UNIVERSITY OF TIMISOARA
FACULTY OF LAW

UNIVERSITY OF PÉCS
FACULTY OF LAW

JOURNAL OF EASTERN-EUROPEAN CRIMINAL LAW

No. 2/2021

Edited biannually by courtesy of the Criminal Law Departments within the Law Faculties of the West University of Timisoara and the University of Pécs

UNIVERSUL JURIDIC

2021

Universul Juridic Publishing House

Edited by Universul Juridic Publishing House

Copyright © 2021, UNIVERSUL JURIDIC S.R.L.

All rights on this edition are reserved to Universul Juridic Publishing House

No part of this volume can't be copied without the subscription of Universul Juridic Publishing House

The journal is indexed in databases SSRN, EBSCO, HeinOnline.

ISSN 2360–4964

Redactor:	Ciprian Radu
Tehnoredactor:	Tania Militaru
Copertă:	Aurelian Leahu

Redacţie:
tel.: 0732.320.666
e-mail: redactie@universuljuridic.ro

Distribuţie:
tel.: 021.314.93.15
fax: 021.314.93.16
e-mail:
distributie@universuljuridic.ro

editurauniversuljuridic.ro

Editura Universul Juridic

Portal:
tel.: 0725.683.560
e-mail: portal@universuljuridic.ro

universuljuridic.ro

Universul Juridic

Librăria UJmag:
tel.: 0733.673.555; 021.312.22.21
e-mail: comenzi@ujmag.ro

ujmag.ro

Ujmag.ro

WEST UNIVERSITY OF TIMISOARA
FACULTY OF LAW

UNIVERSITY OF PÉCS
FACULTY OF LAW

Center of Research in Criminal Sciences
FACULTY OF LAW
West University of Timisoara

JOURNAL OF EASTERNEUROPEAN CRIMINAL LAW

❍ BOARD OF EDITORS ❍

EditorsinChief

Lect. dr. LAURA STĂNILĂ
West University of Timisoara
Faculty of Law

Prof. dr. ZORAN PAVLOVIC
University of Novi Sad
Faculty of Law

Conf. dr. FLAVIU CIOPEC
West University of Timisoara
Faculty of Law

Prof. dr. ISTVÁN GÁL
University of Pécs
Faculty of Law

Honorary Member
Prof. dr. VIOREL PAȘCA

Editors

Dr. CSONGOR HERKE
Dr. SILVIA SIGNORATO
Dr. MIHÁLY TÓTH
Dr. IOANA CELINA PAŞCA
Dr. LÁSZLÓ KŐHALMI
Dr. ZOLTÁN ANDRÁS NAGY
Dr. CSABA FENYVESI
Dr. RUXANDRA RĂDUCANU

SCIENTIFIC BOARD

Prof. dr. Ulrich Sieber, director Max Planck Institute for International Criminal Law; Prof. dr. Ye Qing. Chancellor Law Institute of SASS, Shanghai; Prof. dr. Zoran Stojanović, University of Belgrade, Faculty of Law; Prof. dr. Vid Jakulin, University Lublijana, Faculty of Law; Prof. dr. Roberto E. Kostoris, Ordinario di Diritto processuale penale nell'Università di Padova; Prof. dr. Zoran Pavlovic, Faculty of Law for Business and Judiciary; Prof. dr. Tudorel Toader, Chancellor University A.I. Cuza Iasi, Faculty of Law, Justice minister; Prof. dr. Florin Streteanu, University „Babes-Bolyai" Cluj-Napoca, Faculty of Law; Prof. dr. Valerian Cioclei, Bucharest University, Faculty of Law; Prof. dr. Elek Balazs, Debrecen University, Faculty of Law; Prof. dr. Silvio Riondato, Università degli Studi di Padova; Prof. dr. Yuri Pudovochkin, Russian State University of Justice; dr. sc. Matko Pajčić, assistant professor, Law Faculty, University of Split, Croatia, prof. dr. François Rousseau, Université de Nantes, dr. habil. István Resperger, Associate Professor, National University of Public Sevice Budapest; dr. habil. József Boda PhD, associate Professor National University of Public Sevice, Budapest; Gary Hill, Scientific Coordinator of the International Scientific and Professional Advisory Council of the United Nations Crime Prevention and Criminal Justice Program (ISPAC), prof. dr. Ovidiu Predescu, General secretary of Academy of Legal Sciences of Romania.

The board of editors shall not take responsibility for the authors' opinions; therefore the authors are exclusively responsible for the former.

FOR CONTRIBUTORS

Journal of Eastern-European Criminal Law could stand out as a unique publication, at least in this part of the world, as an outcome of the partnership between specialists in Criminal law and Criminal Procedure law from the law faculties of the West University in Timisoara and the University in Pecs, who aimed at presenting, in a different language from their own, the serious amendments of criminal legislation that occurred in their countries in the post-communist era, an essential requirement for the rule of law. We envisage this journal, published semesterly, to be open to all researchers in the academic environment from the former communist countries, to professors, PhD students, but also, to magistrates and other professionals interested in the evolution of criminal legislation and in the more and more firm response to be given to the criminal phenomenon, while observing the fundamental human rights.

Our concerns aim at enlisting the Journal in additional databases, others than the ones in which the magazine is presently indexed, **namely Social Science Research Network (SSRN), EBSCO and HeinOnline.**

Any correspondence with the journal editors shall be sent with the mention „for the Journal of Eastern-European Criminal Law" at the following mail addresses:

laura.stanila@e-uvt.ro; flaviu.ciopec@e-uvt.ro; gal.istvan@ajk.pte.hu; zoran.pav@hotmail.com

For the time being, the journal cannot pay copyright compensation, any collaboration article shall therefore be voluntarily submitted.

Non-patrimonial copyright is protected, so any reproduction, representation, adaptation, translation and/or modification, partial or total, or transfer to a site of the articles, without consent of the authors, is prohibited.

The articles to be published shall be written in the following forma:

Title (capital letters, bold type, centered, 14)

Author(s)' name *(e.g. Sandra Marked[1], Werner Taylor[2], Roland G. Rowling[3]) (italics, bold type, centered, 12)*

Scientific degree, position (in order of the marking number), centered

Abstract and key words: Times New Roman font type, size 12.

The **text** shall be typed on A4 size (white copy paper), margins: left 3 cm, others 2.5 cm, Times New Roman font type, size 12.

Headings (chapter titles) shall be in capitals, with a blank line preceding and following them.

Within chapters, subheadings shall be italicized with a blank line preceding and following them.

References shall be listed **at the end of the paper, in alphabetical order.**

The recommended form of the list of references at the end of the paper: 1. Lippman, M: *Contemporary Criminal Law*, London: Sage Publications, 2007, p...

The paper shall be written exclusively in English and shall be accompanied by an abstract in English (10-15 lines).

THE BOARD OF EDITORS

Contents

Balázs Elek
Game Theory and Criminal Proceedings 9

István László Gál
The Protection of Classified Information in Western Europe and the USA 24

Csaba Szilovics, Alexander Szívós, Dávid Bányai
Fighting Against Tax Evasion – A Comparative Approach Between Romania, Hungary and Anglo-Saxon Countries 36

Dávid Toth
Questions Arising from Digital Evidence in the Hungarian Criminal Procedure 52

Vadim Khiluta
Free Will in Criminal Law Through the Lens of Neuroscience 63

Mikhail Matveyevich Babayev, Yuriy Yevgenyevich Pudovochkin
Some Aspects of Crisis of Punishment 73

Cristina Nicorici
"The Confined Woman of Poitiers" and the Guarantor's Position of the Brother 81

Rocco Neri
The Eternal Dilemma Between Possible Intent and Conscious Fault: A Recent Case-Study in Italian Jurisprudence 89

Ferenc Dávid
Scaremongering in the Hungarian Criminal Law 100

Game Theory and Criminal Proceedings

Balázs Elek*

Abstract

The expression "game theory" is essentially a scientific metaphor where two or more individuals with opposing or mixed motivations take actions, employing strategies that are both interdependent and also build upon each other.

The game-theory method makes possible the study on how individuals on opposing sides make decisions in a given situation. It also applies to those life situations where a decision made by an individual has no power over other decisions that affect him. The decision maker can be an individual, a group, or an organization. Game theory can analyze situations where participants must take decisions that pose risks. In these situations, at least two players try to maximize their own so-called "utility function. Game theory can be used to model criminal proceedings, as each decision carries a risk with respect to the end result.

If the accused and their attorneys adequately apply game theory to their strategies, then they will achieve the result that is most optimal for themselves. Game theory also makes it easier to understand the actions of the participants in criminal proceedings and therefore to understand certain testimony, especially betrayal; game theory helps us properly assess the creditworthiness of incriminating statements that one defendant makes about another.

Keywords: *game theory, criminal procedure, decision, prisoner's dilemma.*

I. Introduction

The expression "game theory" is essentially a scientific metaphor where two or more individuals who have opposing or mixed motivations take actions, employing strategies that are both interdependent and also build upon each other[1].

The game-theory method makes it possible to study how individuals on opposing sides make decisions in a given situation. It also applies to those life situations where a decision made by an individual has no power over other decisions that affect him. The decision maker can be an individual, a group, or an organization[2].

---

* Head of Criminal Department, Debrecen Court of Appeals; Department Head and Professor, University of Debrecen Faculty of Law, Department of Criminal Proceedings. Contact: elek.balazs@law.unideb.hu.

[1] G. Iván, *Játékelmélet – a racionális döntések elmélete* [Game Theory – The Theory of Rational Decisions], V. Vajdasági Magyar Tudományos diákköri Konferencia [Fifth Conference of the Vojvodina Hungarian Scientific Student Body], 2006, pp. 1-17. http://vmtdk.edu.rs/a2392a4a-feb3-8217-c098-67fe2159f959 (accessed on March 1st, 2019).

[2] The foundations of the decision theory, which examines logical choices in situations with uncertain outcomes, were laid out by mathematician János Neumann. His work transformed our

The essence of the "game" is that it is played by decision makers who have diverse objectives and whose destinies are intertwined. It is a situation where several outcomes are possible, and each outcome has a different value depending on what decisions the individuals make. Each individual may have some influence on the final result, but no single person has complete control over the process as a whole. The player must consider how to maximize his outcome while keeping in mind that there are others whose goals are different from his own and whose actions will affect everyone else. The player not only needs to adjust his plans to his own desires or capabilities, but to those of others as well. The outcome of the game depends on the strategies that the various players employ. It also depends on factors that none of the players can control, such as luck[3].

We call a game "totally informed" when all participants are familiar with all the data that concerns them; they have a transparent view of their position and the steps that they or their opponents might take. In such cases, one can achieve victory through a so-called "clean strategy". The players keep their decisions secret, disguising them as random or as possibilities. They mix strategies to target the optimal ratio, try to deduce the others' decisions, and do their best to confound them. All players are aware of all this, so they remain vigilant against the others' efforts to wrongfoot them[4].

Game theory can analyze situations where participants must take decisions that pose risks. In these situations, at least two players try to maximize their own so-called "utility function". Each participant's utility function depends on at least one other participant's utility function. It is generally understood that the player who wins the most is the one who eschews conventional answers to questions and dares to step out of the equilibrium. However, this player might also end up losing the most.

Starting out as a set of mathematical models, game theory has evolved into a system that can be used to analyze many-sided conflict situations.

The theory generally treats players as rational. Naturally, the players are the ones who have to formulate diverse answers to particular challenges in numerous areas of life. The concept of rationality can be perceived in that the players, as decision makers, endeavor to maximize their own advantage – that is, they choose the action that is most optimal for themselves[5].

Game theory is very good for modeling various economic processes, customs policy, perhaps an election, and criminal proceedings as well. It facilitates the examination of criminological processes – for example, how the law influences prospective criminals and how it impacts societal welfare as a whole[6].

For example, researchers have used game theory to analyze how intensified police action in a crime-infested area affects the behavior of possible victims in potential target groups and, consequently, the development of criminal activity. Professional criminological

---

approach on the nature of rational behavior. Neumann and economist Oskar Morgenstern published their book "Theory of Games and Economic Behavior", in which they tried to develop principles of rational behavior for situations in economic, political and social life. (John von Neumann and Oskar Morgenstern, *Theory of Games and Economic Behavior* (Princeton, NJ: Princeton University Press, 1944).

[3] R.L. Birmingham, *Model of Criminal Process: Game Theory and Law*, Cornell Law Review no. 56/1970-71, pp. 57-69.

[4] G. Iván, cited, pp. 1-17.

[5] F. Forgó, *Mivel foglalkozik a játékelmélet?* [What Does Game Theory Deal With?], Magyar Tudomány no. 5/2009, pp. 515-527, http://www.matud.iif.hu/2009/09maj/02.htm, epa.oszk.hu/00600/00691/00065/pdf/515-527.pdf. (accessed on 1 March, 2019).

[6] R.L. Birmingham, cited, pp. 57-69.

literature regards intensified police activity in particularly dangerous locales as a feasible strategy. By contrast, game-theory processes suggest that the optimal strategy would be random police action in various locales. If statistics indicate a high rate of crime in a given area, or criminal activity is intensely directed at a certain class of victims, then a redistribution of law-enforcement resources is not necessarily justified; it might mean that although fewer crimes are committed against the less vulnerable (for example, homeowners who are able to protect their homes), criminal activity will intensify against victims who are truly vulnerable[7].

Gál (2007) employs what is essentially game theory in setting up his model for sanctioning economic criminals, starting with theories that describe criminals as profit-maximizing actors. These theories argue that a perpetrator commits a crime when the profit he anticipates from illicit activities exceeds the losses he may suffer should he get caught[8].

In some cases, criminal proceedings raise questions with respect to decision analysis. In cases adjudicated by multi-judge panels, researchers usually analyze the process through which jurors make decisions. However, the workings of three- and five-judge councils, composed of professional judges, can be examined using similar methods[9].

In one example of game-theory analysis, jurors must render a verdict on a defendant's guilt or innocence and also decide what kind of punishment he deserves. In this case, 35 percent of the jurors believe the accused is innocent, 20 percent think he is guilty but deserves a relatively light sentence, and 45 percent think he is guilty and should serve a long term in prison. The jury president, who manages the voting, favors a "guilty" verdict with a lighter punishment. When he realizes the jury is deadlocked, he comes up with the following solution: First, he will call a vote on the question of guilt or innocence, which will clearly go 65-35 percent in favor of "guilty". Then, he will call a vote on sentencing. If the decision-making process is rational, then those who consider the defendant innocent will vote alongside jurors who favor a lighter punishment. Thus, the jury president achieves the outcome he wanted, which was originally the least popular of all three alternatives[10].

II. Game theory and criminal proceedings

Game theory originally emerged from the scientific study of well-known games such as chess and poker, where the player has to think ahead and develop a strategy to deal with other players' possible responses. The strategy is a long-term plan. It covers the entire game and extends to all of its details. The strategy is the player's plan for self-conduct; it guides the player on which way to go – and how to go there –

[7] E. Guttel, B. Medina, *Less Crime, More (Vulnerable) Victims: Game Theory and the Distributional Effects of Criminal Sanctions*, Review of Law and Economics no. 3/2007, pp. 407-433.

[8] I.L. Gál, *Gazdasági büntetőjog közgazdászoknak* [Economic Crime Law for Economists], Budapest: Akadémiai Kiadó, 2007, p. 57.

[9] If a vote is not unanimous, a decision shall be taken by majority vote. If there is no unanimity on assessing punishment or applying a provision, the majority of votes shall be established in such a way that the vote for the most severe legal consequence reinforces the one that falls closest to it, and that is to be expected. (Hungarian Law on Criminal Proceedings, Act XC (2017) (Abbreviated in Hungarian as "Be.") §450 (1)(2)).

[10] J. Mészáros, *Játékelmélet* [Game Theory], Budapest, Gondolat Kiadó, 2005, p. 222.

at every future decision-making point, assuming the game proceeds that far. Essentially, it is a method that will help the player to victory, or at least a tie, by taking advantage of his opponent's mistakes. Hence a strategy means the decision that a player considers optimal[11]; it is a decision alternative, or a series of such alternatives.

In cases where information is not available to a participating player, then no strategy will lead to a clear victory. There is no point in the player trying out different tactics, as his opponent will soon recognize them and make use of them[12]. In court, one defendant may find it advantageous to employ a defense that is significantly different from the other defendants' defenses, but the moment that the others begin imitating him, it is hardly certain that his strategy will bear fruit[13].

A similar strategy is required in numerous business situations. It can also be useful in developing and understanding an investigative plan or a defense strategy[14]. In forensic science, criminal strategy and criminal tactics concern rules for planning and organizing investigations, the behavior of the investigators, and the applicable apprehensions and operations[15].

This concept also makes it possible to understand a defense plan, where the defense counsel makes assumptions about future events and decides what he will do in response to them. The more surefooted his assumptions, the better decisions he will make. Here, game-theory modelling is an excellent tool as it can establish the optimal decision in light of the other competitors' anticipated behavior. Thus, the game theory can be used to model criminal proceedings, as each decision carries a risk with respect to the end result.

Participants in criminal proceedings have many decisions to make. The "players" are the accused, the defense attorneys, the investigators and the prosecutors. Game theory precisely shapes procedures in which cooperation and competition are simultaneously present. It deals with situations where at least two decision makers try to maximize their own so-called "utility function". Every participant's utility function depends on at least one other participant's utility function.

The accused must take risks when deciding whether to testify, whether to confess to the charges against him, perhaps whether to concoct a cover-up story, or whether to expose the role his partners may have played in the crime. Likewise, every decision the investigator takes carries a risk that directly affects the behavior of the accused and his attorneys.

In game-theory terminology, an "interaction" occurs when the decisions of at least one player directly affect the conduct of another player. Their effectiveness also

---

[11] F. Forgó, cited, pp. 515-527.

[12] G. Iván, cited, pp. 1-17.

[13] For example, a criminal proceeding where one defendant's attorney argued that his client wanted to smuggle cigarettes, but they ran out before he arrived. The case against him was dropped because the wiretap evidence proved nothing more than this, and the act of planning fraud against the state budget is not punishable. The other defendants tried in vain to copy this defense during the trial phase; it could no longer bring results.

[14] Fenyvesi raises the applicability in criminal proceedings of the Bayesian analysis, which provides an objective model for dealing with uncertainty, stressing that it is employed effectively in game-theory in the field of economics. The present study takes a slightly different approach to analyzing the applicability of game-theory to modeling criminal proceedings. See C. Fenyvesi, *A kriminalisztika tendenciái: A bűnügyi nyomozás múltja, jelene, jövője* [The Tendencies of Forensics: The Past, Present and Future of Criminal Investigations], Budapest: Dialóg Campus Kiadó, 2014, p. 243.

[15] G. Bíró, *Kriminalisztika* [Forensics], Debrecen: Debrecen University Faculty of Law, Lícium Art Könyvkiadó Kft, 2015, p. 9.

depends on the decisions of the other participants. When individuals or groups decide how to behave toward others, then their conduct influences the others' decisions as well as their behavior, according to the basic premise of game theory[16].

We call an interaction a "strategic game" when the participants are aware of this effect, and even take it into account when formulating their behavior; that is, each player is aware that the other player is also aware that he is also aware etc.

A strategic game can be pictured as an interaction between actors, where the actors develop their behavior by paying attention to the opposing side's conduct; they already know these actions, or at least consider to be within the realm of possibility. For example, a good chess player thinks several steps ahead, trying to foresee his opponent's possible moves. He decides on his current move only after having thought through the entire process to the very end. Similarly, a military commander in the heat of battle tries to think with the enemy leader's mind. Criminal proceedings typically represent a similar kind of strategic game. There is a conflict of interests between opposing parties. Persons involved in criminal proceedings have knowledge and assumptions about the others' objectives and possible alternatives, but this information is hardly symmetrical. The basic theorem remains valid: Every player tries to optimize his position in accordance with his individual goals[17].

In criminal proceedings, every actor – regardless of whether he is an investigator, a defense attorney, or a defendant – is aware that each of his moves affects the others' decisions and conduct. Each player, whether defendant or investigator, builds into his decisions what he considers to be the opposing party's behavior, or possible behavior. It is essential for more than one decision maker to take part: Obviously, if there is only one player, then we are talking about a decision problem (someone who has a problem making decisions), not a game.

If any suspect (perhaps a witness) provides incriminating testimony about himself or his co-defendants, that will clearly influence the game's final outcome.

The key characteristic of the games is interdependence. In investigations, this interdependence can be interpreted as defendant-investigator, defendant-prosecutor, defendant-other defendants, or even defendant-defense attorney. If we look at the simple game-theory questions, we can see that the same questions apply to criminal proceedings as well.

In some games, the players know their situation precisely. This is hardly the case in criminal proceedings, although certain "players" might know their situation. For example, an investigator is someone who knows what certain accused persons and witnesses have said and what they know. However, he has only indirect information on how the past event occurred. The typical card player acts in a similar way: he knows his own cards, still can only deduce what cards the other players are holding. At the same time, he tries to deceive other players about what cards he is holding.

In game-theory terms, an actor has a "clean strategy" when his strategy is final and does not change in later stages. Correlated to all this is the so-called "total memory", which means that the player does not forget his own previous moves[18]. When an accused person forgets details about his earlier testimony, offers up too much information, or changes counsel, he complicates his own strategy for winning, but his responses to the others' already-known moves can also alter the strategy he has employed thus far.

---

[16] G. Iván, cited, pp. 1-17.
[17] J. Mészáros, cited, p. 1.
[18] J. Mészáros, cited., p. 4.

"Individual" and "common" knowledge is the usual method of classification to express the state of possible information in game theory. Information that is available to all players is called "common knowledge". It is a situation where each player is aware that the other players also have complete information; each player also knows that his opponents know the same thing about him. This common knowledge is much more than the sum total of each player's individual knowledge.

A well-known example of game theory concerns the customs surrounding adultery in an island society. When a woman discovers that her husband has been unfaithful, it is compulsory for her to publicly shame him in the village square the next day until midnight. Let's suppose there are two couples, e.g. two women and two men. A stranger shows up and declares that one member of the group has been unfaithful; in fact, each woman is engaging in an illicit relationship with the other's husband. The first woman knows she has been unfaithful with the other's husband, so she expects that his wife will take him out to the main square at midnight and shame him. However, this does not occur because the other woman is thinking the same thing. The next day, when it becomes clear that nobody had gone to the main square, the common knowledge emerges: everyone has been unfaithful[19]. In criminal proceedings, the dilemma over common knowledge emerges in a similar fashion when parties with opposing interests try to determine who will talk and who will stay silent.

If an investigator states that one of the accused has confessed and therefore can leave detention, no one knows for sure what will happen. Sometimes it is not clear who – if anyone – made the incriminating statement or confession until the court proceedings take place. Common knowledge will emerge, at the very latest, when the documents accompanying the indictment are disclosed.

III. Trap Situation

In game theory, a "trap situation" is when an apparently simple solution runs into difficulties or cannot be completed. Such trap situations include the so-called Prisoner's Dilemma, the Battle of the Sexes, and Leader.

IV. The Battle of the Sexes

A wife and husband both want to spend the evening together, but both of them know the husband would prefer to go to a football match and the woman wants to go to the theater. The person who cooperates is the one who is inclined to give in to the other. As during the weekdays, the party that fares best is the one who refuses to give in because the spouse is compliant. The party that gives in fares somewhat worse because they do not get to spend the evening as they wish, but at least they get to spend the evening with their spouse[20]. In criminal proceedings, it is often clear that the person who defies the rules may win the most – but he is also the one who stands to lose the most. The defendant who does not give in, but rather consistently denies his guilt or comes up with a new and unusual defense, wins big if the judge dismisses

[19] *Idem*, pp. 1-6.

[20] Z. Zsigó, *Van-e megoldás a csapdahelyzetekre?* [Is There a Solution to Entrapment?], Sulinet, 28th March 2014, https://hirmagazin.sulinet.hu/tudomany (accessed on 31 March 2019).

the charges against him or halts the criminal proceedings. However, he also misses out numerous legal possibilities where a confession might have led to a more favorable judgment or agreement. Should the trial end in a conviction, the defendant might also miss out on the lighter sentence that a confession would have afforded him.

V. The Leader

The moral of an old Japanese tale is that the more polite of two people is, in fact, the one who is less polite – because by being impolite, he allows the other person to be more polite. Two gentlemen are trying to get through a narrow doorway. The collaborator is now actually the leader; he is the one who takes on the "less polite" role and starts through the doorway first. He gets the biggest reward accruing to the selfless Japanese. However, the leader's action is also advantageous for his colleague, because if the leader crosses through the doorway first, then the colleague can pass himself off as the more polite man. If both parties do the same thing, then the above-described "equilibrium" is upset. If both people want to be the leader, then each will block the other while walking through the doorway; if neither is polite, then they both will stand in front of the door making gestures of courtesy to one another.

In criminal proceedings, the accused wants to be the leader – the one who tries to direct the events with his testimony. Certainly, the defendants hinder each other when they testify against each other; they upset the equilibrium. The defendant who declines to testify will not be believable, but with his silence, he is actually calling attention to himself[21].

VI. Prisoner's Dilemma

In this classic example of game theory, police apprehend two criminals who were accomplices in a crime; authorities have been trying to catch these men for a long time. They lock the prisoners up in separate rooms. In an effort to uncover the facts, the prosecutor makes the following offer to each prisoner: "If you confess and your partner does not, then you go free and he gets 10 years behind bars. Your partner gets the same offer: If he confesses and you do not, he goes free and you get 10 years. If neither of you confesses, then each of you get one year behind bars on a lesser charge. If both of you confess, then each gets five years in prison". This is not a zero-sum game; no matter what his partner does, the prisoner gets the best deal if he confesses.

[21] In the practice of the European Court of Human Rights (ECHR), the right to remain silent is contravened if an accused person is convicted based solely or predominantly on his silence, his refusal to testify or his own confession. However, the right to remain silent does not mean that the accused's silence cannot be taken into account amid circumstances that clearly require his explanation during an examination of the merits of the evidence cited in the indictment. A similar conclusion can be drawn in cases where a defendant is late in providing his evidence: As the ECHR ruled in *Murray v. United Kingdom* (1996): *"The courts in a considerable number of countries where evidence is freely assessed may have regard to all relevant circumstances, including the manner in which the accused has behaved or has conducted his defense, when evaluating the evidence in the case".* (*John Murray v. The United Kingdom* 18731/91, *Averill v. The United Kingdom* 36408/97, Budapest Court of Appeals 8.Bf.392/2016/113.

The primary goal for both prisoners is to be set free, or at least to get the shortest possible sentence at trial. The question to be answered is, what is the most logical way to accomplish this?

The perpetrator approaches the question logically. "If my partner confesses, then two outcomes are possible: If I also confess, I will get five years, but if I don't confess, I will get 10". It follows that the perpetrator will make out best if he confesses when his partner does likewise.

If a perpetrator does not confess, then the possible outcomes are different: Either one perpetrator will go free while his partner gets 10 years, or if neither confesses, then each gets one year. It is clear that the perpetrator will fare better if he confesses while his partner remains silent. The logical model therefore suggests that both prisoners will do better if they both confess and serve five years. However, if neither of them had confessed, they could have gotten away with one year each[22].

It is in neither prisoner's interest to do differently than he is advised, as long as his partner also takes the prosecutor's advice. This situation might be an equilibrium, since it is in no one's interest to diverge from the path so long as the other does not. We call this situation the point of equilibrium, or "Nash equilibrium" after John Nash, the American mathematician and Nobel laureate in economics who discovered equilibrium theory. At the Nash equilibrium point, any player's equilibrium action (maximizing his own utility or advantage) is the best response to the other players' action profiles[23].

A Nash equilibrium comes about if one person's decision is optimal in relation to another person's choice, and vice-versa. When making strategic decisions, no one knows what the other will decide. However, each player can envisage the others' decisions. The Nash equilibrium can also be interpreted as mutual expectations toward the other player[24].

According to the conclusions of game theory, the betrayal of a partner (called "defection") is always the dominant strategy. This is because in most cases, it comes with a higher payout at the individual level. But all in all, the best course of action for players is mutual cooperation.

Naturally, researchers have scrutinized the decisions people make in prisoner's dilemma situations[25]. Two economists from the University of Hamburg studied real-life prisoners and found that the majority were highly cooperative – indeed, they cooperated at a much higher rate than the students who served as the control group[26].

Psychologists also like to examine prisoner's dilemma situations. However, they focus more on real-life situations and use their experiences to build up a model that describes the regularity of the situation. In psychological experiments related to prisoner's dilemma, it is clear that the game's outcome is influenced by the concrete values of the payout matrix – not just the values' relation to each other, permission to communicate, the players' gender, the relationship between the two players' gender, the gender of the person managing the experiment (!) whether the game is one-round or

---

[22] G. Iván, cited, pp. 1-17.

[23] F. Forgó, cited, pp. 515-527.

[24] G. Iván, cited, pp. 1-17. John Nash and János Harsányi shared the 1994 Nobel Prize in Economics for their pioneering analysis of equilibria in the theory of non-cooperative games. Nash and Harsányi jointly developed a method for the general resolution of non-cooperative games.

[25] M.M. Flood, *Some Experimental Games*, Management Science no. 5, vol. 1, October 1958, pp. 5-26.

[26] M. Khadjavi, Andreas L., Prisoners and their Dilemma, *Journal of Economic Behavior & Organisation* no. 92, August 2013, pp. 163-175.

multi-round[27]. Kuba also points out that over the course of many games, psychological factors can have a major influencing effect. These include trust, sympathy, assumptions, learning, prior knowledge, worldview, and personality traits[28].

Research on the regularities of games in real-life situations has evolved into "behavioral game theory"[29]. However, the experiments often concluded that in some situations, the decisions people make are hardly rational. The thesis of behavioral game theory posits that people are basically rational decision makers even when they are limited by various conditions.

VII. New rules for criminal proceedings

The beginning of a game determines its end. Or, if the rules of the game change, then the player must completely rethink his own strategy. Hungary's new Law on Criminal Proceedings, which entered into force in July 2018, significantly changes the nature of the strategies that participants in criminal proceedings must develop.

VIII. Cooperation or conflict

Games can be categorized in different ways. We draw a distinction between cooperative and non-cooperative games. In non-cooperative games, players compete against each other, but tacit cooperation is permitted. In cooperative games, players work together toward a common goal and are allowed to make agreements with each other. The players jointly maximize their benefits, allowing them to reach a result that is more propitious that what could be achieved without cooperation[30].

Players know their exact position in games such as chess, which is a "complete information" game. However, such a situation is exceptional; in most games, some players have information that others do not. A clear example of this is the investigator, who knows the prior testimony of certain defendants and witnesses or perhaps an expert witness' opinion, while the other participants do not. To make another comparison to real-life games: In most card games, each player knows his own cards and tries to deduce what cards his opponents are holding, or, at least, tries to deceive the others as to what cards he holds. All the players are aware of this; everybody tries to take account of the others' deceptive intentions.

The players' strategic interaction is a mix of mutual interests and mutual conflict. It is often worthwhile for the players to enter into agreements on cooperation; however, in many cases it is beneficial for certain players to unilaterally break these agreements, hoping that the others will not do likewise. The other players may make various assumptions about their behavior after the agreements and develop their

---

[27] L. Mérő, *Mindenki másképp egyforma. A játékelmélet és a racionalitás pszichológiája* [Everybody is the Same in a Different Way: The Psychology of Game Theory and Rationality], Budapest: Tercium, 2007, pp. 1-388.

[28] P. Kuba, *A magatartás játékelmélet eredményeinek általánosíthatósága és korlátai* [Generalizability and Limitations of the Results of Behavioral Game Theory], pp. 280-285, www.eco.u-szeged.hu/download.php?docID=40109 (accessed on 30 March 2019).

[29] Kuba uses this expression; see P. Kuba, cited, p. 279.

[30] F. Forgó, cited, pp. 515-527.

strategies accordingly. For example, defendants may cooperate by firmly denying the charges against them. However, the rules of game theory suggest that this kind of cooperation generally will not last unless the agreement is somehow enforceable[31].

The basic premise of game theory argues that it is often worthwhile for players to make agreements. Cooperation can be beneficial, but in numerous cases it is more advantageous for an individual player to break the agreement, hoping that the others will not do likewise. The players devise their strategies accordingly. Defendants might cooperate by agreeing that nobody will talk, which could mean staying silent or denying all charges. However, a basic rule of game theory suggests that cooperation will not succeed in the long run unless it is somehow enforceable[32]. This is true for cooperation between defendants as well.

The new Law on Criminal Proceedings raises another possibility: cooperation between the defendant and the investigator or the prosecutor. The legislators who drafted the law attempted to make the terms of such cooperation enforceable.

The law introduces a procedure called "prospective prosecutorial measure or decision", as well as two legal institutions under the title "procedure toward agreement". These can be employed right at the beginning of an investigation. By positing a prospective prosecutorial measure or decision, it becomes clear which legal institution should be applied, even as early as the interrogation of the suspect. Such institutions might include a mediation procedure, a conditional suspension by the prosecutor, or other method of facilitating the procedure[33].

The undisguised aim of the Law on Criminal Proceedings is to facilitate the defendants' cooperation and obtain a confession. In cases where the defendant receives precise information on the possible outcome of a criminal proceeding, or about the concrete possibilities that would open up should he decide to cooperate, he might become interested in the opportunity to confess.

The new rules necessarily gave rise to new forms of conduct in the multi-player "game", since the prosecutor's interest is to prove his criminal case in the simplest but most reliable manner. The law's authors sought to accomplish this by strengthening cooperation for the sake of opportunity, by increasing the role of the victim and by codifying enforceable agreements.

IX. Trust and the value system

In the sphere of formal and informal agreements, one factor of uncertainty is that the defendants' value systems may not concur with one another, while those of the investigator, the prosecutor and the defense counsel may also be entirely different. This can seriously affect the outcome of the game. According to game theory's premises, every player is only consistent with respect to his own value system[34]. Players often have different value systems and they do not know about each other's values. From this point, the game is a function of informality rather than rationality[35].

---

[31] J. Mészáros, cited, pp. 1-6.
[32] *Idem*, p. 5.
[33] Law on Criminal Procedures, §404-416.
[34] J. Mészáros, cited, p. 7.
[35] *Ibidem*.

The sensitive point of every agreement made in criminal proceedings is the extent to which the participants trust each other.

In a review of his game-theory results, Camerer arrived at the opinion that the various fields of social science might find a common denominator when it comes to defining terms such as "trust". The disciplines of psychology and sociology had been trying to find an acceptable way to define the concept of "trust".

According to Camerer's theory, the concept of trust can easily be grasped in a game where someone gives out a cash loan with the understanding that the debtor will not receive any punishment if he does not pay it back. In this kind of game, the creditor trusts the debtor if he loans him money; if he does give out the loan, then there is no trust. Camerer argues that it is possible to measure the level of trust by changing the amount of the loan[36]. Naturally, measuring trust takes an entirely different shape in criminal proceedings, since giving money would mean engaging in corruption. However, the issue of trust is by no means negligible, as it will be a precondition for agreements. In criminal proceedings, trust may be relevant to the material weight of the case, but also to the personal acquaintance of the people involved and their previous experiences with each other[37]. A related game-theory rule is that players will not forget their previous moves, assuming that their behavior is rational.

X. Prospective prosecutorial measure or decision and settlements

The Hungarian Law on Criminal Proceedings, which went into effect in July 2018, introduced new opportunities for actors to cooperate during the investigation phase.

A conditional suspension of a prosecution creates a dependent legal situation that will end with either the termination of the proceedings or an order to continue the proceedings. The application of a conditional suspension is not yet an alternative to prosecution. The law on criminal proceedings deliberately moved to the beginning of the investigation those prosecutorial legal institutions that, when applied, would have to carry out fewer procedural acts and could carry out acts of proof more quickly and cost-effectively.

The prosecutor can employ these institutions at any time during the investigation. Likewise, prosecutor may tell the suspect that if he confesses, it is possible that he will not face prosecution; rather, the prosecutor will drop the charges.

In addition, the prosecutor may also raise the possibility of using a simplified method of prosecution[38].

The accused must decide between two courses of action: deny the charges and cooperate with the other defendants (perpetrators) or confess and cooperate with the authorities. The risk in denying the charges is that another defendant might seize the opportunity to cooperate with the authorities, as in the classic Prisoner's Dilemma situation.

When accepting a prospective prosecutorial measure or decision, the accused takes a risk by renouncing other defense strategies (keeping silent or denying the charges, for example.) In order to avoid a situation arising from the prosecutor's initiative in which

---

[36] C.F. Camerer, *Behavioral Game Theory: Experiments in Strategic Interaction*, Princeton, NJ: Princeton University Press, 2003, pp. 43-62.

[37] C.F. Camerer, cited, pp. 43-62.

[38] Law on Criminal Procedures, §382(1), §399(1).

the prosecutor unfairly denies the terms of the agreement at a later time, the Law on Criminal Proceedings excludes the use of the suspect's statement and the means of proof obtained on this basis[39].

In this rule, the Anglo-Saxon legal doctrine known as "the fruit of the poisonous tree" enters into the new codex, because the law prohibits using means of proof that were originally – at least on the surface – legally obtained personal evidence[40]. If the accused testifies under the influence of prosecutorial deception or an unfulfilled promise from the prosecutor, then – in order to exclude evidence obtained under improper influence – the Law on Criminal Prosecutions excludes his confession and the evidence obtained from it.

The "fruit of the poisonous tree" doctrine means that all illegal evidence, evidence stemming from illegal sources, and evidence obtained in relation to illegal sources is excluded from the scope of evidence.

Therefore, in implementing the prospective prosecutorial decision or measure, the legislators' starting point was the game-theory rule that says cooperation can only be enforceable if there are consequences. The prosecutor will pay a high price if he diverges from the terms of the agreement, which must set in writing. If he fails to uphold the terms, then he will not be able to use any confessions or evidence stemming from the offer. This demands a totally new game strategy from the participants in the proceedings.

On the other hand, the prosecutor's office is under no obligation to act upon a measure set in writing and approved by the suspect, or to issue an order, if the suspect fails to fulfill the conditions to which he agreed or provides false testimony. In this case, the suspect's testimony, made in light of the offer from the prosecutor, is usable as a tool of evidence. Although the Law on Criminal Prosecutions encourages the accused to confess, there is no tolerance for false testimony or a false confession. The sanction for a suspect who provides false testimony is the same as if the defendant does not fulfill the conditions he has agreed to undertake.

XI. The settlement

Under the Law on Criminal Proceedings, the state can create an opportunity during the settlement with the defendant for the person who is the subject of the criminal proceedings to exercise his right to choose the format of the proceedings. Before the indictment is filed, the prosecutor's office and the accused can enter into a settlement on an admission of guilt and the consequences thereof. If the prosecutor's office and the accused do not reach a settlement, the initiative and the documents drawn up in connection with it may not be used as evidence or as a means of proof. In this case, the prosecutor's office cannot inform the court about the initiative that led to the agreement or submit documents related to it[41].

A "change in approach" means that the process of admitting guilt is included in the rules of general procedure. It follows that settlements have a place in any case and in any instance of crime. An exception to this is criminal proceedings against defendants who cannot be punished due to abnormal state of mind; obviously, such defendants cannot admit their guilt.

---

[39] Law on Criminal Procedures §406(2).

[40] The "doctrine of the fruit of the poisonous tree" in the legal practice of Hungary and Strasbourg. *Magyar Jog*, February 2018, pp. 94-104.

[41] The Law on Criminal Procedures, §407 409.

In relation to the settlement, the law expressly makes it possible to bargain over the punishment to be meted out. All of this results in new, previously unknown (or hardly known) forms of behavior in criminal proceedings. The success or failure of the indictment and the evidentiary procedure, as well as the subjective factors in determining punishment all point in the direction of an agreement.

Camerer ascribed the term "ultimatum game" to those models that are developed after a bargaining process has taken place. He offers the following example: If a photographer is selling pictures of attendees at a social gathering for $10, and nobody buys them, then the pictures will be worthless to him. We want the photos, but we also want to take advantage of our negotiating position. Naturally, the photographer will not lower the price for us while others are crowding around to buy photos of themselves; in that case, he would lose a lot of money because it would be obvious to everyone that it is worthwhile to bargain with him. Something similar happens in the last few moments before workers call a strike or prosecutors submit a case to a court[42]. A settlement reached during an investigation may result in a similar bargain, which is likewise an ultimatum game in the sense that failure to accept the settlement would mean continuing with an indictment whose outcome is inscrutable.

Camerer's final conclusion is that it makes a difference who initiates the offer in the bargaining process, according to his model. The analytical approach to the ultimatum bargaining works as follows: First, let us assume that all players are self-interested – that is, they consider it important to earn the most money for themselves. If this is the case, then the person responding to the offer (Respondent) accepts the smallest sum offered, say $0.25. If person making the offer (Bidder) counts on this, and he wants the most money for himself, then he will offer $0.25 and keep $9.75 for himself. Figuratively speaking, the $0.25 offer (as well as the acceptance of any positive sum) means the "pricing game's perfect equilibrium". If the Bidder starts the game, then his bargaining position is stronger and – theoretically – he can take advantage of the situation because the self-interested Respondent will accept whatever sum he can.

In laboratory experiments, however, Camerer pointed out that Respondents consider a price proposal unfair if it is significantly less than half of what they originally asked. They are inclined to reject a such a small price simply because they want to punish the Bidders who behaved so unjustly toward them[43].

XII. Concluding thoughts

If the accused and their attorneys adequately apply game theory to their strategies, then they will achieve the result that is most optimal for themselves. Game theory also makes it easier to understand the actions of the participants in criminal proceedings and therefore to understand certain testimony, especially betrayal; game theory helps us properly assess the creditworthiness of incriminating statements that one defendant makes about another.

Naturally, a question that frequently crops up in relation to game theory is its practical application. A common concern is that it is hard to divine from game-theory models what kinds of decisions people or actors will make in real-life situations. There

[42] C.F. Camerer, cited, pp. 43-62.
[43] *Idem*, pp. 43-62.

is no professional consensus on which game-theory models are desirable or whether they correspond with reality.

In real-life situations, the actors' behavior is influenced by many factors that were not considered in the initial assumptions. These factors, known as distortionary effects, can influence the game's results in real-life situations[44].

With respect to the relationship between real-life situations and game-theory models, situations that are difficult to fit into a logical model can be deduced; thus "using this approach, an interesting result is that one can create a model in which the phenomenon of bluffing can be grasped in an abstract strategic situation[45]". All this would lead to the analysis of further uncertain situations, such as tactical bluffs during hearings or the tactical influence on obtaining testimonies, which goes beyond the scope of this study.

References

1. Birmingham, R.L., *Model of Criminal Process: Game Theory and Law*, Cornell Law Review no. 56/1970-71, pp. 57-69.
2. Bíró, G., *Kriminalisztika* [Forensics], Debrecen: Debrecen University Faculty of Law, Lícium Art Könyvkiadó Kft, 2015, p. 9.
3. Camerer, C.F., *Behavioral Game Theory: Experiments in Strategic Interaction*, Princeton, NJ: Princeton University Press, 2003, pp. 43-62.
4. Fenyvesi, C., *A kriminalisztika tendenciái: A bűnügyi nyomozás múltja, jelene, jövője* [The Tendencies of Forensics: The Past, Present and Future of Criminal Investigations], Budapest: Dialóg Campus Kiadó, 2014, p. 243.
5. Flood, M.M., *Some Experimental Games*, Management Science no. 5, vol. 1, October 1958, pp. 5-26.
6. Forgó, F., *Mivel foglalkozik a játékelmélet?* ["What Does Game Theory Deal With?"], Magyar Tudomány no. 5/2009, pp. 515-527, http://www.matud.iif.hu/2009/09maj/02.htm, epa.oszk.hu/00600/00691/00065/pdf/515-527.pdf. (accessed on 1 March, 2019).
7. Gál, I.L., *Gazdasági büntetőjog közgazdászoknak* [Economic Crime Law for Economists], Budapest: Akadémiai Kiadó, 2007), p. 57.
8. Guttel, E., Medina, B. *Less Crime, More (Vulnerable) Victims: Game Theory and the Distributional Effects of Criminal Sanctions*, Review of Law and Economics no. 3/2007, pp. 407-433.
9. Iván, G., *Játékelmélet – a racionális döntések elmélete* [Game Theory – The Theory of Rational Decisions], V. Vajdasági Magyar Tudományos diákköri Konferencia [Fifth Conference of the Vojvodina Hungarian Scientific Student Body], 2006, pp. 1-17. http://vmtdk.edu.rs/a2392a4a-feb3-8217-c098-67fe2159f959 (accessed on March 1st, 2019).
10. Khadjavi, M., Andreas L., *Prisoners and their Dilemma*, Journal of Economic Behavior & Organisation no. 92, August 2013, pp. 163-175.
11. Kuba, P., *A magatartás játékelmélet eredményeinek általánosíthatósága és korlátai* [Generalizability and Limitations of the Results of Behavioral Game Theory], pp. 280-285, www.eco.u-szeged.hu/download.php?docID=40109 (accessed on 30 March 2019.

[44] P. Kuba, cited, pp. 275-276.
[45] *Ibidem*.

12. Magyar Jog, *The "doctrine of the fruit of the poisonous tree" in the legal practice of Hungary and Strasbourg*, February 2018, pp. 94-104.

13. Mérő, L., *Mindenki másképp egyforma. A játékelmélet és a racionalitás pszichológiája* [Everybody is the Same in a Different Way: The Psychology of Game Theory and Rationality], Budapest: Tercium, 2007, pp. 1-388.

14. Mészáros, J., *Játékelmélet* [Game Theory], Budapest, Gondolat Kiadó, 2005, p. 222.

15. von Neumann, J., Morgenstern, O., *Theory of Games and Economic Behavior*, Princeton, NJ: Princeton University Press, 1944.

16. Zsigó, Z., *Van-e megoldás a csapdahelyzetekre?* [Is There a Solution to Entrapment?], Sulinet, 28th March 2014, https://hirmagazin.sulinet.hu/tudomany (accessed on 31 March 2019).

The Protection of Classified Information in Western Europe and the USA

István László Gál*

Abstract

Regulations for the protection of classified information are extremely similar in developed Western countries. The XXI. century, these states are struggling in a close political and military alliance to meet the security policy challenges of the present and the future. For this reason, the mutual protection of their diplomatic and military secrets plays a key role. The present study presents the secrecy systems of three of NATO's most important member states, primarily in terms of criminal law regulation.

Keywords: *classified data, secrecy, NATO, national security, press, NSA, Five Eyes, need to know*

I. The concept of classified information

In my view, secrecy, in the broadest sense, is a category inherent in human nature that appears at a certain quality of the process of becoming human. A secret is anything that only a certain number of people know about, and whose secrecy for a specified period of time, regardless of its value, is in the interest of one or more people or society, and the holder of the secret has taken appropriate measures to keep it secret. If we examine the secrecy of secrecy, which is also protected by law, as a kind of special legal relationship, we can make the following conclusions about it: – always present in humans, – an absolute legal relationship (everyone is obliged to tolerate that the secret owner only shares the secret with whom he wishes), – always exists within a specified time frame, – its subject-matter is information of a valuable nature which requires and deserves legal protection, and – the loss, destruction, disclosure or making available to an unauthorized person of this information has legal consequences governed by different rights. After defining the general concept of secrecy, we turn to the examination of state secrecy, first also in general. The three indispensable components of the concept of state are territory, population, and sovereignty. Preserving the security and integrity of all three essential components today is closely correlated with the ability and efficiency of the state to preserve information whose disclosure or acquisition by unauthorized persons or bodies could harm or jeopardize the legitimate interests of the state. Already Max Weber points out, every bureaucracy strives to strengthen the sense of superiority of its members with professional knowledge by

* Phd. Head of Department, full professor, University of Pécs, Faculty of Law, Department of Criminal Law. Contact: gal.istvan@ajk.pte.hu.

keeping their knowledge and intentions secret. The bureaucratic administration always strives to be the "administration of secret meetings" as much as possible, hiding its knowledge and actual activities from possible criticism.

The concept of "official secret" is a specific invention of the bureaucracy, which is why it is also fanatically defended by the bureaucracy[1]. Other types of secrets, such as economic secrets, can be conceived as personal secrets, but one of the distinguishing features of state secrets is that they are of a social nature, directly or indirectly affecting the security of the state, and therefore inconceivable only as personal secrets. Nowadays, the developed legal systems use the category of "classified data" instead of the concept of state secrets. Classified data is, in the most general terms, any information that a state or group of states considers to be sensitive in some way and which is therefore subject to an obligation of confidentiality based on national, regional or even international security needs. Access to classified information is restricted by law or regulation, and misuse can often result in criminal sanctions. A security certificate is usually required to manage or access classified information. This can typically be issued after a person's security check. Classified data typically has several hierarchical levels in each legal system, and access to them usually requires different levels of security requirements. The classification level of the data is determined in the framework of the qualification procedure[2]. These characteristics are usually found in the regulations of all countries, but the specific practice and terminology of course differs from country to country. In order to one of the secret type be classified as classified information today, it must fulfill the following requests:

- there is at least one public interest that can be protected by the rating and in the course of the procedure the rating agency has ascertained that the misuse of the data in question directly harms or threatens the public interest that can be protected by the rating,
- conducted by an authorized person,
- a qualification procedure that fully complies with the formal requirements, which qualifies the data for a specified period of time[3].

The appearance of classified information may also vary in practice:

- classified data recorded or transmitted by a data carrier;
- written information, classified data;
- an object or technical device carrying classified information;
- classified information, procedures or knowledge presented in an intangible form;
- finally, there is classified information provided orally[4].

According to the tasks of the application level of information protection, the protection system of classified data includes the following elements: physical protection,

---

[1] M. Weber, *Essays in sociology* [Szociológiai tanulmányok] pp. 233-234 (H.H. Gerth & C. Wright Mills trans. and eds., 1946), *apud* H. Kitrosser, *Classified information leaks and free speech*, University of Illinois Law Review no. 3/2008, p. 889.

[2] https://www.definitions.net/definition/classified+information (accessed on 21.04.2020).

[3] L. Szőke Gergely, *Gondolatok a hazai titokvédelmi szabályozás rendszeréről* [Thoughts on the system of Hungarian secrecy regulations], JURA no. 2/2018, p. 253.

[4] Z. Kuris, E. Pándi, *Komplex információbiztonság megvalósítási lehetőségeinek megközelítése* [Approaching the possibilities of implementing complex information security], Hadmérnök no. 2/2009, p. 312.

hardware and software, as well as encryption, IT protection of transmission paths, protection against compromising radiation, document protection, personal protection, and procedure protection as well[5].

The characteristics of classified information to be protected in the broadest sense may be the following:

- confidentiality (information can only be accessed by an authorized person);
- authenticity (the characteristic of the information that represents the originality);
- availability (those entitled to it will have access to the information in accordance with the provisions of the relevant regulations);
- integrity (a properly functioning information system represents the data in an appropriate form)[6].

II. United States of America

In the United States, a number of laws and regulations govern the qualification process. In the 1980s, at the initiative of President Reagan, a comprehensive regulation was established on the classification and protection of information relevant to national security[7]. The regulation defines national security as the protection of the national and foreign policy interests of the United States. It defined three rating levels according to a damage-based rating system: top secret, secret, and confidential[8].

President George W. Bush was prone to intensive encryption before September 11, 2001, but this trend intensified in the years that followed. Thus, among others, President Bush set up a secret military court after 9/11, expanded the scope of closed court hearings, further widened the executive's special powers, widened the protection of classified information in court proceedings, banned access to former presidents' files, congressional requests refused to release documents requested under the NSA, kept the NSA's U.S. citizenship surveillance program secret, and in many cases reclassified previously declassified documents. The number of classified data in the United States showed an upward trend in those years: 8.6 million in 2001, 11.3 million in 2002, 14.2 million in 2003, and 15.6 million in 2004[9]. This is already considered by American experts to be a lot, although comparing the population with the Hungarian data, more than twice as much qualified data is generated in Hungary today, with an intensity ratio of 1,000 inhabitants. However, the U.S. legislature also considers the number of its own classified data to be excessive, so a law was passed in 2010 to reduce[10] over-classification. Section 2 (3) of this Act states: "An over-classification

---

[5] K. Kassai, *Az információvédelem rendszerszintű feladatai* [System-level tasks of information protection], http://193.224.76.2/downloads/konyvtar/digitgy/20014/tartalom.html (accessed on 2020.04.30).

[6] Z. Kuris, E. Pándi, cited, p. 312.

[7] Exec. Order No. 12, 356, 3 C.F.R. 166 (1983).

[8] B.E. Fein, *Access to Classified Information: Constitutional and Statutory Dimensions,* William and Mary Law Review no. 5/1985, p. 807.

[9] D.A. Silver, *National Security and the Press: The Governments ability to Prosecute Journalists for the Possession or Publication of National Security Information* Communication Law and Policy 13(4)/ 2008, p. 450.

[10] Reducing Over-Classification Act [A túlminősítés csökkentéséről szóló törvény] (https://www.congress.gov/111/plaws/publ258/PLAW-111publ258.pdf (accessed on 30.08.2020).

causes significant confusion as to what information can be shared with, and also has a negative impact on the flow of information within the federal government and between individual Member States and local authorities, as well as the private sector". The concept of classified information is currently contained in Enforcement Order No. 13526, signed by President Obama and effective in the United States on December 29, 2009. It defines classified information as information that must be retained in the interests of national security "in order to protect the security of our citizens, our democratic institutions, our country and our relations with foreign nations"[11]. According to a textbook definition, classified information is "news that is so sensitive that its dissemination may be restricted to persons who meet certain specific security requirements and who have a clear need for that information in order to perform their duties. Each organization develops its own rating system, but in the United States, all agencies in the federal intelligence community must adhere to the rules set forth in the implementing instructions, most recently approved by President Obama"[12].

In October 2011, President Obama issued Implementing Decree No. 13587 on "Structural Reforms to Improve the Security of Classified Networks and the Responsible Sharing and Protection of Classified Information". It includes a nationwide program (insider risk program) designed to prevent, detect, and mitigate internal risks, including the protection of classified information from unauthorized disclosure, taking into account the levels of risk and individual needs of each agency[13].

The regulation of classified information in the United States is the sole responsibility of the federal government. Although individuals or organizations may be granted access to classified information in certain cases, such information is always the property of the federal government under applicable U.S. law. The rating level reflects the degree of national security risk: the higher the risk, the higher the rating level[14]. The rating level is indicated at the bottom and top of the page on that document, but only the rating level is listed on the document, not the rating name, position, and term of protection. You can classify a document in smaller sections at different levels, or you can specify the classification level for that paragraph or figure by paragraph[15].

Access to classified information is based on the principle of the necessary knowledge[16], ie a person holding a "Top Secret" personal security clearance may only access top secret information that is relevant to his or her own work. These limitations are intended, among other things, to protect resources and methods[17].

In the first two decades of the XXI. century, the issue of state secrets has been the subject of extensive debate in the United States. One of the central issues in the debate

---

[11] Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009); *ld még: The President Executive Order 13526.*

[12] C.J. Jensen, D.H. McElreath, M.Graves, *Bevezetés a hírszerzésbe* [Introduction to Intelligence], Antall József Tudásközpont [József Antall Knowledge Center], Budapest, 2017, p. 205.

[13] J.K. Elsea, *The Protection of Classified Information: The Legal Framework*, Congressional Research Service 18 May 2017, p. 19.

[14] B.M. MacKay, *The use of classified information in terrorism trials*, Southern Illinois University Law Journal Vol. 42/2017, pp. 67-68.

[15] Marking Classified National Security Information as Required by Executive Order 13526, 4 January 2018.

[16] Exec. Order No. 13526 § 4.1(a), 75 Fed. Reg. 707 § 4.1(a).

[17] A. Rossmiller, *Adjudicating Classified Information,* St. John's Law Review, vol. 85, no. 4/2011, p. 1301.

is what should be done with government employees leaking classified information to the press, who most often want to inform the public about government action. Whether their act is unlawful, unconstitutional or, where appropriate, even justified in order to enforce the controlling role of the public[18].

However, freedom of the press is a very important constraint on the practical application of classified data regulations in the country. In 1971, the United States Supreme Court ruled against the famous New York Times et al. United States case ruled that the press in some cases may publish classified information with impunity: this was the famous Pentagon Files lawsuit.

The Supreme Court rejected the government's position that 7,000 classified documents related to the Vietnam War should not have been released by 6-3 votes. The court argues that only a free press can uncover abuses by the government and prevent the government from misleading people. In any case, the stakes were high, and under the laws in force, decades of imprisonment could have been imposed. Nowadays, many laws and court decisions have been made that could lead to criminal prosecution of a journalist who publishes classified information with the intent to harm the United States. However, although journalists working for the largest, leading newspapers have been published on a number of occasions in recent decades, no criminal proceedings have been instituted, according to a 2008 study[19].

A 2019 study confirms this finding ten years earlier: media workers are not being prosecuted in the United States, even today, solely against government officials who leak classified information. Snowden could face up to 30 years in prison until he was charged with the newspaper The Guardian, even though they also broke the law. One reason for this, according to the author, may be that the press has special rights based on the principle of freedom of the press or because of its role, as many now consider the media to be the fourth branch of power. The second argument is that leaks cause more damage than the press. The author notes that current U.S. criminal practice is inconsistent: prosecutors should prosecute both, or neither[20].

Under President Obama, five prosecutions have been filed against incumbent and former government officials for violating nationally sensitive information in the press under the espionage law. In one such case, a journalist was put under pressure to testify and reveal the source of the information he published. Attempts were made to persuade the journalist to testify on the grounds that he was the only witness to the crime in which he orally received classified information from his source, that is, a government official. This new practice is significantly different from the previous one, and some authors believe it threatens the right of U.S. citizens to know what their government is doing[21].

It should be noted here that "leakage", ie the disclosure of classified information during the term of protection in the press or on the Internet, is not clearly a negative or positive phenomenon in the literature. In this regard, the UN Johannesburg Principles

---

[18] R. Clark, *Classified Information in the Public Sphere: An Examination of Legal Issues Surrounding the NSA Leaks,* (2013) 41:4 DttP: Documents to the People, p. 7.

[19] D.A. Silver, cited, pp. 447-483.

[20] D. Mokrosinska, *Why Snowden and not Greenwald? On the Accountability of the Press for Unauthorized Disclosures of Classified Information,* Law and Philosophy no. 39/2020, pp. 203-238.

[21] M.H. Halperin, *Criminal Penalties for Disclosing Classified Information to the Press in the United States,* https://www.right2info.org/resources/publications/Halperin_CriminalPenaltiesforDisclosingClassifiedInformationtothePressintheUnitedStates.pdf (accessed on 22.08.2020).

on National Security[22], Freedom of Expression and Access to Information contain the following in Principle 15: "General Rules for Disclosure of Confidential Information No one shall be penalized for reasons of national security for disclosing information if (1) the disclosure is not likely to have a real effect on the legitimate interests of national security, or (2) the public interest served by disclosure outweighs the harm caused by disclosure".

In my view, this can only be accepted in a very narrow, very exceptional way. In general, the risk of unauthorized disclosure of classified information during the term of protection is much greater than the benefit to the public interest of disclosure in an open, democratic society. Nonetheless, we must acknowledge that such a case may occur. Examples of this can be found in the case of major social changes, such as a change in the political and economic system, as we will see in the historical section. The position of Károly Kassai is in line with this, according to which opinions that the law should not hinder the work of investigative and fact-finding journalists and that journalists should not be prosecuted if classified information is disclosed are completely devoid of professionalism[23].

Also of great interest in the relevant United States legislation is the provision for the reclassification of data that has already been released and declassified. This is called "retroactive rating" or "downgrading" by U.S. regulations. The legitimacy of the provision has been a concern in the past, but in the age of the Internet, it is already completely questionable, as a study published a few years ago suggests. Once something has been uploaded to the Internet as public material, it is almost impossible to remove it from there. The only consequence of the provision is that any public discourse regarding such reclassified data will become impossible[24].

The United States has a strong culture and literature on confidentiality, and they also pay close attention to training employees of organizations handling classified information during training. A good example of this is one of the Ministry of Energy's educational materials, which emphasizes the need to prepare in advance about how to respond during public hearings, including press conferences, lectures, and other events. The English term "No comment" is a worldwide, popular answer, but its use should be avoided because it would confirm that the respondent may be in the background of the question, and in the case of a question to be decided, such an answer may infer the content of the classified information. Therefore, you should not choose any of the following answers:

Are there nuclear weapons in country x? " No".

Is there a nuclear weapon in country y? "No".

Are there nuclear weapons in country x? "No comment".

The correct use of "No comment", on the other hand, is as follows*: „Are there nuclear weapons in country x?"* We recognize that nuclear weapons are or have been in many countries. I cannot provide more detailed information on the location of nuclear

---

[22] The Johannesburg Principles on National Security, Freedom of Expression and Access to Information U.N. Doc. E/CN.4/1996/39.

[23] K. Kassai, *A Magyar Honvédség információvédelmének – mint a biztonság részének –* feladatrendszere [Task system of information protection of the Hungarian Armed Forces as a part of security], Doctoral (PhD) dissertation, Budapest, 2007, p. 7.

[24] J. Abel, *Do you have to keep the government's secrets? Retroactively classified documents, the first amendment and the power to make secrets out of the public report,* University of Pennsylvania Law Review Issue 163, no. 4/2015, pp. 1038-1039.

weapons. " And if the person in possession of the classified information is talking to his friends, according to the educational material, be humorous, articulate, and change the subject as soon as possible[25].

In summary, breaches of classified information are referred to in the U.S. literature as "unauthorized disclosure". There are four typical types:

1. the deliberate leakage of classified information (mainly by government officials, primarily to the media),
2. outflow of classified information (usually through electronic data transmission systems, whether intentionally or negligently, such as an e-mail message, classified information is also sent between open data),
3. espionage,
4. Inadequate security measures (in this case, the security breach of classified information is typically negligent, such as someone forgetting a page containing classified information in a copier)[26].

In the United States, federal criminal law includes the most serious federal offenses, but for less serious offenses, each state has created its own criminal code. In addition to all this, military criminal law and Native American reserves have their own criminal law, meaning that there are more than 500 systems of criminal law in force in the country, and it is almost impossible for a university professor of criminal law to review and understand them. However, the regulation of misuse of classified information is easy to review, as it is a federal crime. A federal employee or official who makes classified information intentionally inaccessible without permission is punishable by one year's imprisonment and a fine of up to $ 1,000. The penalty is imprisonment for up to 10 years and a fine of up to $ 10,000 if that employee or officer knowingly transfers classified information to a person who is known to work for a foreign government. The same penalty applies if a federal employee or official or anyone else discloses classified information, makes it available to an unauthorized person, or uses classified information used by the United States, encryption, and intelligence to the detriment of the United States. Finally, a person entitled to use classified information is punishable by up to 15 years' imprisonment if he or she intentionally commits the offense and, as a result, the identity of one or more undercover agents is disclosed. Other classified cases of the offense are all related to the disclosure of classified information about covered agents, with a maximum penalty of 15 years imprisonment[27].

One of the biggest scandals over the misuse of classified information in recent years has erupted in the 2016 U.S. presidential election campaign in America. Donald Trump and Hillary Clinton once engaged in a fierce battle of words during the campaign over alleged misuse of classified information by Hillary Clinton during the 2016 presidential election campaign. Hillary Clinton told CNN about the illegal transfer of classified information: "It was a mistake that I used my personal email. I'm sorry". Then he reacted again to the topic in the presidential debate on October 9, 2016: "It is terribly good that not a man of temperate Donald Trump is controlling our country" Donald Trump replied, "because you would be in prison by then". Incidentally,

---

[25] https://fas.org/sgp/othergov/doe/gen-16-rev2.pdf (accessed on 15.08.2020).

[26] https://www.cdse.edu/documents/student-guides/IF130-guide.pdf (accessed on 15.08.2020).

[27] J.K. Elsea, *The Protection of Classified Information: The Legal Framework,* Congressional Research Service 2017, pp. 14-15.

no criminal proceedings have been instituted in the case to date, but an assessment of this circumstance would already be a political decision.

III. United Kingdom

In Europe, the UK is one of the most important geopolitical and military factors, so it's a good idea to briefly review its privacy regulations. The UK rating system is simple and easy to review, currently using only three rating levels: Official, Secret, Top Secret. The Official rating level is commonly used for most information created or processed by the public sector. such as economic data, which could have harmful consequences if lost, stolen or published in the media. At the Secret classification level, highly sensitive information is protected for which enhanced security measures are warranted. For example, data the disclosure of which could seriously damage military defense capabilities, international relations, but also data related to the fight against organized crime. The Top Secret rating level is the highest. This protects the Queen's Government's most sensitive information, the data that requires the highest level of protection against the most serious threats. For example, data may be included where disclosure or unauthorized acquisition by a person could endanger life or endanger the security or economic well-being of the country or Allied nations. Access to classified information is also based on the need-to-know principle under the British system. However, the regulation also allows for the application of the need-to-share principle in specific situations, ie the possibility of sharing classified information with persons who do not have the appropriate personal security clearance, for example where immediate action is required to protect life or commit a serious crime. to prevent the commission of such offenses. In such circumstances, a reasonable approach under UK law should be followed: if time permits, individual alternatives should also be considered and steps taken to protect the source of the information[28].

The UK is also a member of the Five Eyes intelligence community, which is still operating in SIGINT[29] today with the participation of five states, with a high degree of efficiency. The Five Eyes came into being during World War II. The United States and Great Britain also worked closely on SIGINT during the war to effectively intercept enemy communications. The British hacked Germany's super-secret Enigma system, and the United States hacked Japanese encryption. This cooperation was institutionalized in 1946 by an agreement between the United Kingdom and the United States. In intelligence against the Soviet Union in the ensuing Cold War, it was already considered necessary to maintain and strengthen intelligence cooperation in peacetime, in order to anticipate potential conflicts. Canada joined the alliance in 1948, and Australia and New Zealand in 1956, creating a global intelligence-sharing organization[30]. The relationship between members of the Five Eyes community is now so close that

[28] Government Security Classifications (Kormányzati minősítések) May 2018, p. 4, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/715778/May-2018_Government-Security-Classifications-2.pdf (accessed on 10.07.2020).

[29] SIGINT, or Radio Electronic Signaling, refers to the interception and processing of electronic communications signals.

[30] J.E. Dailey, *The Intelligence Club: A Comparative Look at Five Eyes*, Journal of Political Sciences & Public Affairs no. 5/2017, p. 1.

participating governments are putting requests from the United States National Security Agency, or NSA, to protect the privacy of their own citizens[31].

IV. Germany

In Germany, the protection of classified information under the current legislation includes any measure by which a public body may declare certain facts, objects or knowledge to be classified information in the context of a specific procedure. Many provisions of German federal and state law govern the subject of classified information. The legal basis for the security of the federal state is primarily the Security Control Act (SÜG) and related administrative regulations. Confidentiality also has personal and physical requirements in Germany, in line with international practice. The key concept in German privacy law is classified information (V*erschlusssache*). Four rating levels are used:

- *VS-Nur für den Dienstgebrauchs (VS-NfD)* – for service use only (this corresponds to the restricted distribution rating level),
- *VS-Vertraulich (VS-Vertr.)* – confidential,
- *Geheim (Geh.)* – secret, and
- *Streng Geheim (Str. Geh.)* – top secret.

The German system is also a damage-based rating system, determining the potential hazards assigned to each rating level in almost the same way as the Hungarian regulations. Classified data may only be created and managed for the time and at the level required. The German legislation also emphasizes the principle of need-to-know (*'Kenntnis nur, wenn nötig'*) in relation to access to classified information[32].

All in all, it can be stated that perhaps the closest is the German regulation to the Hungarian, we most likely used it as one of the examples during the codification. German criminal law contains criminal provisions in other sectoral laws, but the most important part of criminal law (*Kernstrafrecht*) can be found in the German Criminal Code, and the ancillary criminal law provisions (*Nebenstrafrecht*). According to the German legislature, the protection of classified information is so important that:

1) the Criminal Code contains all relevant criminal law provisions,
2) several facts protect the legal objects related to the classified information, and
3) these provisions can be found relatively at the beginning of the Special Part, in the second chapter, and the legislator also indicates their importance. The facts related to the protection of classified data can be found in the second chapter of the German Criminal Code, under the title "Trafficking and endangering the external security of the state". In doing so, German criminal law clearly states that it considers these behaviors to be crimes against the state that endanger national security.

Section 93 contains the definition of state secrets:

(1) *State secrecy is any fact, object or knowledge to which a limited number of persons have access and which must be kept secret from foreign powers in*

[31] G. Greenwald, *A Snowden-ügy. Korunk legnagyobb nemzetbiztonsági botránya* [The Snowden case. The biggest national security scandal of our time], Hvgkönyvek, Budapest, 2014, p. 164.

[32] M. Vogt, D. Wahlen, *Geheimschutzrecht Voraussetzungen und Folgen der Einstufung von Informationen als Verschlusssachen,* Deutscher Bundestag [Protection of secrets Prerequisites and consequences of the classification of information as classified information, German Bundestag], WD 3-3010-036/15. 2015, pp. 4-9.

order to avoid any serious threat to the external security of the Federal Republic of Germany.

(2) *Information which infringes the interests of a free, democratic state, the constitutional order of the Federal Republic of Germany or of the contracting parties to international arms control agreements is not a state secret*. The German legislation is interesting in that it states *expressis verbis* what cannot be classified as a state secret, ie what should not be classified. In this respect, this is the most democratic regulation I have examined, as in the event of such anti-democratic classified information, citizens are protected by the Criminal Code itself if they are prosecuted for disclosure.

Section 94 of the Criminal Code contains the provisions of the betrayal:

(1) *Who discloses a state secret to a foreign power or one of its representatives* or *is making a State secret available to an unauthorized person for the purpose of harming the Federal Republic of Germany or gaining an advantage over a foreign power shall be punishable by a term of imprisonment of one year or more.*

(2) In particularly serious cases, the sentence shall be imprisonment for a term of imprisonment of at least five years.

A particularly serious case is usually when the perpetrator *1. Abuses his official position in which he would be bound by professional secrecy;* or *2. Poses a particularly serious threat to the external security of the Federal Republic of Germany by committing the offense.*

Another important fact related to the protection of classified data of the German Criminal Code is the offense of disclosure of state secrets in 95 §:

(1) *Whoever makes or discloses a state secret classified by an official body to an unauthorized person, thereby endangering the external security of the Federal Republic of Germany with the possibility of serious harm, shall be punishable by a term of imprisonment of six months to five years.*

(2) An attempt to commit a criminal offense shall be punishable.

(3) In particularly serious cases, the penalty shall be one to ten years imprisonment.

With regard to the concept of a particularly serious case, the second sentence of Section 94 (2) shall apply. In addition to these, there are eight other facts about the extremely thorough, casuistic system of criminal law rules. Studying these, it may occur to us that extremely thorough, strict criminal law provisions may have been the criminal means of combating East German intelligence at the time, and one of the reasons for the strict regulation may have been the decades-long secret service struggle between the two former German states.

References

Abel, J., *Do you have to keep the government's secrets? Retroactively classified documents, the first amendment and the power to make secrets out of the public report,* University of Pennsylvania Law Review Issue 163, no. 4/2015.

1. Clark, R., *Classified Information in the Public Sphere: An Examination of Legal Issues Surrounding the NSA Leaks,* (2013) 41:4 DttP: Documents to the People.

2. Dailey, J.E., *The Intelligence Club: A Comparative Look at Five Eyes*, Journal of Political Sciences & Public Affairs no. 5/2017.

3. Elsea, J.K., *The Protection of Classified Information: The Legal Framework*, Congressional Research Service 18 May 2017.

4. Elsea, J.K., *The Protection of Classified Information: The Legal Framework,* Congressional Research Service 2017.

5. Fein, B.E., *Access to Classified Information: Constitutional and Statutory Dimensions,* William and Mary Law Review no. 5/1985.

6. Government Security Classifications [Kormányzati minősítések] May 2018, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/715778/May-2018_Government-Security-Classifications-2.pdf (accessed on 10.07.2020).

7. Greenwald, G., *A Snowden-ügy. Korunk legnagyobb nemzetbiztonsági botránya* [The Snowden case. The biggest national security scandal of our time], Hvgkönyvek, Budapest, 2014.

8. Halperin, M.H., *Criminal Penalties for Disclosing Classified Information to the Press in the United States,* https://www.right2info.org/resources/publications/Halperin_CriminalPenaltiesforDisclosingClassifiedInformationtothePressintheUnitedStates.pdf (accessed on 22.08.2020).

9. https://fas.org/sgp/othergov/doe/gen-16-rev2.pdf (accessed on 15.08.2020).

10. https://www.cdse.edu/documents/student-guides/IF130-guide.pdf (accessed on 15.08.2020).

11. https://www.definitions.net/definition/classified+information (accessed on 21.04.2020.

12. Jensen, C.J., McElreath, D.H., Graves, M., *Bevezetés a hírszerzésbe* [Introduction to Intelligence], Antall József Tudásközpont [József Antall Knowledge Center], Budapest, 2017.

13. Kassai, K., *A Magyar Honvédség információvédelmének – mint a biztonság részének* –feladatrendszere [Task system of information protection of the Hungarian Armed Forces as a part of security], Doctoral (PhD) dissertation, Budapest, 2007.

14. Kassai, K., *Az információvédelem rendszerszintű feladatai* [System-level tasks of information protection], http://193.224.76.2/downloads/konyvtar/digitgy/20014/tartalom.html (accessed on 2020. 04. 30).

15. Kuris, Z., Pándi, E., *Komplex információbiztonság megvalósítási lehetőségeinek megközelítése* [Approaching the possibilities of implementing complex information security], Hadmérnök no. 2/2009.

16. MacKay, B.M., *The use of classified information in terrorism trials*, Southern Illinois University Law Journal Vol. 42/2017.

17. Mokrosinska, D., *Why Snowden and not Greenwald? On the Accountability of the Press for Unauthorized Disclosures of Classified Information,* Law and Philosophy no. 39/2020.

18. Reducing Over-Classification Act [A túlminősítés csökkentéséről szóló törvény] (https://www.congress.gov/111/plaws/publ258/PLAW-111publ258.pdf (accessed on 30.08.2020).

19. Rossmiller, A., *Adjudicating Classified Information,* St. John's Law Review, vol. 85, no. 4/2011.

20. Silver, D.A., *National Security and the Press: The Governments ability to Prosecute Journalists for the Possession or Publication of National Security Information* Communication Law and Policy 13(4)/2008, p. 450.

21. Szőke Gergely, L., *Gondolatok a hazai titokvédelmi szabályozás rendszeréről* [Thoughts on the system of Hungarian secrecy regulations], JURA no. 2/2018.

22. The Johannesburg Principles on National Security, Freedom of Expression and Access to Information U.N. Doc. E/CN.4/1996/39.

23. Vogt, M., Wahlen, D., *Geheimschutzrecht Voraussetzungen und Folgen der Einstufung von Informationen als Verschlusssachen Deutscher Bundestag* [Protection of secrets Prerequisites and consequences of the classification of information as classified information, German Bundestag], WD 3-3010-036/15. 2015.

24. Weber, M., *Essays in sociology* [Szociológiai tanulmányok] pp. 233-234 (H.H. Gerth & C. Wright Mills trans. and eds., 1946), *apud* H. Kitrosser, *Classified information leaks and free speech*, University of Illinois Law Review no. 3/2008.

Fighting Against Tax Evasion – A Comparative Approach Between Romania, Hungary and Anglo-Saxon Countries

Csaba Szilovics[1]
Alexander Szívós[2]
Dávid Bányai[3]

Abstract

The coronavirus pandemic, which began in 2019, has caused a global health crisis as well as an economic downturn worldwide. National budgets and economic operators both have suffered significant revenues losses, while expenditure has been multiplied, due to the overfunding of the health sector and the recovery of businesses that have gone bankrupt, to save jobs and to create new ones. Optimal tax systems could play a major role in reducing the increased public deficits. It is essential to the states to collect and redistribute taxes in an effective and fair way. Consequently, one of the main tasks of the tax authorities is to step up in the fight against tax fraud and curb the black economy. The study presents the fight against tax evasion from Romanian and Hungarian perspectives. In the third part of the work, the authors discuss some Anglo-Saxon tools used to combat tax fraud, providing an opportunity to compare them with the Central and Eastern-European approaches.

Keywords: *taxation, tax fraud, tax evasion, tax compliance, public administration, digitalization, digital tools, high court decision, jurisdiction practices.*

I. An introduction to tax fraud and tax evasion

Tax evasion appears in every country – which has tax systems – at different levels. According to Anthony D. Williams, this behavior is necessarily and undoubtedly linked to tax norms and can only be eliminated by the illusion of tax-exempt societies[4]. We can find tax fraud and tax evasion or tax avoidance in every social class or group, and in every economic system. However, until the second half of the twentieth century, relatively little attention was paid to the problem. Major synthesis works on tax theory, such as Richard Gude's monograph on personal income taxation[5] and Musgrave's *Theory of Public Money*, did not consider the issue of tax evasion as a relevant topic. A significant change occurred in the 1980s, when tax avoidance, tax planning have gained attention of legislators and international institutions. According

[1] Professor, Head of Department PTE ÁJK Financial and Business Law, Faculty of Law, university of Pecs, Hungary. Contact: szilovics.csaba@ajk.pte.hu.
[2] Phd student PTE ÁJK Financial and Business Law.
[3] Phd student PTE ÁJK Financial and Business Law.
[4] A.D. Williams, *Trends in Anti-Avoidance*, Bulletin of IBFD XI-XII, 1996, pp. 502-503.
[5] R. Gude, *The Individual Income Tax Washington*, 1964, D.C. The Brookings Institution.

to professor Uckmar we can find the reason for this perspective change in the economic recession[6]. During the banking and stock market crisis of 2008[7] or the pandemic of 2019, taxpayers contributions decreased and their willingness to pay taxes deteriorated. Governments forced to compensate the rising expenditure side by borrowing, and without new types of public revenue, it is essential to ensure a more efficient use of existing taxes. With reference Professor Uckmar's work, economic recession is repeating itself from time to time, as evidenced by the events of 2008 and the current coronavirus situation.

In addition to the above, it is important to note that the efficiency of tax administration is significantly linked to the new international dimension of tax compliance. National governments need to understand the increasing internationalization activities of businesses and individuals. Taxpayers have recognized the wider economic opportunities of globalization. The establishment of regional confederations, trade and economic treaty systems allowed the free movement of capital, labor and goods. The situation has created new challenges for national tax systems. Many authors have recognized that the development of industry and trade has opened up new opportunities for tax evasion through transfer fees, capital and profit shifting[8]. This process has facilitated the concealment of economic events and in parallel has made tax authorities enforcement procedures more difficult[9]. Nowadays, one of the biggest challenges for tax authorities is to detect and tax the wealth transferred to offshore centers[10] and to force multinational companies to proportionally pay taxes regarding their economic activities. The globalized economy and technological innovation mean new, modern tax collection opportunities for countries and, at the same time, new tax avoidance solutions for tax evaders.

According to the complicated financial web of tax matters, it is easy to think that the abovementioned issues only matter for tax professionals and not for ordinary citizens. However, a newly published Eurobarometer survey shows otherwise[11]. Three quarters of Europeans believe that the fight against tax fraud should be the third most important priority for the European Union, after the fight against terrorism and the reduction of unemployment.

II. Tax evasion in Hungary and Romania

The transformation process of Central and Eastern-European economies from socialist into capitalist economies has had serious consequences for their tax systems.

---

[6] V. Uckmar, *General Report of ITA,* 1994, pp. 11-15.

[7] See furher Z. Bujtár, *Reregulation of securitization in the United States and the European Union after the subprime crisis of 2007-2009*, in Economics & Working Capital 1-2/2020, pp. 34-40.

[8] See eg. E. Saez, G. Zucman, *The Triumph of Injustice: How the Rich Dodge Taxes and How to Make Them Pay*, New York, 2020; or G. Zucman, *The Hidden Wealth of Nations: The Scourge of Tax Havens* University of Chicago Press, 2016; see further T. Piketty, *Capital in the Twenty-First Century*, Harvard University Press, 2017.

[9] D.-G. Mockherje, *Incentives and Institutional Reform in Tax Enforcement*, Delhi, 1998, pp. 246-248.

[10] B. Layman, *Az Offshore halála* [The death of the Offshore], Libri, 2011.

[11] https://www.europarl.europa.eu/news/hu/headlines/priorities/adomegallapitasok/20160707STO36204/az-europaiak-haromnegyede-komolyabb-unios-fellepest-var-az-adocsalas-ellen (accessed on 14.11.2021).

Although, complex economic, political and social circumstances slowed down the implementation of desired changes[12]. The two ex-socialist countries under review have been permanently reforming their tax systems[13] to meet the upcoming challenges of international tax competition, the expectations of European Union and the constant changing fiscal and social needs. They have, tried to meet these demands with different approaches and different tax measures.

II.1. Tax evasion in Hungary since the change of regime

Hungary was ahead of other Central and Eastern-European former socialist countries in the reforming of the tax system and catching up with western standards, as the 1987/88 tax reform implemented the modern forms of value-added tax, personal income tax and corporate income tax in the Hungarian tax system. These steps have given Hungary a 10-15 years advantage in establishing a "Western-European" economic structure and legal framework. It was the first comprehensive tax reform in Central and Eastern-Europe, and perhaps the most significant too. The depth and pace of the changes and the newly introduced tax norms created significant challenges for both individuals and entities in Hungary. One of these challenges was to understand the forms of tax avoidance that have come with the capitalist market economy and to develop a sufficiently effective institutional and legislative environment. In the early 1990s, there were various legal and illegal forms of tax evasion, ranging from tax planning – tax optimization to deliberate tax evasion – that were not defined comprehensively by Hungarian legislation. We must notice that 30 years later there is still no consistent separation of the various types of behavior. The new Criminal Code has abolished the separate offence of tax fraud and incorporated the concept into the collective offence of budget fraud[14]. In our point of view, the mentioned solution makes it more difficult to assess the legal status of the various types of conduct and thus makes it harder to combat tax fraud successfully. Following the change of regime, there were many compliance issues, which were not adequately addressed by the 1988 tax reform.

The low level of Hungarian compliance has greatly affected by the facts that the tax office was initially unprepared, had a small staff and technical knowledge, and for a few years, until the entry into force of Act XCI of 1990 on the Rules of Taxation, it was unable to build an independent and efficient administrative system. At the beginning of the 1990s, the revenue shifted from taxation was estimated an amount of HUF 200-400 billion, which was the 2.4% of Gross Domestic Product in 1990. Tax experts recognized that creating special rules are fundamental to combat tax evasion. The Act 1991 on Tax Administration has already contained more efficient provisions and safeguards against tax evasion[15].

---

[12] V. Tanzi, *Tax reform and the move to a Market Economy: Overview of the Issues*, in OECD, *The Role of Tax Reform in Central and Eastern European Economies*, Paris, 1991, pp. 19-34.

[13] Tax reform is when the changes significantly alter the tax system, including the tax code or the tax administration as a whole, and create new or significantly modified elements that are able to operate more efficiently and create more favorable conditions for taxpayers. Tax reform can be a combination of improving the functioning of the public finance system, increasing tax revenues and raising the level of compliance. However, a change implemented solely for the sake of fiscal surplus is not a tax reform, but a tax increase. Likewise, a continuous, small annual adjustment of the tax structure and a shift in the tax burden cannot be called a reform.

[14] Act C of 2012 on the Criminal Code 396. § (1) Budget fraud.

[15] G. Földes, *Pénzügyi Jog* [Financial Law], 1999, p. 115.

The lack of precise normative definitions of tax evasion activities has slowed down the fight against tax fraud. In its decision 21/1993 (IV.2.) the Hungarian Constitutional Court found the obligation to declare wealth and assets unconstitutional and abandoned it, this step worsened the efficiency of tax compliance. Thus, it became more difficult to conduct asset and wealth investigations, which process is considered one of the most successful tools in the fight against tax evasion in many countries like Greece, Romania and Brazil.

The European Union reports from the mid-2010s have described Hungary as a tax haven because of the favorable mix of tax incentives and state aids provided to multinational companies. We must highlight that in the last decade tax competition has increased globally for winning multinational firms to settle down in the countries. Regarding this, a large number of states try to simplify their tax systems and reduce their tax rates. The result of the mentioned situation can be seen in the current Hungarian corporate tax law. In 2017, the 30 largest foreign companies in Hungary paid only 3.2% tax on their profits[16]. The gap between the nominal and the effective corporate tax rate has been opened wide for businesses that make maximum use of the possibilities offered by the underlying tax regulations. We can conclude that foreign companies have a competitive advantage over domestic players in the capital-poor SME sector[17].

We can state that several major public finance reforms have been implemented in the past 30 years of Hungarian economic policy. These include the tax reforms in 1987-1988 linked to the change of regime, the “Bokros package” in 1995 and the tax changes implemented by the second Orbán government in 2011. We can conclude that the Hungarian tax system, like in many other countries in the region, has been in permanent reform since 1988. In our point of view, the level of tax compliance has been significantly undermined by the inconsistent and rapidly changing tax law environment and the absence of transparency in the system and the norms as well. However, in the last few years we found some promising efforts from the legislator.

The public finance reform in 2010 aimed to make the tax system more efficient, more customer-friendly and to reduce the tax burden. The complex tax measures have broaden the tax base without raising taxes, while other elements reduced the size of the black economy by restricting the amount of illegal gains. The common feature of all measures was that they relied on a greater cooperation from taxpayer side. The legislator also simplified tax administration and broadened the audit database through technical means, without imposing a significant additional burden on taxpayers. In other words, most of the changes were focused on providing a more accurate and real-time picture, building up a new database to access information in order to understand the real processes of the economy. A basic condition for well-functioning tax administration is that business activity does not become a "black box". It can be stated that any tool that improves transparency also improves the efficiency of the tax administration.

The package of measures included, among others, the obligation to use online cash registers, the introduction of reverse value-added tax payments, the targeted reduction of value-added tax rates, the creation of EKÁER and, last but not least, the introduction of

---

[16] P. Bucsky, *Magyarország lassan tényleg adóparadicsom less* [Hungary is slowly really looking for a tax haven], available at G7 https://g7.hu/kozelet/20190122/magyarorszag-lassan-tenyleg-adoparadicsom-lesz/ (accessed on 22.10.2019).

[17] Z. Bujtár, *Az értékpapírosítás* [The securitization], University of Pécs, Állam- és Jogtudományi Kar, 2021, pp. 231-234.

online invoicing. We can see that a number of measures took with regard to value-added tax transactions. The main reason behind this is that a significant proportion of tax fraud in EU countries takes place in this tax. In 2017, the value-added tax loss at EU level was estimated at an amount of EUR 137 billion. The biggest value-added tax shortfall in 2017 was in Romania, where 36% of the expected value-added tax revenue did not reach the central budget[18].

A major step forward in the fight against value-added tax evasion was the innovation of EKÁER[19]. It is a technical system for monitoring, controlling and registering the movement of goods, launched and operated by the Hungarian Tax Authority in 2015. The primary objective of EKÁER was reducing the number of abuses and value-added tax fraud related to the transport of goods. The system covers transactions between Member States and the first domestic movement of goods for supply to a non-end user, as well as the advance electronic recording of these statutory data by the tax authorities and the declaration of the transport. The efficient operation of EKÁER[20] is supported by the so-called HU-GO camera system. Two countries have already introduced a similar electronic tool after recognized the success of the Hungarian system. In Poland, a roadside inspection system called SENT, following the Hungarian model, operating since 1 May 2017[21]. Slovakia introduced the technology in 2018. In addition, several countries have indicated that they are monitoring the experience of the Hungarian operation and are interested in its introduction.

The legislator's main objective was to establish a customer-friendly tax authority, and the introduction of the e-personal income tax system was a successful step forward this direction. As a result, in the tax year of 2019, 5.0613 million taxpayers used the digital tax returns prepared by the Hungarian Tax Authority. 3.3273 million taxpayers accepted their pre-prepared returns without any changes. The next goal of the Hungarian Tax Authority is to help companies preparing their tax returns and by 2021 all invoices issued will be connected to the tax authority's central digital system[22].

The authors welcome the Hungarian tax provisions made in recent years, because there was a significant reduction in income taxes and, in parallel an improvement in tax compliance too. Hungary ranked first in 2017 and third in 2016 and 2018 among the OECD's tax cut leaders. With a 13% value-added tax gap, Hungary holds a strong second place in the region, ahead of only Austria (7%)[23].

---

[18] C. Szilovics, *Hatékony eszközök az adócsalás elleni küzdelemben* [Effective tools in the fight against tax fraud] in: C. Szilovics, Z. Bujtár, B. Ferencz, B. Breszkovics, Al.R. Szívós (eds.), *Gzdasag es punzugyek a 21. Szazaban II, Konferenciakotet* [Economy and punches in the 21st century II, Conference], *Busssiness and Economy in the 21st Century II*, Conference Proceedings, Pécsi Tudományegyetem Állam – és Jogtudományi Kar, 2020, pp. 39-51, p. 13.

[19] L. Varga, *Az EKÁER helyszíni ellenőrzésének tapasztalatai*, Adóvilág XX [Experiences of the on-site inspection of EKÁER, Tax World XX], 2016, pp. 29-31; see also I. Magyar, *Százmilliárdos adócsökkentés jövőre. VM interjú* [One hundred billion tax cuts next year. VM interview], available at https://magyaridok.hu/gazdasag/szazmilliardos-adocsokkentes-jovore-2456239/ (accessed 22.10.2018).

[20] C. Szilovics, *On a new tool to combat tax evasion*, Journal of Eastern-European Criminal Law no. 1/2019, pp. 34-43, p. 10.

[21] Poland has introduced a system called SENT, modeled after the Hungarian EKÁER. Information available at http://www.mkfe.hu/hu/mediamenu/hirek/aktualis-hrek/148-kulfoldi-hrek/8173-lengyelorsz%C3%A1g-bevezeti-a-sent-nev%C5%B1-rendszert,-a-magyar-ekaer-mint%C3%A1j%C3%A1ra.html (accessed on 14.02.2020).

[22] http://www.e-adotanacsadas.com/930-mi-varhato-a-magyar-adozasban-mutatjuk-a-negy-legfontosabb-iranyt.html (accessed on 09.11.2021).

[23] Hungary is no longer the country of VAT fraudsters. Available: https://piacesprofit.hu/kkv_cegblog/mar-nem-magyarorszag-az-afacsalok-orszaga/ (accessed on 12. 01. 2020).

The Hungarian government radically changed the legal definition of tax fraud in 2012. It was a part of the fighting against the black economy. From 1 July 2013, the National Assembly amended the legal definition of tax fraud, which had been settled in the Criminal Code for 30 years and incorporated it into a new comprehensive definition of budget fraud. As a result, the acts previously covered by 7 separate offences can be assessed by the law enforcement authorities under a single offence. Under the current legislation, the criminal offence of budget fraud can be divided into three basic cases: budget fraud in the strict sense, tax evasion on excise goods and administrative budget fraud. With this regulatory solution, the norm combines a wide range of offences, from misappropriation of budget funds to false tax declarations and concealment of an important fact concerning budget revenue.

Compared to the previous act, the legislator's change of approach was also noticeable with regard to the result of the offence. Whereas previously the reduction of tax revenue was the result of the offence, the new legislation focuses on the damage caused to the budget. The aim of the modification is to protect the financial interests of a broader legal object, the budget, and through it the whole community, by creating a *delictum complexum*. An examination of recent case law shows that the legislator has not achieved this objective. The legal unity that has been created has created a number of doctrinal and legal difficulties in the work of adjudication and investigation. One of these is the problem of determining the date of completion of the unit of offence when assessing the unity of the law. In this respect, the Supreme Court of Hungary stated in a decision from 2018: "In the case of budget fraud, the date of indictment concludes the unit of offence, so that all the factual elements of the offence committed during the period up to that date fall within the scope of the unit of offence, regardless of whether they were committed for different types of taxes and contributions, as well as if they would not constitute an offence individually"[24]. The biggest problem with this reasoning was that offences discovered after indictment, which are typically repeat offences, can only be protected by criminal law through retrial. The issues places a significant and unjustified burden on the investigating authority, the prosecution and the court system. An equally difficult task in the new regulatory environment is the interpretation of the grounds for non-continuity and decriminalization. In assessing the effectiveness of the new legislation, it can be said that, although it has remedied many of the shortcomings of the previous legislation, its unusual legal technicalities have created new problems which need to be amended and clarified in the future in order to ensure practical application.

II.2. The situation of tax evasion in Romania during the period of regime change and in the following decades

Romania's tax law is similar in both its principles and its detailed solutions to those of other CEE countries. In terms of compliance, most estimates put the share of the black economy at 50-60% of GDP from the period of regime change until the early 2000s. Among the Central European countries, Romania had the highest rates of inflation and corruption, and the shortest period of tax compliance. After the change of regime, the extraordinary size of the black economy became one of the biggest problems facing lawmakers. Up until the early 2000s, the European Union and the International Monetary Fund (IMF) regularly drew attention to the size of the Romanian black

[24] BH2018.162.

economy and called for greater predictability and transparency in the business world. The country has tried to make progress in the fight against corruption and the black economy through a series of innovations. One element of this was Romania's ratification in 2004 of the 1999 Strasbourg Criminal Law Convention on Corruption, together with its Protocol[25]. The fight against tax evasion was helped by the amendment of the Penal Code, which redefined the offences of bribery and influence peddling.

The most important instrument in the fight against corruption was created when the National Anti-Corruption Directorate was established, a specialized prosecution office specialized in the fight against corruption at the middle and top levels[26]. Its activities have proved successful, as confirmed by the statistics of recent years and the international repercussions of its activities27. Investigations into corruption or maladministration are, as a rule, conducted by the National Anticorruption Directorate (DNA) within the Prosecutor General's Office. Investigation, detection and collection of evidence is the responsibility of the investigative authority, but all participants in the proceedings have the opportunity to submit evidence during the proceedings.

A priority in the EU's accession negotiations with Romania in 2004 was to improve the fight against tax evasion and avoidance, in parallel with the reform of fiscal policy and the fiscal system. High tax rates and inefficient tax collection machinery have contributed greatly to the growth of the black economy[28]. A number of other factors contributed to the spread of tax evasion, including the tax law, which was characterized by loopholes, inconsistencies, ambiguities and lack of stability, and the late emergence of the anti-avoidance law[29, 30]. According to the literature, the average level of tax evasion in developing countries is equivalent to 25% of annual budgets. The Romanian tax system in the mid-1990s suffered from inefficiencies in tax administration, similar to other Central European countries' models, which it has not been able to overcome successfully. By the 2005 tax reform, all the major central tax types applied in European countries had been introduced, accompanied by low tax rates, but the level of efficiency of the tax administration was weak. Economic policy makers have sought to apply a mosaic of tax legislation, using legal instruments, tax instruments and tax mixes already successfully applied in other countries. In order to increase efficiency, they created a system that resembled both the Hungarian and Croatian structures emphasizing consumption taxes, while at the same time adopting elements of the Slovak tax system, such as the single rate for personal income tax and corporate tax and drawing on the Austrian example for property taxation.

---

[25] ETS 191.

[26] P. Novoszáth, *There is no other way for society than fairness and respect for the law. Evaluation of the Romanian Anti-Corruption Agency*, in *Citizen's Review* 2015, https://polgariszemle.hu/archivum/101-2015-december-11-evfolyam-4-6-szam/gazdasagpolitika-jegybankpolitika-allami-ellenorzes/ 714-nincs-mas-ut-a-tarsadalom-szamara-mint-a-korrektseg-es-a-toervenytisztelet-a-roman-korrupcioellenes-uegynoekseg-mukoedesenek-ertekelese.

[27] *Ibidem*.

[28] L.-L. Albu, *Estimating the Size of Underground Economy in Romania* in The Economics of Transition, June 1, 2004, p. 3. Available at SSRN: https://ssrn.com/abstract=1569577 or http://dx.doi.org/10.2139/ssrn.1569577.

[29] D. David, D. Pojar, *Approaches Regarding The Tax Evasion In Romania*, 2011, p. 378, https://www.researchgate.net/publication/227462770_APPROACHES_REGARDING_THE_TAX_EVASION_IN_ROMANIA.

[30] D. Clocotici, Gh. Gheorghiu, *Dolul, frauda și evaziunea fiscală* [Decepton, fraud and tax evasion], Ed. Lumina Lex, Bucharest, 1996, p. 56.

In order to regulate tax evasion, Law 87/1994 was enacted in 1994[31], Article 1 of which defines tax evasion as follows: 'Tax evasion is the evasion, in whole or in part, by any means, of Romanian and foreign natural and legal persons from paying taxes, duties and other public charges, including local budget payments and state social insurance funds'. This wording protected a broader range of public-law liabilities than Article 310 of the old Hungarian Criminal Code. Romanian jurisprudence and legal literature recognizes several variants of tax evasion and distinguishes between legal and illegal tax evasion. In general, tax evasion (*evaziune fiscală*) is the case where a taxpayer evades paying tax. However, not all behaviour is considered to be a breach of the law when taking advantage of the legal possibilities. Tax evasion is illegal and punishable when the law is knowingly broken (*evaziune fiscală frauduloasă*). The legal assessment of this can be twofold. In the milder cases it is considered a misdemeanour – *contravenție* – and in the more serious cases listed above it is considered a felony (*infracțiune*).

The initial ad hoc, inconsistent and opaque tax structure was completely rewritten and redefined by the 2003 Tax Code. It was for this reason, and in preparation for EU accession, that the Romanian legislature adopted Tax Law 571/2003, which, in an unusual solution, regulated the whole of the previously highly fragmented tax system in a unified structure. Interestingly, in stark contrast to the other CEE countries, only Romania has seen a decline in its tax revenue-to-GDP ratio in the first ten years after EU accession. The country's public tax revenue is still below the EU average by more than 10%[32]. Bulk of the Romanian state's tax revenues is levied on consumption and labor, while taxes on capital and property are negligible[33].

A more precise formulation of the criminalization of tax evasion was undertaken by Law 241/2005. Under the umbrella term of tax fraud, the legislator criminalized several types of conduct that jeopardizes the collection, assessment and payment of tax revenues. Law no. 241/2005 on the prevention and combating of tax evasion set out in detail the conduct that falls within the definition of tax evasion. Article 9 of the Act. Article 9 of the Penal Code provides that the following acts committed with the purpose of evading tax obligations constitute a criminal offence of tax fraud and are punishable by imprisonment for a term of 2 to 8 years and deprivation of certain rights: concealment of an object or source liable to tax or duty, total or partial failure to record commercial operations or income in accounting documents or other legal documents, recording in accounting documents or other documents of expenses relating to operations which are not real or other fictitious operations, damaging, destroying or concealing the memory of accounting documents, tariff clocks or electronic tax cash registers or other recording devices, double-entry bookkeeping by means of transcripts or other recording devices, evasion of financial, tax or customs controls by failing to declare the principal or secondary establishment of controlled persons, by declaring a fictitious establishment or by inaccurately declaring it, by competent bodies – bodies responsible for carrying out financial, tax or customs controls in accordance with the

---

[31] V. Panescu, *Evaziunea fiscală* [Tax evasion], 1999, Bucharest, p. 3.

[32] See https://data.worldbank.org/indicator/GC.TAX.TOTL.GD.ZS 6.06.2021. Also see C. Ban, Al. Rusu, *Romania's Eak Fiscal State. What explains it and what can (still) be done about it. Economy and Finance*, 2019, http://library.fes.de/pdf-files/bueros/bukarest/15914.pdf (accessed on 13.05.2021).

[33] See A.-M. Izvoranu, H.-C. Calin, *Taxation System in Romania and in the European Union,* 2018, https://www.researchgate.net/publication/324756496_TAXATION_SYSTEM_IN_ROMANIA_AND_IN_THE_EUROPEAN_UNION (accessed on 26.09.2020) and C. Ban, Al. Rusu, cited.

law, and by the judicial police, criminal investigation bodies"[34]. The range of the penalty is adapted to the extent of the damage caused in this respect being similar to the Hungarian legislation. The legislator's intention was that tax evasion should be considered to be the deliberate or negligent breach of documentary obligations resulting in the loss or destruction of supporting documents. Obstructing official controls was also considered to be tax fraud. The legislator has made the offenders of tax fraud liable to criminal prosecution only. However, behind this apparently strict system, which appears to be dogmatically more elaborate than in Hungary, there is still a poorly paid tax administration with a weak technical base and low public morale.

The new regulatory attitude has resulted in a significant increase in the number and proportion of white-collar crimes detected. The penalties set out in the criminal law have been further tightened. Following a 2013 amendment to the law, the maximum statutory penalty for tax evasion is increased to five years if the damage is equal to or exceeds €100,000 and to seven years if the damage exceeds €500,000 in national currency. The effectiveness of controls and investigations has also been enhanced by the fact that, in addition to the law enforcement authorities (police) and the courts, the relevant authorities for investigation and sentencing in the Romanian legal system always include the prosecution with special expertise in cases against white-collar criminals.

Despite the implementation of tax and criminal law reforms, experts say that the black economy and tax evasion rates have not fallen as much as expected[35]. Sometimes increasing, sometimes decreasing tax burdens and constantly changing tax obligations have made the Romanian tax system unpredictable for economic operators, which has undermined compliance[36]. Even in 2012, Romania and Bulgaria were the worst performers in the EU in terms of the share of the black economy and tax evasion. In nominal terms, this meant that 29.6% of gross domestic product generated no revenue for the state. By contrast, in the same period, the black economy in the Western model state, Austria, was estimated at only 7.9%. It is telling that the Romanian tax revenue in 2017 was only 15.42% of GDP, in line with the French statistics of 1926 and the US statistics of 1942[37]. Tax evasion and the flight of the wealth generated from the country is largely due to the multinational companies established in Romania, whose activities are nonetheless essential to survive in a competitive economy. According to some estimates, in their absence exports would fall by 70% and GDP by 30%. This is why the legislator grants disproportionate tax breaks and exemptions to foreign capital. The[38] country is committed to minimizing the tax burden on multinationals and to treating their transfer pricing practices leniently[39].

Due to legislative changes and social pressure, there has been a marked increase in the internal control activities of parent companies in the Romanian subsidiaries of multinational companies, indicating that the zero tolerance of law enforcement agencies

---

[34] See https://www.monitoruloficial.ro/actimp/hu/0272.pdf. Also see Dr. Edit Szentpáli Balláné, *The characteristics of deceptive behavior in budget fraud*, PhD thesis, 2020, University of Debrecen, Faculty of Law, pp. 75-77.

[35] Quoted by E-Népujság.ro, published in the daily newspaper Gândul, 27.12.2012.

[36] See C. Szilovics, *Experiences of tax credits in some Central European countries in the last two decades*, PTE ÁJK, JURA no. 1/2018, pp. 142-160.

[37] C. Ban, A. Rusu, cited, p. 4.

[38] *Ibidem*.

[39] B. Dick, M. Rafferty, D. Wigan, *Capital unchained: finance, intangible assets and the double life of capital in the offshore world,* Review of International Political Economy 24(1)/2017, pp. 56-86.

in relation to economic crime has been understood by company managers. Companies have adapted their own internal regulations to promote transparent and orderly operations. The companies have made a clear statement of their distance from any criminal activities and from the persons who have committed criminal activities on behalf of the company. The only way for companies to be exempted from criminal prosecution is for them to take an active part in the investigation of the crimes by carrying out detailed investigations. Individuals who "voluntarily" disclose the commission of crimes and make a detailed confession before the authorities discover the crime are called "whistle-blowers". There are various options available to the authorities to protect whistle-blowers, but they are not specialized for economic crime, but are applied according to general rules. They can either protect repentant offenders or their relatives or keep their identity secret during proceedings.

On the positive side, Romania has achieved outstanding results in the period 2004-2017 in simplifying tax administration and reducing the number of hours needed to fulfil certain tax obligations[40], thanks to the possibilities offered by digitalization, including for employment taxes and VAT[41].

III. Lessons from regulatory practice in the Anglo-Saxon countries

In addition to the practice of the two Central and Eastern European countries, it may be useful to briefly review the main instruments of the anti-fraud legal systems of some Anglo-Saxon countries. It may be very instructive to note that the Anglo-Saxon countries also use solutions to combat tax fraud that differ from continental law. The most striking difference is in the United Kingdom, where there is no general anti-avoidance measure. In this legal system, the role of judicial legislation is paramount, and the emphasis is on analogy and infringement of the spirit of the law, and on interpretation of legislative intent, as opposed to the normative approach of continental law. Such a picture of the British approach emerged from the work of Bracewell – Millnes, Sawyer, Jones. These authors argued that the English approach, which does not make a significant distinction between culpable and intentional tax evasion and the exploitation of loopholes in the law, is outdated. "There appears to be no substantive or procedural distinction between tax avoidance and tax planning, on the principle that the economic consequences are the same. Tax evasion is generally referred to as tax avoidance, which implies the nature of a deliberate crime, since the purpose of tax laws is to collect taxes and not to conceal them". In this spirit, the British attitude is that any way of avoiding the law is illegal. The[42] fact is that it is for Parliament to lay down clear and unambiguous rules and for the courts to interpret them. There is, however, a somewhat contradictory view, expressed by Lord Tromlin, that 'every man has a right to arrange his affairs so that his taxes may be less than they otherwise would be under the proper law'[43], but that he can only achieve this by legal means.

[40] C. Ban, A. Rusu, cited, p. 21.

[41] See for example F. Gherghel, *Aspects regarding electronically supplied services*, in WTS CEE, Taxbridge no. 2/2019, *Going Digital: Trends in Taxation and Administration in Central and Eastern Europe*, p. 11, https://wts.com/wts.com/publications/cee-tax-bridge/2019/wts-cee-tax-bridge-2019_2.pdf (accessed on 5.12.2021).

[42] V. Uckmar, cited, pp. 5-6.

[43] (1936) 19 Tax Cases ("TC") 490.

The question is for the courts to decide when considering the legal transaction and their role is therefore enhanced. In A. Ramsay (W. T.) Limited v IRC, the House of Lords agreed with the decision of the court when it considered the transaction not only as a whole but also in its steps. The court stated that the legality of the sham steps, which had no independent economic justification, could not be recognized. In so ruling, the Ramsay case inadvertently provided a model for the fight against continental tax evasion. According to Chelvathurai[44], 4,000 tax cases in England were settled as a result of the Ramsay precedent and the Treasury collected £1.2 million in tax. This judicial decision has transformed tax jurisprudence and reduced the scope for tax evasion by providing a general rule for the interpretation of a legal transaction.

III.1. Australia

The Australian tax system is considered one of the most modern in the world. The main aim of Australian lawmakers is to separate the inadvertent and deliberate modes of tax evasion. A strict distinction is made between the two. The legislator clearly intended to punish only intentional tax evasion. Innocent conduct should not be penalized even if it is otherwise by its nature a reduction in tax liability.

In Australia, very early on, in 1936, the Australian Income Tax Act (ITA) provided for the minimization of unacceptable tax burdens in section 260. This, unlike the English legislation, was specifically designed to prevent deliberate tax evasion. Section 260 stated that it was prohibited to ascribe to any law a meaning other than that which it did not expressly state, and therefore prohibited to interpret it expansively if it would result in a reduction in public revenue. The purpose of this legislation was to provide an objective and uniform interpretation of the concept of tax evasion in order to ensure that taxpayers behave appropriately in critical situations. A public finance policy must be implemented that is capable of cracking down on contrived and devious tax avoidance practices. Of course, this has never included regular commercial transactions where taxpayers legitimately take advantage of the opportunities to settle their affairs".

The Australian jurisprudence on tax fraud is characterized by the fact that, as in English jurisprudence, the courts have emphasized the primacy of substance over form[45].The Australian courts have always placed a premium on the precise definition of the purpose of the transaction, following the English model of "substance before form". At the same time, they have taken into account English case law, and have applied a strict interpretation of the wording of the Act, from Ramsay (W. T.) Limited v IRC[46] to Fuzniss v Davis[47], or Westminster[48]. Australian jurisprudence is also characterized by a strictness of judgement that exceeds that of other Anglo-Saxon countries. "They take the view that, interpreted literally, their anti-avoidance action extends their investigation to any transaction that may have resulted in a reduction in the taxpayer's income"[49]. Numerous rulings in Australian case law have developed the distinction between legal tax reduction and what is defined in law as tax evasion. This

---

[44] S.I. Chelvathurai, *Tax Avoidance, Tax Evasion and the Underground Economy,* Bulletin of IBFD XII, 1990, p. 594.

[45] C. Szilovics, *Fraud and compliance in tax law*, Gondolat Publishing House, 2003, p. 49.

[46] (1981) 54 (T.C). 101.

[47] (1984) 55 (T.C). 324.

[48] (1963) 19 (T.C). 490.

[49] S.I. Chelvathurai, cited, p. 595.

judicial attitude has a strong tradition in Australia. As long ago as the 1926 Wilson or Chamberi Co. case, the Supreme Court held that tax evasion could be established by "any trick, artifice or sham." In Isaacs I Rio's view, anyone who withheld a compulsory payment without any reasonable excuse or legal basis was cheating the payment. The avoidance may appear to be a simple consequence of the practice of minimizing the tax burden, although the mere failure to pay may be inadvertent or by mistake. But the concept of fraud always involves more than simple omission. The Australian judges have taken into account the 1949 decision in Denver Chemical Manufacturing v. Commissioner of Taxation (Denver)[50], in which Judge Dixon himself stated that it was unwise and impractical to define tax evasion in terms of its multifaceted nature. Nevertheless, he himself defined the essence of tax evasion in terms of reprehensible conduct or knowing omission, which is punishable. The Anglo-Saxon Federal Courts and the Supreme Courts have accepted that intentional conduct or at least omission is necessary to establish tax evasion. In *Barri*, Judge Williams explained that the omission of income to minimize the tax burden must be intentional in order to establish tax evasion. However, in Brambles Holding Ltd v AITR, Judge Barwick, in the words of the English Lord Tromlin, held that a taxpayer has the right to choose a genuine transaction which will result in him obtaining the benefit of the tax law, i.e. minimizing his tax. Despite this, section 260 of the ITA proved to be quite ineffective and by the 1970s Australian taxpayers had developed a number of sophisticated tax avoidance schemes. In response to this, the Government introduced an anti-avoidance measure (IVA) in 1981-82 to replace ITA section 280. The legislation created a strict regime in which, on a literal interpretation, a transfer of an income-producing property between husband and wife could be considered invalid. The penalty under the norm is also strict and the taxpayer is liable to pay double the amount of tax foregone in addition to the tax foregone. In addition, in December 1980, the Tax Crimes Act was passed, which criminalized a number of tax deduction practices and made the assistance of experts an offence. The so-called general provisions continued to apply, nullifying and thus rendering invalid any transaction whose purpose, directly or indirectly, was to evade tax.

In 2008, the Australian Taxation Office (ATO) issued a practical guide[51] for authorities and taxpayers, setting out the elements of the distinction between tax avoidance and tax evasion. This provides guidance for both parties and is used by auditors during audits. The guide is regularly reviewed, supplemented and updated. The Practical Guide sets out that the definition of tax avoidance is inevitable for tax audits and legal consequences. The definition of tax avoidance is based on the expectation that the taxpayer has engaged in conduct (omission) that is attributable to the taxpayer. The concept of omission, or reprehensible conduct, lies halfway between culpable conduct and intentional conduct. Most often, taxpayers engage in this conduct by making an incorrect or erroneous declaration or return. Tax audits must factually examine whether the taxpayer has acted with due diligence. Adequacy must be equated with the care and responsibility expected of a 'diligent person'. Under Australian tax policy and tax law, tax liabilities can only be investigated by the authorities within a specified time limit. This is generally between 2 and 4 years for income tax. However, in certain cases the authorities may also examine tax liabilities retrospectively for an

[50] *Denver Chemical Manufacturing v. Commissioner of Taxation* (1949) 79 CLR 296 at 313.
[51] "Fraud or Evasion" PS LA 2008/6.

unlimited period. Examples include tax evasion or tax fraud in the context of fringe benefits or income tax. Another interesting provision is that tax evasion or tax fraud can only be established during a tax audit by a senior auditor or a senior auditor. This is obviously intended to ensure that the finding is thorough, justified and professional. If the investigation reveals significant tax evasion or tax evasion with a future risk, the tax auditor, in addition to the Tax Counsel Network (TCN), must notify the National Fraud or Evasion Advisory Panel (NAFEP), which will examine whether the finding was objective and fair. The suspected tax fraud is investigated by a panel of at least 3 senior officials. Australian tax law recognizes and regulates aggressive tax planning and treats any transaction as such if there is little or no economic rationale behind the business actions.

III.2. New Zealand

New Zealand has a highly developed and modern tax system. The New Zealand Tax Authority regularly issues information leaflets to taxpayers setting out the principles on which the process, which they describe as a 'red code', can be based. If these conditions are met, a thorough and detailed tax audit can certainly be initiated[52]. The authority has made clear in its information to clients that tax evasion and tax fraud often go hand in hand with money laundering. Illegally obtained income is also taxable, so money laundering also involves clarifying the origin of assets. In general, it is established that operations to launder the proceeds of tax evasion can implement classic money laundering techniques. Clients will carry out sham transactions such as the inclusion of tax havens in business transactions or the performance of acts incompatible with sound management. The essence of tax avoidance is defined as the failure of a taxpayer to meet his or her actual tax obligations. This can take two forms, either by not recording all of his income or by understating income by fictitiously increasing expenses and deducting the amount from income. Tax evasion is defined as a scheme whereby the offender clearly obtains unlawful income. This is considered to be the case where taxpayers file fictitious returns, prepare false invoices or vouchers and record their tax liabilities on that basis, or claim benefits on the basis of false information. As there are some sources of income that are tax exempt, e.g. casinos, horse racing, gifts, tax evaders prefer to claim that their money comes from these transactions. It is extremely interesting that the tax authorities' information note gives detailed examples of schemes and signals to which the authorities react immediately. In the case of cash predominant services (hairdresser, beauty salon etc.) it is highly suspicious if the private and business bank accounts are with the same bank and card payments are made to the business account, while cash deposits to this account are negligible, while cash deposits to the private bank account are continuous. The guidance also states that in this case, the authority will assume that the cash flow is not reported by the customer as a business flow. It also specifies which states are considered tax havens and lists them (e.g. Bahamas, Samoa, Cayman Islands, MAN Islands etc.) For information and service purposes, it also specifies which transactions trigger an immediate Code Red. These are transactions involving states that function as tax havens or complex and unusual economic transactions that cannot be explained economically. These might include the use of a private bank account for business transactions. In order to

[52] New Zealand Government, *Tax evasion, tax fraud and money laundering*, Inland Revenue, IR1061 | July 2019, www.ird.govt.nz.

ensure transparent and traceable payments, the PAYE system was introduced in 2019, which is derived from an English acronym [Pay As You Earn (PAYE)].

IV. Conclusions

In conclusion, the two countries have made progress in the fight against tax evasion over the last two decades, mainly as a result of the opportunities offered by digitalization. However, insufficient attention has been paid to the incorporation of Western principles in tax legislation and to the development of judicial enforcement. The results achieved and the whitening of the economy are due to the simple technical tools presented in the study, which have long been used in other Western countries. We are not talking about an internal strengthening of the level of compliance or a significant reduction in taxes, but 'only' about a well thought-out electronic improvement in the control of the tax administration. A more effective solution would seem to be the introduction of new taxes aimed at a slight improvement in the performance of the tax administration and the modernization of technical conditions, rather than a substantial overhaul of the tax system. In many ways, a well-prepared, well-paid, adequately staffed and politically neutral tax administration can achieve more than any reform. A segmented tax administration that is aware of and responsive to the taxpayers' tax activity characteristics is the key to success. The new approach needs to focus not only on developing digital tools but also on developing a collaborative tax administration model. Digitalization can also be used to better engage with customers, to listen to taxpayer opinions, to monitor the media and to process information from both domestic and international peer organizations.

In terms of legal standards, both countries have successfully caught up, although the concepts of tax fraud, tax evasion, tax avoidance and tax optimization have still not been consistently contrasted in Hungarian legislation. However, changing the rules is not enough if the financial literacy of the population is low, as illustrated by the brokerage scandals and pyramid schemes of recent decades and the high level of corruption in the legal practice[53]. It is encouraging that the development of financial awareness has been increasingly emphasized in recent years, but programs, organizations and educational materials dealing with this issue should discuss the importance of taxation and compliance with the law much more strongly.

References

1. Albu, L.-L., *Estimating the Size of Underground Economy in Romania* in The Economics of Transition, June 1, 2004, available at SSRN: https://ssrn.com/abstract=1569577 or http://dx.doi.org/10.2139/ssrn.1569577.

[53] L. Kőhalmi, *Korruptionslage in Ungarn* [Corruption in Hungary] in C. Szilovics, Z. Bujtár, B. Ferencz, B. Breszkovics, A.R. Szívós (eds.), *Gazdag es pegnzugyek a 21.Szazadban II. Konferenciiakotet* [Rich and money in the 21st century II. Conference volume] *Business and Economy in the 21st Century.* Conference Proceedings, Pécsi Tudományegyetem, Állam – és Jogtudományi Kar, pp. 182-193, p. 12. Also see L. Kőhalmi, *Fehérgalléros bűnözés, gazdasági bűnözés, korrupciós bűnözés* [White-collar crime, economic crime, corruption crime] in T.A. Barabás (ed.) *Alkalmazott kriminológia* [Applied Criminology], Ludovika Egyetemi Kiadó, pp. 431-444, p. 14.

2. Ban, C., Rusu, Al., *Romania's Eak Fiscal State. What explains it and what can (still) be done about it. Economy and Finance*, 2019, http://library.fes.de/pdf-files/bueros/bukarest/15914.pdf (accessed on 13.05.2021).

3. Bucsky, P., *Magyarország lassan tényleg adóparadicsom less* [Hungary is slowly really looking for a tax haven], available at G7 https://g7.hu/kozelet/20190122/ magyarorszag-lassan-tenyleg-adoparadicsom-lesz/ (accessed on 22.10.2019).

4. Bujtár, Z., *Az értékpapírosítás* [The securitization] University of Pécs, Állam- és Jogtudományi Kar, 2021.

5. Bujtár, Z., *Reregulation of securitization in the United States and the European Union after the subprime crisis of 2007-2009*, in Economics & Working Capital 1-2/2020.

6. Chelvathurai, S.I., *Tax Avoidance, Tax Evasion and the Underground Economy,* Bulletin of IBFD XII, 1990.

7. Clocotici, D., Gheorghiu, Gh., *Dolul, frauda și evaziunea fiscală* [Deception, fraud and tax evasion], Ed. Lumina Lex, Bucharest, 1996.

8. David, D., Pojar, D., *Approaches Regarding The Tax Evasion In Romania*, 2011, https://www.researchgate.net/publication/227462770_APPROACHES_REGARDING_THE_TAX_EVASION_IN_ROMANIA.

9. Dick, B., Rafferty, M., Wigan, D., *Capital unchained: finance, intangible assets and the double life of capital in the offshore world,* Review of International Political Economy 24(1)/2017.

10. E-Népujság.ro, published in the daily newspaper Gandul, 27.12.2012.

11. Földes, G., *Pénzügyi Jog* [*Financial Law*], 1999.

12. Gherghel, F., *Aspects regarding electronically supplied services*, in WTS CEE, Taxbridge no. 2/2019, *Going Digital: Trends in Taxation and Administration in Central and Eastern Europe*, https://wts.com/wts.com/publications/cee-tax-bridge/2019/wts-cee-tax-bridge-2019_2.pdf (accessed on 5.12.2021).

13. Gude, R., *The Individual Income Tax Washington*, 1964, D.C. The Brookings Institution.

14. http://www.e-adotanacsadas.com/930-mi-varhato-a-magyar-adozasban-mutatjuk-a-negy-legfontosabb-iranyt.html (accessed on 09.11.2021).

15. http://www.mkfe.hu/hu/mediamenu/hirek/aktualis-hrek/148-kulfoldi-hrek/8173-lengyelorsz%C3%A1g-bevezeti-a-sent-nev%C5%B1-rendszert,-a-magyar-ekaermint%C3%A1j%C3%A1ra.html (accessed on 14.02.2020).

16. https://data.worldbank.org/indicator/GC.TAX.TOTL.GD.ZS 6.06.2021.

17. https://piacesprofit.hu/kkv_cegblog/mar-nem-magyarorszag-az-afacsalok-orszaga/ (accessed on 12. 01. 2020).

18. https://www.europarl.europa.eu/news/hu/headlines/priorities/adomegallapitasok/20160707STO36204/az-europaiak-haromnegyede-komolyabb-unios-fellepest-var-az-adocsalas-ellen (accessed on 14.11.2021).

19. https://www.monitoruloficial.ro/actimp/hu/0272.pdf.

20. Izvoranu, A.-M., Calin, H.-C., *Taxation System in Romania and in the European Union,* 2018, https://www.researchgate.net/publication/324756496_TAXATION_SYSTEM_ IN_ROMANIA_AND_IN_THE_EUROPEAN_UNION (accessed on 26.09.2020).

21. Kőhalmi, L., *Korruptionslage in Ungarn* [Corruption situation in Hungary] in C. Szilovics, Z. Bujtár, B. Ferencz, B. Breszkovics, A.R. Szívós (eds.), *Gazdag es penzugyek a 21.Szazadban II. Konferenciiakotet* [Rich and money in the 21st century II. Conference volume], *Business and Economy in the 21st Century,* Conference Proceedings, Pécsi Tudományegyetem, Állam – és Jogtudományi Kar, pp. 182-193.

22. Kőhalmi, L., *Fehérgalléros bűnözés, gazdasági bűnözés, korrupciós bűnözés* [White-collar crime, economic crime, corruption crime] in T.A. Barabás (ed.) *Alkalmazott kriminológia (Applied Criminology),* Ludovika Egyetemi Kiadó, pp. 431-444.

23. Layman, B., *Az Offshore halála* [The death of the Offshore], Libri, 2011.

24. Magyar, I., *Százmilliárdos adócsökkentés jövőre. VM interjú* [One hundred billion tax cuts next year. VM interview], available at https://magyaridok.hu/gazdasag/szazmilliardos-adocsokkentes-jovore-2456239/ (accessed 22.10.2018).

25. Mockherje, D.-G., *Incentives and Institutional Reform in Tax Enforcement*, Delhi, 1998.

26. New Zealand Government, *Tax evasion, tax fraud and money laundering*, Inland Revenue, IR1061 | July 2019, www.ird.govt.nz.

27. Novoszáth, P., *There is no other way for society than fairness and respect for the law*. *Evaluation of the Romanian Anti-Corruption Agency*, in *Citizen's Review* 2015, https://polgariszemle.hu/archivum/101-2015-december-11-evfolyam-4-6-szam/gazdasagpolitika-jegybankpolitika-allami-ellenorzes/714-nincs-mas-ut-a-tarsadalom-szamara-mint-a-korrektseg-es-a-toervenytisztelet-a-roman-korrupcioellenes-uegynoekseg-mukoedesenek-ertekelese.

28. Panescu, V., *Evaziunea fiscală* [Tax evasion], 1999, Bucharest.

29. Piketty, T., *Capital in the Twenty-First Century*, Harvard University Press, 2017.

30. Saez, E., Zucman, G., *The Triumph of Injustice: How the Rich Dodge Taxes and How to Make Them Pay*, New York, 2020.

31. Szentpáli, E., *The characteristics of deceptive behavior in budget fraud*, PhD thesis, 2020, University of Debrecen, Faculty of Law.

32. Szilovics, C., *Experiences of tax credits in some Central European countries in the last two decades*, PTE ÁJK, JURA no. 1/2018.

33. Szilovics, C., *Fraud and compliance in tax law*, Gondolat Publishing House, 2003.

34. Szilovics, C., *Hatékony eszközök az adócsalás elleni küzdelemben* [Effective tools in the fight against tax fraud] in: C. Szilovics, Z. Bujtár, B. Ferencz, B. Breszkovics, Al.R. Szívós (eds.), *Gzdasag es punzugyek a 21. Szazaban II, Konferenciakotet* [Rich and money in the 21st century II. Conference volume]*, Busssiness and Economy in the 21st Century II*, Conference Proceedings, Pécsi Tudományegyetem Állam – és Jogtudományi Kar, 2020, pp. 39-51.

35. Szilovics, C., *On a new tool to combat tax evasion*, Journal of Eastern-European Criminal Law no. 1/2019.

36. Tanzi, V., *Tax reform and the move to a Market Economy: Overview of the Issues*, in OECD, *The Role of Tax Reform in Central and Eastern European Economies*, Paris, 1991.

37. Uckmar, V., *General Report of ITA,* 1994.

38. Varga, L., *Az EKÁER helyszíni ellenőrzésének tapasztalatai*, Adóvilág XX, [*Experiences of the on-site inspection of EKÁER, Tax World XX*], 2016.

39. Williams, A.D., *Trends in Anti-Avoidance*, Bulletin of IBFD XI-XII, 1996.

40. Zucman, G., *The Hidden Wealth of Nations: The Scourge of Tax Havens* University of Chicago Press, 2016.

Questions Arising from Digital Evidence in the Hungarian Criminal Procedure

Dávid Toth*

Abstract

In combating cybercrime, it is vital that the investigative authorities be able to quickly obtain all the electronic data which can be relevant in the criminal procedure and can be presented as evidence. Many problems appeared for law enforcement in the 21st century. Questions like which country has jurisdiction to investigate for digital evidence in an international cybercrime case. How can we seize cryptocurrencies (e.g., bitcoin)? Hungary has adopted a new Criminal Procedure Code in 2017, which entered into force in 2018 on the first of July. I would like to examine the current regulation with a descriptive approach considering these challenges.

The aim of the research is to give an overview of the practical problems and the regulation of the criminal procedure in connection with digital evidence. In the last part of the article, my goal is to give proposals for the legislature on the development of the relevant legal provisions.

Keywords: *digital evidence, criminal procedure, cryptocurrencies.*

I. Introduction

Thanks to the information technology revolution of the 21st century, people are increasingly communicating with each other in the online space through smart devices, and the pandemic caused by Covid 19 has even steered the worlds of work and education more towards cyberspace[1]. In this situation, people leave more digital traces daily (so-called digital footprint).

In combating cybercrime, it is vital that the investigative authorities be able to quickly obtain all the electronic data which can be relevant in the criminal procedure and can be presented as evidence. Furthermore, we can also see that there is a growing demand for the knowledge and opinion of an IT professional in criminal proceedings[2].

The research aims to give an overview of the practical problems and the regulation of the criminal procedure in connection with digital evidence. In the last part of the

* Ph.D., Senior Lecturer, Criminology and Penal Law Department, University of Pécs, Faculty of Law, Hungary. Contact: toth.david@ajk.pte.hu.

[1] I.L. Gál, *A koronavírus (COVID-19) és az általa okozott gazdasági világválság lehetséges hatásai a bűnözésre* [Potential effects of the coronavirus (COVID-19) and the global economic crisis on crime], in Magyar Jog no. 5/2020, pp. 257-265.

[2] E. Balázs, *Informatikus szakértés a büntetőeljárásban* [IT expertise in criminal proceedings], *in* Belügyi Szemle, 7-8/2014, pp. 158-180.

article, my goal is to give proposals for the legislature on the development of the relevant legal provisions.

II. Basic concepts

There are many concepts in the legal literature for proof. According to Herke, Fenyvesi, and Tremmel, proof is a cognition process, where the authorities aim to explore the events that happened in the past for a single case. In this procedure, authorities collect evidence and data which can be relevant to the criminal case in which they investigate. The result of proof is that the court can establish the statutory provisions according to the truth. The process must have a legal basis. In their concept, they aimed to combine different approaches to the proof definition[3].

Evidence in criminal proceedings is data related to criminally relevant facts which are obtained from sources permitted by law, and which may therefore be used in their entirety to determine the relevant statutory provisions of criminal law by the deciding authority[4].

For a long time, the taxonomic place of electronic data in Hungarian criminal law was not sufficiently clarified[5]. Our previous Criminal Procedure Code (the Act XIX of 1998) only contained the definition of physical evidence. Electronic data was not listed as mean of proof[6]. Under Section 115 of the previous Code, any object was considered as physical evidence if they were suitable for proving the facts to be proven. A typical example for this could be an object bearing the marks of the commission of the crime. Documents, drawings, and any data-recording objects were also included in the definition[7].

It was time to amend the regulation because people use more and more electronic telecommunication devices daily and the electronic data recorded and stored on them can be vital evidence in certain cases. The justification of the Code favored the separate naming of electronic data because these cannot be treated in all cases by analogy with physical evidence. In accordance with this, the Code defines the concept of electronic data in a chapter together with physical evidence. The law also treats electronic data as physical evidence, unless otherwise provided.

According to the law, electronic data is the appearance of facts, information, or concepts in any form which can be processed by an information system. Under the Code, a program that provides the execution of a function by the information system is also considered electronic data. Where the Code mentions a material means of proof, electronic data shall also be understood, unless otherwise provided (Section 205). This definition is similar to the Convention on Cybercrime's concept of computer data [Convention on Cybercrime from the Council of Europe (Budapest, 23.XI.2001) Article 1]. Overall, we

---

[3] C. Herke, C. Fenyvesi, F. Tremmel, *A büntetőeljárásjog elmélete* [Theory of criminal procedure law], Budapest-Pécs, Dialog Campus Kiadó, 2012, pp. 125-138.

[4] *Ibidem.*

[5] K. Sorbán, *A digitális bizonyíték a büntetőeljárásban* [Digital evidence in criminal proceedings] in Belügyi Szemle no. 11/2016, pp. 81-96.

[6] L. Dornfeld, *Az elektronikus bizonyítékszerzés aktuális kérdései* [Current Issues in Electronic Evidence] in Kriminológiai Közlemények no. 77/2017, pp. 241-256.

[7] I.Z. Máté, *A digitális bizonyíték* [Digital evidence] in IX. Jogász Doktoranduszok Országos Szakmai Találkozója [IXth National Professional Meeting of Doctoral Students in Law] 2013, Budapest, Károli Gáspár Református Egyetem, pp. 86-94.

can note that not just a single file, like a digital video, can be considered as electronic data but also an operating system in its entirety[8].

Electronic data may be generated on personal devices like smartphones or personal computers as well as high-performance servers, networks, or cloud services (e.g., iCloud, google drive etc.). Electronic data can carry different information and based on this we can differentiate between content data or metadata[9]. E-mails, chat messages, files can be examples of the former. The latter is a set of data that describes and gives information about other data. A good example for metadata can be log files on a server, or music file metadata might include the artist's name or genre of the song[10].

III. Issues on manipulating digital evidence and legality

Electronic data is often volatile and stored data can be easily and quickly manipulated, even without a trace. By breaking down a particular information system, the data stored in the system can also change. The integrity, and authenticity of the digital evidence must be ensured in the acquisition[11].

We could mention digital photos as an example that has been increasingly used as digital evidence in criminal proceedings. There are concerns about these photos whether can be admissible in front of a court hearing because these photos can be manipulated with computer software (e.g., Photoshop)12. There are also many smartphone applications nowadays that can alter the original photos.

Other concerns are related to online text messages and comments. There can be cases where somebody is framed or staged to commit a crime while they have nothing to do with these messages. Personal accounts can be hacked, and this can lead to the so-called criminal identity theft phenomenon and in unfortunate cases can result in *Justizmord* where innocent people are found guilty[13].

Digital traces can usually only be found and interpreted by qualified people. Very often, not only special expertise but also special tools are needed to retrieve this information. Obviously, in these cases, IT experts must take part and analyze digital evidence according to the law. However, at the end, the judge shall decide on the digital evidence whether will be admissible or not[14]. The judge shall ask the right questions

---

[8] I. Szabó, *Az elektronikus bizonyítékok megszerzésének időszerű problémái* [Timely problems in obtaining electronic evidence] in Ügyészségi Szemle no. 3/2018, pp. 117-160.

[9] A. Kraut, L. Kőhalmi, D. Tóth, *Digital Dangers of Smartphones,* in Journal of Eastern-European Criminal Law no. 1/2020, pp. 36-49.

[10] T. Ibolya, *XXXIII. Fejezet. Tárgyi bizonyítási eszköz, elektronikus adat* [XXXIIIth Chapter. Material means of proof, electronic data] in Kommentár a büntetőeljárási törvényhez [Commentary on the Code of Criminal Procedure], Budapest, Wolters Kluwer, pp. 459-460.

[11] *Ibidem*.

[12] D.P. Nagosky, *The admissibility of digital photographs in criminal cases,* FBI L. Enforcement Bull., 2005, p. 1.

[13] D. Tóth, *Az identitáslopás kriminológiai sajátosságai* [Criminological features of identity theft] in A bűnüldözés és a bűnmegelőzés rendészettudományi tényezői [Law Enforcement Factors in Law Enforcement and Crime Prevention], Pécs: Magyar Hadtudományi Társaság Határőr Szakosztály Pécsi Szakcsoport, 2019, pp. 207-213.

[14] A. Bendes, *A szakértő szerepe a digitális adat elemzése során a büntetőeljárásban* [The role of the expert in the analysis of digital data in criminal proceedings] in I-II. Konferenciakötet: A pécsi jogász doktoranduszoknak szervezett konferencia előadásai [I-II. Conference volume: Presentations of the conference organized for doctoral students of law in Pécs], Pécsi Tudományegyetem Állam– és Jogtudományi Kar Doktori Iskola, Pécs, 2021, pp. 68-76.

to the expert and interpret the expert's opinion. This is a somewhat paradoxical situation where the expert understands the major facts on the evidence and the court will just filter the essence of it (the so-called iceberg effect). Parti recommends that lawyers should be trained in basic IT skills. Lawyers equipped with IT skills will see not only the surface of the case, but they will already have ideas about what might have happened to the digital evidence and what aspects should be examined[15].

In connection with this, the evidence must be traced, gathered, secured, and used in compliance with the provisions of the in-force regulation irrespective of the physical or digital nature. In this aspect, two parties have duties to ensure legality. On one hand the lawmaker more precisely, the Parliament must lay down and set the rules for the proof system. The lawmaker must follow the changes in society and give a legal framework for the new life situations.

On the other hand, law enforcement must apply and follow the legal framework to ensure that justice is delivered in individual cases. They shall collect evidence pursuant to the law and eliminate the possibility of using tampered, misleading, or irrelevant evidence. During the evaluation of the evidence, the authorities shall apply the law as well.

This also imposes an obligation on law enforcement to refrain from certain acts. Facts derived from means of evidence obtained by the court, the prosecution office, or the investigating authority by way of committing a criminal action, by other illicit methods, or by the substantial restriction of the procedural rights of the participants may not be admitted as evidence in the criminal procedure. These general rules for legality must be supplemented with special provisions for the seizure and use of digital evidence.

IV. Coercive measures in connection with digital evidence

4.1. The seizure of electronic data

There are several coercive measures in the Criminal Procedure Code in relation to electronic data. Digital evidence may be seized. There is also the possibility for an obligation to preserve it or render it inaccessible temporarily.

Seizure as a coercive measure restricts the ownership of electronic data. The purpose of seizure is to obtain and preserve digital evidence for the criminal procedure[16]. The seized electronic data may contribute to the final verdict on innocence or guilt. The first question that arises is what exactly should be seized? There are three options in practice:

- seizure of the whole information system (e.g., the entire computer);
- seizure of the storage device that contains the relevant data (e.g., hard drive, or Solid-State Drive); or
- seizing only, the electronic data itself.

The first option can infringe fundamental privacy rights as many irrelevant parts of the computer will be seized which might rapidly be depreciated due to the development of technology, so it might cause financial damage as well[17].

---

[15] K. Parti, *Újratervezés, avagy miért fontos az elektronikus bizonyítékszerzés?* [Redesign, or why is electronic taking of evidence important?] in Rendészeti Szemle no. 3/2010, p. 101.

[16] M. Tóth, *A bizonyítás a büntetőeljárásban* [Evidence in criminal proceedings] in Büntető eljárásjog, Budapest: Hvg-orac Könyvkiadó, 2020, pp. 156-195.

[17] K. Sorbán, cited, pp. 81-96.

In some cases, not a single computer, but a whole server of a company might be seized which can also cause a significant financial damage to the company. The second possibility has the advantage of causing less damage to the person who suffers the seizure but on the other hand, always requires an expert for the procedure[18]. The first option used to be the practice for many years. Even the monitor or the keyboard or mouse were taken away by the police.

According to Peszleg's view, it is not enough for the investigating authority to remove only the data carriers from the computer for fear of seizing devices that are redundant during the proceedings. He mentions examples of Redundant Array of Inexpensive Disks (RAID) arrays. If the device unit is disassembled, it is no longer possible to restore the original data contained in this case[19].

According to the in-force Criminal Procedure Code, the seizure of electronic data can be carried out in all three ways. This means according to Section 315 (1) that:

- by making a copy
- by transferring,
- by making a copy of the entire contents of the information system or data carrier containing it,
- by seizing the information system or medium containing it.

A big novelty in the new Code is that according to Section 315 (2) the seizure of the electronic data used for payment may also be carried out by inhibiting the data subject from disposing of the value. These rules must be applied for the seizure of a document existing as electronic data.

The Code consists of the principle of necessity by laying down that the seizure of electronic data – if possible – shall be carried out only on data that are relevant to the criminal procedure. If they seize irrelevant data, the seizure of these should terminate as soon as possible.

An information system or data carrier containing electronic data may be seized if:

- it can be confiscated, or
- it is relevant as a mean of physical evidence, or
- the verification requires an examination of an unforeseeable or significant amount of electronic data stored therein.

The owner of the electronic data may request a copy of the data if this does not jeopardize the purpose of the criminal proceeding.

Ministerial decree (11/2003. (V. 8.) IM-BM-PM joint decree) as an important legal source supplements the regulation in connection with digital evidence. This decree regulates with the rules for the handling, registration, pre-sale, and destruction of seizures and criminal records and on the execution of confiscations. The decree gives frames for the technical way of executing the seizure of electronic data in Section 67. Pursuant to this, the seizure of electronic data shall be carried out by making a copy if:

- the conditions for leaving the seized object in the custody of the person concerned are met, and
- the continued storage of the data in the original place after the copy has been made does not jeopardize the interests of criminal proceedings.

In justified cases, a specialist consultant shall be used to make the seizure.

---

[18] *Ibidem*.

[19] T. Peszleg, *A digitális bizonyítási eszközök megszerzésének elvei és gyakorlati érvényesülésük* [Principles of the acquisition of digital means of proof and their practical application], in Ügyészek Lapja no. 2/2010, pp. 23-32.

When seizing electronic data, copying should, as far as possible, take place on a medium that cannot be subsequently altered.

If the data subject requests the sale of electronic data used for payment, this may be waived only if this is also necessary for proof.

Seized electronic data must be stored on a data carrier or in a repository provided by the authority. If the seized electronic data is stored on a separate medium, the identification number of the exhibit must be indicated on the medium.

4.2. Issues with the seizure of cryptocurrencies as digital evidence

In 2009 new type of money appeared called cryptocurrencies, like Bitcoin and Ethereum. They should not be confused with electronic money because they have very different properties. With these currencies, they use an encryption technique to regulate the generation of units of currency and verify the transfer of funds. One of the main characteristics of cryptocurrencies is that they are decentralized[20].

To illustrate the challenges of the seizure of cryptocurrencies I would like to summarize a case report written by Eszteri. The offenders have taken an amount of bitcoin of considerable value from the victim by fraud. Eszteri was an advisor in the case ordered by the court. The two accused persons have visited the victim in winter. Later they met at a parking lot of a store. The perpetrators offered 2.5 million Forints for 15 units of bitcoin. The victim brought the notebook with him to the parking lot to transfer the bitcoins. He transferred the crypto money to the address assigned by the offenders. After this, the two perpetrators tried to flee from the scene in their car but eventually, the police caught them. At first time the authorities did not mention in their report that it was a financial crime, and even though the victim asked for the seizure of the IT equipment the police failed to do so. Later the indictment contained the crime of fraud which caused a considerable amount of damage. The offenders transferred the bitcoins to several addresses, and these were untraceable. The seizure probably would have prevented the loss of the 15 units of bitcoin[21]. At the time of the case, it was a problem that the regulation did not deal with the seizure of these virtual currencies, but as I mentioned before Section 315 (2) of the new Criminal Procedure Code created the possibility of this[22].

How can we ensure the value of cryptocurrencies? To answer this question, some basic technical knowledge is required of how crypto money works. In the case of Bitcoin, you need a wallet (a program) to store your virtual coins. This wallet has a unique address that can be created by a certain algorithm (in the case of bitcoin it is called an elliptical curve digital signature algorithm). The algorithm creates a private key and a public key which are mathematically linked to each other. The public key will be the owner's address (just like a bank account number) while the private key proves who is the owner of the wallet. The private key allows the owner to spend his crypto money. A standard bitcoin wallet will create a wallet.dat file containing its private key.

In the case of bitcoin, the blocks represent a financial value that is never in the possession of the entitled person. The person only has the right to disposal. The

---

[20] B. Simon, *Kriptovaluták – rendészeti válaszok* [Cryptocurrencies – law enforcement responses] in Belügyi Szemle no. 10/2018, p. 77.

[21] D. Eszteri, *Egy Bitcoinnal elkövetett vagyon elleni bűncselekmény és az ahhoz kapcsolódó egyes jogi kérdések* [A crime against property committed with Bitcoin and certain related legal issues], Infokommunikáció és Jog, 2017, pp. 25-31.

[22] A. Czine, *49. A lefoglalás* [49. The seizure] in Büntető eljárásjog, Budapest: Patrocinium, 2020, pp. 243-252.

authorities may seize the wallet.dat file but this might not always ensure the value. As Szathmáry points out the seizure of the wallet.dat file will be successful with guarantees if only one file exists of it. The most reassuring way to ensure the value would be to force the owner to transfer the crypto money to a (bitcoin) wallet of the authority[23]. There can be even cases where no wallet.dat file exist at all because the owner deleted them and decided to memorize (so-called brain wallet). In these situations, it would be impossible to seize the cryptocurrency without the cooperation of the owner[24]. Overall it is a very difficult task for the lawmaker to give perfect regulation as technology advances so rapidly. It is a positive change in the current Criminal Procedure Code that the seizure of cryptocurrencies became possible. Generally, it is expected from the regulation to have a framed nature and to be sufficiently flexible for upcoming challenges of the revolution of information technology.

4.3. Obligation to preserve electronic data

The international legal background of this institution was based on Article 16 (about the expedited preservation of stored computer data) of the Convention on Cybercrime which was adopted under the auspices of the Council of Europe and was signed in Budapest[25]. Act I of 2002 modified the previous Criminal Procedure Code and introduced it to the Hungarian system in 2003 first of July[26].

This coercive measure restricts the right of the person to dispose of the data in his possession. It can be considered as a special coercive measure because it is not carried out by the authority but by a non-criminal person to whom the provision is addressed.

The obligation to retain electronic data shall be imposed by a court, prosecutor's office, or investigative authority.

An obligation to retain electronic data may be imposed in order:

- to detect a means of proof,
- to provide a means of a proof; or
- to establish the identity or actual whereabouts of the suspect.

The data subject shall prevent the alteration, deletion, destruction, transmission of the electronic data, unauthorized copying of the electronic data, or unauthorized access thereto.

During the period of coercive measures, the electronic data which are subject to the retention obligation may be accessed only with the permission of the court, the prosecutor's office, or the investigating authority and the person obliged to retain the retention order.

Following the obligation to retain electronic data, the person ordering the retention obligation shall immediately begin the review of the electronic data. As a result of the review, the person ordering the retention order decides whether to order another way of carrying out the seizure or terminates the retention order. The retention obligation lasts for a maximum of three months. The obligation to retain will cease once the criminal

---

[23] Z. Szathmáry, *Az elektronikus pénz és a bitcoin biztosítása a büntetőeljárásban* [Provision of electronic money and bitcoin in criminal proceedings], in Magyar Jog no. 11/2015, 62, pp. 639-647.

[24] V. Halász, *A bitcoin működése és lefoglalása a büntetőeljárásban* [Operation and seizure of bitcoin in criminal proceedings] in Belügyi Szemle no. 7-8/2018, pp. 117-146.

[25] L. Dornfeld, *A kibertérben elkövetett bűncselekményekkel összefüggésben alkalmazható kényszerintézkedések* [Coercive measures in connection with cybercrime], Belügyi Szemle no. 2/2018, pp. 115-135.

[26] T. Ibolya, cited, p. 459.

proceedings have been completed. The detainee shall be informed of the termination of the criminal proceedings. [Section 316 (1)-(10) of the Criminal Procedure Code]

4.4. Making the electronic data temporarily inaccessible

This coercive measure was introduced in the criminal procedure in 2013 first of July just like the new Criminal Code of Hungary (Act C of 2012). The Criminal Code created a new measure called irreversibly rendering electronic information inaccessible.

The goal of the coercive measure called making the electronic data temporarily inaccessible is to ensure the enforceability of the criminal law measure and to limit the continuation of the infringements intended to be repaired in this way until the end of the criminal proceedings.

This coercive measure can be applied if two conditions are met:

- First, the temporary unavailability of electronic data may be ordered if the criminal procedure began due to public prosecution.
- Second condition is that it is necessary to make electronic data on the offense permanently inaccessible (e.g., child pornography) to interrupt the criminal offense. This coercive measure shall be ordered only by the court.

Temporary inaccessibility of electronic data may be ordered:

- by temporarily removing the electronic data, or
- by temporarily blocking access to electronic data.

The temporary removal of electronic data and the obligation to retain electronic data may be ordered together. The Criminal Procedure Code also gives the possibility of temporary removal of electronic data and temporary blocking of access to electronic data. The latter can be used in cases related to certain crimes like drug trafficking, child pornography, the act of terrorism, terrorism financing etc.[27].

The court shall by its decision oblige the electronic communications service providers to temporarily block access to the electronic data. In this coercive measure, the National Media and Infocommunications Authority (in Hungarian Nemzeti Média- és Hírközlési Hatóság abbreviated as NMHH) have a role as well which is a central state administration body in Hungary. The NMHH performs the tasks of regulating and supervising the communications and media sector in Hungary. The court shall immediately notify the NMHH about the application of the measure. After this, the NMHH shall organize and control the implementation of the coercive measure.

Lastly, the Code regulates the call for voluntary removal of electronic data, If the interests of criminal proceedings are not harmed, the prosecutor's office or the investigating authority may call on the media content provider pursuant to the Act on Freedom of the Press and Basic Rules of Media Content to order the electronic data to be removed voluntarily. The request is optional and aims to speed up the blocking of access to electronic data. (Section 338).

V. Jurisdictional challenges

Due to character limitations, I would like to just briefly mention the jurisdictional challenges of digital evidence. Jurisdiction is a legal term used in international law. Under this institution, a state has the right to legislate, apply and enforce the law. The

[27] L. Kőhalmi, *Gondolatok a vallási indíttatású terrorizmus ürügyén* [Thoughts on the pretext of religiously motivated terrorism], in Belügyi Szemle 7-8/2015, pp. 52-71.

jurisdiction creates the possibility of the application of the law. Due to the internet digital evidence can be found in different countries in certain legal cases. Cyber-attacks can be initiated from one country and the victim can be found in another country. In the end, this can lead to jurisdictional conflicts when more states have the right and the intention to proceed in a criminal case containing international elements (so-called positive jurisdictional collision). We elaborated on this issue in another article with my colleague in detail[28]. The European Union created in 2018 a package of the proposal which could solve these issues in the future[29]. The new system would make the procedure faster for judicial authorities to access data of criminal investigations[30]. Unfortunately, these have not been adopted yet until the study was written.

VI. Summary and suggestions

In my opinion, it will be necessary for the future to train lawyers (especially judges, prosecutors, attorneys) with the basic information about the challenges of digitalization. We should also consider creating special branches within courts that deal with cases where cybercrime and digital evidence are determinative.

Mezei argues that the regulation is a step forward, but the methodological issues of seizure should be addressed by the law[31]. In my opinion, the current legislation on a statutory level is sufficient and meets the criteria to be precise clear, and necessary[32]. The methodological issues might be regulated in more detail on a decree level. On the other hand, the substantive criminal law still has not dealt with cryptocurrencies which are currently in a legally grey area in this aspect. These payment methods are not considered as money or cash-substitute payment instruments which should be changed in the future in order to have a comprehensive regulation.

References

1. Balázs, E., *Informatikus szakértés a büntetőeljárásban* [IT expertise in criminal proceedings], *in* Belügyi Szemle, 7-8/2014.

2. Bendes, A., *A szakértő szerepe a digitális adat elemzése során a büntetőeljárásban* [The role of the expert in the analysis of digital data in criminal proceedings] in I-II. Konferenciakötet: A pécsi jogász doktoranduszoknak szervezett konferencia előadásai [I-II. Conference volume: Presentations of the conference organized for doctoral students of law in Pécs], Pécsi Tudományegyetem Állam – és Jogtudományi Kar Doktori Iskola, Pécs, 2021.

---

[28] D. Tóth, Z. Gáspár, *Jurisdictional challenges of cybercrime,* in Journal of Eastern-European Criminal Law no. 2/2020, pp. 101-118.

[29] L. Dornfeld, *A határokon átnyúló elektronikus bizonyítékgyűjtés szabályozása az EU-ban* [Regulation of cross-border electronic taking of evidence in the EU], in Infokummikáció és Jog 73, 16, 2020, pp. 37-42.

[30] A.T. Pastrana, *The proposal on electronic evidence in the European Union*, in Eucrim: The European Criminal Law Associations' Forum, 2020, pp. 46-50.

[31] K. Mezei, *Az elektronikus bizonyítékokkal kapcsolatos kihívások és szabályozási újdonságok* [Challenges and regulatory innovations in electronic evidence] in Belügyi Szemle no. 10/2019, pp. 25-40.

[32] L. Kőhalmi, *A büntetőjog alapproblémái* [Basic problems of criminal law], Pécsi Tudományegyetem Állam – és Jogtudományi Kar, Pécs, 2012.

3. Czine, A., *49. A lefoglalás* [49. The seizure] in Büntető eljárásjog, Budapest: Patrocinium, 2020.

4. Dornfeld, L., *A határokon átnyúló elektronikus bizonyítékgyűjtés szabályozása az EU-ban* [Regulation of cross-border electronic taking of evidence in the EU], in Infokummikáció és Jog 73, 16, 2020.

5. Dornfeld, L., *A kibertérben elkövetett bűncselekményekkel összefüggésben alkalmazható kényszerintézkedések* [Coercive measures in connection with cybercrime], Belügyi Szemle no. 2/2018.

6. Dornfeld, L., *Az elektronikus bizonyítékszerzés aktuális kérdései* [Current Issues in Electronic Evidence] in Kriminológiai Közlemények no. 77/2017.

7. Eszteri, D., *Egy Bitcoinnal elkövetett vagyon elleni bűncselekmény és az ahhoz kapcsolódó egyes jogi kérdések* [A crime against property committed with Bitcoin and certain related legal issues], Infokommunikáció és Jog, 2017.

8. Gál, I.L., *A koronavírus (COVID-19) és az általa okozott gazdasági világválság lehetséges hatásai a bűnözésre* [Potential effects of the coronavirus (COVID-19) and the global economic crisis on crime], in Magyar Jog no. 5/2020.

9. Halász, V., *A bitcoin működése és lefoglalása a büntetőeljárásban* [Operation and seizure of bitcoin in criminal proceedings] in Belügyi Szemle no. 7-8/2018.

10. Herke, C., Fenyvesi, C., Tremmel, F., *A büntetőeljárásjog elmélete* [Theory of criminal procedure law], Budapest-Pécs, Dialog Campus Kiadó, 2012.

11. Ibolya, T., *XXXIII. Fejezet. Tárgyi bizonyítási eszköz, elektronikus adat* [XXXIIIth Chapter. Material means of proof, electronic data] in Kommentár a büntetőeljárási törvényhez (Commentary on the Code of Criminal Procedure), Budapest, Wolters Kluwer.

12. Kőhalmi, L., *A büntetőjog alapproblémái* [Basic problems of criminal law], Pécsi Tudományegyetem Állam – és Jogtudományi Kar, Pécs 2012.

13. Kőhalmi, L., *Gondolatok a vallási indíttatású terrorizmus ürügyén* [Thoughts on the pretext of religiously motivated terrorism], in Belügyi Szemle no. 7-8/2015.

14. Kraut, A., Kőhalmi, L., Tóth, D., *Digital Dangers of Smartphones,* in Journal of Eastern-European Criminal Law no. 1/2020.

15. Máté, I.Z., *A digitális bizonyíték* [Digital evidence] in IX. Jogász Doktoranduszok Országos Szakmai Találkozója [IXth National Professional Meeting of Doctoral Students in Law] 2013, Budapest, Károli Gáspár Református Egyetem.

16. Mezei, K., *Az elektronikus bizonyítékokkal kapcsolatos kihívások és szabályozási újdonságok* [Challenges and regulatory innovations in electronic evidence] in Belügyi Szemle no. 10/2019.

17. Nagosky, D. P., *The admissibility of digital photographs in criminal cases,* FBI L. Enforcement Bull., 2005.

18. Parti, K., *Újratervezés, avagy miért fontos az elektronikus bizonyítékszerzés?* [Redesign, or why is electronic taking of evidence important?] in Rendészeti Szemle no. 3/2010.

19. Pastrana, A.T., *The proposal on electronic evidence in the European Union*, in Eucrim: The European Criminal Law Associations' Forum, 2020.

20. Peszleg, T., *A digitális bizonyítási eszközök megszerzésének elvei és gyakorlati érvényesülésük* [Principles of the acquisition of digital means of proof and their practical application], in Ügyészek Lapja no. 2/2010.

21. Simon, B., *Kriptovaluták – rendészeti válaszok* [Cryptocurrencies – law enforcement responses] in Belügyi Szemle no. 10/2018.

22. Sorbán, K., *A digitális bizonyíték a büntetőeljárásban* [Digital evidence in criminal proceedings] in Belügyi Szemle no. 11/2016.

23. Szabó, I., *Az elektronikus bizonyítékok megszerzésének időszerű problémái* [Timely problems in obtaining electronic evidence] in Ügyészségi Szemle no. 3/2018.

24. Szathmáry, Z., *Az elektronikus pénz és a bitcoin biztosítása a büntetőeljárásban* [Provision of electronic money and bitcoin in criminal proceedings], in Magyar Jog no. 11/2015, 62.

25. Tóth, D., *Az identitáslopás kriminológiai sajátosságai* [Criminological features of identity theft] in A bűnüldözés és a bűnmegelőzés rendészettudományi tényezői [Law Enforcement Factors in Law Enforcement and Crime Prevention], Pécs: Magyar Hadtudományi Társaság Határőr Szakosztály Pécsi Szakcsoport, 2019.

26. Tóth, D., Gáspár, Z., *Jurisdictional challenges of cybercrime* in Journal of Eastern-European Criminal Law no.2/2020.

27. Tóth, M., *A bizonyítás a büntetőeljárásban* [Evidence in criminal proceedings] in Büntető eljárásjog, Budapest: Hvg-orac Könyvkiadó, 2020.

Free Will in Criminal Law Through the Lens of Neuroscience

Vadim Khiluta*

Abstract

The article deals with the problem of the ratio of free will and guilt of a person through the prism of recent research in neuroscience. Key aspects of understanding guilt in criminal law and its relationship to free will have been identified. Deterministic and Indertermist approaches to determining the essence of freedom of will in the doctrine of foreign criminal law are disclosed. The purpose of the study is to determine the essence and significance of freedom of will in understanding the institution of guilt and to correlate freedom of will with the basis of criminal responsibility. On this basis, it is proposed to establish scenarios for the development of criminal law in the event of a rejection of the principle of guilt and to outline the prospects for the functioning of criminal responsibility in the context of the security doctrine. According to the results of the study, it was proposed to maintain the existing concept of freedom of will and indeterminism as the basis for criminal liability. It is proposed to distinguish between the concepts of "free will" and "freedom of action".

Keywords: *criminal law, responsibility, free will, guilt, crime, punishment, guilt, neuroscience.*

I. A new perspective on the understanding of free will

Free will is the cornerstone of Western European criminal law. The debate about understanding free will in the philosophy of criminal law does not stop silent. However, not only in the field of criminal law. The point is not even what approach to take as a basis: determinism or indeterminism, compatibilism or incompatibilism. The denial of free will or the illusion of this phenomenon creates new standards in the understanding that there is a crime and that a person can be prosecuted and whether at all. Here, the main rebuke to law (to criminal, including) is that it is very conservative and does not want to take into account new discoveries in neuroscience, and cannot abandon the postulate of free will[1]. And on this occasion, it was increasingly said that free will is incompatible with scientific considerations and the concept of guilt.

Recall that at the heart of the modern doctrine of criminal law, the central element of the crime is an act that is relatively free, and which is accepted by the subject himself.

* PhD, Associate Professor of the Department of Criminal Law, Yanka Kupala State University of Grodno (Republic of Belarus). Contact: tajna@tut.by.

[1] Some researchers even give the impression that "the science of criminal law is immune from criticism of free will". That is, the consistency of the precondition of free will cannot be discussed at all in criminal law. H. Kudlich, *Die Kritik der hirnforschung an der willensfreiheit als chance für eine neudiskussion im strafrecht* [Brain research's criticism of free will as an opportunity for a new discussion in criminal law] in Onlinezeitschrift für Höchstrichterliche Rechtsprechung zum Strafrecht no. 2/2005, p. 43.

The school of classical criminal law assumes that guilt and responsibility imply free will. Without free will, there is no responsibility. A strong-willed capacity, in the absence of which the subject is not responsible, means that the person has the ability to act in accordance with his own motives and can control his behavior. In this regard, punishment as a form of exercising criminal responsibility implies the guilt of the offender, and it is justified only if the subject acted guilty, in other words, his freedom of will can be confirmed in a non-deterministic sense. This suggests that decisions should not be based on motives of conduct or on certain reasons. People themselves determine their actions, no matter what they are conditioned on, and it is from these indeterministic positions that criminal law comes, determining the presence of free will.

However, recent discoveries in the field of brain functioning indicate that a person is not free in his self-determination, he does not act freely, because he is subordinate to his unconscious. In this respect, free will is relative and does not shape our actions. Usually, here we refer to the experiment of B. Liebet, who recorded that the action does not begin with will, the potential for readiness to act in a certain way is not related to the freedom of choice of a person[2]. Literally, this means that almost nothing remains of free will, that human actions are as deterministic as all causal processes in nature[3]. In fact, in all this paradigm, free will is designed (at best) to be a controlling function where free will exercises control over the readiness potential, that is, a strong-willed decision follows the readiness potential and either approves or stops the action.

In addition, non-compliance with the consequences of criminal law on the basis of free will raises a number of other questions, where the importance of the precondition of free will is questioned:

a) in the presence of free will, the preventive purpose of punishment "does not work", because in such a system the prevention of crime is unnecessary and meaningless. Thus, the purpose of crime prevention is unnecessary because any perpetrator can act within the framework of existing legislation and attempts to psychologically influence it (or rather its will) through educational and restraining measures are meaningless. Such psychological influence is excluded if a person cannot decide and make his own decision. There is no free will[4];

---

[2] According to American scientists, it was found that, at least in the case of simple movements, conscious will decision is always preceded by unconscious neural activity, the so-called readiness potential, that is, this readiness potential never coincides with a conscious human decision. For this observation, later they even coined the phrase: "We do not do what we want; we want what we do". Subsequently, these B. Libet results were confirmed by other scientists. This meant that at the heart of the individual phenomena observed during the functioning of the brain, it is empirically difficult to support the idea of human "free will". These researchers' scientific findings are also consistent with both psychological evidence of actions (e.g., experiments with signals or electrical brain stimuli) and neurobiological evidence of control of arbitrary actions. In the end, the results of the research are that the final decision is made 1-2 seconds before this decision is realized and the person has a desire to perform the action. Therefore, on the one hand, people can attribute to themselves actions that they did not commit, and on the other hand, they can deny actions in respect of which they can be proved to be their executors. B. Libet, *Mind time: The temporal factor in consciousness, Perspectives in Cognitive Neuroscience*, Harvard, 2004.

[3] J. Feinberg, *The moral limits of the criminal law*, Oxford, 1984.

[4] G. Spilgies, *Die Bedeutung des Determinismus-Indeterminismus-Streits für das Strafrecht. Über die Nichtbeachtung der Implikationen eines auf Willensfreiheit gegründeten Schuldstrafrechts* [The significance of the determinism-indeterminism dispute for criminal law. About the non-observance of

b) the statement of free will is contrary to criminological studies of the causes of crime. This is due to the fact that under such a paradigm, the search for the causes of crime is also meaningless, because there are no reasons for the crime, subject to free will. In this regard, all criminal etiological research seems superfluous, since it is carried out only in order to prevent criminal crimes by eliminating the reasons already identified, and if there is freedom of human will, then it is not related to the causality of the decisions made by the subject (within the framework of indeterministic concepts);
c) free will is not taken into account when choosing a punishment, since freedom of will cannot be measured on a certain scale (it does not increase or decrease, but is simply stated). This leads to the exclusion of the possibility of justifying a person through a certain motive in his behavior, because if there is a deterministic motive, then by definition he excludes a non-deterministic approach to free will. In other words, if we recognize the existence of free will, then why, in a number of situations, do we put forward grounds for exempting a person from criminal responsibility on the grounds of some kind of motivational behavior?

II. Free will as an illusion

As you know, criminal law forms the reaction of the state to criminal behavior. Such conduct is determined on the basis of a standard, which indicates what a person should and can do and what is a violation (unlawful act), since it deviates from these standards – regulatory rules of conduct. The presumption of the legislator in this case (responsibility is the norm, irresponsibility is the exception) implies a certain idea of what normality is (permitted behavior).

As indicated in the Western European literature, one element of responsibility is the will ability (the ability to determine itself according to this assessment), that is, the ability to act in accordance with their own motives and exercise control over their behavior. In order to be found guilty, a person who has committed an act must be able to act in accordance with what he is motivated by knowledge of the regulatory rule. Thus, he will be found irresponsible if, knowing how to act contrary to the law, he could not do anything about himself[5].

Therefore, having a strong-willed ability implies for a responsible person the ability to determine his act. He has a will that he can freely exercise: when faced with a situation that he assesses as illegal, he can refrain from actions and, thus, control his behavior. It is this free will that distinguishes normal from abnormal, responsible from irresponsible.

According to the moral concept of guilt, a person is responsible because he made mistakes using his free will. Thus, responsibility depends on a certain freedom of will. However, responsibility is of great importance beyond its understanding solely as a condition of guilt. The very concept of responsibility has its own and autonomous significance in the face of a crime that goes beyond a person's mere capacity to be guilty. The lack of free will does not mean that the fate of man cannot be changed. On the contrary, determinism assumes that its (human) actions are determined by many factors, and many of them are not congenital, but are the result of the environment in

the implications of a criminal law based on free will], Verlag Dr. Kovac, Hamburg, 2004, p. 200.

[5] J. Didisheim, *Déterminisme et Responsabilité Pénale: Inconciliables?* https://sui-generis.ch/article/view/sg.29/618/.

which the subject develops. From this point of view, free will indicates that human actions are not determined only by physical causality. And in this context, free will is an illusion, because human behavior depends on many external and internal factors.

The cornerstone here for determinism is the latest neuroscience studies of brain decision-making mechanisms. And as we know, these studies have shown that our decisions are influenced by many causes and conditions. Hence the assumption that the idea of free will is an illusion. It is argued that our choice is by no means free, and sometimes we cannot do quite differently in different situations. The choice cannot be fully determined, it is influenced by many factors that go beyond the characteristics traditionally attributed to free will: the structure of the brain or external simulations can be a source of movements, decisions, pathologies. The slightest brain damage, the slightest change in neuronal functioning can affect the content of the decision.

By and large, this provision indicates that an important part of the decision-making process is unconscious. As J. Didisheim emphasizes, of course, it is impossible to establish that we are deterministic in the true sense of the word, but the achievements of recent years have shown that we are limited in our choice[6]. Man is the product of his genes, his brain and his environment. Its actions are controlled by areas of the brain inaccessible to consciousness. And therefor are not subject to his control[7]. Although, today people believe that they are free in their decisions, but in fact, as neuroscientists believe, "they are the executors of their brains".

In this regard, J. Didisheim wonders: does a person have a special ability, a will that can be shown freely, that is, without any restrictions? And he summarizes: if freedom is understood as "full consciousness", then the answer seems to be negative[8]. The logic of determinism in this case is that the choice of a person depends on many factors, such as genetics, brain structure, life experience, context etc.[9]. And if we consider neurobiological determinism in its classical understanding, then we will not be able to confirm the existence of free will by the simple argument that life in society would be impossible without it.

In stating this, there is an unequivocal conclusion. Its essence is that freedom of will and the resulting concept of guilt are "necessary fiction for the state and legalized by it", which primarily serves to maintain the legal order[10]. The traditional concept of criminal responsibility, which is based on the guilty conduct of a person, makes the entire criminal law system incompatible with determinism. Guilt cannot justify responsibility, and the preventive functions of criminal punishment do not depend on free will[11].

---

[6] J. Didisheim, cited.

[7] I. Breuer, *Ist Verantwortung eine Illusion?* [Is responsibility an illusion?] https://www.deutschlandfunk.de/ist-verantwortung-eine-illusion.1148.de.html?dram:article_id=180844.

[8] J. Didisheim, cited.

[9] The determinism of human behavior, which has previously been affirmed by religious, psychoanalytic or behaviorist parties, has recently been presented mainly by neuroscience studies. Behind this is the idea of peace as a physically causally closed system with fixed relationships between causes and consequences. Experiments with imaging methods show that processes that are hidden from consciousness lead to solutions, and that only then do we come up with the reasons for our actions. V. Ulrich, *Psychiatrische Gutachten* [Psychiatric Opinions], https://www.aerztezeitung.at/ archiv/ oeaez-2012/oeaez-1516-15082012/psychiatrische-gutachten-zurechnungsfaehigkeit-freier-wille. html.

[10] W. Schild, *§ 20 StGB* [Section 20 of the Criminal Code], http://www.jura.uni-bielefeld.de/ lehrstuehle/schild/nomos___20.

[11] Here, the most radical neuroscientists argue that neuroscience today suggests that no one is really responsible, because we are not agents – but victims of neural circumstances that mechanically produce our epiphenomenic thoughts and movements of our bodies.

The freedom of the personal self in relation to the brain should not be determined by law. And if today no one can prove the opposite from a philosophical and legal point of view, then this indicates that the concepts of criminal responsibility and freedom of will used are not correct[12]. Free will in the legal sense is a concept that is used in a contradictory way and in its current wording is not a sufficient basis for establishing guilt and punishment. In this sense, the apologists of determinism very clearly indicate their position, which indicates that "it is wrong to base the concept of guilt on free will, taking will ability as a condition of responsibility"[13].

III. Frontiers of free will and criminal liability

What could all this led to? By shifting the latest neuroscience results to the ground of jurisprudence, they should bring about profound changes in human self-esteem and remove the basis of the principle of personal responsibility as a central one in criminal law. One might even think that if criminal law and criminological theories were formulated as deterministic causal laws, then according to them the individual sanity of the subject would be excluded.

Nevertheless, the issue of free will is a problem only when the law requires that freedom[14]. Today, freedom of will is directly linked to guilt, where criminal guilt is the accusation of a person for committing a crime (misconduct). This accusation links the offender and his act, which involves reconciling his will with understanding what is being done and managing the person's actions. Thus, there is a violation of the legitimate will, when the executor must be able to form his will and relate it to the act being committed. In this case, from a criminal legal point of view, the established model of free will can be understood as an attempt to fill the concept of guilt with material content. And this material content reflects free will.

So, if we argue that there is no freedom of will in criminal law, then what should be the basis when we are talking about bringing a person to criminal responsibility? What element will lie at its base?

Concepts that do not link the preventive functions of criminal law to free will are based on the fact that criminal liability is possible without guilt. Here, guilt is measured not by the conscious and cognitive abilities of the criminal, but by a general warning. In other words, free will is not a prerequisite for punishment, and the degree of punishment must be measured on the basis of the preventive needs of society.

Proponents of reformatting criminal law (without free will) proceed from the fact that it is the sanction of a legal norm that should broadcast guilt. Here, the function of punishment is to reproach for a certain action. Thus, the punishment must be proportional to the guilt of the act. Literally following the logic presented, it can be concluded that guilt should be defined as the commission of a crime "deserving of censure", and not a "guilty act". This focuses on the judgment of disapproval of the action, and not on the moral qualities inherent in the subject of the crime.

---

[12] In this respect, the difference between the formulas used in legal systems where the concept of criminal responsibility is not exactly of the same meaning is clearly seen. "Ability to be guilty" corresponds to the current concept of responsibility, as well as the condition of guilt. "Responsibility" or "answer for" can be understood in a broader sense, which is promoted by modern determinists.

[13] W. Schild, cited; J. Didisheim, cited.

[14] M. Joite*, Willensfreiheit, schuldprinzip und grundgesetzliches menschenbild* [Free will, principle of guilt and the constitutional image of man] in Bucerius Law Journal no. 2/2013.

What is the result of this reformatting of guilt in practical terms? Only to exclude free will from understanding what constitutes guilt in a socio-psychological context. That is, there is no awareness, there is no guilt, but only a rebuke from society and the state as a "social contract". For law enforcement, professing the psychological concept of guilt is a serious blow[15].

IV. Will there be a new criminal law without guilt?

However, it still seems that freedom of will is currently mixed by researchers with freedom of action. Of course, the will can be causally caused by various motives. It is clear that an emotionally charged motive more than another will induce a person to commit a certain (in our case, criminal) action. But this does not exclude at all that such a motivated person can freely decide against this action, determined by his will.

But our consciousness is not identical to will, but simply a prerequisite for strong-willed action. Consciousness itself does not allow a person to act. It only creates an opportunity to compare motives with each other and decide which motive prevails. This operation is determined not by our consciousness, but by our feelings (actions)[16].

From this point of view, free will is the same coercion, but not external, but internal. A person forces himself to choose the best possible behavior and perform a certain act. Or conversely, when we talk about free will, we talk about the illusion of such freedom, because we make a decision under duress, but we do not realize this fact, believing that we are acting freely. In this regard, free will is unequal to the understanding of "freedom of action". Of course, today we proceed from the fact that moral and criminal responsibility is associated with the act of a person (a physical, imputed person who has reached the age of criminal responsibility). Nevertheless, it is possible to commit a certain act, but at the same time not be completely free. It is not a question of physical or mental coercion, i.e. external coercion, when the choice is small or not at all, but of the fact that a person may not want certain criminal consequences, but for various reasons internally agrees to carry out the act and even then criminal consequences occur. In this case, there is no complete freedom, it is retouched by various factors and circumstances.

Other arguments in this matter can be cited, referring to inconsistencies in criminal law. For example, if we are talking about a careless form of guilt, then the intellectual component of guilt does not provide for an element of awareness in criminal behavior at all. Does this mean that there is no free will with criminal frivolity and negligence? Or, nevertheless, free will is unequal to understanding freedom of action and these concepts need to be distinguished.

At the same time, new discoveries in the world of science, disputes between determinism and indeterminism remain as unresolved as before, even taking into account quantum and wave mechanics, the Heisenberg uncertainty principle etc. All this rather suggests that there are still uncertain areas that can be interpreted in different ways.

---

[15] Z. Pavlovic, *About legality of online trials in criminal procedure,* in Journal of Eastern-European Criminal Law no. 2/2020, pp. 33-41; В.В. Хилюта (Hiluta), *Глобальная инструментализация уголовного права* [Global instrumentalization of criminal law], Moscow: Yurlitinform, 2020, pp. 31-43.

[16] K. Günther, *Hirnforschung und strafrechtlicher Schuldbegriff* [Brain research and the concept of criminal guilt] in Kritische Justiz no. 2/2006, pp. 116-132.

If we take the same results of the experiments of B. Libet and his followers, then they are primarily based on the fact that certain brain activity associated with conscious actions systematically preceded the conscious intent of a person, and numerous interpretations suggested that conscious will was not the reason for our actions, that we did not have free will, and therefore we cannot be held responsible. However, such conclusions had nothing to do with criminal law and responsibility, since the origin of the intention was irrelevant. Criminal liability requires establishing the ability of a person to act in such a way as to be able to accept the realization of an appropriate intention, taking into account knowledge of social norms that determine what is acceptable and what is unacceptable to him.

Neuroscience and its tools, especially brain imaging, can only prove permanent abnormalities, not temporary conditions that coincide with the time of events and have already disappeared in a criminal case in court[17]. Moreover, it was impossible to know whether the anomaly observed was prior to or subsequent to the crime. The thesis that turning to behavior is important for correctly interpreting brain activity becomes important when using data-based methods to "decode" the intentions or thoughts of the accused. However, "decoded" patterns of activity alone do not indicate whether the brain actually uses these patterns to perform a task or to achieve a certain cognitive goal[18].

Nevertheless, today it is quite obvious that the denial of freedom of will by ricochet beats on the principle of personal guilty responsibility and the very understanding of guilt in criminal law (also as a key sign of the crime). If there is no free will, then we are forced to state that there is no guilt and the crime itself.

What is the way out of all this if a person is not free in his act? Social prevention or therapy? To a certain extent, this can be allowed if someone stole a wallet from someone, and he was not free in his act, because following the theory of determinism, a person was held hostage by various factors and circumstances and in fact the brain controlled him, and not his will[19]. In this situation, it is possible to use elements of restorative justice and try to find a compromise, continue to prevent and prevent the commission of illegal acts etc. But if a murder is committed, how to be here? Is prevention permissible in this case or will it be about therapy only? The system of penalties, based solely on prevention, seems rather problematic, because it is not immune from security violations and excessive repression, the risk of increasing relapse. In the context of the reasoning of the supporters of determinism, a rather strange situation turns out: "the criminal is not responsible for the action, but still must answer for this action according to his motives".

In our opinion, behind all this legal discourse on free will lies one important detail, indicating that the task is to reset the criminal law itself, which will be based on

---

[17] A. Bigenwald, V. Chambon, *Criminal responsibility and neuroscience: no revolution yet.* https://www.frontiersin.org/articles/10.3389/fpsyg.2019.01406/full.

[18] It should also be noted that in German literature, Libet's experiment lends itself to fierce criticism, since, as indicated, B. Libet gave a tendentious description of his experiment and the "action of will" was actually equated with the "feeling" of muscle tension. (See: W. Schild, *op. cit.*). Waiting for momentum cannot replace the presence or absence of free will. Free choice is given only if the conflict between the different motives is to be resolved by reflection and weighing. If there is no conflict, if desire and reason coincide or if we are talking only about alternatives of equal value (for example, which book should be taken from a stack in a bookstore), then there is no need for a choice, so there is only one desire.

[19] I. Breuer, cited. Interestingly, in the spirit of the considerations expressed, these motives are controlled by neurons and that is why the offender is not to blame.

the principle of objective imputation, not subjective. All these arguments about the mutual smoothing of guilt, social therapy, the use of non-punitive means and elements of restorative justice in the presence of social conflicts in the criminal legal sphere seem to take us aside. Because the main idea that they are trying to convey to us in this way is the idea of security. That is, criminal law should no longer speak of guilt and punishment, but of danger and prevention.

In fact, this means that if a person commits a wrongful act (or worse, is able to do so), social protection and security measures (the principle of deterrence) should be applied to him in the framework of preventive measures and social reproach. This function (the application of social protection and security measures) remains only in the hands of the state. A crime in such a paradigm will be connected only with the committed act, and guilt will be of secondary importance (for if there is no free will, then this place will take an external element – social reproach on the part of society and the state). Any criminal turns into a sick person who needs help. The only question in this case is how, by whom and how the measure of criminal responsibility will be determined for such persons. It seems that history already knew such research.

All this can lead to the fact that the offender will be considered only as a combination of causes and consequences, which, in turn, should be under the causal influence of the State, based on the declared need for protection. In such a paradigm, no one will ask about the responsibility of the offender for his act (illegal act), still will try to find the most dangerous people in advance, and then take preventive measures. However, unlike charges of committing a crime, such a "danger test" can be carried out only in a vague space of probabilistic statements, and nothing more[20].

The arguments expressed by supporters of determinism, where there is no place for free will in the concept of guilt, push us to a situation of total neurodomination, in which social processes are not applied in the calculation, and priority is the experience of a neuroscientist stating that someone has too few frontal lobes in the cerebral cortex etc., the principle of deterrence and social protection should therefore be applied to such persons. Obviously, criminal liability without guilt is based on the principles of prevention and proportionality, where the center of gravity shifts towards preventive measures «*défense sociale*». However, in such a plane, not only the actions committed by the person are taken into account, but also the actions expected of him.

V. Instead of a conclusion

Thus, today criminal law is faced with the choice of whether to move it from a retributivist concept of law, in which the offender deserves punishment, to a consequentialist concept, where security, deterrence, prevention and treatment considerations prevail.

Of course, a truly scientific, mechanistic view of the nervous system makes the very idea of responsibility meaningless. However, should neuroscience really revolutionize criminal law? Neuroscience cannot create a revolution in jurisprudence, it can only improve existing practices in terms of stating mental disorders or differential diagnosis. Neuroscience results can influence social institutions, but only because they are also involved in their formation, persuade the population and take into account the resulting consequences. The notion of determinism put forward by neuroscience,

[20] K. Günther, cited.

reducing each of our actions to their neurological and unconscious causes and, therefore, treating them as simple events rather than deliberate actions, would seem to make it possible to allow alternative results to apply to the concept of "free will". If we translate this into criminal law, then it turns out that "criminal liability is not based on free will, but on practical, subjective and political considerations"[21].

Nevertheless, the institution of criminal responsibility lies in the ability of the individual to experience free will, a subjective sense of causal responsibility for his actions and their consequences. In this regard, criminal responsibility depends mainly on our subjective experience, the impression of being able to act or avoid action. Thus, freedom of action is an objective fact that is demonstrated by the behavior of people and the consequences of this behavior. Still, the brain does not commit any crime, and the illegal act is done by human hands.

Therefore, no scientific discovery, no matter how significant it may seem, itself does not require the overthrow or modification of social institutions, including punitive ones. Cognitive neuroscience and related disciplines (cognitive psychology, neuroeconomics etc.) will not change the paradigm of criminal responsibility and the principle of guilt, but can only inform this paradigm, in order to provide scientific foundations for understanding what freedom of will is based on and how to be with the principles of criminal law. Even assuming that a reasonable person will have several brain implants in the future, the criminal law will still remain unchanged. Only the social and legal norm that will affect only cases of objective responsibility (i.e. cases of inaction) can be subject to change, but actions will still be evaluated through the prism of subjective responsibility (i.e. the subjective ability to have a sense of free will, distinguish the good from the bad etc.).

References

1. Bigenwald, A., Chambon, V., *Criminal responsibility and neuroscience: no revolution yet.* https://www.frontiersin.org/articles/10.3389/fpsyg.2019.01406/full.

2. Breuer, I., *Ist Verantwortung eine Illusion?* [Is responsibility an illusion?] https://www.deutschlandfunk.de/ist-verantwortung-eine-illusion.1148.de.html?dram:article_id=180844.

3. Didisheim, J., *Déterminisme et Responsabilité Pénale: Inconciliables?* https://sui-generis.ch/article/view/sg.29/618/.

4. Feinberg, J., *The moral limits of the criminal law*, Oxford, 1984.

5. Günther, K., *Hirnforschung und strafrechtlicher Schuldbegriff* [Brain research and the concept of criminal guilt] in Kritische Justiz no. 2/2006.

6. Joite, M., *Willensfreiheit, schuldprinzip und grundgesetzliches menschenbild* [Free will, principle of guilt and the constitutional image of man] in Bucerius Law Journal no. 2/2013.

7. Kudlich, H., *Die Kritik der hirnforschung an der willensfreiheit als chance für eine neudiskussion im strafrecht* [Brain research's criticism of free will as an opportunity for a new discussion in criminal law] in Onlinezeitschrift für Höchstrichterliche Rechtsprechung zum Strafrecht no. 2/2005.

8. Libet, B., *Mind time: The temporal factor in consciousness, Perspectives in Cognitive Neuroscience*, Harvard, 2004.

[21] A. Bigenwald, V. Chambon, *op. cit.*

9. Pavlovic, Z., *About legality of online trials in criminal procedure,* in Journal of Eastern-European Criminal Law no. 2/2020, pp. 33-41; В.В. Хилюта (Hiluta), *Глобальная инструментализация уголовного права* [Global instrumentalization of criminal law], Moscow: Yurlitinform, 2020.

10. Spilgies, G., *Die Bedeutung des Determinismus-Indeterminismus-Streits für das Strafrecht. Über die Nichtbeachtung der Implikationen eines auf Willensfreiheit gegründeten Schuldstrafrechts* [The significance of the determinism-indeterminism dispute for criminal law. About the non-observance of the implications of a criminal law based on free will], Verlag Dr. Kovac, Hamburg, 2004.

11. Ulrich, V., *Psychiatrische Gutachten* [Psychiatric Opinions], https://www.aerztezeitung.at/archiv/oeaez-2012/oeaez-1516-15082012/psychiatrische-gutachten-zurechnungsfaehigkeit-freier-wille.html.

12. W. Schild*, § 20 StGB* [Section 20 of the Criminal Code], http://www.jura.uni-bielefeld.de/lehrstuehle/schild/nomos___20.

Some Aspects of Crisis of Punishment

***Mikhail Matveyevich Babayev*[1]**
***Yuriy Yevgenyevich Pudovochkin*[2]**

Abstract

An important area of criminal law discourse in recent decades has been the idea of a crisis in criminal punishment. At the same time, the crisis of punishment is seen in the fact that it in no way can achieve the goals set for it to prevent crimes and correct the perpetrators. The article substantiates the opinion that such an approach to assessing the theory and practice of punishment is not entirely justified. The crisis of punishment is not that it is incapable of achieving a goal, but that society and the state set deliberately unattainable goals before punishment. What is called the crisis of punishment is in fact a crisis of goal-setting in criminal punishment.

Keywords: *criminal policy, crisis of criminal punishment, purpose of criminal punishment, humanization of criminal punishment.*

I. Introduction

The idea of a "crisis of criminal punishment" has become a solid part of the pool of the most important research problems of criminal policy since the second half of the 20th century. It has long been the subject of lively discussion and is still very popular in the literature. Referring to the works of T. Mathisen, N. Christie, and other authors, many experts see the crisis of punishment in its inability to achieve the noble goals of correcting criminals and preventing crimes, in its excessive harshness and even cruelty, offering substantial humanization of penitentiary practice as prospects for overcoming the crisis and the development of alternative measures to punish criminals. It seems to us that such reasoning does not quite correctly describe the real state of affairs in the field of theory and practice of the application of criminal punishment. In an article we will try to substantiate that what in science is called the "crisis of punishment" is in fact a "crisis of goal-setting of punishment."

II. Sources review

In Russian literature, a detailed description of the phenomenon of the punishment crisis given by Ya.I. Gilinsky: “Punishment, intended for millennia to perform the

[1] PhD, Honoured Scientist of the Russian Federation, Senior researcher at the Criminal Law Research Department of the Justice Issues Research Centre, Russian State University of Justice, Moscow, Russia. Contact: babaevmm@yandex.ru.

[2] PhD, Professor, Senior researcher, Head of the Criminal Law Research Department at the Justice Issues Research Centre, Russian State University of Justice, Moscow, Russia. Contact: 11081975@list.ru.

function of deterrence, reduction of crime, is not effective, does not fulfill the tasks assigned to it!"… "The crisis of punishment" is manifested, in particular, in the fact that (1) in the entire history of mankind, none of the most severe punishments (including the qualified death penalty – quartering, burning alive, pouring hot lead down the throat etc.) did not "liquidate" crime; (2) from the end of World War II to the late 1990s – early 2000s, the crime rate increased throughout the world, despite all the efforts of the police and criminal justice, and since the late 1990s and early 2000s, it has been decreasing in all countries, regardless of activities of law enforcement agencies; (3) the rate of recidivism is relatively constant for each country (and in Russia it has increased over the past ten years from 25% to 56%, which indicates the complete ineffectiveness of punishment)[3].

According to foreign scholars, the crisis of punishment is in its cruelty (the preservation of the death penalty[4]), the unjustified scale of the use of punishment[5], in the impossibility of adequately substantiating punishment either from the standpoint of retribution or from the standpoint of utilitarianism[6], and, as a consequence, in the growing attractiveness of alternatives to punishment (including restorative measures[7]) or other preventive practices[8].

Backed up by a wide body of evidence, the very idea of a punishment crisis is appealing. At the same time, we dare to suggest that the crisis of punishment in question presented in literary sources for the most part as an empirical reality, rather than a theoretical problem. In theory, the question of the crisis of punishment seems to merit a broader view. The thought seems to be correct: the practice of criminal law and punishment is far from ideal. This raises difficult questions about the relationship between theory and practice. The "gap" between theory and practice can lead to a frustrating impasse in which the empirical reality of criminal justice used as evidence against ideal theories[9].

III. Discussion

3.1. History of Punishment as History of Crises

As an initial thesis, let us express the idea that the entire history of criminal punishment is at the same time the history of its repeated crises, or, more precisely, the history of overcoming multiple crises.

---

[3] YA.I. Gilinskij, *Kriminologiya postmoderna. Neokriminologiya* [Postmodern criminology. Neocriminology] – SPb.: Aletejya, 2021, pp. 94-95; YA.I. Gilinskij, *Kriminologiya: teoriya, istoriya, empiricheskaya baza, social'nyj control* [Criminology: theory, history, empirical base, social control], 2nd ed., rev. and add., Legal Center Press, 2009, pp. 404-410.

[4] Ch. Black, *The Crisis in Capital Punishment*, Maryland Law Revew, vol. 31, no. 4/1971, pp. 289-311.

[5] D. Husak, *Retributivism and Over-Punishment*, Law and Philosophy, 2021, DOI: 10.1007/s10982-021-09422-w.

[6] M. Materni, *Criminal Punishment and the Pursuit of Justice*, British Journal of American Legal Studies, Vol. 2, Issue 1, 2013, pp. 263-304.

[7] D. Boonin, *The Problem of Punishment*, Cambridge: Cambridge University Press, 2008.

[8] F. Focquaert, E. Shaw, B. Waller (eds.), *The Routledge Handbook of The Philosophy and Science of Punishment*, Routledge, 2021.

[9] M. Matravers, *On the 'Specialness' of the Criminal Law*, Criminal Law and Philosophy, 2021. https://doi.org/10.1007/s11572-021-09611-7.

- the first historically documented crisis, perhaps, can be considered a crisis of blood feud in tribal societies and the concentration of punitive power in the hands of the state, which led to the limitation of the scale of uncontrolled violence and the formation of the punishment system itself as measures of public-legal, official, state reaction to crime (remember Russkaya Pravda and its role in forming the foundations of criminal law);
- the second clear "decay" of the punishment system is observed during the second half of the 18th – early 20th centuries, when the humanistic criticism of Beccaria and the development of sociological criminal law theories led to the expulsion of the ideas of punishment and retribution from punishment, the limitation or exclusion of extremely cruel and inhuman punishments, and the formation of an expanded system of "progressive" consequentialist measures of influence on criminals, focused on their correction and prevention of crimes (a clear evidence of the results of this crisis should be recognized gradation of punishments into "criminal" and "corrective" in the Russian Code of 1845, as well as the subsequent replacement of the category “punishment” by the category “measures of social protection" in the post-revolutionary legislation of Soviet Russia);
- the third crisis is clearly correlated with the judgments of T. Mathisen, N. Christie, J. Gilinsky, close to us in time, testifying that an attempt to achieve the goals set for "correctional" punishments can hardly be recognized as successful or effective, which led to a new modernization of the theory and practice of criminal law measures, including through the development of a restorative justice system, preventive criminal law and risk-based justice.

It is hardly true to believe that the history of crises has been exhausted and completed on this, and this ingenuous forecast prompts our opponents to focus their attention on one very important circumstance.

The three mentioned crises are at the same time three ways out of the crisis, each of which was a stage in the movement towards the humanization of the system of penalties.

If we proceed from the logic of the supporters of the crisis theory, such progress would have to be accompanied every time by a further reduction in crime. However, there is no such effect. Why? In our opinion, it is precisely this question that should have arisen in the first place before the authors of works on the crisis of punishment and put “for resolution”. Who, where, when, why and on what legal basis decided that the solution to the problem of reducing the crime rate is part of the punishment mission? What is the theoretical basis for such a decision? Why this mission has never been marked with success, and the history of many thousands of years of punishment has become a history of its failures. Alas, we are not aware of works in which similar questions arose before the authors and became the subject of in-depth research.

3.2. Humanization and effectiveness of criminal punishment

A quick overview of the main milestones in the development of punishment shows a clear connection between the categories "crisis" and "humanization": punishment is steadily (albeit with inevitable fluctuations) moving in the direction of humanization and each crisis in its development can be perceived as a public acknowledgment of the excessive cruelty of punishments, the consequence of which is another process of mitigating criminal law measures and sanctions. There is a persistent feeling that the ineffectiveness of punishment over the centuries was determined by its insufficient

humanity, and therefore the achievement of the humanistic ideals of punishment was thought of as a movement towards the effectiveness of criminal punishment.

What is called the crisis of criminal punishment should not be regarded as a purely legal phenomenon, and its overcoming by humanizing the punitive system should be associated only with the innovations of criminal law and criminal political thought.

In fact, we believe that the initial driving force here should be considered not some unacceptable state of punishment and punitive practice, called a crisis, but the onset of the next stage of the civilization process. At each of them, naturally, assessments of many values and priorities change, ethical and cultural postulates, understanding of what is good and what is evil are corrected. New concepts and views, of course, penetrate into the sphere of law, changing the idea of what is allowed and what is not, what is unacceptable even in such an acute social situation as the fight against crime. The need for general changes, updates, growing in society, has been and remains a source of progress and gives impetus to development, including in the field of criminal law.

"Efficiency" and "humanity" of punishment are, although related, but qualitatively different parameters and characteristics. An attempt to connect them together, and even more so to establish the presence of deterministic connections between them, is essentially erroneous. It, in our opinion, is direct evidence of a persistent and persistent misconception that by using criminal punishment, in principle, it is possible to solve the problem of crime.

The system of punishments should be assessed as some somewhat a given, a derivative of the political, social, economic order of things that exists in the state. Criminal law reality, accordingly, cannot be better or worse than this order of things, if only because they are formed, regulated and controlled from one source, which is the state power.

However, the initial predestination does not mean the inviolability, inability of the criminal legal institutions to change. However, in order for these changes to bring a result in which society and citizens are interested, they must be timely, scientifically substantiated and motivated by the objective innovative needs of society. This means, first, that a certain synchronization of the planned changes with changes in the life of society is necessary, i.e. a significant improvement in the living conditions of the population, the growth of their moral, political and legal consciousness, general culture etc. The above applies to the level of professionalism and the formation of progressive positions of power.

"Games" ahead of the curve, running ahead are not allowed here. One should not hope that the super-liberal system of punishments and the superhuman conditions for their execution (let us call them "Norwegian" for short) by themselves can lead the country to progress and the general triumph of humanism.

Instead of harsh imprisonment, "Norwegian" punishments are easy to enact in the law. However, they still need to find criminals who would be able to perceive (recognize) them as punishment, as a proper warning signal from the state and society and follow it. And we must add here a society that will be convinced that such laws and "humane" prisons with colonies reliably protect them from crime. Therefore, that everything else would be like in Norway.

Then (maybe!) the administration of the Russian prison without laughing will meet the complaint of the prisoner that in the morning he is not served hot enough coffee, as was the case, by the way, with the Norwegian Breivik, who was in a separate

two-room cell with all the amenities and means of communication, who shot more than 70 people from the machine.

With these words, we least of all justify and defend the order and manners prevailing in the modern penitentiary system, the conditions for serving sentences in many prisons and colonies with their, sometimes blatant cruelty, towards those awaiting punishment and convicted persons. It is about something completely different, about the inadmissibility of extremes, about the need for thoughtful proportionality in solving problems behind which the fate and lives of people stand.

3.3. Costs of humanizing punishment as a crisis

Now, the symptoms of the next crisis of punishment are clearly predicted. Entry into the era of the dominance of IT technologies, biotechnology, robotization, artificial intelligence, total control over human behavior and manipulation of it predetermines fundamental changes in the very life of society, in the system of values and preferences of people, in the complex of factors that generate crime, in its structural and other meaningful characteristics etc. All this cannot fail to lead to serious criminal-legal innovations and, at the same time, to a clash of old, ingrained and newly emerging, growing strategies and tactical ideas for combating crime. Including ideas for building a system of punishment. In fact, the first steps towards its restructuring are already being made, but sometimes they are accompanied by unexpected results.

Humanistic, maximally sparing human rights, aimed at preventing early deviations from social norms, a system of soft punishments and "pre-punishments" (fines, restrictions and control over the exercise of rights, compulsory treatment, education etc.), which abandoned the idea of retribution and corrections, suddenly opened a wide road to the almost uncontrolled design of criminal law prohibitions and the large-scale application of criminal punishments. The increasing mitigation of criminal punishments inevitably led to the expansion of the scope of criminalization of acts due to the desire to impose precisely criminal (albeit slightly repressive) punishment on such types of deviant behavior that, if the criminal punishment were more severe, could remain outside the framework of criminal law. The diagnosis of such a crisis in science was made: "overcriminalization" and "overpunitivity". This situation can be viewed as the use of humane punishments in order to increase the level of repressiveness of the criminal law system.

Let us illustrate this idea with just four examples from the Criminal Code of the Russian Federation:

- part 1 of art. 139 of the Criminal Code of the Russian Federation "Illegal entry into a dwelling committed against the will of a person living in it" – the maximum sanction – arrest for up to three months – 5388 people were convicted in 2020;
- art. 171.4 of the Criminal Code of the Russian Federation "Illegal retail sale of alcoholic and alcohol-containing food products" – maximum sanction – correctional labor for up to one year – 681 people were convicted in 2020;
- art. 158.1 of the Criminal Code of the Russian Federation “Petty theft” – the maximum sanction – imprisonment for up to one year – 5773 people were convicted in 2020;
- part 3 of art. 327 of the Criminal Code of the Russian Federation – "Acquisition, storage, transportation for the purpose of use or sale or use of a knowingly fake passport of a citizen, identity card or other official document granting rights or exempting from duties, stamps, seals or letterheads" – the maximum sanction is up to one year in prison – 5487 people were convicted in 2020.

We are not sure that in all these cases the legislator was strongly concerned with the idea of economizing on repression. However, we are sure that the low level of public danger of these acts (and the indicated maximum sanctions are evidence of the official recognition of such) gave and gives reason to think repeatedly how necessary it was, in principle, to elevate them to the rank of crimes. Meanwhile, 17329 people (3.3% of the total number of convicts) were convicted for their commission in 2020 alone. Undoubtedly, an impressive group of people who broke the law, whose fate could have turned out differently without prejudice to our common cause.

These sad examples should not be taken as evidence that the introduction of optimal and minimum severe punishment into the law is inexpedient and undesirable. In no case! The humanization of criminal law and punishment is a permanent process and not just a "revolutionary coup" (always carrying many dangers) in the event of a real or imaginary "crisis" of these most important institutions. In principle, it should not be interrupted if the process is limited by a reasonable framework and correlated with the dictates of the times and social needs. We fully agree with U. Hellman: “The crowding out of... harmful prison isolation requires the creation of a system of criminal-legal sanctions, which allows, on the one hand, to impose a punishment corresponding to the guilt of the offender, but, if possible, dispensing with actual imprisonment, and on the other hand, provides public safety when the harmful premises are driven back to institutions for the execution of sentences in the form of imprisonment"[10].

We believe that the recommendation is quite appropriate and relevant, first, with regard to the design and adjustment of sanctions for crimes that are notable for a low degree of public danger, since it is in this segment of Russian regulatory practice that examples of the unjustified use of too severe punishment can be found.

3.4. Crisis of goal setting of criminal punishment

As the purposes of punishment in the doctrine, there are ideals that set the vector of movement, which must be guided by, which must be strived for, but cannot be achieved. Part 2 of art. 43 of the Criminal Code of the Russian Federation, the purposes of punishment are called the restoration of social justice, the prevention of crimes and the correction of criminals.

In our opinion, the problem of the purposes of any legal institution should be specified, dividing the purposes into two groups. This division is based on the criterion that can be defined by the word "resource". This is what provides the opportunity to move towards the purpose.

The first group includes the purposes of legal institutions that have resources that allow them to solve problems that are adequate to the purposes set, and to actually and successfully move in the right direction. In other words, these are correctly set purposes correlated with the capabilities of the actor. Let us call them the secured targets.

The second group includes unsecured and (or) insufficiently secured purposes, i.e. incorrectly placed before legal institutions that are actually deprived of the above-named internal resources or possessing them to such a small extent that one can count on only minimal success.

---

[10] U. Hell'man, *Znachenie preventivnogo zaklyucheniya dlya praktiki ugolovnyh nakazanij v Germanii* [The value of preventive detention for the practice of criminal punishment in Germany], Soyuz kriminalistov i kriminologov [Union of Criminalists and Criminologists], no. 1/2013, pp. 92-95.

Purposes formally assigned to criminal penalties are a classic example of “unsecured” goals. This circumstance serves as evidence that the restoration of social justice, the correction of the convicted person and the prevention of crimes in the text of the law as the purpose (special task) of punishment is not advisable. Moreover, the society has not been presented with any evidence that at least one of the purposes listed in the law, our judicial system has approached, even to the modest extent that could be called satisfactory.

Let us pay attention to one fundamentally significant circumstance: criticism of the normative purposes of punishment in no way concerns important and practically significant ideas inherent in the concept of purpose of punishment. The categories "justice", "correction of convicted persons", "prevention of new crimes" should not be lost for criminal law and codified legislation. The only problem is that the level of fixation of these legal values does not match their nature and content. In any case, these values are not specific purposes of punishment, according to the degree of achievement of which one can assess the effectiveness of criminal punishment.

IV. Results

According to the supporters of the theory of the crisis of punishment, the essence of this crisis lies in the fact that it was intended to fulfill the function of deterring and reducing crime, but it turned out to be ineffective and does not fulfill its tasks. The "crisis of punishment" is manifested, in particular, in the fact that in the entire history of humanity, none of the most severe punishments has "eliminated" criminality.

In our opinion, the very idea of a punishment crisis, and the arguments in support of it, look unconvincing. I think it is time to admit that the failure to achieve the unattainable cannot be considered a crisis. A crisis is a negative assessment not only of certain performance results, but also of the source that gave rise to them. A crisis is a destructive process that takes place within the framework of that social, legal institution, which, in principle, is capable of achieving the set goal, but for various reasons, “fails” the assigned task. However, what happens to the punishment (the "register" of its vices is known and can be easily continued) can be called whatever you like, just not a crisis. However, there is also a name: this is not a crisis of punishment, but a crisis of goal setting, the result of a dramatic error in setting goals where they do not belong. Fortunately, the negative consequences of such an error did not overstep the boundaries of various kinds of theoretical disputes and did not affect the activities of the courts, in judicial practice.

Moreover, one more thing: proponents of the punishment crisis theory argue that its history goes back millennia. In other words, it turns out that the crisis is as old as the punishment itself. However, the crisis cannot last many millennia. Be it so, any substance should have been "gobbled up" by the crisis long ago. However, the punishment does exist and, good or bad, does its job.

Yet it really is not capable of changing the crime statistics, which is what not only citizens and society expect from it, but also a certain circle of specialists. In addition, if such a desired influence on crime is considered a mission of criminal punishment, then it must be said with all certainty: the mission is impossible. We are convinced that since punishment, functioning within the limits of the possible does not have a tangible effect on crime, there is no reason and reason to talk about a crisis and “blame” the punishment for allegedly failing to fulfill its erroneously understood social purpose.

References

1. Black, Ch., *The Crisis in Capital Punishment*, Maryland Law Revew, vol. 31, no. 4/1971.

2. Boonin, D., *The Problem of Punishment*, Cambridge: Cambridge University Press, 2008.

3. Focquaert, F., Shaw, E., Waller, B. (eds.), *The Routledge Handbook of The Philosophy and Science of Punishment*, Routledge, 2021.

4. Gilinskij, YA.I., *Kriminologiya postmoderna. Neokriminologiya* [Postmodern criminology. Neocriminology] – SPb.: Aletejya, 2021.

5. Gilinskij, YA.I., *Kriminologiya: teoriya, istoriya, empiricheskaya baza, social'nyj control* [Criminology: theory, history, empirical base, social control], 2nd ed., rev. and add., Legal Center Press, 2009.

6. Hell'man, U., *Znachenie preventivnogo zaklyucheniya dlya praktiki ugolovnyh nakazanij v Germanii* [The value of preventive detention for the practice of criminal punishment in Germany], Soyuz kriminalistov i kriminologov [Union of Criminalists and Criminologists], no. 1/2013.

7. Husak, D., *Retributivism and Over-Punishment*, Law and Philosophy, 2021, DOI: 10.1007/s10982-021-09422-w.

8. Materni, M., *Criminal Punishment and the Pursuit of Justice*, British Journal of American Legal Studies, Vol. 2, Issue 1, 2013.

9. Matravers, M., *On the 'Specialness' of the Criminal Law*, Criminal Law and Philosophy, 2021. https://doi.org/10.1007/s11572-021-09611-7.

"The Confined Woman of Poitiers" and the Guarantor's Position of the Brother

Cristina Nicorici[1]

Abstract

The concept of the state penalizing a person for his or her failure to act must be understood and analyzed as more than criminal responsibility for something that a person has failed to do. The idea that, unless a person complies with the obligations imposed by the state and acts accordingly, he or she will receive a court sentence, is related to the principle of legality in criminal law, individual liberty to act, and the rule of law.

This article will underline the concept of improper omission, and how the criminal liability for improper omission is affecting the principle of legality in the perspective of the French criminal law theorists. In contrast with other European countries that have a long-standing tradition in accepting and analyzing criminal omission (such as Germany or Spain, for instance), in France, the idea of criminal responsibility for an omission that is not expressly regulated by the law was rejected. This long-standing position is based on a famous case – law that was very popular and is still mentioned by the theorists of criminal law when talking about responsibility for omission (known as the "Poitiers Case").

This decision, however, besides being an important case-law for the French criminal law, raises a problem that has not been solved even in the systems where the commission by omission is accepted. The main question that must be answered is whether a brother has a guarantor's position, or, in other words, has a duty to act, if his sister is in danger, and in this article, I present the main ideas developed as an answer to this problem.

Keywords: *commission by omission, improper omission, duty to act, "The Confined Woman of Poitiers", French criminal law, the brother's guarantor position.*

I. Introduction

The concept of the state penalizing a person for his or her failure to act must be understood and analyzed as transcending a criminal responsibility for something that a person has failed to do, and in the perspective of non-compliance of a particular duty to act that a person had. Every time we commit an action, we omit infinity of other actions, therefore it can be said that we commit infinity of omissions. However, the goal of criminal law should be to punish only those particular omissions that are

[1] PhD, Assistant professor, Faculty of Law, West University of Timisoara, Romania. Contact: nicorici.cristina@gmail.com.

dangerous to others. The idea that, unless a person complies with the obligations imposed by the law and acts accordingly, he or she will be held liable, is related to the principle of legality in criminal law, individual liberty to act, and the rule of law.

In continental criminal law, the distinction between proper and improper omissions is a well-known distinction.

Proper omission is generally described as a type of crime expressly regulated by the criminal law, where the dangerous conduct is described in terms of inaction. Therefore, the norm that regulates the proper omissive crime imposes a certain conduct for the subject, that the subject, for various reasons, does not comply with.

Improper omission, also known as commission by omission, is different from the proper omission. Although the conduct of the subject is represented by an omission, this omission is not expressly punished by the law. On the contrary, a norm that regulates a positive act of the subject, therefore a crime that is committed by action, is the main framework for the commission by omission. In the case of commission by omission, the crime, that is defined by an action, is committed, in the concrete case, by an inaction of the subject, when the subject had a duty to act that he or she neglected. In some countries (such as Spain, Germany, Italy, Romania etc.), a general definition of the improper omission can be found in their criminal codes, definition that is generally considered to make this type of crime compatible with the principle of legality.

In France, however, the position of the theorists regarding the improper omission (or commission by omission) has a long-standing tradition in rejecting this type of crime. This position is usually justified based on the reasoning of a Court of Appeal in the case of a confined woman of Poitiers, a famous case-law regarding the criminal responsibility for omission, that will be analyzed in the following lines.

It was appreciated[2] that, in the case of France, we are at the antipode of the Spanish – German perspective, because the general clause of equivalence of the action with the omission does not exist. As a general line of argumentation, in France, because a general clause of equivalence of the omission with the action does not exist, the jurisprudence has refused to assimilate the lack of an action with the inaction and to admit that a commissive crime could be committed by a simple inaction[3]. As a consequence, in the French juridical literature, it is appreciated[4] that only where the law expressly regulates in this sense, the omission may have the juridical value of an action and may expose the author to be punished for a commissive crime. Some French theorists considered to be logic to punish as an author the person that has realized a crime, by a negative behavior, if the strict interpretation of the legal text does not exclude this possibility[5].

It must be mentioned that there are other states where the commission by omission is not expressly regulated, such as Sweden, where, although formally this concept does not exist, the literature and the jurisprudence have developed this

---

[2] J.A. Ramos Vázquez, *La secuestrada de Poitiers y la comisión por omisión en Francia* [The kidnapped woman from Poitiers and the commission by omission in France], in J.L. Gonzáles Cussac, *Lenguaje y dogmática penal* [Criminal language and dogmatics], Tirant lo Blanch, Valencia, 2019, p. 207.

[3] G. Stefani, G. Levasseur, B. Bouloc, *Droit pénal général*, Dalloz, Paris, 2005, p. 207. Also see H.H. Jescheck, *Problemas del delito impropio de omisión desde la perspectiva del derecho penal comparado* [Problems of the improper crime of omission from the perspective of comparative criminal law], in *Nuevo Foro Penal* no. 59/1993, p. 10.

[4] G. Stefani, G. Levasseur, B. Bouloc, cited, p. 208.

[5] J. Pradel, A. Varinard, *Les grands arrêts du droit pénal gênêral,* Dalloz, Paris, 2007, p. 369.

concept[6]. The introduction of a general clause of equivalence was rejected in this country because of the difficulty to identify an acceptable definition[7].

In the following lines I will present the famous decision of Poitiers Court, and its implications in French criminal law, but also the other countries perspective of the guarantor's position of the brother (the problem that was analyzed in the mentioned decision).

II. "The Confined Woman of Poitiers" – the decision of the Court of Appeal of Poitiers (20.11.1901)

The Monnier case remains a leading – case for the French jurisprudence in the matter of commission by omission[8].

In fact, the catholic parents of Blanche Monnier kept their daughter locked in a room, without access to natural light, between garbage and excrements, for a period of 25 years, because, when she was younger, she had a relationship with a protestant lawyer, in France[9]. The investigation showed that, when their daughter was younger, their parents opposed to her marring a protestant lawyer, and, as a consequence, she started acting strange, yelling at her parents and destroying goods from the house, and, in some days, isolating herself from the world.

Because of this behavior, their parents decided, together, that it is better that she will remain in her room permanently, and therefore locked her in her room, serving there all the food she needed. After her father's death, her mother continued to keep her locked for years, until the situation of her daughter was discovered, Blanche being found with serious damage regarding her health. Although her mother order food for her daughter from the most expensive restaurants, she refused to let her maid to clean her room, to open the windows for fresh air, or to change her daughter's clothes and her bedsheets. Let us remember that all this happened in the late XIX century, so the girl was let to make her needs in her room, near the food she ate and near her bed. Her mother completely forbidden her maid to ever clean the room of her daughter, so Blanche used the same clothes and bedsheets for decades.

In the words of Andre Gide, that describes[10] a photo of the girl when she was set free, "it is impossible to imagine something more impressive than the look of the poor girl, and that of her smile – because she smiles, an angelic smile, idyllic, but sly, almost mean".

The father of Blanche died long before the situation of his daughter was discovered, and her mother died two weeks after she was discovered and released by the authorities. At the time of the judgement, there was alive only one person that knew what has happened with Blanche, and this person was Marcel Moinner, her brother, that, at 11.10.1901 was convicted as an accomplice at 15 months of prison by the

---

[6] C.A. Domocoș, *Fapta omisivă și incriminarea ei în legea penală română* [The Omissive Crime and Its Regulation in Romanian Criminal Law], Ed. Universul Juridic, Bucharest, 2010, p. 313.

[7] *Ibidem*.

[8] Decision of Poitiers Court of Appeal, from 20.11.1901, *apud* J. Pradel, A. Varinard, cited, pp. 360-361.

[9] The case is presented from the newspapers and documents of the investigation by Andre Gide in A. Gide, *Amintiri de la Curtea cu Juri. Sechestrata din Poitiers* [Memories from the Jury Court. The Confined Woman of Poitiers], Ed. RAO, Bucharest, 2016, p. 114 and following.

[10] *Idem*, p. 116.

Tribunal of Poitiers. It was proven during that investigation that Marcel lived in the house near the one where Blanche was kept locked, and he used to visit his sister during all this period of time, being perfectly aware of her condition. Although it was testified by the house's personnel that he tried to persuade her mother to set Blanche free in a few occasions, he did nothing more to help his sister over all this period of time.

Against this decision, Monnier formulated an appeal, arguing that, although he knew the fact that her sister was held against her will in that room, and despite the fact that he did not do something for saving her, he personally committed no act to affect her liberty, all the acts being committed by their parents, and, therefore, he should not be held liable.

This case and the sentence that followed remain an important point in the French criminal law, but they also raise the problem of the duty to act of the brother of the victim. Therefore, before analyzing the sentence of Poitiers Court, I will present the main positions regarding this problem.

III. The duty to act of the brother of the victim

The problem of the brother that has a duty to act to protect his sister is not an easy problem for the systems that accept commission by omission, and the case from Poitiers is even more complicated. Firstly, let us make some considerations regarding the responsibility of the brother regarding the protection of his sister.

If we regard the sources of the duty to act from a formal perspective, then we may face a difficult problem, since we cannot find a legal norm, a contract or a former dangerous conduct to fundaments this duty to act. For instance, Romanian Civil code does not foresee a duty of the brother to protect his sister, but only a duty of maintenance (article 516[11] Romanian Civil code). However, this duty supposes only that, in case of need, the brother must give to the sister the means to live[12] (to buy food, to pay for the basic necessities), but this article does not foresee a duty to help his sister when she is in danger. Therefore, unless there was a contract where the brother promised to help his sister, or unless the brother did something that increased the previous state of danger of the victim, in case of omission, his criminal responsibility is excluded.

If we regard the duty to act from a material perspective, therefore from the perspective of the theory of the duty to act of Armin Kaufmann[13], then the things get complicated. Normally, one of the functions identified by Armin Kaufmann as being the source of the duty to act is the family relationship between the victim and the subject[14]. The doctrine is not unanimous when establishing a duty to act of the brother, given his relation of family with his sister. There are authors that consider that he has a duty to act[15], others that recognize this duty to act only is the victim lived with his

---

[11] Article 516 of the Romanian Civil Code: *"The duty of maintenance exists between husband and wife, between family in direct connection, between brothers* and sisters, and between all the other persons foreseen by the law".

[12] According to article 529 alin. (1) of the Romanian Civil Code: *"The maintenance is to be paid in accordance with the need of the debtor and the means of the creditor".*

[13] A. Kaufmann, *Dogmática de los delitos de omission* [Dogmatics of crimes of omission], Marcial Pons, Madrid, 2006, p. 289 and following.

[14] *Ibidem*.

[15] *Idem,* p. 322.

brother (therefore we must identify what is named "a community of life"[16]), and other that completely deny this criterion, considering it is too imprecise[17]. It was appreciated that, if the family connection is not close, there should be taken more precautions regarding the commission by omission[18].

However, the authors that accept that there is a duty to act, consider that it is necessary to really exist a direct connection with the social value that must be protected, meaning a social proximity with the value protected. Some authors[19] talk in this case about a natural solidarity as a juridical cause from which we can imply a duty to act. We talk therefore in the case of the community of life not only of an aspect of privacy, but of close solidarity[20].

In other states, formal solutions have been found to this problem. As an example, the Criminal Code of Chile, in article 352, sanctions the act of a person to abandon his spouse, concubine, ascendant of descendant, legitimate or illegitimate, sick or who is in an impossibility to take care of himself, if the person abandoned has lesions or dies because of the inaction[21], this representing a possible solution regarding our problem.

IV. The decision of the Court of Appel of Poitiers

The decision of the Court of Appel from Poitiers remains famous in France and for the France criminal law, one century later. Through this decision, at 20.11.1901, the Court of Appeal set Monnier right, appreciating that the facts he was accused of cannot be qualified as a criminal act, not being an act of killing or of hitting a person. "Taking into consideration that the appellant has not participated, as an coauthor or as an accomplice, at the facts considered crimes by the law, acts of which only the mother appears to be responsible (…); that, without a doubt, it cannot be trusted Monnier that said that he has ignored the lamentable state in which his sister was, and that the pure passive role that Monnier thought he must resign to should be punished with the most severe reproach, however, his conduct, without any doubt, does not enter the sphere of criminal law, sphere that the judges cannot supply, and, therefore, his acquittal is mandatory"[22].

---

[16] C. Roxin, *Derecho penal. Parte general. Tomo II. Especiales formas de aparición del delito* [Criminal law. General part. Volume II. Special forms of appearance of the crime], Civitas Thomson Reuters, Madrid, 2014, p. 862.

[17] R. Gullock Vargas, *Fundamentos teóricos básicos del delito de omisión su aplicación en el derecho penal costarricense* [Basic theoretical foundations of the crime of omission and its application in Costa Rican criminal law], Heredia, San Juaquín de Flores: Escuela Judicial, 2008, p. 121; T. López Angel, *Límites político criminales del delito de comisión por omission* [Political-criminal limits of the crime of commission by omission], in *Anuario de derecho penal y ciencias penales* [Yearbook of Criminal Law and Criminal Sciences], 1984, p. 703.

[18] S. Mir Puig, *Derecho penal. Parte general* [Criminal law. General part], Editorial Reppertor, Barcelona, 2006, p. 309.

[19] P. Gómez Toledo, *El delito de omisión impropia* [The crime of improper omission], p. 166, https://docplayer.es/43776481-El-delito-de-omision-impropia.html (accessed on 25.02.2022).

[20] R. Plascencia Villanueva, *Teoría del delito* [The theory of crime], Universidad Nacional Autónoma de México, México, 2000, p. 167.

[21] C. Izquierdo Sánchez, *Comisión por omisión. Algunas consideraciones sobre la injerencia como fuente de la posición de garante* [Commission by omission. Some considerations on interference as a source of the position of guarantor], in *Revista Chilena de Derecho*, no. 2/2006, p. 341.

[22] J.A. Ramos Vázquez, cited, p. 202.

The French doctrine considers also today as being determinant this sentence for the commission for omission, and it appreciates that it is not possible to convict a person for an omission, if the crime is regulated in terms of action[23]. If the lawmaker wants to introduce certain omissions in the sphere of the criminal law, he must do so expressly. It was underlined that to conclude otherwise would supposed to use an analogy, that is a forbidden method of interpretation[24] if used against the accused person.

The French criminal law theorists do not contest only the causality of improper omission in relation with the dangerous result, but also the theory of the guarantor's position, thus creating a juridical environment completely opposed from the German and Spanish one[25] (and Romanian, we can add). Another aspect that is considered problematic by the theorists is that the improper omission is not compatible with the principle of legality, and with the principle of predictability of law[26].

Another decision that follows the line marked in the Monnier sentence, is the sentence of the Court of Cassation from 29.01.1936[27] (named the "Coutant sentence") in which is acquitted an administrator of a commercial society that permitted the organization of an illegal lottery inside the society. The solution of acquittal was founded on the fact that the administrator committed no positive act that he could be held liable, in the case the conduct analyzed being only a simple abstention. For the same reason, he was held liable for no act of complicity.

The Monnier decision clearly underlines that it does not matter what obligation foreseen by the civil law or of moral character has a person, if a precise crime which could sanction the omission does not exist, and that a judge cannot decide to assimilate the omission with an action. It is considered that such a solution is still valid in the present time, in base of the principle of legality, as a consequence of the principle of strict interpretation of the criminal law[28].

Let us not forget that the famous line "qui peut et n'empêche, péche" ("the one that can do something, and does not do it, is a sinner") comes from the French culture, which supposes that the old theorists of criminal accepted the possibility of the commission by omission[29].

In the period of XIX century, there were no regulations in France regarding omission, not even proper omission, and it was considered that the duty to act must remain in the personal conscience of each citizen[30]. Therefore, although the Poitiers sentence remains a leading case, in reality this sentence is an expression of it time, and Monnier could have never been convicted for letting a victim in danger (or for a crime similar to the one foreseen in article 203 Criminal Code), because those conducts were not criminalized.

In the present, not only the doctrine[31], but, although in a shy manner, also the jurisprudence, begin to consider that where the lawmaker did not expressly foresee,

---

[23] *Idem*, p. 203.

[24] G. Stefani, G. Levasseur, B. Bouloc, cited, p. 207.

[25] J.A. Ramos Vázquez, cited, p. 204.

[26] P. Cannin, *Droit penal general*, edition Hachette Paris, 2005, p. 52, *apud* J.A. Ramos Vázquez, *op. cit.,* p. 204.

[27] J. Pradel, A. Varinard, cited, p. 361.

[28] *Idem*, p. 363.

[29] *Idem*, p. 363.

[30] J.A. Ramos Vázquez, cited, p. 207.

[31] A.C. Danna, *Essai sur la notion d'infraction pénale*, in *Librarie générale de droit et de jurisprudence*, Paris, 1982, p. 67, *apud* J.A. Ramos Vázquez, *op. cit.,* p. 209.

the judge can interpret[32]. Therefore, it could be argued that the French juridical space is going through a process of reform and change of juridical thinking regarding this theme (considering also the increasing intervention of the state that has as a consequence the multiplication of omissive crimes)[33]. If France will follow the example of Germany or of Spain, or will expressly equivalate the action with omission for certain crimes, this remains to be seen.

V. Conclusion

As "The Confined Woman of Poitiers" remains a work of reference for the opera of Andre Gide, the Decision of the Court of Poitiers is still a reference case-law for the French perspective regarding criminal responsibility for omission, and, in particular, in what regards commission by omission.

As presented in this article, the duty to act of the brother to help his sister (or the other way around) is not a simple problem in criminal law. If we regard this duty through the theory of formal sources of the duty to act, we might conclude that there is no special duty to act of the brother to help his sister in danger, and, therefore, his omission has the same criminal value as the one of normal citizens, that does not share any special connection with the victim. This conclusion is, however, difficult to accept in our society, which sees the family connection between brothers and sisters as very important. It is difficult to accept that a brother must not help his sister when facing danger, and, I think, for many people, it is even outrageous to think like this.

On the other hand, if we analyze this duty to act from the perspective of the theory of material sources of the duty to act, things do not get necessarily clearer. Should we always accept that the family connection between the brother and sister fundaments the duty to act, even if, for instance, they were not in connection for a long period of time? Or should we recognize such a connection as a source of the duty to act only when they live under the same roof? Or only when the connection is strongly enforced by their day to day life?

In my opinion, the good faith of the interpreters is of maximum importance: I do not believe that the simple family connection between brother and sister can be considered a source of the duty to act. However, if they live together, therefore if they have developed a community of life, then I believe their relation is stronger and the dependence of the subject owner of the social values from her brother is a reason good enough for justifying such a source.

References

1. Cannin, P., *Droit penal general*, edition Hachette Paris, 2005.
2. Danna, A.C., *Essai sur la notion d'infraction pénale*, in *Librarie générale de droit et de jurisprudence*, Paris, 1982.
3. Domocoș, C.A., *Fapta omisivă și incriminarea ei în legea penală română* [The Omissive Crime and Its Regulation in Romanian Criminal Law], Ed. Universul Juridic, Bucharest, 2010.

[32] J.A. Ramos Vázquez, cited, p. 209.
[33] *Idem*, p. 210.

4. Gide, A., *Amintiri de la Curtea cu Juri. Sechestrata din Poitiers* [Memories from the Jury Court. The Confined Woman of Poitiers], Ed. RAO, Bucharest, 2016.

5. Gómez Toledo, P., *El delito de omisión impropia* [The crime of improper omission], https://docplayer.es/43776481-El-delito-de-omision-impropia.html (accessed on 25.02.2022).

6. Gonzáles Cussac, J.L., *Lenguaje y dogmática penal* [Criminal language and dogmatics], Tirant lo Blanch, Valencia, 2019.

7. Gullock Vargas, R., *Fundamentos teóricos básicos del delito de omisión su aplicación en el derecho penal costarricense* [Basic theoretical foundations of the crime of omission and its application in Costa Rican criminal law], Heredia, San Juaquín de Flores: Escuela Judicial, 2008.

8. Izquierdo Sánchez, C., *Comisión por omisión. Algunas consideraciones sobre la injerencia como fuente de la posición de garante* [Commission by omission. Some considerations on interference as a source of the position of guarantor], in *Revista Chilena de Derecho*, no. 2/2006.

9. Jescheck, H.H., *Problemas del delito impropio de omisión desde la perspectiva del derecho penal comparado* [Problems of the improper crime of omission from the perspective of comparative criminal law], in *Nuevo Foro Penal* no. 59/1993.

10. Kaufmann, A., *Dogmática de los delitos de omission* [Dogmatics of crimes of omission], Marcial Pons, Madrid, 2006.

11. López Angel, T., *Límites político criminales del delito de comisión por omission* [Political-criminal limits of the crime of commission by omission], in *Anuario de derecho penal y ciencias penales*, 1984.

12. Mir Puig, S., *Derecho penal. Parte general* [Criminal law. General part], Editorial Reppertor, Barcelona, 2006.

13. Plascencia Villanueva, R., *Teoría del delito* [The Theory of crime], Universidad Nacional Autónoma de México, México, 2000.

14. Pradel, J., Varinard, A., *Les grands arrêts du droit pénal général,* Dalloz, Paris, 2007.

15. Roxin, C., *Derecho penal. Parte general. Tomo II. Especiales formas de aparición del delito* [*Criminal law. General part. Volume II. Special forms of appearance of the crime*], Civitas Thomson Reuters, Madrid, 2014.

16. Stefani, G., Levasseur, G., Bouloc, B., *Droit pénal général***,** Dalloz, Paris, 2005.

The Eternal Dilemma Between Possible Intent and Conscious Fault: A Recent Case-Study in Italian Jurisprudence

***Rocco Neri*[1]**

Abstract

The essay tends to identify the conceptual, substantive and procedural boundary that distinguishes possible intent and conscious guilt, since the difficult definition of intent in criminal doctrine, is referred to the psychological discipline, which has so far provided uncertain information and assessments. The research will be structured through the response to the following arguments. The question will be about the probability of the event or the reasonable doubt about the event represented by the agent. Which of the two criteria is preferable? What is the difference between probability and doubt of the event? What does it mean to "accept the event"? In the expressions "accept the risk" and "accept the event" the term acceptance has different meanings. It is useless to distinguish acceptance of the risk and acceptance of the event if the same evidence is then sufficient to prove both the former and the latter. Willfulness can only occur when there is acceptance of the risk of an event? How can the risk be translated in terms of reasonable doubts? On these questions we will try to clarify and achieve the objectives set out above.

***Keywords**: possible intent, theory of crime, causality, doubt, will*

I. Introduction

A young man in his twenties is wounded by a gunshot in his girlfriend's house. Her father shot him, inadvertently, as the result of a joke. The bullet has pierced the young man in correspondence of the middle third of the right arm, following an unfortunate parabola: from the shoulder to the lung, up to the heart, without escaping. The boy is still alive, but none of those present in the house, almost all belonging to the family of the girlfriend, call the emergency room: if not later, to warn that a man is sick. They are also reported to have false information about the causes of the illness, both on the phone and on the arrival of the health workers. They ignored the decisive circumstance and transported the patient to the nearest emergency response structure, unable to reconstruct the real dynamics of the event. It is already late when the doctors of the structure, after further incomprehensible delays, learn the truth from the responsible. A desperate transport to the hospital began but the accumulated delay, compared to the entity of the injuries, caused the death of the young man.

[1] PhD, legal specialist. Contact: rocconeri7@gmail.com.

The facts can be divided into phases. In the first phase is the culpable shot that triggered the lethal causal course, i.e. the culpable action capable of killing, attributable only to the perpetrator of the wounding. In the second phase, on the other hand, there is the subsequent concurrent conduct, both omissive and active, which hindered the effective rescue of the injured person, resulting in his death. The relevant issues in terms of legal qualification relate solely to the second phase.

The question arises as to whether the conduct as a whole should be qualified, in the regulatory assessment, as an "omission" (i.e. "omissive" action) or as an "action" (i.e. "commission" action); whether, in the event of opting for "omission" (i.e. "omissive" action), a position of guarantee can be established, with a related obligation to prevent pursuant to Article 40 C.p. (Italian Criminal Code), or whether such omission can at most integrate the extremes of the case of failure to provide assistance (if necessary, aggravated pursuant to Article 593, paragraph 3, C.p.)[2]; whether, having affirmed the existence of a position of guarantee and the correlated obligation to prevent pursuant to Article 40, paragraph 3, C.p., the death of the victim was intentional, by way of possible willful misconduct, on the part of the identified guarantors, with consequent liability for voluntary homicide by omission (Articles 40, paragraph 2, C.p. and 575 C.p.)[3].

II. The case-study

For the Assize Court of Rome between the obligation to take action (Article 593 C.p. and the obligation to prevent (Article 40 C.p.) there is a merely quantitative distinction: the objective seriousness of the fact and therefore the seriousness of the injured person's condition, his not occasional finding, the performance of mendacious acts, the degree of deviation from the dutiful conduct makes it possible to go from omission to assist to manslaughter, to go "well beyond" the milder offence, integrating the more serious offence, even in the face of a duty with identical content.

However, the origin of the obligation to prevent does not depend on the "seriousness" of the omission, nor does the position of guarantee have a quantitative, rather than qualitative, dimension; the same applies to the differences between the obligation to prevent and the obligation to rescue, which are not situated at the level of the seriousness of the injuries, the occasional nature of the finding or the degree of remoteness from the dutiful action, but are rooted in the decisive watershed of the position of guarantee.

The judgement of first instance had in fact linked the obligation of guarantee with the duty to ensure adequate assistance to anyone who comes across an injured person in need of assistance, but with considerable ambiguity and inaccuracies:

1) for the apparent reference to a particularly serious infirmity as the generative element of the duty of guarantee;
2) because of the requirement that the person must come across the injured person 'not occasionally';
3) because it was stated that the defendants had engaged in conduct that was 'not only omissive within the meaning of Article 40 C.p., but also commissive

[2] G. Marinucci, E. Dolcini, *Corso di diritto penale* [Criminal Law Course], IIIrd ed., 2001, p. 501; M. Donini, *Teoria del reato*, in Digesto/pen., XIV, 1999, p. 7.

[3] F. Bricola, *Teoria generale del reato* [Theory of the crime], in Noviss. Dig. Ita., Utet, Torino 1973; G.P. Demuro, *Studi di diritto penale. Il dolo* [Criminal law studies. The willful misconduct], vol. 1-2, Giuffrè, Milano, 2010.

by omission, in terms of the failure to provide information to the institutional guarantors, as if the expressions used referred to different institutions in Italian legal system;

4) for the conclusion that the ascribed conduct, "seriously negligent, imprudent and damaging to the rule that imposed an obligation of guarantee, went "well beyond the mere omission to provide assistance, rather integrating "the more serious crime under Article 589 C.p.

On the contrary, the grounds of the appeal identified the basis of the position of guarantor in the very general principle of *neminem laedere,* which would have imposed a different conduct from the one held due to the seriousness of the dangerous situation and its foreseeable deterioration.

In addition, on the basis of constant case law, the defendants could well have activated even lesser powers than those of enforcement, in particular powers of solicitation. It was concluded that the defendants had a precise and autonomous obligation to guarantee that they would immediately come to the aid of the injured person and would not conceal any useful circumstances from the rescuers[4].

Finally, the Court of Cassation objected that the basis of the position of guarantee cannot be rooted in the general duty not to damage the legal sphere of others", because this duty is imposed on any member and, therefore, has "no selective capacity for the constitution of qualified obligations to act[5]. On the one hand, in fact, the aggravating event referred to in paragraph 3 of Art. 593 C.p. must be linked by an etiological link with the previous omission, while, on the other hand, the principle of culpability remodelling every hypothesis of objective responsibility in terms of responsibility by fault[6]. This is the case for involuntary manslaughter, for the offence referred to Article 586 C.p. and for offences aggravated by the event, including the case referred to Article 593, paragraph 3, of the C.p., which requires that the aggravating event of the failure to provide assistance must also be imputed on the basis of negligence, like the corresponding constituent element of manslaughter.

The motivation starts by emphasizing a fact: the non-ordinary survival of the victim in the face of a gunshot wound, with the consequence that "for a long period of time. In short, the entire motivation is constructed according to an escalation of factual and logical references, whereby the normative consistency of the position of guarantee is framed with increasing definition as the legally relevant evidence grows[7].

On a subjective level (Article 593 par. 2 C.p.), the Court of Assizes of Appeal had rejected the exception, stating that the case in question punishes anyone who fails to provide assistance after having "found" an injured person, but not anyone who, through his own conduct, is responsible for aggravating the injured person's condition

---

[4] Corte d'appello di Roma, Sez. I, 29 January 2019, (dep. 1st March 2019), no. 3, in Giurisprudenza Penale Web, 2019.

[5] Cass. pen., Sez. I, 7 February 2020 (dep. 6th March 2020), P.M. e altri [P.M. and others], n. 9049, *La Cassazione sul caso Vannini: i rapporti tra omicidio mediante omissione e omissione aggravata dall'evento morte in un noto caso di cronaca* [The Supreme Court on the Vannini case: the relationship between murder by omission and omission aggravated by the death event in a well-known news cas], in Sist. Pen., 23 April 2020.

[6] M. Donini, *Il dolo eventuale, fatto-illecito e colpevolezza* [The eventual willful misconduct, unlawful act and culpability], in Dir. pen. cont. no. 1/2014.

[7] G. Ubertis, *La ricerca della verità giudiziale* [The search for judicial truth], in G. Ubertis (ed.) *La conoscenza del fatto nel processo penale* [The knowledge of the fact in the criminal trial], Milano, 1992, p. 15, P. Ferrua, *Il 'giusto processo'* [The 'due process'], Bologna, 2012, p. 71.

by violating the rules of caution imposed by the position of guarantor (second instance ruling).

The Court of Cassation rejected this assumption: the defendants had in fact "found themselves" in front of an injured person because the requirement of "finding oneself" is not to be understood in a literal sense, still presupposes only direct material contact with the object of the finding, which is independent of prior co-presence. Thus, the defendants ran towards the bathroom when they heard the shot and "found" a wounded man there; and the same applies to the shooter because, if the shot was fired accidentally, he "must have been surprised by an event that was not foreseeable for him and, like the others, found himself in the presence of a wounded man".

III. Possible intent between doctrine and Italian jurisprudence

Conduct, action, omission, duty of assistance and duty of guarantee constitute the gateway to willful misconduct (or possible intent), i.e. the person who culpably causes an injury must, for that reason alone, attempt to mitigate the consequences; otherwise, he is liable as if he had intended the initial injury, i.e. as if he had been the guarantor of the injured good from the outset.

The term "possible intent" generally means the lack of a contradictory relationship between will and event; in fact, the subject decides to act even at the cost of causing a criminal event through this corollary: "it may be so or otherwise, it may happen so or otherwise, in any case I act"8. The risk is accepted following a deliberation with which the agent consciously subordinates a specific legal good to another9.

The conscious guilt is configured instead when the sure forecast of the damaging consequence would have determined the abstention from the action, that is when the acceptance of the risk, by the subject agent, is a subjective attitude referable to the concept of mere imprudence or negligence[10].

However, these definitions do not calm the doctrinal and jurisprudential debate regarding the general theory of "eventual" culpability[11]. Doubts have been fueled first of all by the *ThyssenKrupp* sentence (Cass.pen S.U.38343/2014) which establishes the revaluation of the volitional profile of the intent through balancing, the recognition of the probative moment[12]. Well, the judgment opens the season of the practice of the indicators of the possible intent that change according to the 'offense of reference and it is a clear example of the first judgment of the Court of Assizes of Appeal of Rome in the case *Vannini* subsequently annulled with reference by the Supreme Court and reformulated by the same Court of Appeal. Beyond the outcome of the proceedings, it is interesting to note that in the first sentence of the Court of Assizes of Appeal in the case in question, Frank's formula was adopted. This formula is a hypothetical judgement on what the agent's behavior would have been if he had foreseen the event as certain[13].

---

[8] G. Cerquetti, *Il dolo* [The willful misconduct], Giappichelli, Torino, 2010.

[9] L. Eusebi, *Il dolo come volontà* [The willful misconduct as act of will], Morcelliana, Brescia, 1993.

[10] K Jaspers, *La questione della colpa* [The question of guilt], It.transl., Milano, 1996, p. 52.

[11] R. Bartoli, *Luci ed ombre della sentenza delle Sezioni unite sul caso Thyssenkrupp* [Lights and shadows of the ruling of the Joint Sections on the Thyssenkrupp case], in Giur. It., 2014.

[12] G. Fiandaca, *Le Sezioni Unite tentano di diradare il "mistero" del dolo eventuale* [The United Sections try to clear up the "mystery" of possible fraud], in Riv. It. Dir. Proc. Pen., 2014.

[13] A. Aimi, *Dolo eventuale e colpa cosciente: il caso Thyssen al vaglio delle Sezioni Unite* [Possible willful misconduct and conscious negligence: the Thyssen case under consideration by the United Sections], in Dir. Pen. Cont. no. 1/2014.

Going back to the *Thyssen* sentence, in order to confirm the culpability of the possible intent, it is essential to be able to affirm that the agent would not have held back from the illegal conduct even if he had been aware of the certain occurrence of the event according to the First Frank formula. In other words, the prediction of an event, in terms of possibility, integrates malice only when the prediction of such an event in terms of certainty would not have held back the agent, nor would it have assumed the significance of a decisive counter-motive. Therefore, in order to sustain a responsibility by way of possible malice, it should be affirmed that in the *Vannini* case, from the beginning, from the moment of the shooting, there is a link of awareness-acceptance of the death event; however, the requests for help made in an unacceptable and mendacious way would remain meaningless. Frank's Second Formula guides the judge's assessment through a hypothetical judgment of a particular psychological state. The mental state is relevant for malice if it is such as to induce the subject to act even in the face of a substantial change in the factors relevant to the decision, such as the passage from the possibility or doubt to the certainty of the occurrence of the damaging event[14].

By accepting the risk, one accepts the event: this would seem to be the decisive criterion for the distinction between possible intent and conscious fault[15].

IV. The Italian Supreme Court's opinion

The ruling of legitimacy raises three issues: a) action/omission; b) position of guarantee; c) possible intent which are interconnected. In fact, the configurability of the position of guarantee is only relevant where the first alternative is dissolved in the sense of "omission", because in the case of "action" the lethal event is not lethal, because in the case of "action" the lethal event can be charged on the basis of the mere etiological link: whoever causes the death of a man by means of an active conduct is liable for murder regardless of the circumstance that he has or has not assumed the role of guarantor[16].

Similarly, the question relating to the possible intent is only relevant by affirming the existence of the position of guarantee. In the absence of a valid position of guarantee, in fact, the causative inaction of death integrates at most the case of omission to rescue (art. 593 C.p.), within which the event. Art. 593 C.p., together with the aggravating circumstance of paragraph 3, stifles the temptation of the judge: not coming to the aid of the unfortunate victim is something different from the will to kill, just as the duty to help is something different from the obligation to guarantee.

In particular, the Court of Cassation maintains that the same resulted, in a unitary consideration and despite the intertwining of active and omissive conduct, in the omission of a timely solicitation of useful assistance It is now necessary to verify the validity of such an assumption, especially in the light of the false information reported by the protagonists of the case to the health care workers. should the active interruption of another person's life-saving causal course be equivalent to the omitted

---

[14] O. Di Giovine, *Diritto penale e neuroetica* [Criminal law and neuroethics], Padova, Cedam, 2013

[15] D. D'Auria, *Fin dove il dolo eventuale? Qualche riflessione, traendo spunto dal "caso Thyssenkrupp"* [How extent is the willful misconduct? Some reflections, drawing inspiration from the "Thyssenkrupp case], in Leg. Pen., 2013.

[16] F. Antolisei, *Manuale di diritto penale. Parte generale* [Criminal law handbook. General part], Milano, 2003.

interruption of a lethal causal course? Who prevents the rescuer from "rescuing", with violence, threat or deception, and puts in place an "active" or "omissive" conduct?

This question, which does not seem to torment Italian doctrine, is the subject of some foreign studies[17]. There is an almost unanimous solution that the "interruption of the rescuer's work of others" should be qualified as an "action", despite the hypothetical structure of the relative judgement of causality, conduct that interrupts the rescuer's action of others, which, in turn, interferes with a lethal causal process. In fact, the injury has its own external cause; it was about to be neutralized, but human conduct "prevented its impediment" (so-called double prevention)[18]. Its essential elements are: an interruptive conduct of a salvific factor that, in turn, would have interrupted a causal course of injury[19]. If this is the minimum framework of the phenomenon, the salvific factors involved can be indistinctly human or natural: a lifesaver to the shipwrecked person can be offered both by a lifeguard and by a favorable sea current.

The same must be said with reference to the causal course of injury: the shipwreck, by etymological sense, is such because the victim of the accidental crash of a ship, but an individual can be in the same condition also because of being thrown into the sea by someone. According to the well-known dogmatic premises, the two causal courses, one injurious and the other saving, one real and the other hypothetical, can occur with a variable rate of statistical probability, also by virtue of the possible psychological nature of the interrupting action. In fact, the distinction between action and omission is not to be interpreted in a physical sense, as is now accepted in many quarters, but through the criteria of the nature of the precept violated and the dimension of the risk: if the overall conduct of the subject violates a "prohibition" to act with the result of introducing a new risk factor for the legal asset, there will be an "action"; vice versa, the conduct of those who limit themselves to not contrasting a risk factor already present in the reference situation, against a "command" that obliged them to intervene, will have the value of "omission".

Based on the case history of "double impediment", the distinction is as follows: if the rescue action has not yet been implemented, if the lifebuoy has not been launched, if the doctor has never been able to provide effective rescue instruments, then the risk of injury has never been mitigated: therefore, it does not derive from the interruptive "action" of the agent. On the contrary, if the rescue action is already in progress, the subject who interrupts it re-exposes the asset to the original risk factor, which is equivalent to qualitatively changing its dimension: the subject "acts" and not "omits"[20].

It follows that it is inappropriate to resort to the doctrinal elaboration in question in order to evade the critical issues that may arise on the side of the position of guarantee, at least in the presence of the typical situation described by art. 593 paragraph 2 C.p. In relation to the author of the shot, the intent, in fact, as a general

---

[17] E. Niethammer, *Ungeschriebenes Strafrecht* [Unwritten criminal law], in ZstW, 55, 1936, p. 745; G. Vassalli, *La giurisprudenza penale germanica in materia di analogia* [The Germanic criminal jurisprudence in the matter of analogy], in Riv. Dir. Pen., 1935, p. 15); R. Hohn, *Die Wandlung im Staatsrechtlichen Denken* [The change in constitutional thinking], Hamburg, 1934; G. Fornasari, *I principi del diritto penale Tedesco* [The principles of German criminal law], 1993, Padova, pp. 4-5; P. Nuvolone, *La riforma del paragrafo 2 del Codice Penale germanico* [The reform of paragraph 2 of the Germanic Criminal Code], in Riv. It Dir. Pen., 1938, p. 530.

[18] M. Ronco, *La riscoperta della volontà nel dolo* [The rediscovery of the will in willful misconduct], in Riv. It. Dir. Proc. pen., 2014.

[19] S. Prosdocimi, *Dolus eventualis* [Dolus eventualis], Giuffrè, Milano, 1993.

[20] M. Ronco, *Riflessioni sulla struttura del dolo* [Reflections on the structure of willful misconduct], in Riv. It. Dir. Proc. Pen., 2015.

principle, must embrace the entire typical fact: if it is murder, it must embrace the action and the event. Therefore, only the concomitant malice is relevant, which consists in the will that supports the action and persists until the event occurs. It is not authentic malice the will that embraces the event, but not the conduct (so-called subsequent malice); or, vice versa, the will that embraces the conduct, but not the event (so-called antecedent malice).

In these cases, the fact in its entirety is culpable: the action or respectively the event, have not been the object of voluntary projection[21]. Therefore, there are two options: either the author of the shot is called to answer for the intentional omission subsequent to the previous culpable action, breaking the event into two parts and restoring the concomitance between intent and the typical fact; or, by reading the conduct of the accused as a whole and omitting to distinguish between a before (culpable) and an after (intentional) act, one is exposed to the censure of intent subjective[22].

V. Judgement's lesson: the relationship between legality and causality

The law can produce ex novo legally relevant positions of guarantee, but the impeding obligations which are its responsibility are identified and regulated by the most varied preventive sources ex art. 43, par. 3 C.p., on which the original dogmatic approach is based[23]. Furthermore, on the one hand, the constitutional provisions are attributed the same value reserved to the law, and on the other, the role of autonomous source is attributed to the previous dangerous activity. If the first extension devalues the profile of determinateness, degrading legality to the role of a bare formal qualification (as the same seems to fear), the second openly contradicts the premises adopted. In fact, procedural legality is a necessary antecedent to the judge's ruling on the application of the incriminating rules. The demand for legality undergoes a physiological decline.

This is particularly true in relation to the definitions of the fundamental categories of criminal law, such as the notions of intent, guilt and premeditation. The certainty and equality of treatment that they aim to guarantee can be validly ensured by scientific elaboration, which, in areas such as that of the fundamental notions, is characterized by diffusion, stability and ponderability that are even greater than the law.

The ascertainment of causality concerns only a few criminal offences (e.g. personal injury). Nevertheless, for reasons of regulatory economy, the institution of causality is today regulated once and for all in the general part of the criminal code, specifically in articles 40 C.p. and 41 C.p.[24].

Again, according to the general rules, causally oriented cases can be committed by omission, under the conditions indicated, also in this case once and for all, in Article

---

[21] M. Bertolino, *Il nuovo volto dell'imputabilità penale. Dal modello positivistico del controllo sociale a quello funzionale-garantistico* [The new face of criminal imputability. From the positivistic model of social control to the functional-guarantee model], in Ind. Pen., 1998, p. 360.

[22] G. Fiandaca, E. Musco, *Manuale di diritto penale. Parte generale* [Criminal Law Handbook. General Part], Bologna, 2008.

[23] G. Vassalli, *"Nullum crimen sine lege"*, in Novissimo Digesto Italiano, Appendice, V (1986), pp. 292-304.

[24] F. D'Alessandro, *La certezza del nesso causale: la lezione "antica" di Carrara e la lezione "moderna" della Corte di cassazione sull' "oltre ogni ragionevole dubbio"* [The certainty of the causal link: the "ancient" lesson of Carrara and the "modern" lesson of the Court of Cassation on "beyond any reasonable doubt"], Riv. It. Dir. Proc. Pen. 2002.

40, paragraph 2, C.p. And again: homicide is relevant in the context of distinct criminal offences, which can be committed with intent, negligence or premeditation[25]. Other offences, such as personal injury, may be intentional or negligent. Most offences, on the other hand, are only punishable as intentional, unless otherwise provided for (Article 42 paragraph 2 C.p.). One thinks of the definitions provided for in Article 43 C.p. and of the institutions, among others, of the so-called *suitas* of conduct (Article 42 C.p.) and of the error of fact as a factor of exclusion of intent (Article 47 C.p.)[26].

With reference to the legislative definition of guilt, it can be observed that it was originally contained in the rules dedicated to homicide and personal injury, although this definition, as a rule, also applied to other culpable offences[27].

VI. Conclusion

The brief discussion shows that causality and doubt lead to the development of a new volitional theory. Frank's formula is a dangerous "pre-judgement" which may jeopardize reasonable doubt. This consideration derives from the problem of proving the volitional moment of the possible intent referred to Frank's formulas.

The theme of doubt is therefore immediately highlighted also by the "criterion of proof" of Frank's first formula, found in the *"ThyssenKrupp*" trial, which starts from the question of what conduct the offender would have assumed if he had been certain of the realization of the typical event[28]. In other words, it is assumed that culpability due to the concrete prediction of the unplanned event corresponds to the culpability of the culpable offence and not to the more serious culpability that characterizes the intentional offence. Therefore, it is assumed that culpability due to the concrete foresight of the unplanned event corresponds to the culpability proper to a culpable offence and not to the more serious culpability that characterizes an intentional offence.

Notwithstanding the volitional theories (the acceptance of risk and the theory of consent), the determination of intent represents another issue concerning the correct configuration of the psychological element of the offence. Also, in this case the doubt on the intentional or culpable nature of culpability may result in reasonable doubts at the procedural level. In case law, the assessment of willfulness is considered a complex cognitive and logical procedure, because it aims at reconstructing an essentially psychic fact, not perceptible to the senses.

The ascertainment of malice is fundamentally based on the elements of the objective legal case (modalities of time, space and place that characterize it in concrete terms) and on the elements that relate to the personality of the agent, to his character,

---

[25] G.A. De Francesco, *Dolo eventuale e dintorni: tra riflessioni teoriche e problematiche applicative* [Dolus eventualis and surroundings: between theoretical reflections and application problems], in Cass. pen., 2015.

[26] A. Regina, *La regola b.a.r.d. nel diritto penale sostanziale. Interferenze con la struttura del reato* [The b.a.r.d. rule in substantive criminal law. Interference with the structure of the crime], in Giur. merito 2008, p. 3032).

[27] M. Ronco, *Il reato. Struttura del fatto tipico. Presupposti oggettivi e soggettivi dell'imputazione penale. Il requisito dell'offensività del fatto* [The crime. Structure of the typical fact. Objective and subjective assumptions of the criminal charge. The offensiveness requirement of the fact], vol. II, Zanichelli, Bologna, 2011.

[28] G. Di Biase, *Il nuovo volto del dolo eventuale. Tra criterio del bilanciamento e prima formula di Frank* [The new face of possible fraud. Between the balancing criterion and Frank's first formula], in Ind. pen., 2015.

to his moral and intellectual figure, understood as 'revelatory indices' of malice, indicators relating to the conduct. Ergo, Frank's formula is intended to offer a criterion for determining the content of the normative concept of intent[29].

Furthermore the doctrine has pointed out that the hypothetical reference is used as the most suitable inductive means to capture an actual psychological situation: the circumstance that the agent would have acted despite the certainty of the result, indicates, in those who have acted representing the possibility of causing the event, a particular psychological attitude, different from that of the subject who, although having decided to act in awareness of the risk, faced with the certainty, would have abstained from the event foreseen and desired as a consequence of the action or omission (Art. 43 C.p.)[30]. Article 43 C.p. defines the psychological element of the offence that is decisive for distinguishing willful misconduct and guilt: the existence or non-existence of the will. Jurisprudence[31] has interpreted the will as the elaborating thought, motivated by an objective, which is resolved in intention, will", but this is not enough to delimit the boundary between conscious guilt and possible willful misconduct. The state of doubt is the pivotal point for a correct definition of willful misconduct and conscious negligence: doubt, in addition to being the window that opens to the moment of proof, is the substantive expression of the procedural criterion of *b.a.r.d. (beyond a reasonable doubt)* and therefore this is the most correct way to conduct the investigation.

The volitional theories and the different psychological conceptions of possible intent and conscious guilt seriously undermine this guideline[32]. These forms of culpability are radically different, antithetical, in that there is the structural diversity of the prediction "the event is different; the scenario of human action is different; the psychological impulse is different". According to the "Cassata" ruling, therefore, in the eventual willful misconduct there must be a situation of probability of the event, which must however be considered from a subjective point of view, i.e. the way in which the concrete agent saw the possibility of the verification of a result of the conduct. Intentional intent and conscious negligence differ in this respect.

Finally, the following considerations may be noted. Possible willfulness is to be sought in the psychological attitude of the person who represents the concrete possibility of the realization of the fact of crime and accepts the risk of its occurrence (there is acceptance of the risk of the event): by acting without having overcome the state of doubt, on the possible concrete occurrence of the fact, despite its representation, the subject wants the fact itself. In conscious negligence there is a prediction followed by a counter-prediction, i.e. by a negative prediction on the occurrence of the event, the agent, despite foreseeing that his conduct is likely to cause an unlawful event, carries it out anyway, having reached a negative prediction about the possibility that the event will actually occur, in the specific context of the circumstances in which he

---

[29] L. Eusebi, *Verso la fine del dolo eventuale? (Salvaguardando, in itinere, la formula di Frank)* [Towards the end of the possible fraud? (Safeguarding Frank's formula on the way)], in Dir. Pen. Cont. no. 1/2014.

[30] L. Eusebi, *Formula di Frank e dolo eventuale* [Frank's formula and dolus eventualis] in Cass. S.U., 24 aprile 2014 / Thyssenkrupp, in Riv. It. Dir. Proc. Pen., 2015.

[31] F. D'Alessandro, Sez. IV, 25 September 2001, no. 1585/02, *S. and others*, in Riv. It. Dir. Proc. Pen. 2002, 737. Criminal Court of Cassation, Section 1, 12 October 1993, no. 748/94,

Cassata.

[32] M. Pisani, *Riflessioni sul tema del "ragionevole dubbio"* [Reflections on the topic of "reasonable doubt"], in Riv. It. Dir. Proc. Pen. 2001, p. 1245. N.N. Taleb, *The Black Swan. The Impact of the Highly Improbable*, New York 2007.

operates. On the contrary, by overcoming the state of doubt about the occurrence of the event, the subject would have been in malice. Therefore, when the subject represents the possibility of the damaging event, but trusts in its concrete non-occurrence, there will be conscious fault or fault with foresight.

References

1. Aimi, A., *Dolo eventuale e colpa cosciente: il caso Thyssen al vaglio delle Sezioni Unite* [Possible willful misconduct and conscious negligence: the Thyssen case under consideration by the United Sections], in Dir. Pen. Cont. no. 1/2014.

2. Antolisei, F., *Manuale di diritto penale. Parte generale* [Criminal law handbook. General part], Milano, 2003.

3. Bartoli, R., *Luci ed ombre della sentenza delle Sezioni unite sul caso Thyssenkrupp* [Lights and shadows of the ruling of the Joint Sections on the Thyssenkrupp case], in Giur. It., 2014.

4. Bricola, F., *Teoria generale del reato* [Theory of the crime], in Noviss. Dig. Ita., Utet, Torino 1973.

5. Cass. pen., Sez. I, 7 February 2020 (dep. 6th March 2020), P.M. e altri (P.M. and others), n. 9049, *La Cassazione sul caso Vannini: i rapporti tra omicidio mediante omissione e omissione aggravata dall'evento morte in un noto caso di cronaca* [The Supreme Court on the Vannini case: the relationship between murder by omission and omission aggravated by the death event in a well-known news cas], in Sist. Pen., 23 April 2020.

6. Cerquetti, G., *Il dolo* [The willful misconduct], Giappichelli, Torino, 2010.

7. D'Alessandro, F., *La certezza del nesso causale: la lezione "antica" di Carrara e la lezione "moderna" della Corte di cassazione sull' "oltre ogni ragionevole dubbio"* [The certainty of the causal link: the "ancient" lesson of Carrara and the "modern" lesson of the Court of Cassation on "beyond any reasonable doubt"], Riv. It. Dir. Proc. Pen. 2002.

8. D'Alessandro, F., Sez. IV, 25 September 2001, no. 1585/02, *S. and others*, in Riv. It. Dir. Proc. Pen. 2002, 737. Criminal Court of Cassation, Section 1, 12 October 1993, no. 748/94, Cassata.

9. D'Auria, D., *Fin dove il dolo eventuale? Qualche riflessione, traendo spunto dal "caso Thyssenkrupp"* [How extent is the willful misconduct? Some reflections, drawing inspiration from the "Thyssenkrupp case"], in Leg. Pen., 2013.

10. De Francesco, G.A., *Dolo eventuale e dintorni: tra riflessioni teoriche e problematiche applicative* [Dolus eventualis and surroundings: between theoretical reflections and application problems], in Cass. pen., 2015.

11. Demuro, G.P., *Studi di diritto penale. Il dolo* [Criminal law studies. The willful misconduct], vol. 1-2, Giuffrè, Milano, 2010.

12. Di Biase, G., *Il nuovo volto del dolo eventuale. Tra criterio del bilanciamento e prima formula di Frank* [The new face of possible fraud. Between the balancing criterion and Frank's first formula], in Ind. pen., 2015.

13. Di Giovine, O., *Diritto penale e neuroetica* [Criminal law and neuroethics], Padova, Cedam, 2013.

14. Donini, M., *Il dolo eventuale, fatto-illecito e colpevolezza* [The eventual willful misconduct, unlawful act and culpability], in Dir. pen. cont. no. 1/2014.

15. Donini, M., *Teoria del reato* [Theory of the crime], in Digesto/pen., XIV, 1999.

16. Eusebi, L., *Formula di Frank e dolo eventuale* [Frank's formula and dolus eventualis] in Cass. S.U., 24 aprile 2014 / Thyssenkrupp, in Riv. It. Dir. Proc. Pen., 2015.

17. Eusebi, L., *Il dolo come volontà* [The willful misconduct as act of will], Morcelliana, Brescia, 1993.

18. Eusebi, L., *Verso la fine del dolo eventuale? (Salvaguardando, in itinere, la formula di Frank)* [Towards the end of the possible fraud? (Safeguarding Frank's formula on the way)], in Dir. Pen. Cont. no. 1/2014.

19. Ferrua, P., *Il 'giusto processo'* [The 'due process'], Bologna, 2012.

20. Fiandaca, G., *Le Sezioni Unite tentano di diradare il "mistero" del dolo eventuale* [The United Sections try to clear up the "mystery" of possible fraud], in Riv. It. Dir.Proc. Pen., 2014.

21. Fiandaca, G., Musco, E., *Manuale di diritto penale. Parte generale* [Criminal Law Handbook. General Part], Bologna, 2008.

22. Fornasari, G., *I principi del diritto penale Tedesco* [The principles of German criminal law], 1993, Padova.

23. Hohn, R., *Die Wandlung im Staatsrechtlichen Denken* [The change in constitutional thinking], Hamburg, 1934.

24. Jaspers, K., *La questione della colpa* [The question of guilt], It.transl., Milano, 1996.

25. M. Bertolino, *Il nuovo volto dell'imputabilità penale. Dal modello positivistico del controllo sociale a quello funzionale-garantistico* [The new face of criminal imputability. From the positivistic model of social control to the functional-guarantee model], in Ind. Pen., 1998.

26. Marinucci, G., Dolcini, E., *Corso di diritto penale* [Criminal Law Course], IIIrd ed., 2001.

27. Niethammer, E., *Ungeschriebenes Strafrecht* [Unwritten criminal law], in ZstW, 55, 1936.

28. Nuvolone, P., *La riforma del paragrafo 2 del Codice Penale germanico* [The reform of paragraph 2 of the Germanic Criminal Code], in Riv. It Dir. Pen., 1938.

29. Prosdocimi, S., *Dolus eventualis* [*Dolus eventualis*], Giuffrè, Milano, 1993.

30. Regina, A., *La regola b.a.r.d. nel diritto penale sostanziale. Interferenze con la struttura del reato* [The b.a.r.d. rule in substantive criminal law. Interference with the structure of the crime], in Giur. merito 2008.

31. Ronco, M., *Il reato. Struttura del fatto tipico. Presupposti oggettivi e soggettivi dell'imputazione penale. Il requisito dell'offensività del fatto* [The crime. Structure of the typical fact. Objective and subjective assumptions of the criminal charge. The offensiveness requirement of the fact], vol. II, Zanichelli, Bologna, 2011.

32. Ronco, M., *La riscoperta della volontà nel dolo* [The rediscovery of the will in willful misconduct], in Riv. It. Dir. Proc. pen., 2014.

33. Ronco, M., *Riflessioni sulla struttura del dolo* [Reflections on the structure of willful misconduct], in Riv. It. Dir. Proc. Pen., 2015.

34. Taleb, N.N., *The Black Swan. The Impact of the Highly Improbable*, New York 2007.

35. Ubertis, G., *La ricerca della verità giudiziale* [The search for judicial truth], in G. Ubertis (ed.) *La conoscenza del fatto nel processo penale* [The knowledge of the fact in the criminal trial], Milano, 1992.

36. Vassalli, G., *"Nullum crimen sine lege"*, in Novissimo Digesto Italiano, Appendice, V, 1986.

37. Vassalli, G., *La giurisprudenza penale germanica in materia di analogia* [The Germanic criminal jurisprudence in the matter of analogy], in Riv. Dir. Pen., 1935.

Pisani, M., *Riflessioni sul tema del "ragionevole dubbio"* [Reflections on the topic of "reasonable doubt"], in Riv. It. Dir. Proc. Pen. 2001.

Scaremongering in the Hungarian Criminal Law

Ferenc Dávid*

Abstract

Pandemic had an impact on Hungarian criminal law and as part of it, the Criminal Code of 2012 was amended on several points. The history of criminalizing scaremongering has a one and a half century long past in Hungarian criminal law since the first national code had been adopted in 1878. Along these long decades, historical circumstances and legislative trends affected the wording and legal concept of scaremongering. At the beginning penalizing the dissemination of various untrue news was not regulated in the criminal code, but so-called scaremongering(s) as criminal offences were regulated in several documents and it took decades to form a single criminal law definition for it. The recent criminal legislation including the current and previous criminal codes in force significant changes affected the wording and legal concept of scaremongering. Harsher punishment of perpetrators during hard times or during special legal order was not unprecedented. There has been always a general and increased social unrest during special legal order of course and justification for a more severe punishment with or without being reasonable has already appeared before. The present paper is focusing on the former and current regulation of scaremongering in the Hungarian criminal law.

Keywords: *scaremongering, pandemic, legislation, regulation, special legal order*

I. Introduction

Criminalizing scaremongering has a long history in Hungarian criminal law. When the coronavirus epidemic hit Hungary and the Criminal Code in force was amended on several points, parallel with all this, there was a significant effervescence among criminal lawyers and scholars too[1]. In addition to the changes of the past year different impacts and legislative trends affected the wording and legal concept of scaremongering along the last century. The early regulation of scaremongering was codified in several different laws and took decades to form a single criminal law definition for it, while the recent criminal legislation including, the current and previous criminal codes both, introduced significant changes affected the legal concept of scaremongering.

II. The Early Regulation of Scaremongering

The history of criminalizing scaremongering has a one and a half century long past in Hungarian criminal law codification. The national codification of criminal law

* PhD, Lecurer, Faculty of Law, University of Pecs, Hungary. Contact: david.ferenc@pte.hu.

[1] See the referred papers and authors in the references, for example and worth mentioning: István Ambrus, Mátyás Bence, Krisztina Ficsor, István Gál, András Koltay or Mihály Tóth.

started with the „Csemegi" Code[2], the very first Criminal Code of 1878. Although the Csemegi Code was a unique product of the Hungarian legislation at that time, penalizing the dissemination of various untrue news was not regulated here. An early so-called „scaremongering" had been regulated among the petty offences[3] a year after of the implementation of the Csemegi Code. The first appearance and wording of the offence has been codified as „whoever, by setting off bells or any other alarm, knowing that there is no cause, disturbs the peace of the inhabitants; or who intentionally misleads the authority by reporting false news of distress or riot shall be punished by imprisonment for up to eight days. And if, as a result of reporting a false rumor, the police or the armed forces are called out: the perpetrator shall be punished by imprisonment for up to fifteen days[4]".

Although the Csemegi Code was amended several times during the decades following the First World War, the substantive criminal offences of defamation and libel were codified in legislation supplementing original Criminal Code. During these decades, burdened by political, economic and social changes, an act on the more effective protection of the state and social order of the Kingdom of Hungary was enacted[5], which was in force since 1921 and left a decisive mark on criminal law and order between the two world wars. These so-called state defense acts[6] divided punishable acts into two groups. The law distinguished between these criminal offences as felonies and misdemeanors aimed at overthrowing or destroying the state and social order, and against the esteem of the Hungarian state and the Hungarian nation. While offences belonging to the first group are theoretically close to the nowadays so-called crimes against the state, while offences from the second should be punished as „defamation of the nation", see as „the allegation or dissemination of a false fact that violated the credibility of the Hungarian state or the Hungarian nation[7]". Criminalizing the defamation of the Hungarian nation as a „political scaremongering" during special legal order was linked to two pieces of legislation passed in 1930. In line with the Military Criminal Code[8] the crime of cowardice could be committed by a military person only who „spreads false war news during hostilities and causes discouragement or danger to another"[9] while with another supplementary act entered into force after[10], the original Csemegi Code was also amended. Based on the above-mentioned amendment, the scaremongering could have been committed by anyone fabricates or spreads false news in war-time or in connection with warfare and these perpetrators should be punished by a term of imprisonment of up to one year, unless his act was punishable by a more serious penalty[11]".

---

[2] See as the Act V of 1878 on the Hungarian Criminal Code named after its scholar codifier, Károly Csemegi.

[3] Act XL of 1879 on Hungarian Criminal Code on Petty Offences.

[4] See Article 40 of the Act XL of 1879 and Tóth 2020, p. 6, see also Angyal, Isaak, 1941, pp. 14-15.

[5] Act III of 1921 on the More Effective Protection of the State and Social Order.

[6] See the similar so-called state defense acts or order acts from Europe: Yugoslavia (1920), Hungary (1921), Germany (1922), Czechoslovakia (1923), Romania (1924), Italy (1926) etc.; Belovics et al. 2012, p. 82.

[7] Hornyák 2010, pp. 26-33.

[8] Act II of 1930 on the Military Criminal Code.

[9] Article 107(p. 3) of the Act II of 1930.

[10] See the Act III of 1930 on the Entry into Force of the Military Criminal Code and on the Amendment and Supplementation of Certain Provisions of the Ordinary Criminal Code.

[11] See Article 80 of the Act III of 1930 (cf.: Article 14 of the Act XXIII of 1913 and Article 107 (p. 3) of the Act II of 1930); see also Koltay 2020a p. 322 and Koltay 2020b, p. 1.

It is unfortunate that the reform of the Military Criminal Code of 1930 and the military judiciary, as well as the justification for its co-regulation with „ordinary criminal laws" lacked a detailed legislative explanation of the above. The referred acts were dealing with the same legal problem, when the State Defense Act of 1921 punished the assertion or dissemination of an untrue fact infringing the credibility of the Hungarian state or the Hungarian nation, while the Military Criminal Code of 1930 penalized the same offence only in connection with warfare, except in the case where it caused such serious damage that it also damaged the credibility of the Hungarian state or the Hungarian nation[12].

The separate and independent „political" and „military" scaremongering was supplemented by the act on ensuring the order of economy and credit and the balance of public finances, which came into force only a year after the global economic crisis hit Hungary in 1930. From this year and being renewed annually, a new substantive article was in effect alongside with the other offences. This so-called „economic" scaremongering was a newly formed crime that could be committed by anyone who fabricated or falsified news that adversely affected the economic situation or credit life of Hungary[13]. In order to protect the national economy a temporary mandate was given to the Ministry of Economy. While the offence should have been punished originally until June 1932, but that had been extended from year to year and the article stayed in force[14].

Following a scaremongering where the offence was regulated in several places, it took years for a uniform regulation covering political, military or economic life. First unification attempt took place in 1937 when in connection with the consequences and experience of the great world economic crisis it has been given rise to a new definition for scaremongering[15], in which if „not punishable by a more serious penalty, it is punishable by imprisonment for a term not exceeding one year for fabricating news or spreading untrue news that may disturb public order or peace of mind or endanger the country's foreign policy or adversely affect its economic situation or its lending practice[16]". Although the new criminal facts being adopted in 1937, they did not cover all aspects of scaremongering, but created a wider definition for its different aspects being regulated in different legal sources before[17]. The unification and amendment described above did not affect the criminal offence of national defamation should be punished with a more severe penalty under the State Defense Act[18].

III. Further criminal law regulation of scaremongering

The failed attempt for a democratic transition in the post-war Hungary led to a communist state order with different ideological emphases after 1945. The act on the

[12] Angyal, Isaák 1941, p. 685.

[13] Article 9 of the Act XXVI of 1931 on Ensuring Economic and Credit Order and the Balance of Public Finances.

[14] The referred deadline has been amended several times see: Act VII of 1932 (until 30 June 1933), Act X of 1933 (until 30 June 1934), Act XV of 1934 (until 30 June 1935), Act IX of 1935 (until 30 June 1936) and Act XVIII of 1936 (until 30 June 1937).

[15] See Act X of 1937 on the Further Extension of the Authorization Granted to the Ministry.

[16] Article 2 of the Act X of 1937; Koltay 2020a p. 323 and Koltay 2020b, p. 2.

[17] See: Article 80 of the Act III of 1930; Article 9 of the Act XXVI of 1931; Article 40 of the Act XL of 1879; Article 7 of the Act III of 1921etc.

[18] See the preamble for the Act X of 1937.

criminal defense of the democratic state and the republic created a new offence in which the perpetrator „in the presence of two or more persons, to state or spread rumors of any untrue fact or allegation that is capable of disturbing public order or public peace, or endangering the country's foreign policy interests or adversely affecting the economic situation[19]". The crime could only be committed by alleging or rumoring an untrue fact that was capable of inciting contempt against the democratic state order and the republic order or undermining its international esteem, but did not punish insignificant or harmless remarks containing untrue facts. Regarding the legal regulation of scaremongering the legislator has penalized the untrue facts only while argued that „this would unduly restrict freedom of criticism"[20] The criminal law protection of the international esteem of the Hungarian state was justified by the closer international relations and by the interest of Hungary in joining the United Nations, but a couple of years later the originally quite slight regulation tightened by adopting certain amending provisions related to legislation reforms of a communist one-party system.

Following the fragmented legal regulation of the earlier decades, a generally formulated definition of scaremongering has rosen with the adoption of the new Criminal Code of 1961 and which replaced the long-lived Csemegi Code from 1878 and its additional criminal legislation. Based on the new code „a person, who claims or spreads rumors, in front of others, of a false fact or fact distorted in such a way as to disturb the public peace or adversely affect the economic situation shall be punished by imprisonment for a term not exceeding two years"[21] and it should be punished by imprisonment for a term from sic month to five years if „the offence was committed through the press of reproduction or in front of a large audience[22]". The criminal offence was included in the chapter on crimes against public security and public order as emphasizing its characteristic and close connection to public order and disturbing public peace of people. The heritage of a partly overlapping subject circle of a diversified regulation the new concept of scaremongering had to be combined and merged with each other. Hereby the legislator identified the legal object requiring primary protection in public peace through which various interests may be jeopardized by the spread of false or untrue rumors resulting confusion and restlessness in behavior of people.

The „old" Criminal Code of 1978, which replaced the short-lived Criminal Code of 1961 meant a qualitative change in the legal regulation and in the regulation and wording of scaremongering, in which „a person who, in front of others, states or disseminates any untrue fact – or any misrepresented true fact – that is capable of causing disturbance shall be punished by imprisonment for up to one year, correctional-work or a fine. The punishment shall be imprisonment for a term not exceeding three years for a criminal offence if the scaremongering is committed in a place of public danger or during a war[23]". Significant changes were adopted during the political and legal transformation of Hungary in 1989 when the old criminal offence of scaremongering was just a lasting piece of the one-party legal system[24]. Following the necessary modification, scaremongering could be committed only „when someone in front of a large audience, states or disseminates any

[19] Koltay 2020a, p. 323 and Koltay 2020b, p. 2.

[20] See the Article 4 of the Act VII of 1946 on the Protection of the Democratic Order and the Criminal Law of the Republic.

[21] Koltay 2020a, pp. 323-324 and Koltay 2020b, pp. 2-3.

[22] Section 218 of the Act V of 1961 on the Criminal Code of the Hungarian People's Republic.

[23] Section 270 of the Act IV of 1978 on the Criminal Code of the Hungarian People's Republic.

[24] See Act XI of 1992 on Annulling Convictions for Certain Offenses against the State and Public Order Committed between 1963 and 1989.

untrue fact or any misrepresented true fact that is capable of causing disturbance is guilty of a misdemeanor and committing this crime should be punished by imprisonment for up to one year, community service or a fine. The punishment should be imprisonment for a term not exceeding three years for a criminal offence if the scaremongering is committed in a place of public danger or during a war[25]". This form of scaremongering had been modified only after the political transformation when assessed the constitutionality of the elements of scaremongering. After this examination related to the freedom of speech and criminal law regulation, the new form of criminal law regulation penalized „any conduct of uttering or publishing before the public at large a statement one knows to be false or with a reckless disregard for its truth or falsity at the scene of some emergency by which to violate public order or disturb the public peace at a place of public danger is guilt of a felony punishable by imprisonment not exceeding three years"[26] after 2000. This regulation form has been incorporated into the new Criminal Code of 2012[27] and lasted for two decades until the legal side effects of the outbreak of the coronavirus epidemic[28].

IV. Outlook: The Pandemic and the Regulation of Scaremongering

Pandemic had an impact on Hungarian criminal law and as part of this, the Criminal Code of 2012 was amended on several points[29]. As a result of the social phenomena that accompany the epidemic situation the changes affected the wording and legal concept of scaremongering on the basis of which thereafter „a person who, at a site of public danger and in front of a large audience, states or disseminates any untrue fact or any misrepresented true fact with regard to the public danger that is capable of causing disturbance or unrest in a larger group of persons at the site of public danger is guilty of a felony and shall be punished by imprisonment for up to three years", furthermore „a person who, during the period of a special legal order and in front of a large audience, states or disseminates any untrue fact or any misrepresented true fact that is capable of hindering or preventing the efficiency of protection is guilty of a felony and shall be punished by imprisonment for one to five years[30]".

The harsher punishment of the perpetrators of certain crimes during war time or during special legal order in force can be understandable and it would not be without precedent in the Hungarian criminal law and theory according to which, „in the defense of the state and its order, especially in times of war, it is often necessary to impose particularly minor offences with disproportionately severe penalties in order to have a deterrent effect even by deterrent example[31]". The ground for the old concept of the justification for a more severe punishment has already appeared before. Naturally there has been always a general and increased social unrest during the times of

[25] See Section 16 of the Act XXV of 1989 on the modification of the Act IV of 1978 on the Criminal Code and see also Koltay 2020a, pp. 323-324 and Koltay 2020b, pp. 2-3.

[26] See as the Section 2 of the Act CXXV of 2000 on the modification of the Act IV of 1978 on the Criminal Code.

[27] Act C of 2012 on the Criminal Code.

[28] See here also Belovics 2012 pp. 543-544 and Gellér 2013, pp. 102-105.

[29] See the Act XII of 2020 on the protection against the coronavirus (see also the bill No. T/9790 on the protection against the coronavirus).

[30] See Section 337(1)(2) of the Act C of 2012 and see also Bencze, Ficsor 2020 and Tóth 2020, p. 8.

[31] Hacker 1940 p. 13.

special legal order like during a war an imminent threat of war or during the times of an emergency crises affecting society. In these times mentioned before public peace becomes more vulnerable and its consequences more severe. Scaremongering has a different shape and effect on criminality in different and turbulent times as cited above. In times of peace, the custodial sentence was completely waived or its execution was suspended for probation. In times of war, a more severe punishment may be justified, but it must be considered because the deterrent effect of a short-term imprisonment may no longer be effective after the first custodial sentence has been served.

In special cases of the current offense of scaremongering, the time and the place of the offense as particular circumstances shall be punished more widely during a special legal order, by a person who's miscarriage capable of hindering or preventing the efficiency of protection[32]. The offense committed during special legal order, as a qualifying circumstance, not just defines the scope of acts to be punished more severely, but has been applied during the pandemic with more or less effectiveness due to the initial uncertainties of the investigation authority[33]. The legislator's consideration and need for decisive action to give greater protection to public peace in times of emergency is understandable. However, it is not prudent to place a fact with a difficult historical legacy in a much broader framework in such a way as to make it difficult for the law enforcement to interpret the law, and while arousing doubts in the observer.

References

1. Ambrus, I., *A koronavírus járvány és a büntetőjog* [The Coronavirus Epidemic and the Criminal Law] MTA Law Working Papers 2020/5, pp. 1-24;

2. Angyal, P., Isaák, G. (eds.), *Büntető Törvénykönyv I-II* [Criminal Code I-II] Grill Károly Könyvkiadó, Budapest, 1941;

3. Belovics, E., Gellér, B., Nagy F., Tóth, M., *Büntetőjog I: Általános rész* [Criminal Law I: General Part], HVG-ORAC Lap- és Könyvkiadó, Budapest, 2012;

4. Belovics, E., Molnár, G.M., Sinku, P., *Büntetőjog II: Különös rész* [Criminal Law II: Special Part], HVG-ORAC Lap- és Könyvkiadó, Budapest, 2012;

5. Belovics, E., *Köznyugalom elleni bűncselekmények. Rémhírterjesztés* [Criminal Offences Committed against Public Peace. Scaremongering] in: Belovics, E., Molnár, G.M., Sinku, P., *Büntetőjog II: Különös rész*, HVG-ORAC Lap – és Könyvkiadó, Budapest, 2012, pp. 543-544;

6. Bencze, M., Ficsor, K., *A koronavírus kihívásai és a jogtudomány: a rémhírterjesztés tényállásának jogalkalmazási kérdései* [The Challenges of Coronavirus and the Jurisprudence: Law Enforcement Issues of the Scaremongering], TKJTI (a Jogtudományi Intézet blogja), April 2020, link: https://jog.tk.hu/blog/2020/04/a-remhirterjesztes-tenyallasanak-jogalkalmazasi-kerdesei;

7. Gellér, B.J., *A köznyugalom elleni bűncselekmények. Rémhírterjesztés* [Criminal Offences Committed against Public Peace. Scaremongering] in: Polt, P. (ed.): *Új Btk. kommentár 6. kötet* [New Comments of the Criminal Code. Volume 6], Nemzeti Közszolgálati és Tankönyv Kiadó, Budapest, 2013, pp. 102-105;

8. Hacker, E., *A háború hatása a kriminalitásra* [The Impact of War on Criminality], Miskolci Jogászélet no. 1/1940 pp. 11-14;

[32] See also Ambrus 2020, pp. 13-14.

[33] Bencze, Ficsor 2020.

9. Hornyák, S., *A köznyugalom elleni bűncselekmények* [Criminal Offences Committed against Public Peace], Pécsi Tudományegyetem Állam- és Jogtudományi Kar Doktori Iskola, Pécs, 2010;

10. Koltay, A., *A rémhírterjesztés büntethetőségének alkotmányosságáról* [On the Constitutionlity of the Punishment of Scaremongering], in Medias Res no. 2/2020 (2020a), pp. 322-338;

11. Koltay, A., *The Punishment of Scaremongering in the Hungarian Legal System. Freedom of Speech in the Times of the Covid-19 Pandemic*, ResearchGate, November 2020, (2020b) link: https://www.researchgate.net/publication/346097241_The_Punishment_of_Scaremongering_in_the_Hungarian_Legal_System_Freedom_of_Speech_in_the_Times_of_the_Covid-19_pandemic;

12. Tóth, M., *Közveszély és rémhír* [Public Danger and Scaremongering], Élet és irodalom no. 16/2020, p. 6.;

13. Gál, I.L., *The Possible Impact of the COVID-19 on Crime Rates in Hungary*, Journal of Eastern European Criminal Law no. 1/2020, pp. 165-177.