding the above-explained derivative works concept approach, the specific of derivative works in software contracts should be taken into account as well (based on the dual nature of the video game as (1) audiovisual content or (2) software, as explained above)[45].

According to the Directive 2009/24/EC of the European Parliament and of the Council on the legal protection of computer programs, the computer program is aimed "*to communicate and work together with other components of a computer system and with users and, for this purpose, a logical and, where appropriate, physical interconnection and interaction is required to permit all elements of software and hardware to work with other software and hardware and with users in all the ways in which they are intended to function*"[46]. The directive states that unauthorised creation of a derivative work based on a computer code forming computer software (i.e. unauthorised reproduction, translation, adaptation or transformation of the form of the code) should be considered as an infringement of the exclusive rights of the code author, nevertheless, derivative works that are created in order to achieve the interoperability of an independently created program with other programs do not require such an authorisation.[47]

If to consider a video game as particular software, the interaction with players is a part of a video game and a required functionality of such software. Any interaction with such a gaming code, for example, creating user content in a particular game, when a functionality of such a game permits and encourages such user behaviour, would be considered as a derivative work that does not require authorisation, as such an authorisation already allowed by the functionality of the game.

Thus, even if de jure EULA forbids any derivative works, however, de facto the gaming interface explicitly allows and encourages such creation, the permission for derivative works should be considered as granted one. Moreover if the EULA forbids any derivative work creation and the gaming interface do not explicitly forbids such a creation, the permission should not be required as long as the elements of the original work do not prevail in the derivative work.[48]

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[44] "Blizzard Entertainment EULA", accessed:? https://www.blizzard.com/en-gb/legal/fba4d00f-c7e4-4883-b8b9-1b4500a402ea/blizzard-end-user-license-agreement

[45] Ramos et al., "The Legal Status of Video Games: Comparative Analysis in National Approaches'; Ramos, de la Haza, 'Video Games: Computer Programs or Creative Works?".

[46] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs. link?

[47] Ibid.

[48] Reuveni, "On Virtual Worlds: Copyright and Contract at the Dawn of the Virtual Age".

Following the utilitarian theory introduced by Jeremy Bentham, the right action is understood entirely in terms of consequences resulted.[49] Based on the utilitarian view, one way to maximize the overall good is to consider the good of others as own good.[50] The game developers benefit from the collaborative nature of virtual worlds – an addition of new creative virtual items populates particular virtual world[51] and attracts new users, thus, a revenue income for game providers as well. Having fewer creative collaborative contributions to the virtual world, the overall public benefit of such collaborative contributions would results in a diminishing effect to the overall public good.[52] Therefore, the utilitarian theory endorses of copyrights granting to players to facilitate collaborative nature of virtual world and to maximize the result for the public good.

Additionally, the element of creativity in user created content should be assessed in order to understand whether specific element of a virtual world can fall under the intellectual property rights protection framework. For example, taking the player's avatar creation, following the abstraction test principle used in Nichols versus Universal Pictures historical case,[53] it can be concluded that the more general and abstract the avatar is, the more likely the avatar is only an idea than a copyrightable expression.[54] In order particular player's avatar to be considered as creative work, specific distinguishing characteristics - i.e. story behind the character or distinguishable graphic representation – should be present.[55]

Taking into account collaborative nature of a virtual world in reality it is very complicated to distinguish in the element of creativity of each player in the scope of the gaming interface or particular virtual world. Generally, the players have limited selection of avatar appearance choices and several avatars can look the same whining one virtual game. Therefore, the element of creativity in graphics of particular avatar will be absent and no copyright protection can be granted, unless specific story is behind particular character (for example, John Neverdie, as explained above, can be considered as copyrighted character) or unless game providers are not offering extensive number of design possibilities that allow unique creativity (for example, City of Villains video game allows staggering range or player's appearances)[56]. At the same time, if game interface allows player own character design (apart of selected appearances pre-defined in a game), such avatar can be considered as creative graphical work and fall under the intellectual property protection framework.

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[49] Jeremy Bentham, , "An Introduction to the Principles of Morals and Legislation", (1781 ed.), https://www.reed.edu/humanities/hum220/syllabus/2010-11/Bentham-Principles.pdf.

[50], F. Gregory Lastowka, Dan Hunter, , "The Laws of the Virtual Worlds", *California Law Review* (January 2004) Vol 92 No. 1, 72.; Bentham, "An Introduction to the Principles of Morals and Legislation".

[51] Reuveni, "On Virtual Worlds: Copyright and Contract at the Dawn of the Virtual Age".

[52] Ibid; Lastowka, Hunter, "The Laws of the Virtual Worlds".

[53] Nichols v. Universal Pictures, Corp., 45 F.2d 119, 121, 2d Cir. 1930, https://cyber.harvard.edu/people/tfisher/IP/1930%20Nichols.pdf

[54] Reuveni, "On Virtual Worlds: Copyright and Contract at the Dawn of the Virtual Age".

[55] Ibid.

[56] City of Villains discription, accessed: ?: http://www.cityofvillains.com/gameinfo/synopsis.html.

It can be concluded that the majority of game developers took in account the creative nature of user content and made a step further regulating in the standard terms EULA transfer of the exclusive rights for derivative work back to the developer by each video game user (see above Blizzard Entertainment EULA provisions). Fewer game developers, indeed, allow players limited freedom in the intellectual rights protection by regulating access right to the user content in a particular game. For example, Linden Lab EULA ("Second Life" video game) states:

"*If you do not wish to grant users of Second Life a User Content License, you agree that it is your obligation to avoid displaying or making available your Content to other users. For example, an island or estate holder may use Virtual Land tools to limit or restrict other users' access to the Virtual Land and thus the Content on the Virtual Land*."[57]

The scope of intellectual property rights protection defined in each EULA has a dual nature regulating not only developer to user copyrights transfer, but also a user to developer intellectual property rights transfer:

(1) the developer grants non-exclusive intellectual property rights to each player that subscribes to a game participation;
(2) each player that creates any derivative work grants exclusive right for such a derivative content to a game developer;
(3) in limited scenarios video game interface can allow players to execute their intellectual property rights and grant non-exclusive rights for derivative works created in virtual world to other users.

3. Conclusions

Considering the complexity of virtual worlds, collaborative nature of majority of video games and monetisation of in-game virtual items, sole intellectual property approach towards gaming company versus consumer relationships cannot fit all parties' needs and cannot effectively manage all spectrum of gaming industry specific legal relationships. Indeed, intellectual property relationships in video games need to be regulated in order to provide the expected level of copyright protection both for developers and for players when a gaming interface allows creativity, however, standard terms EULA created by a game developer should be accepted only in pay-to-play video games with limited gaming interface that does not allow collaborative nature of virtual world creation.

Intellectual property rights protection framework can be applicable on the stage of video game access acquisition by a player (notwithstanding the medium of representation) regulating third party gaming platform access, copy creation and other copyrights resulting from access to video game per se. However, further relationships, micro transactions, user content creation cannot be regulated solely under framework licensing agreement. Therefore, a different approach towards virtual property and complex virtual worlds should be taken into account in order to protect the rights of consumers and to secure European Digital Single Market Strategy.

[57] LindenLab EULA, available at: https://www.lindenlab.com/legal/second-life-terms-and-conditions.

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Szabolcs Diósi* – Behaviorally informed regulations- an emerging trend in modern public policymaking

Reviewer: Dr. habil. Gábor Szabó PhD.

Abstract:

In 2008, following the publication of Richard Thaler and Cass Sunstein's influential book 'Nudge: Improving Decisions About Health, Wealth, and Happiness', a new wave of academic discourse started to formulate around well-established public policymaking practices. Heavily influenced by the findings of modern behavioral sciences, Thaler and Sunstein moved away from prevailing neoclassical economic theories and introduced their novel, empirically grounded, behaviorally informed public policymaking approach; libertarian paternalism. The authors claim that even though various biases, mental shortcomings, and cognitive limitations influence human decision-making, the very process of reaching a decision can still be predictable. By utilizing cognitive flaws, it is possible – without limiting one's freedom– to consciously design choice environments that are able to steer people's decisions into certain desired directions. They conclude that these behaviorally informed regulations - often referred to as nudges, e.g., default rules, automatic enrollment policies, smart disclosures - could become effective, freedom-preserving, cost-saving alternatives to old conventional policymaking strategies primarily relying on bans, commands, and coercion. This paper attempts to provide a detailed picture of the general nature of nudges, explore how different governments have implemented such behaviorally informed policies during the previous decade, and explore the possible challenges liberal paternalism might face in the future.

Keywords: liberal paternalism, behaviorally informed regulations, public policymaking

1. The old myth of the rational agent

Today, most public policy is still designed through the lens of the neoclassical economic perspective, which sees the subjects of policies as rational agents (homo

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economicus).[1] According to this view, people can make well-informed, conscious decisions most of the time. They are knowledgeable and possess all necessary information relevant to their specific situation. They handle probabilities and contradictions well and are able to carry out detailed analyses before making a decision. They also plan ahead and consider both short-term and long-term consequences when making decisions.[2]

Contrary to this view, however, modern behavioral sciences – most notably behavioral economics and cognitive psychology – revealed that real decision-making differs from this rational agent model in many aspects. Due to inherent cognitive flaws and the general complexity of most choice environments, people do not make rational decisions most of the time. As people's cognitive capacities are flawed and limited in their nature, biases, heuristics, and mental shortcomings play a big part in decision-making; much of it occurs subconsciously, passively, and without self-reflection.[3] Modern behavioral sciences also revealed that human conduct is highly context-dependent: the environment in which people decide heavily influences the outcome of the decision-making process. Since context matters a great deal, the way how existing laws, institutions are perceived plays a central role in shaping people's behavior. Since people often make poor, irrational decisions that are not aligned with their best interests, policymakers constantly seek better strategies to design public policies that are more able to assist citizens in attaining their preferred goals. An alternative approach to classic policymaking has been formulated during the last two decades, which by applying behaviorally informed regulations (also known as nudges), advocates for a different view on individual behavior and offers novel practices in regulating human conduct. This new model of public policies aims to use the inherent limitations of cognitive capacities for the benefit of people.

If policymakers better understand how decision-making works and what are the default ways of people's thinking and behavior, they can design instruments that bring more preferable outcomes. As conventional policymaking and public policies, most of the time, still rely on traditional bans and commands (backed by explicit coercive sanctions)[4] from a public policy perspective, this new approach may also lead to improved, more personalized regulations.

Before exploring what behaviorally informed nudge regulations entail, it is worth understanding more about how cognitive flaws, biases, and heuristics actually influence human conduct.

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[1] Barr, M. S., S. Mullainathan, E. Shafir: Behaviorally Informed Regulation. In Behavioral Foundations of Public Policy, edited by E. Shafir. Princeton, Princeton University Press, 2012, p. 440.

[2] Thaler, Richard & Cass Sunstein: Nudge: Improving decisions about health, wealth and happiness. London, Penguin, 2008, p. 6-8.

[3] Kahneman, Daniel: Thinking, Fast and Slow. New York, Farrar, Straus and Giroux, 2013, p. 23.

[4] Yeung, Karen (2017): Hypernudge: Big data as a mode of regulation by design. *Information, Communication and Society*, Vol.20(3), pp. 123.

2. The human decision-making process

2.1 Dual Process Theory

Perhaps the most famous and widely adopted theory of modern behavioral science was popularised by Daniel Kahneman in his influential book Thinking, Fast and Slow. Kahneman's Dual Process Theory asserts that the human brain operates under two distinctive modes of cognitive thinking: System 1, which *'operates automatically and quickly, with little or no effort and no sense of voluntary control*' and System 2 that *'allocates attention to the effortful mental activities that demand it, including complex computation'*.[5][6] System 1 is generally driven by -subconscious- habits and automatic responses: It *leads you when you duck because a ball is thrown at you unexpectedly or smile when you see a cute puppy*.[7] In contrast, System 2 feels more like a carefully calculating computer; its operation is slower, more deliberate, and aware of probabilities: It can help *fill out a tax form*[8] or help decide *which route to take for a trip and whether to go to law school or business school*.[9] System 2 thinking is the one responsible for the thorough assessments of future plans as well as their conscious implementation. Even though the feeling of a subjective agent is connected to System 2 thinking, the process of articulating an opinion and reaching a decision relies heavily on System 1. Without conscious perception, the automatic pilot mode intuitively judges, assess, and prioritizes what information constitutes significant or relevant in a decision. In this sense, System 2 thinking is often led by its counterpart; only after the input was received makes an effort to endorse or rationalize ideas and feelings generated by System 1.[10] The danger here stems from the fact that System 1 thinking is much more vulnerable to cognitive errors. Due to its automatic and fast operation mode - to take many decisions a day with minimal effort and to save limited attentional resources[11] - it is inclined to use shortcuts and heuristics, which opens up a possibility to various types of cognitive errors and biases, undermining one's chances to reach rational, welfare serving decisions.

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[5] Kahneman, Daniel: Thinking, Fast and Slow. New York, Farrar, Straus and Giroux, 2013, p. 16-17.

[6] A more 'scientific' approach would formulate it as: System 1 thinking is linked to the amygdala of the human brain; as it is responsible to various automatic processes and feelings in the body. System 2 thinking on the other hand is associated with the prefrontal cortex region of the brain: a more developed part which is associated with thorough deliberation.

[7] Thaler, Richard & Cass Sunstein: Nudge: Improving decisions about health, wealth and happiness. London, Penguin, 2008, p. 19.

[8] Kahneman, Daniel: Thinking, Fast and Slow. New York, Farrar, Straus and Giroux, 2013, p. 20.

[9] Thaler, Richard & Cass Sunstein: Nudge: Improving decisions about health, wealth and happiness. London, Penguin, 2008, p. 20.

[10] Kahneman, Daniel: Thinking, Fast and Slow. New York, Farrar, Straus and Giroux, 2013, p. 450.

[11] Opinion of the European Economic and Social Committee on 'Towards applying Nudge Thinking to EU Policies'. *Official Journal of the European Union*. Vol. 60, 2017/C 075/05, pp. 28-33.

The fundamental processes of how biases and heuristics can affect decision-making were established more than four decades ago.[12] Since then, rapid advances in behavioral science and cognitive psychology have helped uncover much about mental flaws and shortcomings.[13] Since it is beyond the scope of this paper to elaborate on all of them, only a few related to the topic will be introduced here.

2.2. Cognitive errors, biases, and other shortcomings of the 'rational' mind

Contrary to the rational agent model, people in a decision-making situation are never fully equipped with all necessary information, nor do they entirely comprehend the actual relevance or short term/long term implications of the information they possess.[14] For instance, a cognitive bias called *hyperbolic discounting* impacts people's ability to assess short-term/long-term goals objectively. It reveals a general tendency of choosing immediate rewards over rewards that come later in the future.[15] Consequently, people tend to make choices with short-term net benefits and long-term net costs; they choose the more attractive present option regardless of its long-term future ramification, which often ends up pursuing various health risking behavior (e.g. smoking cigarettes).[16] Another cognitive flaw, called *availability heuristics*, is linked to the accessibility of information in people's minds. If an event or a piece of information is cognitively available and accessible from memories, people might overestimate its significance or the frequency of its occurrence, and if it's not accessible, they tend to underestimate its weight and probability.[17] That's why recent events or vivid, easily imaginable scenarios impact people's behavior and preferences more than their less explicit counterparts. As Thaler and Sunstein write, graphic causes of death like a tornado often cause greater fear in people's minds than less vivid ones, like an asthma attack, even though its occurrence is significantly lower.[18] Just like hyperbolic discounting, this bias heavily influences people's risk-related behaviors.

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[12] Daniel Kahneman and Amos Tversky (1981): The framing of decisions and the psychology of choice. *Science*. Vol. 211, pp. 453–458.

[13] To list a few: bandwagon effect, choice-supportive bias, clustering illusion, conformation bias, ostrich effect, placebo effect, present bias, reverse effect, selective perception, stereotyping, priming effect, etc.

[14] According to decisional conflict theory granting an overload of relevant information or having more additional options regarding a certain situation would not necessarily constitute an advantage. If there are too much information and options in a certain decisional context, adding more options or providing more information could make the process more complicated and complex, which can eventually lead people to postpone their decision.

[15] Jess Benhabib, Alberto Bisin & Andrew Schotter (2010): Present-Bias, Quasi-Hyperbolic Discounting, and Fixed Costs. *Games and Economic Behavior*. Vol. 69(2), pp. 205.

[16] Sunstein, Cass R. (2013): The Storrs Lectures: Behavioral Economics and Paternalism. *Yale Law Journal*, Vol. 122 (7), pp. 1843.

[17] Amos Tversky & Daniel Kahneman (1973):Availability: A Heuristic for Judging Frequency and Probability. *Cognitive Psychology*. Vol.5(2), pp. 207-232.

[18] Thaler, Richard & Cass Sunstein: Nudge: Improving decisions about health, wealth and happiness. London, Penguin, 2008. p. 25

According to *default mode bias*, when people have to decide on a new setting, they tend to select the one that has already been implicitly recommended or highlighted to them. In a choice environment, when more options are offered, even though the default option represents solely one of the full range of alternatives, it is still considered the most desirable. This behavior shares resemblances to *status quo bias* and *decision inertia*, which assert that people tend to favor their current position if a new decision is not straightforward. Even if it could promote their general well-being, they would be reluctant to alter their state as they tend to accept their original environment instead of making deliberate, intentional actions to change it.
Framing also shapes people's decisions to a great extent. Even when two situations are objectively the same, the way how those situations or their possible future consequences are being framed is decisive. Since people tend to be passive decision-makers, their reflective system does not always work on high alert; if a situation has already been interpreted in a certain way, checking or reframing the whole environment sometimes demands too much cognitive work.[19] In other cases, even if reframing does occur, the apparent change in the situation could provoke *cognitive dissonance*, which would lead to the desire to end the whole reflective reframing process altogether.
Lastly – and perhaps least surprisingly - most people are profoundly influenced and pressured by existing social norms. People tend to pursue certain conduct because the social environment around them deems it worthy; how other peers behave – consciously and subconsciously alike - shapes the actions of all members of a given community.

3. Introduction to nudging

In 2008, behavioral economist Richard Thaler and legal scholar Cass Sunstein published their book *Nudge: Improving Decisions About Health, Wealth, and Happiness*. The writers claimed that, albeit human decision-making is not always rational at its core, the process itself shows clear rules and patterns; thus, it can be predictable**.** By utilizing well-known biases, it is possible – without limiting one's choices options – to consciously design a *choice environment* that can successfully steer people's decisions into certain desired – welfare-promoting - directions. They called these regulations nudges and defined them as: '*...any aspect of the choice architecture that alters people's behaviour in a predictable way without forbidding any options or significantly changing their economic incentives'*.[20]
The authors refered to this new system of behaviorally informed regulations as libertarian paternalism. It is libertarian – liberty preserving – since people remain free to do what they want and can always *opt-out of undesirable arrangements* if they wish to do so. And it is paternalistic since the underlying premise of this idea suggests that it is legitimate to influence people's behavior in order to *make their lives longer, healthier, and better.* The source of legitimacy lies in the fact that nudges are designed to help orient people in the right direction and improve their decision-making for

[19] Ibid. p. 37.
[20] Ibid p. 6.

better results *as judged by the citizens.* That is, nudges help people do what they would do if they were the neoclassical rational agent equipped with unlimited cognitive abilities, willpower, and complete information regarding a given decision.
According to Thaler and Sunstein, the operation of nudge policies should be completely transparent; information about both the methods and the intentions behind them should be openly available to the public. As a standard, they cite John Rawls's publicity principle, which '*bans the government from selecting a policy that it would not be able or willing to defend publicly to its own citizens*".[21] This principle can serve as a reasonable guideline for both implementing and constraining nudges. If governments chose to enforce policies that they cannot legitimize and defend in the public's eyes, they would fail to grant citizens even the minimal standards of respect; they would treat them only as *means, not as ends.*
The concept of nudge soon became a popular subject of political, philosophical, and ethical discussions, legal and economic theorists engaged in fierce debates advocating for or against such regulatory measures. Throughout the last decade, public administrations from different parts of the world have also experimented with the idea. The newly implemented behaviorally informed regulation policies in the United States, United Kingdom, and Australia mainly aimed to help people live healthier lives, consume goods and services more sustainably, or make wiser decisions in general. The Obama administration, for instance, launched its nudge-inspired policy plan in September 2015. The initiative – titled: Using Behavioral Science Insights to Better Serve the American People – included policies on promoting retirement security, advancing economic opportunities, improving college access and affordability, assisting job seekers, and promoting health.[22] The United Kindom's Behavioural Insights Team - often referred to as Nudge-unit - aimed to find effective alternatives to traditional regulation and move towards less-restrictive and lower-cost controls of behavior.[23] They applied insights from the fields of behavioral economics and psychology to enhance energy efficiency, organ donation registration, consumer protection, and various compliance promotion strategies (e.g., tax reporting). [24]

4. Classification of nudges and real-world applications

Since *nudging* is a general term that covers a wide range of possible policy instruments, it is useful to distinguish between different types of regulation. Several distinctions can be made based on the general scope, degree of intrusiveness, target,

[21] Ibid p. 244.
[22] To read more about the US initiative (Executive Order 13707): https://www.whitehouse.gov/sites/whitehouse.gov/files/images/2016%20Social%20and%20Behavioral%20Sciences%20Team%20Annual%20Report.pdf (11 October 2021)
[23] Baldwin, R. (2014): Giving Nudge the Third Degree. *Modern Law Review*. Vol.77, pp. 831.
[24] Cabinet Office: Behavioural Insights Team: Applying behavioural insights to reduce fraud, error and debt. Aailable at: http://www.cabinetoffice.gov.uk/resource-library/behavioural-insights-team-paper-fraud-error-and-debt (8 October 2021)

visibility, and other characteristics of nudges.[25] For instance, Hagman et al. focus on the regulation's potential target by distinguishing between pro-self nudges and pro-social nudges.[26] The former aims to help people reach more improved decisions in terms of their individual life (e.g., weight loss) while the latter aims at a morel generally understood well-being of societies (e.g., sustainable consumption, recycling). Mongin and Cozic distinguished three categories of nudge policies based on their scope, means, and the desired outcome.[27] Nudge1 refers to regulatory policies that alter the choice environment in small, subtle ways, Nudge2 refers to tools that instrumentally use cognitive flaws and biases to steer the subjects of the regulation towards the desired direction, while Nudge3 regulations are designed to decrease and limit the adverse effects of cognitive flaws the human mind already possess.

Based on Kahneman's *Dual Process Theory,* Hansen and Jensen differentiated between Type1 and Type2 nudges.[28] Type1 nudges primarily focus on automatic behaviors that do not involve active deliberation nor result in conscious choices. Generally speaking, they are not engaged with reflective thinking and are more likely to operate without the decision maker's awareness (thus could be perceived as more manipulative).[29] Type2 nudges, on the other hand, are engaging with the reflective system and mainly influencing behaviors and actions stemming from thorough deliberation. They focus on decisions and choices that are more tightly linked to *self-image, ego, or reflected long-term preferences*.[30] Hansen and Jensen further categorized nudges into transparent and non-transparent regulations. In the case of transparent nudges, individuals understand the intention behind a nudge policy, as well as the means and measures of its design. With non-transparent nudges, individuals are less likely to recognize the deliberate intent to provoke behavioral change, and they cannot trace back the motivations or the means behind the operation of the nudge. As Hansen and Jensen assert, non-transparent nudges are more controversial and often perceived as more intrusive, freedom-threatening than other traditional public policies.[31]

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[25] Jung, J. Y., Mellers, B. A. (2016): American attitudes toward nudges. *Judgment and Decision Making*. Vol.11(1), pp. 63.

[26] Hagman, W., Andersson, D., Västfjäll, D., & Tinghög, G. (2015): Public views on policies involving nudges. *Review of Philosophy and Psychology*. Vol.6(3), pp. 439–453.

[27] Mongin, Philippe, and Mikaël Cozic (2018): Rethinking Nudge: Not one but Three Concepts. *Behavioural Public Policy* Vol.2(1), pp.107–124.

[28] Hansen, P. G., & Jespersen, A. M. (2013): Nudge and the Manipulation of Choice: A Framework for the Responsible Use of the Nudge Approach to Behaviour Change in Public Policy. *European Journal of Risk Regulation*. Vol.1. pp. 3-28.

[29] An example of Type1 nudge would be information displayed with vivid warning signs, intense colors, and flashing lights to immediately draw the reader's attention.

[30] For instance, clear, exhaustive information on calorie labels that could make people more conscious about their decision.

[31] Hansen, P. G., & Jespersen, A. M. (2013): Nudge and the Manipulation of Choice: A Framework for the Responsible Use of the Nudge Approach to Behaviour Change in Public Policy. *European Journal of Risk Regulation*. Vol.1. pp. 22.

Although many nudge inspired behavioral regulations have been introduced successfully in recent years,[32] due to the limited scope of this paper, only two of them will be discussed in more detail here.

4.1 Default rule policies

The underlying mechanics of default rules policies rely on status quo bias, inertia, and the general human tendency for procrastination. These regulations are designed to steer people towards a predetermined choice while still fully retaining their freedom. Since people tend to choose default options - due to the aforementioned cognitive flaws - the choice environment can be constructed in favor of certain decisions. Many nudge inspired opt-in programs and automatic enrollment programs use default strategies. Through automatic donor enrolment, for instance, citizens become organ donors by default, and this status persists until they actively choose (opt put) not to be a donor anymore. Most countries use the system of *explicit consent* by which to become a donor, one has to take direct actions. In the case of an automatic enrollment system, explicit consent alters to *presumed consent*.[33] This policy presumes citizens to be consenting donors while still keeping the possibility to unregister easily accessible. Thaler and Sunstein present examples showing the effectiveness of this simple policy implementation; countries with an automatic enrollment system have significantly higher organ donor rates than countries with an opt-in system. In Germany, where the opt-in system is in practice, only 12% of citizens expressed their wish to become an organ donor, while in Austria, where automatic registration is in practice, almost all members of the population (99%) did so. [34] Various savings/retirement plans operate on the same account: the often overly complicated and burdensome decisions about saving plans lead many people to postpone their choice or to not sign up at all. Advocates of nudge policies believe that saving plans work best as a default, and it would be advisable to enroll employees automatically in a default retirement plan. Empirical data suggests that this way, the number of employees with retirement and other saving plans increases significantly.[35]

4.2 Disclosure policies

As mentioned before, the way how information is displayed in a choice environment has a significant effect on the decision outcome; various disclosure policies are

[32] Just to mention a few; Placing healthy foods at eye level in grocery stores to make them more visible, changing the order of food in buffet lines to promote healthier food choices Sending more personalised reminders (e.g. using the first name of the recipient) to citizens to encourage and remind them to subscribe to certain benefit programs. Sending information about how one's energy consumption compares to one's neighbors' (social pressure has been shown to lead to a reduction in energy use).

[33] Thaler, Richard & Cass Sunstein: Nudge: Improving decisions about health, wealth and happiness. London, Penguin, 2008, p.176.

[34] Ibid. p. 179.

[35] Sousa Lourenco J, et al.:Behavioural Insights Applied to Policy: European Report 2016. Luxembourg, Publications Office of the European Union, 2016, p. 15-32.

building on this effect. Traditional disclosure policies often fail to fully convey the information they meant to communicate due to their complexity and confusing nature. These policies aim to consciously design them in a manner that is more clear, intelligible, and able not only to convey information but to persuade people to specific behaviors.[36] Alemano and Sibony write about smart disclosure requirements that are more and more popular in public policymaking. The EU legislation leads the trend with novel regulations on tobacco products, food labeling, and financial products.[37] For instance, EU DIRECTIVE 2014/40 requires the use of graphic warnings on cigarette packages about the possible health-related consequences of smoking (*requires the display of a combined warning (graphic and pictorial) occupying 65% of the two main surfaces of the pack).*[38] Another example of smart disclosure policies in the EU legislation is REGULATION 1169/2011 on food labeling that requires to clearly and visibly display all relevant information about the nutritional content of products in '*the principle field of vision, ie. that which is most likely to be seen at first glance by the consumer at the time of purchase'*.[39]

5. Negative nudges and counter nudges

In their book, Thaler and Sunstein mainly focus on public nudges designed by public authorities whose primary goal should be to increase the population's overall well-being. However, the practice of exploiting cognitive flaws is not limited to the public sphere. Many nudges are applied in the commercial sector by private companies. Albeit not all of them, a great percentage of these aim to steer consumers' decisions towards ways that are not necessarily in favor of their best interest. Schmidt calls these behaviorally informed strategies; negative nudges.[40] Food companies, for instance, have taken advantage of people's food-related preferences for many years now. Schmidt asserts that people's relationship with food developed in an evolutionary process that was mostly grounded in a vastly different environment than today's. Since food scarcity was prevalent for a long time, people still have subconscious inclinations to consume large amounts of calories (sugary foods), making them vulnerable to clever marketing strategies and private nudges. This vulnerability and people's lack of scientific knowledge about food nutrients are a perfect combination to get consumers addicted to unhealthy processed foods rich in use salt, fat, and sugar.[41][42] Negative

[36] Sunstein, Cass R. (2013): The Storrs Lectures: Behavioral Economics and Paternalism. *Yale Law Journal*, Vol.122(7), pp. 1857.
[37] Sibony, A., & Alemanno, A.: The Emergence of Behavioural Policy-Making: A European Perspective. In A. Alemanno & A. Sibony (Eds.) Nudge and the Law: A European Perspective. London, Hart Publishing, p. 14-16.
[38] Art 10 of Directive 2014/40/EU of the European Parliament and of the Council, OJ L127/1
[39] Recital 41 of Regulation (EU) 1169/2011 of the European Parliament and of the Council, OJ L304/18
[40] Schmidt A. T. (2019): Getting Real on Rationality- Behavioral Science, Nudging, and Public Policy. *Ethics*. Vol.129(4), pp. 530.
[41] Ibid. pp. 533.
[42] A popular behavioral strategy that exploits people's innate fear of scarcity is implemented when user tracing websites display inaccurate numbers of their remained items; every time a

nudges also often appear in connection to default rules strategies; status quo bias and the general inclination to inertia are exploited by many advertisement tactics that rely on the use of pre-ticked boxes. Various media sites (sending notifications as a default setting), online traveling websites (automatic subscription to insurance services), online webshops (sending new offers every month to e-mail addresses) are using such default option technics exploiting people's tendency of not taking active measures to opt-out of the recommended options. A possible solution to this problem could be a governmental public nudge initiative that limits the usage of negative nudges (or even require companies to use helpful ones). Public authorities can design regulations – Alemano and Sibony call them counter-nudges - that can fight against manipulating behavioral strategies.[43] Existing smart disclosure requirements are good examples: If companies use deceptive labels, fonts, colors, pictures that aim to highlight healthy ingredients and conceal unhealthy ones, requirements that obligate them to display all relevant nutrients and calories information are helpful tools to protect consumers. The EU legislation on pre-ticked boxes - Article 22 of the EU Consumer Rights Directive prohibits pre-ticked boxes on e-commerce websites - serves as another effective, low-cost counter nudge policy.[44]
Although the whole concept is still relatively new, the integration of behavioral insights into public policymaking already constitutes an ambiguous project. There are many arguments for and against the wider use of such regulation. The following section attempts to explore the most relevant ones.

6. Arguments in favor of nudge policies

Most arguments advocating nudges emphasize the potential social good they can bring about. The significant amount of knowledge about how people process information, behave in certain situations, or tend to choose wrong means to achieve their ends can serve governments in helping people make better decisions and establish good, healthier habits. Moreover, behaviorally informed regulations not only preserve but potentially extend people's freedom of choice: If people were able to resist and fight against their lesser urges and inherent irrationality, they would become stronger, more independent persons with greater control over themselves.[45]
Another argument claims that nudge policies can become an easy, cost-effective alternative to many current policies. The traditional regulatory measures mostly building on command and control (bans, fines, taxation, etc.) constitute a more intrusive way to organize societies and generally represent a more significant threat to freedom. As Thaler and Sunstein write, the libertarian paternalistic model based on

potential consumers visits back the website they show less remining items to them provoking the feeling of scarcity: hence motivate the user to buy the product.
[43] Sibony, A., & Alemanno, A.: The Emergence of Behavioural Policy-Making: A European Perspective. In A. Alemanno & A. Sibony (Eds.) Nudge and the Law: A European Perspective. London, Hart Publishing, p. 2-26.
[44] Ibid. p. 11.
[45] Schmidt A. T. (2019): Getting Real on Rationality- Behavioral Science, Nudging, and Public Policy. Ethics. Vol.129(4), pp. 537.

subtle incentives and nudges has never advocated for an overreaching government. Its operation is not for *'a bigger government just for better governance'*.[46]
The third argument is related to the context-dependent nature of every decision environment. Since people's decisions can never be completely free, the notion of a nudge-free environment is a misconception that does not exist in real life.[47] Every decision is influenced by various forces (social norms, pressure or manipulation, psychological limitations, lack of information, internal bias, etc.).[48] The real question is whether to design nudges that better people's lives or leave the 'free' decision environment only to be influenced by the already existing decisional forces. In this view, nudge policies are a better, more predictable way to construct the decisional environment than random circumstances. A follow-up argument asserts that if public policies would not make use of behavioral insights, other actors would (deceptive behavioral marketing strategies and other harmful, manipulative/ exploitive negative nudges). If the governments– under full transparency as advocated – establish a nudge program, the people (the voters) can directly influence what directions those programs evolve towards. Governments could only pursue nudge policies that people would collectively endorse; through elections, citizens can exercise a certain amount of control over public officials who enact those regulations.

7. Critical view on nudges

The arguments against nudges focus on their inherent manipulative nature, threat to individual autonomy, and lack of democratic legitimacy. There is also considerable criticism of the possible emergence of a more authoritarian, coercive, paternalistic model.
The manipulative argument asserts that whenever individuals are nudged, their behavior, actions, preferences are intentionally steered towards a predictable direction that they do not necessarily approved nor are they aware of; thus, it undermines individual autonomy.[49] In this sense, the choice-preserving or transparent sides of these regulations are less relevant since the inner workings of the decision-making

[46] Thaler, Richard & Cass Sunstein: Nudge: Improving decisions about health, wealth and happiness. London, Penguin, 2008, p. 14.
[47] Besides being influenced by various factors, many choices in life have already been made for people living in a civilized society (e.g., what medicine should be allowed on the market). As Sunstein writes, this limited control over many issues could be understood as a good thing. Since people have a finite amount of time, interest, and competency; if they were forced to make all the complex decisions that influence their lives in some aspect, they would inevitably fail.
[48] Thaler, Richard & Cass Sunstein: Nudge: Improving decisions about health, wealth and happiness. London, Penguin, 2008, p. 10-11.
[49] It is important to note that albeit the concept of autonomy is tightly related to notions of free will, freedom of choice, freedom of thought etc. in its general sense, it is a richer concept than mere freedom itself: in addition to the absence of external interventions it is the clear sensation of agency over one's actions, the sensation of one is more than just an observer or slave of their feelings and desires. It also refers to the capability to reflect on/changes one's own motivations, desires, actions, preferences, and to be able to identify with the new structures continuously.

process have already been pushed towards a particular direction. Even if people are aware of nudging and comprehend its operation, it does not change the fact that the way those methods are designed makes it impossible not to be influenced by them at the moment of decision-making.

It is also often pointed out that behaviorally informed public policymaking is not compatible with modern standards of democracy. The implementation of public nudges raises concerns predominantly in terms of legitimacy, transparency, impartiality, and privacy. The notion of legitimacy is especially challenged in the cases of non-transparent nudges or nudges that bypass human cognition and awareness.[50] Another concern relates to the lack of democratic control of nudge policies. As the field of behavioral rules is still reasonably new, nudges oftentimes are not counterbalanced by democratic checks and balances.[51] Private companies, members of different behavioral teams, and public officials equipped with all available information regarding social conduct can design overly smart, non-transparent, and intrusive nudges.

It is also unclear who bears the moral and ethical accountability for the introduction of nudges. Given that public policies deliberately shape the decision-making context, nothing can ensure that the designers of such policies themselves are not subject to biases and other forces (e.g., pressure from lobby groups).[52] It is also safe to assume that public officials and policymakers are not always entirely aware of citizens' inner desires and genuine needs. Apart from clear cases, it is difficult to define what objective goals policymakers should impose on citizens. People have different goals and choose different means to achieve them. It is impossible to create behavioral policies that are universally attractive to all citizens.

Health-related policies are still considered the most straightforward in this regard. Most people support and justify more intrusive measures than simple nudges when it comes to health and general safety.[53] But there are obvious challenges in this respect as well. Suppose someone doesn't want to give up their addictions or live a healthy life and wants to engage in ongoing destructive activities. Should people be allowed to act on their own judgment? This dilemma is at the heart of the paternalistic debate.

7.1 From libertarian paternalism to authoritarian paternalism

The underlying principle of the paternalistic approach is that governments do not believe that people's choices can fully promote their well-being, and it is appropriate to take steps to influence or change people's decisions for their own benefit. The use of nudges – libertarian paternalism – generally speaking, falls into the categories of

[50] Even if the application of such tools would be transparent, Thaler and Sunstein explicitly condemnd the practice of subliminal nudging.

[51] Alemanno A., Alessandro S. (2014): Nudging legally: On the checks and balances of behavioral regulation. *International Journal of Constitutional Law*. Vol.12(2), pp. 445.

[52] Sunstein, Cass R. (2013): The Storrs Lectures: Behavioral Economics and Paternalism. *Yale Law Journal*, Vol.122(7), pp.1867.

[53] Like banning certain actions (the consumption of dangerous drugs) or imposing mandatory actions (seat belt laws, vaccination policies).

soft and *means* paternalism.[54] Soft paternalism refers to governmental actions that aim to improve people's life by influencing their choices without limiting their freedom or imposing material costs on those choices. Means paternalism is focused on helping attain a specific goal, on designing the right environment of decisions to succeed. They aim to equip people with the right set of skills to be able to reach their own ends. It accepts people's ideal outcome but does not necessarily believe they can attain it through their ways. Sunstein illustrates it with the example of a GPS device that assesses the destination its owner writes in and helps find the fastest, shortest route to that decided destination.[55] This form of paternalism does not exert too much control over individual freedom and autonomy.[56] This, however, might not be the case for long. A few scholars have raised attention to some possible unexpected ramifications of the threatening merger of behavioral insights and advancing Big Data technologies. In the 21st century, with the recent advances in informational technology, behavioral-based regulatory systems may present new challenges. The combination of novel behavioral insights, Big Data technologies, and automated algorithms - some call this fusion Hypernudge[57] - could become a tool to exert control over citizens on an unprecedented level. Hypernudge would differ from previous forms of behaviorally informed politics in several ways. First, it would be fully personalized; it could build much more accurate predictive models of the people it aims to nudge. With more data, it could identify and predict the most common biases, behaviors, preferences of citizens with complete accuracy. Second, the scope of behavioral policies can grow much broader than the current recommendations on healthy eating or retirement savings plans.[58] Third, the whole process of creating nudge policies could be automatized. The once static *choice environment*, designed to guide people's decisions towards healthier alternatives, would undergo infinite configuration and update several times a day/hour/minute.[59] If implemented with the wrong intentions, libertarian paternalism could become a new type of algorithmically driven state paternalism, in which exploiting psychological weaknesses in order to manipulate public opinion, influence votes, or change the collective behavior of societies would be commonplace. But even if there is no malicious intent to abuse, the sense of personal autonomy and independent individual decision-making about life choices might be significantly reduced. Human behavior could be regulated by a dynamically

[54] Thaler and Sustein assert that libertarian paternalism is a *relatively weak, soft and nonintrusive type of paternalism* since no options are forbidden to choose, and no overly burdensome incentives are applied in the process of steering people choices.

[55] Sunstein, Cass R. (2013): The Storrs Lectures: Behavioral Economics and Paternalism. *Yale Law Journal*, Vol.122(7), pp.1855.

[56] By contrast hard paternalism is willing to limit individual's freedom or impose significant material cost on certain decisisons (even without the subject's consent).

[57] Yeung, Karen (2017): Hypernudge': Big data as a mode of regulation by design. *Information, Communication and Society*, Vol.20(1), pp. 118–136.

[58] Ranchordás, Sofia (2020): Nudging citizens through technology in smart cities. *International Review of Law, Computers & Technology*, Volume 34, pp. 259.

[59] Yeung, Karen (2017): Hypernudge: Big data as a mode of regulation by design. *Information, Communication and Society*, Vol. 20(1), pp. 123.

changing network of automated systems[60] that not only know what the subject of the regulation thinks, feels, and wants but would also be able to change and manipulate it without people being aware of it.[61]

8. Concluding thoughts

Nudges and other behaviorally informed regulations represent a promising new addition to the traditional public policy toolbox. Even though barely more than a decade has passed since this new approach started gaining wider public recognition, behavior-based regulations have already been successfully applied in various areas of life. Since collecting, processing, and analyzing large data sets have great potential in generating valuable insights for designing such policies, today's data-driven climate, along with recent advances in information technology, may further accelerate this trend in the near future.

Although nudge strategies hold great promise for improving and enhancing people's lives, they must be implemented with a clear awareness of their limitations and potential risks. To create a more transparent and accountable environment for their fair application, general ethical frameworks and definitive strategy guidelines must be developed. Governments need to establish independent bodies, safeguards, and effective, enforceable legal constraints on the potential misuse of such policies. In addition, special attention must be directed towards challenges relating to individual autonomy, privacy, and the growing power asymmetry between those who exercise control and those who are subjected to it, while taking into account the many new formulating challenges as well (e.g., the gradual incorporation of new behavioral insights gained from modern neuroscience).

Since this new regulatory approach has the potential to shape how public policies are designed in the future, it is essential to equip citizens with all the necessary information about it so they can actively participate in the discussions on its unfolding development.

[60] Helbing, D., Frey, B.S., Gigerenzer, G., Hafen, E., Hagner, M.,Hofstetter, Y., van den Hoven, J., Zicari, R.V., Zwitter, A.*: Will democracy survive big data and artificial intelligence*? In: Helbing, Dirk (Ed.) Towards Digital Enlightenment. New York, Springer, 2017, pp. 82.

[61] Diósi, Szabolcs: The rise of algorithmic decision-making in the age of Big Data. In Bendes Ákos L. et al. (Ed): I-II. Konferenciakötet: A pécsi jogász doktoranduszoknak szervezett konferencia előadásai. Pécs, Pécsi Tudományegyetem Állam- és Jogtudományi Kar Doktori Iskola, 2021, p. 158-161.

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Magyar nyelvű tanulmányok

Mészáros Pál Emil[*]– A felek rendelkezési jogának és a bíróság közrehatásának konvergenciája

Lektorálta: Prof. Dr. Nochta Tibor

Absztrakt:

A felek rendelkezési jogával összefüggésben elmondható, hogy a jogirodalom különböző jogpolitikai célok mentén más és más megoldásokkal próbálkozott a megfelelő megoldás érdekében. Az egyes felfogások mentén hol erősítették, hol gyengítették a felek uralmát a per befolyásolásával összefüggésben.
Jelen tanulmányban rá kívánok mutatni arra a rendszerváltást követő folyamatra, amely a jelenlegi perrendhez elvezetett, továbbá amennyiben szükséges a felek uralmának vagy a bíróság hatalmának erősítése, úgy ezekre kívánok rámutatni.
A tanulmány megírásához dogmatikai szempontból Kengyel Miklós munkásságát veszem alapul, míg gyakorlati szempontból az elmúlt 30 év kialakult polgári eljárásjogi gyakorlatát.

Kulcsszavak: rendelkezési jog, Pp., bíróság közrehatása, peres eljárás.

1. Bevezető

Az alapelvekkel kapcsolatban fontos megjegyeznünk, hogy az egyik legfontosabb elv – véleményem szerint a legfontosabb elv – a felek rendelkezési elve, amely a leginkább kifejezi a feleknek és a bíróságnak a per tárgyához való viszonyát. A bíróság és a felek viszonya a polgári per olyan alapkérdése, amelynek helyes megoldása évszázadok óta foglalkoztatja a polgári eljárásjog művelőit.
A kérdésre adandó válasz alapján a polgári pernek két alaptípusát különböztethetjük meg: az egyikben a peres felek általában korlátozás nélkül rendelkezhetnek a perbe vitt anyagi és eljárási jogaik felett, sőt a per menetének az irányítása is az ő kezükben van, míg a másik esetben a bírói hatalom, a hivatalbóliság érvényesül a per során, nemegyszer a felek akarata ellenében is. A modern polgári perjog történetében e két alaptípusnak többféle változata alakult ki. A hetvenes-nyolcvanas évek polgári eljárásjogi reformjai, illetve reformtörekvései során a liberális értékeket őrző polgári perrendtartásoknál (francia, német, olasz) a bírói felelősséget növelı, míg a szocialista polgári eljárásjogban – ha sokkal halványabban is – a felek felelősséget növelı irányzatok bontakoztak ki. A kilencvenes évektől kezdve már az eljárási modellek konvergenciájáról beszélhetünk.
A volt szocialista országokban megkezdődött a bíróságok polgári perbeli szerepének a csökkentése, a bíróság és a peres felek viszonyában a túlméretezett bírói hatalom leépítése. Ugyanakkor a liberális permodell fellegvárát jelentı common law jogrendszerben kibontakozott a „judicial case management” gondolata, amely a bírót

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ki akarja mozdítani a hagyományos passzivitásából. A fejlődés mindkét irányból a kiegyensúlyozott bírói hatalom, a felek és a bíróság modern együttműködése felé tart.[1] Napjainkban a legnagyobb indukáló erő az Európai Unió, mivel az egységes piac elérése, tökéletesítése érdekében a polgári igazságszolgáltatásban is jelentős előrelépés történt és ennek megfelelően - illetve annak, hogy az egyes tagállamokban folytatott eljárások során hozott határozatokat más tagállamok bíróságai, hatóságai is elfogadják, végrehajtsák – az egyes tagállami eljárásjogi kódexeket is közelíteni kell egymáshoz véleményem szerint. A tagállami eljárási kódexek – amelyekben szerepel – az alapelvek szabályozása, annak egymáshoz való közelítése lenne az üdvözlendő, hiszen ezek az alapelvek az egész eljárást áthatják és azok egymáshoz való közelítésével egyben az egyes eljárásjogi jogintézmények szabályozása, alkalmazása is közelítene egymáshoz.
Ahhoz, hogy a jelenlegi állapotokat, elméleti és gyakorlati megközelítést megértsük, szükséges a fentebb említett permodelleket bemutatni. A permodelleket a rendelkezési elv tekintetében a legcélszerűbb Kengyel Miklós monográfiájában[2] található felosztás szerint áttekinteni. Ez alapján beszélhetünk a korlátlan féluralomról, túlméretezett bírói hatalom, féluralom és a bírói hatalom egyensúlyáról.

3. A rendelkezési alapelv a hatályos polgári perrendtartásban

A 2016. évi CXXX. Törvény (Továbbiakban: Pp.) a rendelkezési alapelvhez tartozó kérelemre történő eljárás elvét külön szakaszban szabályozza. Ez véleményem szerint nem támogatható, hiszen a kérelemre történő eljárás és a kérelemhez kötöttség szorosan összefüggő két elv, amelyeket valójában egy egységben a rendelkezési alapelv testesít meg. A kérelemre történő eljárás elvét a rendelkezési alapelv részeként tekintem, amely hangsúlyos alapelv az eljárást megindító kereseti kérelem esetében. A Pp. rendelkezési alapelvet magába foglaló rendelkezései – 1.§ (2) bekezdése és a 2.§ - a következők:
„A bíróság az e törvény hatálya alá tartozó jogvitát erre irányuló kérelem esetén bírálja el. A felek szabadon rendelkeznek perbe vitt jogaikkal. A bíróság - törvény eltérő rendelkezése hiányában - a felek által előterjesztett kérelmekhez és jognyilatkozatokhoz kötve van.”
Észrevehető, hogy az új szabályozás sokkal tömörebben fogalmaz a rendelkezési alapelvvel kapcsolatban és annak egy részét a „törvény hatálya” címszó alatt helyezi el, ami – ahogy már említettem – nem megfelelő, hiszen az alapelv koherenciáját szünteti meg azáltal, hogy annak részeit külön kezeli. A rendelkezési alapelv veleje a felek által megtett cselekményekben vehető leginkább észre, mint például a kereseti kérelem előterjesztése, a keresetváltoztatás, keresetkiterjesztés, a viszontkereset indítása, elállás a keresettől, a jogról való lemondás, elismerés, egyezség kötése. A következőkben ezen jogintézmények korábbi és hatályos szabályozásának összevetésével a rendelkezési alapelv módosulása is megállapítható álláspontom szerint.

[1] Miklós Kengyel, A Bírói Hatalom És a Felek Rendelkezési Joga a Polgári Perben (Budapest: Osiris , 2003), 11 .
[2] Ibidem

3.1. A kereseti kérelem előterjesztése

A kereseti kérelem benyújtásával az érdekelt személy rendelkezési jogával él, mivel a kereset benyújtására az jogosult, aki az adott vitában érdekelt.[3] Nincs arra lehetőség a hatályos szabályozás szerint, hogy magát a kereseti jogot másra átruházzuk. A kereshetőségi jog átruházására – engedményezés[4] – lehetőség van, azonban ez a kérdés nem képezi tárgyát jelen értekezésnek.
A kereseti kérelem benyújtásával a felperes a peres eljárás kereteit határozza meg, mivel a határozott kérelmével pontosan megjelöli azt az anyagi jogi igényt, amelyet érvényesíteni kíván. Ezen állítások az 1952. évi III. Törvény (Továbbiakban: régi Pp.) és a most hatályos Pp.-re is igazak, azonban a hatályos jogszabály sokkal egzaktabban, precízebben határozza meg a kereseti kérelem kötelező tartalmi elemeit. A törvény a keresetlevél tartalmi követelményeit úgy határozza meg, hogy a bíróság és az alperes számára valamennyi anyagi- és eljárásjogi adat a kereset tárgyalhatóságához azonnal rendelkezésre álljon, így szükségtelen legyen minden - jelentős idő- és költségvonzattal járó - hiánypótlási és egyéb tevékenység. Ez egyben az alperes részére lehetővé és elvárhatóvá teszi a teljes körű ellenkérelem előterjesztését. A törvény a fél rendelkezési jogára hangsúlyosan építő koncepció szellemével összhangban kötelezővé teszi az érvényesíteni kívánt jognak, az igény anyagi jogi jogalapjának az egyértelmű nevesítését. A keresetlevélben meg kell jelölni, melyik felperes, melyik alperessel szemben milyen jogalapon, milyen jogot kíván érvényesíteni. A törvény ezzel is azt juttatja kifejezésre, hogy a felperesnek kell a bíróság felé egyértelműen kijelölnie azon jogvédelmet, amelyet a bíróságtól kér, és amitől a bíróság - a fél rendelkezési joga folytán - nem térhet el.[5] Ez azt jelenti, hogy a felperesnek minden olyan adatot, bizonyítékot a keresetlevelében fel kell tüntetnie, amely a per szempontjából releváns, amennyiben ezt nem teszi meg és a fél jogi képviselővel jár el, úgy a bíróság a keresetlevelet vissza fogja utasítani. A jogalap megjelölése, amely a kérelemhez kötöttség egyik biztosítéka azonban meghatározott esetekben áttörhető a bíróság által. Személyiségi jogi perekben a bíróság nem a fél által megjelölt személyiségi joghoz, hanem a tényállás alapján megállapítható személyiségi jogi kérelemhez van kötve.[6] Abban az esetben azonban, ha a jogsérelem a tényállásból nem állapítható meg illetve magát az adott jogcímet a fél nem jelöli meg, úgy a bíróság a kereseti kérelem keretein nem terjeszkedhet túl, hiszen az sértené a felek rendelkezési jogát.[7]
Amennyiben a fél nem teszi meg a szükséges bizonyítási indítványait vagy a keresetlevélben szereplő nyilatkozatát bizonyítékkal nem támasztja alá, akkor a bíróság a keresetlevelet visszautasítja, amennyiben a fél jogi képviselővel jár el – hiszen jogi képviselőtől elvárható a törvénynek teljes mértékben megfelelő kereset

[3] BH2017.346
[4] EBH2005.1227.: Az engedményezés érvénytelenségével kapcsolatban az adósnak perbeli legitimációja nincsen.
[5] 2016. évi CXXX. Törvény 170. § Indokolás
[6] BDT2020.4181.
[7] Fővárosi Ítélőtábla Pf.20.462/2019/3

benyújtása – a törvény alapján. Ez az egzakt és rendkívül aprólékosan meghatározott feltételrendszer a bíróságok általi tömeges visszautasításokat eredményezte a törvény hatályba lépését követő egy évben.[8]
Újdonság a Pp.-ben – annak nyelvtani értelmezése alapján – a bizonyítékok csatolása a keresethez, hiszen az új jogszabály a keresetlevél zárórészében kötelezővé teszi azt, hogy a felperes a zárórészben feltüntetett tényeket - mint például a pertárgyértéke vagy a bíróság hatásköre, illetékessége – bizonyítékokkal támassza alá. Amennyiben szűk jogértelmezéssel él a jogalkalmazó, akkor ez azt jelenti, hogy természetes személy alperes esetén már a kereset megküldése során szükséges a személyi okmányok másolatának becsatolása. Itt merül fel a kérdés, hogy ezt valójában hogyan lehetne kivitelezni, hiszen az alperes és a felperes közt felmerült jogvita miatt nem valószínűsíthető az, hogy az alperes az ellenne indítandó per „érdekében" személyi okmányait átadja a felperesnek. A felperes lehetősége az, hogy a lakcímnyilvántartó hatóságtól kikéri a felperes adatait, azonban ez költség és időigényes, amely a Pp. szellemiségével ellentétben – ha nem is kirívóan nagymértékben – de megdrágítja a peres eljárást illetve az az előtti eljárást. Álláspontom szerint itt a józanész kritériumára kell figyelemmel lenni és ez alapján lehet csak a féltől elvárni az egyes adatok közlését a bírósággal.
További kérdésként merül fel, hogy a pertárgyérték alapjául vett követelést pontosan hogyan is lehet bizonyítani, hiszen egy szerződésen alapuló követelésnél egyszerűen a felperes benyújtja a szerződés másolatát, azonban ha egy ingatlan a per tárgya, akkor annak értékének meghatározásakor elegendő-e a felperes állítása az ingatlan értékéről vagy szükséges értékbecslő véleményét a keresethez csatolni. Tekintettel arra, hogy a Pp. kimondott célja a perhatékonyság, az eljárások gyorsítása így véleményem szerint az indokolatlan, felesleges bizonyítástól a feleket a bíróságnak meg kell „kímélnie" és így a peres eljárás költségeit is redukálni tudja.
Problémaként merült fel a keresetlevelek tagolása is, hiszen a korábbi szabályozáshoz képest a Pp. három jól elhatárolható részre bontotta a keresetet.[9] Találkozhattunk olyan ítélettel, amely visszautasította a jogi képviselővel eljáró felperes keresetét, amiatt mert az nem a Pp.-ben meghatározott sorrendben tartalmazta a kötelező tartalmi elemeket. Ezzel a jogértelmezési problémával foglalkozott a Kúria elnöke által felállított a Pp. jogértelmezési kérdéseivel foglalkozó konzultációs testület. A keresetlevél szerkezeti egységekre való felbontásával a jogalkotó az ismertetett célok elérése érdekében a keresetlevél áttekinthetővé tételével a perek hatékony lezárását kívánta előmozdítani. A Pp.-ben szereplő szerkezeti tagolásból azonban – erre vonatkozó kifejezett jogszabályi előírás hiányában – nem következik, hogy a felperesnek minden szerkezeti egységet külön címmel kell ellátnia, elegendő, ha a keresetlevél felismerhetően, jól áttekinthetően tartalmazza mindhárom szerkezeti

[8] A bíróság által hozott végzés alapján az olyan keresetlevelet, amelyet házassági bontóperben terjesztettek elő, vissza kell utasítani, amennyiben az bizonyítási indítványt nem tartalmaz. Megjegyzem az adott ügyben olyan házasságot kellett volna felbontania a bíróságnak, amelyben gyerekről nem kellett rendelkezni és mivel a felek személyes meghallgatása a személyi állapotokra vonatkozó különleges rendelkezések miatt kötelező, így semmilyen más bizonyíték nem használható fel azzal kapcsolatban, hogy a felek valójában felkívánják-e bontani házasságukat.
[9] Pp. 170. § (1), (2) és (3) bekezdése

egységet. A keresetlevél visszautasításáról a Pp. 176. §-a rendelkezik, amely egyértelműen kimondja, hogy akkor kell visszautasítani a keresetlevelet, ha az nem tartalmazza a 170. §-ban, illetve a törvényben előírt egyéb kötelező tartalmi elemeket, illetve alaki kellékeket. Amennyiben tehát a keresetlevél mindezeket tartalmazza és csak az egyes szerkezeti egységek címének feltüntetése hiányzik, vagy az egyes szerkezeti egységeken belül a tartalmi elemek nem a felsorolás szerinti sorrendben követik egymást, a keresetlevél visszautasítására nincs mód.[10]
A Pp. jogértelmezési kérdéseivel foglalkozó konzultációs testület állásfoglalása alapján kijelenthető, hogy a kereset visszautasítását nem alapozza meg az, ha a jogi képviselő nem a Pp.-ben meghatározott sorrendben és külön címmel ellátva nyújtja be a keresetét, hiszen a törvény alapján a követelmény az, hogy minden ott felsorolt kötelező tartalmi elemet az tartalmazzon.
Abban az esetben, ha a felperes az alperessel szemben több kereseti kérelmet foglal egybe, akkor tárgyi keresethalmazatról beszélünk, amelynek két fajtája van.[11] Az egyik a látszólagos tárgyi keresethalmazat, a másik pedig a valódi tárgyi keresethalmazat. A látszólagos tárgyi keresethalmazattal kapcsolatosan meg kell jegyeznünk, hogy a Pp. által megengedett látszólagos tárgyi keresethalmazat esetén ellentmondásos a perjogi megítélése annak, ha a felperes vagylagosan terjeszti elő a tartalma szerint eshetőleges keresethalmazatát, illetőleg annak is, ha a felperes az egymással eshetőleges kapcsolatban álló több kereseti kérelmét olyan sorrendben terjeszti elő, amely logikailag helytelen. Eshetőleges keresethalmazat esetén a felperesnek úgy van több keresete, hogy a keresetek létezése egymástól függ, mert a felperes feltételesen, az elsődlegesen kért keresetének alaptalansága esetére terjeszt elő másik - másodlagos, harmadlagos stb. - keresetet. A látszólagos tárgyi keresethalmazat másik típusa, a vagylagos kereset esetén - a felperesnek több egymást kölcsönösen kizáró keresete van úgy, hogy azok elbírálási sorrendjét nem kell meghatároznia - a kérelme arra irányul, hogy a bíróság az egyik keresetét teljesítse. Ha az eshetőleges keresethalmazatot tartalmazó kérelmét a fél nem a bíróság által helyesnek tartott sorrendben terjesztette elő, akkor a bíróság az anyagi pervezetés szabályai szerint gyakorolhatja azt a jogát, hogy rávezesse a felet az eshetőleges keresetek megfelelő sorrendben való előterjesztésére. Ez, az anyagi jogi kérdéseket felvető hiányosság ugyanis nem lehet indok a keresetlevél visszautasítására akkor, ha a felperes a bíróság felhívása ellenére is ragaszkodik az általa megjelölt sorrendhez.[12]
A látszólagos tárgyi keresethalmazattal szemben a Pp. 173. § (1) bekezdése a valódi tárgyi keresethalmazat esetét szabályozza, amely alapján valódi tárgyi keresethalmazat akkor terjeszthető elő, „ha a keresetek ugyanabból vagy - ténybeli és jogi alapon - összefüggő jogviszonyból erednek és a keresetek között nincs olyan, amelynek elbírálása más bíróság kizárólagos illetékességébe tartozik.” Ezzel szorosan összefüggő kérdésként merült fel, hogy vajon a fizetési meghagyásban több parkolási, személyszállítási illetve közüzemi díjak együttes érvényesítése valódi tárgyi keresethalmazatnak tekintendő, avagy sem. Azonos kötelezettel szemben egy

[10] http://www.lb.hu/hu/uj-pp-jogert?page=1
[11] István Novák, A Kereset a Polgári Perben (Budapest: Közgazdasági és Jogi Könyvkiadó, 1966), 219.
[12] http://www.lb.hu/hu/uj-pp-jogert?page=7

ingatlanon keletkező különböző közüzemi díjköveteléseit, vagy különböző parkolási eseményekből származó díj- és pótdíjkövetelését, illetve több személyszállítási szerződésből eredő díj- és pótdíjkövetelését egy fizetési meghagyásban érvényesíteni kívánó jogosult, egy ingatlanon keletkező több különböző közüzemi díjkövetelése, vagy parkolási eseményekből, illetve személyszállítási szerződésekből származó díj- és pótdíjkövetelése a Pp. 173. § (1) bekezdése szerinti valódi tárgyi keresethalmazatot alkot és egy fizetési meghagyásban érvényesíthető.[13]
Pertársaság fennállása esetén is kötve van a bíróság a felek kérelméhez, hiszen amennyiben a felperes elál az egyik alperessel szemben a keresettől és az alperes az elálláshoz hozzájárul, akkor a bíróság köteles az eljárást az adott alperessel szemben megszüntetni. Nem jogosult a bíróság arra, hogy az elállás indokoltságát vizsgálja.[14]
A kérelemhez kötöttség elve a felek rendelkezési jogának biztosítéka és a bíróság hatalmának korlátja. A fél döntheti azt el, kivel szemben indít eljárást és milyen jogalapon, így például végrendelet érvénytelenségének megállapítása esetén is a fél jogosult arra, hogy eldöntse, mely örökösökkel szemben érvényesíti igényét.[15]
A fél rendelkezési jogának eljárásjogi korlátját jelenti az, hogy a felperes pertársa nem jogosult arra, hogy a perbe önként belépni nem kívánó jogutódót perbe vonja.[16] A felek jogosultak arra, hogy saját jogukkal rendelkezzenek, eljárást megindítsák, azonban a per menetét csak meghatározott mértékben befolyásolhatják. Ez a fajta korlát célszerű, hiszen egy olyan fél perbehívása, akitől a per elővitelére irányuló magatartás nem várható, csak a per elhúzódását ereményezheti.
Az általam fent említett jogalkalmazási problémák véleményem szerint szorosan összefüggnek a felek rendelkezési jogosítványaival is és így a rendelkezési alapelvvel. Nem lenne célszerű, ha a jogalkalmazói jogértelmezés a felek rendelkezési jogait korlátozná illetve olyan feltételeket támasztana, amelyek miatt a felek anyagi jogaikat csak nehezen tudnák érvényesíteni. A fentebb felsorolt jogalkalmazói vélemények, állásfoglalások nem korlátozzák a felek rendelkezési jogát, inkább a Pp. tág jogértelmezésével szembesülhetünk, amely így lehetővé teszi a minél hatékonyabb jogérvényesítést.

3.2. Az írásbeli beadványok benyújtása

A törvény újítása a perfelvételi tárgyalás írásbeli előkészítése azzal, hogy az írásbeli előkészítés mértékéről a bíróság az ügy sajátosságaihoz igazodóan határozhat. A törvény a perfelvétel koncentrált menete érdekében meghatározza az írásbeli előkészítés keretében kötelezően benyújtandó, illetve a bíróság felhívására benyújtható perfelvételi iratok tartalmát.[17]
A perfelvételi eljárásban kötelezően benyújtandó a felperes részéről az eljárást megindító kereset, míg az alperes oldaláról a keresettel szembeni ellenkérelem. Az

[13] http://www.kuria-birosag.hu/hu/sajto/civilisztikai-kollegiumvezetok-orszagos-ertekezletenek-2018-majus-3-allasfoglalasai-polgari
[14] BH1994.616.
[15] BDT.2020.4163.
[16] BH2004.301.
[17] 2016. évi CXXX. Törvény 200. § Indokolása

alperes írásbeli ellenkérelmének tartalmi elemeit a törvény, ugyanúgy, mint a kereset esetében három különböző részre osztja. A törvény újítása az, hogy az ellenkérelem kötelező tartalmi elemeit meghatározza valamint, hogy annak előterjesztését általánosságban kötelezővé teszi, tehát az írásbeli ellenkérelem benyújtása a „fő" védekezési forma a szóbeli jognyilatkozatokkal szemben.. A törvény lényeges újítása, hogy az ellenkérelemmel kapcsolatban elvárás az érvényesíteni kívánt joggal szembeni anyagi jogi kifogás előterjesztése. Az anyagi jogi kifogás olyan, a fél által perbe vitt anyagi jogi hivatkozás, amely jellege folytán a keresetlevélhez hasonló módon megköveteli annak anyagi jogi jogalapjának és ténybeli alapjának előadását ahhoz, hogy az érdemben elbírálható legyen.[18] Meg kell említenünk az írásbeli ellenkérelem zárórészét, hiszen a Pp. előírja az alperesnek azt, hogy a felperes állítási szükséghelyzettel, illetve bizonyítási szükséghelyzettel kapcsolatos nyilatkozataira válaszoljon, azzal kapcsolatosan a szükséges bizonyítást, állítást tegye meg vagy a megtagadásának indokait, bizonyítékait csatolja az ellenkérelméhez.

Azzal, hogy az ellenkérelmet írásban kell benyújtani több előnyt is elér hatályos jogunk, mint például, hogy a bírósági meghagyás már tárgyalás nélkül kibocsátható, a per akadálya hamarabb kiderül, mint a korábbi peres eljárásokban és így a következményét tárgyaláson kívül is el lehet intézni valamint az első tárgyalást nem a kereset és az ellenkérelem előadásával és annak jegyzőkönyvvezetésével kell megkezdeni és így a tárgyalás ideját elhúzni.[19] Ezzel kapcsolatban azonban megjegyzem, hogy az ellenkérelmet elő lehet adni úgy is, hogy az megfeleljen a törvényi követelményeknek, de a tényállás felderítése érdekében további írásbeli perfelvétel vagy tárgyalás tartása szükségessé váljon. Véleményem szerint ez egy olyan fajta magatartás, amely a rendelkezési jog által biztosított jogosultságokkal nem összeegyeztethető és így a fél a jóhiszemű pervitel elvével ellentétesen használja jogait.

A Pp. további újítása, hogy nevesíti a perfelvételi eljárás során előterjeszthető további iratokat. Az alperes ellenkérelmét – amennyiben a bíróság további írásbeli perelőkészítést rendel el – a felperes válaszirata követi, majd erre az alperesnek viszonválasz formájában van lehetősége saját nyilatkozatát megtennie.

Ahogy azt már korábban említettem a hivatkozott 203. § paragrafus jelentős újítást tartalmaz a korábbi eljárási rendhez képest, hiszen a bíróság felhívása alapján van lehetősége a feleknek iratok előterjesztésére. Ezeket az iratokat nem lehet egy beadványban benyújtani, hiszen azok különböző típusú beadványok lehetnek – válaszirat, beszámítás, viszontkereset stb. – és így azok együttes kezelése nehézkes lenne illetve az eljárás során a bíróság feladatát is megnehezíteni. Megállapítható, hogy bírósági felhívás nélkül benyújtott perfelvételi irat hatálytalan, amelynek célja az, hogy a felek rendelkezési jogukkal ne éljenek vissza és így ne árasszák el a bíróságot felesleges iratokkal, mert azokkal az eljárás idejének elhúzását tudnák megvalósítani. Ezzel kapcsolatban azonban megjegyzendő, hogy a perfelvételi tárgyaláson bármely perfelvételi nyilatkozat hatályosan előterjeszthető, tehát amennyiben a félnek a bíróság nem engedélyez további perfelvételi irat csatolását,

[18] 2016. évi CXXX. Törvény 200. § Indokolása

[19] Zsuzsa Wopera, Kommentár a Polgári Perrendtartásról Szóló 2016. Évi CXXX. Törvényhez (Budapest: Magyar Közlöny Lap- és Könykiadó Kft., 2017), 391.

akkor azt a fél megteheti a perfelvételi tárgyaláson, akkor is ha annak tartását a bíróság nem látta szükségesnek, hiszen a fél kérelmére[20] perfelvételi tárgyalást a bíróságnak kell tartania.[21]
Fontos követelmény a bírósággal kapcsolatban az, hogy amennyiben hivatalból észlel a perrel kapcsolatos körülményt, akkor erről a feleket tájékoztatnia kell és lehetőséget kell biztosítani arra, hogy a felek jognyilatkozataikat megtegyék. Ha ezt nem teszi meg a bíróság, akkor a felek rendelkezési jogát sérti és ez megalapozza a bíróság ítéletének hatályon kívül helyezését.[22]
A perfelvételi irat alaki hiányossága estén nem visszautasításnak, hanem hiánypótlásnak van helye, azonban ha az irat érdemi hiányosságban szenved, akkor a bíróság azt tartalma alapján fogja figyelembe venni az eljárás során. Ebben az esetben úgy kell tekinteni, hogy a fél az ellenfél tényállítását, jogállítását, bizonyítékait nem vitatja, indítványának teljesítését nem ellenzi, kivéve, ha korábban azzal ellentétes nyilatkozatot tett. A perfelvétel irat visszautasításának hiánya lényegében a peres eljárást egyszerűsíti, gyorsítja.[23]
A törvény a korábbi eljárásjogi szabályozás hiányosságait pótolta, azzal hogy az alperes viszontkeresetét önálló eljárásjogi jogintézményként kezeli. A Pp. bevezette a viszontkereset-levél fogalmát. A keresetlevéllel és a kereset tárgyalásával lényegében azonos szabályozást tartalmaz, tekintettel arra, hogy a viszontkeresetet tartalmazó viszontkereset-levéllel az alperes „viszont-pert" indít. Ennek megfelelően a törvény lényeges változtatása, hogy viszontkeresetet az alperes nem szóban az első tárgyaláson adja elő, hanem a keresettel egyezően csak írásban terjesztheti elő és időbeli korlátként az ellenkérelemre nyitva álló határidő került meghatározásra. A viszontkereset előterjesztésre szolgáló perfelvételi irat tartalmi követelményeire a keresetlevélre vonatkozó szabályokat rendeli alkalmazni a törvény.[24]
Az új polgári eljárásjogi rendszer az általam említett jogintézményeknél is sokkal pontosabb, egzaktabb fogalmakat használ, mint korábbi perjogunk. A bírói hatalom véleményem szerint a felek rendelkezési jogának „kárára" növekszik, amely azonban egy jogalkotói válasz volt, a perelhúzás érdekében kifejtett joggyakorlatra, így annak szükségessége alátámasztható. A túlzottan szabad rendelkezési jog a felek oldalán oda vezetett, hogy sokszor a bírósági eljárások partalanná váltak és elhúzódtak, amely végső soron a pervesztes fél költségeiben csapódott le az eljárás végeztével. Álláspontom szerint indokolható az, hogy a felek rendelkezési jogát a kereseti kérelem és az érdemi ellenkérelem benyújtását követően a bírói hatalom megerősítésével korlátozzák.

3.3. Egyezség a polgári perben

Az egyezséggel kapcsolatos szabályokat a Pp. a korábbai szabályozáshoz képest több helyen helyezi el a törvényben. Ez annak is köszönhető, hogy az egyezségi kísérlet

[20] 2016. évi CXXX. Törvény 197.§ (1) bekezdés c.) pont
[21] (Szerk) Wopera Zsuzsa: i.m. 396 old.
[22] BH2006.219
[23] (Szerk) Wopera Zsuzsa: i.m. 397 old.
[24] 2016. évi CXXX. Törvény 205. §

perindítás előtt nevet viselő polgári nemperes eljárást is szabályozza hatályos polgári perrendtartásunk. Ezen kívül az egyezséggel kapcsolatos szabályokat – az elsőfokú eljárással kapcsolatban – a perfelvételt lezáró perfelvételi tárgyalás cím illetve az egyezség cím alatt találjuk. A régi Pp. szerinti peren kívüli elintézés kötelező megkísérlésére vonatkozó szabályozást a törvény elhagyja, mivel a gyakorlatban nem váltotta be a hozzá fűzött pozitív várakozásokat.[25]
A régi Pp. az egyezségi kísérletre történő jogintézményt a 127.§ alatt tárgyalta, amelyet azonban hatályos polgári perrendtartásunk eltérő szerkezeti egységben tárgyalja, kiemelve azt, hogy az egyezségi kísérlet a pert megelőző, azt kiváltó funkcióval rendelkező jogintézmény. A Pp. az egyezségi kísérletre idézés két estkőrét szabályozza, az egyik amikor közvetítői eljárás megelőzi, míg a másik amikor közvetítői eljárás nem előzi meg az egyezségi kísérletre történő idézést. A szabályozással kapcsolatos újdonság, hogy az egyezségi kísérletre történő idézést nem csak járásbírósági hatáskörbe tartozó ügyekben, hanem törvényszék hatáskörébe tartozó ügyekben is lehet kérni, vagyis az egyezségi kísérletre történő idézés lehetőségét kiterjeszti a jogalkotó ezzel a megoldással. A szabályozás lényeges eltérést mutat az eljárás lezárásával kapcsolatban, hiszen amennyiben a felek között nem jön létre egyezség, úgy az eljárást a bíróság megszüntetni, szemben azzal a megoldással, amit a régi Pp. alkalmazott, miszerint a keresetet a felperes szóban előadhatta. Megszűnik tehát a peres eljárásba történő átfordulás lehetősége.[26]
A régi Pp. szabályozását megtartva hatályos jogunk is arra ösztönözi a bíróságokat, hogy az ésszerű időn belül történi vitarendezés érdekében a felek közötti egyezségkötés lehetőségét mozdítsák előre. A felekben az egyezség megkötése általában nagyobb megnyugvást jelent, mint az ítélet, hiszen az egyezség mindkét fél számára elfogadható, rendszerint előnyökkel járó megállapodás. A feleknek lehetőségük van arra, hogy jogvitájuk egy részét rendezzék egyezség formájában, ekkor az eljárást a további igények tekintetében kell folytatni. A régi Pp. által kimondott elvet is tovább viszi hatályos jogforrásunk, amikor előírja, hogy mind a perbeli egyezség, mind pedig a közvetítő által létrehozott megállapodás is a bíróság ellenőrzése mellett jöhet létre perbeli egyezségként.[27] Az egyezség jogintézményét hatályos jogunk nem változtatta meg, azt a régi tartalommal átültette.

4. Összegzés

A polgári eljárás során hangsúlyos kérdés a rendelkezési jog és a bírói hatalom kapcsolata, hogy azok az adott szabályozást mennyiben alakítják. Elmondható, hogy a rendelkezések többségében a felek rendelkezési jogának korlátozása figyelhető meg, azonban nem túlzó módon, hiszen a törvény egyik célja a perhatékonyság növelése, de ezt nem oly módon teszi meg, hogy azzal a felek rendelkezési jogát minimálisra csökkentse. A régi Pp. nagy utat tett meg a rendelkezési jog szabályozásával kapcsolatban, hiszen az abszolút bírói hatalomtól a felek szinte teljes rendelkezési szabadságáig terjedt.

[25] 2016. évi CXXX. Törvény 168.§ Indokolása
[26] Wopera Op. Cit. 344-345.
[27] Wopera Op. Cit. 347-348-

A régi polgári perrendtartásunk 1999. évi novellája módosította a törvény alapvető elveit. Ezzel kapcsolatban meg kell jegyeznünk azt, hogy a törvény egyértelművé teszi, hogy az ügy urai a peres felek ők határozzák meg a per tárgyát, és ezáltal a bírósági eljárási mozgásterét is. A bíróság azonban köteles megakadályozni azt, hogy a felek a jogaikkal a jóhiszemű per vitellel ellentétesen tevékenykedjenek. Ebből a szempontból azt mondhatjuk, hogy a felek rendelkezési joga nem korlátlan, csak egy másik alapelv, nevezetesen a jóhiszemű joggyakorlás elve keretei között érvényesülhet.[28]

Ezt követően az új Pp. a rendelkezési alapelvet és az abból fakadó rendelkezési jogot sokkal jobban általános szinten határozta meg, azonban az egyes jogintézményeknél – kereset benyújtása, módosítása, beadványok benyújtása, egyezség – sokkal szűkebben húzta meg a felek rendelkezési jogának korlátait.

A költség tényezők vizsgálata során igazolódott az a hipotézis, hogy azok a felek, akik a pereskedéshez megfelelő anyagi háttérrel rendelkeznek, nyilvánvalóan előnyben vannak azokkal szemben, akik ilyen kiadásokat nem kockáztatnak meg. A vagyoni különbségek csökkentésére hivatott szegény jog nem képes megszüntetni az úgynevezett jogi szegénységet, vagyis számos ember képtelenségét arra, hogy a jogot és az igazságszolgáltatás intézményét teljes mértékben kihasználja. [29] Ezen megállapítás alapján a jogalkotók kötelezettsége az, hogy a bírói hatalmat úgy emeljék meg a polgári peres eljárásban, hogy az megfelelően arra szorítsa az eljáró feleket rendelkezési jogukkal kapcsolatban, hogy a jóhiszemű pervitel elvével összhangban gyakorolják azt.

Fontos azt megjegyeznünk, hogy a bíróság polgári perbeli szerepét Magyarországon sem, illetve Európában sem kell újra feltalálnunk, hiszen azt már korábbi jogtudósok megállapították, mint például Magyarországon Magyary Géza ezt már pontosan meghatározta. Az általa tett megfogalmazás így szólt: „a féltől függően, hogy akar e jogvédelmet vagy sem, de ne tőle függjön, hogy az eljárás miképpen bonyolódik le, és meddig tartson.”[30]

Kengyel Miklós által kialakított inga módszer[31] - ami szerint a rendelkezési jog és a bírói hatalom között egy inga van, amely mindig az egyik irányba kileng – alapján véleményem szerint a hatályos Pp. a felek rendelkezési jogát középen helyezte el, azt megfelelő mértékben korlátozza, úgy hogy a felek anyagi jogosultságai a peres eljárások során nem sérüljenek.

[28] Kengyel Op. Cit.. 318.

[29] Cappelletti, M, B Garth and N Trocker. Access to justice: comparative general report. n.p.: Rabels Zeitschrift für ausländisches und internationales Privatrecht/The Rabel Journal of Comparative and International Private Law, 40(H. 3/4), 669-717, 1976.

[30] Géza Magyary, Magyar Polgári Perjog, 2nd ed. (Budapest: Franklin, 1924), 36.

[31] Kengyel Op. Cit.. 18-19. o.

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Projics Nárcisz[*] – A bírói közrehatás a polgári peres eljárásban

Lektorálta: Prof. Dr. Herke Csongor

Absztrakt

A polgári perrendtartásról szóló 2016. évi CXXX. törvény (a továbbiakban: Pp.) egyik jellegadó sajátossága a bíróság szerepének erősítése a jogvita tárgyi kereteinek tisztázásában. A Pp. már a Preambulumban célként rögzíti a bíróság aktív pervezetésén alapuló szabályozás megteremtését. A Pp. egyik fő célkitűzése a perkoncentráció, amelynek címzettje a bíróság és a felek egyaránt. A felek részéről ez fokozott eljárási felelősséget kíván, ennek alapelvi szintű megjelenése a felek eljárástámogatási kötelezettsége. A Pp. alapelvként rögzíti a bíróság közrehatási tevékenységét, amely az anyagi pervezetésben jelenik meg az elsőfokú és másodfokú eljárás folyamán. A jogalkotó a bírói közrehatás alapján aktivitást vár el a bíróságoktól, amelynek az anyagi pervezetés eszközeivel tudnak eleget tenni azáltal, hogy elősegítik a felek jogérvényesítését és közrehatnak a peranyag mihamarabbi és koncentrált rendelkezésre állásában. Fontos megjegyezni, hogy az aktív bírói pervezetés nemzetközi elvárás.
Jelen tanulmányban a bíróság közrehatási tevékenységének jellemzőit és az anyagi pervezetés tartalmát kívánom vizsgálni.

Kulcsszavak: bírói közrehatás, anyagi pervezetés, nyilatkozat, keresetlevél, bizonyítás

1. Bevezető gondolatok

Magyary Géza a magyar perjogi reformmozgalmakról szóló előadásában hangsúlyozta, hogy „*Minden perjogi codificatio legnehezebb része a bíró és a felek közötti viszonyt szabályozni*." [1] Ez a megállapítás a hatályos eljárási törvény előkészítése, illetve megalkotása során is aktuális volt.
A polgári perrendtartásról szóló 2016. évi CXXX. törvény (a továbbiakban: Pp.) 2015 januárjában elfogadott koncepciója tartalmazta azokat a szabályozási célokat és elveket, amelyek alapján kialakításra kerültek a kódex rendelkezései. A nevesített szempontok között megtalálható volt a perhatékonyság rendszerszintű megvalósítása és új alapelvek rögzítése a hatékonyság érdekében, valamint a perkoncentráció elvének hangsúlyos érvényesítése.[2] A perkoncentráció a korábbiaktól részben eltérő

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[1] Magyary Géza, *Magyar perjogi reformmozgalmak. Magyary Géza összegyűjtött dolgozatai a polgári eljárás, a magánjog és a kereskedelmi jog köréből. I. kötet* (Budapest: MTA kiadása, 1942), 16.
[2] Wopera Zsuzsa (szerk.), *Kommentár a polgári perrendtartáshoz. Kommentár a polgári perrendtartásról szóló 2016. évi CXXX. törvényhez* (Budapest: Wolters Kluwer Hungary Kft., 2019), 21.

szerepfelfogást kíván a felektől és a bíróságtól egyaránt. A bíróság irányában e körben megfogalmazott kötelezettségek alapelvi szinten a bíróság közrehatási tevékenységének rögzítésével jelennek meg: „*A bíróság a perkoncentráció érvényesülése érdekében az e törvényben meghatározott módon és eszközökkel hozzájárul ahhoz, hogy a felek eljárási kötelezettségeiket teljesíthessék*.”[3] A Pp. egyik jellegadó sajátossága a bíróság szerepének erősítése a jogvita kereteinek tisztázásában. Ezzel a törvény aktív, a felek eljárástámogatási kötelezettségét elősegítő magatartást vár el a bíróságtól. A bíróság közrehatásának elve és a felek eljárástámogatási kötelezettsége egyenes arányos viszonyban áll egymással, céljuk a perkoncentráció megvalósulása. A felek csak a megfelelő bírói közrehatási tevékenység mellett tudnak eleget tenni eljárástámogatási kötelezettségüknek.[4]
A bíróság közrehatási tevékenységének elve a Pp. „Alapvetések” címet viselő első részében „Alapelvek” cím alatt került elhelyezésre, mivel az eljárás teljes tartama alatt érvényesülnie kell. Jelen tanulmányban a bíróság közrehatási tevékenységének jellemzőit, a bírói pervezetéssel kapcsolatos nemzetközi elvárásokat, a bírói közrehatás külföldi kódexekben való megnyilvánulását és az anyagi pervezetés tartalmát veszem górcső alá.

2. A bírói közrehatás megjelenési formái a külföldi kódexekben

A bírói aktivitás fokozódása megfigyelhető valamennyi újrakodifikált európai perrendtartásban. Annak intenzitásában, illetve kiterjedtségében azonban vannak eltérések az egyes szabályozási megoldások között. A svájci, a szlovén és a horvát polgári perrendtartás alapelvi szinten rögzíti a bíró közrehatási kötelezettségét. A német polgári perrendtartásnak már az 1976. évi novellája a bíró számára a korábbi szabályozáshoz képest új kötelezettségeket írt elő. Egyrészt a bíróságnak kellő időben kell megtennie az előkészítő intézkedéseket, másrészt oda kell hatnia az eljárás egész ideje alatt, hogy a felek is kellő időben és a szükséges terjedelemben tegyék meg nyilatkozataikat [dZPO 273. § (1) bek.]. [5] A német polgári perrendtartás (a továbbiakban: dZPO) 2001. évi reformjának kulcsszava a bíróság „útmutatási és közrehatási” kötelezettsége volt. Az e reform eredményeként megszülető 2001. évi novella határozott meg egzakt kötelezettségeket a bíró számára az anyagi pervezetés körében. A dZPO 139. § (1) bekezdése szerint „*a bíróság – amennyiben szükséges – a tény- és jogviszonyt ténybeli és jogi szempontból megtárgyalja a felekkel és kérdéseket tesz fel. A bíróság közrehat annak érdekében, hogy a felek minden lényeges tényről időben és teljes körűen nyilatkozzanak, különösen a hivatkozott tényekre vonatkozó elégtelen adatokat egészítsék ki, a bizonyítási eszközöket jelöljék meg és a célszerű kérelmeket terjesszék elő.*” A jogalkotó nyilvánvalóvá tette, hogy a bíróságnak hangsúlyosabb szerepet kell vállalnia a tényállás megállapításában.[6] Az

[3] Pp. 6. §
[4] Kiss Attila, „Hol a határ? – Gondolatok az aktív bírói szerepfelfogás egyes kérdéseiről,” *Debreceni Jogi Műhely* XVII, no. 3-4 (2020): 65.
[5] Kengyel Miklós, *A bírói hatalom és a felek rendelkezési joga a polgári perben* (Budapest: Osiris Kiadó, 2003), 141.
[6] Kengyel, *A bírói hatalom és a felek rendelkezési joga a polgári perben*, 146-147.

osztrák polgári perben a bíró feladata az alaki és az anyagi pervezetés is. Az osztrák Pp. 182. §-a szerint „*az elnöknek a tárgyaláson a kérdéseivel vagy más módon oda kell hatnia, hogy a felek a döntés szempontjából lényeges ténybeli közléseiket megtegyék, vagy hiányzó adatokat pótoljanak, vagy a bizonyítási eszközeiket megjelöljék, a felajánlott bizonyítékaikat kiegészítsék, és általában minden olyan felvilágosítást megadjanak, amelyek a valós tényállás megállapításához szükségesek.*" Tehát az elnöknek kell gondoskodnia az ügy kimerítő tárgyalásáról.[7] A svájci polgári perrendtartás 56. §-a, a „Bíróság feltárási (tisztázási) kötelezettsége" cím alatt előírja, hogy „*ha a fél kérelme homályos, ellentmondásos, vagy nyilvánvalóan hiányos, a bíróság megfelelő kérdések félhez történő intézésével lehetőséget ad a félnek a kérelem tisztázására, vagy kiegészítésére*".[8]
A bíróság anyagi pervezetésével kapcsolatban Ébner Vilmos részletekbe menően elemzi, hogy a német polgári eljárásjogban ennek három fő funkciója hangsúlyozható. Az első az úgynevezett tisztázó funkció, ezáltal a fél nyilatkozatának pontos jelentése, illetve tartalma megállapítható. Ez vonatkozik a tényállításokra, a kereseti és egyéb eljárási kérelmekre, azok pontosítását, világosabbá, érthetőbbé tételét, a szóbeli és írásbeli nyilatkozatok közötti eltérés tisztázását jelenti. Adott esetben a bíróságnak vizsgálnia kell az indítványozó célját, illetve szándékát. Ez arra a helyzetre vonatkozik, ha esetlegesen az indítvány nem kellően világos vagy jogilag kifogásolható módon került megfogalmazásra. Ekkor a bíróságnak azt kell vizsgálnia, hogy az indítványozó mit kívánt elérni az indítvánnyal. A tisztázó funkció körébe tartozik még a fél által használt jogi fogalmak tényleges tartalmának megállapítása is. Ugyanis a felek számos esetben használnak olyan jogi kifejezéseket, minősítéseket, amelyek ténybeli alapját nem adják elő. Az anyagi pervezetés második rendeltetése a transzformációs funkció, amely nemcsak szorosan kapcsolódik a tisztázási funkcióhoz, hanem annak valójában következménye is. Ennek lényege úgy foglalható össze, hogy a bíróság az anyagi pervezetés eszközeit felhasználva átvezeti a fél nyilatkozatait a laikus szférából az eljárás szakszerű világába, például a szakszerű kérelem előterjesztésére való ösztönzéssel. Tehát a fél által egyszerűen, nem a jogi fogalmakat, kifejezéseket alkalmazva megfogalmazott akaratát ülteti át és gondoskodik arról, hogy szakszerű-perszerű kifejezést kapjon. Ehhez kapcsolódik a harmadik, értelmezési-megértési funkció, ami azt jelenti, hogy a bíróság feladata a jogvitát tényállásbeli és jogi szempontból átbeszélni a felekkel és nekik kérdéseket feltenni. Ennek köszönhetően már a per korai szakaszában megvilágításra kerül, hogy mi az, ami a perben relevanciával rendelkezik.[9]

3. A bíróság közrehatásával kapcsolatos nemzetközi elvárások

Az Európa Tanács Miniszteri Bizottságának az igazságszolgáltatás működését elősegítő polgári eljárásjogi irányelvekről szóló R (84) 5. számú ajánlás 1. elve

[7] Kengyel, *A bírói hatalom és a felek rendelkezési joga a polgári perben*, 113-114.
[8] Wopera Zsuzsa, „Az új polgári perrendtartás karakterét adó egyes megoldások európai összehasonlításban," *Advocat*, különszám (2017): 3.
[9] Ébner Vilmos, *Az anyagi pervezetés és az eljárási alapelvek kapcsolata* (Székesfehérvár: Kézirat, 2015), 9-10.

szerint: „*Rendes körülmények között a pert legfeljebb két tárgyaláson kell befejezni: az első esetlegesen az előkészítő jellegű tárgyalás és a második folyamán történik a bizonyítás felvétele, a felek előadásai és ha lehetséges, az ítélet hozatala. A bírónak ügyelnie kell arra, hogy minden, a második tárgyalásra szükséges cselekményt elvégezzenek a megfelelő időben, elviekben mindenféle halasztás tilos, kivéve akkor, ha új tények vagy más rendkívüli és fontos körülmények merülnek fel.*" Az ajánlás az ügy elbírálása kapcsán két tárgyalást jelenít meg, egy előkészítő jellegű tárgyalást és egy érdemi tárgyalást, ahol a bizonyítás, valamint az ítélethozatal történik.
Az Európa Tanács Miniszteri Bizottságának az igazságszolgáltatás működését elősegítő polgári eljárásjogi irányelvekről szóló R (84) 5. számú ajánlás 3. elve a bírói közrehatás mértékét tágabban értelmezi, mint a Pp.: „*A bírónak legalább az előkészítő tárgyaláson, de ha ez lehetséges, az eljárás egésze során aktív szerepet kell játszani az eljárás gyors lefolytatásának biztosítása érdekében, a felek jogainak és egyenlőségük elvének tiszteletben tartása mellett. Különösen hivatalból kellene rendelkezni azzal a joggal, hogy a felektől valamennyi szükséges felvilágosítást megkérhessen, őket személyes megjelenésre idézhesse, jogkérdéseket vethessen fel, bizonyítékokat kutathasson fel akkor, ha az ügy érdemi része nem a felek rendelkezése alatt áll, a bizonyítást irányítsa, kizárja azokat a tanúkat, akiknek a tanúvallomása esetlegesen az ügyre vonatkozóan nem relevánsak, korlátozza az ugyanabban az ügyben tanúvallomásra idézendők számát, amennyiben eltúlzottan sokan vannak. Mindezeket úgy kell megtennie, hogy ne terjeszkedjen túl a célon*." A bírói aktivitás ajánlásban felsorolt elemei közül a bizonyítékok felkutatását emelem ki. Itt e jog általánosságban fogalmazódik meg, míg a Pp. csak kivételesen egyes különleges eljárásokban engedi meg a hivatalbóli bizonyítást.[10]
Az Európa Tanács igazságszolgáltatás hatékonysága biztosításáért felállított bizottságának [11] 2006. évi ajánlásában [12] külön nevesítve szerepel a bíróság aktivitásának fokozása, e szerint a bírónak aktív, ügyet menedzselő szerepet kell biztosítani. Proaktív, kezdeményező szerepet kell játszania a per észszerű időn belül történő befejezése érdekében.[13]
A nemzetközi elvárások is azt fogalmazzák meg, hogy a bíró aktívan vegyen részt a perelőkészítésben és az alapos perelőkészítést követően egy koncentrált tárgyalás tartására kerüljön sor.

4. A bírói közrehatás és a pervezetés egymáshoz való viszonya

A bírói közrehatás az anyagi pervezetésben ölt testet az elsőfokú és másodfokú eljárás során egyaránt. A bírói közrehatási tevékenységnek a Pp.-t értelmező szakirodalomban, valamint bírói testületekben kialakult egy szűkebb és egy tágabb értelmezése. A szűkebb értelmezés szerint a bíróság közrehatási tevékenysége magát

[10] Pp. 434. § (3) bek., Pp. 492. § (2) bek.
[11] Ez a bizottság: European Commission for the Efficiency of Justice, rövidítve: CEPEJ
[12] Compendium of „best practices" on time management of judicial proceedings. Strasbourg, 8 December 2006, CEPEJ
[13] Nagy Adrienn és Wopera Zsuzsa (szerk.), *Polgári eljárásjog I.* (Budapest: Wolters Kluwer Hungary Kft., 2018), 50.

az anyagi pervezetést jelenti. A másik felfogás szerint a bírói közrehatás elvének egyik legfontosabb megnyilvánulási módja az anyagi pervezetés, azonban nemcsak egy konkrét megjelenési formája van, ezért ide tartozónak tekintendő az általános hiánypótlási szabály és a kötelező tájékoztatások köre, mint például a jogi képviseletről vagy a perorvoslati lehetőségről történő tájékoztatás, valamint az egyezség létrehozásának a megkísérlése is.[14]
A pervezetés két ágát különböztetjük meg: az alaki és az anyagi pervezetést. Az alaki pervezetés körébe tartozó bírói cselekményeket a Pp. összefoglalóan nem nevesíti, mivel azok maradéktalan felsorolása nem lehetséges. Az eljárás technikai lebonyolításához szükséges és az eljárás törvényességét biztosító cselekmények (például: tárgyalás kitűzése, idézés, zárt tárgyalás elrendelése) tartoznak ide. Az alaki pervezetés alatt tágabb értelemben érteni kell az eljárás menetét, külső lefolyását biztosító bírói jogosítványokat. Szintén ide sorolandó az „Egyéb általános szabályok" című IX. Fejezetben rögzített tájékoztatási kötelezettség[15], amely az anyagi pervezetés körén kívül esik, de a bíróság közrehatási tevékenységi körébe tartozik.[16]
Az anyagi pervezetés az ügy kimerítő tárgyalásának és szakszerű eldöntésének során tanúsított bírói tevékenységet jelöli.[17] Ennek gyakorlására nincs általános szabály vagy protokoll, mindig a konkrét helyzetben az adott ügy körülményeinek megfelelően kell teljesíteni. Azonban fontos kiemelni, hogy csak szükség esetén és a kereseti kérelem, valamint az ellenkérelem keretei között kell gyakorolni. A Pp. a bíróság anyagi pervezetésének három eszközéről tesz említést: kérdés feltevése, nyilatkozattételre történő felhívás és a tájékoztatás. Az anyagi pervezetés tartalma perszakonként eltérő, az egyes perszakokhoz idomul, jellegét a szak vagy szakasz célja határozza meg. A perfelvétel során, egészen annak lezárásáig a bíróság a jogvita kereteinek meghatározása érdekében gyakorolja, a felek perbeli nyilatkozatainak, a vitás kérdéseknek a tisztázására, a bizonyítékok számbavételére és a bizonyítási eljárás tervezhetőségére irányul, tehát az ügy érdemi tárgyalásra való előkészítését irányozza elő. E jogosítványok gyakorlása az érdemi tárgyalási szakban pedig az érdemi bizonyítás lefolytatását szolgálja.[18]

5. Az anyagi pervezetés esetkörei

Pp. 237. § (1) „Ha a fél perfelvételi nyilatkozata - e § alkalmazásában ideértve a keresetlevélben feltüntetett nyilatkozatokat is - hiányos, nem kellően részletezett vagy ellentmondó, a bíróság közrehat abban, hogy a fél a perfelvételi nyilatkozatát teljeskörűen előadja, illetve annak hibáit kijavítsa."

[14] Wopera (szerk.), *Kommentár a polgári perrendtartáshoz*, 653.
Wopera Zsuzsa, „A felek és a bíróság közötti szereposztás a keresetindítás során," *Miskolci Jogi Szemle* XV, no. 1 (2020): 360-361.
[15] Pp. 111. § *„A bíróság köteles a jogi képviselő nélkül eljáró felet perbeli eljárási jogairól és kötelezettségeiről, indokolt esetben a támogató perben történő részvételéről, valamint a pártfogó ügyvédi képviselet engedélyezésének lehetőségéről a szükséges tájékoztatással ellátni."*
[16] Wopera (szerk.), *Kommentár a polgári perrendtartáshoz*, 648.
[17] Kengyel, *A bírói hatalom és a felek rendelkezési joga a polgári perben*, 113.
[18] Wopera (szerk.), *Kommentár a polgári perrendtartáshoz*, 654-656.

A felek feladata a tények előadása, jogállítás és a bizonyítékok rendelkezésre bocsátása. A bíróság a homályos nyilatkozatokat tisztázza, a hiányos nyilatkozatokat kiegészítteti, tájékoztatja a feleket a bizonyítandó tényekről, a bizonyítási kötelezettségről és a bizonyítási teherről, valamint a hivatalból figyelembe veendő tényekről. E körben a bíróság kérdéseket tesz fel a feleknek vagy valamely megjelölt kérdésben írásban felhívja nyilatkozatra. A pervezetési tevékenység nem irányulhat arra, hogy a fél teljesen új, az előzőekben előadottakkal ellentétes tényállításokat tegyen. A rendelkezési jog irányadó, ennek megfelelően a fél eldöntheti, hogy egy hozzá intézett kérdésre vagy nyilatkozattételre történő felhívásra válaszol-e és, ha igen milyen terjedelemben teszi ezt meg.[19] Amennyiben a fél valamely perfelvételi nyilatkozatot az anyagi pervezetés ellenére nem vagy nem teljeskörűen terjeszt elő, a bíróság hiányos tartalma szerint a rendelkezésre álló peranyag alapján bírálja el.[20] Tehát a közrehatás arra irányul, hogy elősegítse a perfelvételi nyilatkozatok érdemi elbíráláshoz szükséges módon történő előterjesztését, vagyis a bíróság orientálja a felet abban, hogy a jogvita eldöntéséhez milyen tárgyban, milyen jellegű nyilatkozat szükséges. Ez azonban semmiképp sem jelenti a fél anyagi jogi kitanítását.[21] Amennyiben az anyagi pervezetés anyagi jogi jogosultságot érintene, ezzel a bíróság megsértené a fegyveregyenlőség elvét.[22] Az anyagi pervezetés nem jelent általános tájékoztatási kötelezettséget, szerepe csupán arra korlátozódik, hogy a felek tényállításait, nyilatkozatait tisztázza és konkretizálja, adott esetben alkalmat adjon a kiegészítésre.[23]

Pp. 237. § (2) „Ha a perfelvételi nyilatkozat nem terjed ki valamely lényeges tény vonatkozásában a bizonyításra vagy a felek között vita van abban, hogy valamely tény bizonyítása mely felet terheli, a bíróság az (1) bekezdésben foglaltakon túl tájékoztatja a feleket a bizonyíték rendelkezésre bocsátása, illetve a bizonyítás indítványozása elmulasztásának, valamint a bizonyítás esetleges sikertelenségének következményéről is."

A bíróság - amennyiben valamely tény vonatkozásában kétséges - köteles a feleket tájékoztatni, hogy az adott tény vonatkozásában kit terhel a bizonyítási kötelezettség és közölnie kell a bizonyíték rendelkezésre bocsátásának vagy az indítványozás elmulasztásának következményeit. A felperesnek a keresetlevél érdemi részében fel kell tüntetnie a tényállításokat alátámasztó és rendelkezésre álló bizonyítékokat, valamint bizonyítási indítványokat,[24] ezek a keresetlevél kötelező tartalmi elemeinek részét képezik. Ennek elmulasztása a keresetlevél hiánypótlási felhívás nélküli visszautasítását eredményezte, majd 2021. január 1-től amennyiben ilyen hiányosságokat észlel a bíróság, hiánypótlásra felhívja a felet és csak annak

[19] Wopera (szerk.), *Kommentár a polgári perrendtartáshoz*, 658-659.
[20] Pp. 183. § (6) bek.
[21] Tóth Barbara, „A bíróság és a felek kötelezettségeiben beálló változások az új polgári perrendtartásban," *Advocat*, különszám (2017): 35.
[22] Mészáros Pál Emil, „A polgári perrendtartás egyes kérdései a gyakorlati tapasztalatok alapján," in *Az igazságszolgáltatással kapcsolatos egyes folyamatok alakulása az elmúlt években* szerk. Tilk Péter és Fekete Kristóf Benedek (Pécs: Pécsi Tudományegyetem Állam- és Jogtudományi Kara, 2020), 208.
[23] PJD2019. 32.
[24] Pp. 170. § (2) bek. e) pont

eredménytelensége esetén kerül sor visszautasításra. Tehát alapvetően már nem visszautasításra, hanem hiánypótlási felhívásra ad alapot. Az alperes írásbeli ellenkérelmének ismeretében válik nyilvánvalóvá, hogy mely tények relevánsak a jogvita eldöntése szempontjából és esetlegesen azok bizonyítatlanok-e. Ez alapján a bíróságnak a feleket tájékoztatni kell, hogy melyiküké a bizonyítási kötelezettség, valamint az indítványozás elmulasztásának következményeiről.

Pp. 237. § (3) „A bíróság hozzájárul a jogvita kereteinek tisztázásához azzal, hogy a felek tudomására hozza, ha

a) az általuk hivatkozott jogszabályi rendelkezést eltérően értelmezi,

b) a rendelkezésre álló adatok alapján olyan tényt észlel, amelyet hivatalból kell figyelembe venni, vagy

c) jogszabály szerint a kérelemhez nincs kötve,

és lehetőséget biztosít a feleknek nyilatkozataik megtételére."

A tájékoztatás vonatkozhat anyagi és eljárási rendelkezésre is. A jogi képviselővel, illetve anélkül eljáró felet ugyanúgy tájékoztatásban kell részesíteni. A tájékoztatás kiterjed például arra, hogy a bíróság az ügy elbírálásánál az alkalmazandó jogszabály melyik hatályos időállapotát kívánja figyelembe venni, bizonyítást nem igénylő minősítésre, jogegységi határozat alapján a bíróságot kötő értelmezésre vagy a bíróság felvilágosítja a felet a jogszabályban meghatározott bizonyítási szempontról, továbbá arról, ha a jogvita más eljárási törvény hatálya alá esik.[25]

A bíróság hivatalból veszi figyelembe a köztudomású tényeket, azokat a tényeket, amelyekről hivatalos tudomása van, valamint a törvényes vélelmeket. Azonban arra figyelemmel kell lennie a bíróságnak, hogy a felsorolt tényekkel szemben a törvény ellenbizonyításra lehetőséget ad.[26]

A bíróságnak a felek tudomására kell hoznia, ha jogszabály felhatalmazása alapján a kérelemtől történő eltérésre kerül sor. Az ítélkezési gyakorlat egyik leggyakoribb példája a közös tulajdon megszüntetésével kapcsolatos: a bíróság a kérelemtől eltérő módot is alkalmazhat a közös tulajdon megszüntetésére, amennyiben az alkalmazni kívánt megszüntetési mód ellen nem tiltakozik valamennyi tulajdonostárs.[27]

A Pp. 160. § (2) bekezdés e) pontja előírja, hogy a jegyzőkönyvnek tartalmaznia kell a pervezetés körében tett intézkedéseket. A pervezetés dokumentálására vonatkozóan nem írja elő a törvény, hogy azt milyen részletesen kell megtenni. Azonban ennek a későbbiekben, jogorvoslat során fontos szerepe lehet, mivel a másodfokon eljáró vagy rendkívüli perorvoslat folytán eljáró bíróság az iratokból (jegyzőkönyvek, beadványok, tárgyaláson kívül hozott végzések) állapítja meg, hogy elkövetett-e valamilyen hibát az elsőfokú bíróság az anyagi pervezetés során. Az anyagi pervezetés körében tett intézkedések rögzítésének hiánya arra a feltételezésre vezet, hogy az elsőfokú bíróság anyagi pervezetést nem végzett. Ez pedig azt eredményezheti, hogy a saját hibájából tények előadását és a bizonyítási kötelezettség teljesítését elmulasztó fél az elsőfokú bíróságra hárítja a felelősséget és így a

[25] Wopera (szerk.), *Kommentár a polgári perrendtartáshoz*, 663-664.
[26] Pp. 266. §
[27] 2013. évi V. törvény a Polgári Törvénykönyvről 5:84. § (6) bek.

perorvoslati szakban megteheti perfelvételi nyilatkozatát, illetve bizonyítási indítványt terjeszthet elő.[28]

6. Az anyagi pervezetés megnyilvánulása a perfelvételi szakban

E tevékenység időbeli kereteihez kapcsolódóan felmerült a kérdés, hogy már a perindítás szakában gyakorolható-e az anyagi pervezetés. A CKOT először 2017. július 7-i ülésén foglalkozott azzal a kérdéssel, hogy a bíróság a keresetlevél benyújtásakor élhet-e az anyagi pervezetés eszközével. Ekkor még az anyagi pervezetés körébe tartozó eszközt nem alkalmazhat a bíróság,[29] azt majd csak a perfelvételi szaktól kezdődően teheti meg. Azonban, ha a keresetlevél valamilyen hiányosságban szenved, arra vonatkozóan a hiány jellegétől függően más-más megoldási módozatot tartalmaz a törvény. A Kúria álláspontja szerint - az akkor hatályos szabályok alapján - a következő értelmezést volt javasolt elfogadni:

- Amennyiben a keresetlevél valamilyen kötelező tartalmi elemet nem foglal magában, akkor visszautasításnak van helye.
- Ha minden kötelező tartalmi elemhez kapcsolódóan tartalmaz ugyan valamit a keresetlevél, de nem teljes körűek, úgy hiánypótlásra való felhívásnak van helye.
- Abban az esetben van helye anyagi pervezetésnek, ha a keresetlevél megfelel a törvény követelményeinek és az előadottak teljes körűek, de az abban foglaltak következetlenek. Ekkor a keresetlevél perfelvételre alkalmas, tehát az alperessel közölni kell és majd a perfelvétel során kell a bíróságnak közrehatnia, hogy a benne foglalt nyilatkozatok hibáit a felperes javítsa.[30]

A CKOT 11. számú állásfoglalásában kimondta, hogy a bíróság által a keresetlevélben észlelt, az érvényesítendő jogra vonatkozó értelmezési probléma esetén anyagi pervezetés nem gyakorolható, azonban a közrehatási kötelezettség körében hiánypótlást rendel el, itt az állásfoglalás a Pp. 115. § (1) bekezdésére utal, amely szerint: „*Ha a beadvány nem felel meg e törvény rendelkezéseinek, vagy más okból kiegészítésre vagy kijavításra szorul, a bíróság, e törvény eltérő rendelkezése hiányában, rövid határidő tűzésével, a hiányok megjelölése mellett - indokolt esetben a beadvány visszaadásával - hiánypótlásra hívja fel a felet. A bíróság ezzel egyidejűleg figyelmezteti a felet, hogy ha a hiányokat nem pótolja vagy a beadványt újból hiányosan adja be, a bíróság azt vissza fogja utasítani, vagy hiányos tartalma szerint fogja elintézni*."

A Pp. 176. § (1) bekezdés j) pontja írta elő, hogy a keresetlevél visszautasításának van helye, ha nem tartalmazza a 170. § szerinti, illetve törvényben előírt egyéb kötelező tartalmi elemeket, illetve alaki kellékeket vagy a felperes nem csatolta a 171. §-ban, illetve törvényben előírt egyéb kötelező tartalmi mellékleteket. Azonban a CKOT

[28] Pp. 369. § (4) „*A másodfokú bíróság az elsőfokú bíróság ítéletének, illetve eljárásának az anyagi pervezetéssel összefüggő részét csak az anyagi jogi felülbírálat részeként vizsgálhatja és minősítheti, úgy, hogy egyúttal köteles elvégezni a saját anyagi jogi álláspontja szerint helyes anyagi pervezetést és az ezzel összefüggő intézkedéseket megtenni."*,
Wopera (szerk.), *Kommentár a polgári perrendtartáshoz*, 665-666.

[29] CKOT 11. számú állásfoglalás

[30] CKOT 10. számú állásfoglalás

állásfoglalás óta e pontot hatályon kívül helyezte 2021. január 1-től a polgári perrendtartásról szóló 2016. évi CXXX. törvény módosításáról szóló 2020. évi CXIX. törvény 76. §-ának 3. pontja. A hiánypótlásra való felhívás esetében az állásfoglalás a Pp. 176. § (2) bekezdés e) pontjára utal. Az állásfoglalás megfogalmazásakor e pont szerint, ha a kötelező tartalmi elemeket tartalmazó, de egyéb okból hiánypótlásra szoruló keresetlevél hiányait a bíróság felhívására nem pótolja a felperes, a keresetlevél visszautasításának van helye. Azonban a 2020. évi CXIX. törvény módosításai a Pp. 176. § (2) bekezdés e) pontját is érintették, amely a következőképp változott: a 170. §-ban foglalt, illetve törvényben előírt egyéb kötelező tartalmi elem, alaki kellék, valamint a 171. §-ban, illetve törvényben előírt egyéb kötelező melléklet hiánya esetén hiánypótlási felhívásnak van helye és csak annak sikertelensége esetén kell visszautasítani a keresetlevelet. Tehát a kapcsolódó szabályozás annyiban változott, hogy míg a Pp. hatálybalépése óta 2018. január 1-től 2020. december 31-ig a keresetlevél kötelező tartalmi elemeinek, illetve a kötelező mellékletek hiánya visszautasítást eredményezett, addig 2021. január 1-től a keresetlevél kötelező tartalmi elemeinek vagy mellékleteinek hiánya alapvetően nem visszautasításra adnak okot, hanem hiánypótlási felhívásra.

Az anyagi pervezetésre vonatkozó szabályok a Pp.-ben a perfelvételi és érdemi tárgyalási szak közös rendelkezései között kerültek elhelyezésre. Ebből egyértelműen megállapítható, hogy a bíróság anyagi pervezetése a perfelvételi szaktól kezdődik. A jogvita kereteit a felek határozzák meg, a felperes a keresetlevél, míg az alperes az írásbeli ellenkérelem benyújtásával teszi ezt meg. A Pp. 237. § (5) bekezdése is rögzíti, hogy „*A bíróság a felek kérelmének és jogállításának korlátain belül gyakorolja az anyagi pervezetést…*”.

A Pp. 170. § (4) bekezdése szerint keresethalmazat esetén egymással eshetőleges viszonyban álló több kereset esetén az elbírálás kért sorrendjét meg kell határozni. Ezzel kapcsolatban az Új Pp. Konzultációs Testület megfogalmazta, ha a felperes az eshetőleges viszonyban álló több keresetet rossz sorrendben terjeszti elő, a helyes sorrend megjelölése érdekében nincs helye olyan hiánypótlás elrendelésének, amelynek elmulasztása visszautasítással járna. Ebben az esetben a bíróságnak csak arra van lehetősége, hogy az anyagi pervezetés intézményével élve felhívja a felperest a megfelelő sorrend megjelölésére.[31] Az állásfoglalás a visszautasításnál a Pp. 176. § (2) bekezdés e) pontjára hivatkozik. A hivatkozott pont tartalmát a Pp. Novella[32] megváltoztatta. E pont szerint az állásfoglalás elkészítésekor, akkor került sor a keresetlevél visszautasítására, ha a felperes hiánypótlási felhívás ellenére nem pótolta a hiánypótlásra szoruló keresetlevél hiányait. 2021. január 1-től e pont alapján utasítja vissza a keresetlevelet a bíróság, ha a 170. § szerinti, illetve egyéb kötelező tartalmi elemet hiánypótlási felhívás ellenére nem tartalmaz a keresetlevél.

Az ellenkérelem előterjesztését követően a bíróság a keresetlevél és az alperes írásbeli ellenkérelmének ismeretében dönt a perfelvétel további menetéről. Lehetséges perfelvételi útvonalak: további írásbeli perfelvétel elrendelése, perfelvételi tárgyalás

[31] Új Pp. Konzultációs Testület 4. számú állásfoglalás

[32] 2020. évi CXIX. törvény a polgári perrendtartásról szóló 2016. évi CXXX. törvény módosításáról 13. §

kitűzése és a perfelvételi tárgyalás mellőzésével történő eljárás.[33] Ha szükség van a bíróság anyagi pervezető cselekményére, csak az első két perfelvételi mód határozható meg. Amennyiben a bíróság a perfelvételi tárgyalás kitűzése előtt további írásbeli perfelvételt rendel el, felhívja a felperest a válaszirat előterjesztésére. Erre az ügy tisztázása és az egy tárgyaláson való lezárása érdekében kerül sor. A Pp. 201. § (1) bekezdés c) pontja alapján „*A válasziratban a bíróság felhívásának megfelelő körben fel kell tüntetni a bíróság anyagi pervezetése szerinti felhívásra vonatkozó nyilatkozatot.*" A bíróság válasziratra felhívó végzésének és az erre a felperes által benyújtandó válasziratnak lényeges eleme a bíróság anyagi pervezetési cselekmények és az arra tett felperesi perfelvételi nyilatkozatok. A bíróság anyagi pervezetésére e körben szükség lehet a keresetlevélben előadottak, valamint az ellenkérelem tartalma miatt is. A keresetlevél vizsgálatakor, illetve azt követően a perindítási szakban anyagi pervezetésnek nincs helye, az kizárólag a perfelvételi szaktól gyakorolható. A Pp. 237. § (1) bekezdése kiemeli, hogy a perfelvételi szaktól gyakorolható anyagi pervezetés kiterjed a keresetlevélben előadottakra is. Így a bíróság azokat a pervezetési cselekményeit, amelyek a kereset miatt váltak szükségessé a válasziratra felhívó végzésben tudja, illetve kell megtennie.[34]

A bíróság a perfelvételi tárgyalás kezdetén összegzi a jogvita szempontjából lényeges nyilatkozatokat. Ezáltal a felek számára világossá válik, hogy a bíróság milyen nyilatkozatoknak, kérdéseknek tulajdonít jelentőséget.[35] A perfelvétel lezárására vagy perfelvételi tárgyaláson vagy annak mellőzése mellett végzéssel kerül sor. A bíróság e végzéséhez kötve van, így annak megváltoztatására, hatályon kívül helyezésére utóbb nem kerülhet sor. Fontosnak tartom megjegyezni, hogy a bíróság pervezető végzéséhez nincs kötve, ez alól kivételt a perfelvételt lezáró végzés jelent. A perfelvételt lezáró végzésben elegendő a bírósági rendelkezés tényének megállapítása, a Pp. további tartalmi követelményt nem támaszt vele szemben.[36] Ha a perfelvételi tárgyaláson a jogvita szempontjából lényeges nyilatkozatok bíróság általi összegzésének a felek további előadása ellentmond, a bíróság akkor jár el helyesen, ha a perfelvétel előtt felhívja a feleket végleges álláspontjuk összefoglalására, majd ennek eredményét megfelelő részletességgel a jegyzőkönyvben rögzíti.[37]

A jogi képviselő nélkül eljáró fél számára a Pp. több támogatást ír elő az anyagi pervezetés terén, mint a jogi képviselővel eljáró fél irányában. Ezekkel a speciális szabályokkal igyekszik segíteni a jogalkotó az eljárás során. A fél perfelvételi nyilatkozatainak tisztázásához szükség lehet a személyes meghallgatására, különösen a tényállítás, jogállítás, kérelem, ellenkérelem, valamint a bizonyítási lehetőségek tisztázása érdekében. A bíróság tájékoztatással látja el a felet a bizonyítási lehetőségekről (bizonyítási eszközökről, bizonyítási módokról, bizonyítási feltételekről).[38]

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[33] Pp. 187. §
[34] Wopera (szerk.), *Kommentár a polgári perrendtartáshoz*, 573.
[35] Pp. 191. § (1) bek.
[36] Pp. 194. §, 198. §
[37] Új Pp. Konzultációs Testület 15. számú állásfoglalás
[38] Pp. 253. §

7. Anyagi pervezetés az érdemi tárgyalási szakban

Az érdemi tárgyalási szakban keresetváltoztatás, ellenkérelem-változtatás, illetve további bizonyítási indítvány előterjesztése főszabály szerint nem megengedett, erre csak nagyon szűk körben, a törvény által meghatározott esetekben van lehetőség. Amennyiben a kereset-, illetve ellenkérelem-változtatást a bíróságnak a perfelvételt lezáró végzés meghozatalát követő anyagi pervezetése indokolja, az elsőfokú ítélet meghozatalát megelőző tárgyalás berekesztéséig van helye.[39] Az utólagos bizonyítás körében a Pp. által megengedett egyik eset, ha az a bíróságnak a perfelvételt lezáró végzés meghozatalát követő anyagi pervezetése folytán vált szükségessé, ekkor a perfelvételt lezáró végzés meghozatalát követően a fél az elsőfokú ítélet meghozatalát megelőző tárgyalás berekesztéséig terjeszthet elő további bizonyítási indítványt, illetve bocsáthat rendelkezésre további bizonyítékot.[40]

7.1. Az anyagi pervezetés megjelenése a szakértői bizonyítás körében

A bizonyításra vonatkozó szabályok között számos helyen került rögzítésre a bíróság anyagi pervezetésére felhatalmazó rendelkezés. A szakértői bizonyítással kapcsolatban a Pp. kimondja, hogy „*A bíróság felhívja a fél figyelmét, ha*

a) szakértő alkalmazása szükséges,

b) jogszabály értelmében szakértő csak kirendelés útján alkalmazható,

c) a szakvélemény elkészítéséhez a perben nem szolgáltatott adatok szükségesek, vagy

d) a magánszakértői vélemény vagy a kirendelt szakértő szakvéleménye aggályos.”[41]

Az a) ponttal kapcsolatban a Civilisztikai Kollégiumvezetők Országos Tanácskozása (a továbbiakban: CKOT) foglalkozott a következő kérdéssel: „*Ha az elsőfokú bíróság elmulasztja az anyagi pervezetés körében felhívni a fél figyelmét, hogy a tényállítása alátámasztása szakértői bizonyítás útján lehetséges, majd a fellebbezésben a fél erre hivatkozva a másodfokú bíróságtól az ítélet megváltoztatását kéri azzal, hogy a másodfokú bíróság a szakértői bizonyítást folytassa le, a másodfokú bíróságnak helyt kell-e adnia fél indítványának, vagy az ítéletet az eljárási szabálysértésre tekintettel a Pp. 381. § alapján hatályon kívül helyezheti?*” Amennyiben az elsőfokú bíróság a Pp. 317. § (1) bekezdés a) pontja szerinti kötelezettségének nem tesz eleget, a másodfokú bíróság előtt lehetséges szakértői bizonyítással összefüggő nyilatkozat előterjesztése és ennek alapján a bizonyítás lefolytatása. Ha a fél szakértői bizonyítási indítványt tesz, a másodfokú bíróság kétféleképpen járhat el. Az egyik lehetséges mód, ha a bíróság az érdemi döntést befolyásoló hibát orvosolhatónak tartja, akkor kiegészítheti az elsőfokú bíróság bizonyítási eljárását a szakértői bizonyítás elrendelésével és lefolytatásával. Míg ennek hiányában pedig az ítéletet hatályon kívül helyezi. Mindig

[39] Pp. 215. § (1) bek. b) pont, Pp. 216. § (1) bek. b) pont
[40] Pp. 220. § (1) bek. d) pont
[41] Pp. 317. § (1) bek.

az adott ügy körülményeitől, illetve attól függ a két lehetőség közüli választás, hogy ezzel a hiba orvoslása és az érdemi döntés meghozatala lehetséges-e.[42]
Az a) pont szerint a bíróság köteles felhívni a felek figyelmét, ha szakértői bizonyítás szükséges. A b) pont alapján e körben a tájékoztatásnak ki kell terjednie arra is, ha az adott ügyben csak kirendelt szakértő járhat el, például ilyenek a gondnoksági perek, amelyekben magánszakértő nem indítványozható. A bírói felhívás a fél oldalán nem keletkeztet kötelezettséget, maradéktalanul érvényesül a felek rendelkezési joga, tehát szabadon dönthetnek arról, hogy a felhívásban foglaltakat teljesítik-e.
A fél indítványozhatja a más eljárásban kirendelt szakértő által készített szakvélemény felhasználását. Amennyiben a bíróság helyt ad a fél indítványának, a bizonyító fél köteles gondoskodni a szakvélemény beszerzéséről, illetve az eljáró bíróság elé tárásáról a megjelölt határidőn belül. Azonban a perkoncentráció elvét tekintve arra kell törekedni, hogy az eljárás költséghatékony és az ügy észszerű időn belül befejezhető legyen. Ebből adódóan vannak olyan helyzetek, amikor a célszerűség miatt a bíróság intézkedik a szakvélemény beszerzéséről: ha a fél számára nem lehetséges a szakvélemény beszerzése, az jelentős nehézséggel vagy aránytalan többletköltséggel járna, valamint ha a más eljárás iratait egyéb okból is be kellene szerezni.[43]

8. Másodfokú eljárásban alkalmazott anyagi pervezetés

A Pp. 369. § (4) bekezdése szerint „*A másodfokú bíróság az elsőfokú bíróság ítéletének, illetve eljárásának az anyagi pervezetéssel összefüggő részét csak az anyagi jogi felülbírálat részeként vizsgálhatja és minősítheti, úgy, hogy egyúttal köteles elvégezni a saját anyagi jogi álláspontja szerint helyes anyagi pervezetést és az ezzel összefüggő intézkedéseket megtenni*."
A másodfokú bíróság felülbírálati jogkörét a fellebbezési kérelem, az ellenkérelem és a csatlakozó fellebbezés keretei között gyakorolhatja.[44] Amennyiben a másodfokú bíróság azt állapítja meg, hogy az elsőfokú bíróság által végzett anyagi pervezetés az érintett kérdéshez kapcsolódóan nem volt megfelelő, ezt a felek tudomására hozza és a fellebbező fél kérelmére figyelembe veszi. A Pp. kifejezetten rögzíti, hogy önmagában nem szolgálhat az elsőfokú ítélet hatályon kívül helyezésére alapul, hogy a másodfokú bíróság az elsőfokú bíróság anyagi pervezetésével nem ért egyet, valamint kizárólag ezen okból a felek sem kérhetik a hatályon kívül helyezést.[45] A másodfokú bíróság az elsőfokú bíróság ítéletének, illetve eljárásának az anyagi pervezetéssel összefüggő részét csak az anyagi jogi felülbírálat részeként vizsgálhatja és minősítheti. E vizsgálat mellett köteles megtenni a saját jogi álláspontja szerinti helyes anyagi pervezetést és az ezzel összefüggő intézkedéseket.[46] A másodfokú bíróság vagy hatályon kívül helyezi az elsőfokú bíróság döntését vagy amennyiben

[42] CKOT 21. számú állásfoglalás
[43] Új Pp. Konzultációs Testület 9. számú állásfoglalás
[44] Pp. 370. § (1) bek.
[45] Pp. 384. § (1) bek.
[46] Pp. 369. § (4) bek.,
Csillám Katalin, „A 2016. évi CXXX. törvényben szabályozott perorvoslatok a gyakorló bíró szemével," *Advocat*, különszám (2017): 27.

lehetséges az ügy érdemében dönt (helybenhagy vagy megváltoztat). Az ítélet akkor helyezhető hatályon kívül, ha nem lehet az ügy érdemében dönteni, nem orvosolható az ügy érdemi hibája.[47]

9. Összegzés

A Pp. legfőbb szabályozási célja a perhatékonyság rendszerszintű megvalósítása, amelyet a jogalkotó igyekezett egyes elemekkel, új alapelvekkel garantálni. A perkoncentráció hangsúlyos érvényesítése is a hatékonyság szolgálatában áll. Ez a követelmény a korábbiaktól eltérő szerepfelfogást, illetve magatartást kíván a felektől és a bíróságtól egyaránt. Ezen elvárás a bíróság irányában alapelvi szinten a bíróság közrehatási tevékenységének rögzítésével jelenik meg. A vizsgált tárgykörhöz kapcsolódó nemzetközi kitekintés után megállapítható, hogy az aktív bírói magatartás nemzetközi elvárásként is megfogalmazódik és alapvetően valamennyi újrakodifikált európai polgári perjogi kódexben megtalálható. A hazai hatályos szabályozás kapcsolódó rendelkezéseit áttekintve leszögezhető, hogy a bírói közrehatás az eljárás folyamán az anyagi pervezetésben ölt testet, ezáltal a bíró hatékony eszközt kap arra, hogy időt takarítson meg és megakadályozza a per elhúzódását. A pervezetési jogosítványok helyes alkalmazásával az eljárás a jogilag releváns körülményekre koncentrálódik. Az anyagi pervezetés az elsőfokú eljárás perfelvételi és érdemi tárgyalási szakában, valamint a másodfokú eljárás során eltérő tartalommal és terjedelemben, de egyaránt szükséges. A bíróság anyagi pervezető cselekményével elő tudja mozdítani, hogy a felek eljárástámogatási kötelezettségüket teljesítsék. Ezzel a tevékenységgel a felek jogérvényesítéséhez és a peranyag mihamarabbi rendelkezésre állásához járul hozzá. Ezáltal segít előmozdítani, hogy az ügy egy érdemi tárgyaláson elbírálható legyen.

[47] Pp. 384. §

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Ripszám Dóra[*] – A gyermekkereskedelem meghatározása

Lektorálta: Dr. Tóth Dávid PhD.

Absztrakt

Az emberi jogok megsértésének egyik legsúlyosabb formája a gyermekkereskedelem.[1] *Az emberkereskedelemben részt vevő szervezett bűnözői csoportokkal*[2] *szemben az egyik legkiszolgáltatottabb csoportot a gyermekek alkotják. Az emberkereskedelem áldozatául esett gyermekeket elsősorban bűnözői tevékenységre kényszerítés útján használják ki, ezeket a gyermekeket gyakran hamisan az adott bűncselekmény elkövetőjeként azonosítják, és nem pedig az emberkereskedelem áldozataként, ezért az esetek nagy része nem kerül napvilágra az Európai Unión belül. A szervezett bűnözéssel foglalkozó csoportok gyakran azért a gyermekeket célozzák meg az emberkereskedelem elkövetése céljából, mert az emberkereskedők őket könnyebben tudják toborozni, ellenőrizni.*[3]

Ahhoz, hogy meg tudjuk határozni a gyermekkereskedelem fogalmát, először tisztáznunk kell magának az emberkereskedelemnek a definícióját, valamint a gyermekkor tartamát.

Kulcsszavak: gyermekkereskedelem, emberkereskedelem, gyermekkor

1. Bevezetés

Az Európai Unió Alapjogi Chartájának 5. Cikke kimondja, hogy „(1) Senkit sem lehet rabszolgaságban vagy szolgaságban tartani. (2) Senkit sem lehet kényszermunkára vagy kötelező munkára igénybe venni. (3) Tilos emberi lényekkel kereskedni.[4]
Magyarország Alaptörvénye a következő tilalmat állapítja meg: „Senkit nem lehet kínzásnak, embertelen, megalázó bánásmódnak vagy büntetésnek alávetni, valamint szolgaságban tartani. Tilos az emberkereskedelem."[5]
Az emberkereskedelem egy országokon átívelő probléma, amely egyaránt érinti a kiindulási-, a cél- és a tranzitországokat. Egy rendkívül magas szervezettségű, gyorsan

[*] PhD-hallgató a PTE-ÁJK Büntetőjogi Tanszékén.
[1] Obertová, Zuzana, and Cattaneo, Cristina. "Child Trafficking and the European Migration Crisis: The Role of Forensic Practitioners." Forensic Science International (2018): pp. 46–59.
[2] Szervezett bűnözésről lásd még: Tóth, Dávid, Gál, István László, Kőhalmi, László. „Organized Crime in Hungary." *Journal of Eastern European Criminal Law* 2:(1) pp. 22-27.
[3] "Fighting Child Trafficking: a Main Priority for EU Law." Europol, October 15, 2014. https://www.europol.europa.eu/newsroom/news/fighting-child-trafficking-main-priority-for-eu-law-enforcement.
[4] Az Európai Unió Alapjogi Chartájának 5. Cikke
[5] Magyarország Alaptörvénye

terjedő bűncselekmény. Az emberkereskedelem célja elsősorban a prostitúciós vagy kényszermunka jellegű kizsákmányolás, szervezett koldultatás, illegális örökbefogadás, illetve a szervkereskedelem. Oka a nők és gyermekek alárendeltségének tradíciójában, az emberi jogok tiszteletben tartásának és védelmének hiányában, valamint a szegénységben gyökerezik.[6]
Az emberi jogok megsértésének egyik legsúlyosabb formája a gyermekkereskedelem.[7]
Az emberkereskedelemben részt vevő szervezett bűnözői csoportokkal[8] szemben az egyik legkiszolgáltatottabb csoportot a gyermekek alkotják. Az emberkereskedelem áldozatául esett gyermekeket elsősorban bűnözői tevékenységre kényszerítés útján használják ki, ezeket a gyermekeket gyakran hamisan az adott bűncselekmény elkövetőjeként azonosítják, és nem az emberkereskedelem áldozataként, ezért az esetek nagy része nem kerül napvilágra az Európai Unión belül. A szervezett bűnözéssel foglalkozó csoportok gyakran azért a gyermekeket célozzák meg az emberkereskedelem elkövetése céljából, mert az emberkereskedők őket könnyebben tudják toborozni, ellenőrizni.[9]
Ahhoz, hogy meg tudjuk határozni a gyermekkereskedelem fogalmát, először tisztáznunk kell magának az emberkereskedelemnek a definícióját, valamint a gyermekkor tartamát. Ezen fogalmak meghatározáshoz elsősorban az európai uniós és a hatályos magyar szabályozást tekintettem át.

2. Az emberkereskedelem fogalma

Az Európai Parlament és a Tanács 2011/36/EU irányelvének (az emberkereskedelem megelőzéséről, és az ellene folytatott küzdelemről, az áldozatok védelméről, valamint a 2002/629/IB tanácsi kerethatározat felváltásáról[10]) 2. Cikke határozza meg az emberkereskedelemmel kapcsolatos szándékos bűncselekményeket, melyek a „Személyek kizsákmányolás céljából való toborzása, szállítása, átadása, rejtegetése vagy fogadása – az adott személyek feletti ellenőrzés megváltoztatását vagy átadását is ideértve – fenyegetéssel, erőszakkal vagy egyéb kényszer alkalmazásával,

[6] "Emberkereskedelem Elleni Küzdelem – Védtelen Áldozatok." Emberkereskedelem.kormany.hu, October 12, 2012. https://emberkereskedelem.kormany.hu/akadalymentes/emberkereskedelem-elleni-kuzdelem-vedtelen-aldozatok.
[7] Obertová, Zuzana, and Cattaneo, Cristina. "Child Trafficking and the European Migration Crisis: The Role of Forensic Practitioners." Forensic Science International (2018): pp. 46–59.
[8] Szervezett bűnözésről lásd még: Tóth ,Dávid, Gál, István László, Kőhalmi, László. „Organized Crime in Hungary." *Journal of Eastern European Criminal Law* 2:(1) pp. 22-27.
[9] "Fighting Child Trafficking: a Main Priority for EU Law." Europol, October 15, 2014. https://www.europol.europa.eu/newsroom/news/fighting-child-trafficking-main-priority-for-eu-law-enforcement.
[10] Az utóbbi években az Európai Unióban egyre több tanácsi kerethatározatot váltanak fel irányelvekkel. Tóth, Dávid "Küzdelem a Bankkártyacsalások Ellen Az Európai Unióban," in *Lépést Tud-e Tartani a Jog a XXI. Század Kihívásaival?* , ed. Bendes, Ákos, Nagy, Melánia, and Tóth Dávid (Pécs: Pécsi Tudományegyetem Állam- és Jogtudományi Kar, Doktori Iskola , 2019), pp. 103-129, 110.

emberrablással, csalással, megtévesztéssel, hatalommal vagy a kiszolgáltatott helyzettel való visszaélés révén, illetve anyagi ellenszolgáltatásnak vagy előnyöknek valamely személy felett ellenőrzést gyakorló személy beleegyezésének megszerzése érdekében történő nyújtásával vagy elfogadásával."[11]
Az emberkereskedelem terén tapasztalt fejlemények kezelése céljából az Európai Parlament és a Tanács 2011/36/EU irányelv tágabban értelmezi az emberkereskedelem fogalmát, mint a 2002/629/IB kerethatározat, így a kizsákmányolás egyéb formáit is magában foglalja. Az irányelvben a kényszer hatására folytatott koldulást egyfajta kényszermunkának vagy kényszerszolgáltatásnak kell tekinteni, a kényszer- vagy kötelező munkáról szóló 1930-as 29. számú ILO-egyezményben meghatározottaknak megfelelően, ezért a kolduláshoz kapcsolódó kizsákmányolás – ideértve az emberkereskedelem áldozatává vált eltartott személyek koldulásra való felhasználását is – csak akkor tartozik bele az emberkereskedelem fogalommeghatározásába, ha a kényszermunka vagy szolgáltatás valamennyi feltétele fennáll. Az ítélkezési gyakorlat alapján eseti alapon kell értékelni, hogy az érintett érvényes beleegyezését adta-e a fent ismertetett munka, vagy szolgáltatás végzésébe. [12]
Kiszolgáltatott helyzet az a helyzet, amelyben az adott személy tényleges vagy elfogadható választási lehetőség hiányában kénytelen alávetni magát az adott visszaélésnek. [13] Közömbös tehát az, hogy a passzív alany miért vagy kinek a magatartásával összefüggésben került ebbe a helyzetbe.[14]
A 2011/36/EU irányelv 2. cikk (3) bekezdése értelmében „A kizsákmányolás magában foglalja legalább a prostitúció révén történő kizsákmányolást vagy a szexuális kizsákmányolás más formáit, a kényszermunkát vagy szolgáltatásokat - a koldulást, a rabszolgatartást vagy a rabszolgatartáshoz hasonló gyakorlatot és a szolgaságot is ideértve -, a bűncselekményekhez kapcsolódó kizsákmányolást és a szervek kivételét."[15] A „bűncselekményhez kapcsolódó kizsákmányolás" kifejezés azt jelenti, hogy egy adott személyt azáltal zsákmányolnak ki, hogy az elkövető – többek között – zsebtolvajlást, áruházi lopást, kábítószerrel való kereskedést és más hasonló, büntetendő és anyagi haszonnal járó tevékenységet követ el. A fogalommeghatározás a szervek kivételének céljából folytatott emberkereskedelemre is kiterjed, amely az emberi méltóság és a testi épség súlyos megsértését jelenti, valamint például olyan tettekre is, mint a jogellenes örökbefogadás és a kényszerházasság, amennyiben ezek megfelelnek az emberkereskedelem tényállási elemeinek.[16]
Az egyéb kizsákmányolási formák közé tartozik a kényszerű koldulás célját szolgáló emberkereskedelem, bűncselekmények, kényszerházasság, színlelt házasság, szervek eltávolítása, örökbefogadásra szánt fiatalok és kisgyermekek kereskedelme, terhes

[11] Az Európai Parlament és a Tanács 2011/36/EU irányelvének 2. Cikke
[12] Az Európai Parlament és a Tanács 2011/36/EU irányelve
[13] Ibid.
[14] Szomora, Zsolt. "Új Tényállásszerkezetek és dogmatikaikategóriák az új Btk. XVIII–XXI. Fejezeteiben." *A Magyar Tudományos Akadémia Állam- és Jogtudományi Bizottságának folyóirata*, no. 9 (2015.): pp. 405–414, 411.
[15] Az Európai Parlament és a Tanács 2011/36/EU irányelv 2. cikk (3) bekezdés
[16] Az Európai Parlament és a Tanács 2011/36/EU irányelve

nők kereskedelme újszülött csecsemőik eladására, emberkereskedelem cannabis előállítása és kábítószer-csempészet vagy kábítószer-eladás céljából.[17]
Az emberkereskedelem áldozatának a tervezett vagy megvalósított kizsákmányoláshoz adott – korábban tárgyalt - beleegyezése nem vehető figyelembe, ha a fenti elkövetési módok bármelyikét alkalmazták.[18]
A magyar Büntető Törvénykönyv 192. § (8) bekezdése rögzítette a kizsákmányolás fogalmát, mely szerint „kizsákmányolás a kiszolgáltatott helyzetbe hozott vagy helyzetben tartott sértett e helyzetének kihasználásával előny szerzésére törekvés.”, azonban az emberkereskedelem áldozatainak kizsákmányolása elleni fellépés érdekében szükséges egyes törvények módosításáról szóló 2020. évi V. törvény 9. §-a értelmében az emberkereskedelem és kényszermunka 2020. július elsejétől egy tényállásban kerül szabályozásra, és ezen módosítás során kikerült a törvényből a kizsákmányolás meghatározása.[19]

3.A gyermekkor tartama

A XX. század második felében került sor a gyermekek jogainak elismerése, amely nélkülözhetetlen ahhoz, hogy a gyermekek a társadalom teljes értékű tagjaivá váljanak.
Az ENSZ Közgyűlése – közel 10 év előkészítő munka után – 1989. november 20-án fogadta el a Gyermekjogi Egyezményt, mely szerint „gyermek az a személy, aki tizennyolcadik életévét nem töltötte be, kivéve ha a reá alkalmazandó jogszabályok értelmében nagykorúságát már korábban eléri.”[20]
Annak ellenére, hogy az ENSZ Gyermekjogi Egyezménye megadja a gyermek fogalmát, napjainkban sem beszélhetünk egységes gondolkodásról. A nyugati országok gyermek fogalma jelentősen eltérhet más kultúrák felfogásaitól; mást jelent gyermeknek lenni Európában és mást jelent egy afrikai kis törzsben. Addig, amég a nyugati kultúrában általában gyermeknek tekintünk mindenkit, amíg be nem tölti tizennyolcadik életévét, ez a világ más részein nem feltétlenül történik így. Ázsiában, Afrikában és még sok más helyen ahol a törzsi szokások máig is erősen jelen vannak - az emberek mindennapi cselekvéseinek részei - gyakran akár már tizenkét-tizenhárom évesen, a serdülőkor kezdetén felnőtté válnak a gyermekek;

[17] *Report from the Commission to the European Parliamentand the Council Report on the Progress Made in the Fight against Trafficking in Human Beings (2016) as Required under Article 20 of Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting Its Victims*, May 19, 2016. https://ec.europa.eu/home-affairs/sites/default/files/what-we-do/policies/organized-crime-and-human-trafficking/trafficking-in-human-beings/docs/commission_report_on_the_progress_made_in_the_fight_against_trafficking_in_human_beings_2016_en.pdf
[18] Az Európai Parlament és a Tanács 2011/36/EU irányelve
[19] Lásd bővebben: a Büntető Törvénykönyvről szóló 2012. évi C. törvény 192. §-a, Az emberkereskedelem áldozatainak kizsákmányolása elleni fellépés érdekében szükséges egyes törvények módosításáról szóló 2020. évi V. törvény 9. §-a
[20] A Gyermek jogairól szóló, New Yorkban, 1989. november 20-án kelt Egyezmény kihirdetéséről szóló 1991. évi LXIV. törvény

kenyérkeresők, családfenntartók lesznek, fiatalon házasságot kötnek és gyermeket vállalnak. Fentiekre tekintettel a gyermekkor meghatározásánál figyelemmel kell lenni arra a tényre, hogy a világ egyes régióiban eltérő a születéskor várható élettartam. Azokban az országokban, ahol ez 40-50 éves kor körülre tehető, ott teljesen más státuszban van egy tizennyolc éves fiatal, mint ott, ahol ez a szám eléri akár a 70 évet is.[21]

A 2011/36/EU irányelv értelmében „„gyermek" minden 18. életévét be nem töltött személy." [22] Hasonló definíciót ad többek között az Európa Tanács Emberkereskedelem Elleni Fellépésről szóló Egyezménye („gyermeknek minősül minden tizennyolcadik életévét be nem töltött személy")[23], valamint a gyermekek szexuális bántalmazása, szexuális kizsákmányolása és a gyermekpornográfia elleni küzdelemről, valamint a 2004/68/IB tanácsi kerethatározat felváltásáról szóló az Európai Parlament és a Tanács 2011/92/EU Irányelve („„gyermek": bármely 18 évesnél fiatalabb személy").[24]

A gyermekkort övező szabályozásbéli ellentmondásokat a gyermekprostitúció kapcsán szemléltetem: a hatóságok, illetve az érintett egyéb hatóságok sokszor csak a tizenhat, vagy tizennégy év alatti gyermekek érintettsége esetén beszélnek gyermekprostitúcióról (és teszik meg a szükséges intézkedéseket). Azonban a vonatkozó nemzetközi egyezmények, illetve a hazai Büntető törvénykönyvről szóló 2012. C. törvény (Btk.) is valamennyi, 18 év alatti, prostitúcióban érintett gyermeket áldozatnak tekinti. [25]

A Polgári Törvénykönyvről szóló 2013. évi V. törvény (Ptk.) szerint kiskorú a tizennyolcadik életévétbe nem töltött személy, a tizennegyedik életévét be nem töltött kiskorú pedig cselekvőképtelennek minősül. A Ptk. használja továbbá a kiskorú gyermek, nagykorú gyermek, továbbtanuló nagykorú gyermek, ítélőképessége birtokában lévő kiskorú gyermek, tizennegyedik életévét betöltött gyermek fogalmát is. A Ptk. fogalomrendszere szerint kiskorú az, aki a tizennyolcadik életévét nem töltötte be, de a kiskorú házasságkötéssel nagykorúvá válik. (A házasságkötést a 16. életév betöltését követően a gyámhatóság engedélyezheti. Ha a házasságot a bíróság - a cselekvőképesség hiánya vagy a kiskorúság miatt szükséges gyámhatósági engedély hiánya miatt - érvénytelennek nyilvánítja, megszűnik a házasságkötéssel szerzett nagykorúság. A házasság megszűnése a házasságkötéssel megszerzett nagykorúságot nem érinti.) [26]

A Btk. a gyermekkorú és a fiatalkorú egymástól elhatárolt fogalmát használja, e szerint gyermekkorú minden tizenkettedik életévét be nem töltött személy, illetve fő szabályként nem büntethetőek a tizennegyedik életévüket be nem töltött személyek

[21] Végh, Eszter. "Gyermekkatonák – a Sierra Leone-i Polgárháború Igazi Áldozatai." btk.ppke.hu. Accessed April 15, 2021. https://btk.ppke.hu/uploads/articles/6414/file/vegheszter.pdf.

[22] Az Európai Parlament és a Tanács 2011/36/EU irányelve

[23] Az Európa Tanács Egyezménye az emberkereskedelem elleni fellépésről 4. Cikk d) pont

[24]Az Európai Parlament és a Tanács 2011/92/EU Irányelv 2. Cikk a)

[25] Hatvani, Erzsébet, Sebhelyi, Viktória, and Vaskuti, Gergely. *Gyermekprostitúció Visszaszorítása, Gyermekkereskedelem*. (Budapest, Hungary: Szociális és Gyermekvédelmi Főigazgatóság, 2018.) p. 106.

[26] Ibid.

sem. Bizonyos bűncselekmények esetében a Btk. szerinti büntethetőségi korhatár már a tizenkettedik életév. A Szabálysértési törvény szerint szabálysértésért csak a tizennegyedik életévüket betöltött személyek büntethetőek. Ezen túlmenően a Btk. több tényállásban használja a „gyermek" fogalmát, tizennyolcadik életévüket be nem töltött személyeket értve alatta. Így alapvetően elmondható, hogy a büntetőjog és a szabálysértési jog, a polgárjogi értelemben vett kiskorúságot gyermek-és fiatalkorra, gyermekkorúra és fiatalkorúra bontja.[27]
Büntetőjogi értelemben a szülési folyamat megindulásától - a magzatnak az anya testétől való elszakadási folyamat kezdetétől - az ún. tolófájások jelentkezésétől beszélhetünk emberi életről.[28] Azonban nem szabad figyelmen kívül hagyni az állapotos nők sérelmére elkövetett emberkereskedelem speciális esetkörét.
Az áldozatok éltkorának a büntetés tételek kiszabása kapcsán is fontos szerepe van. A hatályos magyar Büntetőtörvénykönyv súlyosabban rendeli büntetni a tizennyolcadik életévét be nem töltött személy sérelmére elkövetett emberkereskedelem és kényszermunkát, valamint még súlyosabban rendeli bünteti, ha azt tizenkettedik életévét be nem töltött személy sérelmére követik el.[29]

4.A gyermekkereskedelem fogalma

A gyermekek eladásáról, a gyermekprostitúcióról és a gyermekpornográfiáról szóló, a Gyermek jogairól szóló egyezményhez fűzött Fakultatív Jegyzőkönyv 2. Cikke határozza meg a gyermekkereskedelem fogalmát. A Jegyzőkönyv értelmében „Gyermekek eladásának minősül minden olyan cselekmény vagy tranzakció, amelynek során egy gyermeket egy személy vagy személyek csoportja átad egy másik személynek vagy személyek csoportjának díjazás vagy más ellenszolgáltatás fejében"[30] Egy gyermek a toborzás, elszállítás, átadás, rejtegetés vagy átvétel módjára tekintet nélkül az emberkereskedelem áldozatának számít, feltéve, hogy annak célja a kizsákmányolás.[31]
Az emberkereskedelem veszélyének kitett gyermekek kifejezés bármely olyan gyermekre utalhat, akinek az esetében – még a kizsákmányolás bekövetkezése előtt – észszerű indokok alapján vélelmezhető, hogy emberkereskedelem áldozatául esnek.[32] Amennyiben a korábban ismertetett emberkereskedelemmel kapcsolatos bűncselekmények valamelyike gyermekre irányul, büntetendő

[27] Ibid.
[28] Tóth, Mihály, Nagy, Zoltán (ed): *Magyar Büntetőjog. Különös Rész*. (Budapest, Hungary: Osiris Kiadó, 2014.) p. 609, 42.
[29] A Büntető Törvénykönyvről szóló 2012. évi C. törvény 192. §
[30] A gyermekek eladásáról, a gyermekprostitúcióról és a gyermekpornográfiáról szóló, a Gyermek jogairól szóló egyezményhez fűzött Fakultatív Jegyzőkönyv megerősítéséről és kihirdetéséről szóló 2009. évi CLXI. törvény
[31] "Az Európa Tanács Emberkereskedelem Elleni Fellépéséről Szóló Egyezménye. Az Áldozatok Jogai." Accessed April 15, 2021. https://rm.coe.int/16805d41ee.
[32] "EASO Gyakorlati Útmutató a Gyermek Menekültügyi Eljárásokban Érvényesítendő, Mindenek Felett Álló Érdekéről." easo.europa.eu. EASO, 2019. https://easo.europa.eu/sites/default/files/Practical_Guide_on_the_Best_Interests_of_the_Child_HU.pdf.

emberkereskedelemnek minősül akkor is, ha az nem jár az ott ismertetett elkövetési módok alkalmazásával.[33]
Abban az esetben, ha az emberkereskedelem áldozata gyermek a már korábban tárgyalt esetleges beleegyezést sohasem lehet érvényesnek tekinteni. [34]

5. Összegezés

Írásomban kezdetben az emberkereskedelem definícióját ismertettem annak legfontosabb tartalmi elemeivel, majd a gyermekkor tartamát határoztam meg a nemzetközi, valamint a hazai hatályos jogszabályok segítségével. Végül pedig áttértem a gyermekkereskedelem fogalmára, melyet a gyermekek eladásáról, a gyermekprostitúcióról és a gyermekpornográfiáról szóló, a Gyermek jogairól szóló egyezményhez fűzött Fakultatív Jegyzőkönyv 2. Cikke határoz meg.
Emberkereskedelemmel kapcsolatos szándékos bűncselekmények a „Személyek kizsákmányolás céljából való toborzása, szállítása, átadása, rejtegetése vagy fogadása – az adott személyek feletti ellenőrzés megváltoztatását vagy átadását is ideértve – fenyegetéssel, erőszakkal vagy egyéb kényszer alkalmazásával, emberrablással, csalással, megtévesztéssel, hatalommal vagy a kiszolgáltatott helyzettel való visszaélés révén, illetve anyagi ellenszolgáltatásnak vagy előnyöknek valamely személy felett ellenőrzést gyakorló személy beleegyezésének megszerzése érdekében történő nyújtásával vagy elfogadásával."[35]
„Gyermek az a személy, aki tizennyolcadik életévét nem töltötte be, kivéve ha a reá alkalmazandó jogszabályok értelmében nagykorúságát már korábban eléri."[36]
„Gyermekek eladásának minősül minden olyan cselekmény vagy tranzakció, amelynek során egy gyermeket egy személy vagy személyek csoportja átad egy másik személynek vagy személyek csoportjának díjazás vagy más ellenszolgáltatás fejében"[37]
A fogalommeghatározások alapján elmondható, hogy a gyermekkereskedelem elkövetési magatartásai, illetve elkövetési módjai jelentősen széleskörűbbek, mint azt az emberkereskedelem kapcsán megfigyelhettük.

[33] Az Európai Parlament és a Tanács 2011/36/EU irányelve
[34] Ibid.
[35] Az Európai Parlament és a Tanács 2011/36/EU irányelv 2. cikke
[36] A Gyermek jogairól szóló, New Yorkban, 1989. november 20-án kelt Egyezmény kihirdetéséről szóló 1991. évi LXIV. törvény
[37] A gyermekek eladásáról, a gyermekprostitúcióról és a gyermekpornográfiáról szóló, a Gyermek jogairól szóló egyezményhez fűzött Fakultatív Jegyzőkönyv megerősítéséről és kihirdetéséről szóló 2009. évi CLXI. törvény

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Schmidt László* – Az elévülés jogintézményének kialakulása, és bírói gyakorlata

Lektorálta: Prof. Dr. Nochta Tibor

Absztrakt

Tanulmányomban az elévülés jogintézményének kialakulását, és magyar bíróságok ezzel kapcsolatos gyakorlatát kívánom bemutatni.
Az elévülés jogintézményét már a posztklasszikus római jog is ismerte. A lényege az volt, hogy az elévült jog érvényesítését célzó felperesi keresettel szemben az alperes elévülési kifogást emelhetett. Az elévülés időtartama ekkor főszabályként 30 év volt, és már ekkor is volt lehetőség az elévülés félbeszakadására és nyugvására is.
A magyar jogban Werbőczy Hármaskönyve szerint az elévülés annak az időnek az eltelése, melyet a törvény a fekvő jószágok jogszerű megtartására és visszaszerzésére nézve megállapított. Az elévülés idejét 100, 40, 32, 12 évben, illetve 1 évben és 2 napban határozta meg. Szintén ismert volt az elévülés félbeszakadása, nyugvása és kizártsága is.
Az 1928. évi törvényjavaslat Magyarország Magánjogi Törvénykönyvéről az elévülés határidejét főszabályként 32 évben határozta meg, de rendelkezett 3 és 1 éves elévülési határidőről is.
Az 1959-es (régi) Ptk. és a 2013-as (új) Ptk. az elévülés idejét főszabályként egyezően 5 évben határozzák meg, ugyanakkor az elévülés megszakítása körében jelentős változás állt be.

Kulcsszavak: elévülés, elévülés kialakulása, elévülés jogintézménye, új Ptk.

1. Az elévülés szabályai a római jogban

Az elévülés fogalma a római jogban ugyan nem volt definiálva, de a posztklasszikus korban a jogintézmény már ismert volt. Eszerint az elévülés valamely jog állami úton való érvényesíthetősége az időmúlás következtében megszűnt. Az elévülés már a római jogban sem volt hivatalból figyelembe vehető, az csak az alperes kifogása alapján kerülhetett megállapításra. Az alanyi jog ugyanakkor fennmaradt, ha az alperes nem hivatkozott az elévülésre (ilyenkor az elévülés ellenére is marasztalható volt), és akkor is, ha az adós teljesítette – az egyébként már elévült- követelést. Az elévülés jogpolitikai indoka ekkor az volt, hogy aki hosszabb időn keresztül nem érvényesíti jogait, viselje ennek következményét, és hosszabb idő után már ne is érvényesíthesse azokat.[1]

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[1] Földi András és Hamza Gábor, *A római jog története és institúciói* (Budapest: Nemzeti Tankönyvkiadó, 1996), 156-157.

Mint már említettem, az elévülés a római jogban a posztklasszikus korig nem volt ismert. A klasszikus korban a civiljog keresetei úgynevezett örökös keresetek (actiones perpetuae) voltak, melyeknek nem volt időbeli korlátjuk, bármikor megindíthatóak voltak. II. Theodosius császár 424-es constitutiója az actiones perpetuae elévülését 30 évben állapította meg, míg az egyházak és kegyes alapítványok keresetei 40 év alatt évültek el. Az elévülés kezdete a kereseti jog létrejöttének napja (actio nata est.) Ez a nap tulajdonjogoknál az a nap, amikor valakinek a tulajdonjogát megsértették (pl. ingatlan jogosulatlan birtokbavétele), követelési jogoknál pedig a követelés esedékességének napja. Az elévülés félbeszakad (interrumpitur) a jogosult jogfenntartó (pl. keresetindítás), illetve a kötelezett jogelismerő (pl. kamatfizetés, részletfizetés) nyilatkozata vagy magatartása következtében. Félbeszakadás esetén a félbeszakadásig eltelt időnek a továbbiakban nincs jelentősége, a félbeszakító ténytől kezdve az elévülés újból elkezdődik.
Az elévülés nyugszik (dormit), amikor a kereset megindításának kizárt a lehetősége (pl. serdületlen kor), de a nyugvást előidéző körülmény megszűnése után (pl. nagykorúvá válás) tovább folytatódik az elévülés, és a körülményig eltelt idő beleszámít az elévülésbe.[2]

2. Az elévülés Werbőczy Hármaskönyvében

Werbőczy Istvánnak II. Ulászló király adott megbízást a magyar polgári jog kodifikációjára. A Hármaskönyv 1514-ben készült el, mely az Országgyűlésnek is benyújtásra került. Mind az Országgyűlés által kiküldött bizottság, mind pedig a király megállapította, hogy a Hármaskönyv az ország jogaival és szokásjogaival megegyezik, ám az végül nem emelkedett törvényerőre. Werbőczy 1517-ben kinyomtatta a művét, mely gyorsan használatba került és közkedveltségnek örvendett. 1565-ben magyar, 1574-ben horvát nyelvre is lefordították. 1628-tól a Corpus Iuris Hungaricibe is bekerült.[3]
Werbőczy szerint „Minthogy úgy az örökös fekvő jószágokra nézve, mint a zálogos birtokjogokra, sőt a hatalmaskodásokra nézve is, gyakran szoktak a törvény előtt elévülésre hivatkozni, azért az elévülésről egyet-mást szükségképpen el kell mondanom. Először is annak mibenlétéről, azután pedig tartamáról és különféleségéről.” [4]
A Hármaskönyv 78. czím 1. §-7. §-ai rendelkeznek az elévülésről. Eszerint az elévülés annak az időnek az eltelése, melyet a törvény a fekvő jószágok jogszerű megtartására és visszaszerzésére nézve megállapított. Ez az idő az eladott, elfoglalt, vagy bármiképpen elidegenített királyi fekvő jószágokra és birtokjogok esetében 100 év, az egyháziak esetében 40 év, a nemesiek és a hatalmaskodások esetében 32 év, a polgáriak esetében 12 év, a falusiak között pedig csupán 1 év és 1 nap. [5] Werbőczy

[2] Földi és Hamza, *A római jog*, 157-158.
[3] Wellmann György (szerk.), *Az új Ptk. magyarázata I/VI.* (Budapest: Hvg-Orac, 2013), 19-20.
[4] Kolosvári Sándor és Óvári Kelemen, *Werbőczy Hármaskönyve* (Budapest: Franklin-Társulat, 1897), 153.
[5] Werbőczy Hármaskönyve I. rész 78. czím 1. § - 4. §

szerint elévülésnek nem lehetett helye nemzetségi és osztályos atyafiak között birtokjogokra, valamint a hitbéreknek és leánynegyedeknek részükről teljesítendő fizetésére nézve.[6] Álláspontom szerint az elévülés nyugvásáról beszél Werbőczy, mikor kifejti, hogyha valaki a törökök, szaracénok, tatárok, vagy más hitetlenek fogságába esik, és ottléte az elévülés idejét túlhaladja, akkor ebben az esetben a fekvő javaitól megfosztott nemes miután hazatért, azokat törvényesen visszaszerezheti az elévülés ellenére.[7]

3. Az elévülés az 1928-as Magánjogi Törvényjavaslatban

Az 1848. évi XV. törvénycikk rendelte el először az ősiség teljes eltörlésének alapján egy polgári törvénykönyv elkészítését, és a javaslat mielőbbi Országgyűlés elébe terjesztését. Több résztervezet is elkészült 1871 és 1892 között, ezek azonban nem emelkedtek törvényerőre. Balogh Jenő akkori igazságügyi miniszter 1915. május 15. napján az Országgyűlés elé terjesztette a javaslatot, ott azonban úgy döntöttek, hogy azt csak a világháború befejezése után vitatják meg. A világháború után 1922-ben kezdődtek el újra a törvénykönyv előkészítésének munkálatai, végül 1928. március 1. napján benyújtásra került Magyarország Magánjogi Törvénykönyvének Törvényjavaslata (Mtj.). Az Mtj. szakmai színvonalát általános elismeréssel illették, számos megoldását a bírói gyakorlat is átvette és szokásjogi úton is alkalmazta, azonban ebből a javaslatból sem lett végül törvény. Leginkább azért nem, mert a magyar magánjog szokásjogként az első világháború után elcsatolt területeken is hatályban volt, így, ha a javaslatból törvény lett volna, annak területi hatálya csupán a csonka-Magyarországra terjedt volna ki.[8]
Az elévülés továbbra is azt jelentette, hogy az időmúlás folytán a követelések bírói érvényesíthetősége megszűnik. Ennek kettős jogpolitikai indoka volt. Egyrészt az adós védelme a hosszas időmúlás miatt egyre valószínűtlenebbé váló követelésekkel szemben, másrészt a tényleges állapotok szerinti helyzetek fenntartásához fűződő társadalmi érdek védelme.[9] A bírói úton való érvényesíthetőség megszűnése azonban itt sem jelentette egyúttal magának a kötelemnek a megszűnését is, hiszen az természetes kötelemként (naturalis obligatio) továbbra is fennmaradt. A hitelező ugyan perrel nem érvényesítheti követelését, azonban, ha az adós az elévülés ellenére mégis teljesített, azt többé az elévülésre hivatkozva nem követelhette vissza. Ha a hitelezőnek zálogtárgy volt a birtokában a követelés biztosítására, ebből ő magát az elévülés után is kielégíthette (remanet propter pignus obligatio).[10] Általában a követelések évülnek el, tehát az elévülés szabályait alkalmazni kell a kötelmi követeléseken kívül a dologi, családi, vagyonjogi igényekre is, sőt ekkor már a végrehajtási jog is elévülhetett.[11] Nem évültek el azonban a személyjogi vagy

[6] Werbőczy Hármaskönyve I. rész 78. czím 5. §
[7] Werbőczy Hármaskönyve I. rész 79. czím
[8] Wellmann (szerk.), *Az új Ptk. magyarázata I/VI.*, 20-21.
[9] Szladits Károly (szerk.), *Magyar Magánjog Kötelmi jog általános része* (Budapest: Grill Károly Könyvkiadó vállalata, 1941), 631.
[10] Szladits Károly, *A magyar magánjog vázlata* (Budapest: Grill Károly Könyvkiadóvállalata, 1933), 169.
[11] Szladits (szerk.), *Magyar Magánjog,* 631-632.

családjogi viszonyból eredő, olyan követelések, melyek célja az volt, hogy a jogosult a jognak megfelelő állapotot állítsa helyre a jövőre nézve.[12] Nem évült el továbbá a tulajdonközösség megszüntetése iránti igény sem.[13]
Az Mtj. szerint a követelések főszabályként 32 év alatt évülnek el.[14] 3 év alatt évültek el többek között a kereskedőknek és iparosoknak oly követelései, amelyek kiszolgáltatott áruk, teljesített szolgálatok és munkák s azokkal összefüggő kiadások fejében illetik meg őket, a vendéglősöknek és más oly személyeknek, akik ételek vagy italok kiszolgáltatásával vagy utasok befogadásával iparszerűen foglalkoznak, üzletük körében vendégeik vagy vevőik ellen felmerülő követelései;, a bérkocsisoknak, hajósoknak és más oly személyeknek, akik személyek vagy dolgok fuvarozásával foglalkoznak, ebből az üzletükből eredő díj- és költségkövetelései;, az ügyvédeknek, kir. közjegyzőknek, bírósági végrehajtóknak és bizonyos ügyek ellátására a hatóságtól kirendelt vagy feljogosított más személyeknek díj- és költségkövetelései.[15] A vasút elleni, tárgyi felelősségen alapuló kártérítési követelések is 3 év alatt évültek el, sőt a bírói gyakorlat ezt kiterjesztette általánosságban a veszélyes üzemi felelősségre is.[16]
Az előszerződésből eredő követelések 1 év alatt, míg a jogerősen megítélt, bírói egyezségen, vagy egyéb végrehajtható követelések 32 év alatt évültek el.[17]
Az elévülési idő a követelés jogilag érvényesíthetővé válásával (általában lejártával) kezdődik. Ha azonban a kötelem teljesítése sem feltételhez, sem határidőhöz nem volt kötve, úgy a követelés a kötelem keletkezésével érvényesíthetővé vált, ilyenkor tehát az elévülés a kötelem létrejöttekor kezdődik.[18] Az elévülés kezdő időpontját egyes jogszabályok az általános szabálytól eltérően határozták meg, így például a közjegyző és az ügyvéd kártérítési felelősségénél az elévülés kezdő időpontja a jogosultnak az igényről való tudomásszerzése.[19]
Az Mtj. alapján az elévülés nyugszik, míg az adós a hitelezőtől kapott halasztás alapján vagy más okból múlóan megtagadhatja a teljesítést, kivéve ha a hitelező az adós kifogását elháríthatja, amíg a hitelezőt követelésének érvényesítésében a jogszolgáltatás szünetelése vagy a követelés bírói úton érvényesítésének jogszabállyal rendelt felfüggesztése vagy az elévülés idejének utolsó hat hónapja alatt katonai szolgálat vagy erőhatalom akadályozza, amíg egyességi tárgyalás vagy a követelés valóságának vagy mennyiségének megállapítása végett szerződéssel kikötött nem peres eljárás van a felek közt folyamatban, házastársak közötti követelések tekintetében a házasság tartama alatt, szülő és gyermek közötti követelések tekintetében a gyermek kiskorúságának tartama alatt, gyám és gyámolt, gondnok és gondnokolt közötti követelések tekintetében a gyámságnak vagy a gondnokságnak

[12] Magyar Magánjogi Törvényjavaslat (Mtj.) 1284. §, Május 9, 2021, https://uj.jogtar.hu/#doc/db/77/id/92800000.TVJ/ts/10000101/
[13] Szladits (szerk.), *Magyar Magánjog*, 632.
[14] Mtj. 1283. §, Május 7, 2021, https://uj.jogtar.hu/#doc/db/77/id/92800000.TVJ/ts/10000101/
[15] Mtj. 1285. § 1., 2., 4., 8.
[16] Szladits (szerk.), *Magyar Magánjog*, 633.
[17] Mtj. 1286. §, 1289. §
[18] Szladits, *A magyar magánjog vázlata*, 170-171.
[19] Szladits (szerk.), *Magyar Magánjog*, 636.

tartama alatt.[20] A nyugvás ideje az elévülés idejébe nem számít bele, a nyugvás megszűntét követő 30 napon belül az elévülés nem fejeződik be.[21]
Az elévülés félbeszakadása esetén a félbeszakadás előtti idő nem számít bele az elévülés idejébe. A félbeszakadás egyik fő esete a hitelező által a követelése érvényesítése iránt indított per. Ezt a hitelezőnek kell az adós ellen indítania, ugyanakkor nem szükséges, hogy marasztalásra irányuljon, elégséges a megállapítás iránti per is. A perindítással egy tekintet alá esik a fizetési meghagyás kibocsátása iránti kérelem, a követelés bejelentése csődeljárásban, beszámítás perbeli érvényesítése, perbehívás, végrehajtási kérelem előterjesztése, és minden végrehajtási cselekmény.[22] Értelemszerűen félbeszakad az elévülés, ha az adós a követelést elismeri, ami történhet szóban, írásban, részletfizetéssel, kamatfizetéssel etc,[23] az a személy ugyanakkor nem hivatkozhat elévülésre, aki a már korábban elévült tartozását írásban elismerte vagy arra nézve írásban fizetési ígéretet tett.[24] Ahogyan már korábban említettem, már a római jogban sem lehetett az elévülést hivatalból figyelembe venni. Az Mtj. szerint hivatalból az elévülést csak annyiban kell figyelembe venni, hogy a bíróság elévültnek látszó követelés alapján fizetési meghagyást nem bocsáthat ki és az adós meghallgatása nélkül ily követelés behajtására vagy biztosítására irányuló intézkedést nem rendelhet el. Elévült követelés tekintetében megállapítási keresetnek sincs helye, ha az adós a keresettel szemben az elévülésre hivatkozik.[25]

4. Az elévülés szabályai és bírósági gyakorlata az 1959-es Ptk.-ban

A Minisztertanács 1953 decemberében létrehozott egy kormánybizottságot az igazságügyi miniszter vezetésével, mely az 1959. évi IV. törvény tervezetét megalkotta. A Kormánybizottság 1954-ben kezdte meg munkáját, és a legkülönbözőbb állami és társadalmi szervezeteket is bevonta az előkészítésbe. 1956 szeptemberére elkészült a Tervezet első változata, majd 1957-ben már az a változat is melynek nyomtatásban megjelent szövegét és indokolását az akkori kormány széleskörű vitára bocsátotta. A vitákról az országos és helyi sajtó is gyakran közölt részletes beszámolókat. A jogi szaksajtóban is számos tanulmány született a Tervezet egyes megoldásaival kapcsolatban. A Kormánybizottság felhasználta a Csehszlovák Köztársaság, a Lengyel Népköztársaság és a Bolgár Népköztársaság szintén akkortájt készülő polgárjogi kódexeivel kapcsolatos tapasztalatokat is. A Polgári Törvénykönyvről szóló 1959. évi IV. törvényt 1959. augusztus 11. napján hirdették ki, és 1960. május 1. napján lépett hatályba.[26]
Az 1959. évi IV. törvény (továbbiakban: régi Ptk.) a szerződés megszűnésének fejezetében, a 324. §-327. §-aiban tárgyalja az elévülést. E szerint a követelések öt év alatt elévülnek, ha jogszabály másként nem rendelkezik. A főkövetelés elévülésével

[20] Mtj. 1292. § 1. - 4.
[21] Mtj. 1293. §
[22] Szladits (szerk.), *Magyar magánjog*, 640-641.
[23] Szladits, *A magyar magánjog vázlata*, 173.
[24] Mtj. 1313. §
[25] Mtj. 1311. §
[26] Wellmann (szerk.), *Az új Ptk. magyarázata I/VI.*, 21-23.

az attól függő mellékkövetelések is elévülnek. A főkövetelést független mellékkövetelések elévülése a főkövetelést nem érinti. A követelés elévülése az azt biztosító kézizálogból való kielégítést nem akadályozza. Az elévült követelést bírósági úton érvényesíteni nem lehet. A felek rövidebb elévülési határidőben is megállapodhatnak; a megállapodás csak írásban érvényes. Az egy évnél rövidebb elévülési határidőt a felek írásban legfeljebb egy évre meghosszabbíthatják, egyébként az elévülési határidők meghosszabbítására irányuló megállapodás semmis. Az elévülés akkor kezdődik, amikor a követelés esedékessé vált.[27]

Mint látható tehát, a régi Ptk. az általános 32 éves elévülési határidő helyett 5 éves általános elévülési határidőt állapított meg. A régi Ptk. Nagykommentárja szerint ennek indoka az, hogy a technikai fejlődés akkori szintjén indokolatlan lett volna fenntartani az Mtj. 32 éves elévülési határidejét. A régi Ptk. azonban figyelemmel volt más jogági jogszabályokra is, így pl. az akkori polgári perrendtartás szabályai szerint a perújítás objektív határideje 5 év volt, a köztartozások kivetésének és beszedésének elévülési határideje szintén 5 év volt. Az elbirtoklás idejét ugyanakkor 10 évben határozta meg a régi Ptk. Ennek indoka az volt, hogy az elbirtoklás jogkövetkezménye (tulajdonjog elvesztése) súlyosabb, mint az elévülés jogkövetkezménye, nevezetesen, hogy a jogosult többé nem érvényesítheti követelését bírósági úton.[28]

A régi Ptk.-ban is vannak azonban kivételek az 5 éves elévülési határidő alól. A 345. § (4) bekezdése szerint a veszélyes üzem működéséből eredő károk megtérítésére irányuló igények három év alatt évülnek el.[29] A 308. § (1) bekezdése alapján hibás teljesítés esetén a szavatossági jogok hat hónapos elévülési határidőben érvényesíthetőek.[30] Az érvénytelen szerződés megtámadását egy éven belül közölni kell a másik féllel, és erre a határidőre az elévülés nyugvásának és megszakadásának szabályait rendelte alkalmazni.[31]

Az általános elévülési határidőnél hosszabb elévülési időre is találunk azonban példát, a bűncselekménnyel okozott kár vonatkozásában úgy rendelkezett a régi Ptk., hogy ilyen esetben a követelés öt éven túl sem évül el addig, amíg a bűncselekmény büntethetősége nem évül el.[32] Ezzel kapcsolatban a Legfelsőbb Bíróság (LB) a BH2009.366. számon közzétett eseti döntésében megállapította, hogy a bűncselekménnyel okozott kár megtérítése iránti igény elévülése nem következik be addig, amíg a károkozó bűncselekmény miatti büntethetőség el nem évül, ezért, ha a büntetőeljárási cselekmények a büntethetőség elvülését félbeszakítják, ezzel a polgári jogi igény elévülési ideje is meghosszabbodik.[33] Ezzel ellentétes álláspontra helyezkedett azonban a Kúria a BH2015.65 számon közzétett eseti döntésében amikoris kimondta, hogy a „régi Ptk. 306. § (4) bekezdése a bűncselekménnyel

[27] régi Ptk. 324.-326. §-ok

[28] Gellért György (szerk.), *Nagykommentár a Polgári Törvénykönyvről szóló 1959. évi IV. törvényhez,* Május 14, 2021, https://uj.jogtar.hu/#doc/db/312/id/A08Y2649.KK/ts/20140101/lr/chain8281/

[29] régi Ptk. 345. § (4) bekezdés

[30] régi Ptk. 308. § (1) bekezdés

[31] régi Ptk. 236. § (1) és (3) bekezdések

[32] régi Ptk. 360. § (4) bekezdés

[33] BH2009. 366., Május 14, 2021, https://uj.jogtar.hu/#doc/db/1/id/A09H0366.GK/ts/20140101/

okozott kár megtérítésére irányuló igény érvényesíthetőségét absztrakt módon, az adott bűncselekmény és nem a konkrét elkövető büntethetőségének elévülési idejéhez igazodóan szabályozza". Indokolásában kifejtette, hogy a „régi Ptk. 360. § (4) bekezdésének alkalmazásában, a jogszabályi rendelkezés absztrakt jellegéből következően, a bűncselekménnyel okozott kár megtérítésére irányuló igény elévülésének megítélése nem függhet attól, hogy adott esetben indult-e büntetőeljárás a károkozó elkövető ellen, illetve a konkrét elkövetővel szemben az egyes büntetőeljárási cselekmények foganatosítása esetleg a büntethetőség elévülésének félbeszakadását eredményezte. Ezért a Ptk. 360. § (4) bekezdésének idézett szabályából nem következik, hogy a bűncselekménnyel okozott kár esetén a Btk.-nak a büntethetőség elévülésének megszakadására vonatkozó szabályai a polgári jogi kárkötelmi igény elévülésének megítélésére is irányadók."[34] Ezzel összhangban a Szegedi Ítélőtábla a BDT2015. 3364. számon közzétett döntésében szintén megállapította, hogy bűncselekményt is megvalósító károkozásból származó igény elévülése kérdésében az elévülés megszakadása és nyugvása szempontjából a polgári jogi szabályokat kell alkalmazni. A bűncselekménnyel okozott kár megtérítésére irányuló igény érvényesíthetőségének határidejét az adott bűncselekmény és nem a konkrét elkövető büntethetőségének elévülési ideje határozza meg. A büntetőjogi intézkedések kizárólag a büntethetőség elévülését szakítják meg. Polgári jogi szempontból az elévülés nyugvása legfeljebb addig áll fenn, amíg a károsult a károkozó magatartásról és a károkozó személyéről egyértelműen tudomást nem szerez. Ahogy az indokolásban is kifejtésre került, [35]„Nem ért egyet azonban az ítélőtábla azzal, hogy a büntetőeljárás során tett büntetőjogi intézkedések a polgári jogi elévülési határidőt megszakították volna (eltérően a BH2009. 366. számú döntésben foglaltaktól). A büntetőjogi intézkedések kizárólag a büntethetőség elévülését szakították meg. Az igény polgári jogi elévülése kérdésében megszakadás, nyugvás szempontjából a polgári jogi szabályokat kell alkalmazni (hasonlóan: BH2011. 101., Szegedi Ítélőtábla Pf. III. 20.114/2011/4.). A kár megtérítése iránti igény elévülése nem nyugszik csupán amiatt, mert az elkövetővel szemben indított büntetőeljárás folyamatban van, ha az elkövető személyének és a kár ismeretének hiánya nem akadályozza a károsultat a kárigénye érvényesítésében (BH1997. 393., BDT2012. 2821.)."

A 115. § (1) bekezdése alapján a tulajdonjogi igények nem évülnek el, tehát pl. az örökség kiadása iránti igények sem.[36] A köteles rész iránti igények azonban kötelmi igénynek számítanak, így azokra vonatkoznak az elévülés szabályai.

Az elévülés jogpolitikai indoka három esetkört ölel fel a régi Ptk. szerint. A jog a hosszabb ideig bizonytalan jogi helyzetek megoldására törekszik, és bizonytalanságot eredményez, ha a jogosult huzamosabb ideig nem érvényesíti követelését; ez arra enged következtetni, hogy a jogosultnak az igényérvényesítéshez fűződő érdeke csökkent vagy akár meg is szűnt; az idő múlása nehezíti, vagy akár lehetetlenné is

[34] BH2015. 65., Május 14, 2021, https://uj.jogtar.hu/#doc/db/25/id/A15H0065.PK/ts/20140101/

[35] BDT2015. 3364., Május 14, 2021, https://uj.jogtar.hu/#doc/db/25/id/A15H3364.BDT/ts/20140101/

[36] régi Ptk. 115. § (1) bekezdés

teszi a bizonyítást.[37] Az elévülés a régi Ptk.-ban is a követelés esedékessé válásakor kezdődött.[38]

Az elévülés nyugszik, ha a követelést a jogosult menthető okból nem tudja érvényesíteni, az akadály megszűnésétől számított egy éven belül - egyéves vagy ennél rövidebb elévülési idő esetében pedig három hónapon belül - a követelés akkor is érvényesíthető, ha az elévülési idő már eltelt, vagy abból egy évnél, illetőleg három hónapnál kevesebb van hátra. Ezt a rendelkezést kell alkalmazni akkor is, ha a jogosult a lejárat után a teljesítésre halasztást adott.[39] Ebben az esetben a közbejött akadály megszűnte után az akadályt megelőzően eltelt idő hozzászámít az akadály megszűnését követő időhöz.[40] Az EBH2003. 853. számú eseti döntés szerint a szavatossági határidő - a jogvesztő határidőn belül - a hiba felismeréséig nyugszik, és attól számítva három hónap áll rendelkezésre az igény bíróság előtti érvényesítésére. A három hónapos határidő nem elévülési jellegű, nem szakítható meg, tehát nem kezdődik újra.[41] A BH2004. 237. számú döntés szerint a teljesítéstől számított hat hónapos elévülési jellegű szavatossági határidő - a jogvesztő határidőn belül - a hiba felismeréséig nyugszik, és attól számítva három hónap áll rendelkezésre az igény bíróság előtti érvényesítésére. A három hónapos határidő nem elévülési jellegű, nem szakítható meg, tehát nem kezdődik újra.[42]

Az elévülés megszakadásával kapcsolatban a régi Ptk. 327. § -a kimondta, hogy a követelés teljesítésére irányuló írásbeli felszólítás, a követelés bírósági úton való érvényesítése, továbbá megegyezéssel való módosítása - ideértve az egyezséget is -, végül a tartozásnak a kötelezett részéről való elismerése megszakítja az elévülést. Az elévülés megszakadása, illetőleg az elévülést megszakító eljárás jogerős befejezése után az elévülés újból megkezdődik. Ha az elévülést megszakító eljárás során végrehajtható határozatot hoztak, az elévülést csak a végrehajtási cselekmények szakítják meg.[43] A mögöttes felelősség elévülése kapcsán az 1/2007. Polgári Jogegységi Határozat (PJE) kimondta, hogy „a mögöttes felelősség olyan járulékos jellegű, másodlagos, közvetett helytállási kötelezettség, amely alapulhat szerződésen (pl. szerződéses egyszerű kezesség) vagy törvény rendelkezésén (törvényi kezesség, valamint a mögöttes felelősség egyéb törvényi esetei). A mögöttesen felelős ugyanazon kötelezettség teljesítéséért felel, mint a főkötelezett. Ebből következően a követelés elévülése mind a főkötelezettel, mind a mögöttesen felelőssel szemben ugyanabban az időpontban - a követelés Ptk. 326. § (1) bekezdés szerinti esedékessé válásának időpontjában - kezdődik. Az elévülést a főkötelezettel szemben megszakító jogcselekmények nem szakítják meg az elévülést a mögöttesen felelős személlyel szemben. A mögöttesen felelős személlyel szembeni követelés elévülése a

[37] Gellért (szerk.), *Nagykommentár a Polgári Törvénykönyvről szóló 1959. évi IV. törvényhez*
[38] régi Ptk. 326. § (1) bekezdés
[39] régi Ptk. 326. § (2) bekezdés
[40] Lábady Tamás, *A magyar magánjog (polgári jog) általános része* (Budapest-Pécs: Dialóg Campus Kiadó, 2002), 317.
[41] EBH2003. 853., Május 14, 2021, https://uj.jogtar.hu/#doc/db/1/id/A03H0853.EBH/ts/20140101/
[42] BH2004. 237., Május 14, 2021, https://uj.jogtar.hu/#doc/db/1/id/A04H0237.PK/ts/20140101/
[43] régi Ptk. 327. § (1)-(3) bekezdések

főkötelezettől való behajthatatlanság igazolt megállapíthatóságáig nyugszik. Az elévülés nyugvása fogalmilag kizárja az elévülés megszakadását. A főkötelezettel szemben el nem évült követelés az elévülés nyugvásának megszűntétől (vagyis a főkötelezettől való behajthatatlanság igazolt megállapíthatóságától) számított egy éven belül érvényesíthető a mögöttesen felelős személlyel szemben." [44]
A BH1979. 297. számú eseti döntés szerint a felszólításhoz elévülést félbeszakító joghatály csak abban az esetben fűződik, ha az ellenérdekű félhez meg is érkezik.[45] A BH1984. 113. számú eseti döntés alapján a követelés azonosítására alkalmas írásbeli felszólítás abban az esetben is megszakítja az elévülést, ha nem jelöli meg a követelés pontos összegét.[46] A BH2014. 106. döntés szerint az elévülést megszakító írásbeli felszólítás minimális tartalmi kelléke a követelést megalapozó tényállásnak, valamint az alapul szolgáló jogviszonynak a megjelölése és a jogosult azon akaratának kifejezésre juttatása, miszerint követelését a kötelezettel szemben érvényesíteni kívánja.[47] A régi Ptk. bírói gyakorlata szerint az elévülés megszakadását az olyan felszólítás eredményezi, amely tartalmazza azokat az adatokat, amelyek alapján a kötelezett a vele szemben támasztott követelést kétségtelenül azonosítani tudja.[48]
A bíróság előtti igényérvényesítés, mint az elévülést megszakító esemény tekintetében kialakult bírói gyakorlat szerint a követelést tartalmazó keresetlevélnek a bíróság általi kézbesítése a per megszűnése esetén is megszakítja az elévülést.[49] Az előzetes bizonyítás iránti kérelem azonban nem szakítja meg az elévülést.[50] A régi Ptk. hatálya alatt kikristályosodott az a bírói gyakorlat, mely szerint azonban csak a bíróság érdemi döntésével záruló eljárás lefolytatása alkalmas az elévülés megszakítására. Így például az a fizetési meghagyás kibocsátása iránti kérelem, melyet a bíróság idézés kibocsátása nélkül elutasít, nem alkalmas az elévülés megszakítására.[51] A BH2017. 51. számú eseti döntésben is ez jut kifejezésre, miszerint a keresetlevél előterjesztése csak abban az esetben alkalmas az elévülés megszakadásának jogkövetkezménye kiváltására, ha annak alapján, az elévüléssel érintett követelés tárgyában, a célzott eljárás ténylegesen megindul és abban a bíróság érdemi döntést hoz.[52] Itt csupán utalni kívánok arra, miszerint az ezzel kapcsolatban

[44] 1/2007. Polgári Jogegységi Határozat (PJE), Május 14, 2021, https://uj.jogtar.hu/#lbj0id1620985898675c611
[45] BH1979. 297., Május 14, 2021, https://uj.jogtar.hu/#doc/db/1/id/979H0297.GK/ts/20140101/
[46] BH1984.113., Május 14, 2021, https://uj.jogtar.hu/#doc/db/1/id/984H0113.GK/ts/20140101/
[47] BH2014. 106., Május 14, 2021, https://uj.jogtar.hu/#doc/db/1/id/A14H0106.PK/ts/20140101/
[48] BDT2013. 2853., Május 14, 2021, https://uj.jogtar.hu/#doc/db/25/id/A13H2853.BDT/ts/20140101/
[49] BH2007. 408., Május 14, 2021, https://uj.jogtar.hu/#doc/db/1/id/A07H0408.PK/ts/20140101/
[50] BH2006. 60., BH2008. 14., Május 14, 2021, https://uj.jogtar.hu/#doc/db/1/id/A06H0060.GK/ts/20140101/
[51] BH 2007. 229., Május 14, 2021, https://uj.jogtar.hu/#doc/db/1/id/A07H0229.PK/ts/20140101/
[52] BH2017. 51., Május 14, 2021, https://uj.jogtar.hu/#doc/db/1/id/A17H0051.PK/ts/20140101/

kialakult bírói gyakorlatot az új Ptk. is átvette normatív, tételes szabályozás formájában.
A régi Ptk. 327. § (3) bekezdése kapcsán szintén nagyon gazdag bírói gyakorlat alakult ki. A régi Ptk. Nagykommentárja szerint az elévülés nyugvásának szabályai a végrehajtási jog elévülésére is megfelelően alkalmazandók. A végrehajtási jog elévülését a fél végrehajtás folytatására irányuló kérelme is megszakítja.[53] A bírósági végrehajtásról szóló 1994. évi LIII. törvény (Vht.) 57. § (1) és (4) bekezdései szerint a végrehajtási jog a végrehajtandó követeléssel együtt évül el. A végrehajtási jog elévülését bármely végrehajtási cselekmény megszakítja.[54] Az LB azonban kifejtette, hogy hiába indított végrehajtást a jogosult, az adós lefoglalható vagyontárgya hiányában szünetelő végrehajtási eljárásban a végrehajtási jog elévülése a szünetelés tartama alatt is bekövetkezhet.[55] Az LB azt is kimondta, hogy a beszedési megbízás ugyan nem tekinthető bírósági végrehajtásnak, de olyan kötelező eljárás, amely elévülést megszakító cselekménynek minősül.[56] A közvetlen munkáltatói letiltás kapcsán is akként foglalt állást az LB, hogy az alkalmas az elévülés félbeszakítására.[57]
A végrehajtási záradékkal ellátható okiratok vonatkozásában a Kúria kifejtette, hogy az azokban meghatározott határidő elteltével a közvetlenül végrehajtható követelések nem csak esedékessé, egyszersmind végrehajthatóvá is válnak. „Az ilyen követelések esetében a végrehajtási jog elévülése - az egyéb feltételek fennállása esetén - a követelésre megállapított teljesítési határidő letelte utáni napon kezdődik. Ettől az időponttól kezdve a követelés más hatósági eljárás közbeiktatása nélkül végrehajtás útján közvetlenül kikényszeríthető, ezért az elévülésének megszakítására a Ptk. 327. §-ának (3) bekezdése az irányadó. Ha mód van végrehajtási kényszer közvetlen alkalmazására, akkor csak a végrehajtási cselekményt lehet olyan célravezető jogérvényesítési lépésnek tekinteni, amely az elévülés megszakítását eredményezheti."[58] A Kúria egy másik döntése értelmében önmagában a Brüsszel I. rendelet szerinti tanúsítvány kibocsátása, illetve az erre irányuló kérelem – ha ahhoz nem társul végrehajtás elrendelése iránti kérelem is- nem tekinthető végrehajtási cselekménynek, így nem alkalmas az elévülés megszakítására.[59] Azonban, ha egy, a követelés behajthatatlansága miatt szünetelő végrehajtási eljárásban a jogosult nem a végrehajtási eljárás folytatását kéri, hanem az adós felszámolása iránt terjeszt elő kérelmet, ez a kérelem alkalmas az elévülés megszakítására.[60]

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[53] Gellért (szerk.), *Nagykommentár…*
[54] 1994. évi LIII. törvény (Vht.) 57. § (1) és (4) bekezdései, Május 14, 2021, https://uj.jogtar.hu/#doc/db/1/id/99400053.TV/ts/20140101/lr/lawrefP%2857%29B%281%29/
[55] EBH2004. 1037, Május 14, 2021, https://uj.jogtar.hu/#doc/db/1/id/A04H1037.EBH/ts/20140101/
[56] BH1996. 468, Május 14, 2021, https://uj.jogtar.hu/#doc/db/1/id/996H0468.PK/ts/20140101/
[57] BH1999. 13, Május 14, 2021, https://uj.jogtar.hu/#doc/db/1/id/999H0131.GK/ts/20140101/
[58] BH2014. 151, Május 14, 2021, https://uj.jogtar.hu/#doc/db/1/id/A14H0151.PK/ts/20140101/
[59] BH2016. 144, Május 14, 2021, https://uj.jogtar.hu/#doc/db/1/id/A16H0144.PK/ts/20140101/
[60] BH2020. 79, Május 14, 2021, https://uj.jogtar.hu/#doc/db/1/id/A20H0079.PK/ts/20140101/

5. Az elévülés szabályai és bírósági gyakorlata az új Ptk.-ban

A 2013. évi V. törvény (továbbiakban: Ptk.) igen jelentős változásokat hozott az elévülés szabályozása körében (is). A Ptk. 6:21. §-a szerint jogosultság gyakorlására és követelés érvényesítésére jogszabályban előírt határidő eltelte jogvesztéssel akkor jár, ha ezt jogszabály kifejezetten így rendeli. Ha a határidő nem jogvesztő, arra az elévülés szabályait kell alkalmazni.[61] A Ptk. Magyarázata szerint a törvény ezzel egyértelművé teszi, hogy az időmúlásnak kétféle következménye lehet az igények érvényesíthetősége szempontjából, a jogvesztés vagy az elévülés. A jogvesztés jogkövetkezményének súlyossága miatt azonban előírja a törvény, hogy ezt a következményt az adott jogszabály kifejezetten írja elő. Ha a jogszabály nem fűzi az időmúláshoz kifejezetten a jogvesztést, akkor a határidőt elévülési jellegűnek kell tekinteni.[62] A Ptk. fenntarja az általános öt éves elévülési határidőt, azt, hogy az elévülés a követelés esedékessé válásával kezdődik, hogy elévült követelést bírósági úton nem lehet érvényesíteni, valamint azt is, hogy az elévülést hatósági vagy bírósági eljárásban hivatalból nem lehet figyelembe venni.[63] A Ptk. is tartalmaz az általánostól eltérő elévülési határidőket, így pl. a szerződés megtámadására és kellékszavatossági igények érvényesítésére egy éves, fokozott veszéllyel járó tevékenységből eredő károk és termékszavatossági igények esetén három éves elévülési határidőt állapít meg.[64] A Ptk. szabályai az elévülés nyugvása körében lényegében megegyeznek a régi Ptk. rendelkezéseivel.[65] Annyi módosítás történt csupán, hogy a Ptk. a korábbi bírói gyakorlatot törvénybe iktatva kifejezetten kizárja az elévülés újabb nyugvását az egy éves és a három hónapos határidő alatt.[66]

Az elévülés megszakításának szabályozásában azonban már komoly változtatásokat eszközölt a Ptk. A Ptk. 6:25. §-a szerint az elévülést megszakítja a tartozásnak a kötelezett részéről történő elismerése; a kötelem megegyezéssel történő módosítása és az egyezség; a követelés kötelezettel szembeni bírósági eljárásban történő érvényesítése, ha a bíróság az eljárást befejező jogerős érdemi határozatot hozott; vagy a követelés csődeljárásban történő bejelentése. Az elévülés megszakításától vagy az elévülést megszakító eljárás jogerős befejezésétől az elévülés újból kezdődik. Ha az elévülést megszakító eljárás során végrehajtható határozatot hoztak, az elévülést a kötelem megegyezéssel való módosítása és a végrehajtási cselekmények szakítják meg.[67] Látható tehát, hogy a Ptk.-ból kimaradt a „követelés teljesítésére irányuló írásbeli felszólítás", mint az elévülést megszakító cselekmény. Ennek indoka, hogy ez az ok ellentétes az elévülés jogintézményével, hiszen nem az igény érvényesítésére, hanem az igényérvényesítési határidő meghosszabbítására ösztönzi a

[61] 2013. évi V. törvény (Ptk.) 6:21. §, Május 14, 2021, https://uj.jogtar.hu/#doc/db/1/id/A1300005.TV/ts/20200903/lr/chain4329/

[62] Vékás Lajos (szerk.), *A Polgári Törvénykönyv magyarázatokkal* (Budapest: Complex Kiadó, 2013), 519.

[63] Ptk. 6:22. § (1)-(2), 6:23. § (1) és (4) bekezdések

[64] Ptk. 6:89. § (3), 6:163. § (1), 6:538. §, 6:558. § (1) bekezdések

[65] Ptk. 6:24. § (1)-(2) bekezdések

[66] Ptk. 6:24. § (3) bekezdés

[67] Ptk. 6:25. § (1)-(3) bekezdések

jogosultat.[68] Álláspontom szerint – melyet a Ptk. Nagykommentárja is megerősít - azonban lehetnek (és vannak is) olyan jogviszonyok, ahol abszolút indokolható és támogatható lehet az, hogy a teljesítésre irányuló írásbeli felszólítás megszakítsa az elévülést. Tipikusan ilyenek lehetnek pl. a tömegesen jelentkező azonos jogalapon felmerülő igények a közüzemi szolgáltatásokat nyújtó gazdasági társaságok díjkövetelései esetében. Ezeknél indokolt lehet az elévülési idő meghosszabbítása, adott esetben a hátralékos fogyasztó fizetésre történő írásbeli felszólításával. Ezen követelések esetében mindkét fél érdekét szolgálhatja az a lehetőség, hogy fizetési meghagyás vagy perindítás nélkül el lehessen érni az elévülés megszakítását, lehetőséget adva a kötelezettnek a békés rendezésre.[69] Ezt ugyan a társaságok szabályozhatják az ÁSZF-jükben, azonban ebben az esetben ebből még lehetnek jogviták, melyek esetében végül a bírói gyakorlatnak kell választ adnia erre a kérdésre. Álláspontom szerint a jogbiztonság érdekét jobban szolgálta volna, ha a jogalkotó az ilyen esetekre speciális rendelkezéseket ír elő.

Szintén problémát okoz(hat) a joggyakorlat számára a Ptk. 6:25. § (1) bekezdés c) pontja, mely szerint a követelés kötelezettel szembeni bírósági eljárásban történő érvényesítése akkor szakítja meg az elévülést, ha a bíróság az eljárást befejező jogerős érdemi határozatot hozott.[70] Az nem okoz problémát, hogy vajon csak a ténylegesen bírósági eljárás eredményezi-e az elévülés megszakítását vagy más (hatósági) eljárás is alkalmas lehet-e erre, ugyanis a Ptk. 8:1. § (3) bekezdése alapján pl. a fizetési meghagyásos eljárás is bírósági eljárásnak minősül.[71] A jogirodalomban és a joggyakorlatban egységes az álláspont azzal kapcsolatban is, hogy nem csupán a fizetési meghagyásos eljárást sorolhatjuk ide, hanem gyakorlatilag bármely állami eljárást, így pl. a követelés felszámolási eljárásban történő bejelentését is.[72][73]

Vékás szerint „a bírósági eljárás az elévülés megszakítására csak abban az esetben vezet, ha az eljárás érdemi határozattal fejeződik be. Érdemi határozatot hoz a bíróság (más hatóság), ha a határozat alkalmas az igénybe vett eljárás által célzott joghatás kiváltására. Ezzel a pontosítással a Ptk. annak kívánja elejét venni, hogy a Pp. szerint érdemi határozat meghozatalára nem alkalmas keresettel is meg lehessen szakítani az elévülést, és ezzel kétszeresére (adott esetben: többszörösére) növelni az elévülési időt. Egy ilyen kereset ugyanis alig több mint egy írásbeli felszólítás, vagyis e megszakítási lehetőség nem az igény érvényesítésére, hanem az igényérvényesítési idő (és az azzal járó bizonytalanság) meghosszabbítására ösztönöz. Az új szabály a jogosultat nem hozza méltánytalan helyzetbe, hiszen az idézés kibocsátása nélkül elutasított vagy egyébként érdemben el nem bírált keresetnek is van anyagi jogi hatása, éspedig az, hogy a bírósági eljárás alatt az elévülés nyugszik. Nyilvánvalóan

[68] Vékás (szerk.), *Magyarázat,* 523-524.

[69] Vékás Lajos (szerk.), *Nagykommentár a Polgári Törvénykönyvről szóló 2013. évi V. törvényhez*, Május 14, 2021, https://uj.jogtar.hu/#doc/db/367/id/A14Y1522.KK/ts/20200101/lr/chain27626/

[70] Ptk. 6:25. § (1) bekezdés c) pont

[71] Ptk. 8:1. § (3) bekezdés

[72] Vékás (szerk.), *Nagykommentár*

[73] Új Ptk. Tanácsadó Testületének Véleménye, Május 14, 2021, https://uj.jogtar.hu/#doc/db/1/id/000V0015.PTT/ts/20200903/

menthető helyzetként kell értékelni ugyanis az igényérvényesítés szempontjából a jogerős érdemi határozat meghozatalára nem vezető bírósági eljárást is."[74]
Egy másik gyakorlati probléma az új szabályozás kapcsán, hogy a jogalkotó nem hozta összhangba a Ptk. elévülés megszakítására vonatkozó új rendelkezését a Vht. szabályaival. Végrehajtási igény ugyanis nem csak bírósági ítéleten alapulhat, hanem pl. közjegyzői okiraton is. Ebben az esetben megtörténhet, hogy a végrehajtási eljárás alatt elévül a követelés, ugyanis ilyenkor a jogosult a követelését bírósági eljárás nélkül, azon kívül érvényesíti, így nincs olyan jogcselekmény, mely megszakítaná az elévülést. Véleményem szerint azonban ilyen esetekben a közjegyző végrehajtási cselekményét az elévülés megszakítására alkalmasnak kell tekinteni. Ezzel megegyező álláspontra helyezkedett az új Ptk. Tanácsadó Testületének már fentebb idézett Véleménye is. Véleményem szerint ezzel az értelmezéssel a bírói gyakorlat a Ptk. és a Vht. összhangjának hiányát -a jogalkotói mulasztás pótlásáig- méltányosan és jogszerűen pótolni tudja.

6. Összegzés

Mint látható tehát, az elévülés jogintézménye egészen a római jog koráig nyúlik vissza. Az elévülés jogpolitika indoka tulajdonképpen a római jog óta változatlan, nevezetesen, hogy hosszabb ideje fennálló, bizonytalan jogi helyzet megváltoztatására a jogosult ne kapjon jogvédelmet, ugyanis a bizonyítás nehézzé vagy akár lehetetlenné is válhat, és ezzel a jogosultat az igénye mielőbbi érvényesítésére ösztönözze. Az is megállapítható, hogy ugyancsak már a római jogtól kezdődően ismert volt az elévülés nyugvása (amikoris a jogosult menthető okból nem tudja az igényét érvényesíteni a kötelezettel szemben), illetve az elévülés megszakadása is, mely esetkörök hellyel-közel szintén azonosak a római jog óta, így pl. részletfizetés, kamatfizetés, kötelezett általi elismerés, bírósági eljárás indítása stb. Az elévülés ideje koronként különbözően került szabályozásra, száz évtől az egy éves határidőig. Magyarországon az új Ptk. jelentős változásokat hozott az elévülés szabályozásában (is), és mint bemutatásra került, a jogalkotó néhol nem kellően pontosan állapította meg a szabályokat, de a joggyakorlat megnyugtató válaszokat tudott adni.

[74] Vékás (szerk.), *Nagykommentár*

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