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AUTHORS

ALI, SANAR SHAREEF – PhD student and lecturer, Károli Gáspár University of the Reformed Church in Hungary, Doctoral School of Law and Political Sciences.

ALISHEVA, ALIYA – Doctoral candidate, associate professor at Kyrgyz National University.

ALMOGRABY, ELHAM – PhD student, University of Miskolc, Faculty of Law, Ferenc Deák Doctoral School in Law and Political Sciences.

BALLA, BULCSÚ – PhD student, University of Miskolc, Faculty of Law, Ferenc Deák Doctoral School in Law and Political Sciences.

DZHANALIEVA, NARGIZA – Doctoral candidate, associate professor at Kyrgyz National University.

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

FÁBIÁN, VANESSZA – PhD student, University of Pécs, Faculty of Law, Doctoral School of Law.

FENYVESI, CSABA – Professor, University of Pécs, Faculty of Law, Criminal and Civil Procedure Department.

FEUERBACH, LEA – PhD student, University of Miskolc, Faculty of Law, Deák Ferenc Doctoral School in Law and Political Sciences.

HORVÁTH, KATA ZSUZSANNA – PhD student, University of Szeged, Doctoral School of Law and Political Sciences; teaching assistant, University of Szeged, Faculty of Law and Political Sciences, Roman Law Department.

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

KISFONAI, BERNADETT – PhD student, University of Pécs, Faculty of Law, Doctoral School of Law.

PHAM THI MINH, TRANG – PhD student, University of Pécs, Faculty of Law, Doctoral School of Law; Lecturer, HoChiMinh City University of Law, Vietnam.

RÉTI, GERGELY – PhD student, Pázmány Péter Catholic University, Doctoral School of Law and Political Sciences, researcher at Mathias Corvinus Collegium.

SZABÓ, KRISZTA – PhD student, University of Miskolc, Faculty of Law, Deák Ferenc Doctoral School in Law and Political Sciences.

SZEKERES, ÁGOTA – PhD student, University of Miskolc, Faculty of Law, Deák Ferenc Doctoral School in Law and Political Sciences.

SZIJÁRTÓ, ISTVÁN – Assistant professor, University of Pécs, Faculty of Law, Department of International and European Law.

TAZBIR, BLAŽEJ – PhD student, University of Miskolc, Faculty of Law, Deák Ferenc Doctoral School of Law, Central European Academy.

TÓTH, SZIMONETTA – PhD student, University of Szeged, Doctoral School of Law and Political Sciences.

VARGA, CSABA KOPPÁNY – PhD student, University of Pécs, Faculty of Law, Doctoral School of Law.

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The Right to Privacy: Historical and Conceptual Framework

ALI, SANAR SHAREEF*

ABSTRACT *The history of privacy has evolved through several stages, beginning with protection against physical intrusions into households and extending today to encompass broader values such as human dignity and liberty. Despite these developments, no single, universally accepted definition of privacy exists. While reductionists deny that privacy has independent value, this view has been weakened by the widespread recognition of privacy as a fundamental right. The most distinctive feature of privacy lies in the sanctity of information itself, irrespective of whether that information is true or false. The general discourse surrounding privacy can be summarized through the following notions: liberty, control, and dignity. Together, these notions can form the basis for a comprehensive definition of privacy. Therefore, any definition of privacy must include them all, particularly dignity, as it reflects the intrinsic value of privacy. Moreover, beyond these moral justifications, a sound definition of privacy should also specify the types of data that merit protection, ensuring clarity and consistency in legal interpretation.*

KEYWORDS *Privacy, home, liberty, control, and dignity.*

1. Introduction

Privacy, since antiquity, has attracted the attention of scholars and legal theorists and has been manifested in different forms across various timeframes. Warren and Brandeis traced privacy through different stages: initially, the law addressed only physical interferences, such as battery or trespass to tangible property like land and livestock; later, the law began to recognize the protection of human spiritual interests, including feelings and intellect; and currently, privacy encompasses the right to enjoy life, liberty, and personal autonomy.¹ While some scholars have found it difficult to provide a definition of privacy, others have

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

¹ Samuel D. Warren, and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4, no. 5 (1890): 193, <http://links.jstor.org/sici?sici=0017-811X%2818901215%294%3A5%3C193%3ATRTP%3E2.0.CO%3B2-C>, accessed 20 September 2025.

attempted to do so; however, there is no unanimous agreement on a single definition.

With the rapid development of technology, privacy concerns have increased unprecedentedly. For the first time in human history, personal privacy has become particularly vulnerable. This has led countries to give greater attention to privacy, and by now, many nations have enacted data protection laws. Currently, 79% of countries have legislation addressing data protection and privacy.²

The problem addressed in this study lies in the absence of a universally accepted and comprehensive understanding of privacy, despite certain commonalities shared among scholarly perspectives. The general scholarly discussion on privacy often revolves around three key notions: liberty, control, and dignity. However, considering these elements in isolation fails to capture the full meaning of privacy and may have a profound impact on the overall landscape of privacy protection. For the purposes of this study, the following research questions will be explored: What is the historical evolution of the concept of privacy? To what extent do scholars find privacy easy to define? How do reductionists conceptualize privacy? In contrast, how do coherentists differ in their understanding of privacy?

The aim of this study is to examine the meaning of the concept of privacy, beginning with its roots at different points in history and considering the various approaches that seek to explain it, to show that these perspectives cannot stand alone; rather, by combining them, we can identify the essential elements of a definition of privacy. To achieve this goal, the study is divided into two chapters: the first addresses the historical background of privacy, while the second explores the concept of privacy.

2. The historical background

Although, there is no exact time that privacy can be traced back to, we can find certain aspects or elements of privacy in different eras. Even if those elements are not the same as modern ones, their goal and motive in some ways serve the privacy concept. Since ancient times, people have valued privacy,³ which has evolved with time. What is deemed private has varied across different eras and cultures. Furthermore, there may be differences between what is socially regarded as private and what the law protects as such.⁴

Scholars have traced the origins of privacy back to ancient civilizations. Barrington Moore, the sociologist of totalitarian regimes, underlined that

² United Nations Conference on Trade and Development (UNCTAD), “Data Protection and Privacy Legislation Worldwide,” *UNCTAD*, accessed September 20, 2025, <https://unctad.org/page/data-protection-and-privacy-legislation-worldwide>.

³ Daniel J. Solove, *Nothing to Hide: The False Tradeoff between Privacy and Security* (New Haven: Yale University Press, 2011), 4.

⁴ Adrienn Lukács, “What Is Privacy? The History and Definition of Privacy,” in *Tavaszi Szél 2016 Tanulmánykötet I.*, ed. Gábor Keresztes (Budapest: Doktoranduszok Országos Szövetsége), 256.

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'totalitarian' regimes throughout history have attempted to control their citizens by either limiting privacy or using surveillance.⁵ Therefore, it is not surprising that privacy has long been a subject of legal discussion. For instance, the Code of Hammurabi featured a section, which forbade invading someone's home, and Roman law also dealt with the issue.⁶

The first ancient reference to the existence of a distinct private domain, according to many privacy scholars, was Aristotle's division between the private domestic sphere of the family, namely the *oikos*, and the public sphere of politics and political activity.⁷ According to Arendt's interpretation of Aristotle, the private realm is distinct from the public and is connected to household survival and necessity. It involves dominance and power, such as ruling over slaves. As a result, privacy is seen as a sphere lacking freedom, and a state of deprivation, keeping people from exercising their greatest human potential such as political freedom.⁸

Historically, privacy was connected to the house, to family life, and to (personal) correspondence. Between the 14th and 18th century, people appeared in court for eavesdrop or for opening and reading personal letters.⁹ In *Leviathan* (1651), Hobbes argues that individuals surrender many of their rights to a sovereign in exchange for peace and order, except certain natural rights, foremost among them the right to self-preservation. Based on this principle, individuals retain the right not to confess to crimes unless granted a pardon.¹⁰ Hobbes thus contributes to shaping the modern understanding of privacy by affirming that natural human drive for self-preservation- innate and inescapable- legitimizes resistance to threats.¹¹

English common law has long prohibited eavesdropping. In 1769, Blackstone defined it as listening "under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales."¹² He described a person's home as their 'castle,' protected against

⁵ Sjoerd Keulen., and Ronald Kroeze, "Privacy from a Historical Perspective," *Handbook Privacy Studies* (2018): 23.

⁶ Gianmarco Cifaldi, "Evolution of Concepts of Privacy and Personal Data Protection under the Influence of Information Technology Development," *Sociology and Social Work Review* 7, no. 1 (2023): 36.

⁷ Keulen and Kroeze, "Privacy from a Historical Perspective," 24.

⁸ Judith A. Swanson, *The Public and the Private in Aristotle's Political Philosophy* (Ithaca: Cornell University Press, 1994), 9.

⁹ Jeroen Holvast, "History of Privacy," in *IFIP Advances in Information and Communication Technology*, ed. Matyáš Vashek., Petr Švenda, Simone Fischer-Hübner, Daniel Cvrček (Springer, 2009), 15. https://link.springer.com/chapter/10.1007/978-3-642-03315-5_2

¹⁰ Thomas Hobbes, *Leviathan* (1651; repr., Oxford: Oxford University Press, 2010), 155.

¹¹ Swanson, *The Public and the Private*, 9.

¹² Solove, *Nothing to Hide*, 4.

intrusion, justifying penalties for eavesdropping and limiting civil authorities' entry, a principle later upheld by 19th-century American courts.¹³

From 1790 to 1840, during the early years of the U.S. Census, there was very little concern about the confidentiality of personal data. The public's perception according to which data should be kept private was not yet taken hold.¹⁴ The census actually mandated that they be displayed in a public area in order to allow people to verify the accuracy of their submission. Throughout the nineteenth century, the census director was informally tasked with protecting the privacy of businesses and survey respondents, but by the early twentieth century, presidential proclamations formally acknowledged the necessity for privacy.¹⁵ Although a few objected, mostly for religious reasons, the majority of Americans were unconcerned about government data use. Some critics cited the Biblical warning, where King David's census brought a plague killing 70,000, while others feared censuses could lead to higher taxes or military conscription.¹⁶

Interestingly, in 1844, at the Austrian government's request, the British authorities secretly opened private letters addressed to Italian revolutionary Giuseppe Mazzini in London. Mazzini discovered surveillance by placing poppy seeds and sand in his letters, which disappeared when they were opened. This covert surveillance, justified by claims of national security, sparked an early and significant controversy over government surveillance and privacy rights.¹⁷

Since the end of the 19th century, the intention of controlling one's own information has been the driving force behind the shift in emphasis towards personal information.¹⁸ A very important step was the development of the modern concept of privacy by Brandeis and Warren in 1890, namely the first U.S. publication to argue for a right to privacy.¹⁹ They defined privacy as "the right

¹³ David J. Seipp, "The Right to Privacy in Nineteenth-Century America," *Harvard Law Review* 94 (1981): 1892, reprinted at Boston University School of Law Scholarly Commons, https://scholarship.law.bu.edu/faculty_scholarship/1568/, accessed 20 August 2025.

¹⁴ United States Census Bureau, *Census Confidentiality and Privacy: 1790–2002*, accessed August 13, 2025, <https://www2.census.gov/library/publications/2003/comm/monograph-confidentiality-privacy.pdf>.

¹⁵ U.S. Census Bureau, "The History of Privacy and Confidentiality at the U.S. Census Bureau," *U.S. Department of Commerce*, accessed August 12, 2025, <https://www.census.gov/about/history/bureau-history/agency-history-timeline/privacy-confidentiality.html>.

¹⁶ United States Census Bureau, *Census Confidentiality and Privacy: 1790–2002*, <https://www2.census.gov/library/publications/2003/comm/monograph-confidentiality-privacy.pdf>, accessed 13 August 2025.

¹⁷ "Surveillance, Privacy and History," History & Policy, *Policy Paper*, accessed February 25, 2025, <https://historyandpolicy.org/policy-papers/papers/surveillance-privacy-and-history/>.

¹⁸ Holvast, "History of Privacy," 15.

¹⁹ "History of Privacy Timeline," Safe Computing (University of Michigan), accessed August 4, 2025. <https://safecomputing.umich.edu/protect-privacy/history-of-privacy-timeline>.

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to be let alone.” The idea sparked widespread recognition, started to develop and became a basic human right in western societies.²⁰

The modern concept of privacy originated in tort law. Courts provided civil remedies for personal wrongs.²¹ Before Warren and Brandeis, Anglo-American common law had already protected several interests that modern lawyers would associate with privacy, such as evidentiary privileges, blackmail laws, and duties of confidentiality within certain relationships. However, their article fundamentally reshaped this legal landscape.²²

In the United States, the public debate on privacy began shortly after World War II.²³ In the early 1970s, privacy became a central topic in human rights debates. In 1968, Beck highlighted the growing use of listening devices by commercial agencies, such as car dealers bugging vehicles to gauge customers’ price limits, and dance studios eavesdropping on clients to improve sales tactics.²⁴

In 1960, Prosser, one of the most influential legal scholars of his time, published the article “Privacy,”²⁵ in which he identified four torts for seeking damages.²⁶ In 1967, Westin defined privacy on freedom, control, and self-determination.²⁷

The right to privacy was advanced to the status of a human right during the twentieth century. It was a completely new addition to the catalogue of the Universal Declaration of Human Rights, and it is unique in that it has no predecessors in state constitutions or fundamental laws.²⁸

After the adoption of the Universal Declaration of Human Rights (UDHR)²⁹ in 1948, human rights principles including privacy have gained much acceptance. This was further strengthened by the adoption of the International Covenant on

²⁰ Adrienn Lukács, “What is privacy,” 256.

²¹ Edward J. Bloustein, *Individual and Group Privacy* (New York: Taylor & Francis, 2003), 2–3.

²² Neil M. Richards, and Daniel J. Solove, “Prosser’s Privacy Law: A Mixed Legacy,” *California Law Review*, *Washington U. School of Law Working Paper* 98, no 10 (2010): 1891.

²³ Holvast, “History of Privacy,” 15.

²⁴ “(Canada’s Human Rights History),” Dominique Clément, *HistoryOfRights.ca* accessed October 8, 2025. www.HistoryOfRights.ca.

²⁵ Edward J. Blaustein, *Individual and Group Privacy*. 2nd ed., with a new introduction by Nathaniel J. Pallone. Taylor & Francis, 2003. 2–3.

²⁶ William L. Prosser, “Privacy,” *California Law Review* 48, no. 3 (1960): 389.

²⁷ Holvast, “History of Privacy,” 16.

²⁸ Beate Roessler and Judith DeCew, “Privacy,” *Stanford Encyclopedia of Philosophy* (Winter 2023 ed.), ed. Edward N. Zalta and Uri Nodelman, <https://plato.stanford.edu/archives/win2023/entries/privacy/>, accessed September 10, 2025.

²⁹ United Nations General Assembly, *Universal Declaration of Human Rights*, Res. 217 A (III), adopted December 10, 1948, art. 12.

Civil and Political Rights (ICCPR) 1966³⁰, and the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.³¹

In 1981, concrete guidelines for protecting personal data were created by (Convention 108). Later, in 2000, the European Union's Charter of Fundamental Rights³² made a formal distinction between privacy and data protection.³³

In order to safeguard individual rights and harmonize data protection regulations for market integration, the EU adopted the Data Protection Directive (95/46/EC) in 1995³⁴. It was superseded in 2016 by the General Data Protection Regulation (GDPR)³⁵, which provided a comprehensive regulatory framework and considered a significant advancement in information policy.

At the national level, the US Freedom of Information Act 1967³⁶ and Data protection act 1970 of the German state of Hesse,³⁷ followed by Sweden's data protection law of 1973 (*Datalagen*),³⁸ were among the first data protection laws enacted decades before the Internet and the World Wide Web became ubiquitous.³⁹ There are an increasing amount of data laws. Currently, 137 out of 194, or 79% of countries have passed legislation pertaining to data protection and

³⁰ United Nations General Assembly, *International Covenant on Civil and Political Rights*, Res. 2200A (XXI), adopted December 16, 1966, entered into force March 23, 1976, art. 17.

³¹ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS No. 005, as amended, entered into force September 3, 1953, art. 8.

³² European Union, *Charter of Fundamental Rights of the European Union*, proclaimed December 7, 2000, *Official Journal of the European Communities* C 364 (December 18, 2000), arts. 7–8.

³³ Council of Europe, *Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data* (Convention 108), Strasbourg, January 28, 1981, arts. 7–8.

³⁴ Directive 95/46/EC of the European Parliament and of the Council of October 24, 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data, *Official Journal of the European Communities* L 281 (November 23, 1995).

³⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council, *General Data Protection Regulation*, *Official Journal of the European Union* L 119 (May 4, 2016).

³⁶ “A Brief History of Data Protection: How Did It All Start?,” INPLP accessed July 11, 2024, <https://inplp.com/latest-news/article/a-brief-history-of-data-protection-how-did-it-all-start/>.

³⁷ Hesse (Germany), *Data Protection Act* (HE 1970), *Law and Ordinance Gazette Hesse* 1970, p. 625, accessed October 23, 2025, <https://starweb.hessen.de/cache/GVBL/1970/00041.pdf>.

³⁸ “Data Protection in Sweden,” GDPRhub, accessed July 11, 2024, <https://gdprhub.eu/Data-Protection-in-Sweden#History>.

³⁹ “U.S. Data Privacy Laws to Enter New Era in 2023,” Fredric D. Bellamy, *Reuters*, 12 January 2023, accessed 11 July 2024, <https://www.reuters.com/legal/legalindustry/us-data-privacy-laws-enter-new-era-2023-2023-01-12>.

privacy. An additional 15% have no data protection legislation at all, while 9% have draft legislation pending.⁴⁰

To sum up, Certain actions, rooted in human nature, have consistently triggered concerns that can be grouped around what we now understand as privacy, even if the term itself was not always used. From Aristotle's distinction between public and private life, boundaries were drawn between the concept of public life that is more open and private life that is more protected. Over time, the approach to private life gained certain privileges, shaped by the developments societies have undergone. In the modern era, the spiritual notion of privacy replaced its earlier material-based concept. With technology advancement, however, privacy has become more complex, leading to many challenges in defining it and setting its boundaries.

3. The concept of privacy

Privacy initially focused on physical intrusion. However, with the recognition of spiritual intrusion and the advancement in technologies, the issue has attracted much more debate. In ordinary language as well as in philosophical, political, and legal discourse, the term "privacy" has no single definition, analysis, or meaning. The idea of privacy has deep historical roots in discussions of legal, ethical, sociological, and anthropology.⁴¹ Posner argues that it is "elusive and ill defined. Much ink has been spilled in trying to clarify its meaning".⁴² The European Court of Human Rights and several privacy scholars agree that it is not possible to provide a comprehensive legal definition of privacy protection.⁴³ Arthur Miller argues "that it is difficult to define because it is exasperatingly vague and evanescent."⁴⁴ Numerous jurists made attempts to define privacy, but most of these definitions only highlight one aspect of it, because privacy is incomprehensible and the components that make up an individual's private sphere are in constant change.⁴⁵

A number of scholars have surveyed the interests that the law protects under the rubric of privacy and have come to the conclusion that they are separate and unrelated.⁴⁶ According to this viewpoint, reductionists argue that privacy is not a

⁴⁰ "Data Protection and Privacy Legislation Worldwide," UNCTAD, accessed august 20, 2025, <https://unctad.org/page/data-protection-and-privacy-legislation-worldwide>, accessed July 19, 2024.

⁴¹ Beate Roessler and Judith DeCew, "Privacy," *Stanford Encyclopedia of Philosophy* (Winter 2023 ed.), ed. Edward N. Zalta and Uri Nodelman, <https://plato.stanford.edu/archives/win2023/entries/privacy/>, accessed September 10, 2025.

⁴² Richard A. Posner, "The Right of Privacy," *Sibley Lecture Series* (1978): 393, https://digitalcommons.law.uga.edu/lectures_pre_arch_lectures_sibley/22.

⁴³ Adrienn Lukács, "What is privacy," 256.

⁴⁴ Daniel J. Solove, "Conceptualizing Privacy," *California Law Review* 90, no. 4 (2002): 1089, <https://doi.org/10.2307/3481326>.

⁴⁵ Adrienn Lukács, "What is privacy," 256.

⁴⁶ Solove, "Conceptualizing Privacy," 1088.

unique right, but can be explained by reducing it to infringements on other rights like property, liberty, or physical integrity.⁴⁷ Thompson, on the other hand, argues that the concept of privacy serves no useful function, for what we call privacy really amounts to a collection of fundamental interests.⁴⁸ In his article, Prosser repudiates Warren and Brandeis by suggesting that privacy is not an independent value at all but rather a composite of the interests in reputation, emotional tranquility and intangible property.⁴⁹ Prosser disagreed with the direction of privacy law, notwithstanding his restrained tone. He was concerned that its haphazard growth threatened both new doctrines such as intentional infliction of emotional distress, and established ones such as defamation. He therefore aimed to steer privacy law in a more cautious and constrained manner.⁵⁰ Prosser divided Warren and Brandeis' nebulous "right to privacy" into a taxonomy of four torts: ⁵¹ invasion of solitude and seclusion, public revelation of private facts, false light, and misuse of one's name or likeness.⁵² He argued that these four torts protect four separate interests, none specifically tied to privacy: freedom from mental distress in intrusion cases, reputation in public disclosure and false light cases, and property rights in one's name or likeness in appropriation cases.⁵³

However, the reductionist position has been significantly undermined by the explicit recognition of privacy as an independent human right and it has further been challenged by coherentists, who defend privacy as a fundamental, integrated value rather than as a mere aggregation of other rights.⁵⁴ Warren and Brandeis distinguish privacy from slander and libel by contrasting the type of injury each law addresses. Slander and libel are concerned with material injury to the external reputation, namely how they are viewed by the community. Privacy, in contrast, protects spiritual injury to internal feelings and emotional well-being, independent of whether the published information is true or false.⁵⁵ In other words, the information itself is protected, regardless of whether it is true or not. Similarly, Parent argued that privacy is the condition of the absence of undocumented personal information about oneself that is possessed by others.⁵⁶ The controversy surrounding privacy did not end there; the debate over whether it is grounded in liberty or dignity remains central, particularly in the context of the European Union and the United States. Privacy protections within the EU emphasize personal dignity, safeguarding an individual's image, name, and

⁴⁷ Adam Moore, "Defining Privacy," *Journal of Social Philosophy* 39, no 3 (2008): 412.

⁴⁸ James Q. Whitman, "The Two Western Cultures of Privacy: Dignity versus Liberty," *Yale Law Journal* 113, no. 6 (2004): 1161–1162.

⁴⁹ Blaustein, *Individual and Group Privacy*, 1.

⁵⁰ Richards and Solove, "Prosser's Privacy Law," 1890.

⁵¹ Richards and Solove, "Prosser's Privacy Law," 1888.

⁵² Prosser, "Privacy," 389.

⁵³ Blaustein, *Individual and Group Privacy*, 4.

⁵⁴ Ferdinand Schoeman, "Privacy," *Stanford Encyclopedia of Philosophy*, 2002, <https://plato.stanford.edu/entries/privacy/>, accessed September 2025.

⁵⁵ Warren and Brandeis, "The Right to Privacy," 197.

⁵⁶ Adam Moore, "Defining Privacy," *Journal of Social Philosophy* 39, no 3 (2008): 412.

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reputation,⁵⁷ much like the concept suggested by Warren and Brandeis. By contrast, the American approach prioritizes liberty, particularly freedom from state intrusion, reflecting the eighteenth-century ideal of privacy within one's home.⁵⁸ Unlike Roman law, however, the U.S. legal system provides no remedy for purely psychological suffering, insult, or intentional harm to a person's sense of honor.⁵⁹

The right to privacy was described by Warren and Brandeis in 1891 as the right to be let alone and as the freedom to determine, under ordinary circumstances, what his or her thoughts, feelings, and emotions shall be when communicating with others.⁶⁰ Since then, three terms have been employed in virtually every publication: freedom, control, and self-determination.⁶¹

Jan Holvast argues that privacy is fundamentally related to the most personal facets of being human, and historically. Privacy has always been associated with the home, family life, and (private) letters.⁶²

Solove approached privacy by providing a list of torts or headings that form privacy, arguing that all academic and legal literature on privacy can be grouped under six headings: "the right to be let alone, limited access to the self, secrecy, control of personal information, personhood, and intimacy."⁶³ Solove did not create a new concept of privacy but instead synthesized existing theories, implying that earlier theories had already addressed all major aspects of privacy. In 1978, Posner avoided the definitional problem by simply noting that one aspect of privacy is the withholding or concealment of information.⁶⁴ Hungarian jurist Mate Daniel Szabo viewed privacy as "the right of a person to control information about themselves."⁶⁵ Alan Westin defines privacy in light of each of these points: freedom, control, and self-governance.⁶⁶ He defined privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others".⁶⁷ There has hardly been a publication on this subject since 1967 that does not include this definition.⁶⁸ However, the word "claim" is not as strong as right, and it does not necessarily carry legal enforcement, in other words, having a claim is not the same as having a right.

The entire discussion surrounding the concept of privacy can be summarized in terms of autonomy, control, freedom, and personhood. While autonomy and

⁵⁷ "History of Privacy Timeline," Safe Computing.

⁵⁸ James Q. Whitman, "The Two Western Cultures," 1161.

⁵⁹ Warren and Brandeis, "The Right to Privacy," 198.

⁶⁰ Holvast, "History of Privacy," 16.

⁶¹ Holvast, "History of Privacy," 16.

⁶² Holvast, "History of Privacy," 15.

⁶³ Solove, "Conceptualizing Privacy," 1094.

⁶⁴ Posner, "The Right of Privacy," 393.

⁶⁵ Cifaldi, "Evolution of Concepts of Privacy," 38.

⁶⁶ Holvast, "History of Privacy," 16.

⁶⁷ Alan F. Westin, *Privacy and Freedom*, (New York: IG Publishing / Association of the Bar of the City of New York, 1967), 24.

⁶⁸ Holvast, "History of Privacy," 16.

freedom are typically understood as matters of liberty, and personhood as a matter of dignity, control does not necessarily align solely with either liberty or dignity. Whitman demonstrated that “control” adapts to reflect the underlying cultural value, respect and social honor in Europe, autonomy and non-interference in America. Thus, “control” is a flexible term that bridges both approaches depending on the legal and cultural setting.⁶⁹ The term ‘liberty’ is derived from the Latin word ‘Liber’ which means free from all shackles or bonds. The liberal writers use the terms ‘Liberty’ and ‘freedom’ synonymously.⁷⁰ The terms liberty and freedom mostly imply a negative or defensive meaning. On the other hand, control means having the final say over how, what, when, and where information about oneself is used. In both cases, the individual retains the ability to decide about their data. Therefore, control and liberty do not necessarily produce different consequences. To achieve distinct results, we should instead focus on the third element, “personhood”, which implies viewing privacy as an ultimate goal and an intrinsic, self-standing value rooted in human dignity.

Dignity is the embodiment of a fundamental value broadly accepted by all peoples and forms the primary cornerstone in the structure of human rights. It is recognized as foundational right that gives rise to all other rights.⁷¹ This universality character renders the right more powerful and attracts the application of universal rules, both encompassing positive law and natural law. By contrast, liberty cannot provide such protection. Maeve Cooke argues that while negative liberty is necessary, it is insufficient, as privacy is deeply tied to human dignity, autonomy, and ethical self-realization.⁷²

The main international and regional frameworks embed privacy protections that safeguard both dignity and liberty. Art 17 of the ICCPR and Art 12 of the UDHR protect against arbitrary or unlawful interference with privacy, family, home, and correspondence, addressing dignity through the protection of honor and reputation and liberty through freedom from state intrusion. Art 8 of the ECHR affirms the right to respect for private and family life, balancing dignity as emotional with liberty as freedom from governmental interference. Art 8 of (ECHR) and Art 7 of the EU Charter reinforce these principles, linking respect for private and family life (dignity) with data protection (liberty and control), reflecting privacy in a modern understanding. Additionally, Art 1 of the charter provides for the dignity explicitly, indicating strong transformation towards dignity approach.

⁶⁹ James Q. Whitman, “The Two Western Cultures,” 1167.

⁷⁰ Khushboo Mahajan and Meetu Mahajan, “Understanding Liberty,” in *Political Theory and Thought: Western and Indian Traditions*, chap. 11, INFLIBNET e-book, 2018, <https://ebooks.inflibnet.ac.in/psp07/chapter/understanding-liberty/>.

⁷¹ Rex D. Glensy, “The Right to Dignity,” *Columbia Human Rights Law Review* 43, no. 1 (2011): 68, 69.

⁷² Maeve Cooke, “A Space of One’s Own: Autonomy, Privacy, Liberty,” *Philosophy & Social Criticism* 25, no. 1 (1999): 24, <https://doi.org/10.1177/019145379902500102>.

4. Conclusion

Though there is no specific point in history to which privacy can be traced, certain elements of privacy have existed across different times and places. At first, it was mainly about intrusion into the physical domain. People felt something was wrong when their privacy was breached, even if they did not use the term “privacy” itself. With the rise of publication and technology, privacy took a new direction. Warren and Brandeis were the first to define it as “the right to be let alone.”

Privacy is widely recognized as a challenging concept. One of the main reasons for this difficulty is that it is often conflated with other similar notions such as slander, libel, and the infliction of emotional distress. This conflation leads reductionists to deny any independent value for privacy. However, the distinctive feature of privacy lies in the fact that the truth or falsity of the information is irrelevant, once an intrusion or disclosure occurs, the harm is presumed. Although the reductionist view of privacy has weakened in the face of the global recognition of its importance, conceptual challenges remain. Among coherentists, there are differing perspectives on how privacy should be understood, but the entire discussion can generally be summarized in three key terms: liberty, control, and personhood. While “control” implies a more active role compared to mere “liberty,” both ultimately aim at the same outcome, ensuring that individuals have the final say over their own data. Nevertheless, control and liberty alone cannot provide sufficient protection unless they are linked to the intrinsic value of human dignity. By incorporating this human dimension, legislators and judges can be granted broader discretionary power to adjudicate privacy-related cases.

Recommendations

Privacy should be defined as a composite concept encompassing control, liberty, and personhood, without excluding any of these elements.

The most distinctive feature of privacy lies in the protection of information itself, regardless of whether that information is true or false; an idea closely tied to human dignity.

While liberty, control, and dignity provide the moral foundations for privacy, it is also necessary to clearly define the types of information that merit legal protection.

Since privacy often overlaps with other areas of law, establishing a human rights–based foundation is essential to ensure consistency and coherence in its protection.

The Public Policy Exception in the Enforcement of Foreign Arbitral Awards: A Comparative Analysis Between Saudi Arabia and Two BRICS Countries

ALMOGRABY, ELHAM^{*}

ABSTRACT *This paper examines the public policy exception under Article V(2)(b) of the 1958 New York Convention as a limit on enforcing foreign arbitral awards, comparing its treatment in Saudi Arabia, India, and China. It analyzes how each country defines and applies “public policy” to deny enforcement, referencing legal theories and case law. While all three states formally interpret public policy narrowly and support the Convention’s pro-enforcement stance, their practices differ: Saudi Arabia often invokes Sharia-based principles (e.g., prohibiting interest), though reforms are bringing more predictability; India limits the exception to serious violations of justice or morality, guided by key cases; and China rarely cites public policy, typically in matters of sovereignty or procedural issues. The jurisdictions show a trend toward narrower use of the exception, enhancing confidence in arbitration. The study calls for clearer legal definitions and more consistent judicial restraint as envisioned by Article V(2)(b).*

KEYWORDS *New York Convention 1958; public policy exception; enforcement; comparative arbitration law; Sharia.*

1. Introduction

The recognition and enforcement of foreign arbitral awards remain the cornerstone of international arbitration, as affirmed by the 1958 New York Convention (“NYC”). Under this framework, enforcement is the rule, while refusal is the exception. One of the most debated exceptions appears in Article V(2)(b), which permits national courts to deny enforcement if doing so would contravene the forum state’s public policy¹. This clause reflects a delicate balance between promoting international uniformity and preserving each state’s sovereign right to uphold its fundamental legal and moral values.

However, the Convention deliberately leaves the term “public policy” undefined, which has prompted concerns about its potential misuse by domestic courts.

^{*} PhD student, University of Miskolc, Faculty of Law, Ferenc Deák Doctoral School in Law and Political Sciences.

¹ *Parsons & Whittemore Overseas Co. v. Société Générale de L’Industrie du Papier (RAKTA)*, 508 F.2d 969 (United States Court of Appeals, Second Circuit, 1974).

Broad or politically motivated interpretations risk undermining the Convention's pro-enforcement bias and eroding trust in the arbitral process.² To address this risk, courts and scholars have consistently emphasized that the public policy exception must be narrowly construed, operating as a "safety valve" reserved for exceptional circumstances – namely, when enforcement would violate the forum's most basic notions of morality and justice.³ Expansive reliance on public policy to protect national interests or reject disfavored awards would distort the Convention's intent and weaken the reliability of international arbitration.

This paper examines how the public policy exception is interpreted in Saudi Arabia, India, and China. Saudi Arabia bases its approach on Islamic Sharia, viewing public order through religious law. India treats public policy as a judicial concept shaped by precedent within its common-law tradition. China, with its socialist civil-law system, frames public policy around state sovereignty and judicial enforcement.

This research uses a comparative and doctrinal approach to examine statutory frameworks, key judicial decisions, and recent legislative changes. It presents practical cases involving public policy exceptions in enforcement to highlight how different jurisdictions interpret these rules. The study compares these interpretations to reveal similarities, differences, and evaluates their impact on cross-border contract enforcement and investor confidence in global arbitration. Structure of the Paper: After the Introduction, Part II discusses Article V(2)(b)'s legal scope and public policy distinctions. Part III reviews Saudi Arabia's judicial evolution, while Parts IV and V cover India and China's key cases and interpretations. Part VI compares common trends and differences, and Part VII offers policy recommendations to align domestic law with the Convention and improve arbitral enforcement predictability.

2. The Public Policy Exception under the New York Convention

2.1 Article V(2)(b): Text and Purpose

Article V(2)(b) of the 1958 New York Convention allows a court to refuse recognition or enforcement of an arbitral award if doing so would be "contrary to the public policy of that country." Unlike the party-initiated grounds listed in Article V (1), this exception may be invoked by the court itself, even if not raised by either party.⁴

The Convention was drafted to promote enforcement and limit domestic courts from blocking foreign awards for protectionist or political reasons. Article V(2)(b) provides a limited safeguard, allowing states to deny enforcement only

² Reportable in the Supreme Court of India, *Civil Appeal No. 3185 of 2020* (Arising out of SLP (Civil) No. 7172 of 2020), (16 Sept 2020) (India), https://www.newyorkconvention.org/media/uploads/pdf/7/3/732_india-2020-i.pdf.

³ *Civil Appeal No. 3185 of 2020* (India).

⁴ Nivedita Shenoy, "Public Policy Under Article V(2)(b) of the New York Convention: Is There a Transnational Standard?," *SSRN Electronic Journal*, (2018), accessed 3 November 2025, <http://dx.doi.org/10.2139/ssrn.3226757>.

if an award seriously violates their legal or moral standards, while preventing misuse of public policy as grounds for refusal.

Importantly, the drafters chose not to define the term *public policy* precisely, leaving it to national courts to interpret the concept within the boundaries of international practice. In principle, this discretion should be exercised sparingly and with restraint, limited to cases involving clear violations of the forum's core moral values, legal principles, or notions of justice.⁵

2.2 Narrow vs. Broad Conceptions of Public Policy

Article V(2)(b) of the 1958 New York Convention allows a court to refuse enforcement of a foreign arbitral award if enforcement “would be contrary to the public policy of that country.” In practice, this “public policy” ground has been construed either broadly or narrowly. A broad conception equates it with the forum's entire domestic public policy, potentially encompassing any mandatory law or moral interest. In contrast, the prevailing narrow conception confines it to the forum's international public policy – the fundamental norms and deeply-held principles of justice and morality from which no derogation is permitted. Under this narrow view, a mere violation of local law or public policy in abstracto is insufficient; the award must implicate the forum's most basic notions of morality or justice to justify refusal.

Both doctrine and jurisprudence overwhelmingly favor the narrow approach in applying Article V(2)(b). Leading commentators emphasize that the Convention's pro-enforcement bias demands a restrictive interpretation of the public policy exception. Courts around the world have likewise adopted a high threshold: for example, the U.S. Court of Appeals in *Parsons & Whittemore v. RAKTA* held that enforcement may be denied only when it would violate “the forum state's most basic notions of morality and justice.” Similarly, other national courts have limited “public policy” to fundamental public policy (order public international) rather than every domestic norm. As a result, attempts to resist enforcement on public policy grounds rarely succeed in practice.⁶

2.3 Comparative Context

Definitions and applications of “public policy” diverge by country, shaped by legal culture and domestic laws. For example, moral or religious norms influence some states' public policy (e.g., Islamic principles in Muslim-majority jurisdictions), while others focus more on procedural fairness or international comity. Against this backdrop, the following sections transition to a comparative analysis of how Saudi Arabia, India, and China—all parties to the New York Convention—have developed and applied the public policy exception. We examine relevant statutory provisions (or the absence thereof) and review notable cases in which courts have refused or granted enforcement despite public policy arguments.

⁵ *Parsons and Whittemore*, 508 F.2d 969 (2d Cir. 1974).

⁶ *Parsons and Whittemore*, 508 F.2d 969 (2d Cir. 1974).

3. Public Policy Exception in Saudi Arabia

3.1 Legal Framework in Saudi Arabia: Saudi Arabia joined the New York Convention in 1994, acceding with a reciprocity reservation⁷. For many years, enforcement of foreign awards in Saudi Arabia was viewed with skepticism. This was due to the primacy of Islamic Sharia law as the kingdom's public policy foundation. Saudi courts derived "public order" from Sharia, meaning any award provision contravening Qur'anic or Sunnah principles could be deemed unenforceable. Until 2012, Saudi arbitration was governed by the 1983 Arbitration Regime. Enforcement was overseen by the Sharia-based Board of Grievances, which had broad discretion. The landscape shifted with the 2012 Saudi Arbitration Law (Royal Decree No. M/34) and the 2013 Enforcement Law. These modernized procedures are aligned with international standards. Under the Enforcement Law, specialized enforcement judges were empowered to recognize foreign awards, subject to certain conditions. One of these is a check that the award "does not contain anything contrary to the Saudi public order."⁸ Notably, Royal Decree No. 44682 (Aug. 2021) clarified and *narrowed* the definition of public policy in Saudi arbitration. It is now essentially confined to the "general rules of Islamic law derived from the Quran and Sunnah."⁹ This clarification aims to curb the historically broad invocations of public policy and to clarify provide clarity on what constitutes a violation of Saudi public order.

3.2 Scope of Public Policy (Sharia and Beyond): In Saudi Arabia, Sharia law constitutes the foundation of the entire legal and judicial system, forming the core of public policy and guiding all legislative and judicial activity¹⁰. Accordingly, the public policy exception in arbitration is deeply intertwined with Sharia prohibitions and mandatory principles. A primary example is *riba* (usury or interest): any arbitral award that orders the payment of interest – whether as compensation, damages, or late payment fees – is treated as a direct violation of Islamic public policy¹¹. Likewise, transactions involving *gharar* (excessive uncertainty) or *haram* (prohibited) elements, such as gambling, alcohol, or other illicit goods and services, cannot be enforced by Saudi courts.¹² Even certain categories of damages, particularly speculative or unjustified losses, may be rejected when viewed as inconsistent with Sharia principles of justice and fairness.

⁷ Jean-Benoît Zegers, *Arbitration Guide: Kingdom of Saudi Arabia*, IBA Arbitration Committee (Riyadh: The Law Firm of Salah Al-Hejailan in association with Freshfields Bruckhaus Deringer, updated January 2018).

⁸ Zegers, *Arbitration Guide: Kingdom of Saudi Arabia*, 2018.

⁹ DLA Piper, "Developments in Saudi Arabia as an Arbitral Seat."

¹⁰ A. Al-Fahad, "The Role of Sharia in the Saudi Legal System," *Arab Law Quarterly* 12, (1997): 229–246.

¹¹ Al-Samaan, H.: "The Enforcement of Arbitral Awards in Saudi Arabia: Challenges and Reforms," *Journal of International Arbitration* 31, (2014): 475–494.

¹² A. Redfern, and M. Hunter, *Law and Practice of International Commercial Arbitration* (Oxford: Oxford University Press, 2015), 601.

Saudi courts have consistently refused to enforce the interest components of foreign awards, considering them contrary to Islamic law and the kingdom's moral order¹³. Similarly, awards requiring the transfer of property not lawfully owned by a party have been deemed unenforceable under Islamic property rules¹⁴. Beyond Sharia, Saudi public policy also extends to matters of national law, such as contracts violating Saudi statutory provisions or involving dealings with entities prohibited under domestic law.¹⁵ However, there is no exhaustive list of public policy grounds in Saudi legislation; each case is determined individually, guided by Sharia principles, legal doctrine, and judicial interpretation.¹⁶ The 2021 Royal Decree No. 44682, issued to narrow the concept of public policy, clarified that it is now limited to "the general rules of Islamic law derived from the Qur'an and the Sunnah."¹⁷ This reform reflects a move toward greater precision and predictability in arbitration enforcement, ensuring that only fundamental violations of Sharia justify refusal.

3.3 Enforcement Practice and Case Examples: Historically, Saudi Arabia was often perceived as a challenging venue for the enforcement of foreign arbitral awards because of its broad interpretation of public policy.¹⁸ Before the 2012 Arbitration Law and 2013 Enforcement Law, courts frequently refused to recognize awards that contained interest or exemplary damages, considering such provisions incompatible with the principles of Islamic justice.¹⁹ In one early case, the Board of Grievances enforced only the principal amount of an award, striking out the interest component as contrary to *Riba* prohibitions – a compromise approach reflecting the courts' effort to respect both Sharia and the finality of arbitral decisions.

However, this position has evolved considerably over the past decade. Recent judicial statistics reveal that Saudi Arabia has become increasingly arbitration-friendly. In 2021 alone, Saudi courts enforced 204 arbitral awards (both domestic and foreign) valued at more than USD 2.1 billion, with most proceedings completed within weeks.²⁰ Of all challenges brought to set aside or resist awards, only around six percent succeeded, and within that figure, approximately three percent involved violations of Sharia or public policy. The few successful

¹³ *Case No. 34/T/4/1412H* (Saudi Board of Grievances, 1992), refusing enforcement due to interest payments (*riba*).

¹⁴ A. Al-Jarbou, "Judicial Independence and the Rule of Law in Saudi Arabia," *Arab Law Quarterly* 21, (2007): 191–227.

¹⁵ Royal Decree No. M/34 of 2012 (Saudi Arbitration Law); Royal Decree No. M/53 of 2013 (Enforcement Law).

¹⁶ H. Al-Khalaf, "Public Policy and the Enforcement of Foreign Arbitral Awards in Saudi Arabia," *Arab Law Quarterly* 36, (2022): 50–72.

¹⁷ Royal Decree No. 44682, dated 18/08/1442H (31 March 2021).

¹⁸ Ahmed Alsirhani, *The Refusal of Foreign Arbitral Awards in Saudi Arabia on the Grounds of Public Policy – An Issue of Fairness and Justice* (PhD thesis, Victoria University, Melbourne, 2019).

¹⁹ Zegers, *Arbitration Guide: Kingdom of Saudi Arabia*, 2018.

²⁰ DLA Piper, "Developments in Saudi Arabia as an Arbitral Seat."

annulments were based on clear and specific breaches, including (1) the charging of interest (*riba*), (2) disguised interest labelled as “compensation for holding money,” and (3) the sale of property without lawful ownership. Notably, no award was rejected on broader or unrelated grounds, suggesting that Saudi courts now apply the public policy exception narrowly and consistently with international standards. This more predictable approach places the Kingdom closer to arbitration-supportive jurisdictions worldwide.²¹

3.4 Analysis – Evolution and Current Outlook: Saudi Arabia’s approach to the enforcement of foreign arbitral awards has evolved from early skepticism to growing acceptance. In the past, public policy was often invoked to protect domestic parties from awards considered inconsistent with Sharia, especially those involving interest (*riba*). However, with the 2012 Arbitration Law and the creation of dedicated enforcement courts, judicial practice has become far more consistent. Today, courts generally presume enforcement unless an award clearly violates a core Sharia principle or contradicts a final Saudi judgment.²²

This trend was reinforced by the 2021 clarification of public policy’s scope, which confirmed that only serious breaches of fundamental Islamic norms justify refusal.²³ Recent data from the Saudi Center for Commercial Arbitration also demonstrates a strong pro-enforcement pattern, with most awards executed swiftly and very few annulled on public-policy grounds. Collectively, these developments indicate that Saudi Arabia now applies Article V(2)(b) of the New York Convention with restraint and transparency, aligning the Kingdom with arbitration-friendly jurisdictions and supporting its Vision 2030 objective of becoming a regional center for dispute resolution.

4. Public Policy Exception in India

4.1 Legal Framework and Doctrinal Stance: India has been a party to the New York Convention since 1960. The enforcement of foreign arbitral awards is regulated under Chapter II of the Arbitration and Conciliation Act, 1996, which reproduces the Convention’s refusal grounds in Section 48.²⁴ Indian courts – most notably the Supreme Court – have maintained a restrictive interpretation of “public policy” in matters of foreign-award enforcement. The landmark case *Renusagar Power Co. Ltd. v. General Electric Co.* (1994 Supp (1) SCC 644) marked a turning point: the Court held that enforcement could be denied only if it would violate the fundamental policy of Indian law, the interests of India, or justice or morality. The judgment further clarified that mere breach of domestic law is insufficient; the violation must strike at the core principles or moral fabric of the legal system.

²¹ DLA Piper, “*Developments in Saudi Arabia as an Arbitral Seat.*”

²² Al-Khalaf, “Public Policy and the Enforcement of Foreign Arbitral Awards in Saudi Arabia,” 51.

²³ *Royal Decree No. 44682*, dated 18/08/1442H (31 March 2021).

²⁴ *Arbitration and Conciliation Act 1996*, s. 48 (India Code, 1996), available at: <https://www.indiacode.nic.in>

This restrictive stance was later codified through the Arbitration and Conciliation (Amendment) Act 2015, whose Explanation 1 to Section 48(2)(b) limits refusal of enforcement to cases involving fraud or corruption, or where the award contravenes fundamental policy, or offends India's most basic notions of morality or justice. Explanation 2 explicitly prohibits courts from reviewing an award on its merits under the pretext of applying public policy.²⁵ Collectively, these provisions confirm India's commitment to a Convention-consistent, pro-enforcement framework.

4.2 Public Policy in Practice – Key Phases: in line with international arbitral standards.

Indian jurisprudence on public policy in arbitration has evolved through distinct phases. After *Renusagar Power Co. Ltd. v. General Electric Co.* (1994) which set a global-oriented tone, a divergence emerged in the domestic-award context: in *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.* (2003) the Supreme Court of India expansively interpreted “public policy” under Section 34 of the Arbitration and Conciliation Act, 1996 to include patent errors of law or “patent illegality.”²⁶ That broad interpretation raised the concern that its logic might spill over into the enforcement of foreign awards. Indeed, in *Phulchand Exports Ltd. v. OOO Patriot* (2008) the Court momentarily applied the *Saw Pipes* reasoning to a foreign-award enforcement context, expanding the scope of public-policy intervention. However, the Court subsequently course-corrected in *Shri Lal Mahal Ltd. v. Progetto Grano Spa* (2013) where a three-judge bench overruled *Phulchand* and reaffirmed that the narrow test of *Renusagar* governs enforcement of foreign awards.²⁷ The Court held that while the phrase “public policy of India” appears in both Section 34 and Section 48, its application must be more restrictive under Section 48 to ensure finality and respect India's treaty obligations. This clarification ushered in a pro-enforcement era. Subsequent Supreme Court decisions, such as *Vijay Karia v. Prysmian Cavi e Sistemi SRL* (2020) and *Government of India v. Vedanta Resources Plc* (2020), have consistently applied the *Renusagar/Lal Mahal* principles – emphasising that foreign awards are not to be dissected on their merits under the cover of public policy, and enforcement may be refused only for truly egregious transgressions of fundamental legal tenets or morality.

4.3 Illustrative Cases and Judicial Application

Indian courts have gradually developed a consistent and restrained approach to public policy in the enforcement of foreign arbitral awards. The evolution is best illustrated through several landmark cases.

²⁵ *Arbitration and Conciliation (Amendment) Act 2015*, Explanation 1 and Explanation 2 to s. 48(2)(b), available at: <https://www.indiacode.nic.in>.

²⁶ *Oil & Natural Gas Corp. Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705 (Supreme Court of India) (introducing “patent illegality” as a fourth head of public-policy under § 34). Available at: <https://indiankanoon.org/doc/919241/>.

²⁷ *Shri Lal Mahal Ltd. v. Progetto Grano Spa*, (2013) 2 SCC 433 (Supreme Court of India) (overruling prior expansive approach to foreign-award enforcement and reaffirming narrow *Renusagar* test). Available at: <https://indiankanoon.org/doc/15591279/>.

In *Renusagar Power Co. Ltd. v. General Electric Co.* (1994), the Supreme Court adopted a *narrow interpretation* of public policy in addressing objections to enforcing an ICC award against an Indian company. The Court held that even if enforcement appeared to contravene certain foreign-exchange regulations, such a violation did not automatically amount to a breach of public policy unless it offended the fundamental policy of Indian law or justice. The award was therefore enforced, marking India's transition toward a Convention-aligned standard.²⁸

Subsequent rulings reaffirmed this limited scope. In *Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd.* (2017), the Supreme Court approved enforcement of a two-tier arbitral procedure agreed by the parties, holding that procedural innovations are not contrary to public policy merely because they diverge from domestic practice. Conversely, in *Penn Racquet Sports v. Mayor International Ltd.* (Delhi HC 2011), enforcement was refused due to underlying illegality in import transactions—an exceptional case demonstrating that only clear violations affecting national economic interests trigger the public-policy defence.

The principle was reaffirmed in *Shri Lal Mahal Ltd. v. Progetto Grano Spa* (2013), where the Court rejected any merits review under Section 48 and restated that “public policy of India” in the enforcement context must be construed narrowly to preserve finality and international comity. The pro-enforcement stance reached maturity in *Vijay Karia & Others v. Prysmian Cavi e Sistemi SRL* (2020), where the Supreme Court dismissed objections alleging violations of exchange-control laws and imposed costs on the objectors for resisting enforcement without a substantive basis.²⁹ The Court emphasised that misuse of the public-policy defence undermines India's reputation as an arbitration-friendly jurisdiction.

Overall, Indian courts now rarely deny enforcement of foreign awards on public-policy grounds. Even the exceptional *NAFED v. Alimenta SA* (2020) decision – where enforcement was refused owing to export restrictions – remains an outlier in an otherwise stable, pro-enforcement jurisprudence firmly aligned with the *New York Convention* standard.

4.4 Summary of the Indian Approach

India's jurisprudence on the enforcement of foreign arbitral awards reflects a careful equilibrium—respecting the finality of international awards while safeguarding a narrow set of non-negotiable legal and moral principles. The “fundamental policy of Indian law” ground has been interpreted to encompass only the most serious violations – such as acts undermining India's core legal or economic framework, including extreme breaches of exchange-control or competition law.³⁰ Lesser statutory infractions are insufficient to trigger this exception. The “interests of India” prong is rarely invoked and is confined to circumstances implicating national security, foreign relations, or conflicts with

²⁸ *Renusagar* (Supreme Court of India, 1994).

²⁹ *Vijay Karia* (Supreme Court of India, 2020).

³⁰ *Renusagar* (1994) – Supreme Court of India (available on IndiaKanoon and SCC).

India's international obligations. Similarly, the "justice or morality" ground applies only where enforcement would shock the conscience of the court—such as awards tainted by fraud or the compelling performance of morally reprehensible acts.

Through sustained judicial discipline and legislative refinement, Indian law has moved toward a globally harmonised standard. Landmark decisions such as *Renusagar Power Co. Ltd. v. General Electric Co.* (1994) and *Shri Lal Mahal Ltd. v. Progetto Grano Spa* (2013) firmly established the narrow interpretation of public policy, while *Vijay Karia v. Prysmian Cavi e Sistemi SRL* (2020) reinforced the pro-enforcement stance and discouraged frivolous objections.³¹ The 246th Law Commission of India Report (2014), which led to the 2015 amendment to the Arbitration and Conciliation Act, expressly recommended codifying this limited view of public policy to bring Indian practice in line with the *New York Convention*.³²

Collectively, these developments confirm that India's courts now treat the public-policy exception as a safeguard against only egregious violations of fundamental law or morality. This predictability has bolstered investor confidence and strengthened India's reputation as an arbitration-friendly jurisdiction grounded in the rule of law.

5. Public Policy Exception in China

5.1 Legal and Institutional Context

The People's Republic of China (PRC) acceded to the *New York Convention* in 1987, with both reciprocity and commercial reservations, marking a decisive step in its integration into the international arbitration regime. The enforcement of foreign-related arbitral awards in China is primarily governed by the Civil Procedure Law (CPL) and supplemented by judicial interpretations and circulars issued by the Supreme People's Court (SPC).

Article V(2)(b) of the *New York Convention*—allowing refusal of enforcement where an award violates the forum's public policy—is reflected in Chinese legislation as contravention of the nation's "social and public interest" (社会公共利益). Chinese courts, acting under SPC supervision, have historically adopted a cautious and centralized approach to this exception, treating it as an extraordinary measure rather than a routine defence.

A distinctive institutional safeguard in China is the SPC Reporting Mechanism, introduced in the 1990s, which remains unique in global arbitration practice. Under this mechanism, if an Intermediate People's Court intends to refuse enforcement of a foreign or foreign-related award – including on public-policy grounds – it must first report its opinion to the Higher People's Court. Should the latter concur, the case is further submitted to the SPC for final review and approval before any refusal can be made. This multi-tiered supervisory process

³¹ Vijay Karia (2020) – Supreme Court judgment on IndiaKanoon.

³² Law Commission Report No. 246 (2014) – Official document of the Government of India.

has significantly curtailed arbitrary denials and has fostered a uniform, pro-enforcement national standard aligned with China's broader policy of judicial modernization and foreign investment promotion.³³

5.2 Interpretation of Public Policy in Chinese Law

Chinese legislation does not provide a detailed definition of “public policy” or “social and public interest.” Instead, the Supreme People's Court (SPC) has clarified through judicial interpretations that this notion must be applied narrowly and with restraint. In practice, Chinese courts understand public policy to cover three main categories: (i) the fundamental principles of Chinese law and governance—especially those reflecting socialist core values or essential state interests; (ii) matters of state sovereignty and national security; and (iii) serious violations of social morality or good customs.

Minor breaches of ordinary statutes or contractual rules are not treated as public-policy concerns. To invoke this exception, an award must affect China's societal or sovereign interests at a fundamental level. Importantly, Chinese courts do not use public policy as a pretext to review an arbitral tribunal's reasoning or the interpretation of law or evidence, since doing so would undermine the finality of arbitration, which China recognises under its international commitments to the *New York Convention*.³⁴

Empirical evidence supports this cautious stance: between 2015 and 2017, out of more than 200 foreign-award enforcement cases, only one was refused on public-policy grounds.³⁵ This statistic underscores how rarely the exception is used and demonstrates that, when applied, it typically concerns conflicts with Chinese judicial sovereignty or outcomes contrary to the nation's fundamental legal order. The SPC has consistently emphasised that the purpose of the public-policy exception is to protect core national values and judicial authority – not to revisit the merits of arbitral awards.

5.3 Case Studies – Rare Invocations of Public Policy

Chinese courts have invoked the public-policy exception under the *New York Convention* only in exceptional circumstances, underscoring a strong presumption in favour of enforcement.

The first well-known instance occurred in the Hemofarm case (2008) before the Jinan Intermediate People's Court. This case is often described as the first where

³³ Supreme People's Court of the People's Republic of China, *notice on the Handling of Foreign-Related Arbitration and Foreign Arbitration Cases by the People's Courts* (Fa [1995] No. 18), 28 August 1995 — establishing the reporting mechanism for foreign arbitral award enforcement. Available at: <https://cicc.court.gov.cn/html/1/219/208/210/217/index.html>.

³⁴ Supreme People's Court of the People's Republic of China, *Notice on the Handling of Foreign-Related Arbitration and Foreign Arbitration Cases by the People's Courts* (Fa [1995] No. 18), 28 August 1995. Available at: <https://cicc.court.gov.cn/html/1/219/208/210/217/index.html>.

³⁵ Ling Yang & Weixia Gu, “The Public Policy Exception under the New York Convention: An Empirical Study of Chinese Judicial Practice (2015–2017),” *Asian International Arbitration Journal* 15, (2019): 1–29.

enforcement was refused on public-policy grounds. The dispute arose from an ICC arbitration between Serbian companies, with indirect involvement of a Chinese state-owned enterprise. The Jinan court declined enforcement because the award had imposed sanctions on a party for applying to a Chinese court for asset preservation. The court viewed this as an affront to China's judicial sovereignty and thus contrary to the country's *social and public interest*. The Supreme People's Court (SPC) subsequently endorsed the refusal through its reporting mechanism, confirming that a foreign award cannot penalise a litigant for exercising lawful procedural rights in Chinese courts.³⁶

By contrast, later cases showed a more measured approach. In the *Castel Electronics v. TCL Communication Technology Holdings Ltd.* (2013) decision, the SPC permitted enforcement of a foreign award even though a Chinese court had previously declared the arbitration clause invalid. The SPC reasoned that the domestic ruling came only after the foreign award had been rendered, and denying enforcement on that ground would be inconsistent with China's pro-arbitration policy. Another notable example is *Wicor Holding AG v. Taizhou Haopu Investment Co.* (2016), where the Taizhou Intermediate Court refused to enforce an ICC award that directly conflicted with an earlier binding judgment of the Jiangsu High Court invalidating the arbitration clause. The SPC endorsed this narrow refusal, stating that enforcing the award would "violate the societal and public interest of the PRC" by undermining judicial authority.³⁷

Outside these few examples, Chinese courts have almost never denied enforcement solely on public-policy grounds. Even in cases involving punitive damages or intellectual-property disputes, enforcement was allowed because the awards did not offend China's fundamental legal or moral order. This selective and cautious application reinforces that the public-policy defence in China remains a *last resort*, reserved only for conflicts that threaten national judicial sovereignty or essential public interests.

5.4 Characteristics of the Chinese Approach

China's application of the public-policy exception in foreign-award enforcement reflects three defining traits: central oversight, rare invocation, and a focus on protecting state and institutional interests. The Supreme People's Court (SPC) exercises supervisory control through its reporting mechanism, ensuring that refusals are exceptional and justified at the highest judicial level. This top-down review has produced a high rate of enforcement success and conveyed a consistent message that denying recognition under Article V(2)(b) of the *New York Convention* is a measure of last resort.

When public policy is raised, it frequently overlaps with sovereignty or non-arbitrability concerns rather than disagreements over substantive law. For example, in *Hemofarm* (2008) and *Wicor Holding AG v. Taizhou Haopu Investment Co.* (2016), Chinese courts linked public policy to judicial authority and the protection of procedural integrity rather than to any particular legal

³⁶ SPC Notice (Fa [1995] No. 18).

³⁷ Matthew S. Erie, "Public Policy and the Enforcement of Foreign Arbitral Awards in China," *Hong Kong Law Journal* 48, (2018): 655–684.

doctrine. This demonstrates that China's notion of public policy primarily safeguards the structure and dignity of its judicial system rather than domestic legal preferences.

Although "social morality" is formally included within the concept of "social and public interest," it has rarely appeared in practice – likely because commercial disputes seldom engage moral issues. Hypothetically, an award enforcing a contract involving bribery or illegal acts would certainly offend public policy, but such matters would also fall under the broader categories of illegality or non-arbitrability.

Empirical studies confirm that refusals on public-policy grounds remain extremely rare. Between 1994 and 2015, Chinese courts refused enforcement in only 5 of 85 cases, and only 1 involved public policy.³⁸ These findings underscore China's alignment with the narrow interpretation of the New York Convention. The SPC itself has repeatedly emphasised that enforcement should be refused only when it would "harm the public interest or good social customs of the PRC."³⁹ By maintaining this disciplined approach, China reinforces its reputation as an arbitration-friendly jurisdiction and a reliable partner in global commerce.

6. Conclusion

The comparative analysis of Saudi Arabia, India, and China demonstrates a gradual but clear movement toward harmonisation in applying the *public policy* exception under the *New York Convention*. Despite differing legal traditions – Sharia-based, common law, and socialist civil law—each system now recognises that "public policy" must function as a shield for fundamental values, not a weapon for protectionism. By embracing this principle, the Convention states collectively advance the Convention's goal: ensuring that arbitral awards are effective and predictable across borders, thereby strengthening international commerce and dispute resolution.

In practice, Saudi Arabia's 2012 Arbitration Law and 2013 Enforcement Law introduced a modern framework that limits refusal of enforcement to awards clearly contradicting Sharia or national sovereignty.⁴⁰ India's courts, from *Renusagar* (1994) to *Vijay Karia* (2020), have consistently narrowed the doctrine to exclude mere errors of law or fact.⁴¹ Similarly, China's centralised judicial review system – anchored in the *Supreme People's Court's 1995 Notice* – has made refusals on public-policy grounds exceedingly rare, reinforcing confidence among foreign investors.⁴²

³⁸ Yongqing Zheng, "Judicial Review and Enforcement of Foreign Arbitral Awards in China: Empirical Findings 1994–2015," *China International Commercial Court (CICC)*, 2018. Available at: <https://cicc.court.gov.cn/html/1/219/208/210/216/index.html>.

³⁹ *SPC Notice (Fa [1995] No. 18)*.

⁴⁰ Saudi Arbitration Law.

⁴¹ *Vijay Karia* (2020).

⁴² *SPC Notice (Fa [1995] No. 18)*.

The Public Policy Exception in the Enforcement of Foreign Arbitral Awards

These examples reveal a shared trajectory: codification of narrow definitions, judicial training, and the pursuit of consistency with international norms. As this trend continues, the likelihood of arbitrary refusals diminishes, and the rule of law in international arbitration grows stronger. The direction is unmistakable – toward a future where a foreign arbitral award, whether rendered in Paris, Mumbai, Beijing, or Riyadh, encounters the same high threshold before any court may deny its enforcement.

Protecting Minor Victims During Interrogation in Criminal Proceedings: The Implementation of the Barnahus Model from a Comparative Perspective with Special Regard to Hungary and Romania

BALLA, BULCSÚ*

ABSTRACT *The interrogation of minor victims in criminal proceedings constitutes one of the most sensitive questions of contemporary criminal justice, requiring a careful balance between the protection of children's rights and the effective implementation of procedural aims. Because of their age, psychological development, and limited legal awareness, minor victims can be considered particularly vulnerable during criminal proceedings, and therefore, they face an increased risk of secondary victimisation. This article aims to assess whether and to what extent the Barnahus model contributes to the effective protection of minor victims during interrogation, and to identify the key challenges arising from its possible integration into criminal proceedings.*

KEYWORDS *Barnahus, children, victim, vulnerable, interrogation, abuse.*

1. Introduction

Principles and special procedural rules applicable to the interrogation of child victims and witnesses are laid down in several international documents and EU legislation, including the EU Directive on combating sexual abuse and sexual exploitation of children, the EU Victims' Rights Directive and the Council of Europe Lanzarote Convention.

Generally speaking, child victims are a particularly vulnerable group who are usually unable to defend themselves or stand up for their rights on their own, and therefore, criminal proceedings should constitute a priority concern where it is particularly important to deal effectively with child victims of crime.¹ For this reason, the focus of child-friendly justice is to ensure that children are not re-traumatised and feel that they are effective participants in the proceedings. The primary reason for this is to avoid the secondary trauma of constant revictimization caused by repeated interrogations. Secondary victimisation is the

* PhD student, University of Miskolc, Faculty of Law, Ferenc Deák Doctoral School in Law and Political Sciences.

¹ Gál Emese Dorottya "A gyermekbarát igazságszolgáltatás modellje a Büntetőeljárásban. A Barnahus-modell," *CSJ*, no. 2 (2021): 30–36.

term used in academic literature to describe when a person is victimised a second time during the criminal proceedings by having to relive the trauma of the previous experience during interviews and testimonies.² If the child relives what happened to him or her over and over again during the interview, it may exacerbate the damage caused by the crime, thereby slowing down the child's mental recovery process. For this reason, the questioning of children during proceedings should be avoided as far as possible and, where unavoidable, increased attention should be paid to the necessary guarantees and standards applicable to their interrogation.³

International legal standards, including, in particular, the UN Convention on the Rights of the Child (UNCRC), recognize that children need special protection and care also when they are involved in criminal proceedings. The Council of Europe's guidelines on child-friendly justice, the European Convention on Human Rights (ECHR) and the European Union's Directive No. 2016/800 also emphasize the need to ensure the procedural rights of minors and to take into account the best interests of children. Despite this, in practice, the implementation of the rules is often incomplete or purely formal, and child protection considerations are often overshadowed by procedural efficiency or repression. Taking this into consideration, the present article examines how the Barnahus model relates to criminal procedural guarantees and whether it is capable of putting the protection of minor victims and effective and reliable evidence-taking on the same page. Particular attention is paid to the manner in which child-friendly interrogation techniques are embedded within criminal proceedings and to the extent to which they focus on the special needs of minor victims. In this context, this study aims to identify the key aspects of Hungarian and Romanian approaches to the interrogation of minor victims and the possible implementation of the Barnahus model. Finally, the analysis seeks to assess whether the current regulatory frameworks in the two legal systems ensure an appropriate balance between the protection of children and the effectiveness of criminal proceedings.

2. The Barnahus model

Barnahus is an Icelandic term meaning “Children’s House”. The model was first adopted in Iceland in 1998, constituting a huge reform in the way cases of violence and abuse against children are dealt with.⁴ The European Barnahus Standards represent the first attempt in Europe to define the principles of the interventions and services referred to as the Barnahus model. Barnahus as a model uses a multidisciplinary and inter-agency approach, ensuring collaboration between judicial, social, and medical agencies. Typically, these agencies work in different locations, with more or less differentiated working hours, and without

² Batta Júlia Dóra, “Némajáték a büntetőeljárásban: a tizennyolcadik életévét be nem töltött tanú kihallgatásának sajátosságai,” *Jura*, no. 3 (2022):109.

³ Batta, “Némajáték a büntetőeljárásban,”109.

⁴ Anna Markina, Andreas Kapardis, and Stefan Heinrich, *The Barnahus Model Across the Broader European Context* (European Commission, 2019). 4.

concurrent collaboration between them. This means that a child victim of violence should appear separately in front of the judicial investigation authorities, the psychologist, the doctor and possibly any other person in charge of the social protection of child victims. The strength of the model lies in the fact that all these agents work in a single space adapted to the child's needs, offering complex services to the child under one roof. The idea at the centre of the Barnahus model is that disclosure by the child is the key to identifying and investigating abuse against child victims for criminal but, at the same time, also for therapeutic purposes. Although the term “Barnahus” has a unified meaning, the ways in which Barnahus homes are set up and organized differ from country to country, and sometimes even within the same country between the different regions. These differences in operational set-up symbolize the flexibility of the model. It is important in this respect that Barnahus should not be considered as a fixed model but rather one that evolves and adapts to the complex needs of every child who is a victim or witness of violence.⁵

In this context, the Barnahus Standards play a very important role at a European level precisely by establishing a framework in which there is room for flexibility and adaptability. This flexibility and adaptability, however, is not absolute because, of course, in the implementation of the flexible model it is very important to keep certain standards that are related to the authenticity of the way a Barnahus centre is organized. These principles are promoted in many European legal and policy frameworks adopted, in particular, by the Council of Europe (CoE) and the European Union (EU), including⁶:

- the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse;
- the Council of Europe Guidelines on child-friendly justice;
- the Council of Europe Recommendation on children's rights and social services friendly to children and families;
- the European Directive on combating the sexual abuse, sexual exploitation of children and child pornography;
- the EU Directive establishing minimum standards on the rights, support and protection of victims of crime.

The key purpose of the Standards is to provide a common operational and organizational framework that promotes a practice that prevents re-traumatization while ensuring valid testimony for the court and respects children's rights to protection, assistance and justice in their best interests. The Standards consist of a collection of principles, activities, and institutional arrangements that ensure effective and coordinated interventions in the best interests of the child. With a view to achieving the targets, the main principles

⁵ Róisín O'Donnell and Daniela Wenke, *Standardele de calitate ale modelului de servicii integrate destinate copiilor victim ale abuzului Barnahus. Ghid pentru dezvoltarea de servicii multidisciplinare integrate Copilul-victimă și martor al violenței* (Consiliul Secretariatului Statelor Mării Baltice și Child Circle, 2017), 2.

⁶ O'Donnell and Wenke, *Standardele de calitate ale modelului de servicii integrate destinate copiilor victim ale abuzului Barnahus*, 3.

considered in the course of organizing the functioning of Barnahus centres and having relevance to this paper are: the best interests of the child; the rights of the child to be heard and informed; prevention of undue delay; broad target group; ensuring a child responsive environment; forensic interviews to procure valid evidence that can be used in the rest of the criminal trial. Through these standards re-traumatization can be prevented, since it involves ensuring: that the best interests of the child are taken into account in practice and in decision-making; that the child's right to be heard is exercised without repetitive interviews; that the child is interviewed and supported by trained and competent professionals; that interviews take place in a multidisciplinary environment in a child-friendly location, providing appropriate support to the child and caregivers without undue delay; and that the child is not obliged to appear in court.

a. Criticisms of the Barnahus method

As it has been pointed out before, repeated, multiple interrogations of children, apart from significantly prolonging the procedure, could be highly retraumatizing and should be avoided. This is precisely the reason why, as mentioned above, the proceedings are video and audio recorded and the other participants in the proceedings can ask questions from the monitoring room through the expert, thus avoiding unnecessary re-interviews.

A large number of experts agree that unnecessary further hearings should be avoided, but some new research suggests that in some cases, re-interviews may be justified, as they may reveal important new information that could change the course and direction of the whole investigation.⁷ The most common reason for this is that at the first interviews many children deny that the abuse happened, or their testimony does not provide sufficient evidence to press charges. Another argument for a re-interview is the phenomenon of reminiscence, which consists of memories that become available in later recollections. This phenomenon has long been known in cognitive psychology but has only in recent decades attracted the interest of criminal psychologists. Prior to this, forensic experts were for a long time sceptical about the phenomenon of reminiscence, fearing that memories retrieved during later interrogations were less reliable than earlier ones. However, experiments and interrogation analyses in recent years show that if the interrogator refrains from using suggestive questions, children can provide reliable information in some cases in the course of a series of interviews, and that these later recollections can in some cases change the course of the investigation.⁸ Although the use of abuse dolls is an essential communication tool in the Barnahus model, the use of such anatomically designed dolls is not recommended by all child-friendly justice models.⁹ One reason for this is that children use dolls in their daily lives to play imaginary situations, so it is not always appropriate to

⁷ Batta, "Némajáték a büntetőeljárásban," 117.

⁸ Batta, "Némajáték a büntetőeljárásban," 117.

⁹ Batta, "Némajáték a büntetőeljárásban," 118.

consider playing with dolls as a representation of reality, or at least it should be treated with caution.¹⁰ Therefore, when using this method, it is important to assess whether the child has already developed the ability to abstract, and to make him aware at the beginning of the interview that the dolls are not for play, but for telling his story. Another argument against the technique is that the existence and elaboration of the dolls' genitals is new to children compared to ordinary dolls. This is the reason why, when comparing the play of abused and non-abused children, it was observed that touching the dolls' genitals was common in both groups. In summary, in older children, where the ability to abstract is well established, the use of the doll tends to result in a more accurate description, but in younger children, typically under 4 years of age, it is common for them to play with the dolls and to include in this play things that are only the result of their imagination or curiosity. It is therefore of paramount importance that the interrogator should proceed with care when children are telling stories using abuse dolls and it is recommended that the interrogation should not solely be based on this modality.

b. The interrogation of minor victims in Hungary

Hungarian criminal procedure law contains special safeguards for the interrogation of victims and witnesses requiring special treatment, which group also includes minors.

The legislator classifies minor victims as persons requiring special treatment in view of their age, regardless of the nature of the crime committed against them.¹¹ At the same time, the type of crime itself may also justify this status, as victims of sexual crimes, regardless of their age, are also considered to require special treatment.¹² With regard to minor victims, Hungarian law provides that persons under the age of 18 who are involved in criminal proceedings as victims or witnesses are entitled to special treatment by operation of law.

If the victim is under the age of 18, the proceedings must, as a general rule, be conducted in a room designed or adapted for this purpose.¹³ An exception to this rule may only be made if the procedural act in question cannot be carried out there, or if the exercise of the victim's rights, the fulfilment of their obligations, and their protection and safety can only be ensured in another way. Pursuant to the provisions of the Criminal Procedure Act, the court, the public prosecutor's office and the investigating authority shall, where possible, make video and audio

¹⁰ Heather R. Hlavka, Sara D. Olinger, and Jodi L. Lashley, "The Use of Anatomical Dolls as a Demonstration Aid in Child Sexual Abuse Interviews: A Study of Forensic Interviewers' Perceptions," *Journal of Child Sexual Abuse* 19, no. 5 (2010): 519–40, <https://doi.org/10.1080/10538712.2010.511988>.

¹¹ Act XC of 2017 §82 a).

¹² Act XC of 2017 §82 c).

¹³ Act XC of 2017 §85 (1) i).

recordings during proceedings involving persons under the age of 18, and may also order the presence of a forensic psychologist or a social welfare expert.¹⁴

In the case of victims under the age of 14, the rules are even stricter: in such cases, the procedural act must be carried out in a room designated or adapted for this purpose, unless the exercise of the child's rights, the fulfilment of his or her obligations, and his or her protection can only be ensured by other means or measures.¹⁵ However, with regard to child interview rooms, it should be emphasized that the “separate room” required by law does not refer exclusively to rooms designed to meet the special needs of children; as this right also applies to adult victims requiring special treatment.

It is mandatory to make video and audio recordings of procedural acts involving victims under the age of 14,¹⁶ and the same person must conduct the procedural act each time during the investigation, if this does not jeopardize the procedure. The purpose of this is to make it easier for the child to open up and feel safe in the presence of a familiar person. In addition, in cases involving victims of crimes against sexual freedom and sexual morality, the interrogation may only be conducted by a person of the same sex as the victim.¹⁷

An important step towards child-friendly justice was taken with the adoption of Decree 32/2011 (XI.18.) of the Ministry of Justice on the establishment of child hearing rooms at police investigation authorities.¹⁸ The Hungarian Child Hearing Rooms, as part of the Child-Centred Justice, are rooms where minors are heard in a special, friendly environment designed according to their needs. They are mainly used in criminal cases where the minor is interviewed as a victim or witness.¹⁹ At this point, it is worth mentioning that the *Barnahus method* is not the same as the *Barnahus institution (home)*. The latter exists within the child protection system and refers to complex child welfare services operating in a specially arranged building. The interrogation method regulated in the Hungarian Code of Criminal Procedure and referred to as “Barnahus”, has been included in the legislation since January 2021. It is one of the possible methods of interviewing minor victims, a procedural act that can take place in any special room.²⁰ Although this new interrogation method has expanded the range of special treatment tools available in criminal proceedings, we cannot equate special interrogation rooms with Barnahus houses. The Barnahus interrogation method requires the involvement of expert advisors and psychological specialists in addition to the investigating authorities; however, while these are also available in a Barnahus home, the latter also contains, for example, a medical

¹⁴ Act XC of 2017 §87 (1) b), bb).

¹⁵ Act XC of 2017 §88 (1) b).

¹⁶ Act XC of 2017 §88 (1) d).

¹⁷ Act XC of 2017 §89 (1) a).

¹⁸ Pressinger Nikoletta, “Barnahus – Az abúzus gyermekáldozataiért,” *Batthyány Lajos Szakkollégium Tudományos Folyóirata*, no. 2 (2021): 30.

¹⁹ Pressinger, “Barnahus – Az abúzus gyermekáldozataiért,” 30.

²⁰ Kiss Anna, “A kiskorú sértettek a büntetőeljárásban” *Kriminológiai tanulmányok* (2000-), no. 59 (2022): 159–160.

room, and “Barnahus houses” located in special buildings serve not only procedural but also therapeutic purposes, unlike interrogation rooms.

Despite all this, it is unquestionable that the amendment to Act XC of 2017 on the Code of Criminal Procedure, which entered into force on 1 January 2021, was a significant step towards using the Barnahus method.²¹ It allowed the court, the prosecution and the investigating authority to order the presence of a forensic psychologist expert or the assistance of a counsellor in the case of a procedural act requiring the participation of a person under the age of 18. Thanks to the amendment, the law allows children involved in criminal proceedings to be interviewed by trained professionals. This helps to ensure that the child is interviewed by a properly trained professional, which will help to ensure that the child is not re-traumatised at the very beginning of the procedure.²² The method is based on the fact that while the interview is conducted by a specialised professional in a dedicated room, the police officer investigating the case, and possibly the prosecutor or lawyer, can observe the entire interview in the “monitoring room,” without disturbing the child victims, and collect information relevant to the case. The most important advantage of this method is that the questions are asked by the professional present with the children, bearing in mind that the best interests of the minor are paramount, but at the same time the minor is actively involved in the resolution of the case.²³

Therefore, following the amendment, the application of the Barnahus method means a procedural act of questioning or hearing carried out by the authority conducting the procedure with the assistance of an expert or a consultant specially qualified to apply the method. Thus, the court, the prosecution and the investigating authority are in direct contact only with the expert adviser, while they communicate with the juvenile only indirectly, through the person who conducts the interview. In this particular procedure, the adviser does not simply interpret the questions of the participants in the proceedings, but also guides the proceedings using the Barnahus system and thus helps the minor to answer the questions. Consequently, the introduction of the Barnahus method in criminal proceedings makes it possible to conduct procedural acts with the assistance of an expert who is familiar with the Barnahus method.²⁴ In addition, the amendment of the Criminal Procedure Code which entered into force on 1 January 2021 made it an official obligation for the authorities to examine and, if necessary, order the interview of a child victim in the course of criminal proceedings in accordance with the Barnahus model.²⁵

²¹ Pressinger, “Barnahus – Az abúzus gyermekáldozataiért,” 33.

²² Pressinger, “Barnahus – Az abúzus gyermekáldozataiért,” 33.

²³ Pressinger, “Barnahus – Az abúzus gyermekáldozataiért,” 33.

²⁴ Pressinger, “Barnahus – Az abúzus gyermekáldozataiért,” 33.

²⁵ Batta, “Némajáték a büntetőeljárásban,” 115–116.

In 2016, the first Barnahus centre in Hungary²⁶ was opened in Szombathely, which was the first Barnahus Home in Hungary and Central and Eastern Europe, and the fifty-first in the world, with the aim to operate and disseminate the Barnahus innovation.²⁷ In order to render the complex facility feasible, it was installed in the building of the Vas County Child Protection Centre, Primary School and Regional Child Protection Specialist Service (TEGYESZ) with several rooms, including a medical room, a monitoring unit and a psychology and therapy room.²⁸ Since the start of the Barnahus house in Szombathely, it has held several conferences on child protection, where it reported on its experiences. Initially set up on an experimental basis, the house in Vas County has already carried out a number of studies, the positive results of which have been confirmed for children. A particular advantage was that it did not only deal with local cases but also with minors from all over the country.²⁹ Later, Government Decision 1046/2020 (II.18.) (National Strategy for Combating Trafficking in Human Beings 2020-2023) made the establishment of the Barnahus system in Hungary a national target. As a result, a Hearing and Therapy Centre was opened in Budapest in February 2021 in the Alföldi Street building of the Metropolitan Child Protection Service.³⁰ Later on, a Barnahus centre was opened in Debrecen in the summer of 2021, based on the model from Szombathely.³¹

c. The interrogation of minor victims in Romania

In Romania the rules of criminal procedure do not set an age limit from which a child can be questioned in a criminal case. In order to fill this gap, Article 29 (2) of Law No 272 of 2004 on the Protection of the Rights of the Child provides that in any judicial or administrative proceedings involving a child, a child over the age of 10 must be heard; however, a child under the age of 10 may also be heard if the competent authority considers that the hearing of the child is necessary for the proper resolution of the case. Accordingly, if the child is over 10 years of age, his or her interview is mandatory. If the child victim has not yet reached this age but the judicial authority considers that the child's testimony contributes to the discovery of the truth and is relevant to the evidence that is the subject of the case, the child may be heard. As the CRC pointed out, age should not constitute a barrier for children to be heard,³² consequently the assessment of the

²⁶ Ágnes Lux and Virág Sebhelyi, *A gyermekjogok helyzete Magyarországon (2014–2019): Alternatív jelentés az ENSZ Gyermekjogi Egyezményének hazai végrehajtásáról* (Gyermekjogi Civil Koalíció, 2019), 39.

²⁷ Pressinger, "Barnahus – Az abúzus gyermekáldozataiért," 33.

²⁸ Pressinger, "Barnahus – Az abúzus gyermekáldozataiért," 33.

²⁹ Pressinger, "Barnahus – Az abúzus gyermekáldozataiért," 33.

³⁰ Fantoly Zsanett, "Az izlandi Barnahus-modell és annak hazai gyakorlata," *Magyar Rendészet* 22, no. 2 (2022): 229–236. <https://doi.org/10.32577/mr.2022.4.14>.

³¹ Pressinger, "Barnahus – Az abúzus gyermekáldozataiért," 34.

³² General Comment No. 12 of the Committee on the Rights of the Child, 20 July 2009, para. 21.

contributory force of the child's testimony has to be carried out with due diligence on the part of judicial authorities.

In accordance with the provisions of Article 111 para. (9) of the Romanian Code of Criminal Procedure, the questioning of the victim shall be carried out without undue delay, or, if this is not possible, after the denunciation has been made and without unreasonable delay. It follows from an analysis of the wording of the law that, as a general rule, the victim must be interviewed at the time when the complaint is lodged, and only if this is not possible due to objective reasons, can the interview take place later but within a reasonable time. Although the law does not contain a specific provision on the questioning of children, their prompt questioning is of paramount importance. Given the specific factors that may influence or change the child's testimony, the interview should be conducted as soon as possible, as the more time passes, the less likely it is that the interview with the minor will produce an unchanged and unbiased result.

The choice of the person(s) to be interviewed depends on the age and cognitive and emotional development of the child and the specificity of the offence under investigation. In principle, it is preferable for one person to conduct the interview,³³ as he or she is better able to establish an emotional connection with the child and the child is more likely to talk about sensitive events. In some cases, however, the advantage of group interviews is that the interviewers complement each other and can cover all the issues better, thus avoiding the need for a second interview. In this case, it is advisable for one person to lead and conduct the interview while the others take notes and suggest or ask further questions at the end of the interview. Whichever "strategy" is used, it is of paramount importance that the persons involved in the interview should have experience of working with minors and preferably have received appropriate training. In addition, it is important that the person conducting the interview should have acquired specific techniques for interviewing a child victim and have knowledge of child developmental psychology and the psychosocial consequences of child abuse.³⁴ In line with international standards, the Romanian system also prescribes the obligation for authorities to reduce the number of interviews to the minimum possible. Despite this, in several cases a stronger relationship between the interviewer and the minor can be built during several sessions of interview, allowing to obtain more information from the child and, therefore, to record a more detailed testimony. If more than one interview session is organized, the interviewer should remind the child of what they said in the previous interviews to help them recall their memories.³⁵ Although this can be very useful during the process, "reminding the child" of information obtained in previous interviews

³³ Viorel Badea and Bogdan Nicolae Trandafir, *Ghid metodologic privind audierea minorilor victime ale violenței* (Federația Organizațiilor Neguvernamentale pentru Copil, 2017), 27.

³⁴ Mona-Maria Pivniceru and Cătălin Luca, *Ghid de audiere a copilului în proceduri judiciare* (Editura Hamangiu, 2009), 171.

³⁵ Consiliul Superior al Magistraturii, *Ghid de bune practici în domeniul tehnicilor de audiere a minorilor* (Norway Grants, 2023), 66.

related to the trauma they have suffered can greatly contribute to their revictimization. For this reason, when using this method, the interviewer must take special care to protect the child from revictimization.

In addition, there are situations where, for various reasons (age, level of development, trauma suffered as a result of the offence), it is necessary to conduct the interview in the presence of a psychologist or a victim counsellor. This possibility is provided for in Article 111 para. (6) b) of the Code of Criminal Procedure. On the other hand, the aforementioned Article 111 para. (7) provides that in certain cases (domestic violence, rape, sexual violence or assault) the interview may be conducted only by a person of the same sex as the victim, if the victim so requests, unless the judicial authority considers that this would jeopardise the proper conduct of the trial or the rights and interests of the parties. The presence of the minor's parents, guardian or legal representative during the proceedings is guaranteed by paragraph (8¹), which provides that *"the interview of a victim under the age of 14 shall take place in the presence of the parent, guardian or representative of the institution to which the minor has been entrusted for the purpose of his upbringing and education, and of a psychologist."* This guarantees that minors receive adequate support during the procedure, from persons of their choice and from a professional. Legal aid under Article 93 para. (4) is mandatory if the victim is a person with reduced capacity or incapacity. Therefore, if the minor does not have a lawyer of his or her choice, the court must arrange for the appointment of a lawyer in whose presence the proceedings will be conducted.

Pursuant to Article 111 para. (6) (a) of the Code of Criminal Procedure, the hearing must be held in a room designed or adapted for that purpose, which provides a safe and friendly environment. The courtroom must be designed and furnished in such a way that it is suitable for children of different ages and free of disturbing elements. For young children, a familiar environment or a welcoming room is conducive to communication and adaptation to a new situation. If, for various reasons (emergency, the child is too young, etc.), the interview cannot be carried out in a special room, a neutral, simply furnished room should be chosen as far as possible. The minor may be interviewed in his or her home, unless that is the place where the offence was committed. The use of premises specially adapted for the interrogation of minors is also justified by the fact that paragraph (8) provides that when the victim interrogated is a minor, the entire interrogation must be recorded by audio-visual means. If this is not possible, the interview shall be recorded by audio recording equipment. In order to fulfil these two obligations at the same time, it is appropriate to provide a suitable environment and a technically equipped room.³⁶

Regarding the right of the child to be informed, it is worth mentioning that Law No. 211 of 2004 on certain measures to ensure the information, support, and protection of crime victims underwent substantial amendments on April 7, 2019,

³⁶ Ministerul Public, *Îndrumar Teoretic și Practic privind infracțiunea de viol* (Înalta Curte de Casație și Justiție, 2022), 48–49.

through Emergency Ordinance No. 24/03.04.2019. These changes laid the foundation for the establishment of general victim support services in Romania, in the form of specialized departments operating within each General Directorate of Social Assistance and Child Protection (DGASPC). These departments must include at least three professionals: a social worker, a psychologist, and a legal advisor. The services provided by these victim support departments include: offering information about victims' rights, psychological counselling, financial advice related to the crime, emotional support, information about the victim's role in criminal proceedings and preparation for court, as well as referral to other specialized support services. These services are free of charge and are offered upon the request of the victim or their family.³⁷

According to data from the PROMISE Barnahus Network, Romania has participated in international training programs and consultations,³⁸ but the model has not yet been integrated into the country's legal and institutional framework for child protection and the justice system. As previously mentioned, in Hungary, for example, the first Barnahus centre was opened in Szombathely in 2016, while in Romania, the first and so far only Barnahus centre was opened in 2022 in the 6th District of Bucharest.³⁹ The centre was established as a joint project of Salvați Copiii România (Save the Children Romania) and the 6th District Child Protection Directorate (DGASPC Sector 6), with support from the Active Citizens Fund Romania – EEA and Norway Grants. The centre officially began operations in July 2022.⁴⁰ The aim of the Barnahus centre in Bucharest is to reduce secondary traumatization of children by providing a single, child-friendly location for judicial interviews, psychological examinations, medical care, and legal proceedings. One-way communication between the interview room and the observation room, video recording, and the presence of specially trained professionals ensure that the procedure is conducted in a sensitive and evidence-based manner.⁴¹

Nevertheless, the Romanian adaptation lags far behind the Hungarian implementation in terms of both timing and structure. In Hungary, based on the example of the centre in Szombathely, child-friendly interview rooms are now operating in several cities, and the professionals working there operate according to a uniform, state-supported methodological framework (Barnahus guide⁴²). In

³⁷ Steven Allen and Bruno Monteiro, *Justiție prietenoasă pentru Copii – inițiativă privind dezvoltarea conceptului de practică în instanțe* (Centrul de Resurse Juridice, 2021), 7–8.

³⁸ Available at: <https://barnahus.eu/2018/10/08/romanian-national-roundtable-focuses-on-the-legal-aspects-surrounding-child-abuse-cases/>. (Accessed: 10 november 2025)

³⁹ Available at: https://www.asistentasociala6.ro/noutati_doc_3573_in-sectorul-6-s-a-deschis-primul-centru-barnahus-din-romania_pg_0.htm. (Accessed: 10 November 2025)

⁴⁰ Available at: https://www.asistentasociala6.ro/noutati_doc_3573_in-sectorul-6-s-a-deschis-primul-centru-barnahus-din-romania_pg_0.htm. (Accessed: 10 November 2025)

⁴¹ <https://www.salvaticopiii.ro/ce-facem/protectie/centrul-barnahus>. (Accessed: 10 November 2025)

⁴² Lazáryné Illés Mária and Lazáry Fanni, *Kézikönyv a magyarországi Barnahus-szolgálatok működtetéséhez* (Emberi Erőforrások Minisztériuma, 2020), 2.

Romania, on the other hand, there is neither similar national coverage nor methodological uniformity. Apart from the centre in Bucharest, there are no other functioning Barnahus institutions, and there is no publicly available handbook or uniform protocol governing the application of the Barnahus model in Romania. Overall, although Romania has taken the first steps towards introducing the Barnahus model in recent years, its adaptation is currently limited and experimental, and the structural and professional frameworks that would be essential for the development of a sustainable model at the national level are lacking. However, the Bucharest centre could serve as an important example and basis for future expansion and legislative reforms.

3. Conclusion

The legitimacy of special rules and procedural guarantees governing the questioning of minors in criminal proceedings is firmly established in both international and domestic legal frameworks. These rules are based on the recognition that minors, due to their age, psychological development and vulnerability, cannot be treated in the same manner as adults during criminal proceedings. In cases involving minor victims and witnesses, this differentiated approach is of particular importance, as the procedural acts carried out during the investigation may have a direct impact on the child's psychological development and well-being.

In this context, criminal proceedings must be conducted in a manner that enables minor victims and witnesses to understand the nature and significance of the procedural acts affecting them and to participate meaningfully in the process. This requires not only the provision of information about their rights and the course of the proceedings, but also that such information be communicated in an age-appropriate and comprehensible manner, using clear language and, where necessary, supportive or illustrative means. Ensuring effective communication contributes to preventing the marginalisation of minors within criminal proceedings and supports their role as active participants rather than passive subjects of procedural acts.

A further core requirement in cases involving minor victims and witnesses is the prevention of secondary victimisation. As these minors have already been exposed to traumatic experiences, particular care must be taken to ensure that the questioning process does not exacerbate the harm suffered. From this perspective, the involvement of qualified professionals and the limitation of the number of interviews are of central importance, both for safeguarding the child's well-being and for preserving the reliability of the evidence obtained.

The Icelandic Barnahus model offers a comprehensive institutional framework capable of addressing these challenges. By applying a multidisciplinary approach and concentrating child-friendly questioning, therapeutic support and professional cooperation within a single setting, the model aims to minimise re-traumatisation while ensuring the collection of legally admissible and probative statements. One of the key strengths of the Barnahus model lies in its flexibility:

rather than imposing rigid procedural solutions, it provides a set of standards for good practice that can be adapted to the individual needs of the child and the circumstances of the case.

With regard to the regulations governing the questioning of minor victims in Romania and Hungary, it can be said that similar solutions are found to comply with international standards. In both Romania and Hungary, it is required, among other things, that the questioning of minors be recorded using audiovisual equipment, that psychologists and counsellors be involved where necessary, and that the location for questioning minors be a specially equipped room. Although both regulations stipulate the necessary guarantees for the protection of minor victims, they may still appear incomplete from the perspective of implementing the Barnahus model. Although the two regulations adopt many elements from the Barnahus model (an interdisciplinary approach involving specialists, recording of interviews to avoid subsequent re-interviews, and the provision of rooms suitable for children), there are still shortcomings. The interrogation methods described are primarily intended to enable the authorities to gather evidence while trying not to worsen the child's situation by avoiding revictimization. At the same time, it should not be overlooked that the requirements for special rooms do not include rooms reserved for medical or therapeutic purposes, but only interrogation rooms. In this sense, the procedures implemented in this environment do not meet the complex multidisciplinary vision of Barnahus homes, which include a medical room and where professionals not only participate in the questioning of children but also provide therapeutic assistance to minors. In light of this, it can be said that while the conditions set out in Romanian and Hungarian procedural law regulations tend to emphasize the collection of valid evidence while protecting the child from further trauma, in the case of Barnahus homes, we can talk about complex therapeutic facilities that go beyond this, where the main goal clearly includes the collection of evidence, but at least as emphatically, the subsequent rehabilitation and trauma processing.

Electronic Evidence in Civil Proceedings of the Kyrgyz Republic

DZHUSUPOV, AKYLBEK^{*}
DZHANALIEVA, NARGIZA^{}**
ALISHEVA, ALIYA^{*}**

ABSTRACT This article analyzes the adopted legal acts of the KR aimed at the development of the digitalization of the legal sphere. Also, it compares the use and recognition of documents in digital form, and the legal status of electronic signatures and documents in selected countries, regional unions (EU, EAEU). It also presents the prospects for improving legislation to enhance the role of digital documents and the importance of the legal regulation of electronic evidence in civil proceedings. The lack of clear regulations for accepting electronic evidence in civil proceedings and recommendations from the Supreme court on dealing with it causes uncertainty for the parties in proceedings. Particular attention is paid to the challenges of identifying the sources of digital information and ensuring its immutability from the point of fixation to its presentation in court. The findings of this research demonstrate the practical potential for integrating electronic evidence into the procedural framework of the Kyrgyz Republic. This integration may be achieved either through legislative clarification of the criteria for establishing the authenticity and legal validity of such evidence or through interpretive guidance provided by the supreme judicial authority.

KEYWORDS electronic evidence; electronic signature; admissibility of evidence; electronic document; Eurasian Economic Union; European Union.

1. Introduction

In recent years, the Kyrgyz Republic (KR) has undergone rapid digital transformation. This is evidenced by both political decisions made at the state level as well as their programmatic and technical implementation. The country's

^{*} PhD student, Károli Gáspár University of the Reformed Church in Hungary, Doctoral School of Law and Political Sciences ORCID: orcid.org/0009-0009-3632-0528.

^{**} Doctoral candidate, associate professor at Kyrgyz National University. ORCID: orcid.org/0009-0008-2773-684X.

^{***} Doctoral candidate, associate professor at Kyrgyz National University. ORCID: orcid.org/0009-0003-3599-7832.

main ‘strategic goal’ is to build a digital ecosystem¹. The potential of information and communication technologies (ICT) is being implemented in all directions: the social life of citizens, business processes, government activities, and their interaction with each other.

According to the National Development Programme of the KR until 2026, digital technologies will be implemented in all spheres of human beings. For this purpose, it is necessary to create appropriate infrastructures and systems in addition to developing basic digital skills and building a favorable environment.² Moreover, seven goals of the Concept ‘Digital Kyrgyzstan 2019-2023’ prescribed in the National Development Strategy of the KR for 2018-2040³ are fixed: *“the construction of digital infrastructure, the creation of a legal environment and institutions for the innovative development of society, the availability of digital services, the involvement of citizens, the formation of a digital society, the transformation of the country into a safe place to live and work online, the desire to become a regional hub of the digital Silk Road.”*⁴

One of the major tasks of the government in this aspect is the digitalization of the judicial system, which includes the creation of a ‘Unified Judicial System,’ the widespread transition to electronic document management, e-payments of state services and fees, online broadcasts of court proceedings, free access to information about court hearings and judicial acts, and others.⁵ All of them are united by the common goal to foster the openness, transparency, accessibility, and efficiency of the judicial system.

Over the years, the ‘digital legislation’ of the KR has been amended and supplemented. Particularly, the Laws “On Electronic Commerce,”⁶ “On Electronic Signature,”⁷ “On Electronic Governance”⁸ which presented the terms like: electronic document or document in electronic form, electronic signature, electronic storage, electronic message. The Civil Code⁹ has been supplemented with specific digital objects of civil law regulation like electronic messages and electronic contract. The new Law “On Notariate”¹⁰ and its subordinate legislative acts have established provisions designed to regulate issues of notarial verification of information or data presented in digital form. However, there is

¹ Digital transformation concept of the KR for 2024-2028, 2024.

² National Development Program of the KR until 2026, 2024.

³ Development Partners Coordination Council: National Development Strategy of the KR for 2018–2040, accessed September 25, 2025, ([https://policy.thinkbluedata.com/sites/default/files/National%20Development%20Strategy%20of%20the%20Kyrgyz%20Republic%20for%202018-2040%20\(EN\).pdf](https://policy.thinkbluedata.com/sites/default/files/National%20Development%20Strategy%20of%20the%20Kyrgyz%20Republic%20for%202018-2040%20(EN).pdf)).

⁴ Ekaterina Rusakova, “The Political Impact of Digitalization on the Judicial Method of Protection of Rights in the EAEU Countries.” *WISDOM* 28 (4), (2023): 201-10. https://doi.org/10.24234/wisdom.v28i4.10_90.

⁵ Digital Transformation Concept for 2024–2028, 2024, para 10.

⁶ Law of the KR On Electronic Commerce 2021.

⁷ Law of the KR On Electronic Signature 2017.

⁸ Law of the KR On Electronic Governance 2017.

⁹ Civil Code of the KR 1996.

¹⁰ Law of the KR On Notariate 2023.

still lack of harmony between substantive and procedural laws of the KR regarding the use of electronic files as evidence.

2. The status of electronic evidence

2.1 The concept of electronic evidence

Let us start this article from the definition that we formulated, since there is no clear definition in legislative acts yet¹¹. ‘Electronic evidence’ means any evidence derived from information contained in or produced by any device (mobile phone, website, computer, GPS recorder) through a software program, a computer system or network, including relevant metadata.

The focus of this article is the analysis of ‘electronic evidence’ as a distinct means of proof in civil proceedings in the KR. Procedural Law establishes ‘written evidence’ as a type of evidence. art. 80 (1) of the CPC contains a definition: *“Written evidence are acts, documents, contracts, certificates, business correspondence, personal letters, other documents and materials containing information about circumstances relevant to the case, including those obtained through facsimile, electronic, or other communication, or by any other means that allow for the establishment of their authenticity.”*

As we see, procedural regulations do not limit the list of evidence or the methods of obtaining it. The essential requirement is their authenticity. Interestingly, the article mentions an electronic source of evidence and others, while classifying them as written evidence.

Conversely, the Criminal Law of the KR contains more advanced regulations. Particularly, the art. 89(3) of the Criminal Procedural Code explicitly recognizes *“the equivalence of digital documents to written evidence and has the same legal force as a document reproduced on paper, confirmed electronically”*. According to the report of CIIP: *“Equivalence of the digital document is important in the recovery of criminal case materials, which will have a positive impact on the observance of deadlines and will significantly accelerate the case consideration time at different stages of criminal proceedings.”*¹²

At the same time, the question arises as to how accurately digital documents correspond to the written form of evidence. In this regard, research on the current legislation would be a high subject of interest to clarify the issue of differentiating evidence which has a technical, electronic, or digital nature.

An electronic document, as well as any other information presented in electronic form, might be served as evidence, if they meet the following requirements:¹³

¹¹ A.A. Abrashin, “Electronic evidence as a separate means of proof” *Vestnik SGYUA* no. 3 (146), (2022) 133-138 DOI: 10.24412/2227-7315-2022-3-133-138.

¹² “Digital technologies in the judicial system of the Kyrgyz Republic 2023” Public Foundation Civil Initiatives on Internet Policy, accessed April 21, 2025, <https://internetpolicy.kg/wp-content/uploads/2024/01/Legislation-review-final1.pdf>.

¹³ Nadejda Veselova, Margarita Medvedeva, Natalia Voronkova, “Issues of modern jurisprudence: Evaluation of evidence in civil and arbitration process” *Voprosy sovremennoy yurisprudentsii* 50, no. 10–11 (2015): 24–29.

- Admissibility;
- Relevance;
- Authenticity/Reliability;
- Sufficiency.

But the question is how to present the electronic evidence: in its original form (i.e., directly in electronic, digital form) or in paper-based form? The popular way of presenting electronic evidence is to verify it through notarial offices. The certification of equivalence between an electronic document and a paper document means the confirmation of the identity of the content of an electronic document created by a notary to the content of a document presented to the notary in paper form. “The electronic document created by the notary has the same legal status as the document in paper form, the equivalence of which is certified by the notary,” states art. 82(1) of Law on Notariate.¹⁴ A similar rule applies when certifying the equivalence of a paper document to an electronic document (art. 83 (1) of the same Law). A document created by a notary in paper form and an electronic document are equivalent when certified by the notary.

Visually, an electronic document is expressed on a screen, paper, or other tangible medium, separable from the device, in a form that is understandable to a person, accessible for visual perception without the use of additional technical means (para. 3 of the Procedure for Performing Notarial Acts in Electronic Form and Using Electronic Documents).¹⁵

The information presented in electronic form and signed with a qualified electronic signature is recognized as an electronic document equivalent to a paper document signed with a handwritten signature, except in cases where legislation or other regulatory acts prohibit the creation of such a document in electronic form.¹⁶ An electronic document signed with an enhanced electronic signature is recognized as equivalent to a paper document signed with a handwritten signature and certified with a seal. In this context, regulatory acts or agreements between parties may establish additional requirements for electronic documents to ensure their equivalence to paper documents bearing a seal.¹⁷

This means that the national legislation of the KR has already permitted the usage of the electronic documents, however, the Kyrgyz courts are not ready to accept them in an authentic nature. They still demand to provide them in written form.

2. 2 The role of electronic evidence in the system of evidence

The position of identifying electronic evidence as an independent form is advocated by a few scholars. D.A. Zateeva, examining the legal nature of electronic evidence, points out the peculiarities of their variable character, which makes it difficult to define their classification within the existing system of

¹⁴ Law of the KR On Notariate 2023.

¹⁵ Procedure of the KR for Performing Notarial Acts in Electronic Form and Using Electronic Documents 2023.

¹⁶ Law of the KR On Electronic Signature, art 6, para 1.

¹⁷ Union of Banks of Kyrgyzstan: Akylbek Dzhusupov, “Electronic signature – as a distance signature” (30 July 2020) accessed 26 September 2025 <https://ub.kg/ru/elektronnaya-podpis-kak-podpis-na-rasstoyanii/>.

evidentiary means. Such evidence possesses specific characteristics: it can exist in digital form, is easily altered, and requires special methods of authentication. This also affects the development of uniform practices in their use. The absence of an established approach in judicial practice creates legal uncertainty and can lead to subjective assessment by the court of their probative value, which underscores the need to develop clear criteria for their application. Based on this, D.A. Zateeva holds the view of excluding electronic documents or other similar evidence from the traditional system and identifying them as an independent form – electronic evidence – enshrining them separately in an article.¹⁸

Other scholars discussed a lot on the legal nature and classification of electronic evidence. One of them is A.T. Bonner, who rightly points out the technical nature of an electronic document, which is created in machine-readable form and cannot be directly classified as written evidence, despite the possibility of converting it into a readable format on paper or electronic media.¹⁹ This position resonates with ours, as the peculiarities of electronic evidence indicate their independence. They are technically different from traditional written and physical evidence.

The next scholar, E.A. Nakhova, in her research, also emphasizes the special legal nature of electronic evidence, which requires a new approach to their identification, classification, and enshrinement in procedural law. She rightly asserts that the admissibility and reliability of electronic evidence depend on the identification of its original source.²⁰ The necessity of verification of electronic evidence authenticity is crucial for this approach, especially in the context of the technical variability of digital information.

It is proposed to define electronic evidence as data recorded in digital format, including an electronic image or other electronic files, that may be submitted to a competent tribunal as a means of ascertaining the truth during proceedings. That amendment appears promising, capable of bringing clarity to law enforcement practice and establishing conditions for legal certainty. It will facilitate the standardization of procedural norms governing the presentation and evaluation of electronic evidence, considering its unique characteristics, such as digital format, variability, and the presence of metadata, while also promoting a unified approach to its application in legal practice.

3. Electronic evidence in practice

3.1 The use of electronic evidence in practice in the Kyrgyz Republic

As for judicial practice, in KR, information posted on the Internet frequently serve as evidence if they presented in printed copies. Particularly, in disputes

¹⁸ D.A. Zateeva, “Elektronnyye dokazatel'stva v grazhdanskom sudoproizvodstve v usloviyakh tsifrovizatsii pravosudiya: teoreticheskiye i prakticheskiye aspekty”, *Vestnik SGYUA* 153, no. 4 (2023): 219–225. doi: 10.24412/2227-7315-2023-4-219-225.

¹⁹ A. T. Bonner, *Traditsionnyye i netraditsionnyye sredstva dokazyvaniya v grazhdanskom i arbitrazhnom protsesse* (Moscow: Prospect, 2014), 613.

²⁰ E. A. Nakhova, “Problemy elektronnykh dokazatel'stv v tsivilisticheskoy protsesse,” *Leningrad Law Journal* 42, no. 4 (2015): 301–312.

concerning the protection of honor, dignity, and business reputation. The Supreme Court of the KR addressed the admissibility of printed web information use in court to ensure the correct and uniform application of legislation.²¹ Specifically, para. 13 states that “*the plaintiff may present a notarized copy of the Internet page on which the disputed information was posted.*” Such type of presenting the electronic evidences occurred in judicial cases like: (1) B.E.V. vs N.A.N., Blockstroy LLC, Information Agency ‘24.kg’ in Lenin district court of Bishkek (GD-2756/16B1 dated December 23, 2016); (2) against Information Agency ‘24.kg’ in Sverdlovsk district court of Bishkek (GD -2756/16B1 dated November 25, 2016); (3) General prosecutor on behalf of the President vs Iidinov N.A. and PF ‘Pro Media’ in October district court of Bishkek GD – 1347/17.B2 dated July 04, 2017.

The same idea of notarial verification of the screenshots was shared in the article “Social networks. How to use them as evidence in court.”²² However, the Resolution of the Kyrgyz Supreme Court does not include a classification of this type of evidence. By the meaning of the CPC KR, they are classified as written evidence, as electronic evidence is not provided for as an independent type of evidence.

Based on this, it is obviously that in some case, the reliability of electronic evidence requires significantly more digital information. Specifically, beyond the notarization of content, meta data may be required, such as information regarding the source and sender (subscriber number, IP address), reliable confirmation that a social media profile belongs to a specific individual, as well as other data pertinent to the case.

3. 2 The use of electronic evidence in practice in other countries

The Supreme Court of the Russian Federation decided that a screenshot can be used as evidence, which has practical significance for court proceedings.²³ When printed, it is evaluated as written evidence, since a screenshot records information that is perceived by the court similarly to traditional written evidence.

The Republic of Kazakhstan, a neighboring country, has made notable progress in regulating the use of electronic files in judicial proceedings. In 2019, a new chapter titled ‘*Features of Electronic Judicial Proceedings*’ was introduced into the Civil Procedure Code. This chapter permits parties to submit electronic files certified by an electronic signature, granting them the same legal force as documents in written form. Furthermore, to ensure clarity in their use, Kazakhstan adopted the ‘*Technical Requirements for an Electronic Document*

²¹ Resolution of Supreme Court of the Kyrgyz Republic on judicial practice in resolving disputes on the protection of honor, dignity, and business reputation N.4 2015.

²² A.A. Abdykalykov, “Social networks. How to use them as evidence in court,” *Yuridicheskaya nauka* 11, (2024): 313-317. DOI: 10.24412/2220-5500-2024-11-313-317.

²³ Resolution of the Supreme Court of the Russian Federation on application of part four of the Civil code 2019 para 55.

*and the Rules for its Circulation in the Automated Information System of the Court.*²⁴

We would also like to describe the judicial practice in Ukraine, where printouts from internet resources may be recognized as evidence if they are created, published, and certified by the owner of the corresponding web resource or the provider. In such cases, they acquire the status of written evidence. It is something different than the legislation of other countries including the KR. Web pages, being electronic documents, cannot physically be presented to the court in the traditional manner. Nevertheless, such pages may contain information relevant to the case. Therefore, the court has the possibility to conduct an inspection and examination of these documents directly on the web resource, recording the procedural actions in the minutes.²⁵

Such electronic evidence may be deemed admissible in court proceedings only upon the fulfillment of specific conditions. The court may recognize electronic evidence as admissible, even if it is printed from the court's computer system. It is crucial to note that in many cases electronic contracts cannot be considered reliable without an electronic signature. Because in such contracts, it is hard to identify the signed parties, and the document's content remains vulnerable to potential alterations and distortions.

4. Legislative regulation of electronic evidence in various Unions

4.1 EAEU legislation

The Rules of Procedure of the Court of the Eurasian Economic Union (Rules of Procedure), contains a separate article in which the conditions for the submission of evidence are prescribed, which does not mention digital or electronic evidence. In particular:

“Litigious documents in the dispute are documents submitted to the Court by the parties involved in the dispute, or received by the Court written documents, or information, explanations, other documents, and materials, on the basis of which the Court establishes the presence or absence of circumstances justifying the claims or objections of the parties, as well as other circumstances that are significant for the resolution of the dispute”.²⁶

It turns out that the Court accepts only written documents, because in this paragraph, electronic evidence was not specifically highlighted. On the other hand, under the term ‘other documents and materials’ we can also understand documents and materials in electronic form, which can be presented as evidence. The Rules of Procedure refer to another international legal document regulating the activities of the Court. It states: “*The Court assesses litigious documents, as well as materials received in accordance with paragraph 55 of the Statute of the*

²⁴ Order ‘On approval of the technical requirements for an electronic document and the Rules for its circulation in the automated information system of the court 2020.

²⁵ Case No. 587/2051/18 7 November 2021 (Resolution of the Supreme Court of Ukraine).

²⁶ 2014 Rules of Procedure of the Court of the Eurasian Economic Union, art 35 para 1.

Court, on its own inner conviction, based on a comprehensive, full, objective, and direct investigation of the available case materials."²⁷

The Statute of the Court of the EAEU contains Chapter V. Court proceedings, Section 1 describing court proceedings in cases of dispute resolution. Thus, Statute states that "the Court may request materials necessary for the consideration of cases from the applicants, authorized bodies and organizations of the member states or Union."²⁸ Usually, materials might be in written or electronic form. Accordingly, the EAEU member states do not specify in what form, but at the same time do not restrict the Court's authority to request the necessary materials. For me, it means that we must refer to the Court's regulations themselves.

Indirectly, the opinion that the EAEU Court recognizes not only paper documents, but also electronic ones can be found in Chapter II. In particular, the application/complaint and the documents attached to it are submitted in one copy on paper and on electronic media.²⁹ In other words, if the EAEU Court were ready to accept electronic evidence, it would have clearly and openly written it in art. 35 (Litigious and other documents and materials) of the Rules of Procedure.

Moreover, the main executive body of the EAEU, the Eurasian Economic Commission, in its Analysis notes that the acceptance of electronic documents as evidence in courts is possible in the presence of an electronic-digital signature (except for electronic payment documents).³⁰

An interesting insight was presented by the authors of the article 'Electronic document management in the countries of the EAEU: comparative analysis and ways of unification'.³¹ They wrote: *"In practice, in all EAEU member countries, electronic documents are recognized as evidence in court and, subject to proper execution, are equivalent to documents on paper media (except for cases where the legislation does not allow the use of only an electronic document)."* The key idea of their conclusions is the necessity of the proper execution of electronic documents. The correctness of the execution of electronic documents can only be determined in electronic form, since a document signed by the parties (for example, a contract) through an electronic signature can only be verified using technology. At the same time, in the procedural laws of the EAEU, we could not find the ways for certifying electronic documents and submitting them to the Court. Although the national legislation of EAEU member-states authorizes that some public notaries have the right to certify electronic documents, how to transfer electronic contracts concluded through limited communication channels

²⁷ EAEU Court's Rules of Procedure, art 35 para 3.

²⁸ Treaty on the Eurasian Economic Union, signed 29.05.2014 appendix No. 2, para 55.

²⁹ EAEU Court's Rules of Procedure, art 8(3), art 9(4), clause 4, art 63(4).

³⁰ B.V. Khuljachiev, L.F. Lukashevich, L.I. Karlash, *"Analysis of the level of development of e-commerce in the sphere of foreign economic activity in the member states of the Eurasian Economic Union"*, Eurasian Economic Commission, 2017:5.

³¹ M.S. Ablameyko, A.A. Andronchik, "Electronic document management in the countries of the Eurasian Economic Union: comparative analysis and ways of unification," *Zhurnal zarubezhnogo zakonodatel'stva i sravnitel'nogo pravovedeniya* 2, (2020): 36–47.

to paper-based files is not described there. Accordingly, the EAEU Court has not yet answered how to present a contract signed through digital means as evidence in court.

Even the Deputy Chairman of the Court of the EAEU, Doctor of Law, K.L. Chaika in his speech recommends introducing the following changes to the Statute and Rules of Procedure of the Court: *“provide for the possibility of holding court sessions through videoconference, as well as the submission of procedural documents by the parties involved in the case in electronic form.”*³²

5. EU legislation

Rules on the admissibility of evidence, including electronic evidence, in civil and administrative proceedings in the EU are regulated by various directives and regulations. Certainly, the main legal bases are contained in the founding treaties of the EU (Treaty on European Union (TEU))³³ and the Treaty on the Functioning of the European Union (TFEU).³⁴

Among these two Treaties the most relevant is TFEU, which has more provisions on procedural orders of the EU, rather than TEU which is more concentrated on the Union’s legal institutions. Particularly, the articles 81(2d) and 82(2) of TFEU contain provision on providing evidence.

The next legal document for research is the ‘Statute of the Court of Justice of the EU’. Even this document does not contain provisions about presenting evidence and electronic workflow. Thus, higher legislative bodies of the EU have not adopted legal acts binding for the Court of Justice of the EU (CJEU).

The CJEU itself approved the Rules of Procedure on September 25, 2021. These Rules state that *‘a party may present or propose additional evidence in support of its arguments’*.³⁵ Although there seems to be no explicit permission for the use of electronic evidence, the CJEU does not require presentation of evidence only in written form as it was shown in the Rule of Procedure of the EAEU Court. The same norms have the Rules of Procedure of the General Court (art. 85). This means that the participants of proceedings are not constrained by specific procedural restrictions and can maneuver in various ways to defend their interests.

However, the substantive law of the EU has presented interesting insights. Specifically, the Regulation on electronic identification and trust services for electronic transactions in the internal market and repealing Directive

³² Popova A.N. “K.L. Chaika Reforming the procedural aspects of the activities of the Court of the Eurasian Economic Union”, *Colorgrad* 2024: 65–76.

³³ Consolidated version of the Treaty on European Union [2012] OJ C326/13.

³⁴ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

³⁵ Rules of Procedure of the Court of Justice [2012] L 265/1 art 128, para 1.

1999/93/EC³⁶ (eIDAS regulation) established the fundamental principle that electronic means (signatures, seals, time stamps, electronic registered delivery service, electronic documents) should not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form.³⁷ The definition is coupled in this European legislation with a provision requiring authorities not to deny legal effect to electronic documents or consider them inadmissible on the ground of their electronic format.³⁸

The eIDAS regulation has a cross-sectoral importance, since it establishes unified rules for recognition of national electronic identification across the EU aiming to create a single legal and technical framework that allows interoperability and recognition of national electronic identification schemes for electronic transactions in the internal market.³⁹

Another legislative act of the EU which deals with electronic evidence is the Regulation on cooperation between the courts in the taking of evidence in civil or commercial matters. Pursuant to it: *“Documents that are transmitted through the decentralised IT system shall not be denied legal effect or considered inadmissible as evidence in the proceedings solely on the grounds that they are in electronic form.”*⁴⁰

5. 1 Other European experience

Let me start from the approach of the arbitration court in Europe on electronic evidence, specifically the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry. The arbitral tribunal may order the parties especially to produce documents, to make such documents available in hard copy or electronically, to take of witness testimony, to inspect an object or place and to appoint of experts, it may call upon any legal entity or any organization not being a legal entity.⁴¹

However, the most advanced legal document on how to deal with electronic evidence is developed by another authority acting in Europe. Guidelines on electronic evidence in civil and administrative proceedings deal with collection, seizure and transmission of evidence, oral evidence taken by a remote link,

³⁶Regulation (EU) No 910/2014 of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market [2014] *OJ L* 257 (eIDAS regulation).

³⁷ eIDAS regulation, art 25(1), 35(1), 41(1), 43(1), 46.

³⁸ Elena Alina Ontanu, “Normalising the use of electronic evidence: Bringing technology use into a familiar normative path in civil procedure,” *Onati socio-legal series* 12, no. 3 (2022): 582–613.

³⁹ P.P. Polański, “Towards the single digital market for e-identification and trust services” *Computer Law and Security Review* 31, no. 6 (2015): 773–781.

⁴⁰ Regulation (EU) 2020/1783 of the European Parliament and of the Council on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast) [2020] *OJ L* 405, art 7.

⁴¹ Rules of Proceedings of the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry [2024] art 40(3) <https://mkik.hu/en/rules-of-proceedings-15092024> accessed 16 April 2025.

relevance, reliability, storage and preservation, archiving, awareness-raising, review, training, and education.⁴²

In this document, the ‘electronic evidence’ is broadly defined as any information in digital form that possesses evidentiary value and can be utilized in legal proceedings.⁴³ It is not necessary to go through all sections of the Guidelines on Electronic Evidence, as it is quite clear how detailed work was done by the legislator. We will focus only on the specifically defined boundaries of action for judges. In particular, the section ‘Use of Electronic Evidence’ sets out the following norms:

- Courts should not refuse electronic evidence;
- Courts should not deny the legal effect of electronic evidence only because it lacks an electronic signature;
- Courts should be aware of the probative value of metadata and of the potential consequences of not using it;
- Parties should be permitted to submit electronic evidence in its original electronic format, without the need to supply printouts.

In addition, the authors of the book ‘Electronic Justice’ analyzed the main provisions of the EU Guidelines on electronic evidence, and emphasized the following requirements that national judicial systems of EU countries must meet when considering cases using electronic evidence:

- “Ensuring the reliability of electronic evidence - the identity of the signatory can be confirmed, and the integrity of the data is guaranteed by the possibility of verification in case of objective doubts;
- Ensuring the preservation of evidence, their readability, accessibility, integrity, authenticity, reliability, and, if necessary, confidentiality”.⁴⁴

According to the European lawyers, *“except the Guidelines only a few legal documents which have been adopted to facilitate the handling of electronic evidence in civil and administrative proceedings at international, European and national level so far.”*⁴⁵

6. Conclusions

1. It is necessary to incorporate a definition of electronic evidence into the procedural codes, the CPC KR. Electronic evidence should be conceptualized as data recorded in digital format.

⁴² Guidelines CM(2018)169 of the Committee of Ministers of the Council of Europe on electronic evidence in civil and administrative proceedings [2019].

⁴³ Shohruhbek Sobirov, “Comparative Legal Analysis of the Regulation of Electronic Evidence in Criminal Proceedings: The Experience of the USA, EU, and CIS Countries” *Science LLC* (2023):2181-1415/©. <https://doi.org/10.47689/2181-1415-vol4-iss5-pp96-117>.

⁴⁴ E.V. Burdina, C.V. Zueva, *Electronic justice* RGUP (2021): 344.

⁴⁵ R. Jokubauskas, M. Świerczyński. “Is Revision of the Council of Europe Guidelines on Electronic Evidence Already Needed?” *Utrecht Law Review* 16 (2020): 13–20. <https://doi.org/10.36633/ulr.525>.

2. We agree with the recommendations that courts should consider both types of evidence as equal ones (written and electronic form).⁴⁶ It is time for courts to recognize and accept electronic files in their original digital format. An analysis of European legal acts reveals their relevance and highlights the efforts of European legislators to adapt to the demands of the digital era.

3. The Parties to legal proceedings should be afforded the opportunity to obtain expert opinions from an authorized state body or a private organization for the fixation and examination of electronic files. This would facilitate the acquisition of an official opinion regarding the content and authenticity of such data.

4. In the legal proceedings of the KR, the court – using its computer or other electronic devices – should be authorized to examine a web page or other digital source, print it, indicate the date of access, and certify it as ‘verified against the original.’ Alternatively, the court may formally record the content displayed on-screen into the court transcript or review and document digital audio or video materials. Such a printout or court record would then be incorporated into the case file and accorded the status of reliable evidence.

5. It is necessary to issue an official recommendation from the highest court of the KR to implement the task outlined in the National Development Programme of the KR until 2026: “*strengthening uniform judicial practice, clearly established by the Plenum of the Supreme Court of the KR*” through “institutional foundations of the judicial system.” Even in the absence of regulations for the recognition of electronic evidence within procedural legislation, the guidelines for law enforcement practice disseminated by the Supreme Court of the KR will support the development of a more adaptive and technologically advanced judicial practice.

6. Although the possibility of submitting electronic evidence is not explicitly addressed in the legal instruments of the EAEU, a contextual analysis of the relevant provisions suggests that such submission is implicitly permitted. In current judicial practice, the admissibility of electronic evidence as a means of proof is often contingent upon its simultaneous submission in paper form, owing to the continued reliance on physical case files compiled in hard copy. However, this practice in the KR is poised for progressive change. Notably, the *Action Plan for the Implementation of the State Target Programme “Development of the Justice System of the KR for 2023–2026”*⁴⁷ includes a provision (Section 3.10) for the transition to the formation of electronic case files, signaling a move toward more modern and efficient handling of digital evidence.

⁴⁶ Digital technologies in the judicial system of the Kyrgyz Republic, Bishkek (2023).

⁴⁷ Decree of the President of the Kyrgyz Republic on the State Program. Development of the Justice System for 2023–2026.

The Assisting Sibling Sciences of Fact-Based Criminalistics

FENYVESI, CSABA^{*}
FÁBIÁN, VANESSZA^{}**

ABSTRACT Criminalistics, as a fact-based and practice-oriented branch of criminal science, functions within the framework of substantive and procedural criminal law while maintaining its own methodological independence. Its primary objective is the detection of crimes and the collection of reliable evidence, with crime prevention serving as a secondary function. This study examines the interdisciplinary nature of criminalistics and its close relationship with its “sibling sciences.” Within the field of criminal sciences, criminalistics interacts with criminal law, criminal procedure law, criminology, victimology, penology, criminal psychology, and forensic medicine. Beyond these, it also draws on knowledge from natural sciences (such as biology, chemistry, physics, mathematics, computer science, and cybernetics) and social sciences (including philosophy, sociology, pedagogy, statistics, and psychology). The analysis highlights the dynamic interplay between criminalistics and these disciplines, showing how mutual knowledge transfer and the integration of professional expertise have contributed to the rapid development of modern criminalistics. It is argued that interdisciplinary preparedness, coupled with the effective use of experts and consultants, enhances the quality and complexity of evidence gathering, facilitates accurate identification, and ultimately serves the overarching goal of establishing criminal liability.

KEYWORDS criminal investigation, criminal procedural law, criminal sciences, criminology, penology, prevention of crime, psychology.

1. The concept of criminalistics

The literature seems to agree that criminalistics is essentially a practical – and to a lesser extent – theoretical branch of criminal investigation, i.e. the branch of criminal science that explores, develops, systematises and applies the tools and methods of criminal investigation (prevention) and evidence gathering within a normative legal framework. In addition to effective crime prevention, which is a

^{*} Professor, University of Pécs, Faculty of Law, Criminal and Civil Procedure Department.

^{**} PhD student, University of Pécs, Faculty of Law, Doctoral School of Law.

secondary function. Its fundamental function is to detect crimes and obtain as much reliable evidence as possible in order to establish and ensure criminal liability, ultimately by the courts.¹ (The authenticity of evidence acquisition is determined not only by the procedural framework but also by the degree of sophistication and reliability of the forensic methods employed.)²

2. Connections between criminalistics and its “siblings”

As an empirical science, criminalistics has a wide range of connections.³ According to our classification, we can distinguish three main groups: *criminal sciences*, *natural sciences* and *social sciences*.

2. 1 The first – and closest – group of connections includes *criminal sciences* dealing with crime, criminal offences and offenders, including:

- a) criminal law (as a normative discipline),
- b) criminal procedure law (as a normative discipline),
- c) criminology (as a factual science),
- d) victimology (increasingly independent, also as a factual science),
- e) penology (as a normative discipline),
- f) criminal psychology (as a special branch of psychology),
- g) forensic medicine (including anthropology).

Ad a) The practical application of criminalistics can only be maintained within a regulated legal framework in a constitutional state. One such framework is provided by criminal procedural law, which enables the application of methodology, and the other by *substantive criminal law*, which defines its subject matter. This legal discipline deals with such essential questions as the conditions for criminal liability and when and how the appropriate criminal law sanctions – as laid down, stated and announced in advance – are to be applied. Criminal law reveals the abstractly formulated elements of the law that are relevant and serve as guidelines, or “beacons,” for criminal investigators in their data research. Viewed through the lens of criminal law, criminalistics is an “auxiliary science” that provides support in achieving its objectives, which does not jeopardise its independence or its ability to develop its own methodology because it is only an “auxiliary force” from the perspective of jurisprudence (and not only criminal law within that).

¹ For more details, see: Csaba Fenyvesi, *A kriminalisztika tendenciái* (Budapest: Dialóg Campus Kiadó, 2017).

² Orsolya Horváth: “A jövő kriminalisztikája más szemszögből,” *Belügyi Szemle* 67, no 11 (2019): 42.

³ Géza Katona has detailed the connections between criminalistics in a separate volume, and in agreement with his findings, we will now briefly outline our own thoughts on the individual areas of contact. Géza Katona, *A kriminalisztika és a bünyügyi tudományok* (Budapest: BM Kiadó, 2002).

Ad b) The interaction between *criminal procedure law* and criminalistics is clear to professionals. In this study, we emphasise that, in a peculiar way, it is precisely criminalistics that, in many cases, represents the substantive side – investigative actions, methods of obtaining evidence and conducting investigations, and the implementation of coercive measures – while the rules of criminal procedure essentially only provide the formal framework. Compliance with procedural rules alone does not lead to the detection of crimes, but at the same time, in accordance with the rule of law, illegally obtained evidence cannot be used effectively or fairly due to the risk of misdirection.⁴ In view of all this, it is fair to say that criminalistics is at least as closely related to criminal procedure law as criminal law is to criminal procedure law.

Here we quote Tibor Király's timeless statement: "Criminal proceedings are a power that can wipe people off the face of the earth, deprive them of their freedom, their property, their honour. Criminal proceedings can be used to wage war even in times of peace. Criminal proceedings are a battleground for human passions. In criminal proceedings, the malice, error or ignorance of judges can have tragic consequences. This explains why criminal proceedings are constrained by legal norms and are not left to the whims of individuals. Efforts are made to establish rules that push individual bias, passion, malice and revenge into the background and rule out error."⁵

Since continental criminal procedure codes, including the Hungarian one, generally regulate investigations, it can be said that criminal procedure law has a significant impact on criminalistics. This is why it can be argued that criminalistics itself has a legal nature,⁶ since:

ba) the code of criminal procedure contains the framework rules for the most important investigative acts, including procedural coercive measures and the obtaining of evidence;

bb) the majority of the fundamental principles of criminal procedure (officiality, presumption of innocence, principle of defence, etc.) must be taken into account and enforced during the implementation of investigative acts;⁷

bc) when carrying out investigative acts, it is very important that their conduct and results are recorded in accordance with procedural law (minutes, official witnesses, etc.) and that other guarantee rules are also observed (instruction on complaints, appointment of a defence counsel, etc.).

The mandatory legal provisions of criminal procedural law thus generally provide the legal framework for investigative acts preparatory to the court phase, while

⁴ For more details, see Viktor Bérces, *A büntetőeljárás reformja és a bizonyítás alapkérdései* (Budapest: ELTE Eötvös Kiadó, 2021), and Flórián Tremmel, *Bizonyítékok a büntetőeljárásban* (Budapest-Pécs, Dialóg Campus Kiadó, 2006).

⁵ Tibor Király, *A védelem és a védő a büntető ügyekben* (Budapest: Közgazdasági és Jogi Könyvkiadó, 1962), 121.

⁶ Tibor Király, *Büntetőútlelet a jog határán. (Tanulmány a perbeli igazságról és valószínűségről.)* (Budapest, Közgazdasági és Jogi Könyvkiadó, 1972).

⁷ For more details, see: Tibor Király – Károly Bárd, "Interjú a Be. reformjáról, az elképzelésekről és a megvalósulásról," *Fundamentum* 6, no. 4 (2002): 41–45.

forensic, criminal tactical and methodological recommendations – and not norms – only fill and can fill this legal framework with considerations of expediency and professionalism, with things to know and do.

Based on known legal history data, we believe it is fair to say that criminalistics itself has had and continues to have a significant impact on criminal procedure law, including the law of evidence. For example, it was clearly theoretical research and practical results in criminalistics that led to the inclusion in procedural codes of institutions developed in criminalistics, such as the evidentiary experiment, the presentation for identification, or the on-site interrogation – using our preferred, earlier terminology – the on-site investigation. Previously, these investigative and evidentiary acts could be carried out more or less by interpreting and applying the rules relating to visual inspection by analogy.

Ad c) *Criminology* – as defined by László Korinek⁸ – does not have a uniformly accepted “dominant” definition, but it can be said that it deals with crime and all criminal offences in general as a social phenomenon. It also investigates the causes of crime, and one of its objectives is crime prevention. It is already apparent that there is a common platform with criminology, which also seeks to prevent similar offences at the level of individual crimes. By examining criminal behaviour, criminology provides guidance on typical forms of crime, locations, times, genders and individuals. It provides guidance to criminalists in recognising, defining and ultimately detecting the modes of commission characteristic of different crimes and investigating the facts as accurately as possible. The exploration of the general and specific causes of criminal behaviour by criminology can also help in crime prevention. This data can also be useful from a law enforcement perspective, for example, when the circumstances and motives of the perpetrator are important in the investigation of certain crimes.

The relationship is not one-sided; criminology can also gain experience and information to achieve its goals from the investigation of individual criminal cases, from accurate data obtained in an open and/or secret manner, which often cannot be uncovered using criminalistic methodology. (In the fields of public security and crime prevention, the use of police dogs is of particular importance, as their capabilities contribute both to preventive measures and to the uncovering of evidence.)⁹

Ad d) We highlight *victimology*, which is part of criminology but has not yet gained total independence, in a separate sub-section because:

da) on the one hand, the professional examination and investigation of the victim and the process leading to victimisation, as well as the characteristics of the group, can provide valuable data for criminal prevention and, in some cases, for

⁸László Korinek, *Kriminológia I-II*. (Budapest: Magyar Közlöny Lap- és Könyvkiadó, 2010), 18.

⁹ Orsolya Horváth, “Police dogs – Servicing the security,” in *Security as the Purpose of Law. 3rd International Conference of PhD Students and Young Researchers*, ed. Makūnaitė Skirmantė, Jurgita Randakevičiūtė, Tamašauskaitė Gintarė, and Vigita Vėbraitė (Vilnius University, 2015), 72.

investigation. Just think of the perseverant thinking and actions of perpetrators. The stubborn persistence in sticking to the victim, for example, their gender or age, can also be a guide in the search for a serial offender;

db) On the other hand, we consider it important to emphasise the goal of avoiding so-called secondary victimisation when applying forensic tools. We will explain what we mean by this in more detail below, given its significance.

During the investigation, investigators using forensic methods will inevitably and necessarily have to use coercive measures and legal force. However, these may be used not only against the suspect (accused), but also against the victim, witnesses and, as their name suggests, those who suffer coercive measures. Of particular note among these is the victim, who voluntarily undertakes the procedural suffering and, at the same time, plays a leading role in victimological research in this context. The victim is often a victim of violence in and of themselves, having suffered an attack on their person, rights or property, or unlawful violence. The injuries and damage caused by violence can be multifaceted: psychological, physical, financial, temporal, etc. All of these can appear cumulatively and emphatically. These can only be compounded by the tone of incompetent, rude, often sceptical, almost suspicious, violent investigators and other law enforcement officials, insensitive, soul-crushing, humiliating – often repeated – interrogations, and the crudeness of the interrogation environment. Furthermore, there is the harshness of the occasional medical examination, the tension caused by the unstoppable nature of the proceedings and the oppressive effect of coercion.

Minors deserve special attention, as they are even more vulnerable and traumatised, and the superiority and concentration of power of adult law enforcement officials can have an even greater impact on them. In their case, due to their age alone, a counterbalance must be established to the acting member of the authority, and under no circumstances may general criminal tactics, interrogation and treatment schemes be used.

On average, there are five to seven witnesses in criminal proceedings, so they too can be subjects and victims of both forms of violence. They too can be subject to being brought before the court, obliging them to undergo certain examinations, to remain in a specific place, etc.

Other interested parties who suffer coercive measures carried out on the basis of criminal tactics guidelines include, for example, those who are subject to seizure or detention, who may not be charged, injured or witnesses. Consider, for example, a bona fide car buyer who is shocked to find that the authorities are seizing his car because it is the proceeds of a previous crime, such as theft or smuggling.

There is no doubt that criminalistics and its practitioners must use every means at their disposal to avoid primary and secondary victimisation. In this case, we will – exceptionally – offer a possible solution to the latter.

We believe that both permissible violence and unlawful violence have a common source (the root of the problem), and therefore a common remedy. This involves the correct selection of employees, with particular regard to investigative authorities and those taking primary measures, criminal investigators and prison staff, as well as increasing their preparedness and strengthening their professional competence, experience, self-confidence and self-assurance.

This includes a particularly demanding recruitment system, the dismissal of candidates and employees with inherent and uncontrolled violent characteristics, and the provision of practical knowledge related to theoretical law (substantive, procedural, administrative and law enforcement), criminalistics (forensic technology, tactics and methodology), psychology (criminal and prison psychology) and conflict situation exercises.

Ad e) Compared to other areas of criminal law, the relationship between criminalistics and *penal law*, as well as penology and criminal law, is modest. We see a truly meaningful common ground in coercive measures that severely restrict personal freedom – including, in particular, arrest – and in the tactics of covert data collection which may also be carried out within the penal institution. Furthermore, we also see a connection between the goals of both branches in the area of crime prevention.

Ad f) *Criminal psychology* exists in both approaches – European continental and Anglo-Saxon – and its existence can be traced back to its historical roots, namely Hans Gross. After all, the first comprehensive work on this subject is associated with his name.¹⁰

Today, the field of research, subject matter and investigative methods of criminal psychology can be clearly distinguished from similar natural and social sciences, whose developments it effectively and appropriately borrows and incorporates into its own toolkit as an applied science. Its fundamental question is the psychology, personality and structure of the criminal. Therefore, conceptions of personality are of crucial importance. Personality as a psychological concept refers to an individual's characteristic patterns of thinking, feeling and behaviour that define the person, their style and their relationships with their environment. When defining personality, it is therefore advisable to focus on describing and explaining the characteristics and factors that distinguish individuals from one another, while also taking into account the interactions between the whole personality and the environment. It follows from all this that clarifying personality plays an important role in substantive and procedural law as well as in criminal tactics.

The intertwining of criminal sciences, including criminology and psychology, has been described in various ways. We can read about legal psychology, forensic psychology or judicial psychology, or our preferred term, criminal psychology. The diversity of names also results in heterogeneous definitions of the concept, which means that there is no universally accepted, commonly used definition. In Hungarian literature, Péter Popper's definition is most frequently cited. According to him, criminal psychology is an applied branch of psychology that deals with the psychological problems of offenders, crimes and the fight against crime – law enforcement, punishment, prevention and aftercare.¹¹

¹⁰ Hans Gross, *Kriminal-Psychologie* (Leipzig: Verlag von F. C. V. Vogel, 1897).

¹¹ Péter Popper, *A kriminális személyiségzavar kialakulása* (Budapest: Akadémiai Kiadó, Budapest, 1970).

We can also note that psychology, as an applied auxiliary science, fits into the system of sciences dealing with the fight against crime. However, criminal law science approaches this from a different starting point than criminal psychology. A criminal is a person who commits the material elements of a crime as described in the legal definition. Criminal psychology, in line with its field of research, also seeks answers in the psychological specifics, personal characteristics and psychological mechanisms of the individual. As a result, its content is enriched with psychological features, while its scope is narrower than the concept of criminality in jurisprudence.

Its development required results from various natural and social sciences, including developmental and personality psychology, medicine, psychiatry and specialised sciences related to law enforcement. In the latter, criminology plays a major role, but forensic experience has helped and continues to help today. The assistance is mutual, as the field of science related to the thinking, personality and emotions of antisocial offenders provides results and conclusions that can be used on a daily basis in criminalistics. Just think of the psychology of interrogations, confrontations, and forensic nursing, and the importance of the valuable information that can be gained from them. But it can also provide important data for crime prevention and effective punishment.

It is no coincidence that the internal structure of criminal psychology also covers similar areas, which Péter Popper classifies as follows.

1. Criminological psychology: seeks answers to the individual and social background and conditions of crime, the characteristics of antisocial personalities, and deals with the possibilities of crime prevention.
2. Criminal psychology: deals with the psychology of the investigative and judicial stages of law enforcement. It deals with the work of law enforcement officers and investigators, including the reliability and psychological aspects of interrogations and confessions.
3. Penitentiary psychology: the psychology of resocialisation, which requires the application of comprehensive pedagogical, psychological and sociological procedures.¹²

Ad g) We could also say that criminalistics is a child of *medicine*, having grown and developed from it since the mid-19th century. It is no coincidence that the first criminalistics experts were doctors, biologists, toxicologists and pathologists. As a result, there has been close interaction, or symbiosis, between the two disciplines for a century and a half. They influence each other and must be familiar with each other's scientific and working methods, and occasionally their techniques.

The versatility of forensic medicine (including forensic pathology, odontology, osteology, serology, toxicology and psychiatry) is already evident today and will likely continue in the future. It plays a role in cases of crimes against life and physical integrity in investigating the mechanism of death and injury and in examining human and animal remains and blood alcohol levels.

¹² Péter Popper, *A kriminális személyiségzavar kialakulása*, 21–22.

We have not specifically mentioned identification based on bones, as this is now increasingly becoming a separate field of forensic anthropology emerging from medicine. The results of identification based on human bones and remains are particularly useful to criminal investigators.

Incidentally, forensic anthropologists often and necessarily work together with forensic pathologists and dentists, primarily to jointly identify victims who are unknown to criminal investigators, to search for material remains related to the crime, other evidence, and to help accurately map the crime scene.

Forensic anthropologists also carry out identification procedures in a number of ways. These include:

- comparison of ante-mortem and post-mortem radiological images;
- using odontostomatological methods, i.e. comparing teeth;
- comparison of serological characteristics (DNA);
- if a photograph of the suspected person is available, superimposing the photograph of the skull and the photograph of the probable victim, or video superimposition of the images;
- by creating a plastic facial reconstruction;
- computerised facial reconstruction identification.

2.2 Due to the space limitations of this commemorative volume, we will only list the second and third groups of contacts in criminalistics, without going into detail. The second classification includes *technical and natural sciences*,¹³ among which, in our opinion, the following are particularly relevant:

- a) biology,
- b) chemistry,
- c) physics,
- d) technical (engineering) sciences,
- e) mathematics (mathematical logic),
- f) computer science (information theory),
- g) cybernetics,
- (h) “bridge or ferry sciences.”¹⁴

2.3 The third major group of disciplines related to criminalistics consists mainly of the following *social sciences*:¹⁵

¹³ Supplemented by philosophy, logic and gnoseology, Géza Katona refers to these as “cross-sectional” sciences, referring to the fact that they have an impact on the entire system of science. Géza Katona, “A kriminalisztika helye a bűnügyi tudományrendszerben,” in *Kriminalisztika I-II*, ed. Endre Bócz (Budapest: BM Duna Kiadó, 2004), 53.

¹⁴ Based on the term coined by Géza Katona, “A kriminalisztika helye a bűnügyi tudományrendszerben,” in Endre Bócz, “A kriminalisztika helye a bűnügyi tudományrendszerben,” 51.

¹⁵ Friedrich Geerds refers to these as spiritual sciences. Friedrich Geerds, “A kriminalisztika helye a tudományok rendszerében,” in *A kriminalisztika aktuális kérdései. Tanulmányok öt európai országból*, ed. Géza Katona (Budapest: BM Kiadó, 17).

- a) philosophy,
- b) psychology,
- c) logic,
- d) sociology,
- e) pedagogy,
- f) statistics,
- g) archaeology,
- h) criminology.

3. Summary (conclusions)

As a summary of the connections between criminalistics and the above, the following conclusion can be drawn: from the outset, modern criminalistics owed its rapid development to its increasing adaptation to the challenges of mass crime in large cities (urbanisation), and it did so within the framework of interdisciplinary and mutual knowledge transfer. Initially, this was achieved through the transfer of knowledge (knowledge transplantation) from discoveries and inventions brought to light by medicine, toxicology and various other social and natural sciences, with the utilisation and meaningful assimilation of research results. Meanwhile, criminalistics itself, with its professional and expert theoretical and practical specialists and organisations working as a unified team, relying on the achievements of information technology, has created and developed independent fields of knowledge and methodologies in response to increased demands and technological and scientific possibilities. (See, for example, fingerprinting, dactyloscopy, ballistics, handwriting analysis, profiling, polygraphs, and covert devices.)

We can also conclude that criminalistics can be characterised not only as an ever-expanding repository of indirect evidence obtained and examined primarily on the basis of scientific knowledge, but also as the integration and transplantation of a wide variety of professional knowledge, generally involving the involvement and integration of scientific disciplines,¹⁶ transplantation of various professional knowledge, generally involving the sciences, into the investigation of crimes. The utilisation of specialised expertise, which is diverse and heterogeneous, requires above all the employment of experts and consultants. In view of this correlation, it can also be said that the more prepared someone is in interdisciplinary criminalistics, the more fields of expertise and experts they can call upon for the purpose of crime detection, the more effective, i.e. diverse and thorough, and the more complex their information base will be, data collection and, at the same time, the acquisition of evidence. In our view, the focus is always on identification and gaining a realistic understanding of the past.

¹⁶ According to Endre Bócz's apt description, "criminalistics is an interdisciplinary, integrative system of knowledge." Endre Bócz, "A kriminalisztika helye a bűnügyi tudományrendszerben," 34.

The Impact of Prior Convictions on Sentencing Decisions in Croatia

FEUERBACH, LEA*

ABSTRACT The role of prior convictions in sentencing remains a central and controversial issue in criminal justice. Whether repeat offenders should be punished more harshly because of their past conduct, or whether each offence should be assessed in isolation, with punishment tied solely to the harm and culpability of the current act is at stake. This research examines the main models through which criminal history is integrated into sentencing: the flat-rate model, which disregards prior convictions; the recidivist sentencing premium model, which systematically increases penalties for repeat offenders; and the progressive loss of mitigation model, which withdraws leniency once reoffending occurs. These approaches are explored through their normative justifications, practical application, and implications for proportionality, deterrence, and fairness. Building on this framework, the study explores how prior convictions influence sentencing in Croatia, both through legislative provisions of the Criminal Code and through judicial practice. By analysing statutory rules alongside practical implications, the research aims to assess whether the Croatian approach reflects principles of proportionality and fairness, or whether it risks reinforcing penal populism and ineffective policies.

KEYWORDS *prior convictions, sentencing, recidivism, punishment*

1. Introduction

Punishment holds a central role in the criminal justice system. Perspectives on punishment have shifted throughout history, and there is no single, simple goal it seeks to achieve. It can be examined from many different aspects, including historical, legal, philosophical, and penological, and its purpose has been discussed since the works of early philosophers such as Plato and Aristotle.¹ In modern legal literature, there is generally a shared understanding of the main purposes of punishment, which include retribution, general and special

* PhD student, University of Miskolc, Faculty of Law, Deák Ferenc Doctoral School in Law and Political Sciences.

¹ Zlata Đurđević, "Odluka o kazni – kaznenoprocena pitanja," *Hrvatski ljetopis za kazneno pravo i praksu* 11, no. 2 (2004): 751–782.

deterrence, and resocialisation.² However, the purposes of punishment are not limited to these, but they can also be understood more broadly to encompass concepts such as restitution³ or restoration,⁴ which emphasise repairing the harm caused by the crime. The challenge of imposing fair and effective punishment is longstanding, and research shows that sentencing depends on more than offence severity, culpability, and mitigating or aggravating factors. This article examines one specific influence: prior convictions. Their use in sentencing raises key questions. Should sentencing reflect only the current offence, or may criminal history justify different punishments for identical crimes? Should punishment rest on the offender's character or solely on the act? Do repeat offenders show greater culpability because they continue breaking the law despite previous sanctions, and can harsher penalties reduce reoffending? These issues frame the three main models discussed: the flat-rate model, the sentencing premium model, and the progressive loss of mitigation model.

2. Current Penal Policy Responses to Recidivism

2. 1 Flat-rate Model

The flat-rate model starts from a retributive perspective, where punishment is based solely on the current offence.⁵ In this view, prior convictions do not play a role: if two offences are the same and the offenders are in the same circumstances, they should receive identical sentences.⁶ Recidivism, therefore, does not justify a

² Henry Weinhofen, "The Purpose of Punishment," *Tennessee Law Review* 7, no. 3 (1929): 145–176.; Alfred W. Stearns, "Evolution of Punishment," *Journal of Criminal Law and Criminology* 27, no. 2 (1936): 219–230.; Frederic R. Kellogg, "From Retribution to Desert: The Evolution of Criminal Punishment," *Criminology* 15, no. 2 (1977): 179–192.; Mirko Bagaric, *Punishment and Sentencing: A Rational Approach* (London: Cavendish Publishing Limited, 2001); Mitchel P. Roth, *Crime and Punishment: A History of the Criminal Justice System*, 2nd ed. (Wadsworth: Cengage Learning, 2011); Mitchel P. Roth, *An Eye for an Eye: A Global History of Crime and Punishment* (Reaktion Books, 2014); Thom Brooks, *Punishment* (Routledge, 2012); Richard S. Frase, "Punishment Purposes," *Stanford Law Review* 58, no. 1 (2015): 67–84., Giorgi Arsoshvili, "Restoring Justice as Purpose of Punishment and Its Interrelation with the Resocialization of Criminal," *Journal of Law I* (2021): 24–40., Henrique Carvalho and Anastasia Chamberlen, *Questioning Punishment* (Routledge, 2024).

³ Shlomo Shoham, Ori Beck, and Martin Kett, eds., *International Handbook of Penology and Criminal Justice* (CRC Press, 2008), 411–443; Roth, *Crime and Punishment*, 377; Mike Maguire, Rod Morgan and Robert Reiner, eds., *The Oxford Handbook of Criminology*, 5th ed. (Oxford University Press, 2012), 415; Stephen C. Richards, "The New School of Convict Criminology Thrives and Matures," *Critical Criminology* 21, no. 3 (2013): 375–387.

⁴ Shoham, Beck, and Kett, *International Handbook of Penology*, 625; Peter Raynor and Gwen Robinson, "Why Help Offenders? Arguments for Rehabilitation as a Penal Strategy," *European Journal of Probation* 1, no. 1 (2009): 3–20, <https://doi.org/10.1177/206622030900100102>, 13; Maguire, Morgan, and Reiner, *The Oxford Handbook of Criminology*, 415.

⁵ Gabriel Hallevy, *The Right to Be Punished* (Springer, 2013), 71.

⁶ Hallevy, *The Right to Be Punished*, 71.

harsher sanction, and punishment remains constant regardless of the offender's criminal history. From a retributive standpoint, prior convictions should have no bearing on punishment, since the harm caused by an offence is judged on its own, separately from the offender's past or their personal characteristics.⁷ Exclusionary retributivists insist that sentencing must rest only on the seriousness of the current offence and the degree of culpability, without reference to criminal history.⁸ Prior convictions are seen as no more relevant than other external factors that might appear persuasive, such as a distinguished military record, and therefore should not influence sentencing.⁹ This approach promotes consistency by treating each offence on its own, without raising penalties simply because the offender has previous convictions. The flat-rate model emphasises that, even if ignoring an offender's past may seem counterintuitive, punishment should be based on the offence itself rather than on judgements about character.¹⁰ Support for this view can also be found in empirical research,¹¹ which repeatedly shows that harsher sentences for repeat offenders do not lead to stronger deterrent effects. A study of felony prosecutions across 39 urban counties in the United States showed that imposing harsher sentences on repeat offenders did not significantly reduce their chances of reoffending compared to first-time offenders.¹² Academic literature also puts forward arguments for treating both groups in the same way. Critics point out that relying on prior convictions can create disproportionality and unfairness in sentencing.¹³ Since offenders have already been punished for their past crimes, using that history again may lead to repeat offenders receiving harsher penalties than first-time offenders for identical offences, even though the harm to society is the same. It is often argued that punishment should reflect the gravity of the offence rather than the offender's criminal history. At the same time, repeat offenders are more easily detected

⁷ Hallevy, *The Right to Be Punished*, 71–72; Stewart J. D'Alessio and Lonn Lanza-Stolzenberg, "Should Repeat Offenders Be Punished More Severely for Their Crimes?," *Criminal Justice Policy Review* 30, no. 5 (2019): 1–17., <https://doi.org/10.1177/0887403417701974>, 11–12.

⁸ Julian V. Roberts, "Punishing Persistence: Explaining the Enduring Appeal of the Recidivist Sentencing Premium," *British Journal of Criminology* 48, no. 4 (2008): 468–481.; Rhys Hester, Richard S. Frase, Julia Laskorunsky, and Kelly Lyn Mitchell, "Rethinking the Role of Criminal History in Sentencing," in *Handbook on Sentencing Policies and Practices in the 21st Century*, ed. Jesper Ryberg, Julian V. Roberts, and Joost V. de Keijser (Routledge, 2019), 283–311.

⁹ Roberts, "Punishing Persistence," 470.

¹⁰ Sharon Ri and Ka-Kit Cheng, "Criminal Record and Sentencing: A Comparative Perspective between England and Wales and Hong Kong," *Journal of Criminal Justice* 92 (2024): 1–11, <https://doi.org/10.1016/j.jcrimjus.2024.102193>, 2.

¹¹ See: D'Alessio and Lanza-Stolzenberg, "Should Repeat Offenders," 1–17.

¹² The study's limitations include issues of causality, lack of experimental design, and restricted focus on urban counties, which suggest caution in interpreting the findings and highlight the need for replication in other contexts. See more details in: D'Alessio and Lanza-Stolzenberg, "Should Repeat Offenders," 12.

¹³ D'Alessio and Lanza-Stolzenberg, "Should Repeat Offenders," 12–14.

because their fingerprints, DNA, and other data are already stored in state systems.¹⁴ Although legislators frequently call for harsher penalties for reoffending, research shows that alternative strategies may reduce recidivism more effectively. One example is the “ban the box” initiative, which removes the requirement to disclose prior convictions at the start of job applications, supporting reintegration and lowering reoffending by removing early barriers to fair employment.¹⁵

2. 2 Recidivist Sentencing Premium Model

In sentencing practice, an offender’s prior criminal record is seen as a significant factor in determining the penalty.¹⁶ The severity of the sentence often increases in proportion to the extent of previous convictions.¹⁷ As a result, repeat offenders are typically given harsher sanctions than first-time offenders, even when the underlying offences are identical. This approach has been firmly rooted in judicial policy for centuries and continues to be applied today, with little critical examination of either its normative justification or its practical validity.¹⁸ Harsher punishment for repeat offenders is often justified either on the grounds that they have shown themselves resistant to ordinary sanctions and therefore require stronger deterrents, or that isolating them from society reduces the risk of further harm to the public.¹⁹ Stricter sentencing is usually justified by increased blameworthiness and by the view that prior convictions signal a higher risk of reoffending and the insufficiency of earlier punishments.²⁰ A repeat offender is seen as more deserving of harsher punishment because, unlike someone facing conviction for the first time, they have already undergone the process of trial and punishment, received formal condemnation from the state, and been given the opportunity to reflect and reform.²¹ Reoffending in spite of this experience is taken as a sign of failing to learn from past punishment and of a conscious

¹⁴ D’Alessio and Lanza-Stolzenberg, “Should Repeat Offenders,” 12–14.

¹⁵ D’Alessio and Lanza-Stolzenberg, “Should Repeat Offenders,” 12–14.

¹⁶ Moshe Burnovski and Zvi Safra, “Deterrence Effects of Sequential Punishment Policies: Should Repeat Offenders Be More Severely Punished?,” *International Review of Law and Economics* 14, no. 3 (1994): 341–350., [https://doi.org/10.1016/0144-8188\(94\)90048-5](https://doi.org/10.1016/0144-8188(94)90048-5); David A. Dana, “Rethinking the Puzzle of Escalating Penalties for Repeat Offenders,” *Yale Law Journal* 110, no. 5 (2001): 733–787, <https://doi.org/10.2307/797607>.

¹⁷ Burnovski and Safra, “Deterrence Effects,” 341.

¹⁸ Shoham, Beck, and Kett, *International Handbook of Penology*, 556.

¹⁹ Youngjae Lee, “Recidivism as Omission: A Relational Account,” *Texas Law Review* 87, no. 3 (2009): 571–622, 573.

²⁰ Burnovski and Safra, “Deterrence Effects.”; Dana, “Rethinking the Puzzle.”; Roberts, “Punishing Persistence,” 479; Shoham, Beck, and Kett, *International Handbook of Penology* ce, chap. 17.3.1.; Maguire, Morgan, and Reiner, *The Oxford Handbook*, 887; Youngjae Lee, “Multiple Offenders and the Question of Desert,” in *Sentencing Multiple Crimes*, ed. Jesper Ryberg, Julian V. Roberts, and Joost V. de Keijser (Oxford University Press, 2017), chap. 7.

²¹ Lee, “Recidivism as Omission,” 614; Richard Dagger, “Play Fair with Recidivists,” in *Recidivist Punishments: The Philosopher’s View*, ed. Claudio Tamburrini and Jesper Ryberg (Lexington Books, 2012), 54.

disregard for both the law and the opportunity for change. In this way, repetition of crime after conviction is regarded as demonstrating a deeper level of blameworthiness, since the offender knowingly chooses to offend again despite full awareness of the consequences.

The fairness of imposing harsher punishments on repeat offenders is open to question, particularly given the evidence that the impact of criminal history on sentencing is not straightforward but curvilinear.²² An increase in prior convictions may at first lead to tougher sanctions, but this effect weakens and can even reverse at the highest levels of criminal history.²³ This pattern suggests that sentencing does not consistently treat prior records as a simple, linear measure of risk or blameworthiness.²⁴ One reason for this inconsistency lies in the way criminal history scores are calculated, which can sometimes exaggerate or misrepresent the seriousness of an offender's past conduct.²⁵ Judges are often aware of these flaws and may respond by showing leniency when a score appears to overstate culpability.²⁶ However, such reliance on judicial discretion carries the risk of unequal treatment and undermines the goal of uniformity in sentencing. If criminal history produces uneven effects across cases, then using it as a decisive factor for harsher punishment raises serious concerns about fairness, proportionality, and consistency.²⁷ A further criticism of this model is that it shifts the focus of punishment away from the offence itself and onto the offender's past behaviour, which can undermine the principle of proportionality and lead to sentences that exceed the seriousness of the current crime.

One of the most well-known examples of a harsher stance towards repeat offenders is the "three strikes and you're out" policy. Rooted in the logic of the recidivist sentencing premium model, this policy institutionalises the escalation of punishment by imposing mandatory life sentences upon a third serious offence.²⁸ It reflects the assumption that repeat offenders pose a greater threat to society and should therefore be incapacitated through long-term imprisonment.²⁹

²² Brian Holmes and Ben Feldmeyer, "Reassessing the Influence of Criminal History in Federal Criminal Courts," *Justice Quarterly* 36, no. 7 (2019): 1206–1228, <https://doi.org/10.1080/07418825.2019.1685121>, 1223–1226.

²³ Holmes and Feldmeyer, "Reassessing the Influence," 1223–1226.

²⁴ Holmes and Feldmeyer, "Reassessing the Influence," 1223–1226.

²⁵ Holmes and Feldmeyer, "Reassessing the Influence," 1223–1226.

²⁶ Holmes and Feldmeyer, "Reassessing the Influence," 1223–1226.

²⁷ Roberts, "Punishing Persistence," 478–479.

²⁸ Michael G. Turner, Francis T. Cullen, Jody L. Sundt, and Brandon K. Applegate, "'Three Strikes and You're Out' Legislation: A National Assessment," *Federal Probation* 59, no. 3 (1995): 16–35, 33; James Austin, John Clark, Patricia Hardyman, and D. Alan Henry, *Three Strikes and You're Out: The Implementation and Impact of Strike Laws* (Justice Policy Institute, 2000), 1; Trevor Jones and Tim Newburn, "Three Strikes and You're Out," *British Journal of Criminology* 46, no. 5 (2006): 781–802, <https://doi.org/10.1093/bjc/azl007>, 783.

²⁹ See: Turner et al., "Three Strikes and You're Out' Legislation"; Isaac M. Shinbein, "Three Strikes and You're Out: A Good Political Slogan to Reduce Crime, but a Failure in Its Application," *New England Journal on Criminal and Civil Confinement* 22, no. 1

For the “three strikes” policy to work as intended, offenders must weigh the risk of committing another crime against the possibility of avoiding severe punishment by leading a crime-free life. This relies on two key conditions: first, that offenders are well-informed about the sentencing policy, and second, that they believe there is a high likelihood of being arrested and convicted if they continue to offend.³⁰ In reality, though, these conditions are often not fully met. Research into prisoners’ perceptions shows that many offenders believe the consequences will not apply to them, assume they will avoid detection, are unaware of the legislative framework, or consider their offences too minor to result in a life sentence.³¹

It is difficult to disregard prior convictions in sentencing, as both the public and criminal justice professionals tend to view an offender’s background as relevant to their level of culpability. Research indicates that people often judge the seriousness of a crime not only by the act itself, but also by the characteristics of the offender.³² At the same time, giving excessive weight to prior convictions risks weakening the principle of proportionality, shifting the focus from the crime to the person, and ultimately undermining public confidence in the justice system. A more balanced approach would be to recognise prior convictions in sentencing, while limiting their influence in order to safeguard fairness and proportionality.

2. 3 Progressive Loss of Mitigation Model

The progressive loss of mitigation (PLM) model takes a middle ground between the flat-rate model and the recidivist sentencing premium model. It accepts that an offender’s past matters in sentencing but gives it only limited weight.³³ Moreover, it reflects the connection between rehabilitation and recidivism.³⁴

The PLM model gives first-time offenders, or those with only a minor record, the benefit of a lighter sentence on the assumption that their crime may have been a one-off lapse rather than a sign of deeper criminality.³⁵ Once this first-time status is gone, the offender can no longer rely on mitigation and will face a harsher penalty. Unlike the recidivist sentencing premium, the PLM model does not raise punishments step by step with each new conviction.³⁶ Under this model, it makes no difference whether an offender has two prior convictions or many more; once the first-time offender status is lost, mitigation is no longer available. This

(1996): 175–206; Austin et al., *Three Strikes and You’re Out*; Jones and Newburn, “Three Strikes.”

³⁰ Austin et al., *Three Strikes*, 2–3.

³¹ Austin et al., *Three Strikes*, 98–102.

³² Roberts, “Punishing Persistence,” 478–479.

³³ Julian V. Roberts and Andrew von Hirsch, eds., *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (Hart Publishing, 2010), 1–17; Julian V. Roberts and Jose Pina-Sánchez, “Previous Convictions at Sentencing: Exploring Empirical Trends in the Crown Court,” *Criminal Law Review* 8 (2014): 575–588, <https://www.researchgate.net/publication/292828321>; Ri and Cheng, “Criminal Record and Sentencing.”

³⁴ Hallevey, *The Right to Be Punished*, 76.

³⁵ Roberts and von Hirsch, *Previous Convictions at Sentencing*, 1–17.

³⁶ Roberts and von Hirsch, *Previous Convictions at Sentencing*, 1–17.

approach is based on the idea that a lighter sentence can be justified for first-time offenders, where the crime may be seen as a temporary lapse, but such reduction is no longer appropriate once offending becomes repeated. The PLM model is especially meaningful when applied to less serious crimes. People who commit minor offences are often influenced by factors such as peer pressure, impulsive decisions or substance use, rather than by a strong commitment to crime.³⁷ In these cases, some level of mitigation for first-time offenders recognises that their behaviour may not reflect a lasting tendency to offend. By contrast, harsh punishment at this stage can increase the risk of pushing them further toward criminal behaviour and making it harder for them to move away from crime.³⁸ The PLM model is built on the idea that first-time offenders deserve a degree of leniency, especially for minor offences, and that sentences should not automatically escalate for relatively trivial crimes.³⁹ This explains why the model emphasises reducing punishment at the beginning of a criminal career rather than continually increasing it with every new offence. However, once the offences become more serious, the logic behind this approach becomes harder to defend, as the stakes for public safety and proportionality grow higher. At the same time, the model recognises the need for balance: while some increase in punishment may be appropriate after repeated convictions, this escalation should have clear limits so that sentencing remains fair, proportionate, and consistent. This model recognises that culpability can vary between offenders, but it also stresses that mitigation cannot override the core principle of proportionality: the punishment must fit the seriousness of the current offence.⁴⁰ In line with modern desert theory, this means that even an offender with many prior convictions should not receive a sentence beyond the normal range set for the present offence.⁴¹ The idea of a “ceiling” ensures that repetition of crime cannot, by itself, justify penalties that exceed what is proportionate to the offence at hand.

2. 4 Reflections on the Models of Sentencing Repeat Offenders

Examination of the three main models shows how differently criminal justice systems balance fairness, proportionality, and social protection. The flat-rate model, rooted in retributive theory, reflects the view that punishment should be determined solely by the seriousness of the current offence and the offender’s culpability at that moment. By contrast, the recidivist sentencing premium model represents the most punitive approach, embedding harsher treatment of repeat offenders directly into sentencing practice. It is widely applied across legal systems and justified by claims of deterrence, incapacitation, and increased blameworthiness.⁴² A repeat offender, having already been convicted,

³⁷ Roberts and von Hirsch, *Previous Convictions at Sentencing*, 32.

³⁸ Roberts and von Hirsch, *Previous Convictions at Sentencing*, 32.

³⁹ Roberts and von Hirsch, *Previous Convictions at Sentencing*, 32.

⁴⁰ Ralph Henham, “Cumulative Sentencing and Penal Policy,” *The Journal of Criminal Law* 59, no. 4 (1995): 420–430, 421.

⁴¹ Henham, “Cumulative Sentencing,” 421.

⁴² Burnovski and Safra, “Deterrence Effects.”; Dana, “Rethinking the Puzzle.”; Roberts, “Punishing Persistence,” 479; Shoham, Beck, and Kett, *International Handbook of*

condemned, and given the opportunity to reform, is viewed as more culpable when they reoffend. Yet the fairness of this model is open to challenge. Empirical research casts doubt on its effectiveness in reducing reoffending, while its heavy reliance on criminal history risks undermining proportionality and shifting the focus of punishment away from the offence itself.⁴³ Concerns also arise from the inconsistency of criminal history scoring and the reliance on judicial discretion to correct inflated assessments of culpability, both of which weaken uniformity and fairness in sentencing. The “three strikes” policy offers a clear example of how this logic can become institutionalised, but it also illustrates the limitations of assuming that offenders will rationally calculate risks in line with harsh legislative frameworks.⁴⁴

Positioned between these two extremes, the progressive loss of mitigation model seeks a middle ground. It acknowledges that an offender’s prior record should have some relevance, but it limits its weight. The PLM framework insists on a ceiling: no matter how extensive an offender’s record may be, sentences should not exceed the proportionate range set for the current offence. In this way, it attempts to reconcile proportionality with the realities of repeat offending, without allowing criminal history to dominate sentencing outcomes. Together, these three models illustrate the persistent tension at the heart of sentencing policy.

3. Sentencing within the Croatian Criminal Justice Framework

3.1 Legislative Framework

Article 47 of the Croatian Criminal Code sets out the general rules for sentencing and establishes the principles that courts must follow when determining both the type and the measure of punishment.⁴⁵ The provision requires judges to begin with two central elements: the degree of culpability and the overall purposes of punishment. On this basis, the court must then assess all relevant circumstances that may justify imposing either a lighter or a harsher penalty, taking into account both mitigating and aggravating factors. The law provides a non-exhaustive list of such circumstances, which include the seriousness of the harm or danger to the protected legal interest, the motives for committing the offence, the extent of the

Penology, chap. 17.3.1., Lee, “Recidivism as Omission,” 581; Maguire, Morgan, and Reiner, *The Oxford Handbook*, 887.

⁴³ Fletcher George, *Rethinking Criminal Law* (Little, Brown and Company, 1978); Burnovski and Safra, “Deterrence Effects.”; Bagaric, *Punishment and Sentencing*; Bagaric, “Punishment Should Fit the Crime.”; Dana, “Rethinking the Puzzle.”; Anthony N. Doob and Cheryl Marie Webster, “Sentence Severity and Crime: Accepting the Null Hypothesis,” *Crime and Justice* 30 (2003): 143–195, <https://doi.org/10.1086/652230>; Dagger, “Play Fair.”; Roberts and Pina-Sánchez, “Previous Convictions at Sentencing.”; Hester et al., “Rethinking the Role.”; Holmes and Feldmeyer, “Reassessing the Influence.”

⁴⁴ Austin et al., *Three Strikes*, 2–3.

⁴⁵ Croatian Criminal Code, *Official Gazette* no. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21, 114/22, 114/23, 36/24 (2024).

offender's breach of duty, as well as the manner in which the act was carried out and the consequences produced. Further factors relate to the offender's personal situation and conduct, such as their previous way of life, personal and financial circumstances, behaviour following the offence, attitude towards the victim, and efforts to make restitution or repair the damage. Importantly, the provision also places a clear substantive limit on punishment by stipulating that the sentence must never exceed the offender's degree of culpability. In this way, Article 47 seeks to strike a balance between the individualisation of punishment and the fundamental principle of proportionality.

In Croatian criminal law, punishment serves several purposes: general prevention, which strengthens public trust and deters crime; special prevention, which seeks to correct the offender; resocialisation, aimed at reintegration into society; and retribution, which reflects the degree of guilt and communicates social condemnation in a proportionate manner.⁴⁶ Sentencing is also guided by the offender's degree of culpability, as Article 47(2) of the Criminal Code makes clear that punishment must not exceed this threshold. Culpability is evaluated on the basis of intent or negligence, mental capacity, and awareness of unlawfulness, ranging from the highest level; direct intent with full responsibility, to the lowest level, where unconscious negligence is combined with diminished capacity.⁴⁷

Although the normative framework in Croatian criminal law provides clear guidelines that serve as the basis for sentencing, important challenges remain in their application. The only comprehensive study dedicated to the problem of sentencing practices was published more than forty years ago, which itself highlights a serious gap in systematic research.⁴⁸ That research identified six major problems: the contradiction between repression and individualisation, the one-sided focus on repression, the absence of uniform criteria for determining the type and measure of punishment, the conflict between the principles of legality and individualisation, the overall leniency of penal policy, and the insufficient reasoning provided for sentences in judicial decisions.⁴⁹ In addition to these six areas, the study also produced three important findings: most sentences were imposed at or near the statutory or special minimum, many prescribed penalties were mitigated, and the proportion of suspended sentences was relatively high.⁵⁰ While the legal framework provides firm guidance for sentencing, long-standing challenges in practice, such as inconsistency, leniency, and insufficient reasoning, continue to raise questions about its effectiveness.

⁴⁶ Croatian Criminal Code, art. 41.

⁴⁷ Marin Mrčela, "Obrazlaganje kaznenopravnih sankcija," in *Novine u kaznenom zakonodavstvu – 2023* (Vrhovni sud Republike Hrvatske and Pravosudna akademija, 2023), 63–81, 65.

⁴⁸ See: Željko Hovatić, *Izbor kazne u jugoslavenskom krivičnom pravu i sudskoj praksi* (Informator, 1980).

⁴⁹ Mrčela, "Obrazlaganje kaznenopravnih sankcija," 63.

⁵⁰ Mrčela, "Obrazlaganje kaznenopravnih sankcija," 63.

3. 2 General Overview of Sentencing Trends in Croatia

Sentencing in Croatia is dominated by suspended prison sentences, which for many years have been the most common sanction.⁵¹ They reflect a tendency to formally impose imprisonment while avoiding actual time in prison, combining punishment with the chance of reintegration in the community. The second most frequent sanction is unsuspended prison, while fines, whether suspended or unsuspended, are rarely used. Other measures, such as admonitions or educational sanctions, appear only in exceptional cases. The low use of fines can be explained by everyday practice. Prosecutors usually do not propose them, and judges often avoid them because calculating fines requires assessing the offender's income, which is seen as complicated and time-consuming compared to simply imposing a prison sentence.⁵² As a result, imprisonment, whether suspended or unsuspended, remains the default sanction. This practice raises questions about efficiency and fairness, since fines could be a more proportionate and flexible response in many cases, especially for less serious crimes.

Most unsuspended prison sentences are short, usually between six months and two years.⁵³ Very short terms of less than six months, once quite common, became rare after the 2011 reform of the Criminal Code introduced the so-called "exceptionality rule," which obliges judges to explain in detail why such a short term is necessary.⁵⁴ Instead of reducing imprisonment overall, this rule led judges to shift towards slightly longer sentences, mainly in the six-to-twelve-month range, in order to avoid the extra work of providing justification. The shift in Croatian sentencing practice after the 2011 reform is best understood when considered alongside wider European patterns. The introduction of the exceptionality rule reduced the use of very short custodial terms of less than six

⁵¹ "Statistical data for various years," Croatian Bureau of Statistics – Republic of Croatia, accessed October 8, 2025, https://web.dzs.hr/default_e.htm.

⁵² See: Anna-Maria Getoš Kalac and Lea Feuerbach, "Sentencing and Imprisonment in Croatia," in *Mapping the Penological Landscape of the Balkans* (Springer Nature, forthcoming).

⁵³ "Statistical Data on Convicted Adult Perpetrators for 2024," Croatian Bureau of Statistics – Republic of Croatia, accessed October 8, 2025, https://web.dzs.hr/PX-Web_e.asp?url=%22Eng/Archive/stat_databases.htm%22.

⁵⁴ Having in mind the negative effects of short-term prison sentences, such as limited rehabilitative impact, stigmatisation of first-time offenders, exposure to more experienced criminals, disruption of employment and family ties, and prison overcrowding, the Croatian legislator introduced a reform in 2011 establishing the principle of exceptionality, under which custodial terms of up to six months may be imposed only where fines, community service, or suspended sentences cannot achieve the purpose of punishment. In practice, this means that if a court imposes a sentence of less than six months, it must provide additional justification explaining why it did not opt for a fine, community service, or a suspended sentence. See more details in: Ksenija Turković and Aleksandar Maršavelski, "Reforma sustava kazni u novom Kaznenom zakonu," *Hrvatski ljetopis za kazneno pravo i praksu* 19, no. 2 (2012): 795–817., <https://hrcak.srce.hr/file/163402>, 813.

months, but it did not decrease the overall reliance on imprisonment. Instead, courts largely shifted sentences into the six-to-twelve-month range, thereby complying with the reform while avoiding the burden of additional justification. While more recent data on sentencing is available from the Croatian Bureau of Statistics, the 2020 figures from the European Sourcebook of Crime and Criminal Justice Statistics⁵⁵ are particularly valuable, as they not only capture this shift in Croatian sentencing practice but also make it possible to compare Croatia's approach with that of other European countries.

In 2020, Croatia imposed a total of 61 unsuspended custodial sanctions, which is notably lower than the European mean of 103 and the median of 88. Its sentence-length distribution differs markedly from European patterns: only 10% of sentences were under six months (versus a mean of 43% and median of 45%), while Croatia concentrated penalties in the mid-range, with 42% between six and twelve months and 33% between twelve and twenty-four months.⁵⁶ Sentences of two to five years made up 13.3%, five to ten years 2%, and more than ten years 0.6%, the last figure broadly matching European levels.⁵⁷ In 2020, Croatia recorded a total of 285 convicted persons per 100,000 population, among these, 75% were convicted without any prior criminal record, while 25% had previous convictions.⁵⁸ Moreover, data on the share of previous unsuspended prison sentences among those with prior convictions was not reported for Croatia. These figures indicate that most persons convicted in Croatia in 2020 were first-time offenders, while just over one-quarter were repeat offenders. This outcome shows how legislative reforms can produce unintended effects, with judicial practice adapting in ways that do not necessarily support the original aim of reducing imprisonment.

Overall, sentencing in Croatia shows a clear pattern: suspended imprisonment dominates, short, unsuspended prison terms are used regularly, and fines remain almost absent. While this structure ensures that prison is formally central to penal policy, it may not always reflect the most effective or proportionate approach to punishment. Heavy reliance on suspended imprisonment risks creating a gap between symbolic punishment and real behavioural change, while the neglect of fines and alternative measures limits the flexibility of the sentencing system. These trends highlight the need for a critical discussion about whether current practices serve the goals of fairness, proportionality, and the prevention of reoffending.

⁵⁵ Aebi et al., *European Sourcebook of Crime and Criminal Justice Statistics*, 7th ed., Series UNILCRIM, 2024, 260.

⁵⁶ Aebi et al., *European Sourcebook*, 260.

⁵⁷ Aebi et al., *European Sourcebook*, 260.

⁵⁸ Aebi et al., *European Sourcebook*, 260.

3.3 The Role of Previous Convictions in Sentencing in Croatia

The existence of prior convictions, or conversely the absence of a criminal record, falls within the category of circumstances relating to the offender's previous life. In practice, a lack of prior convictions is typically treated as a mitigating factor.⁵⁹ When considering prior convictions, it is important to take into account whether rehabilitation has occurred. The time limits for rehabilitation are set out in Article 19 of the Act on the Legal Consequences of Convictions, Criminal Records and Rehabilitation.⁶⁰ Once these time limits have expired, a previous conviction may not be considered in sentencing, even if the court is aware of it through attached case files or the defendant's own statement.⁶¹ The weight of prior convictions is determined by whether they are connected to similar offenses.⁶² Reoffending of the same type is treated as aggravating, while unrelated convictions do not automatically increase the sentence unless they clearly reveal a pattern of behaviour.⁶³ Moreover, the court cannot consider the fact that other criminal proceedings are pending against the defendant as an aggravating circumstance, as this would breach the constitutional presumption of innocence.⁶⁴

The quality of judicial reasoning in sentencing has long been a concern, as research over more than two decades shows that courts often fail to provide sufficient justification for the sanctions they impose.⁶⁵ Mitigating and aggravating circumstances are frequently listed without any real evaluation of their impact on the final sentence, and in some cases, they are omitted altogether.⁶⁶ This lack of reasoning makes it difficult to establish a clear link between the stated circumstances and the punishment imposed, which in turn prevents meaningful assessment of sentencing policy. In practice, courts tend to rely on a synthetic rather than analytical approach, meaning that the sentence often appears to be an overall impression subsequently justified by selected factors.⁶⁷ As a result, sentencing decisions are frequently under-reasoned, and courts rarely specify the sources of relevant information or explain why certain

⁵⁹ Davor Tripalo and Marin Mrčela, *Odmjeravanje i obrazlaganje kaznenopravnih sankcija* (Pravosudna akademija, 2023), chap. 3.1.1.7.

⁶⁰ Croatian Act on the Legal Consequences of Convictions, Criminal Records and Rehabilitation, *Official Gazette* no. 143/12, 105/15, 32/17, 53/22 (2022).

⁶¹ Tripalo and Mrčela, *Odmjeravanje i obrazlaganje kaznenopravnih sankcija*, chap. 3.1.1.7.

⁶² Tripalo and Mrčela, *Odmjeravanje i obrazlaganje kaznenopravnih sankcija*, chap. 3.1.1.7.

⁶³ Tripalo and Mrčela, *Odmjeravanje i obrazlaganje kaznenopravnih sankcija*, chap. 3.1.1.7.

⁶⁴ Đurđević, "Odluka o kazni," 778.

⁶⁵ Đurđević, "Odluka o kazni," 779.; Velinka Grozdanić, Zoran Sršen and Davor Rittossa, "Kaznena politika općinskih sudova na području Županijskog suda u Rijeci," *Hrvatski ljetopis za kazneno pravo i praksu* 11, no. 2 (2004): 567–608., 607.; Mrčela, "Obrazlaganje kaznenopravnih sankcija," 80.

⁶⁶ Đurđević, "Odluka o kazni," 779.; Grozdanić, Sršen, and Rittossa, "Kaznena politika," 607; Mrčela, "Obrazlaganje kaznenopravnih sankcija," 80.

⁶⁷ Grozdanić, Sršen, and Rittossa, "Kaznena politika," 607.

evidence was considered credible.⁶⁸ Beyond improving sentencing reasoning, courts also need clearer public communication. Media criticism of sentences often stems from limited explanations or misunderstandings, leading to public debates based on incomplete information.⁶⁹ Courts therefore have a responsibility not only to justify decisions in judgments but also to explain them clearly to the public, which requires a more active role from court presidents and spokespersons in presenting sentencing reasons in a simple and understandable way.

4. Conclusion

The three sentencing models show how difficult it is to balance prior convictions with proportionality, and none fully resolves the tension between retribution, deterrence, and rehabilitation. The flat-rate model offers consistency but risks ignoring relevant risk factors; the recidivist sentencing premium model promises stronger protection and deterrence but undermines proportionality and fairness, while the progressive loss of mitigation model attempts to balance both sides by recognising first-time lapses without escalating punishment indefinitely. The broader lesson is that reliance on prior convictions cannot be treated as a simple formula. Any approach must remain attentive to proportionality, fairness, and effectiveness if it is to maintain legitimacy.

In Croatia, sentencing law is clear, yet practice remains inconsistent. Courts rely heavily on suspended sentences, rarely impose fines, and frequently use short custodial terms, which indicates routine rather than systematic reasoning. Although prior convictions are recognised as an aggravating factor when they reveal a pattern, judges often mention them without explaining their actual impact on the sentence, which undermines transparency and hinders proportionality. Clearer judicial reasoning, especially on the role of prior convictions, supported by updated empirical research, would improve coherence, predictability, and public trust in Croatian sentencing practice.

⁶⁸ Đurđević, “Odluka o kazni,” 779.

⁶⁹ Mrčela, “Obrazlaganje kaznenopravnih sankcija,” 80.

Si ita dedi, ut intra certum tempus manumittas. The Case of Ulp. 26 ed. D. 12,4,3,3¹

HORVÁTH, KATA ZSUZSANNA*

ABSTRACT *This paper deals with the problem of unjust enrichment in Roman law in particular with the *condictio causa data causa non secuta*. This action was used for the recovery of a performance rendered for an intended purpose that has not been achieved. The study focuses on the exegesis of fragment D. 12,4,3,3. This source concerns a person who gives money to another person for him to manumit his own slave, however, this does not happen. The legal question is whether there is a possibility of initiating a *condictio*. The research method used is the exegetical method.*

KEYWORDS *unjust enrichment, *condictio causa data causa non secuta*, exegesis, D. 12,4,3,3, manumissio.*

1. Introduction

The subject of this study is unjust enrichment. The legal concept of unjust enrichment was already known in Roman law, where it was applied in various typical situations.² These cases were known by classical jurists, but no strictly defined, separate types were established.³ Later, during the Justinian codification, several types of *condictio* were developed for specific types of situations. As a

¹ A KULTURÁLIS ÉS INNOVÁCIÓS MINISZTERIUM EGYETEMI KUTATÓI ÖSZTÖNDÍJ PROGRAMJÁNAK A NEMZETI KUTATÁSI, FEJLESZTÉSI ÉS INNOVÁCIÓS ALAPBÓL FINANSZÍROZOTT SZAKMAI TÁMOGATÁSÁVAL KÉSZÜLT.



KULTURÁLIS ÉS INNOVÁCIÓS
MINISZTERIUM

* PhD student, University of Szeged, Doctoral School of Law and Political Sciences; teaching assistant, University of Szeged, Faculty of Law and Political Sciences, Roman Law Department.

² Ferenc Benedek, “Jogalap nélküli gazdagodás jogellenes és erkölcstelen magatartásból a római jogban,” *Dolgozatok az állam-és jogtudományok köréből*, 15 (1984): 8. says, that with regard to the interpretation of unjust enrichment, the most significant difference between Roman law and current law is the following: Roman law applied the rules of unjust enrichment to specific types of situations, while in current law the situations of unjust enrichment are considered “innominate”.

³ Reinhard Zimmermann, *The Law of Obligations* (Oxford University Press, 1996), 838–839.

result, the Digest regulates the individual types of unjust enrichment under separate titles. Thus: the *condictio causa data causa non secuta* is regulated in D. 12,4, the *condictio ob turpem vel iniustam causam* is regulated in D. 12,5, *condictio indebiti* is regulated in title D. 12,6, *condictio sine causa* is regulated in title D. 12,7, and *condictio furtiva* is regulated in title D. 13,1. This paper deals with the case of *condictio causa data causa non secuta*.

In terms of the structure of the paper, following the introduction, I will first briefly present the *condictio causa data causa non secuta* as a case of unjust enrichment. Following this theoretical introduction, I will move on to the exegesis of the fragment D. 12,4,3,3, which can be found in the title of the Digest on *condictio causa data causa non secuta*. In doing so, after examining the *inscriptio*, I will analyse the various factual situations. I will also outline the legal issues and problems that arise, then present the solution to the case and its legal justification.

2. The *condictio causa data causa non secuta*

The concept of unjust enrichment can be defined as follows: the wealth of one person (the “enriched”) increases at the expense of another person (the “enricher”),⁴ usually on the basis of a legal transaction between the two, but sometimes due to other circumstances, without there being sufficient reason for the permanent retention of this increase in wealth.⁵ The starting point is that every performance has a purpose, and if that purpose is not achieved, the law allows the performing party to reclaim it.⁶ On the other hand, the person accepting the performance lacks the legal basis to retain or withhold the performance received.⁷ The Roman law textbooks in Hungary highlight two conceptual elements of unjust enrichment. On the one hand, the realization of the so-called *datio* is essential for unjust enrichment.⁸ This *datio* basically means a transfer of ownership under civil law.⁹ It should be emphasized that the essence of this condition is that the wealth of the enriched increases at the expense of the other

⁴ It is important to note that this advantage must actually be incorporated into the wealth. Compare Ferenc Benedek and Attila Pókecz Kovács, *Római magánjog* (Dialóg Campus, 2018), 339.

⁵ Benedek and Pókecz Kovács, *Római magánjog*, 339.

⁶ András Bessenýő, *Római magánjog. A római gondolkodás az európai jogi gondolkodás történetében* (Dialóg Campus, 2003), 481.

⁷ Bessenýő, *Római magánjog*, 481.

⁸ Benedek and Pókecz Kovács, *Római magánjog*, 311.; Imre Molnár and Éva Jakab, *Római jog* (Leges Diligens, 2021), 325–326.; András Földi and Gábor Hamza, *A római jog története és intézményei* (Novissima Kiadó, 2023), 552–553.; Róbert Brósz and Elemér Pólay, *Római jog* (Tankönyvkiadó, 1989), 453.; Iván Siklósi, *Római magánjog II. kötet* (ELTE Eötvös Kiadó, 2021), 1586.

⁹ Ferenc Benedek, *Jogalap nélküli gazdagodás a római jogban* (Candidate dissertation, University of Pécs, 1968), 77.

party's wealth.¹⁰ The second element is the so-called *sine causa* requirement.¹¹ That is, the enriched must not have a valid legal title to retain the enrichment (*sine causa retinendi*).¹²

This paper focuses on *condictio causa data causa non secuta* which refers to the reclamation of a performance that has lost its purpose. In other words, it occurs when someone provided a performance in the hope of receiving a certain counter-performance, but the hoped-for goal did not materialize.¹³ It was particularly significant because not all agreements were enforceable in Roman law (*nuda pactio obligationem non parit*).¹⁴ Thus, a person who provided a performance on the basis of a *pactum* in the hope of receiving a certain counter-performance could reclaim the performance they had provided on the basis of unjust enrichment if the other party failed to perform.

Based on Benedek's further classification, the fragment examined in this paper belongs to the category of *datio ob rem* within the scope of *condictio causa data causa non secuta*.¹⁵ *Datio ob rem* is a type of transfer of ownership that: "was made for a specific purpose and the transferor has a financial or other interest in its realization".¹⁶ It follows that if something was transferred to another party for the specific purpose of the acquiring party fulfilling some kind of counter-performance on their part, the "*res data*" can be reclaimed if the expected result did not occur.¹⁷

Within this category of *datio ob rem*, the analyzed fragment can be classified as belonging to the "*do ut facias*" group. In this case, the purpose of the *datio* expected from the acquiring party may be any conduct other than *datio* itself.¹⁸ If this intended conduct did not subsequently materialize, the first performing party had the option of reclaiming the transferred property. However, if the purpose was achieved, the possibility to initiate a *condictio* was lost.

¹⁰ Benedek and Pókecz Kovács, *Római magánjog*, 311. considers the increase in wealth and the increase in wealth occurring at the expense of the other party's wealth as separate elements.

¹¹ Benedek and Pókecz Kovács, *Római magánjog*, 311.; Molnár and Jakab, *Római jog*, 325-326.; Földi and Hamza, *A római jog története és intézményei*, 552-553.; Brósz and Pólay, *Római jog*, 453.; Siklósi, *Római magánjog II. kötet*, 1589.

¹² Benedek and Pókecz Kovács, *Római magánjog*, 311.; Földi and Hamza, *A római jog története és intézményei*, 553.; Siklósi, *Római magánjog II. kötet*, 1589.

¹³ Molnár and Jakab, *Római jog*, 326.; Brósz and Pólay, *Római jog*, 453-454.; Földi and Hamza, *A római jog története és intézményei*, 553.; Benedek and Pókecz Kovács, *Római magánjog*, 314.

¹⁴ D. 2,14,7,4.

¹⁵ Benedek, *Jogalap nélküli gazdagodás a római jogban*, 210-211.

¹⁶ Benedek, *Jogalap nélküli gazdagodás a római jogban*, 204.

¹⁷ Benedek, *Jogalap nélküli gazdagodás a római jogban*, 204.

¹⁸ Benedek, *Jogalap nélküli gazdagodás a római jogban*, 215.

3. The exegesis of D. 12,4,3,3

Following this theoretical introduction, I will move on to the exegesis of the case. The Latin text of the fragment analysed in this study is as follows:

D. 12,4,3,3 Ulpianus libro 26 ad edictum

Quid si ita dedi, ut intra certum tempus manumittas? Si nondum tempus praeteriit, inhibenda erit repetitio, nisi paeniteat: quod si praeteriit, condici poterit. Sed si Stichus decesserit, an repeti quod datum est possit? Proculus ait, si post id temporis decesserit, quo manumitti potuit, repetitionem esse, si minus, cessare.

What if I pay you to manumit him within a fixed time? While the period runs recovery is to be refused, unless I change my mind. When the period has passed, the *condictio* lies. Suppose that Stichus dies. Can the payment then be recovered? Proculus holds that if he dies after the time fixed for manumission, recovery is to be allowed; if not, not.¹⁹

Upon examining the inscription, we can conclude that the source comes from the 26th book of Ulpianus' commentary on the praetor's edict. This book deals with cases of "*de rebus creditis*", and within that, the present source appears under the subheading "*de condictione*" in Lenel's *Palingenesia*.²⁰

3. 1 Analysis of the facts, the legal issue, and the solution

This chapter intends to review the text, which contains several variations of the facts. First, I will outline the initial factual situation, then I will describe the different variations. The starting point in all cases is as follows: there are two people, one of whom we will call person "A" and the other person "B". Based on the facts, person "A" gave something (presumably money) to person "B" with the agreement that person "B" would manumit a slave in his possession. The parties also set a specific time limit for this.

According to the first factual variation, person "A" wishes to initiate *condictio* against person "B", within the specified time limit, in order to recover the money he has given. He wants to do so on the legal basis that person "B" has not yet freed the slave.

In the second factual variation, person "A" wishes to initiate a *condictio* against person "B" to reclaim the transferred money, also within the time period available for manumission, on the grounds that person "A" withdrew from the release, regretted it.

The third version of the facts describes the case where person "A" wishes to initiate a *condictio* against person "B" after the *terminus* has expired in order to reclaim the amount transferred. He wants to do so because person "B" did not manumit the slave in time.

¹⁹ Alan Watson, ed., *The Digest of Justinian. Volume 1*. (University of Pennsylvania Press, 1998), 374.

²⁰ Otto Lenel, *Palingenesia Iuris Civilis* (Ex Officina Bernhardi Tauchnitz, 1889), 567–569.

The fourth and fifth versions of the facts are based on the death of the slave to be manumitted. According to the fourth version of the facts, the slave dies after the time limit set for manumission has passed, while according to the fifth version, the slave dies within the fixed time period.

As we can see, in the first three factual variations the slave to be manumitted, Stichus, is alive. These cases can be further divided according to whether the *condictio* is initiated before or after the time limit: in the first and second factual versions, we are before the expiry of the *terminus*, while in the third case, we are after it. However, a difference can be noticed in the legal grounds for the *condictio*. In the first and third factual variations, the legal ground for recovery is person “B”’s failure to free Stichus, while in the second factual variation, it is reconsideration and regret. Even in the situation where Stichus dies, two versions can be found, depending on whether the death occurs before or after the fixed time for manumission. In the fourth version of the facts, the slave dies after the period has passed, while in the fifth version, he dies before it.

After discussing the facts of the case, let us turn to the legal issue. In all variations of the facts, the question that arises is whether, based on the rules of unjust enrichment, person “A” has the possibility to recover the amount transferred (*dare*) from person “B” by way of *condictio*.

The solution is also provided by the source, according to which *condictio* is not available in the first variation of the facts, but is available in the second and third cases. In the fourth version of the facts, the jurist also considers *condictio* to be available, while in the fifth and final case he does not.

I would like to illustrate, using a diagram, the aforementioned different factual variations and the legal solution provided by the jurist to the legal question of whether *condictio* can be granted or not.

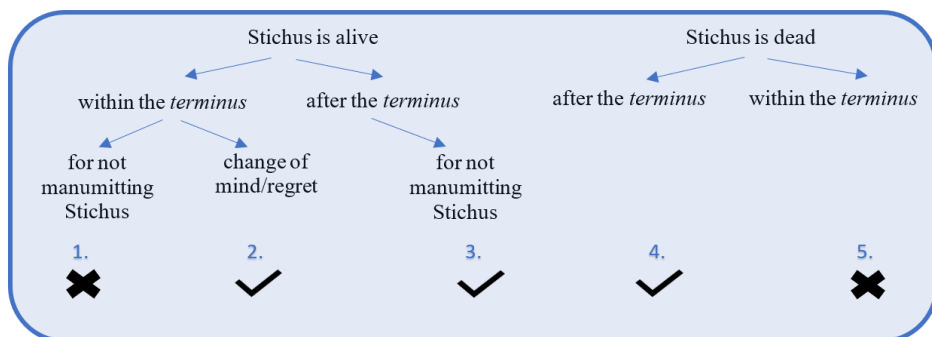


Illustration 1: Presentation of factual variations and the legal solutions (own illustration).

3. 2 Legal justification

In the following, I would like to present the legal reasoning in line with the different factual variations. According to the starting point of the case, person “A” and “B” agreed that person “A” would transfer something to person “B” in exchange for person “B” manumitting a slave in his possession (Stichus). The

parties agreed in a *pactum*, there is no indication that a *stipulatio* was concluded between them. Consequently, since Roman law did not recognize such agreement as a nominate contract, any claim arising from it could not have been enforced.²¹ Roman law had a closed contractus system, so it only recognized certain types of contracts, and any contract that did not fall within this scope could not be litigated (*numerus clausus* system of contracts). This is also related to the concept of the action-based approach in Roman law, which meant that legal proceedings could only be initiated in cases where an appropriate *actio* was available.

At this point, it is also necessary to mention innominate real contracts. The essence of these contracts is that if one party has performed, this party has the opportunity to demand counter-performance from the other party. In the case of innominate contracts, from classical times onwards, if one party had already performed, the praetor gave an *in factum actio* or *actio praescriptis verbis* to that party. In this way the first performing party could enforce the counter-performance.²² This legal development led to the system of innominate real contracts developed by Justinian. By that time, a new set of contracts had emerged, divided into four types: *du ut des*, *do ut facias*, *facio ut des*, and *facias ut facias*.²³

Subsequently, let us turn to the analysis of each factual variation. Firstly, in the first factual case, we can see that person “A” wishes to initiate *condictio* against person “B” within the time limit available for manumission as person “B” has not yet fulfilled their agreement, i.e., he has not manumitted the slave. As we have already established, no named contract was concluded between the parties, which means that this agreement was not originally enforceable under Roman law. However, person “A” is not left without a mean of redress, as the rules on unjust enrichment become relevant (in this case, in an auxiliary, subsidiary capacity). The option available to person “A” is to initiate *condictio* to reclaim the amount he has paid. At a later stage in the development of the law, based on the information discussed above, the praetor granted *actio in factum* and *actio praescriptis verbis* in order to enable the party that had already performed to not only reclaim performance, but also to enforce the other party to perform. However, at the time this case arose, it was not yet possible, so in the present situation, person “A” wishes to reclaim his own performance by means of *condictio* due to the other party’s failure to perform.

The legal situation that arises between the parties can be classified as *condictio causa data causa non secuta*. In this case, one thing is transferred to another with the express purpose that the acquiring party also provides counter-performance on his part. It follows from that that the *res data* can be reclaimed if the expected result did not occur and the desired goal was not achieved.²⁴ However, it is very

²¹ It is worth noting that under Roman law, no action could be brought from a *pactum* on the basis of the principle of *nuda pactio obligationem non parit*, but an objection (exception) could be raised.

²² Zimmermann, *The Law of Obligations*, 534., 844.

²³ Zimmermann, *The Law of Obligations*, 534.

²⁴ Benedek, *Jogalap nélküli gazdagodás a római jogban*, 204.

important to note that this action is only admissible if the goal is definitively lost. If a certain time limit is set, it is not certain until the expiry of the fixed time that the other party will not actually provide the counter-performance, in this case the manumission of the slave. During this period of uncertainty (pending legal situation) *condictio* cannot be initiated.²⁵

Based on this, it is completely clear why it is not possible to initiate *condictio* in this first variation of the facts. The *terminus* has not yet expired, so it is not certain at all that person “B” will not manumit the slave in time. It is conceivable that person “B” will still fulfil the obligation within the time period, as this is still an open question at this point. Therefore, it cannot be stated with certainty that the goal will not be achieved, thus the *condictio* cannot be granted.

Now, let us move on to the second variation of the facts. This case is similar to the first one in that we are still before the expiry of the agreed *terminus*. However, it differs in terms of the ground on which person “A” bases the right to recover the money given. Unlike in the previous case, it is not the failure of the purpose of the agreement, but rather “regret”, meaning withdrawal from the agreement, or change of mind (*paeniteat*).

The question arises as to what the so-called *ius paenitentiae* (Reurecht) actually means. According to the Oxford Latin Dictionary, the word *paenitentia* means regret for one’s actions or a change of mind or attitude.²⁶ The verb *paeniteo* also has similar meanings, such as: to cause dissatisfaction, give reason to complain or regret; to feel regret, or think better.²⁷ The Encyclopedic Dictionary of Roman Law also provides similar guidance. According to this, *paenitentia* (which derives from the verb *paenitere*) means that someone changes their mind about a transaction they have already concluded or about failing to perform a legal act within a specified time limit.²⁸ The dictionary also mentions that although *paenitentia* has no legal effect as a general rule, there have been cases where a person was able to unilaterally withdraw from a transaction merely as a result of a simple change of mind.²⁹ Berger explains that, for example, if someone gives money to a slave owner to manumit the slave, they then have the option to revoke the agreement (he uses the word “donation” for the monetary contribution made).³⁰ The Finály Latin-Hungarian dictionary also contains meanings consistent with the above, as follows: *poenitentia* means repentance, *poenitet* means to regret something, to be dissatisfied with something.³¹

From these meaning and the opinions in the literature, we can conclude that the essence of *ius paenitentiae* is that the party who performed first, in this case person

²⁵ Benedek, *Jogalap nélküli gazdagodás a római jogban*, 220.

²⁶ Peter Geoffrey William Glare, ed., *Oxford Latin Dictionary* (Clarendon Press, 1992), 1282.

²⁷ Glare, *Oxford Latin Dictionary*, 1282.

²⁸ Adolf Berger, *Encyclopedic Dictionary of Roman Law* (The American Philosophical Society, 1953), 616.

²⁹ Berger, *Encyclopedic Dictionary of Roman Law*, 616.

³⁰ Berger, *Encyclopedic Dictionary of Roman Law*, 616.

³¹ Finály Henrik, *A latin nyelv szótára* (Akadémiai Kiadó, 2002), 1517.

“A”, had the right to change their mind.³² They could unilaterally decide to reclaim the performance they had performed. If the party who had already performed initiated *condictio* for this reason, we can actually speak of a subcategory of *condictio causa data causa non secuta*, namely *condictio ex paenitentia*.³³ It should be noted that the assessment of this *condictio* is controversial in the literature in the context of *datio ob rem*.³⁴ The starting point is D. 12,4,5 pr.,³⁵ and in the title of *condictio causa data causa non secuta condictio ex paenitentia* also appears in D. 12,4,5,1, D. 12,4,3,2, and D. 12,4,3,3 which is examined in this study. In connection with the aforementioned *condictio*, the Kaser-Knütel textbook emphasizes that it most often appeared in the context of someone giving money to the owner for the purpose of manumitting his slave or buying a slave with that money, whom he would then manumit.³⁶ This is when the so-called Reurecht, or right of revocation, appears, usually without the parties agreeing on it separately.³⁷ The *ius paenitentia* was essentially equivalent to a right of withdrawal after the conclusion of innominate real contracts.³⁸ Dogmatically, this issue can be interpreted as meaning that the person who performed first and had not yet received counter-performance could not be sued – with the then known *actio praescriptis verbis*– because it was only possible to bring proceedings against the other person who had not yet performed.³⁹ Liebs’ explanation of the problem is as follows: in the case of unjust enrichment, the critical period is when one party has performed and the other has not yet performed. If the transaction partner of the party that has already performed changes their mind and does not counter-perform, the original performance is returned on the basis of *condictio*. Liebs concludes that this logically means that the party who performed first is not bound by the agreement either. Therefore, they did not have to wait to see whether the other party would perform in accordance with the agreement, but could initiate *condictio* to reclaim their performance.⁴⁰ It is also important to note that, under *ius paenitentia*, it was only possible to initiate *condictio* as long as the other party had not yet counter-

³² Zimmermann, *The Law of Obligations*, 844.

³³ Zimmermann, *The Law of Obligations*, 844.; Lisa Isola, *Venire contra factum proprium. Herkunft und Grundlagen eines sprichwörtlichen Rechtsprinzips* (Peter Lang Edition, 2017), 331.

³⁴ Wolfgang Ernst, “Die datio ob rem als Austauschgeschäft – Ein Beitrag zu einseitig geregelten Geschäftsvorgängen im Verkehrsrecht”, in *Usus Antiquus Juris Romani*, ed. Wolfgang Ernst and Éva Jakab (Springer, 2005), 45.

³⁵ Ernst, “Die datio ob rem als Austauschgeschäft,” 45.

³⁶ Max Kaser and Rolf Knütel, *Römisches Privatrecht. Ein Studienbuch* (Verlag C. H. Beck, 2014), 288.

³⁷ Kaser and Knütel, *Römisches Privatrecht. Ein Studienbuch*, 288.

³⁸ Zimmermann, *The Law of Obligations*, 844., 858.

³⁹ Zimmermann, *The Law of Obligations*, 844.

⁴⁰ Detlef Liebs, “The History of the Roman *Condictio* up to Justinian,” in *The Legal Mind. Essays for Tony Honoré*, ed. Neil MacCormick and Peter Birks (Oxford University Press, 1986), 172–173.

performed.⁴¹ Prior to this, however, the first performing party could exercise this right even if the other party was willing to perform or had already begun preparations for performance.⁴²

Some questions arise regarding the evidential rules. It is certainly necessary to prove that the person who wishes to withdraw from the agreement notified the other party of this intention. The necessity of such notification is indicated in fragment D. 12,4,5,1. This source describes a case in which someone transfers a slave to another person on the condition that the slave be freed within a specified period of time but then he changes his mind. The person notifies the other party of this change, but the other party frees the slave anyway. The significance of this fragment in the present case lies in the fact that it concerns the obligation of the withdrawing party to notify the other party. It would be anomalous if individuals could refer to this right without restriction, so in my opinion it is absolutely necessary for the other party to be notified in advance.

Therefore, in the present case, person “A” had the right to withdraw from the agreement with the help of the rules of unjust enrichment, more precisely *condictio causa data causa non secuta*, more specifically, the *condictio ex paenitentia*. He may unilaterally change his mind and demand the return of the performance he has given. This is not precluded by the rule that *ius paenitentia* may only be exercised prior to the other party’s performance, as person “B” has not yet fulfilled his obligation under the agreement. Thus, on this legal basis, it is possible to initiate *condictio* against person “B” even before the *terminus* expires. However, based on the above, a prerequisite for this, according to the logic of procedural law, would be that the plaintiff must prove that the other party was notified of the withdrawal beforehand.

The next issue to consider is the third scenario, in which person “A” wishes to reclaim the transferred amount after the fixed time set for manumission, on the grounds that person “B” did not manumit the slave. In this case, *condictio* (*causa data causa non secuta*) can be granted without any problems on the basis of the rules of unjust enrichment, since, as discussed above, a definitive failure of purpose was necessary for the claim to be made. In the present case, it has become clear that the purpose has not been achieved, since the original purpose for which person “A” transferred the money was for person “B” to manumit his slave within the specified time limit. With the expiry of the *terminus*, it has become certain that this will not and cannot happen. The *condictio* therefore clearly is available to person “A”.

Moving on to the fourth and fifth factual variations, we see that the jurist introduces another factual element into the source, namely the death of the slave to be manumitted. In the following, I will examine these two factual versions. In the fourth case, where the slave dies after the time limit for manumission, the amount can be reclaimed, and we can apply the general principle of unjust enrichment. This can be supported by the reasoning related to the previous factual

⁴¹ Liebs, “The History of the Roman *Condictio* up to Justinian”, 173.; Zimmermann, *The Law of Obligations*, 858.

⁴² Zimmermann, *The Law of Obligations*, 858.

variation. If the slave dies after the fixed time set for his manumission, it is clear that the goal has permanently failed. Person “B” undertook to manumit Stichus within a certain period of time, but this did not happen. Stichus died as a slave after the *terminus* had expired. In fact, at this point, the slave’s death can be considered irrelevant, because even if he was alive, the amount would be recoverable due to the certain failure of the goal. The question arises as to why the jurist highlights this case.

This question can be answered by examining the fifth factual variation. In this case, contrary to the logic of unjust enrichment, the *conditio* is not available in the event of the slave’s death within the fixed time. This cannot be explained by the logic of unjust enrichment, since in this case too, the goal has permanently failed. The death of the slave necessarily means that his manumission will certainly not take place. Thus, applying the rules of unjust enrichment, one would have to conclude that since the goal for which person “A” provided the sum has certainly failed, the *condictio causa data causa non secuta* is admissible. It is therefore an interesting question why Ulpianus, taking up Proculus’s idea, says that in this case, recovery is not possible.

If we look at the fifth variation, we encounter a rule of transfer of risk. The source states that the “risk” of the slave’s death is ultimately borne by person “A,” who is the one providing the money (if the slave dies within the specified period of time set for the manumission). In this case, the possibility of recovery, *condictio*, is excluded. This risk of transfer clause is similar to the risk of transfer rules known from the sale of goods (*Preisgefahr*). According to this, the buyer bears the risk of damage or destruction of the item due to *vis maior* occurred between the conclusion of the contract and the transfer of the item, provided that the sale was perfect. The sale is perfect if the goods and the purchase price are specifically determined and the transaction is not subject to any suspensive conditions.

Applying this rule to the present situation, it can be seen that the risk of the slave dying as a result of an accidental event within the time available for manumission lies on person “A”. The transaction can be considered perfect based on the logic of the sale, as the goods were specified, the amount was transferred, and there were no suspensive conditions. The time limit set for manumission does not affect the perfection of the transaction. Thus, we can say that the „risk” has been transferred to person “A”, who is the one providing the money.

The question arises as to why this transfer of risk clause of a sale is applied in a case of unjust enrichment. The explanation for this, in my opinion, can be that the present agreement is a “mixed contract”, a so-called “gemischte” Vertrag.⁴³ In other words, it is a contract that combines elements of several types of contracts (“z. B. die Elemente von Kauf und Pacht oder von Pacht und Werkvertrag miteinander vereinigten”).⁴⁴ In this case, elements of both sale and mandate can be found. Sale, because person “A” actually “buys” the slave in order to free him, but the transfer does not take place, only the transfer of the amount. It is a mandate, because person “B” undertakes to perform a task namely

⁴³ Kaser and Knütel, *Römisches Privatrecht. Ein Studienbuch*, 277.

⁴⁴ Kaser and Knütel, *Römisches Privatrecht. Ein Studienbuch*, 277.

to manumit the slave (Stichus) whom person “A” wishes to manumit. It is also clear that this is a confidential agreement, which also reinforces the contract of agency nature of the transaction. However, unlike a *mandatum*, this transaction is not free of charge.

Proculus, recognizing the significance of this mixed nature, considered it important to properly regulate the relationship between the parties. Since there was no other option available at this point in the development, he gave the *condictio* but based on the rules of transfer of risk in sale agreements. We can see that Roman jurists were fundamentally practical in their thinking, seeking to provide solutions to the practical problems that arose. In the present situation, they believed that this agreement contained elements of both *emptio venditio* and *mandatum*, therefore considered this analogy of transfer of risk to be applicable for the purpose of a fair and appropriate assessment of the legal problem.

It is also interesting to note that Ulpianus adopts the opinion of Proculus, who lived about 200 years before him. From this we can see that this transactional mechanism already played a role in Proculus’s time, as well as in Ulpianus’s time, since he adopted it without change, and it was also significant during the Justinian codification. In other words, a situation that has existed for 600 years is unfolding before our eyes.

Furthermore, it is worth asking why person “A” did not choose the option of buying the slave himself and then manumitting him on his own terms. Or why they did not conclude their agreement in a *stipulatio*. These solutions would have resolved the problems that arose. First, if they had actually entered into a sales contract with each other, person “A” as the owner of the slave, could have manumitted him at any time. Furthermore, concluding the agreement in a *stipulatio* would have meant that if person “B” failed to fulfil his obligations, meaning that he did not manumit Stichus by the fixed time, then person “A” would have had the right to sue him on the basis of the stipulation.

These questions can be explained by the fact that this may have been an agreement between absent parties. In this case, given the time-consuming, costly, and dangerous nature of travel, it is understandable why they did not want to meet in person to complete the transaction or to conclude the *stipulatio* which required personal presence. In addition, there was presumably a relationship of trust between them, which is characteristic of a mandate. Thus, they were able to easily speed up the process by agreeing in this way.

4. Conclusion

In this study, following a brief theoretical introduction, I conducted an exegesis of D. 12,4,3,3. This fragment can be found in the Digest under the title dealing with the issue of *condictio causa data causa non secuta*. This *condictio* was aimed at reclaiming performance that had lost its purpose.

After analysing several factual variations in the source, we saw that one party (person “A”) gave money to the other (person “B”) to manumit his slave (Stichus) within a specified period of time, but this did not happen. If the *terminus* has not yet expired, person “A” cannot, as a general rule, initiate *condictio* against person

“B”, as the goal cannot yet be considered definitively lost. However, person “A” may invoke the so-called *ius paenitentiae*, i.e. they may withdraw from the agreement, in which case a *condictio* may be initiated within the time limit set for manumission, until the manumission takes place. After the fixed time, *condictio* can be granted without any problem due to the certain failure of the purpose. *Condictio* is also possible in the event of the slave’s death after the time limit, as the purpose has not been achieved. If the slave dies within the fixed time, then, given the mixed nature of the agreement (a combination of sale and mandate), *condictio* cannot be granted on the basis of the transfer of risk analogy, contrary to the logic of unjust enrichment. As for the question of why no sale contract or contract of agency was concluded and why no *stipulatio* was agreed upon, the answer can be that this is presumably an agreement between absent parties.

AI in the Cloud: Legal Accountability for Intelligent Infrastructure

KHRAISHA, WASIM*

ABSTRACT *The convergence of Artificial Intelligence (AI) and cloud computing marks a fundamental shift in the digital ecosystem. Modern cloud infrastructures increasingly embed AI-driven mechanisms that autonomously allocate resources, enhance cybersecurity, and enhance performance, creating what may be called “intelligent infrastructure”. This self-learning model transforms the cloud from a passive service platform into an active decision-making environment. However, this transformation raises complex questions of legal accountability and transparency within the European Union’s regulatory framework. The existing legal instruments including the General Data Protection Regulation (GDPR), the NIS2 Directive, the AI Act, and the Cybersecurity Act assign multiple obligations among cloud service providers, users, and AI developers, leaving critical accountability gaps. This article argues that intelligent infrastructures require a reconfiguration of liability models to address autonomous decision-making and shared responsibility. It proposes a hybrid approach that combines contractual governance with regulatory compliance, ensuring that accountability remains traceable, enforceable, and compatible with EU digital law.*

KEYWORDS *Artificial Intelligence, Cloud Computing, Legal Accountability, EU Law, Intelligent Infrastructure.*

1. Introduction

The integration of Artificial Intelligence (AI) into cloud computing infrastructures has fundamentally altered the nature of digital service provision. Cloud platforms no longer operate merely as passive storage or computational environments but increasingly incorporate AI systems capable of autonomous learning, decision-making, and optimization. The result is the emergence of what may be called “*intelligent infrastructure*” which is a dynamic, self-adaptive technological framework that continuously modifies its operations based on real-time data flows and predictive analytics. This evolution holds transformative potential for efficiency, resilience, and innovation within the digital economy, yet

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

it also weaken the established notions of accountability, transparency, and liability under EU laws.

AI-driven automation at the infrastructure: such as risk detection, and data lifecycle management, means that critical operational decisions are often made without direct human intervention.¹ This essential change from human control to algorithmic model challenges the traditional legal models that presuppose identifiable human factor affected of intent and negligence.² Within the EU, regulatory mechanisms such as the General Data Protection Regulation (GDPR),³ the NIS2 Directive,⁴ and the AI Act⁵ collectively establish frameworks for risk management, transparency, and responsibility, yet they remain fragmented when applied to integrated AI–cloud systems. The resulting legal uncertainty raises the question: *who is accountable when intelligent infrastructures make an error or mistake?*

Accountability in the context of intelligent infrastructure must therefore be understood as a distributed concept. Unlike conventional cloud models, where liability could be assigned contractually between the cloud service provider (CSP) and the customer, the introduction of AI creates multi-agent decision environments involving software developers, AI model providers, CSPs, and end-users.⁶ Each actor contributes to the functioning of the system, but no single entity have the full control. The European Commission’s Digital Decade Strategy recognizes that such technological convergence requires “trustworthy, transparent, and accountable” AI systems, especially where they support essential digital services.⁷

Yet, despite these policy ambitions, existing legal frameworks have struggled to reconcile the technical opacity of AI systems with the normative demands of accountability. The so-called *black box* problem where the internal logic of machine learning systems resists interpretability undermines the transparency principles enshrined in Article 5(1)(a) of the GDPR and the rights to explanation

¹ Peter Mell and Timothy Grance, *The NIST Definition of Cloud Computing* (NIST Special Publication 800-145, 2011), 3–5.

² Mireille Hildebrandt, *Law for Computer Scientists and Other Folk* (Oxford: Oxford University Press, 2020), 221–224.

³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Data Protection Regulation) 2016.

⁴ Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 (NIS2 Directive) 2022.

⁵ European Parliament and Council of the European Union, *Regulation (EU) 2024/1689 of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act)*, OJ L, 12 July 2024.

⁶ Christopher Millard, ed., *Cloud Computing Law*, 2nd ed. (Oxford: Oxford University Press, 2021), 45–52.

⁷ European Commission, *2030 Digital Compass: The European Way for the Digital Decade* COM (2021).

under Articles 13–15 and 22 GDPR.⁸ The AI Act attempts to address this through obligations of transparency, documentation, and risk assessment, but it mostly focuses on application-level AI rather than embedded infrastructural intelligence.⁹

This article adopts a doctrinal and analytical method to explore how EU law conceptualizes and allocates accountability in the context of AI-enabled cloud infrastructures. It argues that while EU digital regulation establishes strong sectoral frameworks for data protection, cybersecurity, and AI governance, the intersection of these regimes reveals structural gaps. The absence of a unified approach to intelligent infrastructure risks diffusing responsibility among multiple actors and weakening enforcement. Accordingly, this paper advances three propositions. First, *intelligent infrastructure* constitutes a novel regulatory object that cannot be fully captured by existing categories of software, service, or processor under current EU law. Second, the integration of AI at the infrastructural level creates a need for *shared accountability models* capable of integrating technical traceability, contractual governance, and regulatory oversight. Third, the development of such models requires a hybrid approach combining compliance duties with liability allocation mechanisms.

By dealing with these issues within the evolving EU digital regulatory frameworks including the AI Act, GDPR, NIS2, and the Cybersecurity Act, this article contributes to the broader discussion on how law can maintain effective accountability in the age of intelligent infrastructure.

2. The Technological Context: AI in Cloud Infrastructure

The evolution of cloud computing from a service-based model to an intelligent infrastructure marks a significant shift in the architecture of the digital economy. Traditional cloud environments structured around the delivery of infrastructure, platforms, and software as services are being progressively re-engineered through the integration of AI systems that enable autonomous monitoring, optimization, and security. The resulting convergence has transformed the cloud into a *self-adaptive ecosystem* in which computational resources and network configurations evolve dynamically in response to real-time data patterns.¹⁰

AI systems could be rooted across the three deployment models of cloud computing: Infrastructure as a Service (IaaS), Platform as a Service (PaaS), and Software as a Service (SaaS). Within the IaaS, machine-learning algorithms

⁸ Sandra Wachter, Brent Mittelstadt, and Luciano Floridi, “Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation,” *International Data Privacy Law* 7, no. 2 (2017): 76–99.

⁹ European Commission, *Impact Assessment Accompanying the Proposal for a Regulation Laying Down Harmonised Rules on Artificial Intelligence*, SWD(2021) 84 final, 12–15. Available at: <https://edz.bib.uni-mannheim.de/edz/pdf/swd/2021/swd-2021-0084-1-en.pdf?utm>.

¹⁰ Organisation for Economic Co-operation and Development (OECD), *The Cloud Ecosystem and Its Role in Digital Transformation* (Paris: OECD Publishing, 2021).

manage virtual machines, predict hardware failures, and optimize energy consumption through continuous learning.¹¹ At the PaaS level, AI models orchestrate data pipelines, automate load balancing, and allocate storage in proportion to demand.¹² In SaaS applications, AI governs user authentication, personalization, and threat detection. The cloud thereby becomes not merely a neutral hosting environment but a decision-making entity capable of governing its own performance.¹³

The operational logic of this intelligent infrastructure relies on *data feedback loops*. AI systems take in and deal with vast quantities of operational data, CPU performance metrics, network latency, and user behavior to train predictive models that anticipate future conditions.¹⁴ This enables the infrastructure to scale resources before congestion occurs or to isolate potential security risks before breaches appear.¹⁵ In technical terms, the cloud evolves from a reactive to a *proactive* infrastructure, advanced by anticipatory control and self-recovery mechanisms.¹⁶

However, the autonomy of these systems introduces significant challenges for legal accountability. Decisions once made by system administrators, such as routing data through specific servers or initiating security patches, are now delegated to algorithms that act without human intervention.¹⁷ The European Union Agency for Cybersecurity (ENISA) has recognized that AI-enabled automation in cloud infrastructures blurs the traditional boundaries of control and responsibility between the service providers and users.¹⁸ This automation complicates the application of existing legal doctrines that presuppose a clear chain of human control.

¹¹ National Institute of Standards and Technology (NIST), *The NIST Cloud Computing Reference Architecture*, Special Publication 500-292 (2018), section 2.3.

¹² European Union Agency for Cybersecurity (ENISA), *Artificial Intelligence and Cloud Security: Technical Guidelines* (2023), section 3.1. available at: <https://www.enisa.europa.eu/publications/multilayer-framework-for-good-cybersecurity-practices-for-ai?utm>.

¹³ Christopher Millard, ed., *Cloud Computing Law*, (Oxford: Oxford University Press, 2021), ch. 3 “Control and Responsibility in Cloud Service Provision.”

¹⁴ ENISA, *Artificial Intelligence and Cybersecurity: Challenges at the Infrastructure Level* (2021), section 2.

¹⁵ Lekkala, Chandrakanth, “AI-Driven Dynamic Resource Allocation in Cloud Computing: Predictive Models and Real-Time Optimization,” *J Artif Intell Mach Learn & Data Sci* 2 no. 2 (2024) Available at SSRN: <https://ssrn.com/abstract=4908420>.

¹⁶ Buyya, Rajkumar, et al. “Market-Oriented Cloud Computing: Vision, Hype, and Reality for Delivering IT Services as Computing Utilities.” *10th IEEE International Conference on High Performance Computing and Communications (HPCC 2008)*, 5–13.

¹⁷ Mireille Hildebrandt, *Law for Computer Scientists and Other Folk* (Oxford: Oxford University Press, 2020), chapter 8 “Accountability and Automation.”

¹⁸ ENISA, *A Multilayer Framework for Good Cybersecurity Practices for AI* (Athens: European Union Agency for Cybersecurity, June 7 2023. Available at: <https://www.enisa.europa.eu/sites/default/files/publications/Multilayer%20Framework%20for%20Good%20Cybersecurity%20Practices%20for%20AI.pdf?utm>.

From a data protection perspective, intelligent infrastructure also transforms the nature of processing activities. Automated orchestration tools continuously analyze data to predict workload trends, potentially resulting in the incidental processing of personal or pseudonymized information during system optimization.¹⁹ This raises interpretive questions under the GDPR regarding the role of cloud providers as controllers or processors when such decisions are not directly instructed by the client.²⁰ The European Data Protection Board (EDPB) has repeatedly emphasized that determining controllership depends on *factual influence over processing*, yet in intelligent infrastructures, that influence is spread across multiple algorithmic and organizational layers.²¹ Beyond data protection, the AI-driven transformation of the cloud has implications for cybersecurity regulation under the NIS2 Directive and the EU Cybersecurity Act. Autonomous systems can boost resilience by detecting errors more rapidly than human operators, but they also create new vulnerabilities when adversarial attacks manipulate machine-learning models themselves.²² The principle of *security by design* explained in Article 21 of NIS2; thus requires explanation in the context of self-modifying infrastructures.

The integration of AI into cloud systems also reflects a broader shift toward what is called *cognitive infrastructure*, digital architectures have decision-making capacities that compete with traditional organizational governance.²³ But, this development raises essential questions about responsibility, whereas if an autonomous resource-allocation system causes a service outage or a security breach -for example-, is liability assigned to the provider who deployed it, the developer who trained the model, or the user whose data caused the decision?²⁴ The answer remains unclear under EU law, where accountability frameworks are still largely based on assumption of human supervision. Finally, intelligent infrastructure complicates contractual governance. Traditional Service Level Agreements (SLAs) specify performance metrics and fault responsibilities,

¹⁹ European Data Protection Board (EDPB), Guidelines 05/2020 on Consent under Regulation 2016/679 (2020), section 36. Available at: https://www.edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_en.pdf?utm_

²⁰ European Data Protection Board (EDPB), Guidelines 05/2020 on Consent under Regulation 2016/679 (2020), section 36. Available at: https://www.edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_en.pdf?utm_

²¹ Regulation (EU) 2016/679 (General Data Protection Regulation), Arts. 4(7) and 28.

²² EDPB, *Guidelines 07/2020 on the Concepts of Controller and Processor* (2021), section 13. Available at: https://www.edpb.europa.eu/system/files/en?file=2023-10%2FEDPB_guidelines_202007_controllerprocessor_final_en.pdf&utm_

²³ Luciano Floridi, "Establishing the Rules for the Digital Environment: Accountability and Transparency in AI Infrastructure," *Philosophy & Technology* 35, (2022)

²⁴ Thomas Schneider and Michael Veale, "Algorithmic Governance and the Allocation of Responsibility," *Law and Contemporary Problems* 84, (2021).

assuming predictable human control over the system. When AI algorithms continuously adjust configurations, Performance standards can change independently, making fixed contractual obligations insufficient.²⁵ Scholars have begun to argue that *adaptive contracts*, which evolve through automated monitoring and shared dashboards, may become necessary to ensure legal certainty in AI-driven cloud environments²⁶. Such mechanisms would align with the European Commission’s call for “trustworthy and human-centric AI” while acknowledging that responsibility in intelligent infrastructures must be distributed, auditable, and legally traceable.²⁷

AI integration would transform the cloud infrastructure from what could be described as a passive channel of digital services into an active participant in decision-making. While this evolution enhances efficiency and resilience, it simultaneously challenges legal frameworks that rely on human accountability. The next section, therefore, examines how the EU’s regulatory architecture, including the GDPR, NIS2 Directive, AI Act, and Cybersecurity Act, approaches accountability in the era of intelligent infrastructure.

3. The EU Regulatory Framework for AI and Cloud Accountability

The EU regulatory approach to digital technologies is characterized by a layered architecture of interrelated instruments that collectively govern data protection, cybersecurity, and artificial intelligence. Each of these legal instruments reflects distinct policy rationales, yet their interaction forms the foundation of accountability in intelligent infrastructures. The GDPR for instance, establishes the standard nature of accountability through principles of transparency, lawfulness, and responsibility in data processing.²⁸ While the NIS2 Directive complements this by imposing cybersecurity obligations on entities providing essential and important digital services, including cloud computing providers.²⁹ The Cybersecurity Act contributes to a European framework for certification and trust in digital products,³⁰ while the AI Act seeks to harmonize standards for AI systems according to their risk level.³¹ Together, these regulations constitute a

²⁵ European Commission, *Cloud Contracts and Service Level Agreements for Digital Europe*, 2020, section 2.

²⁶ Jörn Gräber, “Smart Contracts and Dynamic Cloud Services: Legal Perspectives,” *Computer Law & Security Review* 43, (2021).

²⁷ European Commission, *Ethics Guidelines for Trustworthy AI*, High-Level Expert Group on Artificial Intelligence (2019). Available at: <https://www.enisa.europa.eu/publications/securing-machine-learning-algorithms?utm>.

²⁸ Regulation (EU) 2016/679 (General Data Protection Regulation) [2016] OJ L 119/1, Art. 5.

²⁹ Directive (EU) 2022/2555 (NIS2 Directive) [2022] OJ L 333/80.

³⁰ Regulation (EU) 2019/881 (Cybersecurity Act) [2019] OJ L 151/15, Art. 46.

³¹ European Commission, “*AI Act | Shaping Europe’s digital future*,” Brussels: European Union, 2024. Available at: <https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-ai?utm>.

regulatory framework that seeks to operationalize accountability in a technologically complicated multi-layer environment.

Under the GDPR, accountability is both a principle and a duty. Article 5/2 expressly provides that controllers are responsible for compliance and must be able to demonstrate it.³² This dual aspect *responsibility* and *demonstrability* is central to the governance of intelligent infrastructure, where automated processing decisions may occur without human awareness.³³ The GDPR thus requires that entities deploying AI-enabled cloud services maintain records of processing activities, implement data protection by design and by default (Article 25), and ensure transparency in automated decision-making (Articles 13–15 and 22).³⁴ Yet the regulation suggests that the controller possesses meaningful knowledge of and control over the processing operations. In AI-driven infrastructures, this assumption differs since algorithmic decision-making within the infrastructure may be ambiguous even to the CSPs.³⁵

The European Data Protection Board (EDPB) has clarified that the determination of controllership must rest on the *factual influence* exercised over processing rather than on contractual formalities.³⁶ However, in intelligent infrastructures, that influence is distributed: AI modules developed by one actor may trigger decisions affecting data controlled by another, mediated by a CSP. The GDPR's double distinction between controller and processor, therefore, becomes difficult to afford in the context of distributed AI–cloud ecosystems.³⁷ Scholars have suggested that the model of *joint controllership*, recognized by the Court of Justice of the European Union (CJEU) in *-Wirtschaftsakademie Schleswig-Holstein* and *Fashion ID-* cases, might better capture this shared accountability.³⁸ Yet even joint controllership presumes identifiable human decision-making and may fall in where AI operates autonomously.

Cybersecurity regulation under the NIS2 Directive reinforces accountability through obligations of risk management and incident reporting. The Directive applies to CSPs as entities of high criticality, requiring them to adopt technical and organizational measures equal with the risk level of their services.³⁹ Article

³² GDPR, Art. 5(2).

³³ Christopher Kuner, Lee Bygrave, and Christopher Docksey, eds., *The EU General Data Protection Regulation (GDPR): A Commentary* (Oxford: Oxford University Press, 2020).

³⁴ GDPR, Arts. 13–15, 22, and 25.

³⁵ Mireille Hildebrandt, *Law for Computer Scientists and Other Folk* (Oxford: Oxford University Press, 2020), chapter 8 “Accountability and Automation.”

³⁶ European Data Protection Board (EDPB), *Guidelines 07/2020 on the Concepts of Controller and Processor* (2020), section 13. Available at: https://www.edpb.europa.eu/system/files/en?file=2023-10%2FEDPB_guidelines_202007_controllerprocessor_final_en.pdf&utm.

³⁷ Orla Lynskey, “Distributing Responsibility: Data Controllers in EU Data Protection Law,” *Common Market Law Review* 50 (2013).

³⁸ Case C-210/16 *Wirtschaftsakademie Schleswig-Holstein GmbH v. ULD* [2018] ECLI:EU:C: 2018:388; Case C-40/17 *Fashion ID GmbH & Co. KG v. Verbraucherzentrale NRW eV* [2019] ECLI:EU:C: 2019:629.

³⁹ NIS2 Directive, Art. 21(1).

21 of it mandates the implementation of “appropriate and proportionate” security measures, including policies on risk analysis, supply-chain security, and vulnerability management.⁴⁰ These duties align with the principle of *security by design*, yet they raise practical difficulties when AI components autonomously modify system configurations. The Directive’s emphasis on human oversight may not easily translate into environments governed by self-learning algorithms, which can alter network behaviors without operator intervention.⁴¹

The EU Cybersecurity Act complements NIS2 by establishing the European Cybersecurity Certification Framework, under which cloud and AI services may obtain voluntary certification for compliance with defined assurance levels.⁴² The framework aims to strengthen trust and accountability through standardization and transparency. ENISA, acting as the central authority, has proposed certification schemes for cloud services (EUCS) and for AI systems, emphasizing continuous monitoring, risk documentation, and post-market surveillance.⁴³ In principle, these mechanisms could support accountability in intelligent infrastructures by providing auditable assurance trials. However, their voluntary nature and the absence of harmonized criteria for AI–cloud integration limit their effectiveness.

The AI Act introduces a risk-based model of governance that explicitly addresses accountability, albeit primarily for autonomous AI systems rather than established infrastructure. It categorizes AI systems into unacceptable, high, and limited risk, imposing the most firm obligations on high-risk systems.⁴⁴ These include requirements of technical documentation, human supervision, accuracy, and cybersecurity (Articles 9–15).⁴⁵ Cloud infrastructure hosting AI services may itself be classified as *high-risk* when it supports critical digital functions, though the distinction between provider and deployer remains ambiguous.⁴⁶ Recital 60 of the AI Act acknowledges that responsibility should rest with the entity exercising control over the AI system’s operation, but in cloud contexts, control is shared across multiple contractual and technical layers.⁴⁷ This diffusion of responsibility agency challenges the AI Act’s conception of accountability. Importantly, the AI Act interacts with the GDPR and NIS2 requiring careful coordination. Both the European Parliament and the Council have emphasized that the AI Act must be applied -without prejudice- to the GDPR’s data protection

⁴⁰ Ibid., Art. 21(2).

⁴¹ ENISA, *Artificial Intelligence Threat Landscape* (2022), section 5. Available at: <https://www.enisa.europa.eu/publications/enisa-threat-landscape-2022?utm>.

⁴² Cybersecurity Act, Arts. 46–49

⁴³ ENISA, *Cybersecurity of AI and Standardisation* (Athens: ENISA, 7 June 2023). Available at: <https://www.enisa.europa.eu/publications/cybersecurity-of-ai-and-standardisation?utm>.

⁴⁴ AI Act, Arts. 6–9.

⁴⁵ Ibid., Arts. 9–15

⁴⁶ Baker Donelson, “Who’s Who under the EU AI Act: Spotlight on Key Actors,” Baker Donelson Insights (2024). Available at: <https://www.bakerdonelson.com/whos-who-under-the-eu-ai-act-spotlight-on-key-actors?utm>.

⁴⁷ Baker Donelson, “Who’s Who under the EU AI Act: Spotlight on Key Actors,”.

regime and the sectoral obligations of NIS2.⁴⁸ Nevertheless, overlaps are there. For instance, the AI Act's requirement for data quality and bias mitigation overlaps with the GDPR's fairness principle, while its cybersecurity provisions are similar to those in NIS2.⁴⁹ Without explicit cross-references or guidance, operators of intelligent infrastructures may face conflicting or duplicative compliance duties.

Beyond these core instruments, several EU policy initiatives reinforce the accountability framework. The *European Data Strategy* (2020) and *Digital Decade Policy Programme* (2022) indicate the vision of a -trusted and human-centric digital environment- based on transparency, traceability, and interoperability⁵⁰. The forthcoming *European Cloud Rulebook* aims to harmonize contractual and technical standards for cloud providers, further embedding accountability within service governance.⁵¹ ENISA's guidelines on AI security complement these efforts by recommending continuous risk assessments, explainability tools, and auditable logging mechanisms for AI components in cloud environments.

The EU's legal landscape on AI and cloud accountability is comprehensive yet fragmented. The GDPR maintains the principle of accountability in data processing, the NIS2 Directive and Cybersecurity Act extend it to system resilience and certification, and the AI Act introduces risk-based oversight for AI systems. What remains unresolved is the integration of these frameworks into a coherent model capable of governing *intelligent infrastructure* systems in which accountability must overpass algorithmic, contractual, and regulatory boundaries.

4. Legal Challenges of Accountability in Intelligent Infrastructure

The introduction of AI into cloud infrastructure exposes deep gaps in the legal concept of accountability. While in the traditional doctrines of liability are predicated on identifiable actors – natural or legal persons whose decisions can be traced, evaluated, and sanctioned, in intelligent infrastructures, however, much of the decision-making process occurs autonomously, arranged by algorithms

⁴⁸ Council of the European Union, *General Approach on the Artificial Intelligence Act*, 6 December 2022, section 5.

⁴⁹ European Data Protection Board (EDPB) and European Data Protection Supervisor (EDPS), *Joint Opinion 5/2021 on the Proposal for a Regulation on Artificial Intelligence (Artificial Intelligence Act)* (Brussels, 18 June 2021), available at: https://www.edps.europa.eu/system/files/2021-06/2021-06-18-edpb-edps_joint_opinion_ai_regulation_en.pdf?utm_

⁵⁰ European Commission, *Digital Decade Policy Programme 2030* (Brussels: Decision (EU) 2022/2481, 14 December 2022). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX%3A32022D2481&utm_

⁵¹ European Commission, "Cloud computing | Shaping Europe's digital future. Available at: https://digital-strategy.ec.europa.eu/en/policies/cloud-computing?utm_

that evolve through continuous learning.⁵² This creates a structural asymmetry in the legal responsibility.

The first and most fundamental challenge concerns the **Assignment of responsibility**. Under EU law, accountability typically follows control: the entity that determines the purposes and means of processing -under the GDPR- or the operator of an important service under NIS2 is considered responsible for compliance.⁵³ Yet intelligent infrastructures challenge these dual roles. Decision-making power is distributed across multiple layers, AI model developers, CSPs, and customers, all contributing to a system whose behavior emerges from the interaction of numerous subsystems.⁵⁴ When an AI-optimized resource allocator unintentionally deprioritizes in important data set, leading to a service outage, determining the liable party becomes nearly impossible.⁵⁵ This dispersion arises in the opacity of AI systems, and machine learning models that are rooted within infrastructure layers of the intelligent infrastructure, such as anomaly detection or predictive scaling operate through statistical connections that are often non-interpretable even to their creators.⁵⁶ The GDPR's transparency obligations (Articles 5 and 13–15) entail the existence of human understandable explanations for processing activities, yet this assumption collapses in the face of algorithmic opacity.⁵⁷ Similarly, the AI Act's provisions on documentation and human oversight require that systems be (sufficiently transparent to enable users to interpret their output),⁵⁸ a standard difficult to satisfy when the user is itself another automated process within a cloud platform.⁵⁹ The lack of interpretability thus creates a practical space, and then responsibility cannot be meaningfully exercised when the underlying decisions cannot be reconstructed or explained.⁶⁰ The **contractual structure** such as Service Level Agreements (SLAs) and Data Processing Agreements (DPAs) define roles, responsibilities, and liability caps between CSPs and cloud customers, but these instruments were designed for what

⁵² Luciano Floridi, "Establishing the Rules for the Digital Environment: Accountability and Transparency in AI Infrastructure," *Philosophy & Technology* 35, (2022).

⁵³ GDPR, Art. 4(7); NIS2 Directive, Art. 21.

⁵⁴ Christopher Millard, ed., *Cloud Computing Law*, 2nd ed. (Oxford: Oxford University Press, 2021), ch. 3 "Control and Responsibility in Cloud Service Provision.

⁵⁵ Jörn Gräber, "Smart Contracts and Dynamic Cloud Services: Legal Perspectives," *Computer Law & Security Review* 43, (2021).

⁵⁶ Sandra Wachter, Brent Mittelstadt, and Luciano Floridi, "Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation," *International Data Privacy Law* 7, no. 2 (2017).

⁵⁷ GDPR, Arts. 5 and 13–15.

⁵⁸ AI Act, Art. 13.

⁵⁹ European Commission, *Impact Assessment Accompanying the Proposal for the AI Act*, SWD(2021) 84 final, section 4.3. available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021SC0084>.

⁶⁰ ENISA, *Artificial Intelligence Threat Landscape* (2022), section 5. Available at: <https://www.enisa.europa.eu/publications/enisa-threat-landscape-2022?utm>.

are called “deterministic systems”.⁶¹ Where the performance metrics, fault conditions, and data flows are predictable and controllable by human operators. On the other hand, intelligent infrastructure, by contrast, could be described as “probabilistic and adaptive”. Its performance parameters shift dynamically based on data-driven learning processes.⁶² Consequently, a provider may find itself technically compliant with an SLA’s uptime guarantee even as the AI subsystem has autonomously reallocated resources causing data loss or service regression.⁶³ Thus, the contractual notion of breach becomes unclear when neither party can conclusively attribute the reason that caused damage.

The difficulty of attributing responsibility also undermines **risk allocation mechanisms**. Where classical contract law relies on foreseeability as parties allocate risks that they can identify and assess. Contrary to that, in intelligent infrastructures, many risks arise emergently discovered only after deployment, when AI systems interact in unanticipated ways.⁶⁴ Attempts to predefine liability through indemnities or warranties thus fail, as no party can fully predict the behavior of a self-learning system. The European Commission’s proposal for an *AI Liability Directive* acknowledges this difficulty by introducing a rebuttable presumption of the cause for claimants harmed by AI systems, effectively shifting the burden of proof.⁶⁵ Yet its scope remains limited to independent AI applications, not rooted in infrastructural systems.

The **allocation of accountability** is further complicated by the multi-jurisdictional nature of the cloud operations. Data and computational processes often navigate multiple EU and non-EU territories, invoking the extraterritorial reach of the GDPR (Article 3) and conflicting national cybersecurity requirements.⁶⁶ When an AI-based system autonomously transfers workloads between data centers in different jurisdictions, questions of applicable law and supervisory competence arise.⁶⁷ The European Data Protection Board has cautioned that effective enforcement in cloud ecosystems requires cross-border

⁶¹ Christopher Millard, ed., *Cloud Computing Law* (Oxford: Oxford University Press, 2021).

⁶² Angelis, A., et al. “An Overview on the Landscape of Self-Adaptive Cloud Computing: Patterns, Mechanisms and Challenges.” *Future Internet* 17, no. 10 (2025). Available at: <https://www.mdpi.com/1999-5903/17/10/434>.

⁶³ European Union Agency for Cybersecurity (ENISA), *Securing Machine Learning Algorithms* (Athens: ENISA, December 2021), <https://www.enisa.europa.eu/publications/securing-machine-learning-algorithms>.

⁶⁴ European Commission, *Impact Assessment Accompanying the Proposal for a Regulation on Artificial Intelligence (Artificial Intelligence Act)*, SWD (2021) 84 final, April 21 2021, p. 32–33. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021SC0084>.

⁶⁵ Proposal for a Directive on Adapting Non-Contractual Civil Liability Rules to Artificial Intelligence (AI Liability Directive), COM (2022) 496 final, Arts. 3–4. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0496>.

⁶⁶ GDPR, Art. 3.

⁶⁷ Ahmed Omar Youssef, “The Law Applicable to Cloud Computing,” *Arab Law Quarterly* 36, no. 4 (2022): 371–394.

cooperation mechanisms capable of addressing “functional fragmentation.”⁶⁸ However, existing enforcement structures remain oriented toward identifiable controllers and processors, not autonomous decision chains.

The **ethical side** of legal accountability also remains unresolved. The EU’s policy, as explained in the *Ethics Guidelines for Trustworthy AI*, promotes principles of human oversight, fairness, and explainability.⁶⁹ However, these principles are formulated at a level of abstraction that offers limited guidance for technical implementation in cloud systems. ENISA and the High-Level Expert Group on AI have both acknowledged that operationalizing these principles requires integrating accountability features into the design of cloud architectures, such as auditable logs, traceability modules, and algorithmic impact assessments.⁷⁰ While these mechanisms can support transparency, they depend on voluntary adoption and lack uniform legal enforceability.

Finally, the challenge of accountability in intelligent infrastructures reveals a deeper conceptual uncertainty within EU law between individual and systemic responsibility. Traditional liability regimes are based on actual actors seeking to identify a responsible subject and assign responsibility. Intelligent infrastructures, by contrast, function as *socio-technical assemblages* where responsibilities are distributed among algorithms, engineers, operators, and regulatory standards.⁷¹ Addressing accountability in such systems may therefore require shifting from a model of individual fault to one of *shared and procedural accountability*, emphasizing documentation, auditability, and governance.⁷² This shift aligns with emerging scholarship advocating for “networked accountability” in digital ecosystems where responsibility is reconstructed as a continuous process embedded in organizational and technical practices.⁷³

In the end, the legal challenges surrounding accountability in intelligent infrastructures expose the inadequacy of current regulatory and contractual frameworks. Attribution of responsibility is hindered by technological opacity, risk allocation failures in complicated environments, and systemic vulnerabilities that override individual liability. To reconcile technological autonomy with normative responsibility, EU law must evolve toward hybrid frameworks that integrate compliance-by-design, dynamic contracts, and continuous monitoring obligations bridging the gap between legal theory and the realities of intelligent infrastructure.

⁶⁸ EDPB, *Guidelines 07/2020 on the Concepts of Controller and Processor* (2020), section 26. Available at: https://www.edpb.europa.eu/system/files/en?file=2023-10%2FEDPB_guidelines_202007_controllerprocessor_final_en.pdf&utm.

⁶⁹ European Commission, *Ethics Guidelines for Trustworthy AI*, High-Level Expert Group on Artificial Intelligence (2019). Available at: <https://op.europa.eu/en/publication-detail/-/publication/d3988569-0434-11ea-8c1f-01aa75ed71a1/language-en?utm>.

⁷⁰ ENISA, *AI Threat Landscape* (2022), section 6. Available at: <https://www.enisa.europa.eu/publications/enisa-threat-landscape-2022?utm>.

⁷¹ Ahmed Omar Youssef, “The Law Applicable to Cloud Computing”.

⁷² Ahmed Omar Youssef, “The Law Applicable to Cloud Computing”.

⁷³ Thomas Schneider and Michael Veale, “Algorithmic Governance and the Allocation of Responsibility,” *Law and Contemporary Problems* 84 (2021).

5. Conclusion

This article contributes to the growing body of scholarship addressing accountability within AI-enabled cloud infrastructures by highlighting the structural tensions that emerge at the intersection of EU digital regulatory regimes. While it is accurate that the overlap between instruments such as the GDPR, the NIS2 Directive, the Cybersecurity Act, and the AI Act reveals both normative convergence and enforcement gaps, these challenges also point toward concrete avenues for regulatory and contractual improvement.

First, a recurring enforcement gap arises in the allocation of responsibility between cloud service providers and AI deployers in complex service chains. For example, in AI-driven cloud environments where automated resource allocation or security monitoring systems are embedded at the infrastructure layer, it remains unclear whether accountability for systemic failures should rest primarily with the cloud provider as infrastructure operator or with the AI developer as system controller. Addressing this ambiguity requires clearer guidance, either through regulatory interpretation or soft-law instruments on how shared controllership and joint responsibility should be assessed in AI-enabled cloud services.

Second, contractual mechanisms can be strengthened to operationalize regulatory obligations more effectively. Cloud service agreements and data processing agreements could incorporate dynamic compliance clauses, such as real-time audit rights, continuous risk assessment obligations, and automated incident-reporting triggers aligned with NIS2 obligations. Such clauses would move cloud contracts beyond static risk allocation toward adaptive governance instruments capable of responding to the evolving behavior of AI systems.

Third, certification and conformity assessment mechanisms under the Cybersecurity Act and the AI Act could be more closely aligned. For instance, EU-wide cybersecurity certification schemes for cloud services could be explicitly linked to AI risk classifications, allowing certified cloud infrastructures to serve as presumptive evidence of compliance for certain categories of high-risk AI systems. This would reduce regulatory fragmentation while incentivizing providers to embed security and accountability measures at the design stage.

Finally, regulators and supervisory authorities may benefit from enhanced coordination mechanisms, particularly where overlapping obligations trigger parallel enforcement under different legal regimes. Joint supervisory guidance or interoperable reporting frameworks could mitigate duplication and improve legal certainty for market actors operating across multiple compliance domains.

By grounding accountability in concrete technical, contractual, and institutional practices, the EU can move toward a more coherent governance model for intelligent cloud infrastructure, one that preserves innovation while ensuring transparency, resilience, and trust.

Predictive Policing: Recent Developments in Law, Criminology, and Technology

KISFONAI, BERNADETT*

ABSTRACT *Predictive policing uses data-driven tools and algorithms to anticipate crime risks and help police allocate resources more effectively. Although recent advances in artificial intelligence have made these systems more sophisticated, growing research highlights important legal and ethical concerns. Models built on historical arrest data can unintentionally reproduce existing biases, creating feedback loops that disproportionately impact marginalized communities. These risks have intensified calls for greater transparency, accountability, and stronger legal safeguards. International responses differ widely. Several U.S. cities have already banned or restricted predictive policing due to civil rights concerns, while the European Union's AI Act classifies such systems as "high-risk" and prohibits certain individual-level crime prediction models. Scholars increasingly stress the need to balance technological innovation with robust protections. Current research focuses on developing responsible frameworks – such as bias audits, human oversight, explainability, and community involvement – to ensure that predictive policing can enhance public safety without compromising fundamental rights.*

KEYWORDS *predictive policing, algorithmic crime forecasting, machine learning, civil rights, data protection (GDPR).*

1. Introduction

The use of data analytics is becoming increasingly popular, whether for predicting market conditions or industry trends or developing sales strategies. Police around the world can use data analytics to make their work more effective. The new direction is called “algorithmic crime forecasting,” and it is already believed in many areas that it can transform law enforcement by enabling police to anticipate and prevent crimes, rather than simply react to them afterwards. In November 2009, the National Institute of Justice, in partnership with the Office of Justice Programs (OJP) and the Los Angeles Police Department, held the Predictive Policing Symposium to discuss this emerging idea and its implications for the future of policing. Researchers, law enforcement officers, crime analysts,

* PhD student, University of Pécs, Faculty of Law, Doctoral School of Law.

and academics gathered in Los Angeles for three days to examine the policy implications, privacy issues, and technology of data-driven policing.

Predictive methods use data-driven analytics and algorithms to predict crime risk, allowing police to allocate resources more effectively. Over the past two decades, this approach has become a defining topic in police science internationally. Today, the development of artificial intelligence (AI) and machine learning has given new impetus to predictive models. Police Big Data analysis is becoming increasingly sophisticated, and many police departments – especially in the United States – have already used such algorithms to predict crimes, potential perpetrators, or even victims. In 2022, researchers at the University of Chicago presented a machine learning model that predicted crime in certain areas of the city a week in advance with about 90% accuracy.¹ In practice, most predictive systems analyze past crime patterns, with one of the best-known such software, namely PredPol, which was introduced in 2013 and maps out future crime hotspots and their expected timing. Similar predictive tools have been tested in several major US cities to support patrol planning. Predictive algorithms have also appeared in criminal justice: for example, in the US, the Public Safety Assessment (PSA) and COMPAS systems help judges by assigning a risk score of detainees based on a database of previous cases, on the ground of the likelihood of recidivism.

This study examines the development, legal framework, and ethical implications of predictive policing, highlighting international trends and their relevance to Hungary. In addition, the study seeks to assess the current Hungarian legal framework and identify potential areas for regulatory improvement. Moreover, the study applies a comparative legal and criminological approach, relying on international literature and EU legal documents.

2. The evolution of intelligence-led policing in the era of Big Data

Until the end of the 20th century, policing was typically reactive, meaning that crimes were responded to afterwards, and the focus of law enforcement was on investigating incidents that had already occurred. Starting in the 1990s, a turning point occurred with the emergence of the so-called intelligence-led policing (ILP).² The essence of ILP is that law enforcement agencies increasingly base their decisions on data analysis and intelligence information. A pioneering example of this is the “Kent model” applied in the county of Kent in England, where the police began to prioritize certain data signals (priority policing) in response to the increase in property crimes.³

¹ V. Rotaru et al., “Event-Level Prediction of Urban Crime Reveals a Signature of Enforcement Bias in U.S. Cities,” *Nature Human Behaviour* 6, no. 8 (2022): 1056–68, <https://doi.org/10.1038/s41562-022-01371-3>.

² Ferenc Szendrei, “Az Európai Bűnügyi Hírszerzési Modell,” *Rendőrségi Tanulmányok* 5, no. 1 (2022): 301.

³ Csaba Csapó, “A korszerű rendőrség alapjai,” *Pécsi Határőr Tudományos Közlemények* 10 (2009): 48.

The method allowed the police to focus on the most active criminal groups, which resulted in a significant reduction in the number of crimes and enabled more efficient use of resources.⁴ According to Jerry Ratcliffe's famous summary,⁵ the ILP strategy is based on four pillars: the police focus on repeat or active criminals, identify hot spot areas, connect extraordinary events based on information (recognizing crime patterns), and take the necessary crime prevention measures.⁶ The concept of ILP became particularly prominent after the terrorist attacks of September 11, 2001, as it highlighted the importance of better data sharing and analysis in the fight against terrorism.⁷ The European Union has also recognized the importance of this method, and subsequent EU security strategies emphasized improving access to cross-border police information or law enforcement authorities. While intelligence-led policing marked the first step towards proactive law enforcement, the rise of Big Data has taken this concept to a new, algorithm-driven level.

Entering the 21st century, digitalization and the era of Big Data have brought another change in the approach to law enforcement. Modern IT systems and the ever-increasing amount of data (e.g. criminal databases, surveillance camera footage, social media content) have made it possible for the police to operate in a far more data-centric manner.⁸ According to the literature, information collection and analysis are becoming a fundamental element of police work in maintaining future security, and the goal of proactive, intelligence-led policing is to seek the answer to the question "what will happen?" instead of the "what happened?" approach. This paradigm shift is embodied by the concept of data-driven policing, which builds on the crime statistics and analysis techniques of previous decades, but at the same time expands them, and attempts to predict future crimes.⁹ The essence of predictive policing is that it uses data from past crimes – primarily spatial and temporal patterns – to predict where and when new crimes may occur, thus enabling preventive police measures.¹⁰ The first such systems appeared in the USA in the late 1990s and proved to be partially successful in reducing crime. However, data protection and ethical concerns also arose at that time – for example, publicly available interactive crime maps may have contributed to the stigmatization of certain disadvantaged urban areas. The

⁴ Csapó, "A korszerű rendőrség alapjai," 48.

⁵ Jerry H. Ratcliffe, *Intelligence-Led Policing*. (Cullompton: Willan Publishing, 2008), 24–58.

⁶ Stephen L. Mallory, *The Concept of Asymmetrical Policing*, Working Paper Series No. 12 (Geneva: DCAF, 2007), accessed October 26, 2025, https://www.dcaf.ch/sites/default/files/publications/documents/WPS_No12_new.pdf.

⁷ Szendrei, "Az Európai Bűnügyi Hírszerzési Modell," 301.

⁸ Dorottya Lang-Fuksa, "Opportunities for Improving Road Safety," in *Collection of Papers: Law Between Protection and Abuse*, ed. Dimitrije Čeranić, Svjetlana, Ivanović, Đorđe Marilović, Radislav Lale, Samir Aličić (Faculty of Law, University of East Sarajevo, 2025), 358–73.

⁹ Attila Suhajda, "Néhány gondolat a prediktív rendészetről," *Rendőrségi Tanulmányok* 2, no. 3 (2019): 75–85.

¹⁰ Suhajda, "Néhány gondolat a prediktív rendészetről," 76.

challenge of the Big Data era is that the use of vast amounts of data leads to the creation of data-driven decision support systems, which, in addition to their effectiveness, also carry new hazards (e.g. erroneous conclusions, discriminatory profiling).¹¹

2. 1 Machine learning algorithms and data types in predictive systems

The operation of algorithmic crime forecasting systems is closely linked to modern machine-learning models, which are able to learn patterns from large amounts of historical data and indicate future risks. Machine learning is a subfield of artificial intelligence and allows a program to independently process data and learn from it. We distinguish three main learning paradigms: supervised learning, unsupervised learning and reinforcement. Supervised learning relies on labelled datasets, unsupervised detects hidden structures, while reinforcement learning optimizes actions based on feedback.

The types of data used by predictive systems are extremely diverse, as the more relevant information they integrate, the more accurate the predictions can be. Initially, the analyses relied mainly on historical crime statistics and the associated location-time data.¹² However, today many other data sources are also included.

Information related to the location (address, coordinates) and time (time, date, time of day) of each crime is essential. Hot spot maps and time series trends can be generated using GIS software. The temporal patterns of time series data (seasonal, holiday crime waves) can be analyzed using ARIMA and GARCH models to identify trends and seasonal effects.¹³

Predictive models often incorporate socioeconomic characteristics (population density, unemployment, income levels), infrastructural features (lighting, transport hubs), and contextual factors (weather, traffic). The data can help understand why a given area becomes risky. GIS-based analyses can combine geographic layers, showing that crime is more concentrated around certain urban spaces (undergrounds, parks).

More advanced predictive systems – individual risk-assessment models – also incorporate data about individuals. Such data can include previous arrests and convictions, criminal connections (known gang members), the person’s age, gender, and possible mental health problems. In the USA and some European countries (United Kingdom, Switzerland), there were programs that used person-based prediction, in addition, the Chicago Police Department’s “heat list” program compiled a list of several hundred people who, based on available data, could be suspected of being perpetrators or victims of gun violence in the near future.¹⁴

¹¹ János Sallai, “Bűnözésföldrajz: a rendőrség szolgálatába állított tudomány,” *Belügyi Szemle* 62, no. 9 (2014): 95–107.

¹² Suhajda, “Néhány gondolat a prediktív rendészetről,” 76.

¹³ Peter J. Brockwell and Richard A. Davis, *Introduction to Time Series and Forecasting* (Springer, 2016), 23–35.

¹⁴ Tim Lau, *Predictive Policing Explained*, Brennan Center for Justice (2020), <https://www.brennancenter.org/our-work/research-reports/predictive-policingexplained>.

In these cases, the types of data used have extended to personal identifiers and contact networks, which in turn raises serious data protection issues. In Europe, a more cautious approach is typical: for example, in some states in Germany, predictive software only uses anonymized, aggregated criminal data and focuses more on spatio-temporal patterns.¹⁵ It is important to emphasize that the accuracy and reliability of data are crucial, as incorrect, incomplete or distorted data can lead to misleading predictions. Therefore, the integration and cleaning of police databases, as well as the continuous monitoring of data quality, are essential parts of the technological background of predictive systems.

2. 2 Types of predictive models and application examples

There are several models in the field of data-driven policing, depending on the type of prediction we want to make. We generally distinguish three main groups: area-based, event-based and person-based models.¹⁶ The approaches seek to answer different questions. Area-based models try to predict where and when a crime is likely to occur. Event-based models examine what type of event is likely to occur at a given location or time. Finally, person-based models focus on who the perpetrator or even the victim might be.¹⁷ These three models therefore approach crime prevention from different perspectives, but their common feature is that they support police decision-making by building on data, statistics and patterns. In the following section, we briefly review the characteristics and practical examples of these types.

Model Type	Main Question	Key Features	Practical Example
Territorial (Location-Based)	Where and when is crime likely to happen?	Uses geographic and time-based data to find “hot spots” of criminal activity.	PredPol (Geolitica) – predicts burglary risk zones based on previous incidents.
Event-Based	What kind of crime might occur?	Focuses on predicting the type or pattern of incidents in a specific context or location.	Models combining crime type data with human mobility flows (e.g., events, weekends).
Person-Based	Who might be involved in a crime — as offender or victim?	Analyzes social networks, past records, or risk factors to identify individuals at higher risk.	Chicago’s “Strategic Subject List” (SSL) program.

Main Types of Predictive Policing Models (Source: Author’s own editing)

¹⁵ Suhajda, “Néhány gondolat a prediktív rendészetről,” 77.

¹⁶ Ourania Kounadi et al., “A Systematic Review on Spatial Crime Forecasting,” *Crime Science* 9, no. 1 (2020): Article 7, <https://doi.org/10.1186/s40163-020-00118-7>.

¹⁷ Grant Drawve, Steven C. Moak, and Everritt R. Berthelot, “Predictability of Gun Crimes: A Comparison of Hot Spot and Risk Terrain Modelling Techniques,” *Policing & Society* 26, no. 3 (2016): 312–331., <https://doi.org/10.1080/10439463.2014.942851>.

3. The legal regulatory environment of Predictive Policing

When applying predictive policing, it is essential to take into account a number of fundamental rights and constitutional principles. Human dignity is an inviolable value that all state measures, including algorithmic crime forecasting, must respect. Article II of the Fundamental Law explicitly states: “Human dignity is inviolable.”¹⁸ The collection and analysis of data for the purpose of crime prevention directly affects the area of privacy and data protection, which must be protected with particular emphasis. Article VI (1) of the Fundamental Law guarantees respect for private and family life,¹⁹ home and communications, while Article VI (3) states that everyone has the right to the protection of their personal data.²⁰

Everyone must be presumed innocent until proven guilty by a final court judgment.²¹ The principle – enshrined in Article XXVIII (2) of the Fundamental Law and Charter of Fundamental Rights of the European Union, Article 48. – sets a limit on treating anyone as a suspect or subjecting them to adverse measures solely on the basis of an algorithmic prediction. Predictive models cannot serve as a basis for criminal liability in themselves. In addition, the European Parliament has also stressed that such predictions are unreliable with regard to individual behavior and therefore cannot form the sole basis for police intervention.²² In practice, this requires that someone cannot be automatically treated as a criminal based on a prediction, meaning that further human consideration and concrete evidence are always needed.

The prohibition of discrimination (equal treatment) is also a sensitive part of the proper application of data-driven policing algorithms. Neither Article XV. (1)-(2) of the Hungarian Fundamental Law nor Article 21 of the EU Charter of Fundamental Rights allow discrimination, in particular, on the basis of characteristics such as race, colour, ethnic origin, gender, religion or political opinion.²³ However, predictive policing analytical tools can easily reproduce existing biases and biases by following patterns in historical data. If a system disproportionately identifies certain areas or groups as high-risk based on historical crime data, it can lead to indirect discrimination against the groups concerned.²⁴ Therefore, when using predictive models based on profiling, it is

¹⁸ *Fundamental Law of Hungary*, April 25, 2011, Article II.

¹⁹ *Charter of Fundamental Rights of the European Union*, 2007/C 303/01.

²⁰ Litska Strikwerda, “Predictive Policing: The Risks Associated with Risk Assessment,” *The Police Journal* 94, no. 3 (2021): 422–436., <https://doi.org/10.1177/0032258X20982120>.

²¹ *Charter of Fundamental Rights of the European Union*, 2007/C 303/01.

²² European Parliament. *Artificial Intelligence in Criminal Law and Its Use by Police and Judicial Authorities in Criminal Matters*. Resolution of October 6, 2021. 2020/2016(INI). 2022/C 132/02., https://www.europarl.europa.eu/doceo/document/A-9-2021-0232_HU.html.

²³ *Charter of Fundamental Rights of the European Union*, 2007/C 303/01. Article 21 Prohibition of discrimination.

²⁴ European Parliament, *Artificial Intelligence in Criminal Law*.

necessary to ensure that the algorithm does not result in discriminatory practices on racial, ethnic or other grounds. The principles of legal certainty, necessity and proportionality must be given special attention, although the principle of the rule of law requires that state interventions be predictable and foreseeable, based on legal authorisation and must not restrict rights more than strictly necessary. According to Article B) (1) of the Fundamental Law, Hungary is a state governed by the rule of law. This includes the requirement of legal certainty. This requirement is also reflected in the EU Charter of Fundamental Rights: Article 52 (1) states that the exercise of fundamental rights may be restricted only by law, respecting the essence of the rights, in accordance with the principle of proportionality, and only in cases where necessary and genuinely justified.²⁵ From a fundamental rights perspective, the use of algorithmic crime forecasting must therefore remain within a clear legal framework and may only be permitted if it is absolutely necessary to protect public safety and is not excessive in relation to the aim. The use of secret or opaque algorithms – based on which citizens are in advance unaware on what basis they may come under the police’s attention – could undermine legal certainty.

The National Authority for Data Protection and Freedom of Information (NAIH) is responsible for monitoring the enforcement of constitutional law.²⁶ At EU level, Article 7 of the EU Charter of Fundamental Rights enshrines the right to respect for private life and Article 8 specifically enshrines the right to the protection of personal data, requiring fair processing, purpose limitation, the right of access and rectification of the data subject and the existence of an independent supervisory authority. Predictive policing typically uses large amounts of personally identifiable data and therefore constitutes data processing to which the laws on the protection of personal data are strictly applicable. The principles of the GDPR (General Data Protection Regulation) – such as purpose limitation, data minimisation, data quality and integrity, and accountability – are also mandatory for predictive analytics. In addition, Article 22 of the GDPR prohibits decisions based solely on automated processing from having a significant impact on the data subject, unless authorised by law and subject to appropriate safeguards. These requirements also appear in Hungarian law: pursuant to Section 6 of Act CXII of 2011 on the Right to Informational Self-Determination (Act CXII of 2011), a decision made exclusively by automated means – in particular by means of profiling – that adversely or significantly affects the data subject, may only be made if it is expressly permitted by law or EU law and at the same time ensures the protection of the data subject's rights (such as compliance with the requirement of equal treatment, the availability of information about the methods applied and the possibility of human review).²⁷ Therefore, from a data protection perspective, predictive policing systems can only operate within strict frameworks, requiring an appropriate legal basis and

²⁵ *Charter of Fundamental Rights of the European Union*, 2007/C 303/01.

²⁶ *Fundamental Law of Hungary*, Article VI (4).

²⁷ Hungary, *Act CXII of 2011 on the Right to Informational Self-Determination and Freedom of Information*.

purpose-specific data storage and use, based on the principle of minimum data requirements. Since such systems may often handle sensitive data for public security purposes, it is of utmost importance to protect this data and to ensure that special categories of data can only be used exceptionally, with legal permission and with guarantees.²⁸

3. 1 Hungarian regulatory situation and challenges

In Hungary, there is currently no separate, explicit legal provision for the application of data-driven policing, the area is delimited by more general legislation and the framework of data processing standards applicable to the police. On the one hand, the constitutional foundations of police activity are laid down by the Fundamental Law itself, and the previously mentioned fundamental rights (human dignity, privacy, equal treatment, fair trial, data protection) constitute binding guidelines for the executive branch. Article VI. (3)–(4) of the Fundamental Law declares the right to the protection of personal data and establishes the independent data protection authority (NAIH),²⁹ while Article XXVIII. guarantees fair trial and the presumption of innocence in criminal proceedings.³⁰ Specific rules on police data processing are contained in several pieces of legislation. Act XXXIV of 1994 on the Police (PPA) empowers the police to collect information for crime prevention and crime-fighting purposes, but at the same time stipulates that police measures must respect fundamental rights and be proportionate to the legitimate aim (according to Section 2(1) of the PPA, the police are obliged to comply with the requirement of proportionality in their measures). The PPA also contains guarantees for preventive information collection, for example: Section 17(4) states that the police may only collect data for crime prevention purposes in relation to a crime that can be reasonably suspected, and the method of data collection may not infringe the rights of the data subjects. Furthermore, the Police Act and related legislation regulate cases of secret information collection and surveillance in detail, which can often be relevant in dealing with threats indicated by predictive systems.

In the field of data protection regulation, Act CXII of 2011 on the Right to Informational Self-Determination and Freedom of Information plays a key role. Section 3(5) of Act CXII of 2011 states that the scope of the law also extends to partially or fully automated data processing, including police data processing. The Infotv. deals with data processing for law enforcement purposes in a separate chapter (Chapter VI/A.), transposing the provisions of the EU Directive 2016/680/EU. According to the law, the data controller must categorize personal data stored in police records according to whether the person concerned is a suspect, convicted person, victim, witness or otherwise involved in the crime.³¹ Thus, if the police identify a person as a potential perpetrator with the help of an algorithm, this can only be recorded in the database as a police assessment and

²⁸ Act CXII of 2011.

²⁹ *Fundamental Law of Hungary*, Article VI (4).

³⁰ Marcell M. Tóth, “A digitalizáció egyes kihívásai a büntetőeljárásban,” *Belügyi Szemle* 72, no. 2 (2024): 185–210.

³¹ Act CXII of 2011.

cannot be confused with proven facts. The Infotv. also regulates in detail the rights of data subjects in law enforcement data processing: although certain rights may be restricted by the police in the interests of the investigation, the data subject may later request to determine what data has been processed about him or her and what automated profiling has been carried out.³² In addition, the NAIH's supervisory authority also extends to police data processing, ensuring independent supervision.

Automated decision-making in public administration and law enforcement has only appeared sporadically so far, however the legal environment already contains relevant frameworks. Hungary has included restrictions on automated decision-making in national law in the spirit of Article 22 of the GDPR.³³ In addition, we can see an example in practice of how an authority applies automated risk analysis in a regulated manner. The Passenger Information Unit (PIU) – in Hungary the Terrorism Information and Crime Analysis Centre (TIBEK) – carries out automatic hazard assessments based on passenger data transmitted by airlines, in order to prevent terrorism and serious crime. The algorithm operating within the PNR system identifies higher-risk passengers using predefined profiles, but the law requires that individuals flagged as high-risk must be reviewed by a human analyst as well before any action is taken.

Although the current domestic legal framework provides a number of general guarantees, new legislative and enforcement challenges arise with the spread of algorithmic crime forecasting tools. Besides, the domestic enforcement of the EU AI Act is also a challenge, as the AI Regulation will be directly applicable, Hungary will have to designate national authorities and a sanctioning system responsible for its implementation. It is expected that the NAIH and other specialized authorities will be given the authority to enforce the AI Regulation. It will be necessary to decide who will supervise the AI systems used by the police, and whether a separate specialized organization or body is needed.

Our current national regulations do not contain specific algorithm transparency or normative requirements for the police. In the future, it may be justified to create legislation or internal standards that require the police to use only properly, legally audited and ethically validated AI systems. It may also be necessary to supplement the Be. (Criminal Procedure Act) to specify under what conditions predictive software outputs may form the basis for police action. It may also be an important guideline for judicial practice, if it is stipulated by law that the results of predictive tools can be evaluated as evidence to a limited extent, only in accordance with other evidence. It is essential that, in the interests of legal certainty, citizens should know if any automated risk analysis has been carried out concerning them. The GDPR in principle guarantees data subjects the right to information and the right to request human intervention in relation to automated decisions, although in the law enforcement sector these rights can be limited in the interests of the investigation. It will be a challenge to find the right

³² Ibid.

³³ Hungary, *Act CXII of 2011 on the Right to Informational Self-Determination and Freedom of Information*, Section 6.

balance between not compromising the effectiveness of law enforcement and at the same time not subjecting citizens to the surveillance of “black box” algorithms without their knowledge.

The legal and moral use of technology is not only a legal issue, but also an institutional and cultural one. In the future, it will be important for law enforcement agencies to develop guidelines for the use of AI. Furthermore, it is necessary to ensure that officers are properly trained. They must understand the limitations of the operation of analytical tools, the potential for bias in them, and that human accountability cannot be delegated to algorithms. These topics are already appearing at the National University of Public Service and other law enforcement training courses, but further training of practicing investigators and commanders is also justified. Finally, it is of particular importance that the regulation of predictive policing is an area that is also emerging globally, and therefore Hungary has the opportunity to adopt European best practices that can help develop the legal environment. In some countries, independent algorithm review committees have been established alongside the police, which continuously monitor the decisions of the applied AI systems in terms of discrimination or error. It will be crucial for domestic legislators to monitor international trends and the evolving Hungarian regulatory landscape. Therefore, Hungary’s challenge lies in aligning technological innovation with constitutional safeguards to ensure lawful and ethical policing.

4. Criminological approach and effects

AI-based crime-prevention systems fit within the broader criminological discourse on risk and surveillance, shifting focus from punishment to prevention. It represents a new, ‘pre-criminal’ approach to fighting crime. In the traditional approach, traditional criminology treats crimes as post-factual events – research is aimed at understanding crimes, perpetrators, victims and the justice process – in contrast, data-driven policing technologies aim to prevent future crimes.³⁴ In this new paradigm, the focus is on precaution and risk management, i.e. the emphasis is on the prior recognition and reduction of potential dangers, rather than merely the ex post treatment of crimes that have already occurred.³⁵

The literature associates this shift with the emergence of a “risk society”, i.e. a social order that focuses on the control and prevention of potential risks, and in which criminal law is also understood as a means of managing crime risks.³⁶ As a result, the scope of criminological research is changing and issues of risk factors, uncertainty, surveillance, and prevention are coming to the fore.

³⁴ Lucia Zedner, “Pre-crime and Post-criminology?” *Theoretical Criminology* 11, no. 2 (2007): 262–63, <https://doi.org/10.1177/1362480607075841>.

³⁵ Strikwerda, “Predictive Policing: The Risks Associated with Risk Assessment.”

³⁶ Ádám Kalmár, “A prediktív rendészet sajátos tényezői a vízi határforgalom-ellenőrzésben,” in *A rendkívüli helyzetek biztonsági tényezői*, edited by Gyula Gaál and Zoltán Hautzinger (Pécs: Magyar Hadtudományi Társaság Határőr Szakosztály Pécsi Szakcsoport – Magyar Rendészettudományi Társaság, 2022), 153–58.

The pre-crime perspective marks a fundamental shift in criminological thinking. The post-crime perspective is replaced by a future-oriented perspective, the goal of which is to prevent crimes before they occur.³⁷ The new approach integrates methods and resources from other disciplines into crime prevention to increase safety.³⁸ Big Data and AI play an important role in the development of algorithmic crime forecasting, the ability to analyze vast amounts of data creates the basis for the police to look for predictable patterns in crime. It fits into the broader trend pursuant to which in the modern information society, data is becoming more valuable and decision-making based on data analysis is gaining more and more ground in the public sector.

One of the theoretical explanations for the change in criminological perspective is that society lives in an era of uncertainty and danger, so the emphasis is shifting to recognizing and reducing risk. Thus, the need for proactivity appears in crime prevention and law enforcement as well: we do not simply want to react to crimes but we want to prevent them by thinking ahead.

4. 1 Benefits and effectiveness issues of risk-based crime prevention

The main promise of predictive policing is to increase the effectiveness of crime prevention and the proactivity of police work thus, in this light, modern algorithms are able to analyze past crime data and other factors, mentioned in the previous chapter. The police can allocate resources more efficiently and target patrols to high-risk neighborhoods. In addition, the application of Big Data and predictive analytics can also bring significant progress in the efficiency of investigations, as analytical tools can comb through large datasets to reveal hidden connections that would remain unnoticed by human analysts.

However, the effectiveness of predictive methods is mixed. First, predictive algorithms only work well for certain types of crime, those that occur in large numbers and patterns. For example, they may be useful for serial property crimes (burglary, theft), while they do not make sense for predicting rare or unique cases, such as homicides.³⁹ Second, there is a threat that crime will shift spatially or adapt to police strategy. If police focus exclusively on designated “hot spots,” police presence in other areas may decrease, which could counterproductively create new opportunities for criminals to operate there.⁴⁰ Furthermore, false alarms (false positive predictions) from algorithms can lead to wasted resources, while missed alarms (false negatives) can create a false sense of security.

³⁷ Kalmár, “A prediktív rendészet sajátos tényezői a vízi határforgalom-ellenőrzésben,” 156.

³⁸ Bence Mészáros, “A kriminálstratégia önállósodása,” *Belügyi Szemle* 66, no. 11 (2018): 65–70, 68.

³⁹ Mo Al-Youssef, “Predictive Policing: Wie die Polizei Verbrechen voraussagt,” accessed October 26, 2025, <https://www.derstandard.de/story/2000091840678/predictive-policing-wie-die-polizei-verbrechen-voraussagt>.

⁴⁰ Katalin Ligeti, *Artificial Intelligence and Criminal Justice*, AIDP-IAPL International Congress of Penal Law (2020), accessed October 26, 2025, https://www.penal.org/sites/default/files/Concept%20Paper_AI%20and%20Criminal%20Justice_Ligeti.pdf.

In practice, these systems have had limited and inconsistent results. Some early projects have been successful in reducing certain types of crime, but problems have arisen in many places. For example, several cities in the United States have withdrawn algorithmic crime forecasting programs after pilot implementation because audits revealed inadequate effectiveness and disproportionate bias effects.⁴¹ Police departments in New York and Cambridge reported that predictive analytical tools did not meet expectations and, in some cases, distorted police actions – therefore, they turned to community policing, which paradoxically led to an improvement in crime rates.⁴² In line with this, experts often emphasize that the field of predictive policing is still in its infancy and, while technologically promising, its application must be approached with great caution. The methods need to be continuously monitored and scientifically evaluated before they are widely introduced into everyday police practice.

Advantage–Challenge type	Short description
The benefits and challenges of predictive policing	The police are able to identify areas at risk in advance and take preventive measures.
Targeted allocation of resources	Patrol and investigative resources can be concentrated in high-risk locations.
Improving investigation efficiency	Algorithms can uncover hidden patterns in large data sets.
Limited applicability (only works for certain crimes)	They are mainly useful for pattern-based crimes against property; in rare cases, they are not.
Spatial shift of crime	Focusing on some areas may reduce police presence elsewhere.
False positive/negative predictions	False alarms can cause unnecessary intervention, and missed alarms can create a false sense of security.
Mixed experiences in international examples	New York, Cambridge and other cities have withdrawn their systems due to low efficiency and distorting effects.

The benefits and challenges of predictive policing (Source: Author's own editing)

⁴¹ European Parliament, *Artificial Intelligence in Criminal Law and Its Use by Police and Judicial Authorities in Criminal Matters*, Resolution of October 6, 2021 (2020/2016(INI)), 2022/C 132/02.

⁴² P9_TA (2021)0405 Artificial intelligence in criminal law.

5. Legal regulation and international reactions

Legal regulation and oversight of algorithmic crime forecasting have begun worldwide, and restrictive measures have been introduced in several places.

The use of AI-based crime prevention systems tools in the United States has sparked several controversies in recent years. Several major cities, including Santa Cruz and Oakland, have banned predictive methods after it was found that such programs often lead to racially discriminatory outcomes. The Los Angeles Police Department also stopped using PredPol in 2020 after an internal audit found that the software reflected existing biases in practice and disproportionately targeted minority areas.⁴³ Overall, there are more critical voices than satisfied voices in the US at the moment. The EU appears to be taking a more cautious, preventive approach. The European Union's proposed AI regulation (AI Act) classifies predictive policing systems as high-threat AI applications. In fact, EU lawmakers explicitly prohibit certain high-risk data-driven policing technologies practices. Article 5(1)(d) of the AI Act prohibits AI systems that evaluate individuals' likelihood of committing a crime based on personal characteristics. Hungary, as an EU Member State, will have to adapt national legislation to comply with the AI Act's high-risk application framework by 2026, including enforcement mechanisms and sanctions. According to the final regulatory text, algorithmic crime forecasting systems that assess an individual's likelihood of committing a crime based on personal characteristics are classified as posing an unacceptable risk and are therefore prohibited.⁴⁴

Solutions based on predictive methods are not yet widely used in Hungary. According to public information, the domestic police do not currently use sophisticated crime prediction softwares such as those used abroad. However, risk analysis systems with similar logic already exist in state administration. It can be argued that if Hungarian law enforcement agencies start using predictive algorithms in larger numbers in the future, similar questions may arise as abroad. According to experts, it is necessary to create legal guarantees in advance that prevent violations of fundamental rights and ensure the transparency and verifiability of the source codes and operating mechanisms of the software used. Hungary is currently following the regulations being prepared within the framework of the EU, and its provisions are expected to guide domestic practice as well.

6. Future assurances

In light of the above, it becomes clear that the future of algorithmic crime forecasting depends on finding a balance between innovation and safeguards. The technology will continue to develop – AI-based crime prevention is expected to become an increasingly common part of everyday police work – but strong

⁴³ Tzu-Wei Hung and Chun-Ping Yen, "Predictive Policing and Algorithmic Fairness," *Synthese* 201 (2023): Article 206, <https://doi.org/10.1007/s11229-023-04189-0>.

⁴⁴ European Union, *Artificial Intelligence Act*, PE/24/2024/REV/1, Article 5(1)(d).

safeguards are needed. Criminologists say it is essential to create a framework in which the use of predictive models does not undermine fundamental rights but truly promotes public safety.⁴⁵

AI-based decisions should never be fully automated; a responsible human actor should always review or make the final decision.⁴⁶ This ensures that machine prediction does not become an exclusive judgment and that the specific circumstances of a given situation can be taken into account. The requirement is that the algorithms of predictive systems are transparent and auditable. Implementing authorities must be aware of the operating principles and independent experts must be able to audit the models. Data protection and civil rights organisations are calling for the datasets and weightings on which the system's decisions are based to be public or at least accessible to supervisory bodies.

The world of predictive methods holds both exciting opportunities and serious dilemmas. With the development of AI and data analytics, the police have the opportunity to not only react to crimes but also prevent them – with more targeted patrols. However, this progress is not without risks: if the appropriate legal and moral safeguards are lacking, people's fundamental rights can easily be undermined. International practices also reflect this. While some American cities have shut down predictive algorithms due to bias and lack of transparency, the European Union's new AI regulation has already imposed a legal ban on certain applications. For algorithmic crime forecasting to truly serve public safety – and not detract from it – an approach is needed that both encourages innovation and ensures the protection of fundamental rights. Only by combining innovation with accountability can the policing of the future remain not only effective but also just. Establishing transparent algorithmic audit mechanisms and interdisciplinary AI ethics committees within law enforcement could ensure that data-driven policing technologies align with both legal standards and societal trust.

7. Conclusion

Predictive methods demonstrate how rapidly technology is transforming criminal justice systems. However, without clear ethical and legal boundaries, even the most advanced systems may threaten fundamental rights. Therefore, the challenge for the coming decade will be to ensure that predictive algorithms serve justice — not replace it.

⁴⁵ Csapó, “A korszerű rendőrség alapjai,” 48.

⁴⁶ European Parliament, Artificial Intelligence in Criminal Law.

Pre-Trial Detention and Human Rights Protection: A Comparative Study of Hungary and Vietnam

PHAM THI MINH, TRANG*

ABSTRACT Pre-trial detention is one of the gravest measures applied in criminal procedure law before trial. The International Covenant on Civil and Political Rights (ICCPR) states that everyone has the right to liberty and security of person, no one shall be subjected to arbitrary arrest or detention, or be deprived of his liberty. In some cases, however, to protect the public interest, as well as the success of the investigation and the trial process, the Court has the power to impose detention on the defendant, which leads to the deprivation of the personal freedom of this person. The indispensable role of pre-trial detention in criminal proceedings cannot be denied; however, it also results in disadvantageous consequences that affect the defendant, including his health, job, family, etc. Arbitrary, overused, or excessive pre-trial detention, and other violations occurring in its application in the proceedings pose a significant risk to human rights. This paper will follow a comparative method to analyse and clarify the relevant regulations on pre-trial detention in both Hungary and Vietnam. Then, the paper will analyse and assess the level of protection of human rights during the enforcement process of this legal measure. It shall also be emphasized that the 2015 Law on Temporary Detention and Custody of Vietnam is currently under revision and amendment. This paper provides a deeper understanding of this topic, identifies regulatory gaps, and offers some suggestions for improving the Vietnamese law by drawing on the experience of Hungary's legal framework.

KEYWORDS Pre-trial detention, human rights, criminal procedure, coercive measures

1. Introduction

Human rights are inherent to human beings, regardless of nationality, sex, national or ethnic origin, colour, religion, language, or any other status.¹ These rights are not granted by any state but exist naturally as the most fundamental

* PhD student, University of Pécs, Faculty of Law, Doctoral School of Law; Lecturer, HoChiMinh City University of Law, Vietnam.

¹ *What are human rights?*, United Nations, accessed October 13, 2025, <https://www.ohchr.org/en/what-are-human-rights#:~:text=Human%20rights%20are%20rights%20we,of%20international%20human%20rights%20law.>

rights that make life worth living. Not all human rights are absolute; they are divided into two categories: absolute rights and relative rights. Absolute rights are never subject to any restrictions² and must be protected under all circumstances. However, in certain circumstances, the law grants the competent authorities the power to restrict some human rights. Such limitations derive from the very nature of state power to pursue legitimate goals, such as managing the State, protecting public order, ensuring society's safety and stability, and protecting the fundamental rights of other individuals. Therefore, most of the human rights are relative rights. It means these rights may be restricted, particularly if these limitations are envisaged by law³ and applied in according with due process.

Therefore, to implement the criminal procedure and ensure the effectiveness of the investigation and trial proceedings, the authorities must apply special measures to a defendant. Such measures may lead to a temporary limitation of the fundamental rights of the person reasonably suspected of having committed a criminal offence or those of the defendant. The strictness of these measures depends on the severity and complexity of the alleged criminal offense. Some measures restrict personal freedom, while others may limit property rights or other private rights. Among them, pre-trial detention is the gravest measure, imposed only when other coercive measures have been applied but the intended objectives cannot be achieved by those means. In other words, its use is only acceptable as a measure of last resort, in very limited circumstances.⁴

In both Hungary and Vietnam, pre-trial detention has been employed as a crucial tool in criminal proceedings. It plays a vital role in ensuring the presence of a defendant at trial, preventing the destruction of or tampering with evidence during the investigation, facilitating the tracing of criminal activities, and restricting the risk of reoffending. Additionally, the regulation on pre-trial detention has undergone significant amendments and improvements throughout the process of socio-economic reform and development. As a result, the protection of human rights has also been given special attention in this context. However, pre-trial detention remains a major concern as it is often criticized for its potential to infringe upon human rights. EU level research critically highlights the overuse of this measure at the national level.⁵ Specifically, there are several instances of abuse of detention, as well as other misconduct by the competent

² Serhiy Melenko, and Dan Paranyuk, "The Issue of Correlation Between Absolute and Relative Human Rights: Logical-Gnosiological Analysis," *European Journal of Law and Public Administration*, No 5(1), (2018), 39, <https://doi.org/10.18662/eljpa/25>.

³ Serhiy Melenko, and Dan Paranyuk, "Absolute and Relative Human Rights," 39.

⁴ Co-funded by the Criminal Justice Programme of the European Commission, "A measure of Last Resort? The Practice of pre-trial detention decision making in the EU," *fairtrials.org*, accessed September 20, 2025, <https://www.fairtrials.org/app/uploads/2022/01/A-Measure-of-Last-Resort-Full-Version.pdf>.

⁵ Adriano Martufi, Christina Peristeridou, "Pre-trial Detention and EU Law: Collecting Fragments of Harmonisation Within the Existing Legal Framework," *European Papers - A Journal on Legal and Integration* 5, no. 3 (2020): 1478., doi:10.15166/2499-8249/423.

authorities in the enforcement of the law, which harm the human rights of detainees. It may include excessive and arbitrary detention; breaches of the duration of detention, which is often excessively prolonged; violations of standards regarding living conditions, nutrition, hygiene, sanitation, and health care, which are often not adequately ensured; even torture and other forms of cruel, inhuman, or degrading treatment or punishment⁶; etc.

Through the analysis and assessment of the current regulations on pre-trial detention, as well as through comparative legal research, the paper examines the regulations of the two countries from the perspective of human rights protection. It aims to identify the similarities and differences, the gaps in the current law, before offering suggestions to strengthen the protection of human rights under Vietnamese law. Moreover, this paper also clarifies three main research questions: (i) What are the conditions for ordering pre-trial detention under the regulations of the two countries? (ii) What are the regulations on the duration of pre-trial detention? (iii) How is humane treatment manifested in pre-trial detention? Especially, the Code of Criminal Procedure of Hungary (*hereinafter referred to as CPC of Hungary*), which entered into force in July 2018, brought along positive changes in the legal framework in the area of pre-trial detention,⁷ principally, by introducing a new approach. The court now has to justify why the aims of the criminal procedure can only be achieved by the most serious coercive measure.⁸ In addition, Hungary is a member of the European Union. Although criminal procedure law remains primarily a matter of domestic competence, its legal framework is partly influenced by EU law, especially regarding the standards of human rights protection in cases where pre-trial detention is imposed. All of these serve as valuable reference materials for Vietnam in the revision and amendment of the Law on Temporary Detention and Custody, as well as related guidance documents.

2. Basic issues of pre-trial detention

2. 1 Conditions for Ordering Pre-trial Detention

Freedom and personal security are fundamental rights of every individual. No one may be deprived of them except for reasons clearly prescribed by law. In the context of coercive measures restricting personal liberty, pre-trial detention is an exceptional measure, never mandatory, and never applicable for punitive

⁶ Ludwig Boltzmann Institute of Human Rights (Wien), University of Bristol, *Human Rights Implementation Centre. Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk*, (New York: Open Society Foundations, 2011). 11.

⁷ “Helsinki Files Reports to international organisations-Submission to the Council of Europe on pre-trial detention”, [helsinki.hu](https://helsinki.hu/en/submission-to-the-council-of-europe-on-pre-trial-detention/), accessed October 16, 2025, <https://helsinki.hu/en/submission-to-the-council-of-europe-on-pre-trial-detention/>.

⁸ Krisztián Szabó, “10 years in the history of pre-trial detention in Hungary (2010–2019)”, accessed October 14, 2025, <https://ujbtk.hu/krisztian-szabo-10-years-in-the-history-of-pre-trial-detention-in-hungary/>.

purposes.⁹ Therefore, the law must ensure legal certainty to prevent arbitrary situations in which detention is applied even when it is not truly necessary. In other words, pre-trial detention should be ordered only when no other alternative measures can achieve the same purpose. Apparently, personal liberty must not be limited without compelling justification and reasonable grounds.

In Hungary, pre-trial detention is regulated as a coercive measure that affects personal freedom (Section 272(1)(d) of the CPC of Hungary).¹⁰ Accordingly, this Article divides coercive measures into two groups. The first one includes measures that affect personal freedom, and the other one comprises measures against property. Among them, certain coercive measures can only be ordered for the defendant, but numerous coercive measures can also be applied to other participants or even entirely outsiders, such as search, seizure, or disciplinary measures.¹¹ Detention is the most severe measure restricting personal freedom. Therefore, it is applied only to the defendant and entails the deprivation of personal liberty for a certain period before a final and binding decision is issued (Section 296 CPC of Hungary). Moreover, Section 276(1) of this Code provides that when a criminal act is punishable by imprisonment, a coercive measure limiting personal freedom may be imposed on the defendant only if two conditions are satisfied: *first*, the defendant is reasonably suspected of having committed a criminal offence or he has been indicted; and *second*, the measure is necessary to achieve the intended objective, which cannot be accomplished by any other means.

The purposes of coercive measures are also clarified by Section 276(2). Moreover, before the competent authority orders pre-trial detention, it is important to consider certain factors. These criteria help determine whether it is necessary to order pre-trial detention or alternative measures can be used to achieve the same purpose. Such factors include the nature of the criminal offence, the state and interests of the investigation, the personal and family situation of the defendant, the relationship between the defendant and another person involved in the criminal proceeding or any other person, the behaviour of the defendant before and during the criminal proceeding.¹²

Meanwhile, under the 2015 Criminal Procedure Code of Vietnam (*hereinafter referred to as the CPC of Vietnam*), pre-trial detention is classified as a preventive measure. Specifically, chapter VII of the Code distinguishes between two categories of measures applicable during criminal proceedings: preventive measures and coercive measures. However, by nature, both categories are coercive measures, as they involve compelling individuals to act through state

⁹ Viktor Bérces, *Chapters from the Scope of Hungarian Criminal Law and Criminal Procedure Law* (Forum Iuris Publishing House Cluj-Napoca, 2024), 471, https://real.mtak.hu/197272/1/BercesViktor_ScopeOfHungarianCriminalLaw1_BTv4-boritos.pdf.

¹⁰ Act XC of 2017 on the Code of Criminal Procedure

¹¹ Herke Csongor, *Criminal Procedure Law*, Lecture Notes, (University of Pécs – Faculty of Law, 2018), 30.

¹² CPC of Hungary, § 277(4).

power held by the competent authorities. The current legal distinction is based on the purpose pursued by the authorities when applying them.

Pre-trial detention is ordered as a last resort measure, which is indirectly embedded in the provisions on the objects and conditions of pre-trial detention. This measure in the CPC of Vietnam is based on the seriousness of the offence, as well as the resistant behaviour and specific personal circumstances of the suspect or defendant, which are to be considered when applying detention. Under the 2015 Criminal Code, crimes are classified into four categories according to their nature and the danger they pose to society, namely, less serious crimes,¹³ serious crimes,¹⁴ very serious crimes,¹⁵ and extremely serious crimes.¹⁶ According to Art. 119 of the CPC, pre-trial detention may be ordered for very serious crimes and extremely serious crimes without any other conditions. Meanwhile, for less serious crimes and serious crimes, additional conditions must be met to apply pre-trial detention, for example, the suspects or defendants continue to commit criminal acts or have absconded and been apprehended pursuant to a wanted notice; they have no fixed place of residence, or their identity has not been established; etc.

Another issue reflecting the protection of human rights concerns the exclusion of certain categories of people from pre-trial detention. In particular, Art 119(4) of the CPC lists the following categories and situations: if the suspect or defendant is a pregnant woman, a woman who raises a child under 36 months of age, an elderly person, or a person with a serious illness, and they have clear information of their residence and identity. The authorities shall replace pre-trial detention by other preventive measures, with the exception of the following cases: (i) They abscond and get arrested as per wanted notices. (ii) They continue criminal acts. (iii) They commit acts of bribing, coercing, or inciting other individuals to provide false statements or documents, or acts of destroying or forging case evidence.

The regulations on the conditions, purposes, and factors to be considered necessarily before ordering pre-trial detention create a screening mechanism to identify cases in which the application of this measure is truly necessary. But in Vietnam, in certain situations, the principle that “pre-trial detention should be

¹³ Art. 9(1) of the Criminal Code of Vietnam 2015, a *less serious crime* refers to an offence whose danger to society is not significant, and for which the maximum penalty prescribed by the Criminal Code is a fine, a non-custodial sentence, or imprisonment for up to three years.

¹⁴ Art. 9(2) of the 2015 CPC of Vietnam, a *serious crime* refers to an offence that poses a significant danger to society, for which the maximum penalty ranges from over three years to seven years of imprisonment.

¹⁵ Art. 9(3) of the 2015 CPC of Vietnam 2015, a *very serious crime* refers to an offence that poses a great danger to society, for which the maximum penalty ranges from more than seven years to fifteen years of imprisonment.

¹⁶ Art. 9(4) of the 2015 CPC of Vietnam 2015, an *extremely serious crime* refers to an offence that presents an exceptionally high degree of danger to society, for which the maximum penalty ranges from more than fifteen years to twenty years of imprisonment, life imprisonment, or the death penalty.

used as a last resort” is only indirectly reflected in the CPC or depends on the discretion of the competent authorities. This may lead to arbitrary pre-trial detention because detainees are entirely in the power of detaining authorities, who often perceive torture and other forms of ill-treatment as the easiest and fastest way to obtain information or extract a confession.¹⁷ It is a partial cause of human rights violations and societal problems associated with an overtaxed detention system. So, the purposes and conditions for its application should be clearly defined, thereby limiting the discretion of the competent authorities.

2. 2 Duration of Pre-trial Detention

Anyone arrested or detained on a criminal charge...shall be entitled to trial within a reasonable time or to release pending trial.¹⁸ Even though law enforcement authorities can order pre-trial detention to investigate and prosecute crimes, it is necessary to balance the legality and proportionality of this measure with the crime. The length of pre-trial detention is one of the most important aspects because it directly affects the period during which the defendant is temporarily isolated from the community and his fundamental rights are restricted. Therefore, the duration of detention enforcement must be clear, transparent, and needs to be subject to independent and impartial review.¹⁹

First, the moment from which pre-trial detention can be ordered. Although in Hungary and Vietnam criminal proceedings are not exactly the same, the nature of the criminal procedure is still quite similar, especially the starting point at which pre-trial detention may be ordered in the proceedings.

The first phase in Hungary’s criminal procedure is ‘*the investigation*’, which comprises three stages: preparatory procedure,²⁰ clearing up,²¹ and examination.²² In this phase, the main purpose is to obtain and record evidence and to decide whether to prosecute, to proceed to an alternative procedure or to close the investigation.²³ Pre-trial detention shall only be ordered once the defendant’s legal status has been established. This means that the authorities must have determined whether there is a reasonable suspicion of a criminal offence and reasonable grounds to believe that the defendant has committed the crime. Therefore, under the CPC, pre-trial detention is only applied following the clearing up (§ 296).

Meanwhile, under the CPC of Vietnam, detention may be applied to a suspect or defendant only after criminal charges have been officially initiated by the competent authority. The criminal charge is the initial phase of criminal

¹⁷ Ludwig Boltzmann Institute of Human Rights (Wien), University of Bristol, Human Rights Implementation Centre, Pretrial Detention and Torture, 11.

¹⁸ Art. 5(3), European Convention on Human Rights (ECHR).

¹⁹ The European Commission (2021), “Pre-Trial Detention Rates and the Rule of Law in the European Union – Briefing to the European Commission”, accessed October 18, 2025. <https://www.fairtrials.org/app/uploads/2021/04/pre-trial-detention-rates.pdf>.

²⁰ §339-347 of CPC of Hungary.

²¹ Also known as Detection stage, §383-390 of CPC of Hungary.

²² §391-397 of CPC of Hungary.

²³ Viktor Bérces, *Hungarian Criminal Law and Criminal Procedure Law* (Forum Iuris Publishing House Cluj-Napoca, 2024), 203.

proceedings in Vietnam. In essence, before the competent authorities decide to bring criminal charges, certain investigative activities are carried out. These activities aim to address denunciations, criminal reports, or requisitions for charges and to determine whether there are sufficient indications that a criminal offence has been committed. This stage shares several similarities with the preparatory procedure in Hungary.

Second, the length of pre-trial detention and extension issues. Concerning the concrete periods of time, the regulations on the length of pre-trial detention set out different durations in the two countries. In Hungary, if the authorities apply detention before the indictment, the initial period shall not exceed one month. This period may be extended repeatedly by the court for up to three months each time, until a total of one year has elapsed from the date of the detention order. After this year, the court can prolong this period for up to two months each time. Besides, Section 298 also determines the maximum overall duration of pre-trial detention. It depends on the severity of the offence and the corresponding statutory maximum penalty. More specifically, pre-trial detention may last up to one year for offences punishable by imprisonment of up to three years; two years for offences punishable by up to five years; three years for offences punishable by up to ten years; four years for offences punishable by more than ten years; and five years for offences punishable by life imprisonment. On the other hand, if pre-trial detention is applied after the indictment, the provisions governing the duration of criminal supervision shall apply, except in the following circumstances: the pre-trial detention was ordered or maintained after the announcement of a conclusive decision; a proceeding to adjudicate an appeal against a setting aside order of the court of second or third instance is pending; or a proceeding repeated due to setting aside is pending.²⁴

Under the CPC of Hungary, the initial pre-trial detention period cannot be longer than one month but may then be extended as necessary. The length of the initial detention period does not differ according to the type or severity of the offence. Instead, the maximum total duration of pre-trial detention is determined by the applicable term of imprisonment for the offence. In contrast, Art. 173 of the CPC of Vietnam classifies the duration of pre-trial detention based on the severity and classification of the crimes, which is clarified above. The maximum initial period of detention shall not exceed two months for less serious crimes and may be extended once for an additional month. For serious crimes, the initial period shall not exceed three months and may be extended once for up to two months. In the case of very serious and extremely serious crimes, the initial period of pre-trial detention shall not exceed four months; it may be extended once for up to three months in the former case, and twice for up to four months each time in the latter. Besides, in case of re-investigation or supplementary investigation under Art. 174, the same rules on time limits and extensions are applicable, which may lead to extending the total period of pre-trial detention.

Compared to the Hungarian Code, the CPC of Vietnam sets a shorter maximum total duration for pre-trial detention. Moreover, both Codes provide transparent

²⁴ §298(2) of CPC of Hungary

provisions about the duration of pre-trial detention. This serves as an effective tool to protect detainees from spending excessively long periods in detention. It partially prevents competent authorities from delaying proceedings, failing to conduct investigations and trials in a diligent manner. However, many pre-trial detainees are still detained well beyond the legal time limits.²⁵ This stems from several different reasons, which have led to a gap between the law on paper and its practical implementation. In some cases, it results from inadequate or incomplete record-keeping and information management for detainees. Or it may be explained by the absence of mechanisms to track detainees who exceed the legally prescribed detention period, a lack of clarity regarding the authorities responsible for ensuring compliance with the maximum duration. As a result, detainees suffer from excessive detention.

3.The Humane Treatment of Detainees

The right to humane treatment in pre-trial detention is aimed at ensuring that if people are detained, they are held in conditions befitting their inherent dignity as human beings,²⁶ regardless of their accusations of a criminal offence. The content of this right is demonstrated by two main aspects, including prohibiting the torture, other ill-treatment (cruel, inhuman, degrading treatment, or punishment) of detainees and ensuring the minimum standards for living, nutrition, sanitation, hygiene, and health care during pre-trial detention.

On the one hand, torture and other acts of ill-treatment are prohibited, which are non-derogable under any circumstances. This rule is considered to be a peremptory norm of international law.²⁷ At the international level, the UDHR, the ICCPR, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) are the foundational legal frameworks, which create international standards guiding Hungary and Vietnam in the domestic implementation of the prohibition of torture.

At the national level, basic values and inalienable human rights are enshrined in the 2013 Constitution of Vietnam and the 2011 Fundamental Law of Hungary (as amended in 2024), both of which are the highest laws in their respective national systems. Both affirm that no one shall be subject to torture, violation, coercion, corporal punishment, or any form of treatment harming his or her body and health or offending their honour and dignity.²⁸ This rule is reiterated in Art. 10 of the

²⁵ Open Society Foundation, Open Society Initiative for Southern Africa, “Pre-Trial Detention Custody Time Limits, Ensuring Compliance in Malawi”, October 20, 2025, 6, https://www.prisonstudies.org/sites/default/files/resources/downloads/malawi_custody_time_limit_report_january_2013.pdf

²⁶ ACT Government, “Right to Humane Treatment”, accessed October 23, 2025, https://www.act.gov.au/_data/assets/pdf_file/0010/2595115/L-s-19-Right-to-humane-treatment-when-deprived-of-liberty-Human-Rights-Education.pdf.

²⁷ Prosecutor v. Anto Furundzija (Trial Judgment), Case No IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10/12/1998.

²⁸ Art. 20 of the Constitution of Vietnam 2013 and Articles III, IV, and V of the Fundamental Law of Hungary 2011 (amended 2024).

Criminal Procedure Law of Vietnam. The Criminal Law also defines the offences of coercing confession and the offences of corporal punishment (Art. 373 and Art. 374), sanctioning them with robust penalties, the most serious of which is life imprisonment. At the same time, the prohibition of torture under Art. 3 of the ECHR is binding on Hungary. Moreover, Section 303 of the Criminal Code defines acts of torture, with the penalty being imprisonment between one and five years if the criminal offense is committed by an individual or two to eight years if committed in a gang.

Although there are regulations prohibiting torture and protecting human dignity, bodily integrity, and health, pre-trial detainees may still be tortured; however, in practice, detention facilities, pre-trial detention centres, and police stations are typically the most difficult places to gain access to.²⁹ Because authorities, in some cases, can use torture and other forms of ill-treatment as the easiest and fastest method to obtain a confession or information during an investigation. Therefore, it is necessary to effectively implement the prevention of torture and other forms of ill-treatment in practice. First and foremost, the training of law enforcement personnel should be strengthened to improve their professional investigative skills and discourage the use of coercive interrogation methods. Police authorities and other law enforcement officials should receive training in modern crime investigation techniques that duly reflect international human rights standards.³⁰ Furthermore, it is necessary to establish a comprehensive mechanism that can monitor the detention process and promptly detect any violations against detainees. The participation of lawyers and access to medical services play an essential role in the fight against torture.

On the other hand, detainees must be ensured adequate conditions in detention facilities, including appropriate living and sanitary conditions, clothing, nutrition, access to healthcare, and other essential amenities. The minimum standards for detention facilities are governed by the 2015 Law on Temporary Detention and Custody for Vietnam. Meanwhile, in Hungary, the Detention Decree (16/2014. (XII. 19) of the Minister of Justice on the detailed rules of the execution of imprisonment, confinement, pre-trial detention and confinement imposed for non-payment of a procedure fine (IM), and Act CCXL of 2013 on the Execution of Punishments, Measures, Certain Coercive Measures and Detention for Offences sets out general standards for detention conditions, which are consistent with the minimum standards provided for by the European Union. Both emphasize that pre-trial detention should be applied only as a measure of last resort³¹ and require clear standards for detention conditions to minimize human rights violations and safeguard the right to humane treatment.

²⁹ Ludwig Boltzmann Institute of Human Rights (Wien), University of Bristol, Human Rights Implementation Centre, Pretrial Detention and Torture, 12.

³⁰ Ludwig Boltzmann Institute of Human Rights (Wien), University of Bristol, Human Rights Implementation Centre, Pretrial Detention and Torture, 14.

³¹ Article 6(1), United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules).

Generally, as regards accommodation, Hungary provides a higher minimum space for detainees than Vietnam. There are two separate sections in penitentiary institutions, namely, cells³² and living quarters,³³ which have different security requirements. Each cell shall have a washbasin with running water and a toilet separated from the living area and, if possible, with independent ventilation. In living quarters, the running water, baths, and toilets necessary for hygiene may be provided for each unit or section.³⁴ Each detainee is entitled to have at least 6 m² living space in a single occupancy cell or at least 4 m² in a multi-occupancy cell³⁵. This space excludes the area occupied by sanitary facilities.³⁶ Pre-trial detainees and convicted detainees must be separated,³⁷ except when they work together; in such cases, they may be accommodated together.³⁸ Besides, in the case of persons arrested or detained by the police, and before being transferred to a penitentiary, different standards apply to police detention facilities, which are regulated in Decree 56/2014. (XII.5.) on the Order of Police Jails. Pursuant to Section 3, male detainees must have at least 3 m² of living space, while female and juvenile detainees must have at least 3.5 m² of living space, excluding the space taken up by cell equipment and furniture.

Moreover, Annexes (1,2,3,7) to the Detention Decree (16/2014. (XII.19.) IM provide lists of objects, equipment items, which ensure basic conditions for living, necessary items for personal hygiene and personal needs during the detention period. Detainees may lock their cabinet and keep the key to store personal belongings. The items stored in the cabinet shall be inspected in the presence of the convicted person. However, for security or other penal enforcement reasons, in the absence of detainees or in the case of their refusal to open the cabinet, the authorities may open the cabinet and must record the event in a report.³⁹

Detainees will be provided with the necessary conditions for personal hygiene. They are permitted to bathe in warm water at least three times per week; female prisoners and working prisoners shall be provided with a warm-water bath daily after work. They are also entitled to receive a free haircut at least once a month.⁴⁰ However, in practice, prison overcrowding and ill-treatment are still challenging issues in Hungary. As of March 31, 2025, there were 18,988 prisoners for 17,024 places, indicating an occupancy rate of 111.5%. There are 15 penitentiary

³² § 2(6) of the Detention Decree (16/2014. (XII. 19.) IM.

³³ § 2(4) of the Detention Decree (16/2014. (XII. 19.) IM.

³⁴ § 120 of the Detention Decree (16/2014. (XII. 19.) IM.

³⁵ Viktor Kazai, “Criminal Detention in the EU Conditions and Monitoring, Update of FRA’s Criminal Detention Database”, accessed November 5, 2025, https://fra.europa.eu/sites/default/files/fra_uploads/hungary-criminal-detention-2022-country-study_en.pdf.

³⁶ § 121 of the Detention Decree (16/2014. (XII. 19.) IM.

³⁷ § 391(1) of Act CCXL of 2013.

³⁸ § 391(4) of Act CCXL of 2013.

³⁹ § 122 of the Detention Decree (16/2014. (XII. 19.) IM.

⁴⁰ § 132 of the Detention Decree (16/2014. (XII. 19.) IM.

institutions operating at over 110% capacity and two at over 120%.⁴¹ Furthermore, inadequate detention conditions, including heating systems, ventilation, cooling, and lighting, can lead to inhuman or degrading treatment. Besides, the lack of monitor systems or video recordings during pre-trial detention, particularly at the investigation stage, also sustains inhuman treatment. Several detainees experience fear and do not complain when they are ill-treated due to the police officers and prison staff being typically present during medical examinations.⁴²

In Vietnam, according to the 2015 Law on Temporary Detention and Custody, the provisions on accommodation are not as detailed as those in Hungary. The law does not specify the minimum living space for each detainee, which often results in cramped living conditions, overcrowding, and a lack of minimum living space. The regulation only provides for standards for the sleeping space of each detainee, which must be at least 2 m² for each person and at least 3 m² if the detainee is a pregnant woman or a woman who brings children under 36 months old (Art. 27 and Art. 35). Each person is provided with a sleeping platform and a mat. Moreover, there are no explicit provisions on ventilation or minimum standards of bathing and sanitation facilities necessary for hygiene, such as running water, toilets, and bathing areas. Therefore, the level of ensuring humane treatment largely depends on the capacity and infrastructure of each local detention facility. However, based on reports from the police representatives in several provinces, many facilities do not meet the required standards, most are makeshift and lack uniform construction.⁴³

On the other hand, the Law on Temporary Detention and Custody details the classification and separation of detainees (Art. 18). Detainees will be placed in separate areas according to specific categories, such as persons under 18 years of age, women, foreigners, persons with infectious diseases, persons with signs of mental illness, etc. This separation plays a vital role in maintaining security and ensuring appropriate management for different groups. Especially, detainees who are gay, lesbian, or transgender people are also held in separate cells, which emphasizes protecting human dignity and prevents discrimination under this Law.

During the detention period, detainees are allowed to keep personal belongings such as clothes, a blanket, a mat, and other necessary items for personal life activities. If they do not have these items, they can borrow them from the penitentiary institution or buy them via signing the book.⁴⁴ In particular, the

⁴¹ Hungarian Helsinki Committee, “Detention conditions in Hungary fall short of European standards”, accessed November 2, 2025, https://helsinki.hu/en/wp-content/uploads/sites/2/2025/07/HHC_DetentionConditions_250702.pdf.

⁴² Hungarian Helsinki Committee, “Detention conditions in Hungary fall short of European standards”, accessed November 2, 2025.

⁴³ Phuong Thuy, “Several Challenges and Limitation on Implementation of the Law on Temporary Detention and Custody”, People’s Public Security, accessed September 28, 2025, <https://cand.com.vn/Hoat-dong-LL-CAND/nhieu-kho-khan-vuong-mac-trong-thuc-hien-luat-thi-hanh-tam-giu-tam-giam-i717706/>.

⁴⁴ Art. 24 of the 2015 Law on Temporary Detention and Custody.

penitentiary institution shall lend clothing, coats, and blankets suitable for the local weather conditions, especially in provinces with cold weather. Personal hygiene products such as shampoo, toothpaste, soap, and additional items needed for women's hygiene shall be provided.

Regarding nutrition, detainees are entitled to receive food free of charge. Their meal will be decided based on the detainee's health assurance. Under Act CCXL of 2013 of Hungary, detainees will receive meals at least three times a day and must have a warm meal at least per day (§ 155). One of the aspects that highlights human rights is the provision of a special diet to meet detainees' state of health, the needs of juvenile detainees, and religious requirements. Pregnant detainees will receive 0.5 litre of milk per day or equivalent nutrition from the 20th week of pregnancy.⁴⁵ Furthermore, the Annex 6 of the Detention Decree (16/2014. (XII. 19.)) IM also sets out daily diet standards based on the categories of detainees according to type of work, their health status, and age. This aims to ensure health and implement humane treatment rights.

In Vietnam, the nutrition standard is determined based on the total amount of basic food for daily meals, such as rice, meat, fish, vegetables, and condiments, as well as electricity, water necessary for cooking. These are converted into monetary value equal to the local market prices in the area where the penitentiary facility is located.⁴⁶ In line with the principle of humane treatment, Vietnam also provides priority nutrition for special groups: (i) Pregnant women or women raising children under 36 months of age are entitled to twice the standard daily food allowance compared to ordinary detainees. Their diet may be adjusted based on the recommendations of doctors or medical staff to ensure adequate nutrition.⁴⁷ Children under 36 months who stay with their mothers in detention facilities also receive necessary items, access to healthcare, and nutrition appropriate to their age and practical conditions.⁴⁸ (ii) Juvenile detainees receive the same quantity of food as adults, but are provided with an additional quantity of meat and fish.⁴⁹ This aims to supply enough nutrition for the growth and physical development of juveniles. On the other hand, on certain holidays, such as public holidays, New Year holidays, detainees can receive additional food; however, the amount shall not exceed five times the food standard on normal days.

Based on the above provisions, it can be seen that freedom of belief and religion must be respected and protected, as stipulated in the 2013 Constitution of Vietnam. However, this rule has not yet been effectively integrated into the legal framework regulating detention. Therefore, it is necessary to amend and improve

⁴⁵ § 33 of Decree 56/2014. (XII. 5.) on the Order of Police Jails.

⁴⁶ Art. 4 Decree 120/2017/ND-CP Detailing and Guiding the Implementation of Certain Articles of the Law on Temporary Detention and Custody.

Art.1(2) Decree 113/2021/ND-CP On Amendment to Decree No. 120/2017/ND-CP Dated 6/12/2017 of The Government Elaborating the Law on Detention and Custody.

⁴⁷ Art. 1(2) of Decree 113/2021/ND-CP.

⁴⁸ Art. 1(5) of Decree 113/2021/ND-CP.

⁴⁹ Art. 33 of the 2015 Law on Temporary Detention and Custody.

the relevant regulations to better safeguard this right, emphasizing human rights and humane treatment that align with the State's policy. Moreover, the clear specification of the number of daily meals and the right to receive warm meals at least reflect humane regulations that are consistent with the practical conditions and cultural values of Vietnam. All factors need to be considered when improving and adapting the Law on Temporary Detention and Custody.

In conclusion, pre-trial detention is one of the key topics that needs careful research and consideration to protect human rights in criminal proceedings. This coercive measure needs to be effectively used while being balanced with the protection of human rights. Although numerous human rights issues are associated with pre-trial detention, this paper focuses on analysing and comparing some of the main aspects, including the conditions for ordering pre-trial detention, its duration, and the perspective of humane treatment. Both legal frameworks relating to pre-trial detention have their advantages and disadvantages. However, in general, the implementation of pre-trial detention has several challenges and requires improvement, especially with a view to protecting human rights. First, there are gaps between law and practice. The infrastructure and facilities are inadequate or below basic standards and require substantial financial investment for improvement. Besides, the prompt application of modern tools and equipment should be promoted to facilitate criminal proceedings and record necessary data on the detention process. Second, the authorities should review and amend provisions to align them with the State's policy on human rights protection. Third, training programs should be conducted to enhance the professional skills of personnel, thereby reducing coercive confessions and torture, and improving the effectiveness of investigations.

National Symbols and Identity in Hungary and the EU

RÉTI, GERGELY*

ABSTRACT *The history of symbols is as old as humanity itself, and they continue to play a key role in expressing national identity today. The external function of symbols is to express sovereignty – as a representation of autonomy and independence – while their internal function is to express identity (emotional attachment to the community). This study examines the constitutional and criminal law protection of national symbols, their history and changes, presenting their role in expressing national identity. The study discusses the fundamental national symbols enshrined in the Fundamental Law of Hungary (flag, coat of arms, national anthem) and, by examining the symbols of the European Union, also addresses the issue of EU identity. It also discusses the most important identity-forming elements and the nation as a political and cultural concept, whose identity is expressed by national symbols.*

KEYWORDS *identity, constitution, symbols, European Union.*

1. Introduction

National and community symbols are sometimes explicitly referred to as symbols of identity and enjoy legal protection almost everywhere in Europe. The existence and extent of this legal protection may indicate the significance of symbols as identity-forming factors for a given state.¹

National and state symbols are almost as old as humanity itself. Throughout human history, almost every body, organization, or community that wished to express its power, sovereignty, or unity has used some kind of symbol. These symbols are therefore not merely simple representations, but also means of expressing power, identity, sovereignty, and group cohesion. These symbols can be divided into two groups, classified according to their external and internal functions. The external function of symbols is to represent the sovereignty of a given political community, while their internal function is to integrate individuals

* PhD student, Pázmány Péter Catholic University, Doctoral School of Law and Political Sciences, researcher at Mathias Corvinus Collegium.

¹ Zoltán Tóth J., *Az identitászimbólumok védelme Európában* (Budapest: Országút, 2022), 2.

associated with a given state and to express their identity and cohesion.² Consequently, national symbols play an important role in expressing sovereignty and identity.

The supreme state authority generally decides on symbols and regulates their use and availability to others. Thanks to this privileged status, national and state symbols also enjoy criminal law protection. In addition to national symbols, the Holy Crown is also protected under criminal law and is part of the regulation. This was not originally included in the new Hungarian Criminal Code (Act C of 2012 on the Criminal Code) but was added as a result of an amendment proposed by Jobbik (a Hungarian right-wing political party) during parliamentary proceedings.

2. On our national symbols

Wearing and using symbols is an expression of belonging to a community and attachment to its traditions, which also means loyalty to a culture's values, religious or ideological commitments, and expected behavioral norms. Overall, wearing symbols is an act that strengthens an individual's identity and self-awareness.³ In his 2014 article, Péter Smuk views national symbols as manifestations of sovereignty.⁴ This is the external function of symbols, the expression of sovereignty, while their internal function is to represent a sense of belonging. In my work, I therefore approach the essence and purpose of national symbols from the perspective of sovereignty and identity, as I believe that, in addition to national independence, they express belonging and attachment to the community on the individual and social levels, showing who is at home in a given geographical area. Article I of the Fundamental Law of Hungary contains the most important national symbols: the coat of arms, the flag, and the anthem.⁵

*"The coat of arms of Hungary shall be a vertically divided shield with a pointed base. The left field shall contain eight horizontal bars of red and silver. The right field shall have a red background and shall depict a base of three green hills with a golden crown on top of the higher central hill from which rises a silver patriarchal cross. The Holy Crown shall rest on top of the shield."*⁶

*"The flag of Hungary shall feature three horizontal bands of equal width coloured red, white and green from top to bottom as the symbols of strength, loyalty and hope, respectively."*⁷

² Iván Halász and Gábor Schweitzer, "Nemzeti jelképek," in *Internetes Jogtudományi Enciklopédia*, ed. András Jakab, Miklós Könczöl, Attila Menyhárd and Gábor Sulyok (2020), 3.

³ Zoltán Tóth J., "A nemzeti szimbólumok büntetőjogi védelme," *Jogtudományi Közlöny* 58, no. 4 (2003): 195–200.

⁴ Péter Smuk, "A szuverenitás jelképei és alkotmányos védelmük," *MTA Law Working Papers* 1, no. 37 (2014): 1.

⁵ Article I of the Fundamental Law of Hungary.

⁶ Paragraph (1) of Article I of the Fundamental Law of Hungary.

⁷ Paragraph (2) of Article I of the Fundamental Law of Hungary.

*“The national anthem of Hungary shall be the poem Himnusz by KÖLCSEY Ferenc set to music by ERKEL Ferenc.”*⁸

The Fundamental Law of Hungary also allows for the use of other historically established forms of the coat of arms and flag: the President of the Republic may use a coat of arms with two angels as shield bearers, the Prime Minister and the Speaker of the Hungarian National Assembly may use a coat of arms surrounded by a holly branch and an olive branch, and the Hungarian National Bank is entitled to use a coat of arms surrounded by oak leaves and laurel leaves.⁹

The detailed rules on the wearing and use of symbols are laid down in Act CCII of 2011 on the use of the coat of arms and flag of Hungary and on state decorations. This law covers the details of the appearance of symbols and regulates their use, for example, by defining the circle of persons entitled to use them and the cases in which their use is mandatory or expressly prohibited. Under this regulation, local governments and municipal bodies are free to decide on their own coat of arms, but it must be distinguishable from the state coat of arms.¹⁰

National emblems and symbols can continue to exist as expressions of identity if they are also present in public education. The Hungarian National Core Curriculum mentions, in the context of visual culture as a school subject, within the framework of principles and objectives, that the aim of the subject is for students to become familiar with visually apparent national symbols.¹¹

3. Other national symbols

Although the Fundamental Law of Hungary lists the coat of arms, the flag, and the anthem as the most important national symbols and gives special status to the Holy Crown, Article J) specifies national holidays and official public holidays:

“(1) The national holidays of Hungary shall be:

a) the 15th day of March, in memory of the 1848–49 Revolution and War of Independence;

b) the 20th day of August, in memory of the foundation of the State and of King Saint Stephen the State Founder;

c) the 23rd day of October, in memory of the 1956 Revolution and War of Independence.

*(2) The official state holiday shall be the 20th day of August.”*¹²

These national holidays are symbols of outstanding importance, which, on the one hand, transcend the political situation and are characterized by permanence, and on the other hand, provide an opportunity to shape attitudes toward national

⁸ Paragraph (3) of Article I) of the Fundamental Law of Hungary.

⁹ Paragraphs (2) - (2a) of Section 1 of the Act CII of 2011 on the use of the coat of arms and flag of Hungary, and on state decorations.

¹⁰ Paragraph (1) of Section 4 of the Act CII of 2011 on the use of the coat of arms and flag of Hungary, and on state decorations.

¹¹ Point 8 of the Principles, Objectives of Decree No. 110/2012 (VI. 4.) of the Government on the publication, introduction, and application of the National Core Curriculum.

¹² Article J) of the Fundamental Law of Hungary.

history.¹³ They simultaneously express identity and provide an opportunity to experience that identity.

The symbols associated with March 15 and October 23 play a special role; they can be considered “multilevel” national symbols. The cockade and the national flag, from which the Soviet-style coat of arms has been removed, express 1) Hungarian national consciousness and identity, 2) the country’s independence and sovereignty against oppressive powers, and 3) are directly linked to specific historical events and figures (the 1848-49 revolution, the March youth, 1956 and its heroes).

Decision 32/2021. (XII. 20.) of the Constitutional Court of Hungary is considered a milestone in the constitutional discourse on constitutional identity. In its reasoning, the court established, in connection with sovereignty as a fundamental condition of identity, that national holidays linked to the founding of the state, the 1848-49 revolution and freedom fighters, as well as the 1956 revolution and freedom fighters, are also protected as elements of our constitutional identity.¹⁴

“A nation lives in its language” – goes the famous saying. The official language and culture are also important elements of identity, and this is especially true in the case of our country, Hungary, located in a Slavic-Germanic Sea.

“(1) In Hungary the official language shall be Hungarian.

(2) Hungary shall protect the Hungarian language.

(3) Hungary shall protect the Hungarian Sign Language as a part of the Hungarian culture.”¹⁵

With regard to Hungarian culture, the legislator acts with particular caution when, in addition to protecting the Hungarian language and culture, it also declares the languages and cultures of the national minorities of Hungary to be values worthy of protection. Other laws also provide for the protection of the official language, for example, Act XCVI of 2001 on the use of the Hungarian language in economic advertising and business signs, and certain public announcements, as a general rule, stating that “the Hungarian language is the most important expression of our national existence and the expression of our national identity.”¹⁶

4. Historical changes

The appearance of the Hungarian coat of arms can be traced back to the founding of the state. Its earliest element is the double cross, a symbol of royal power, which also frequently appeared in Byzantine depictions. Heraldry deals with the study of the composition of coats of arms. Another element of the Hungarian coat of arms that has been preserved for centuries is the shield field divided several times with red and silver, which first appeared on the pendant seal of King Imre’s charter issued in 1204. By the time of King Béla III, the double cross had become

¹³ Smuk, “A szuverenitás jelképei és alkotmányos védelmük,” 3.

¹⁴ Decision 32/2021. (XII. 20.) of the Constitutional Court of Hungary, Reasoning [109].

¹⁵ Article H) of the Fundamental Law of Hungary.

¹⁶ See the introductory part of Act XCVI of 2001 on the use of the Hungarian language in economic advertising and business signs, and certain public announcements.

a symbol of royal power rather than that of the church.¹⁷ This change may have been justified by the fact that St. Stephen received the crown from the head of the Catholic Church, the Pope. The cross originally floated, and it was not until the 13th-14th centuries that the triple mound pedestal was developed. The popular symbolism of the triple mound, representing the Mátra, Tátra, and Fátka mountains, developed in modern times. Similarly, the idea that the silver stripes represent the Danube, Tisza, Drava, and Sava rivers is also a modern concept. One of the earliest interpretations of the triple mound referred to Golgotha, while others referred to the three social orders of the country.

From the 15th century onwards, the coat of arms of the Kingdom of Hungary began to feature in the coats of arms of the other territories belonging to the Holy Crown alongside the “Árpád stripes”. This is how the large coat of arms and the medium coat of arms came into being, while the original form was called the small coat of arms. The so-called crowned small coat of arms was in use until 1945, except for the shorter periods of the revolutions of 1848-49 and 1918-19. In 1849, Lajos Kossuth made the so-called Kossuth coat of arms without the crown official, by which he tried to emphasize that the dethroned Franz Joseph was not recognized as the Hungarian ruler.

This coat of arms was also used during the 1918 Aster Revolution, when Prime Minister Mihály Károlyi issued a decree stipulating the use of the “coat of arms of the Hungarian People’s Republic.” The Hungarian Soviet Republic used the red flag and the star, and then the Second Hungarian Republic, proclaimed on February 1, 1946, returned to the small coat of arms without the crown. The Soviet-style constitution of 1949 (Act XX of 1949) reduced the national character of the coat of arms in terms of its appearance and placed a hammer, a wheat ear, and a five-pointed red star on it. During the Imre Nagy government in the fall of 1956, the Kossuth coat of arms was reinstated, but from 1957, Soviet symbols reappeared in the design of the Republic’s coat of arms.

In the first free elections in 1990, the crowned coat of arms finally replaced the Kossuth coat of arms as the coat of arms of the Third Hungarian Republic, as proclaimed by Act XLIV of 1990.¹⁸

Another important national symbol, the historical changes in which I will discuss below, is the national flag. Its colours are derived from those of the coat of arms. Just as there are different explanations for the mounds and stripes on the coat of arms, there are also different explanations for the colours of the flag. The most common explanation is that red symbolizes strength or the blood of heroes, white symbolizes loyalty, and green symbolizes hope. Although the red white green flag had been in use since the 16th century, it was not until the 19th century that Act XXI of 1848 established the national colours at the legislative level. After the revolution and war of independence were crushed, its use was banned, but it was restored during the Compromise of 1867. In 1949, the communist coat of arms was placed in the centre of the flag, but it was cut out by freedom fighters

¹⁷ József Laszlovszky, *A magyar címer története* (Budapest: Egyetemi Nyomda, 1989), 9.

¹⁸ Halász and Schweitzer, “Nemzeti jelképek,” 9.

in 1956. After the change of regime, Act XL of 1990 finally adopted the red white green flag without the coat of arms as the official flag of the Republic of Hungary.¹⁹

From a historical overview of the flag and the coat of arms, we can see that they are visible expressions of national identity, formal manifestations of belonging to a community, whose form and values – beyond their basic principles – may depend on the political convictions of the ruling power, the geographical extent of the state, and the prevailing ideological trends.

The original meaning of the hymn is a religiously inspired poem written in a solemn, unbound form. As Christianity began to spread, the hymn took on a new meaning, with the function of singing the praises of God becoming more prominent, and St. Augustine, Bishop of Hippo, played a particularly important role in this. During the European Reformation, hymns were similar to biblical psalms. The religious nature of hymns declined in the 18th century, and today's national anthem emerged during the awakening of national consciousness.

Ferenc Kölcsey finished writing his poem entitled Himnusz (Hymn) in Cseke, Szatmár County, at the end of January 1823, and it was first published in print in 1829 in the magazine *Auróra*, edited by Károly Kisfaludy. It is interesting to note that in the 19th century, *Szózat* was still considered the national anthem, while Kölcsey's poem was regarded as a "valuable literary work."²⁰

This changed at the turn of the century, and although a proposal to revise the national anthem was put forward as early as 1903, it was only implemented under Act XXXI of 1989, which comprehensively amended the Constitution.

5. The achievements of the historical constitution and the Holy Crown

Although neither the achievements of the historical constitution nor the Holy Crown are considered national symbols under the Fundamental Law of Hungary, mentioning them is justified by their outstanding significance and the appearance of the crown in the coat of arms, and also by the fact that Section 334 of the Criminal Code regulates the violation of national symbols and the violation of the Holy Crown in a single provision and punishes both acts equally as misdemeanours.

*"Any person who – before the public at large – uses an expression to dishonour or degrade the national anthem, the flag or the coat of arms, or the Holy Crown of Hungary, or commits any other similarly slanderous act is guilty of a misdemeanour punishable by imprisonment not exceeding one year, insofar as the act did not result in a more serious criminal offense."*²¹

The Fundamental Law of Hungary states the following in the National Avowal: "We honour the achievements of our historic constitution and we honour the Holy

¹⁹ Halász and Schweitzer, "Nemzeti jelképek," 10.

²⁰ Halász and Schweitzer, "Nemzeti jelképek," 10.

²¹ Section 334 of the Act C of 2012 on the Criminal Code.

Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation."

From the last decades of the 14th century onwards, the crown appeared as a state symbol in international treaties. The contracting parties concluded the treaty not with the king, but with the crown. Seventeenth-century legal sources testify that the crown embodied the country, and in Act LXIII of 1741, it clearly represented the Hungarian state. The Hungarian crown was mentioned in the Compromise Act (Act XII of 1867), while the Croatian Compromise Act (Act XXX of 1868) highlighted the crown of St. Stephen. In the 19th and 20th centuries, the Holy Crown was a concept in public law that represented the entire sovereign Hungarian state with full legal capacity.²²

The development of the Holy Crown doctrine formed part of Hungarian public law thinking throughout the centuries, constituting one of the fundamental elements of the historical constitution. The historical constitution comprises constitutional laws, charters, and customs of outstanding importance relating to the exercise of state power and Hungary's independence, created in different historical eras but never recorded simultaneously in a single constitutional document.²³

The Holy Crown has a very special role in public law, as it can be regarded as both the source and subject of sovereignty. In this context, the Holy Crown is the supreme power, and citizens' loyalty is directed towards it.²⁴

The Holy Crown has been given a special role in the Fundamental Law of Hungary. It plays a much more important role than national symbols, which express identity and belonging to a political and cultural community. The Holy Crown embodies Hungary's constitutional continuity and national unity. Before the Fundamental Law of Hungary was adopted, the Ad-Hoc Parliamentary Constitution Drafting Committee led by László Salamon developed a constitutional concept. According to this concept, the Holy Crown merely "expresses" state continuity, but the Fundamental Law of Hungary uses a stronger term: it embodies it. Thus, the Holy Crown embodies state continuity in its material form.²⁵

The so-called Holy Crown Act²⁶ places the crown, which embodies the constitutional continuity and sovereignty of the state, in the most important building of sovereignty, the Parliament.

The outstanding importance of national symbols in expressing national identity, as well as the role of the historical constitution have already been mentioned. In addition, certain achievements of the historical constitution may also fall under

²² Halász and Schweitzer, "Nemzeti jelképek," 8.

²³ Zoltán Szente, "A historizáló alkotmányozás problémái – a történeti alkotmány és a Szent Korona az új Alaptörvényben," *Közjogi Szemle* 4, no. 3 (2011): 113.

²⁴ Szente, "A historizáló alkotmányozás problémái," 1–13.

²⁵ András Zs. Varga, "A Szent Korona a magyar Alaptörvényben," *Pázmány Law Working Papers*, no 1 (2018): 3.

²⁶ Act I of 2000 on the commemoration of the founding of the state by Saint Stephen and the Holy Crown.

protection as elements of constitutional identity, thus enjoying double protection. This is reflected in Decision 22/2016. (XII. 5.) of the Constitutional Court of Hungary, in which the body classified the recognition of judicial power and the protection of national minorities living among us as part of constitutional identity and as achievements of the historical constitution.²⁷ We can see an example of this in Decision 32/2021. (XII. 20.) of the Constitutional Court of Hungary. The court classified the facts that constitute Hungary's constitutional identity as legal facts and the results of historical constitutional development, which cannot be renounced.²⁸ It explained that the consolidation of sovereignty began with the establishment of the state and the development of its organizational structure.²⁹ In this context, in accordance with Article R(3) of the Fundamental Law of Hungary, it identified the Golden Bull of 1222, which limited royal power, as an achievement of historical constitutional development, in the same way as King Ladislaus I's charter of 1440, which declared the union of Hungary and Poland against the Turkish threat, as a result of which our country bore the title of "bastion of Christianity" for centuries. In its Decision 29/2015. (X. 2.), the Constitutional Court of Hungary also confirmed the classification of Werbőczy's Tripartitum as an achievement. In addition, the Constitutional Court of Hungary also identified Act XII of 1790/91 as an achievement of the historical constitution, based on which the monarch and the Hungarian National Assembly jointly exercise the right to legislate. The reasoning behind the decision refers to the extension of rights during the 1848-1849 War of Independence, the centralized state organization, and the government accountable to the National Assembly.³⁰ Finally, it emphasizes: "The elements of the historical constitution listed above, relating to sovereignty, population, linguistic, historical, and cultural traditions, are considered achievements in terms of Hungary's constitutional identity, pursuant to Article R) (3) of the Fundamental Law of Hungary."³¹

6. Use of symbols of autocracy: Section 335 of the Hungarian Criminal Code

The use of symbols of autocracy is regulated by Section 335 of the Criminal Code, which stipulates that their dissemination, use, and display in public shall be punished by imprisonment, meaning that the penalty is lower than in the case of regulations concerning the violation of national symbols. These symbols (swastika, the insignia of the SS, the arrow cross, the sickle and hammer and the five-pointed red star) express the identity of totalitarian political systems and

²⁷ Decision 22/2016. (XII. 5.) of the Constitutional Court of Hungary, Reasoning [65].

²⁸ Csoma Pál Kecskés, *Nemzeti és alkotmányos identitás az Unió elsődleges jogában, valamint a német és a magyar alkotmánybíróági gyakorlatban* (Law degree thesis, Pázmány Péter Catholic University, Doctoral School of Law and Political Sciences, 2022), 51.

²⁹ Decision 32/2021. (XII. 20.) of the Constitutional Court of Hungary, Reasoning [104].

³⁰ Decision 32/2021. (XII. 20.) of the Constitutional Court of Hungary, Reasoning [102].

³¹ Decision 32/2021. (XII. 20.) of the Constitutional Court of Hungary, Reasoning [106].

played a significant role in maintaining them and creating group cohesion. Unlike national symbols, however, they served to express the identity of illegitimate political systems.

The use of symbols of autocratic rule is also a matter of freedom of expression, which can be exercised through words, writing, works of art, or symbols. The protection of human dignity is a clear limitation on the freedom of expression, and the prohibition of the use of these symbols serves to protect individual rights, public order, condemn autocratic ideologies, and curb extremist manifestations and hate speech.³² This prohibition cannot be a general prohibition; the relevant circumstances are to be specified in the statutory elements of the prohibited conduct, as a total prohibition would result in a disproportionate restriction of the freedom of expression.³³

7. Nation and State

Identity means identification and attachment. This attachment can be realized in relation to a certain community, in our case, the country, the nation, or the state, which are bound together by certain identity-forming factors (e.g., native language, culture, traditions, shared history).

In the following, I will analyse the concepts of nation and state, as well as the types and changes in attachment to them. Hungary is in a special situation, as belonging, attachment and loyalty to the state or the nation can be separated in public opinion. The state – as an “institutional entity” – can also evoke negative feelings in citizens (e.g. as someone to whom one has to pay taxes). In contrast, we tend to have a more positive connection to the nation as a “community of destiny.” Here, we must distinguish between the political and cultural concepts of ‘nation’. The political nation refers to all citizens living within the country’s borders who have an institutional relationship with the state, regardless of their ethnic origin, while the cultural nation is independent of state borders and is primarily held together by cultural and ethnic factors (such as a shared history or language).

8. The concept of nation in the Fundamental Law of Hungary

According to István Kukorelli, “[t]he Fundamental Law of Hungary has taken a very bold step towards a political or nation-state model, without denying the concept of a cultural nation, which is favoured by Pan-Slavism and also lives on in Hungarian political thinking.”³⁴ We must also consider whose identity and sovereignty these symbols represent. I believe that the national symbols protected

³² Péter Smuk, “Az önkényuralmi rendszerek jelképei és a használatukat tiltó jogi szankciók rendszere,” *In Medias Res* 8, no. 2 (2019): 230.

³³ Smuk, “Az önkényuralmi rendszerek jelképei és a használatukat tiltó jogi szankciók rendszere,” 245.

³⁴ István Kukorelli, “Az Alaptörvény és az Európai Unió,” *Pro Publico Bono* 1, no. 1 (2013): 9.

as constitutional identity, recognized in the Fundamental Law of Hungary but existing already before it, express not only the identity of Hungarian citizens (political concept of nation), but also that of all those who identify with this national identity, regardless of whether they live within or outside the state borders, regardless of citizenship (cultural concept of nationhood).

Many pages could be written about the complex concept of ‘nation’ in the Fundamental Law of Hungary, and lively academic and political debates have erupted in the years since its adoption, as the text of the law refers to cultural, political, and ethnic concepts of ‘nation’.

*“WE, THE MEMBERS OF THE HUNGARIAN NATION, at the beginning of the new millennium, with responsibility for all Hungarians, hereby proclaim the following:”*³⁵ – is stated at the beginning of the preamble of the Fundamental Law of Hungary. It is a general observation that the text of the Fundamental Law of Hungary contains the first-person plural pronoun “we” in several places. The question may reasonably arise as to on whose behalf the constitution-maker is speaking. There are various possible answers to this question, without claiming to be exhaustive: 1) on behalf of the Hungarian nation (however, the Fundamental Law of Hungary is inconsistent in who it considers to form part of the Hungarian nation) 2) on behalf of the constitutional parliamentary majority, or on behalf of the representatives who adopted the Fundamental Law of Hungary in a regular parliamentary vote 3) on behalf of the representatives and contributors who effectively participated in the drafting of the Fundamental Law of Hungary. József Szájer, one of the key figures in the drafting of the Fundamental Law of Hungary, defines the subject of constitution-making as the representatives of the Hungarian National Assembly who are creating the text and presume that other members of the Hungarian nation share their ideas as expressed in the text.³⁶ In my personal opinion, the subject of constitution-making is in fact and primarily the parliamentary majority that adopted the Fundamental Law of Hungary, and indirectly, based on the principles laid down in Article B)(3) and(4) of the Fundamental Law of Hungary, the citizens of the political nation.³⁷ As stated in the postamble to the Fundamental Law of Hungary: *“We, the Members of the National Assembly elected on 25 April 2010, being aware of our responsibility before God and man and in exercise of our constituent power, hereby adopt this to be the first unified Fundamental Law of Hungary.”*³⁸ Despite all this, unlike the communist constitution of 1949, the Fundamental Law of Hungary places great emphasis on expressing the unity of the Hungarian nation, on the fate of

³⁵ Monday First Sentence of the National Avowal of the Fundamental Law of Hungary.

³⁶ Péter Smuk, “Nemzetfogalom és történeti narratíva az Alaptörvényben,” *Doktori műhelytanulmányok*, 2013, 263.

³⁷ Iván Halász, “A nemzetfelfogás kérdése az Alaptörvényben és a hatályos magyar közjogban,” in *Rendhagyó kommentár egy rendhagyó preambulumról*, ed. András Patyi (Budapest: Dialóg Campus, 2019), 24.

³⁸ Postamble of the Fundamental Law of Hungary.

Hungarians living outside its borders, their communities, their aspirations, and the enforcement of their rights.³⁹

9. European symbols – European identity?

“We are proud that our king Saint Stephen built the Hungarian State on solid ground and made our country a part of Christian Europe one thousand years ago.”

“We are proud that our nation has over the centuries defended Europe in a series of struggles and enriched Europe’s common values with its talent and diligence.”

“We believe that our national culture is a rich contribution to the diversity of European unity.”⁴⁰

These passages from the National Creed section of the Fundamental Law of Hungary clearly refer to Hungary’s European identity, as it is also pointed out in the reasoning of Decision 32/2021. (XII. 20.) of the Constitutional Court of Hungary.⁴¹

Hungary has been a member of the European Union since 2004, and as an EU member state, it is not only a participant in the integration, but also an active shaper of it. Member state identity also influences European identity, and vice versa. In his work, János Martonyi writes that without accepting national identity, it is impossible to understand European identity, as it is the understanding of the former as a primary affiliation that can lead to European identity. In his opinion, the essence of European identity is easier to understand by going out into the streets and looking at what surrounds us than by reading historical-philosophical works. We see crosses on top of churches, in public spaces, along main roads, and in cemeteries, and we hear bells ringing at noon, which gives a stranger the initial impression that the cross carries some important meaning. Next to the cross, we encounter human figures, images, and statues, which – in the wake of the Renaissance – are imprints of ancient Greek heritage. Thus, alongside Christianity, it identifies ancient Greek culture as an element of European identity.⁴²

Defining European identity means finding the common ground that EU citizens accept as such and that we present to the world. This raises the often-debated question as to whether there is such a thing as a European demos, a European people, to which we can express our attachment through symbols.⁴³

It is often said, and nowadays considered almost archaic, that Europe’s cultural and spiritual identity rests on three hills: Golgotha (Judeo-Christian tradition), the

³⁹ Article D) of the Fundamental Law of Hungary.

⁴⁰ National Avowal of the Fundamental Law of Hungary.

⁴¹ Decision 32/2021. (XII. 20.) of the Constitutional Court of Hungary, Reasoning [96].

⁴² János Martonyi, “Európai identitás – Nyitni vagy bezárkózni,” *Európai Tükör* 24, no. 2 (2021): 141.

⁴³ Marcel Szabó, “Az Európai Unió keresztény gyökerei – Európai identitás és a Lisszaboni Szerződés,” *Iustum Aequum Salutare* 8, no. 2 (2012): 263.

Acropolis (Greek philosophy) and the Capitol (Roman Law). These are the so-called three pillars of Europe.

In the 20th century, European cooperation was given an institutional framework. The initial, exclusively economic cooperation gradually expanded to include a political dimension, culminating in the adoption of the constitutionally significant Treaty of Lisbon. Although the European Union does not have its own constitution, and attempts to move in this direction failed in the Dutch and French referendums, there is significant overlap between the text of the Lisbon Treaty and that of the planned Constitutional Treaty.

In the 1950s and 1960s, at the beginning of economic integration, there was no need for a common identity or common values, as the emphasis was on market-based cooperation. With the deepening of political cooperation, joint decision-making developed, the effectiveness of which is crucial in the 27-member European Union. At the national level, minorities can submit to the will of the majority, but at the EU level, stronger political unity and a more unified, common identity are necessary for the EU to function.⁴⁴

Defining European identity is no easy task, and there are several approaches to doing so. First, we need to distinguish between different concepts of Europe. Timothy G. Ash and Václav Havel identify three separate dimensions: cultural, political, and geographical Europe. The geographical concept of Europe considers the area within the continent's borders to be Europe, but these borders may depend on both political and cultural factors. According to French researcher Jean-Marc Ferry, cultural Europe is linked to the canonized values accumulated over thousands of years in the so-called "qualitative Europe" and expresses the cultural unity of Europe.⁴⁵ The political concept of Europe focuses on "institutional Europe", i.e., the institutional and political system of the European Union itself, rather than on quality. According to other opinions, cultural and political Europe cannot be separated from each other at this level, but together they form "European consciousness."⁴⁶

Almost all European countries regulate national and state symbols and their protection in their constitutions. It can be said that German, Italian, Portuguese, and Polish criminal laws afford the same protection to the national symbols of foreign states as they do to domestic national symbols.⁴⁷ The United Kingdom is an exception, as it has neither a written constitution nor a separate criminal code. Overall, however, it may be stated that the constitutional and criminal law protection of these symbols can be considered a fundamental European principle.⁴⁸

In the following, I will analyse the most important symbols of the European Union as expressions of European identity. One such symbol is the European

⁴⁴ Szabó, "Az Európai Unió keresztény gyökerei," 261.

⁴⁵ Aladár Dér, "Európai Unió – európai identitás," *Politikatudományi Szemle* 14, no. 1 (2005): 127.

⁴⁶ Dér, "Európai Unió – európai identitás," 128.

⁴⁷ Decision /2000. (V. 12.) of the Constitutional Court of Hungary, Reasoning III.2.

⁴⁸ Tóth, "A nemzeti szimbólumok büntetőjogi védelme," 195.

anthem, which has been Beethoven's Ode to Joy since 1985. Europe Day, the anniversary of the historic Schuman Declaration, is observed every year on May 9, celebrating peace and unity in Europe. Other important symbols include the flag of the European Union, which symbolizes European unity and identity based on a 1983 resolution of the European Parliament, and the Union's famous motto since 2000: "United in diversity". Florian Bieber and Roland Bieber (2021) argue that the EU needs symbols because mere bureaucracy and legislation are not enough to inspire loyalty among citizens. The purpose of symbols (flag, anthem) is to make the otherwise abstract union visible, to form an emotional bridge between distant Brussels decision-making and everyday life, and to show unity to the outside world.⁴⁹ Michael Billig's concept of "banal nationalism" is applied to the EU, according to which European identity is reinforced not by grand political speeches, but by small, unnoticed signs in everyday life, such as blue license plates on cars, the EU logo on driving licenses and passports, or the presence of the European flag on public buildings alongside the national flag. This process makes "Europe" an unnoticed part of our lives.⁵⁰

The uncertainty and weaknesses surrounding European identity may be reflected in the fact that the symbols of the European Union, although being official symbols under Council and Parliament resolutions, do not enjoy constitutional or criminal law protection, unlike national symbols and emblems, which are protected by national constitutions and criminal codes.

An interesting international example is Latvia, where, in addition to the legislator granting constitutional and criminal law protection to national symbols and the flag, the interpreter of the constitution also considers certain elements (such as popular sovereignty, the protection of state territory, respect for the Latvian language and the national flag) to be "core elements of the Latvian constitution" as a kind of eternity clause, and includes sovereignty, national independence, Latvia's territorial integrity, the principle of democratic governance, respect for the Latvian language, fundamental human and Christian values, and respect for the Latvian national flag and national symbols among values of constitutional identity.⁵¹

A similar example is Malta, where although the constitution does not contain an explicit eternity clause, Article 66 can be considered a quasi-eternity clause, and the first and second chapters of the text of the norm can be considered the source of constitutional identity. This section regulates fundamental values such as

⁴⁹ Florian Bieber, Roland Bieber, *'Europe' as a Symbol: Symbols of Europe*, (Springer, 2021), chap. 6, 135. https://doi.org/10.1007/978-3-030-55016-5_6.

⁵⁰ Laura Cram, "Does the EU Need a Navel? Implicit and Explicit Identification with the European Union" *Journal of Common Market Studies* (2011): 80.

⁵¹ Norbert Tribl, "Az alkotmányos identitás funkciója és alkalmazhatósága a szupranacionális térben" (PhD diss., University of Szeged, Faculty of Law and Political Sciences, 2020), 93.

territorial integrity, religion and the national language, and – of particular relevance to our topic – respect for the flag and national anthem.⁵²

10. Summary

In summary, it can be concluded that the fundamental purpose of national and community symbols is to represent sovereignty externally and to strengthen and integrate community identity internally. The Fundamental Law of Hungary lists the most important state symbols – the coat of arms, the flag, and the anthem – while the Holy Crown enjoys a special status under public law as the embodiment of state continuity and national unity. In its decision 32/2021. (XII. 20.), the Hungarian Constitutional Court recognized the national holidays listed in Article J) of the Fundamental Law as part of Hungary's constitutional identity, as an expression of the struggle for sovereignty and national self-determination. Due to their significance, these symbols enjoy not only constitutional protection but also protection under criminal law. At the same time, the European Union also uses its own symbols – the European flag, anthem, motto, Europe Day, and the common currency – in order to bring the abstract institutional system closer to its citizens on an emotional level. However, it is important to note that, unlike Hungarian national symbols, EU symbols do not enjoy direct constitutional or criminal law protection, from which we can conclude the uncertainty of the content of European identity.

⁵² Tribl, “Az alkotmányos identitás funkciója és alkalmazhatósága a szupranacionális térben,” 94.

The Minimum Age of Criminal Responsibility: Interdisciplinary Perspectives

SZABÓ, KRISZTA^{*}

ABSTRACT The criminal liability of minors represents a complex and sensitive legal issue, involving not only legal aspects but also psychological, social, and ethical dimensions. Children's developmental particularities – especially neurocognitive maturation processes and decision-making capacity – require a constant reassessment of the criteria for criminal responsibility. From this perspective, neuropsychological factors play an essential role in determining the age at which a minor can be considered capable of understanding the nature and consequences of their actions and of acting with free will in relation to them. This raises the question of whether such capacity can truly be assigned to a fixed age and what essential developmental processes must occur in a child in order to justify holding them criminally responsible. The paper examines key international instruments, including UN conventions and Council of Europe recommendations, which provide guidance to member states on establishing a minimum age of criminal responsibility and developing a child-sensitive justice system. Adopting an interdisciplinary approach, the study explores whether legal science incorporates insights from other disciplines when defining the minimum age of criminal responsibility and identifies international trends in this field by analyzing both legal instruments and their practical application.

KEYWORDS Criminal law, Criminal liability of minors, International law, Interdisciplinary approach, Minors, Minimum age, Children's rights.

1. Introduction

All regulations concerning children occupy a prominent place in jurisprudence, as they affect an age group that is still in the developmental stage and thus requires special attention. This paper explores the issue of the minimum age of criminal responsibility in an international and interdisciplinary context, with particular emphasis on the relationship between legal science and neuropsychology.

This paper aims to explore both the theoretical foundations and the practical implications of the criminal liability of minors. The first part analyzes the main

^{*} PhD student, University of Miskolc, Faculty of Law, Deák Ferenc Doctoral School in Law and Political Sciences.

relevant international documents – including various UN instruments and the recommendations of the Council of Europe – that provide guidance to member states on establishing a minimum age of criminal responsibility and creating a justice system tailored to children.

The second part of the paper examines a practical approach to countries with common law and continental systems. The analysis is conducted using the case of England, complemented by a brief historical overview that highlights the directions of legal development regarding this issue. England represents the average approach of common law legal traditions concerning the minimum age of criminal liability. The aim of the paper is not only to evaluate the internal regulations of each country but also to place them in an international context—with particular emphasis on an interdisciplinary approach that incorporates findings from neuropsychology to gain a deeper understanding of children's criminal responsibility.

The case of common law countries differs from what is conventional in average continental legal systems. Therefore, presenting England's regulation illuminates the criminal responsibility of minors from a different perspective. At the same time, the low age threshold in the regulation makes it particularly relevant to consider whether the law should adopt recommendations from other disciplines. Consequently, the research hypothesis is that jurisprudence does not take into account findings and recommendations from the field of neuropsychology, neither during the legislative process nor in the application of the law. The main aim of this paper is to validate or challenge this hypothesis by examining the pertinent neuropsychological and legal literature.

2. Neuropsychological effects

The criminal liability of minors is a complex issue that can be approached from multiple perspectives to better understand its significance. In addition to sociological, cultural, and historical aspects, psychological and biological development is perhaps the key factor that should be uniformly considered across all regions, countries, and continents. The key questions addressed in this chapter will be:

1. To what extent can science accurately determine the age from which a minor should be held criminally liable?
2. According to the current state of scientific knowledge, what is the minimum age below which a minor should never be subject to criminal punishment? What impact would their inclusion in the criminal justice system have?
3. What significant differences exist between the cognitive and perceptual processes of children and adults regarding criminal proceedings and the consequences of criminal offenses?
4. Has children's development truly accelerated in recent times, according to scientific findings?

A main condition for determining the minimum age of criminal responsibility (MACR) is that individuals must be capable of recognizing the unlawfulness of

their actions, as well as understanding their effects and consequences on both others and themselves. In the case of minors, the brain's developmental processes must be compared to those of an adult to fully grasp the role and impact of these crucial changes. According to neuroscience and developmental psychology, these abilities are limited in childhood and adolescence. During this period, important changes occur in brain maturation that affect executive functioning, emotional processing, and social cognition. Additionally, this stage is characterized by emotional instability, sensation-seeking behavior, and inadequate inhibitory self-control.¹

During adolescent development, three key areas are worth highlighting: executive functioning, emotional processing and social cognition.² Executive functioning (EF) skills play a crucial role in regulating and coordinating thoughts and behavior. They include working memory (the ability to retain and manipulate information), selective attention, and inhibition of emotional responses.³ The improvement of EF skills throughout adolescence is closely linked to dramatic changes in the prefrontal cortex, which may also include transformations in abilities related to future orientation.⁴ The prefrontal cortex matures progressively throughout adolescence and reaches near full development around the age of 18.⁵ Young individuals gradually develop the capacity to plan ahead and consider future consequences in their decision-making processes. The ability to focus attention emerges during early school years (from the age of 6 to 10/11). During this period, self-control also develops, which is based on the child's ability to tolerate frustration, delay gratification, feel competent in their actions, and build confidence in their own effectiveness.⁶

During adolescence, the child becomes more developed. However, social relationships have a greater influence on them, which can impact both their present and future criminal behavior.⁷ Self-esteem and the desire to fit into a social group become more significant during this stage.

In the 2000s, Miyake and his colleagues defined and differentiated between the three main components of executive functions: (a) shifting between tasks or mental sets; (b) updating and monitoring of working memory representations,

¹ Jana Hulmáková, Jiří Tomášek, and Eva Krulichová, "Public Opinion on the Minimum Age of Criminal Responsibility: The Role of Cognition and Emotions," *International Criminal Justice Review* (2024): 1–18, <https://doi.org/10.1177/10575677241282285>.

² Elly Farmer, "The Age of Criminal Responsibility: Developmental Science and Human Rights Perspectives," *Journal of Children's Services* 6, no. 2 (2011): 86–95, <https://doi.org/10.1108/17466661111149385>.

³ Adele Diamond, "Executive Functions," *Annual Review of Psychology* 64 (2013): 135–168, <https://doi.org/10.1146/annurev-psych-113011-143750>.

⁴ Farmer, "The Age of Criminal Responsibility," 90.

⁵ Farmer, "The Age of Criminal Responsibility," 90.

⁶ Katalin Visontai-Szabó, "Fejlődéslélektani alapismeretek," in *Improving Decisions through Empowerment and Advocacy* (2018), 8.

⁷ Yolisha Singh, "Old Enough to Offend but Not to Buy a Hamster: The Argument for Raising the Minimum Age of Criminal Responsibility," *Psychiatry, Psychology and Law* 30, no. 1 (2023): 51–67, <https://doi.org/10.1080/13218719.2022.2134229>.

and (c) inhibition of dominant or prepotent responses.⁸ Shifting between tasks or mental sets involves the ability to alternate between different tasks, operations, or cognitive sets, essentially referring to the process of attention or task switching. The second executive function, updating and monitoring of working memory representations, is closely related to the concept of working memory itself. Finally, inhibition of prepotent responses, the third executive function, refers to the capacity to consciously suppress dominant, automatic, or habitual responses when required.⁹

These analyses were necessary to understand the mechanisms occurring in children's brains, especially given their development stage. Several studies have found that EFs differentiate with age. In preschoolers, EF is best understood as a single, unified ability. By primary school, working memory starts to emerge as a distinct component, separate from inhibition and shifting.¹⁰ During adolescence, typically around 13–14 years, a fully differentiated three-factor model – comprising inhibition, shifting, and updating – becomes evident, highlighting the progressive refinement of cognitive control processes.¹¹ In fact, EF is in a constant state of development during childhood and touches on a number of important areas that contribute to a fundamental understanding of the criminal justice process and its implications.

The second key area, where adolescence develops, as mentioned, is the emotional processing. Based on advancements in neurodevelopmental research an individual's brain does not fully develop until their early twenties, many of the limbic structures (frontal lobe, amygdala) are also involved in a person's emotional processing.¹² Children experience emotions more intensely than adults because of the immaturity of inhibitory pathways in their brains.¹³ When these strong emotions impair a child's judgement, it is not fair to hold them fully responsible for their actions, as they are not able to regulate and rationalize their impulses in the same way as adults. The frontal lobe of the brain is the slowest-developing area. Research shows that the frontal lobes develop rapidly until the age of 25, with further development continuing until the age of 35.¹⁴ This is why

⁸ Akira Miyake et al., "The Unity and Diversity of Executive Functions and Their Contributions to Complex 'Frontal Lobe' Tasks: A Latent Variable Analysis," *Cognitive Psychology* 41 (2000): 49–100, <https://doi.org/10.1006/cogp.1999.0734>.

⁹ Miyake et al., "The Unity and Diversity of Executive Functions," 49–100.

¹⁰ Thalia Theodoraki, Sarah McGeown, Sinead Rhodes, and Sarah E. MacPherson, "Developmental Changes in Executive Functions During Adolescence: A Study of Inhibition, Shifting, and Working Memory," *British Journal of Developmental Psychology* 38, no. 1 (2020): 74–89, <https://doi.org/10.1111/bjdp.12307>.

¹¹ Theodoraki et al., "Developmental Changes in Executive Functions," 77.

¹² Anthony L. Pillay, "The Minimum Age of Criminal Responsibility, International Variation, and the Dual Systems Model in Neurodevelopment," *Journal of Child and Adolescent Mental Health* 31, no. 3 (2019): 224–235, <https://doi.org/10.2989/17280583.2019.1692851>.

¹³ Pillay, "The Minimum Age of Criminal Responsibility," 224–235.

¹⁴ Jerome Amir Singh et al., "World Health Organization Guidance on Ethical Considerations in Planning and Reviewing Research Studies on Sexual and Reproductive

children are more risk-taking than adults, their primary concern being the pursuit of reward, immediate emotions and desires.

The last field is the social cognition where researchers indicate that as young people transition from early adolescence to adulthood, they become more adept at understanding different perspectives and recognizing others' mental states.¹⁵ In young school-aged children, especially early adolescents, a strong attachment to parents can be observed. However, this attachment becomes more challenging in the second half of adolescence, as one aspect of identity formation involves separating from parents and developing social skills. Initially, children prioritize following rules set by their parents without questioning them and take pleasure in receiving praise for their obedience.¹⁶ Criminal law acknowledges that individuals are not fully accountable for their actions if their cognitive functioning was significantly impaired at the time of the offense.

In addition, the "Dual Systems Model" proposes that risk-taking behavior intensifies during adolescence due to an imbalance in brain development. The "socioemotional system" which matures earlier, drives the pursuit of rewards, excitement, and risky activities, while the "cognitive control" system develops more gradually, leaving adolescents with insufficient regulation to curb impulsive or potentially hazardous actions.¹⁷ This model suggests that adolescents experience a temporary disconnect between an affective system that matures relatively early and a cognitive control system that lags behind in development.¹⁸

The criminal prosecution of minors is also a sensitive issue. Beyond the fact that a minor may not fully comprehend the legal process or may do so only to a limited extent, they also risk being stigmatized. This stigma can have two major consequences.¹⁹ First, labeling a minor as a criminal influences their identity, increasing the likelihood that they will associate with this role and engage in future offenses. Second, it poses significant challenges to reintegration, complicating their reinsertion into society at an early stage. Socially legalized adulthood is postponed until later and later, making the moral norms associated with this stage of life increasingly blurred and uncertain.²⁰

In the current social context, adolescence has become a significantly extended period. Although sexual maturation begins earlier, it does not signal full maturity, as psychological development follows a separate trajectory. Over the past

Health in Adolescents," *Journal of Adolescent Health* 64, no. 4 (2019): 427–429, <https://doi.org/10.1016/j.jadohealth.2019.01.008>.

¹⁵ Farmer, "The Age of Criminal Responsibility," 88.

¹⁶ Zsuzsanna Vajda, *A gyermek pszichológiai fejlődése* (Budapest: Helikon, 2004), 198.

¹⁷ Pillay, "The Minimum Age of Criminal Responsibility," 224–235.

¹⁸ Teena Willoughby et al., "Examining the Link between Adolescent Brain Development and Risk Taking from a Social–Developmental Perspective," *Brain and Cognition* 83, no. 3 (2013): 315–323, <https://doi.org/10.1016/j.bandc.2013.09.008>.

¹⁹ Tim Bateman, "Criminalising Children for No Good Purpose: The Age of Criminal Responsibility in England and Wales," *NAYJ Campaign Paper* (2012): 13.

²⁰ Mária Roth-Szamosközi and Andrea E. Vincze, *Bevezetés a fejlődéslélektanba* (Cluj-Napoca: Presa Universitară Clujeană, 2010), 240.

century, the physical growth of children and teenagers has accelerated, with puberty beginning earlier than in previous generations—a phenomenon known as the secular trend, often attributed to better nutrition and overall health conditions.²¹ However, these biological changes should not be mistaken for cognitive and emotional maturity, as these aspects of development progress at a much slower and more variable pace. Socially legalized adulthood, on the other hand, is postponed until later and later, making the moral norms associated with this stage of life increasingly blurred and uncertain.²² Consequently, redefining adolescence to encompass the ages of 10 to 24 better aligns with modern developmental science and contemporary understandings of this life phase.²³

2. 1 The answers

A brief review of the research reveals that the field of neuropsychology does not establish a specific age limit, meaning that the first two questions cannot be answered with an exact number. However, examining different regions of the brain makes it clear that a complex set of processes is required for healthy development. It can be stated with certainty that some of these transformative processes are completed by the age of 18, while others continue to change at ages 25 and even 35. In light of this, the lower the age of criminal responsibility is set, the more questionable its scientific foundation becomes. During adolescence, typically around the age of 13-14, a gradual refinement of cognitive control processes has been observed, encompassing inhibition, shifting, and updating. Therefore, in my opinion, this age group could represent the threshold below which a minor should not be held criminally responsible.

The early involvement of children in criminal proceedings can affect them not only on a psychological level but also in terms of social attitudes. The appropriate determination of the minimum age for criminal responsibility can also affect further brain development, as, discussed above, the participation of a minor in a criminal procedure may influence later brain processes. As with adults, stigmatization can be actively present for minors as well, regardless of the outcome of the case. This reaction can also have an impact on their further development and integration in the future.

Answering question three, it is evident that some of these developmental processes do not fully mature even in adulthood, highlighting the significant developmental differences between minors and adults. For minors, the three core components of EF develop gradually, with all three typically emerging together around the ages of 13-14. In contrast, in adults, these functions ideally operate at a highly efficient level. Whereas most adults are capable of making decisions based on careful consideration and planning, minors tend to be significantly more influenced by emotions and the pursuit of immediate rewards. When committing a criminal act, minors primarily act under the influence of immediate emotions

²¹ Bateman, “Criminalising Children for No Good Purpose: The Age of Criminal Responsibility,” 6.

²² Roth-Szamosközi and Vincze, *Bevezetés a fejlődéslélektanba*, 240.

²³ Susan M. Sawyer et al., “The Age of Adolescence,” *The Lancet Child & Adolescent Health* 2, no. 3 (2018): 224, [https://doi.org/10.1016/S2352-4642\(18\)30022-1](https://doi.org/10.1016/S2352-4642(18)30022-1).

and potential rewards, with a significantly weaker cognitive control function to regulate their impulses. Another crucial factor is the stronger influence of the environment on minors. Their heightened need for parental approval, the power of attachment, and their susceptibility to emotional influence can contribute to parent-child criminal involvement, where the parent may act as the instigator while the minor becomes the perpetrator. These differences also extend to criminal proceedings. A key consideration is that minors may be more susceptible to external pressures during interrogations, increasing the likelihood that they might confess to crimes they did not commit due to environmental influence.

Regarding the fourth question, it has become evident that minors have been maturing faster in certain biological aspects, particularly in terms of sexual development, for over a decade. However, it is crucial to emphasize that this acceleration does not occur in parallel with their overall maturity level. Consequently, it cannot be concluded that they are more advanced in all areas, which means there is no justification for lowering the minimum age of criminal responsibility on this basis. While these physical changes may suggest increased development, they are not reliable indicators of emotional or cognitive maturity.

3. International Legal Frameworks

In parallel with scientific recommendations, it is pertinent to examine the guidance provided by various international documents, particularly with regard to the age of the offender. Maintaining chronological order, the first relevant document to highlight is the Geneva Declaration of the Rights of the Child, adopted on September 26, 1924, by the League of Nations, the predecessor of the United Nations. In the form of general principles, it encouraged states to engage in international cooperation for the protection of children's rights. Based on the vulnerability of children, this document was the first to articulate—through a paternalistic approach—the necessity of general legal protection for children and the resulting duties, focusing on ensuring and safeguarding the conditions required for children's healthy development.²⁴ In 1959, the UN General Assembly issued a resolution consisting of 10 principles – the Declaration of the Rights of the Child, 1389 (XIV) – which addresses children's rights, including the right to education, the right to healthy development, and the right to be free from discrimination. The two international documents mentioned so far marked the beginning of the recognition of children's rights; however, they did not have binding authority on states, as they were recommendations, primarily specifying guidelines and objectives to be achieved.

On 16 December 1966 the International Covenant on Civil and Political Rights (ICCPR) was adopted by the United Nations. Several relevant provisions were introduced here, including in Article 6, paragraph 5, which highlights the protection of juvenile offenders and pregnant women. Specifically, it states that the death penalty shall not be imposed for crimes committed by persons under

²⁴ Ildikó Bereczki, "Gyermekek jogok és szülői felelősség nemzetközi magánjogi perspektívából" (PhD diss., Pázmány Péter Katolikus Egyetem, 2020), 13.

the age of eighteen, nor shall it be carried out on pregnant women. The provision of Article 10, paragraph 2 (b) is as follows: “*Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.*” Furthermore, paragraph 3 of this article declares that “*Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.*” These provisions underscore the importance of protecting juvenile offenders by ensuring that they are treated in a manner that is suitable for their age and legal circumstances, separate from adult offenders. It is clearly noticeable that in the latter recommendation, more specific legal remedies emerge, rather than merely addressing the issue at the level of principles, as was the case with the 1924 and 1959 documents.

The issue of the specific minimum age of criminal responsibility was first addressed in more detail at the international level in 1985. Under the auspices of the United Nations, the Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”) were formulated. This was the first international document to summarize all of the United Nations’ principles on crime prevention and the circumstances shaping juvenile delinquency.²⁵ This resolution, adopted by the General Assembly, outlines more specific provisions, primarily providing guidance on how children should be treated while within the criminal justice system. Upon further analysis, it is essential to mention Article 4 and its commentary. Article 4 says that: “*In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.*”

The establishment of a MACR is necessary, but the resolution emphasizes that this age should be reasonable and not set too low. Due to cultural and historical reasons, the approach to criminal responsibility varies significantly from country to country. The setting of age limits provides a stable point of reference for law enforcement and is an essential element of the institution of accountability. The Rules recommend that national legal systems develop regulations specifically applicable to juvenile offenders, including the creation of measures and bodies to represent the rights and interests of minors.²⁶ Given the importance of rehabilitation, Article 8 addresses the need to prevent the disclosure of information that could lead to the identification of juvenile offenders. This measure is necessary to ensure that minors are not stigmatized, as they have the right to privacy. From a criminological perspective, one of the primary issues with labeling juveniles as offenders lies in the profound social stigma that such categorization entails.²⁷

²⁵ Bálint Majoros, *A fiatalok bünelkövetők kezelésének hazai és nemzetközi áttekintése* (Budapest: Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, 2014), 6.

²⁶ Petra Vucskics, “A büntethetőség alsó korhatára és a belátási képesség,” *Jogi Fórum*, 2023, 7. https://www.jogiforum.hu/wp-content/uploads/2023/03/vucskics-petra_buntethetoseg-also-korhatara-es-belatasi-kepesseg_cimlappal.pdf.

²⁷ Mohammad A. Masoun, Mohammad T. Wamiq, and Ali A. Modaber, “Criminological Examination of Juvenile Presence in Criminal Proceedings (With a Perspective on the

The Beijing Rules paved the way for the adoption of several international legal instruments concerning juveniles, such as the UN Guidelines for the Prevention of Juvenile Delinquency.

A milestone in the field of child protection is the adoption of the Convention on the Rights of the Child (CRC) by the UN General Assembly, which is the first binding international legal instrument in this area. UNICEF, which played a key role in the drafting of the convention, is listed as an expert source in the document. With the growing emphasis on the international protection of human rights, the regulation of children's status at a higher legal level has increasingly come to the forefront.²⁸ The Convention guarantees and establishes minimum standards for the protection of children's rights in all respects. The preamble of the Convention affirms the necessity of providing children with special support, protection, and care.²⁹ Like the Beijing Rules, this document does not specify a minimum age that states are required to adopt. Instead, Article 40(3) provides general guidance.

Article 3 of the CRC must be highlighted, as it enshrines the “best interests of the child” principle, first articulated in the 1958 Declaration.³⁰ This principle requires that all authorities, including courts, prioritize the child's interests in all proceedings. The CRC creates a synthesis among various legal systems, traditions, and cultures, while establishing universal human rights for children. These rights, grounded in the child's vulnerability and limited maturity, justify special protection and support.³¹

The document known as the Riyadh Guidelines was adopted by the United Nations General Assembly during its plenary session on 14 December 1990, under the title “United Nations Guidelines for the Prevention of Juvenile Delinquency.” Similar to the Beijing Rules, it seeks to explore what measures can be taken—beyond the criminal justice system—to effectively address and prevent juvenile delinquency.³² The guidelines stress that policies should avoid criminalizing and imposing criminal sanctions for behaviors that does not cause serious harm to the child or others' development.³³ It highlights that juvenile

2014 Afghanistan Offenses Adjudication Law),” *Science and Education* 5, no. 8 (2024): 72–86.

²⁸ Barbara Igaz and Attila Kenese, “A gyermekbűnözők, avagy a büntethetőségi korhatár kérdései,” accessed April 20, 2025, [http://www.jogiforum.hu/files/publikaciok/igaz_barbara_kenese_attila_a_gyermekbunozok\[jogi_forum\].pdf](http://www.jogiforum.hu/files/publikaciok/igaz_barbara_kenese_attila_a_gyermekbunozok[jogi_forum].pdf).

²⁹ Miklós Tóth, “A büntethetőségi korhatár a társadalmi elvárások tükrében, szabályozásának hazai és nemzetközi története,” *Belügyi Szemle* 65, no. 2 (2017): 20–34. <https://doi.org/10.38146/BSZ.2017.2.2>.

³⁰ Tóth, “A büntethetőségi korhatár a társadalmi elvárások tükrében,” 26.

³¹ Bereczki, *Gyermekek jogok és szülői felelősség*, 16.

³² Erika Csemáné Váradi, *Nemzetközi és hazai tendenciák a fiatalkorúak büntető igazságszolgáltatásban* (Miskolc: Miskolci Egyetem Állam- és Jogtudományi Kar, 2000).

³³ Raymond Arthur, “The Youth Justice System in England and Wales: Complying with International Human Rights Law,” *International Family Law* 9 (2005): 157–160.

delinquency and other forms of deviant behavior are most significantly influenced by factors such as family dynamics, the school environment, residential settings, and peer groups.³⁴ It also underscores the harmful consequences of stigmatizing minors, a perspective widely endorsed by experts (Point 6 in the Fundamental Principles).

On the same day, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules) were also adopted. These rules focus on the protection of juveniles who are deprived of their liberty, stipulating that juvenile offenders should be released as soon as possible.³⁵ As with the previous documents, the 18-year age limit is also defined here, establishing the juvenile person.

The spirit of the previously mentioned documents—the 1989 UN Convention on the Rights of the Child, the Beijing Rules, the Riyadh Guidelines, and the Havana Rules—remains consistent. They reflect the same principles advocating for the distinct treatment of juvenile offenders in criminal justice systems, providing an approach that allows for “different treatment” compared to adult offenders, thereby supporting the maintenance of a separate juvenile justice system.³⁶

The Council of Europe Recommendation R (2000) 20 on the role of early psychosocial intervention in the prevention of criminality emphasizes the importance of respecting the right to privacy of children and their families, ensuring equal opportunities, and avoiding stigmatization.³⁷ The Recommendation also addresses the dilemma concerning the extent to which children are competent to make decisions in matters affecting them and how they can be held criminally responsible. At the same time, it emphasizes the importance of enabling the child to recognize and understand the consequences of their actions.³⁸

According to Recommendation R (2003) 20 of the Council of the European Union, from the moment of contact with the justice system or other competent authorities, children and their parents must be promptly and appropriately informed about their rights, the applicable procedures and systems, relevant child protection mechanisms, and the availability of protective measures. The explanatory memorandum explicitly notes that the Recommendation may also be applied to children below the age of criminal responsibility, in recognition of the

³⁴ Katalin Ligeti, “A fiatakorúak büntető igazságszolgáltatási törvényének koncepciója,” *Büntetőjogi Kodifikáció* 6, no. 2 (2006): 21–38.

³⁵ Gábor Duda, *A büntethetőségi korhatár alapkérdései* (Budapest: Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, 2014), 6.

³⁶ Erika Csemáné Váradi and Miklós Lévy, “A fiatakorúak büntetőjogának kodifikációs kérdéseiről – történeti és jogösszehasonlító szempontból,” *Büntetőjogi Kodifikáció* 2, no. 1 (2002): 12–27.

³⁷ Máté Nánási, “A belátási képesség megközelítése a jogtörténet és az új Btk. tükrében,” *Magyar Bírói Egyesület* (2017): 13.

³⁸ Mária Herczog, “Gyerek elkövetők, felnőtt bűnök,” *Beszélő* 2008, no. 4 (2008): 5.

significant challenges many countries face in addressing offenses committed by children who cannot be held criminally liable.³⁹

The next relevant document was issued in 2008, the European Rules for Juvenile Offenders Subject to Sanctions or Measures. Although this document does not explicitly use the term “*minimum age of criminal responsibility*,” Rule 4 states that “*the minimum age for the imposition of sanctions or measures as a result of the commission of an offence shall not be too low and shall be determined by law.*” The accompanying Commentary clarifies that this rule implicitly refers both to the establishment of the minimum age of criminal responsibility and to the age from which more punitive sanctions may be applied. The importance of age is further emphasized in paragraph 5, under the section Basic Principles, where it is stated that in addition to the best interests of the juvenile offender, several individual factors must be taken into account when imposing sanctions or other measures. In the section on definitions, the term young adult offender is also given a more specific interpretation: it refers to any person between the ages of 18 and 21 who is alleged to have committed, or has been found to have committed.

The Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice (2010) reflect and reinforce international standards set by the United Nations regarding juvenile justice. In line with the UN's position, Guideline 23 states that “*the minimum age of criminal responsibility should not be too low and should be determined by law.*” As in the previously discussed documents, the juvenile's age must be taken into account throughout various stages of the criminal justice process.

In its General Comment No. 24 (2019), the Committee on the Rights of the Child provides a detailed analysis of children's rights within the juvenile justice system, including specific guidance on the minimum age of criminal responsibility, as outlined in paragraphs 11 and 20–27. Among the objectives of this General comment is the establishment of an appropriate minimum age of criminal responsibility, as well as the assurance that children on both sides of this age threshold receive appropriate and differentiated treatment. Children who are below the minimum age of criminal responsibility at the time an offence is committed cannot be held criminally liable or subjected to criminal proceedings. Article 40(3) of the Convention obliges States Parties to establish a minimum age of criminal responsibility, although it does not prescribe a specific age. Following the ratification of the Convention, more than 50 States have raised their minimum age thresholds, with the most frequently adopted age internationally being 14. The Committee underscores that while setting the MACR at a reasonably high level is essential, it is equally important to ensure that appropriate legal and procedural safeguards are applied to children both below and above that threshold. States Parties are encouraged to consider recent scientific findings and to raise their MACR to at least 14 years of age. In this context, the Committee

³⁹ Miklós Lévy, “Az Európa Tanács R (2003) 20. számú ajánlása a fiatalkorú bűnelkövetőkre vonatkozó igazságszolgáltatási rendszerről,” *Család, Gyermek, Ifjúság* 2005, no. 3 (2005): 21–23.

commends those States that have adopted a higher minimum age—such as 15 or 16—and strongly advises that under no circumstances should the MACR be lowered, in accordance with Article 41 of the Convention.

In summary, a wide range of international legal instruments address the question of criminal responsibility in childhood. Over time, these have evolved from general principles to more concrete recommendations and authoritative interpretations. One of the key shortcomings of these documents, however, is that the majority of them are non-binding in nature; they take the form of guidelines or recommendations rather than enforceable legal norms. As a result, despite their relevance and the urgency of the issues they address, they lack mandatory effect on States.

4. Practical approach

Despite the insights provided by neuropsychological expert opinions and international legal recommendations, a uniform regulatory framework concerning this issue has yet to be established. Consequently, a brief comparative analysis is undertaken to examine how countries operating under common law and continental legal systems approach and regulate this matter. The following table offers a non-exhaustive classification of selected countries according to their respective legal systems:

Table 1: Countries with a Common Law System (Source: UNICEF)

Countries with Common Law System	Minimum age of criminal responsibility
Australia	10
Ireland	10
United Kingdom (England, Wales)	10
Scotland	12

Table 2: Countries with a Continental Law System (Source: UNICEF)

Countries with Continental Law System	Minimum age of criminal responsibility
Albania	14
Andorra	12
Austria	14
Belgium	12
Bosnia and Herzegovina	14
Bulgaria	14
Croatia	14
Czech Republic	15
Denmark	14
Finland	15

The Minimum Age of Criminal Responsibility

France	13
Greece	13
Hungary	12
Luxembourg	16
Netherlands	12
Norway	15
Poland	15
Portugal	12
Serbia	14
Slovakia	14
Spain	14
Switzerland	10

From a preliminary review of the data, it becomes apparent that countries within the common law tradition tend to establish a lower minimum age of criminal responsibility, often falling below the thresholds recommended by the aforementioned international guidelines.

4. 1 England

The low age threshold of the common law legal system has attracted numerous criticisms; therefore, it is particularly relevant to examine the reasons for the establishment of the 10-year age limit and its historical background using England as an example. In this jurisdiction, since 1999, children can be held fully criminally responsible from the age of 10.⁴⁰ This low minimum threshold has drawn criticism both domestically and internationally, due to its implications on the rate of juvenile criminalization. For a brief period, there was hope that English courts would once again recognize the defense based on the presumption of *doli incapax* (lack of capacity to understand the wrongful nature of the act) for children between 10 and 14 years old. However, these hopes were quickly dashed.⁴¹ In the past, children aged 7 to 14 benefited from the *doli incapax* presumption, being considered lacking in discernment unless the prosecution could prove that the child understood the wrongful nature of their act. The social strata of children in early 19th-century England, for instance, generated a significantly higher number of offenders than other population segments, due in part to the absence of a differentiated approach and the ineffective application of punishment.⁴²

These age thresholds remained relatively constant throughout history until the 20th century, when a statutory minimum age was introduced: it was set at 8 years

⁴⁰ Terry McGuinness, *The Age of Criminal Responsibility* (Briefing Paper, 2016), accessed April 23, 2025, <https://dera.ioe.ac.uk/id/eprint/27170/>.

⁴¹ Thomas Crofts, "Catching Up with Europe: Taking the Age of Criminal Responsibility Seriously in England," *European Journal of Crime, Criminal Law and Criminal Justice* 17, no. 4 (2009): 267–291, <https://doi.org/10.1163/157181709X470956>.

⁴² Vitalie Rusu, "Procesul penal în cauzele cu minori: Reflecții de ordin istoric," *Analele Științifice ale Universității „Alexandru Ioan Cuza” din Iași* 67, no. 1 (2021): 89–102, <https://doi.org/10.47743/jss-2021-67-1-6>.

in 1933 and raised to 10 in 1963. The upper threshold of 14 years remained governed by common law until 1994, when the Divisional Court ruled that this presumption no longer formed part of English law.⁴³ This decision was made in a context marked by growing concerns over juvenile delinquency and increasing calls for a tougher stance on young offenders. Public panic was heightened by the murder of a two-year-old child, James Bulger, by two ten-year-old boys—a case that received massive media attention.⁴⁴

The Labour Party, newly in power, reacted swiftly to demonstrate its toughness on youth crime by adopting the Crime and Disorder Act 1998, which formally abolished the *doli incapax* presumption.⁴⁵ This low age of criminal responsibility has been heavily criticized. In the case of *R (A Child) v. Whitty* (1993), Judge Harper stated: “*No civilized society regards children as accountable for their actions to the same extent as adults. The wisdom of protecting young children against the full rigor of the law is beyond argument.*”⁴⁶ Nevertheless, following the convictions, section 34 of the Crime and Disorder Act 1998 was enacted in the UK, formally abolishing the *doli incapax* presumption.

In this context, a lack of logic becomes evident, as, for example, it is not permitted to buy a pet under the age of 12, to purchase a lottery ticket under the age of 16, or to buy alcohol under the age of 18.⁴⁷ In these cases, it is presumed that the minor does not have the necessary capacity to make a proper decision, and their judgment cannot be considered equivalent to that of an adult. However, when a 10-year-old child commits a criminal offense, this same logic is no longer applied, and the same assumption is not made.

5. Conclusions

The question of the MACR remains one of the most sensitive and complex challenges for contemporary legal systems. It lies at the intersection of law, psychology, neuroscience, ethics, and child protection. This paper has demonstrated that assigning criminal responsibility to minors requires more than the mere application of formal legal norms. It necessitates a deep understanding of the child’s cognitive, emotional, and social development and the recognition that children are qualitatively different from adults in their capacity for moral reasoning, impulse control, and future orientation.

Scientific research, particularly from the fields of developmental neuroscience and psychology, confirms that crucial brain structures involved in judgment, self-

⁴³ Rusu, “Procesul penal în cauzele cu minori,” 89–102.

⁴⁴ Laura M. Guerrero Puerta, “James Bulger, a Case of Juvenile Criminality Key for the Change of the Legislative System of the United Kingdom. A Case Study,” *Publicaciones Didácticas* (2017).

⁴⁵ Crofts, “Catching Up with Europe,” 267–291.

⁴⁶ Ayodhya Prabhashini Rathnayake, “A Juvenile Homicide: A Criminological Summary of the Murder of James Bulger,” *Sri Lanka Journal of Forensic Medicine, Science & Law* 14, no. 2 (2023): 24–27, <https://doi.org/10.4038/sljfmsl.v14i2.7935>.

⁴⁷ Bateman, *Criminalising Children for No Good Purpose*, 9.

regulation, and decision-making – such as the prefrontal cortex – do not reach maturity until the late teenage years or even beyond. This knowledge challenges traditional punitive approaches and calls into question the legitimacy of low MACR thresholds. The evidence further supports the conclusion that children under the age of 14 should not be held criminally responsible, as they lack the full cognitive and emotional maturity necessary to understand and internalize the consequences of their actions in a meaningful legal sense.

The review of international legal instruments reflects a growing consensus among global and regional bodies: justice systems must be child-sensitive, rehabilitative in nature, and grounded in the principle of the best interests of the child. While these instruments often refrain from imposing a fixed minimum age, many now emphasize that the MACR must not be set too low and recommend a minimum of 14 years. These legal developments illustrate an important normative shift from retribution toward rehabilitation and child protection. In conclusion, the analysis highlights that jurisprudence does not necessarily follow the recommendations of other disciplines regarding this issue. While international recommendations suggest a higher age threshold, they do not directly refer to the positions formulated in neuropsychology (or other fields of science). Observing the criminal age limit regulations in the aforementioned continental and common law systems, it becomes evident that most national legislations certainly do not take into account the current neuropsychological findings available to date.

The consequences of premature criminalization are far-reaching. Subjecting children to formal criminal proceedings at an early age can stigmatize them, disrupt their psychological development, and increase the risk of recidivism. It undermines the rehabilitative potential of juvenile justice and may lead to a lifelong entanglement with the criminal justice system. Instead of promoting accountability, it fosters alienation, exclusion, and entrenched criminal identities. Ultimately, children must not be held responsible for actions they are biologically, psychologically, and socially unprepared to fully understand. The law must reflect this fundamental reality. A justice system that respects the developmental vulnerabilities of children, and prioritizes their rehabilitation over retribution, is not only more humane – it is also more effective in promoting social reintegration and reducing youth crime in the long term.

Water Governance after Remunicipalisation: Centralisation and Public Control in Hungary

SZEKERES, ÁGOTA*

ABSTRACT *This article examines the transformation of Hungary's water governance from the early 1990s to the present, tracing a rare trajectory from remunicipalisation to centralisation. While many European countries have re-established local public ownership after failed privatisation, Hungary's case demonstrates how municipal control functioned only as an intermediate step toward full state ownership. The analysis situates Hungary within the broader European debate on public services, revealing how shifting political regimes and economic ideologies have shaped legal and institutional frameworks. The study explores how the Water Utility Act of 2011 initiated a process of consolidation under state authority, culminating in the establishment of the National Water Works in 2021. This development represents not merely administrative reform but a structural reconfiguration of public ownership and accountability. Hungary's experience shows how the state regained control over a sector that had been decentralised and partially privatised, shifting the focus from ownership toward the governance mechanisms through which efficiency, equity, and democratic oversight are negotiated in essential services.*

KEYWORDS *Hungary; water governance, remunicipalisation, centralisation, public ownership, state control.*

1. Introduction

The governance of water services in Europe has undergone significant transformation over the past three decades, reflecting shifting ideas about ownership, efficiency, and public responsibility. While many European cities¹ have experienced waves of remunicipalisation,² a return to local public

* PhD student, University of Miskolc, Faculty of Law, Deák Ferenc Doctoral School in Law and Political Sciences.

¹ Emanuele Lobina, Satoko Kishimoto, and Olivier Petitjean, *Here to Stay: Water Remunicipalisation as a Global Trend* (London: Transnational Institute / Public Services International Research Unit, November 2014), 4, <https://www.tni.org/files/download/heretostay-en.pdf>.

² Vanessa Mascia Turri, "Remunicipalisation of Water Services in Europe: Comparative Study of the Neapolitan and Parisian Cases," *Water Policy* 24, no. 12 (2022): 1842, <https://doi.org/10.2166/wp.2022.090>.

management after failed privatisation, Hungary represents an exceptional case. Rather than stabilising as a model of local public ownership, Hungary's trajectory demonstrates a movement from remunicipalisation to centralisation, where municipal control functioned as an intermediate stage on the path toward full state ownership.

This evolution reflects both the legacy of the socialist past and the pressures of post-transition reform. After the fall of Soviet-type regimes, Hungary pursued rapid market liberalisation and privatisation, driven by the political and financial imperatives of the early 1990s. The resulting fragmentation and uneven performance of local water utilities revealed the limits of decentralised governance. In response, the early 2010s brought renewed efforts to reintegrate and professionalise the sector. Yet, the Water Utility Act of 2011 (Act CCIX), intended to strengthen coordination and sustainability, soon transformed into a framework for state-led consolidation.

By 2021 the process reached its culmination: ownership, regulation, and strategic control of Hungary's water utilities became fully centralised under the state. What began as a corrective to market-driven inefficiencies evolved into a unitary public model, where central authorities replaced municipalities as the main custodians of the right to water.

This raises critical questions about the changing nature of public ownership and the role of the state in essential service provision: how and why did remunicipalisation in Hungary evolve into centralisation rather than consolidating as a local model? What legal and institutional mechanisms enabled this shift, and what does it reveal about the interplay between subsidiarity, efficiency, and human rights in European water governance?

By addressing these questions, this article situates Hungary's case within the broader European debate on water governance, where questions of ownership intersect with principles of subsidiarity, efficiency, and democratic accountability. By tracing the historical and legal evolution of the Hungarian water sector, from decentralisation to full state control, it explores how remunicipalisation, rather than restoring local autonomy, became a transitional phase in the reassertion of central authority.

1. 1 Conceptual Clarifications and Key Terms

To ensure a clear understanding of the processes discussed in this article, this section defines the key terms used throughout the text.

Centralisation refers to the consolidation of many small, locally managed water service providers into a few larger entities under state oversight. The goal is to create uniform practices, improve management, and provide consistent service across regions. Nevertheless, recentralisation describes a later stage when responsibility for water services, once transferred to local or private operators, is brought back under national or regional control. This usually happens when earlier arrangements fail to provide effective service, investment, or oversight.

"Privatisation is an instrument referring broadly to the transfer (or outsourcing) of some or all of the traditional water service functions (e.g. water distribution and treatment, wastewater collection and treatment, customers services) and, in some cases, ownership of infrastructure assets and water resources, from

government to a private party for a certain period of time under conditions set in contractual agreements. Privatisation can be in part, often referred as public-private partnerships (PPP) or in full, in the form of vertically integrated water companies owned and managed by private entities.”³ Shortly, it means that privatization is transferring the management of water services from public or municipal authorities to private operators.⁴ Although introduced to increase efficiency and attract investment, as noted by scholars, this approach has often reduced transparency, raised tariffs, and limited reinvestment in infrastructure due to the focus on profit.

Fragmentation describes the period after the fall of centralised control when water service provision became divided among many small operators. This often caused differences in service quality and made it harder to coordinate investments and regulatory control.

Remunicipalisation is the process of returning the management of water services from private operators to public or municipal authorities. Its purpose is to restore democratic control, improve transparency, and ensure that investment and tariff decisions serve the public interest.

Public Accountability and Democratic Oversight refer to the ways in which citizens and local governments can monitor and influence how water services are managed. Systems based on these principles promote transparency, responsibility, and service to the public good.

1. 2 From Remunicipalisation to Centralisation

Period	Characterisation	Main Actor	Key Legal Basis	Description
1990–2008	Privatisation / Local Self-Government	Municipalities (often with private partners)	Act LXV of 1990 on Local Self-Governments	Decentralised ownership model; municipalities as service providers; emergence of mixed companies and private concessions due to market-oriented reforms.
2009–2012	Amalgamation and Transition	Municipalities (with growing state influence)	Local decisions; contract terminations	Period of consolidation and municipal mergers of service providers; partial re-municipalisation at local level, but not yet centralisation.
2012–2019	Centralisation / Recentralisation	State (Central Government)	Act CCIX of 2011 on Water Utility Services; introduction of Public Utility Network Tax (2012); tariff cuts (2013)	Strong state intervention: integration of utilities, central tax burdening municipal owners, reduction of public utility charges limiting local revenues; transfer of assets to state-controlled entities; erosion of local ownership rights.
2019–2021	Consolidated State Oversight	State through MEKH and regional companies	Amendments to Act CCIX/2011; sectoral regulations	Increasing central coordination; service providers placed under unified regulatory and operational supervision; limited municipal role.
2021–today	Full State Control / National Water Works	Central Government (National Water Works)	Establishment of National Water Works (2021); related decrees	Establishment of National Water Works aimed at full integration of assets into central ownership; municipal autonomy effectively eliminated; state-owned providers dominate water services.

Table 1.⁵

³ F. A. Memon, *The Role of Privatisation in the Water Sector* (The Hague: IRC International Water and Sanitation Centre, 2003), 28–29.

⁴ Tamás M. Horváth, *Közzolgáltatási reformok* (Budapest: Dialóg Campus Kiadó, 2016), 42. The author defines privatisation in the field of public services as “a process through which (a) public goods become private goods, or (b) the private sector, on behalf of public administration, performs public tasks or activities of community interest.”

⁵ Table made by the author.

The evolution of Hungarian water services demonstrates a shifting balance between decentralised self-governance and centralised state control. Following the regime change, the period between 1990 and 2008 was defined by decentralisation and partial privatisation, grounded in the principle of local self-government established by Act LXV of 1990 on Local Self-Governments.⁶ Municipalities became the principal providers of water and sanitation services, often through mixed ownership structures and concession agreements with private partners. These market-oriented reforms aimed to increase efficiency but, in practice, the absence of an effective regulatory framework and the lack of a competition culture frequently led to local monopolies rather than genuine market pluralism.

The years 2009–2012 constituted a phase of amalgamation and transition, rather than a coherent process of remunicipalisation. Several municipalities terminated private concession contracts and merged local utilities to regain operational control. However, these measures were predominantly administrative and lacked the political and legal intentionality that characterises the remunicipalisation movements observed in Western Europe.⁷

A fundamental shift occurred with the adoption of Act CCIX of 2011 on Water Utility Services⁸, which marked the beginning of centralisation and recentralisation (2012–2019). The central government introduced sectoral policies that gradually eroded local autonomy and restructured ownership relations. Notably, the Public Utility Network Tax (Act CLXXXV of 2012) imposed a financial burden on municipal infrastructure owners,⁹ while the central reduction of public utility tariffs (Government Decree No. 259/2013) reallocated revenues within the sector, effectively transforming income distribution against municipal providers.¹⁰ These measures reflected a growing tendency toward central regulatory intervention and fiscal control over previously local assets.

From 2019 onward, central oversight intensified through the Hungarian Energy and Public Utility Regulatory Authority (MEKH), which became the dominant supervisory and licensing body.¹¹ This process culminated in the establishment

⁶ *Act LXV of 1990 on Local Self-Governments*, establishing the principle of municipal autonomy and competence in managing local public services, including water supply and sanitation.

⁷ Martin Pigeon, David A. McDonald, Olivier Hoedeman, and Satoko Kishimoto, eds., *Remunicipalisation: Putting Water Back into Public Hands* (Amsterdam: Transnational Institute, 2012), 8-24, 106-112.

⁸ *Act CCIX of 2011 on Water Utility Services*, establishing a uniform national framework for licensing, regulation, and supervision of water service providers.

⁹ *Act CLXXXV of 2012 on the Public Utility Network Tax*, introducing a central tax on infrastructural assets such as water pipes, adversely affecting municipal service providers.

¹⁰ *Government Decree No. 259/2013 (VII. 5.) on the Reduction of Public Utility Charges*, implementing the policy of “*rezsicsökkentés*” (utility cost cuts) by fixing tariffs at state-determined levels.

¹¹ *Act XXII of 2013 on the Hungarian Energy and Public Utility Regulatory Authority (MEKH)*, assigning the Authority with extended supervisory and licensing powers over water utilities.

of the National Water Works (Országos Vízművek Zrt.) in 2021,¹² an institution designed to integrate regional utilities under direct state ownership and coordination. This final stage represents full state control, in which the remaining local competences have been largely formalised, and the decision-making authority has been transferred to centrally delegated entities.

Overall, the Hungarian trajectory illustrates not a straightforward process of remunicipalisation but rather a reconfiguration of ownership from municipal to state control, showing us almost a full circle of ownership changes. The legal developments demonstrate a structural realignment of the water services sector within the framework of public service law, where the state increasingly asserts its role as both regulator and operator.

2. The Historical Evolution of Water Services in Hungary

After the fall of Soviet-type regimes, Central and Eastern Europe entered a rapid political and economic transition. Unlike Western Europe's gradual and institutionalised privatisation, the CEE (Central and Eastern Europe) approach aimed for quick convergence with the West, often without first building the foundations of a functioning market economy. This haste shaped the results of privatisation and destabilised an already fragile system. A system that could not withstand the transitions and shocks required to ensure resilience as a water utility system.

Our research examines Hungary's trajectory from privatisation¹³ to remunicipalisation and later to centralisation, with a specific focus on water services. This raises an important question: why is this case relevant among Central and Eastern European countries?

Hungary was one of the first ones to implement large-scale privatisation following the fall of Soviet-type regimes. This early initiative provides valuable insight into the transition period, particularly in the water sector, where ownership shifted to private operators. The study analyses the motivations behind privatisation, the challenges it faced, and its impact on efficiency and democratic control under private management.

It also highlights the turning point around 2011, when attitudes towards privatisation changed, resulting in a shift in policy direction. Hungary's experience serves as an early precedent for other countries in the region undergoing similar transitions. It is a particularly notable case, as the country's water governance evolved almost in a full circle, moving from public to private, then to municipal, and finally back to central control within a relatively short period.

¹² *Government Decision No. 1485/2021 (VII. 30.) on the Establishment of the National Water Works (Országos Vízművek Zrt.)*, aimed at integrating regional water service providers into central state ownership.

¹³ Zsolt Boda and Gábor Scheiring, "Water Privatisation in the Context of Transition," in *Beyond the Market: Public Services Yearbook*, ed. Daniel Chávez (Amsterdam: Transnational Institute, 2006), 95–101.

By looking at the overall picture, we can conclude that over the past three decades, water supply and sewerage services in the EU have undergone significant transformation.¹⁴ Beyond national reforms, EU influence has played a key role in shaping these changes. This dual dynamic, between EU harmonisation and national sovereignty, also raises questions about subsidiarity and the state's duty to ensure access to essential services. Some countries, like Hungary, went through a trial-and-error phase marked by shifts in ownership and regulatory approach.¹⁵ Unlike sectors such as energy or telecommunications, which are under stronger EU economic regulation, water services remain largely shaped by national frameworks due to their inherently centralised and public nature.

The power to decide how water services are provided, who bears responsibility, and to what extent the private sector is involved remains within national competence.¹⁶ Across the EU, approaches to water service provision vary widely. For instance, in Germany, water services are still mainly publicly owned and managed locally.¹⁷ Although this was not always the case, dissatisfaction with private operators around 2010 led to a renewed preference for public control. In France, local authorities remain responsible for water services but often delegate their operation to private companies through concession or mixed-ownership models. In contrast, England, though outside the EU, represents the only fully privatised water sector in Europe, where recent concerns over water quality have reignited debates about the model's sustainability.¹⁸ These aspects underline the importance of the topic and the need to understand the ownership models of water utility services, as well as how these models can shape, though not alone, the trajectory of resilience in the water sector.

Our study focuses on Hungary's regulatory path over the past three decades: how successive reforms consolidated smaller utilities into larger entities and whether this centralisation achieved its intended goals. To answer this, we combine historical analysis with an assessment of the socio-economic impacts of these regulatory decisions.

¹⁴ Thomas Bolognesi, "The Paradox of the Modernisation of Urban Water Systems in Europe: Intrinsic Institutional Limits for Sustainability," *Natural Resources Forum* 38, no. 4 (2014): 270–281, <https://doi.org/10.1111/1477-8947.12052>. ; Thomas Bolognesi, "The Results of Modernizing Network Industries: The Case of Urban Water Services in Europe," *Competition and Regulation in Network Industries* 15, no. 4 (2014): 371–391, <https://doi.org/10.1177/178359171401500401>.

¹⁵ István Szabó and María G. Quesada, "Historical Waves in Hungarian Water Sector Reform and Implications for Integration," *Utilities Policy* 46 (2017): 15, <https://doi.org/10.1016/j.jup.2017.02.005>.

¹⁶ Ibid.

¹⁷ Ibid, 17.

¹⁸ Bolognesi, "Paradox of the Modernisation," 270–281; Bolognesi, "Results of Modernizing Network Industries," 371–391.

3. Understanding Water Privatisation

When neoliberalism took hold in the United States, Margaret Thatcher steered the United Kingdom, and soon the rest of Western Europe, in the same direction.¹⁹ What becomes dominant in the West tends to spread, by persuasion or by force.²⁰ Privatisation was no exception.²¹

Through loan conditionalities, the International Monetary Fund and the World Bank imposed neoliberal reforms on developing nations. During the 1970s and 1980s, these institutions, together with international development agencies and governments, financed most water infrastructure in the Global South.²² Until 1990, international funding largely supported public entities, and privatised systems remained rare.²³ The turning point came in 1989, when the Thatcher government sold the British water utilities.²⁴

Few countries followed the British model outright. Most turned to public–private partnerships. The French model, based on long-term concession contracts, granted private companies operational control over water systems. A third approach emerged through mixed public corporations, combining private efficiency with public goals of equity and affordability.²⁵

Although “privatisation” has many meanings, it generally refers to the transfer of public duties or obligations to the private sector, while a transfer of ownership is more precisely termed *divestiture* or *asset sale*.²⁶ With the rise of neoliberalism, privatisation became not only an economic policy but a political strategy.²⁷

In the water sector, privatisation typically takes contractual forms aimed at fostering competition and efficiency. It may involve full privatisation, operational privatisation, or various contractual arrangements. Neoliberalism, advocating limited state intervention and faith in market efficiency, treats private

¹⁹ Violeta Petrova, “All the Frontiers of the Rush for Blue Gold: Water Privatization and the Human Right to Water,” *Brooklyn Journal of International Law* 31, no. 2 (2006): 591.

²⁰ Elena Ramos, “The Dangers of Water Privatization: An Exploration of the Discriminatory Practices of Private Water Companies,” *Environmental and Earth Law Journal* 7 (2017): 190.

²¹ Petrova, “All the Frontiers of the Rush for Blue Gold,” 577–583.

²² Thomas M. Kerr, “Supplying Water Infrastructure to Developing Countries via Private Sector Project Financing,” *Georgetown International Environmental Law Review* 8 (1995): 91.

²³ World Panel on Financing Water Infrastructure, *Financing Water for All* (Marseille: World Water Council, 2003).

²⁴ David Saal, David Parker, and Tim Weyman–Jones, “Determining the Contribution of Technical Change, Efficiency Change and Scale Change to Productivity Growth in the Privatised English and Welsh Water and Sewerage Industry: 1985–2000,” *Journal of Productivity Analysis* 28 (2007): 127–139, <https://doi.org/10.1007/s11123-007-0040-z>; “The Economist,” “Stagnant: Water Companies Mop Up Capital and Leak Profits,” *The Economist*, July 31, 2003.

²⁵ Petrova, “All the Frontiers of the Rush for Blue Gold,” 583.

²⁶ Petrova, “All the Frontiers of the Rush for Blue Gold,” 583.

²⁷ Ramos, “The Dangers of Water Privatization,” 191.

ownership as a safeguard against the “tragedy of the commons.”²⁸ Consequently, water, despite being a natural monopoly with high fixed costs and irreversible investments, became a key target of privatisation.

In the water sector, the key distinction lies between *competition for the market* and *competition within the market*.²⁹ Since parallel water networks are impractical, competition mainly occurs in bidding for licenses rather than within the market itself.³⁰

4. The Case for Public Water Service

Across the European Union, water and sanitation services have reached near-universal coverage, although countries such as Hungary, the Czech Republic, Slovakia, Slovenia, the Baltic States, and Portugal still lag slightly behind.³¹ Most EU Member States rely on municipal or public providers, yet waves of privatization, often inspired by neoliberal reform, have reshaped the sector with uneven outcomes.

Experiences in cities like Paris and Berlin revealed the limits of private control. Paris remunicipalised its services in 2008 after dissatisfaction with Suez and Veolia, whose divided contracts generated excessive profits. In Berlin, a referendum exposed profit guarantees granted to private shareholders under a concession with RWE and Veolia, leading to its reversal. These cases triggered a broader European rethinking of water governance and ownership.³²

The European Citizens’ Initiative *Right2Water* (R2W) crystallised this movement, rejecting profit-oriented models and reaffirming water as a public good and human right.³³ It gained momentum when the proposed Concession Directive threatened to liberalise water services across the EU, raising the question of whether water should remain a community good or be treated as a commodity.³⁴

²⁸ Ramos, “The Dangers of Water Privatization,” 191.

²⁹ János Ede Szilágyi, *Vízjog – Aktuális kihívások a vizek jogi szabályozásában* (Miskolc: University of Miskolc, 2013), 118.

³⁰ Johann Wackerbauer, “Regulation and Privatisation of the Public Water Supply in England, France and Germany,” *Competition and Regulation in Network Industries* 8 (2007): 103, <https://doi.org/10.1177/178359170700800201>.

³¹ Jerry van den Berge, Rutgerd Boelens, and Jeroen Vos, “How the European Citizens’ Initiative ‘Water and Sanitation Is a Human Right!’ Changed EU Discourse on Water Services Provision,” *Utrecht Law Review* 16 (2020): 50-51, <https://doi.org/10.36633/ulr.568>.

³² Pierre Bauby, Claire Hecht, and Sylvain Warm, “Water Remunicipalisation in Berlin and Paris: Specific Processes and Common Challenges,” *CIRIEC Working Papers* 18/07 (2018): 6.

³³ Jerry van den Berge, Boelens, and Vos, “How the European Citizens’ Initiative ‘Water and Sanitation Is a Human Right!’,” 55.

³⁴ Jerry van den Berge, Boelens, and Vos, “How the European Citizens’ Initiative ‘Water and Sanitation Is a Human Right!’,” 55.

Hungary's trajectory reflects this broader European dynamic but with distinct characteristics. Following initial market liberalisation, the government pursued a process of partial remunicipalisation, consolidating public ownership under state control, after recentralisation took place. This shift was justified as a response to market failures and the need for equitable access, yet it also marked a move from local autonomy toward central governance.

Water pricing and market mechanisms rarely capture the social or ecological value of water.³⁵ Without robust regulation, privatisation risks excluding vulnerable groups, undermining environmental sustainability, and weakening public accountability. The Hungarian case thus exemplifies a renewed emphasis on state-led management, not only as a corrective to privatisation but as a reassertion of water's status as a public good under central authority.

5. Historical Development of Water Services in Hungary

Hungary's water sector has followed a swerving, non-linear path, marked by alternating phases of integration, fragmentation, and, more recently, centralisation.³⁶ These shifts mirror changing political and economic regimes, as well as evolving conceptions of ownership, control, and public responsibility.

This article traces that trajectory from the fall of Soviet-type dictatorships to the present, with brief reference to earlier developments. The stages of this evolution are not always clear-cut or easily identifiable, as the transitions often overlapped and unfolded gradually. Nevertheless, several distinct tendencies can be observed.

The first phase, from 1948 to 1989, was the wave of integration, when the number of providers fell from 430 to 34.³⁷ The second phase, from 1989 to 2010, was the period of fragmentation, during which the number of providers increased to nearly 450. The third phase, from 2009 to 2012, represented a period of amalgamation and transition, as municipalities began to merge utilities and terminate private contracts. Although sometimes referred to as remunicipalisation, this process remained limited and lacked coherent national direction. The fourth phase, from 2012 to 2019, marked a decisive turn toward centralisation, initiated by *Act CCIX of 2011 on Water Utility Services*. State intervention deepened through the *Public Utility Network Tax (2012)* and the *central reduction of public utility charges (2013)*, both of which significantly constrained municipal ownership and financial autonomy. The fifth and current phase, from 2019 to the present, signifies the stage of full state control, consolidated first through the *Hungarian Energy and Public Utility Regulatory Authority (MEKH)* and later through the establishment of the *National Water Works (Országos Vízművek Zrt., 2021)*, placing water services firmly under central government ownership and direction.

³⁵ John S. Wade, "Privatization and the Future of Water Services," *Florida Journal of International Law* 20, no. 4 (2008): 191.

³⁶ Szabó and Quesada, "Historical Waves in Hungarian Water Sector Reform," 15.

³⁷ Szabó and Quesada, "Historical Waves in Hungarian Water Sector Reform," 15.

Integration and fragmentation can be assessed by the number and size of providers,³⁸ as exemplified by the case when the number of operators fell back again to 36.³⁹ A more integrated system reflects consolidation, capacity, and oversight; a fragmented one indicates decentralisation and weaker regulatory cohesion. These structural shifts carry implications for service efficiency, equity, and long-term sustainability.

State ownership brings an inherent tension between financial viability and public duty, between market rationality and the constitutional obligation to ensure equitable access and environmental protection. Each structural transformation in the sector coincides with broader regime changes, revealing how water governance has been used as a tool of political and administrative control.

While the public–private ownership debate has been well explored, this study shifts focus to the state’s evolving role as owner, regulator, and central actor. Building on the works of Szabó and Quesada, and integrating additional legislative instruments, this study examines how Hungary’s water governance has moved from local autonomy to centralised public control, highlighting the legal and institutional consequences of this transformation.⁴⁰

5. 1 Hungary through the phases of change

In Hungary, as in many European countries, local authorities initially bore responsibility for water services. Until the 1940s, around 340 council-established companies operated independently, providing water where pipelines existed. This highly fragmented system functioned locally but lacked national coordination.⁴¹

Following the Second World War, a first wave of integration brought the sector under direct state control and ownership⁴², reflecting the state-led planning typical of the socialist era. In 1948, the National Water Management Office (Országos Vízgazdálkodási Hivatal) was created to consolidate local providers into regional entities under government direction.⁴³

The *Civil Code (Act IV of 1959)* formalised the legal personality of state-owned companies and defined their competences, establishing the basis for a unified national framework. The *Water Act IV of 1964* further strengthened centralisation, setting rules for service provision, licensing, and the financing of public water infrastructure.⁴⁴

By the late 1960s, the previous 430 local utilities had been merged into 34 regional and county water and sewage companies, alongside five major regional

³⁸ Szabó and Quesada, “Historical Waves in Hungarian Water Sector Reform,” 16.

³⁹ Hungarian Energy and Public Utility Regulatory Authority (MEKH), “A víziközmű működési engedélyes szolgáltatók listája,” May 15, 2018.

⁴⁰ Szabó and Quesada, “Historical Waves in Hungarian Water Sector Reform,” 16.

⁴¹ On the creation of the Act XXIII of 1885 on the basis of which the municipal water service was established and the foundations of regulation, see István K. Koncz, “The Development of Water Rights Administration in Hungary,” *Journal of Agricultural and Environmental Law* 27 (2019): 103–111, <https://doi.org/10.21029/JAEL.2019.27.103>.

⁴² Article 6, Act XX of 1949 (Constitution of the Hungarian People’s Republic).

⁴³ Decree 207.760/1948 on the establishment of local waterworks.

⁴⁴ Chapter VI of the Civil Code (Act IV of 1959).

waterworks (DRV, EDV, DMRV, ERV, TRV Zrt.).⁴⁵ These reforms aimed to extend access and reduce disparities between urban and rural areas. Yet, despite their integrative intent, technical and financial shortcomings soon undermined the system. The highly centralised model, though ambitious, struggled with inefficiency and underinvestment, signs of the structural fragility that would later define the sector's decline.

With the end of the Soviet-type dictatorship in 1989, Hungary's water utility system entered a period of profound transformation. Under the banner of market liberalisation and decentralisation, the number of providers expanded rapidly: from 34 regional companies to nearly 450 by the year 2000. The previously centralised model was dismantled, giving way to a fragmented structure dominated by smaller municipal enterprises and mixed-ownership companies.⁴⁶ This transformation was closely tied to the broader economic reforms that accompanied the country's transition to a market economy. The *Transformation Act (Act XIII of 1989)*⁴⁷ required state-owned enterprises to convert into limited liability or joint-stock companies, introducing private law forms into previously public sectors. Meanwhile, *Act XXXI of 1989* amended the 1949 Constitution, replacing the socialist planned economy with a system based on private property and free enterprise.⁴⁸ These constitutional and economic changes opened public utilities, including water services, to private capital and competition.

Responsibility for water provision shifted to the local level. The *Act LXV of 1990 on Local Governments* (Art. 8, point 4) made the supply of healthy drinking water an obligatory municipal duty.⁴⁹ This was followed by *Act XX of 1991* and the *Assets Act (Act XXXIII of 1991)*,⁵⁰ which transferred ownership of local infrastructure from the state to municipalities. The Assets Act created Asset Transfer Committees to oversee this process, allocating former state-owned systems individually, jointly, or by technical separation. Where ownership could not be clearly established, assets remained under state control.

However, the decentralisation process also revealed serious legal and institutional ambiguities. The legislation did not clearly define the notion of "water utility assets," nor did it specify how such assets should be managed or transferred. These gaps enabled privatisation beyond the legislature's original intent. In liquidation cases, water infrastructure was often excluded from the category of municipal property, allowing unrestricted sales to private operators.

By the late 1990s, the combined effect of privatisation, decentralisation, and local autonomy produced a highly fragmented landscape of water service providers. Many municipalities established their own small-scale companies, often without the financial or technical capacity for long-term operation. By the early 2000s,

⁴⁵ Szabó and Quesada, "Historical Waves in Hungarian Water Sector Reform," 16–17.

⁴⁶ Szabó and Quesada, "Historical Waves in Hungarian Water Sector Reform," 16–17.

⁴⁷ Szabó and Quesada, "Historical Waves in Hungarian Water Sector Reform," 18.

⁴⁸ Act XXXI of 1989, § 2, replacing Chapter I of the Constitution with new Articles 1, 2(1), 9(1), and 12(1).

⁴⁹ Quote: "The settlement government must ensure a healthy drinking water supply."

⁵⁰ Szabó and Quesada, "Historical Waves in Hungarian Water Sector Reform," 16–17.

Hungary's water sector was characterised by uneven service quality, financial instability, and limited regulatory cohesion. The disintegration of the system underscored the fragility of uncoordinated decentralisation, laying the groundwork for the later policy shift toward reintegration and state-led control. Hungary's water sector was largely privatised through concession agreements with foreign companies such as SUEZ, Veolia, RWE, and E.ON, while local governments, lacking regulatory and financial expertise, struggled to oversee these contracts.⁵¹ Lease arrangements were widely used in the water sector, allowing private capital participation without formal concession procedures. Although private ownership in operating companies was initially capped at 49%, investors often exceeded this through syndicated contracts.⁵² A 2007 amendment later prohibited new private equity participation in water utilities, though existing agreements remained in force.⁵³ Privatisation served mainly fiscal aims, exemplified by Budapest's sale of a 25% stake in its Waterworks to a French–German consortium, yet major investments still depended on public funding.⁵⁴ By the 2000s, rising prices, weak oversight, and limited EU funding exposed the shortcomings of the model. These structural and financial weaknesses, coupled with growing public dissatisfaction and the limited capacity of local governments to manage fragmented services, gradually revived the idea of public control and coordinated management. By the late 2000s, the perceived failure of privatisation to ensure affordability, efficiency, or long-term investment created political momentum for reform. This environment set the stage for the 2009–2012 period of amalgamation, during which municipalities began reclaiming ownership and consolidating local utilities, marking the first steps toward a renewed phase of remunicipalisation.

The adoption of Act CCIX of 2011 on Water Utility Services marked a new wave of transformation in Hungary's water sector, beginning around 2010 and continuing to the present day. This phase followed earlier municipal efforts to regain control over local utilities from private operators, representing an attempted remunicipalisation that was only partly successful. These local initiatives, often involving the merger of smaller utilities, lacked coherent national coordination and sufficient financial capacity. As a result, they created the conditions for a more comprehensive but state-led integration process.

The Water Utility Act of 2011 aimed to consolidate the sector and address the financial and structural weaknesses of the decentralised model.⁵⁵ It reintroduced the principle of regionalisation, promoting larger, more sustainable operators and greater coordination. While the Act did not fix the size of providers, it established minimum user thresholds (the number of residential and non-residential users), 50,000 by 2013, 100,000 by 2014, and 150,000 by 2016, which gradually forced

⁵¹ Boda and Scheiring, "Water Privatisation in the Context of Transition," 95–101.

⁵² Szabó and Quesada, "Historical Waves in Hungarian Water Sector Reform," 19.

⁵³ Act CXXI of 2006, § 10(1), replacing § 9(1) of Act LVII of 1995 (Water Act).

⁵⁴ Boda and Scheiring, "Water Privatisation in the Context of Transition," 95–101.

⁵⁵ Szabó and Quesada, "Historical Waves in Hungarian Water Sector Reform," 18–19.

smaller companies either to merge or to give up their licences.⁵⁶ This process reduced the number of providers from around 450 in 2010 to 42 by 2015 and 36 by 2024, forming the basis of a centralised, state-dominated system.⁵⁷

Three key measures under the Act illustrate this transition:

1. The law defined “water utility assets” as public infrastructure directly linked to municipal tasks, distinguishing them from “operating assets” held by enterprises. This clarification aimed to prevent the ambiguities that had facilitated privatisation in earlier decades.
2. The Act outlined the three main models, concession, lease, and asset management, establishing clearer divisions of responsibility between municipalities and operators.
3. The Hungarian Energy and Public Utility Regulatory Authority (MEKH), originally founded in 1994, was expanded to oversee the water sector, issue licences, and supervise compliance.

The 2012–2019 period thus represents a phase of centralisation and recentralisation, where the state intervened heavily in ownership and management. Measures such as the Public Utility Network Tax (2012) and the central reduction of tariffs (2013) placed additional burdens on municipal providers and transferred effective control to state institutions.

By 2019–2021, the system had evolved into a model of consolidated state oversight, with MEKH exercising comprehensive supervision and local governments retaining only formal ownership rights. The establishment of the National Water Works (Országos Vízművek Zrt.) in 2021 completed the process, transferring assets and operational control to the central government.

Although the Water Utility Act was designed to stabilise the sector and enhance consumer protection, its long-term effect was a shift from local self-government to full state control. What began as a municipal remunicipalisation attempt, a response to the failures of privatisation, ultimately led to state-led centralisation, where ownership, regulation, and service provision are now concentrated in the hands of the national government.

5. 2 Lessons Learned: Ownership, Governance, and Public Accountability

Following the 1989 regime change, Hungary, like other Central and Eastern European states, embraced market liberalisation and privatisation, influenced by the *Washington Consensus*.⁵⁸ In the water sector, these reforms often relied on foreign capital and long-term concession contracts, which limited competition and occasionally fostered corruption.

⁵⁶ Ákos Kis and Gergely Ungvári, “Are We Still Falling? Sustainability and Equity in the Hungarian Water Utility Services Sector,” *Budapest Management Review* 50, (2019): 81. <https://doi.org/10.14267/VEZTUD.2019.KSZ.07>.

⁵⁷ Szabó and Quesada, “Historical Waves in Hungarian Water Sector Reform,” 19.

⁵⁸ The “Washington Consensus” is a term used to describe a set of economic policy recommendations and principles that emerged in the 1980s and 1990s. International financial institutions, such as the International Monetary Fund and the World Bank, broadly promoted these recommendations.

Hungary's Fundamental Law places strong emphasis on environmental and health rights, linking access to clean drinking water to the right to physical and mental health (Article XX) and declaring water resources part of the nation's common heritage (Article P).⁵⁹

In response to the shortcomings of fragmented privatisation, the Water Utility Act of 2011 introduced comprehensive regulation aimed at sustainable operation and state oversight.⁶⁰ Its objectives included ensuring national or municipal ownership, introducing operational permits, enforcing uniform pricing, and promoting planned maintenance.⁶¹

Since 2021, the National Water Works (Nemzeti Vízművek), under the Ministry of Energy, has exercised ownership rights over state-held utilities, consolidating management and extending national control. Through these reforms, Hungary has reframed water governance as a public duty rooted in the human right to water, prioritising continuity, affordability, and state responsibility over market competition.⁶²

The creation of the National Water Works (Országos Vízművek Zrt.) has marked the beginning of a new stage, which results in full state control. Under the strategic supervision of the Ministry of Energy, this institution assumed ownership rights and obligations over all state-owned water utility companies and networks, completing the transfer of operational authority from municipalities to the central government. The reform aimed to ensure uniform service quality, efficient asset management, and financial stability across the country.

The National Water Works coordinates investment, maintenance, and development activities on a national scale, representing a decisive step in the integration of regional water systems. Municipalities, though formally retaining some ownership, now play only a limited role in decision-making. Through this structure, the state guarantees continuous service provision and price stability, interpreting access to drinking water as a constitutional and human right under the Fundamental Law (Articles P and XX).

In practice, this period has consolidated Hungary's water governance into a unitary, centrally managed model, where public utilities are integrated under state ownership and supervision. While the framework enhances financial predictability and national coordination, it also reduces local autonomy and accountability. The ongoing challenge lies in balancing central efficiency and

⁵⁹ János Ede Szilágyi, "Current Challenges Concerning the Law of Water Services in Hungary," *Lex et Scientia* 23, no. 1 (2016): 73.

⁶⁰ Anikó Raisz, "A Constitution's Environment, Environment in the Constitution," *Est Europa*, Special Edition 1 (2012): 47–51; László Fodor, "A víz az alaptörvény környezeti értékrendjében," *Publicationes Universitatis Miskolciensis, Sectio Juridica et Politica* 31 (2013): 334–345.

⁶¹ Gyula Bándi, "A fenntartható fejlődés jogáról," *Pro Futuro* 3, no. 1 (2013): 11–30; Orsolya Bányai, *Energiajog az ökológiai fenntarthatóság szolgálatában* (Debrecen: DELA Könyvkiadó és Kereskedelmi Kft., 2014), 16–55.

⁶² Magyarország Kormánya (Government of Hungary), "Lehetővé vált a Nemzeti Vízművek integrációs folyamatához való csatlakozás," July 16, 2021.

local responsiveness, ensuring that state-led governance continues to uphold the social and environmental values embedded in the right to water.

6. Conclusion

Hungary's reform of the water services sector shows the tension between different forms of public ownership. The period of amalgamation (2009–2012) reflected an effort to correct the fragmentation and uneven outcomes of privatisation. By merging local utilities and restoring public responsibility, municipalities sought to stabilise the sector and regain control over essential services. Yet, these efforts lacked national coordination and adequate financial capacity, which limited their success and revealed the structural weaknesses of local self-government.

The Water Utility Act of 2011 transformed this process into state-led consolidation. The policy of integration, combined with uniform licensing and tariff regulation, created a system of central oversight. The establishment of the National Water Works (Országos Vízművek Zrt.) in 2021 completed this process, transferring ownership and operational control to the state. While the new model improved regulatory coherence and financial stability, it reduced municipal autonomy and limited opportunities for local decision-making.

Both decentralised and centralised systems have shown their limitations. Municipal control can encourage participation and responsiveness but often lacks the capacity to manage large-scale infrastructure effectively. Centralised control ensures continuity and economic supervision but distances service provision from local needs. Hungary's experience demonstrates that changes in ownership alone do not guarantee more equitable or efficient outcomes.

The evolution of Hungary's water services, shaped by successive waves of integration, fragmentation, amalgamation, and centralisation, shows that ownership structures alone cannot determine public value. The effectiveness of each phase has depended less on who owned the assets and more on how governance was exercised, through regulation, accountability, and institutional balance. Future reforms should therefore focus not only on restoring or retaining public ownership, but on building durable governance frameworks capable of adapting to social, environmental, and economic challenges.

Recent Developments in the Hungarian State Victim Support System

SZIJÁRTÓ, ISTVÁN*

ABSTRACT *The article explores the victim support activities of the Hungarian police and the Victim Support Centers both from an institutional point of view and the added value of their services, and how they cooperate with the Victim Support Offices. In addition, the operation of the newly introduced opt-out scheme will also be analyzed. Consequently, the article aims to predict the final organizational structure and the division of functions between the different state actors of the Hungarian victim support system, the reconstruction of which, is currently coming to an end. The article is based on empirical and qualitative research focusing on the Hungarian legislative framework for victim support, utilizing interviews conducted with professionals working in the state victim support system in an attempt to map out the institutional relations and added value provided by the state actors in Hungarian victim support meanwhile shedding light on the long-lasting shortcomings of the system and analyzing how the recent developments addressed them.*

KEYWORDS *victim support, Hungary, Victim Support Center, single point of access, police.*

1. Introduction

The field of victim support falls outside the boundaries of *stricto sensu* criminal law, since the aim of substantive and procedural criminal law is to hold the perpetrators of crimes criminally liable and to achieve specific and general prevention through the operation of an appropriate sanctions-regime.¹ Instead, it falls inside the field of criminology, more specifically in the sub-discipline of criminology called victimology.² The concept of victim support is difficult to define. The simplest way to describe it is based on its most striking characteristics: victim support is some kind of (public) service provided to

* Assistant professor, University of Pécs, Faculty of Law, Department of International and European Law.

¹ Talia Fisher, "Economic analysis of criminal law," in *The Oxford Handbook of Criminal Law*, ed. Markus D. Dubber and Tatjana Hörnle (Oxford University Press 2014), 42–43.

² Lorraine Wolhuter, Niel Olley and David Denham, *Victimology. Victimisation and Victims' Rights* (Routledge, 2009), 13.

persons who have fallen victim to crime,³ and that aims to alleviate social, physical and material harm suffered by victims of crime, whose quality of life is threatened as a result.⁴ Thus, victim support has a solid foundation on social solidarity and equity.⁵ Hence, victim support can be considered social work, which aims to alleviate the effects of harmful behaviors.⁶

The modern state has a primary obligation to maintain internal security and protect its citizens. One of the strongest tools of a state to this end is criminal law. Although it is an undeniable fact that the number of offenses committed each year in the European Union steadily decreases,⁷ there are at least as many cases where the state has failed to protect its citizens as the number of offenses committed – and recorded in the criminal databases – in its territory.⁸ This data does not even take note of the latency in crime. The question therefore arises as to what the state does for people who have become victims of crime and how it addresses the various needs of the victim to restore their original status.⁹ The answer to the question is, evidently, that the state sets up a victim support system to provide specific services to those who have been victims of crime, in order to alleviate its harmful consequences.

While victim support has a well-founded theoretical basis in the global context, the realization of victim support services remains diverse on the level of states. This field has started to develop in the 1970s both in the USA and Europe.¹⁰ One of its earliest manifestations was realized in the UK by a network of criminal justice practitioners, which developed into a community-based service essentially provided by a civil society organization.¹¹ From this point forward, victim support developed in two directions in Europe, namely one that is predominantly characterized by NGOs funded by the government, an approach taken by the

³ Klára Kerecsi and József Kó, *Az áldozatsegítő szolgálat hatékonyságvizsgálata. Második szakasz. Összefoglaló jelentés* (2008), 6.

⁴ Heleen J. Janssen, Dietrich Oberwittler and Goeran Koeber, “Victimization and Its Consequences for Well-Being: A Between- and Within-Person Analysis” *Journal of Quantitative Criminology* 37, no. 1 (2021): 102. <https://doi.org/10.1007/s10940-019-09445-6>.

⁵ Act no. CXXXV of 2005 on Assistance to Victims of Crime and State Compensation

⁶ Judit Kozma, “A szociális munka professzionalizációja a jóléti államokban,” *Kapocs* 6, no. 2 (2007): 2.

⁷ For details, see Eurostat database. Available at https://ec.europa.eu/eurostat/databrowser/view/crim_off_cat/default/table?lang=en.

⁸ For example, in 2024, 233.470 offenses were registered in Hungary. See: Beáta Borbély, *Tájékoztató a bűnözés 2024. évi adatairól* (Legfőbb Ügyészség, 2025), 9

⁹ The report of the Commissioner for Fundamental Rights in case AJB-7599/2012 (rapporteurs: Dr. Barbara Zséger and Dr. Cecília Bódis).

¹⁰ Carina Gallo and Kerstin Svensson, *Victim Support and the Welfare State* (Routledge, 2019), 31–33.

¹¹ Lesley Simmonds, “Lost in transition? The changing face of Victim Support,” *International Review of Victimology* 19, no. 2 (2013): 202. <https://doi.org/10.1177/026975801247277>.

UK,¹² and another that is characterized by state actors in the field of victim support, a path followed by Sweden for example.¹³ Nevertheless, both systems are characterized by services provided to victims of crime by the state. However, in the former, the state essentially provides subsidies to civil society organizations to realize victim support, while in the latter, the state sets up its own state actors in victim support for the provision of services. Hungary follows the same model as well, which will be demonstrated later in this article.

Unlike victim support in the global context, the operation of a (state) victim support system in Hungary has a relatively short history. The first attempt to create such a system was made in 1997, building on European experience. In 1998, the National Foundation for Public Safety and Crime Prevention was established, which initially took on tasks related to victim support.¹⁴ The foundation was set up by the government, which meant that the Hungarian victim support system was a mix of the two methods of realizing victim support in the beginning. However, this attempt was a short-lived one, since the Hungarian victim support system was radically transformed with Hungary's accession to the EU. In 2005, the Hungarian Parliament adopted Act no. CXXXV of 2005 on Assistance of Victims of Crime and State Compensation (hereinafter referred to as VSA), which transposes several EU secondary legal acts into Hungarian law. As a result, the Hungarian victim support system is heavily influenced by EU legislation.¹⁵ From this point forward, victim support services were provided by a variety of state actors in Hungary including government offices, the police and eventually Victim Support Centers as well.

The article fills an important research gap in the English language literature about victim support. Even though some Western victim support systems are quite well documented, Central and Eastern European models remain out of focus. This article contributes to existing literature by providing a thorough qualitative analysis of the Hungarian state victim support system. It examines the trajectory of development of the Hungarian state victim support system, showcases the state actors tasked with the provision of services and introduces the services provided to victims in an attempt to demonstrate that the Hungarian system has been modified to a great extent in the last two decades. Additionally, the article also considers whether the development of the Hungarian victim support system positively affected the status of victims. As such, the article will answer the following research questions:

1. How did the Hungarian state victim support system develop in the past two decades?

¹² R. I. Mawby, "Victim Support in England and Wales: The end of an era?," *International Review of Victimology* 22, no. 3 (2016): 203-221. <https://doi.org/10.1177/0269758016649065>.

¹³ Gallo and Svensson, *Victim Support*, 3.

¹⁴ Zsanett Schweighardt, "Áldozatvédelem, áldozatsegítés és a büntető felelősségre vonás," *Jog- és Politikatudományi Folyóirat* 3, no. 2 (2000): 19.

¹⁵ Act no. CXXXV of 2005 on Assistance to Victims of Crime and State Compensation § 47.

2. What state actors operate in the field of Hungarian state victim support?
3. What kind of services are provided to victims of crime in Hungary?
4. What are the shortcomings of the Hungarian state victim support system?
5. What are the roles of state actors operating in the field of Hungarian state victim support system and how do they cooperate with each other?
6. Were the shortcomings addressed by any change over the course of the past two decades?

2. Methods

To answer the above questions, both empirical and qualitative research was carried out. Qualitative research concerned the development of the Hungarian state victim support system in the past two decades, the services provided therein and the roles of the state actors operating in this field. Qualitative research was carried out via the analysis of the legislative framework that is the basis of the Hungarian state victim support system. Moreover, Hungarian literature was utilized to discover the shortcomings of the Hungarian state victim support system.

Additionally, empirical research was carried out in order to shed light on the added value provided by various state actors operating in the field of Hungarian state victim support and aimed to map out their institutional relations with each other. The research was carried out by conducting interviews with the County and Metropolitan Police Headquarters – either in person or in writing – and with the coordinator of the Victim Support Centre in Pécs. As such, 20 individuals answered the research questions via electronic means. Besides, an in-depth interview was conducted with the coordinator of the Victim Support Centre in Pécs in person. Consequently, the research covers all counties in terms of the police and provides access to the methodology applied by the Victim Support Centers. The interviews focused on the staff employed by the police headquarters for the task of victim support, the organizational structure in which they are employed and their respective roles. In addition, the interviews gathered best practices, good examples of the operation of victim support services which are described in this article to exemplify the meaningful activities of these actors. Consequently, the pool of information gathered in the research covers each Police Headquarters in Hungary and the operation guidelines of Victim Support Centers guaranteeing the widest possible insight into the Hungarian victim support system.

As the final goal of this study, a critical analysis of the findings of the research in the discussion will answer the last question regarding whether the shortcomings of the Hungarian state victim support system were addressed by the various policy changes.

3. Findings

3. 1 The organizational structure of the Hungarian state victim support system

As already briefly referenced, the VSA has largely reorganized the Hungarian state victim support system. Based on EU legislation, it sets out the most important services provided to victims of crime. The institutional structure for victim support, though, is not regulated by the very same act. Instead, it is set out by governmental and ministerial decrees adopted on the authorization provided in the VSA.¹⁶ Until 2017, the sole provider of victim support services were the county and metropolitan government offices (hereinafter referred to as Victim Support Office) on the basis of a government decree.¹⁷ However, beginning from 2017, on the initiative of the Ministry of Justice, Victim Support Centers were set up in county administration centers and the capital city with the aim to cover all counties by 2025.¹⁸ Victim Support Centers have subsidiary, yet nonetheless important, function in the state victim support system which will be discussed below. In addition, the police have also gradually taken on responsibilities relating to this field. From the early 1990s until the adoption of the VSA, it only had an active role in crime prevention.¹⁹ However, after the adoption of the VSA in 2005, its functions in victim support were first regulated in a ministerial decree,²⁰ then in a regulation adopted by the National Chief of Police.²¹ The updated version of that regulation was adopted in 2013. In addition to defining the tasks and responsibilities of the police in connection with victim support, it sets out an organizational structure which shall be implemented in each County Police Headquarters.²²

Consequently, victim support services in Hungary are provided by three different state actors, namely the Victim Support Offices operated in the county and capital government offices in the capital city and the county administration centers, the Victim Support Centers which are also operated in the county administration centers and the police that provides victim support services on a lower level of administration that is called a district in Hungary.

3. 2 The services provided by the Hungarian state victim support system

Apart from the organizational point of view, it is also important to showcase the services provided by the Hungarian state victim support system. It allows for a

¹⁶ Act no. CXXXV of 2005 on Assistance to Victims of Crime and State Compensation § 46.

¹⁷ Gábor Veisz, *VOCIARE National Report on Hungary. Victims of Crime Implementation Analysis of Rights in Europe* (Victim Support Europe 2019) 31.

¹⁸ <https://vansegitseg.im.gov.hu/elerhetosegek/>; 2072/2017 (XII. 28.) Government Decision on the more efficient implementation of victim support § 6(c).

¹⁹ László Oláh, "A rendészeti bűnmegelőzés gyakorlata és lehetőségei 2011-ben," *Belügyi Szemle* 59, no. 5 (2012): 29.

²⁰ 17/2007. (III. 13.) Justice and home affairs ministerial decree; 64/2015. (XII. 12.) Home affairs ministerial decree.

²¹ 50/2008. (OT 29.) order of the National Police Headquarters.

²² 2/2013. (I.31.) order of the National Police Headquarters.

range of services to help people who are victims of crime or offences against property committed in the territory of Hungary, or who suffer harm, in particular physical or psychological injury, emotional distress or damage to property incurred by crimes or offences against property committed in the territory of Hungary.²³ This sets both the personal and the territorial scope of the Act. Generally speaking, the scope of persons eligible for victim support services largely – though not fully – coincides with the definition of victims in procedural law. The difference is that in case of the procedural law, the victim is the person whose right or legitimate interest was harmed by the offense, while the VSA extends this definition over persons who are indirectly affected by an offense. This definition is in line with relevant international guidelines.²⁴ However monetary services, such as state compensation for damages resulting from an offence and the immediate financial support are only provided in cases of specific offences (e.g. intentional, violent crimes against the person, incorporating a number of offences).²⁵ It is also important to note that not only Hungarian citizens are eligible for victim support services, but also EU citizens residing in Hungary, refugees granted protection in Hungary, third country nationals and stateless persons who become victims of crime on the territory of Hungary.²⁶

The state currently provides financial and other services (in kind) to victims of crime. The former category includes immediate financial assistance and state compensation, while the latter includes advocacy, certification of victim status, witness care and shelter.²⁷ Monetary services are intended to compensate or cover all or part of the property damage and costs incurred by the offense. The so-called immediate financial assistance is intended to cover at least part of the victim's extraordinary expenses for housing, clothing, food, travel, medical and other expenses of a social nature stemming from the crime committed against them. The maximum amount of immediate financial assistance may be up to 43% of the average gross monthly income in the national economy in the second year preceding the time and date of the perpetration of the crime. This also sets the basis for the amount that can be granted via state compensation, which may compensate for a much larger amount of the damage incurred by specific offenses.²⁸

²³ Act no. CXXXV of 2005 on Assistance to Victims of Crime and State Compensation § 1(1).

²⁴ Act no. XC of 2017 on Criminal Procedure § 50; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted, General Assembly resolution 40/34 of 29 November 1985.

²⁵ Act no. CXXXV of 2005 on Assistance to Victims of Crime and State Compensation § 2(1a) 6).

²⁶ Act no. CXXXV of 2005 on Assistance to Victims of Crime and State Compensation §§ 1(1)a) to f).

²⁷ Act no. CXXXV of 2005 on Assistance to Victims of Crime and State Compensation § 4(1).

²⁸ Act no. CXXXV of 2005 on Assistance to Victims of Crime and State Compensation §§ 4(3), 7(2).

A decision granting immediate financial assistance is subject to the discretion of the competent authority, which also applies to the determination of its amount.²⁹ Thus, there is no income limit for granting immediate financial assistance, but it may only be awarded in cases where the victim is unable to pay for their basic needs due to the offence committed against them. In contrast, state compensation for damage incurred by an offence may only be claimed by persons who are victims of a violent crime against a person and whose physical integrity or health has been seriously damaged as a result, or by a person who has been indirectly affected by such crime - for example, if the victim of the crime was a relative of the person concerned and the victim died as a result of the crime.³⁰ A further limitation of state compensation was that only a person whose income did not exceed twice the applicable basic amount (the yearly basis) of the state compensation, already referred to above, was entitled to compensation. This limitation was abolished as of 1 January 2021.³¹ Lastly, it is important to note that the state does not undertake to compensate the victim for the entire loss suffered, but only for losses not exceeding fifteen times the basic amount.³²

Services in kind are designed to help the victim or witness to assert his or her rights, in particular by providing information, counselling, and emotional support. These services aim to address the victims' most important needs that arise after a crime is committed against them such as empathy, advocacy enabling the victims to effectively navigate the criminal justice system and professional help in processing the trauma induced by the offence.³³ In addition, victim support authorities also certify the victim's status by issuing an official certificate, which entitles the victim to make use of various social security (health insurance) services and financial benefits.

3. 3 The shortcomings of the Hungarian state victim support system

Even though there is a wide variety of services provided to victims of crime in Hungary, the state victim support system had some flaws in the past. The shortcomings can be approached both from an institutional point of view, and from the services provided to the victims including criteria of provision. Overall, most of the victim support services provided by the state are only available to individuals who have become victims of a crime, namely having a certification of victim status, witness care and assistance in asserting their rights and

²⁹ Act no. CXXXV of 2005 on Assistance to Victims of Crime and State Compensation § 27.

³⁰ Barbara Zséger, "Hogyan járul hozzá az áldozatsegítés hazai rendszere az áldozatok vagyoni kárának megtérüléséhez," *Themis* 11, no. 3 (2013): 347.

³¹ Act no. CXXXV of 2005 on Assistance to Victims of Crime and State Compensation (effective until 1 January 2021) § 6(2).

³² Act no. CXXXV of 2005 on Assistance to Victims of Crime and State Compensation § 7(2).

³³ Carl B. Clements, Dia N. Brannen, Shalene M. Kirkley, Trina Gordon and Wesley T Church, "The measurement of concern about victims: Empathy, victim advocacy and the Victim Concern Scale (VSC)," *Legal and Criminological Psychology* 11, no. 2 (2010): 289-290.

interests.³⁴ However, state compensation is limited to cases of violent crimes against a person, which objectively narrows down the cases in which the victim may be entitled to compensation, even though not only such offences have serious material consequences (for example, traffic offenses may result in a great deal of damages in the vehicle of the person who is not at fault of the accident). In addition, it should be noted that state compensation is capped and cannot exceed the maximum amount. If the amount of damage exceeds the maximum compensation, the remaining amount is not reimbursed. The VSA therefore imposes significant restrictions on the most helpful service, which can be seen as a shortcoming of the victim support system, since a significant proportion of victims are excluded from the scope of the state compensation scheme and others may face only partial compensation for their damage incurred by the offence.

Another critical point of state victim support is the institutional system. The Victim Support Office – that was the sole provider of victim support services for more than a decade – was and is still operated by the county and capital government offices, which also means that the territorial coverage is far from ideal, as victims who do not live in or near the county administration centers or the capital city have to travel to access victim support services. In certain counties, travel distances can amount to a hundred kilometers. Moreover, the victims' health, financial circumstances, age, and family situation can be an obstacle to making a longer journey.³⁵ The lack of territorial coverage was indicated by the very low number of victims of crime who received some form of victim support service. In Tolna county, for example, there were more than 4,000 victims per year until 2016. Only 3-7% of them received victim support.³⁶ Finally, another problem is posed by the lack of professional staff specialized in victim support in Victim Support Offices. Therefore, victims often encounter staff who lack the personal skills and professional knowledge required to assist victims.³⁷ Additionally, the environment in which victim support services are provided in the Victim Support Offices also hamper the outreach to victims. As these Offices are seated in the county and metropolitan government offices, they do not meet the needs of a victim, since they have a predominantly official and rigid setting, which may discourage victims from seeking help.

3. 4 Old and new actors in the Hungarian Victim Support System

Originally, Victim Support Offices provided all public services associated with state victim support in Hungary until 2017 – notably monetary services, advocacy for the rights of the victims and witnesses, issuing certificates and providing emotional support. In other words, the Victim Support Office carried out functions both typical of public administration (e.g. monetary services and certificates are granted in an administrative procedure) and atypical of public

³⁴ Act no. CXXXV of 2005 on Assistance to Victims of Crime and State Compensation § 4(1).

³⁵ László Illés, "Volt egyszer egy program. Az áldozatsegítés Tolna megyei mintamodellje," *Belügyi Szemle* 64, no. 4 (2016): 82.

³⁶ Illés, "Volt egyszer egy program," 84.

³⁷ Schweighardt, "Áldozatvédelem," 27.

administration such as advocacy and emotional support. Before 2017, the Victim Support Office was not the only actor in the field of victim support, since the police, another state authority, also had and still have its own functions in this field. Finally, from 2017, the establishment of Victim Support Centers changed the landscape of the Hungarian victim support system.

The underlying reason for the diversification of the state victim support system was the existence of the systemic shortcomings described above. As of 2017, Victim Support Centers have taken over – in a subsidiary manner – functions that are atypical of public administration in an effort to introduce social work in the wider judicial system which better suits victims' needs. Additionally, although not expressly for this reason, the police also created a system which can mitigate the lack of sufficient territorial coverage. In the following sub-sections, these actors and their roles will be demonstrated.

3. 4. 1 The role and added value of the police

According to the 2/2013. (I.31.) order of the National Police Headquarters, the Hungarian police operate a victim support network which consists of victim support rapporteurs on two organizational levels (national and county). Victim support rapporteurs on the national and county levels carry out managerial functions regarding the rapporteurs operating on a lower organizational level. They are also tasked with supervising the victim support activities carried out by police departments operating under the authority of County Police Headquarters. With view to the efficient operation of the victim support network, the national and the county level rapporteurs cannot be tasked with other police functions simultaneously.³⁸ It is clear that the police – unlike the Victim Support Offices – does not provide public services in this field. Instead, its functions coincide with its original functions including crime prevention and investigation. As the police are usually the first authority which victims of crime contact, they have an important role in properly informing them about their rights and options in the victim support system. Consequently, the 2/2013 (I.31.) order first and foremost sets out rules about the provision of information to victims about their rights (in speech, in writing and even in leaflets), communication with the victims regarding the case and lays down standards of procedure serving to protect vulnerable victims.³⁹

It is interesting to note that although not required by the 2/2013 (I.31.) order, a survey which was sent to the county police headquarters and the National Police Headquarter in the beginning of 2024 showed that the above tasks are carried out at each district police department by police officers who are either investigators, crime scene technicians or who primarily focus on crime prevention. Communication between the victim support rapporteurs operating on a national, county or district level is realized in standard police procedures.

The survey also indicated that the victim support network operated by the police has two major advantages over the state victim support system: extensive territorial coverage and a range of services. First and foremost, it should be

³⁸ 2/2013. (I.31.) order of the National Police Headquarters §§ 3–5.

³⁹ 2/2013. (I.31.) order of the National Police Headquarters §§ 8–14.

emphasized that during the research, 211 victim support rapporteurs were employed by the police, most of whom work at one of Hungary's 148 district police departments (179 of 211 rapporteurs), which greatly overstretches the territorial coverage achieved by the Victim Support Offices operating in the county administration centers and the capital city. The essence of the victim support network is that the victim is able to discuss their situation with the rapporteur after the police interviewed them, whereby the rapporteur facilitates access to state victim support services and provides emotional support.

In addition, each County Police Headquarters declared in the survey that they cooperate with civil society organizations either on an *ad hoc* basis or based on strategic partnership. Most notable among these civil society organizations are those who specify in victim support such as the Fehér Gyűrű charitable association (közhasznú egyesület) established for aiding victims of traffic accidents, or other charity and ecumenical services operated either by civil society or various churches. They provide services that efficiently complement state victim support services in more than one way. First, through their efforts, financial aid can be provided to individuals who become victims of crimes other than violent crimes against a person. For instance, traffic offenses do not fall under the category of offences that justify state compensation, but they are nevertheless offences with consequences that are comparable to crimes of violence against the person. In this case, instead of state compensation, victims are supported by various civil society organizations, such as the above-mentioned Fehér Gyűrű charitable association.

Another finding of the empirical research conducted via questionnaires at the police is that a further merit of this type of cooperation is that victim support may go beyond the traditional notion of victim. An example is a case from Somogy county, where a television fell on a child entrusted to the custody of grandparents. As a result, the child died of his injuries. In the end, the police found that the grandparents could not be held accountable for the tragic accident. However, in the absence of an offence, there is no victim. Yet, it is plausible that family members needed psychological support which was indeed provided through the above organizations.

Although not as widespread as the above practices, there are some specific characteristics of the victim support networks found in some counties in Hungary that are also worth mentioning. For example, communication with the victim is regulated in a unique way in Somogy county where the rapporteur of the case is obliged to contact the victim within five days of the reporting of the offence and to consult the victim at least once a month during the investigation until the indictment is issued. During such consultations, the victim must be informed of the progress of the case and be advised that they may provide further information on the case. This practice helps promote the interests of victims in criminal proceedings, where, in principle, victims have long been perceived as witnesses with special status who have directly suffered the crime, but without any further consideration regarding their specific needs after being victimized.

Finally, it is also worth mentioning that the Budapest Police Headquarters explained in the survey that it established formalized cooperation partnership

with various state actors and civil society organization operating in the field of victim support. The so-called Victim Support Professional Networks operating in districts of Budapest are coordinated by a victim support rapporteur employed by the Police Headquarters. In addition to civil society organizations, local governments, civil guard associations, family support centers and even general medical practitioners take part in the initiative. The added value of such formalized system is the ease of communication and the wide range of services that can be provided on short notice.

3. 4. 2 The role and the added value of Victim Support Centers

Apart from the new role of the police in victim support, another major development of the Hungarian system was the establishment of Victim Support Centers. Currently 20 Victim Support Centers and 3 Victim Support Points operate in Hungary. This essentially creates a nationwide network of centers mostly based in county administration centers.⁴⁰ The Centers operate under the authority of the Ministry of Justice.⁴¹ These centers do not replace the Victim Support Offices but rather complement them. It is therefore important to note that the Victim Support Centers do not carry out administrative procedures, such as issuing official certificates of victim status, deciding on immediate financial assistance or state compensation. Instead, their main role is to promote the interests of victims of crime.⁴²

According to the coordinator of the Victim Support Center in Pécs, Victim Support Centers represent a different approach to the public victim support system than that of the Victim Support Offices. They have the advantage of taking victim support out of the traditional official environment that best describes government offices and avoiding the rigorous procedures of official administration, thus increasing victims' trust in their activities. Experience so far shows that in all of the county administration centers where Victim Support Centers have been opened, there has been an increase in the number of victims who have applied for victim support services. Based on the interview conducted with the coordinator of the Victim Support Centre in Pécs, while Victim Support Offices are mainly visited by victims of offences against property and misdemeanors, Victim Support Centers are relied on by victims of offences of violence against a person, such as relationship violence – the circumstances of which offences differ in a great deal.

The methodological reform taking place in Victim Support Centers can be best exemplified by the fact that they were designed with view to the crisis of the victim. A safe environment is reflected even in the color of the rooms and the furnishings. Efficient tending to the specific needs of the victim is facilitated by applying professional case management, tailored to each individual case, and implemented until the crisis of the victim of crime is resolved. This is necessary

⁴⁰ <https://vansegitseg.im.gov.hu/elerhetosegek/>.

⁴¹ 362/2016 (XI. 29.) Government Decree on certain duties and powers related to judicial services § 4(3)a).

⁴² Orsolya Doszpoly, Gábor Barta, István Novák and Péter Patai, "A hazai áldozatsegítés rendszerének aktuális kérdései," *Fontes Iuris* 6, no. 3 (2020): 15.

because each victim and their situation is unique. Victims are affected in different ways by crime and thus have different needs. The most important factor is, of course, the seriousness of the offence, but the victim's capacity to process the resulting trauma is equally important. Overall, the process of victim support consists of two types of activities: psychological support and practical help and information for the victim about the situation caused by the offence.⁴³ Both functions are fulfilled by the Victim Support Centers.

Consequently, the activity of the Victim Support Centers can be considered as social rather than administrative work, which must be taken into consideration when choosing the staff for the center. As a result, Victim Support Centers rarely employ lawyers better suited for taking care of administrative procedures. Instead, they employ social workers and heavily rely on the assistance of a psychologist during the management of each crisis situation.⁴⁴

3. 5 Institutional relations and a single point of access

As already described above, the Hungarian victim support system is currently operated by several state actors in the form of Victim Support Offices, Victim Support Centers, and the police, all of which administer different tasks. Victim Support Offices carry out administrative procedures, Victim Support Centers tend to the personal needs of the victim in the form of professional case management and the police operate as an information hub for the victims, and as the first point of entry into the justice system. Since the current state of the Hungarian victim support system has been under reconstruction in the past few years, notably due to the establishment of Victim Support Centers, institutional relations between the three actors are still developing.

As the division of functions currently stands, it could very well happen that after the victim reports the crime to the police, it is required to submit several requests to the Victim Support Office for immediate financial assistance, state compensation for damages and a certification regarding their status while, for the psychological needs, they would need to approach Victim Support Centers. This practice is highly recommended to be avoided since it could result in secondary victimization where the victim needs to repeatedly recall the offence they sustained, thus repeatedly inducing stress that was caused by the offence itself in the first place.⁴⁵ As such, close cooperation needs to be established between the state actors in order to mitigate this effect.

To this end, there is a tendency where the above actors coordinate their operation in an attempt to create a single point of access to the different victim support organizations, which greatly helps avoid secondary victimization in line with the

⁴³ György Virág, "Az áldozatsegítés módszertana" in *A kriminálpolitika és a társadalmi bűnmegelőzés kézikönyve*, ed. Andrea Borbíró, Anna Kiss, Edit Velez and Lajos Garami (Igazságügyi és Rendészeti Minisztérium 2009), 106-107.

⁴⁴ Doszpoly, Barta, Novák and Patai, "A hazai áldozatsegítés," 15.

⁴⁵ Ilona Görgényi, "Az áldozatpolitika története, elmélete és gyakorlata nemzetközi kitekintéssel," in *A kriminálpolitika*, ed. Borbíró, Kiss, Velez and Garami, 30.

Preamble of the EU directive on the rights of victims.⁴⁶ Based on the interviews conducted with the County Police Headquarters, there are formalized cooperation partnerships in 16 counties among these actors. In 3 counties, the cooperation is limited to efficient communication and coordination meetings between the police and the Victim Support Offices. However, in 12 other counties, the victim support employees both from the Victim Support Offices and the Centers hold reception hours at the police departments in various towns. This effort is particularly significant in Budapest, where such reception hours are provided in all 23 police departments operating in the capital. This kind of cooperation lets victims contact victim support organizations easier and builds trust. In addition, in two counties, namely Somogy and Csongrád-Csanád, victim support rapporteurs employed by the police may take part in the questioning of the victim in case of particularly serious offences to further decrease the effects of secondary victimization. Similar single points of entries can be established in Victim Support Centers as well. For instance, in Baranya County, an employee of the Victim Support Office is stationed at the Victim Support Centre which lets victims receive every kind of victim support service at the same place without the need to visit the Victim Support Office as well.

Creating single point of entries for the victims can make a great difference in the administration of their cases. Cooperation between the state actors results in efficient communication and greater reliability of each actor even shortly after the victimization took place. One such example of institutional cooperation that took place in Somogy County was shared in the survey. Three persons died in a traffic accident. Although the family of the deceased persons resided in another county, the victim support rapporteur of Somogy County Police Headquarters personally visited the deceased persons' family to help navigate the administrative procedure and fill out the request for immediate financial aid that was later delivered to the Somogy County Victim Support Office by the rapporteur. The financial situation of the victims' family excluded them from travelling to any county administration centers where they could do so in person. Thus, the single point of entry proved indispensable in overcoming difficulties of the victims' family regarding the location of the Victim Support Offices.

Another case described in the research was where the police as a single point of entry proved to enhance the operation of the victim support system involved a homicide which took place in Komárom-Esztergom County. The family of the victim resided in Zala County where they contacted the Victim Support Office since they financially aided the deceased victim's previous husband who took care of their three children alone. The deceased person's family needed financial and emotional help. The Victim Support Office in Zala County approached the victim support rapporteur of the Zala County Police Headquarters to establish communication with the Komárom-Esztergom Police Headquarters. In addition, through the assistance of the latter police headquarters, the previous husband and

⁴⁶ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Preamble (62).

their children were aided in contacting the family support services in their place of residence.

In addition to specific institutional relations, the Hungarian state victim support system was developed in an opt-out direction through the modification of the VSA. An opt-out scheme for the operation of a victim support system describes the method of reaching out to the victims. In an opt-out scheme, the police, being the first public authority to encounter the victim, send their contact information to the competent organization after a report about the offense had been made. Upon this provision of data, the victim support organizations then contact the victims of crime, which lends them a more active role.⁴⁷ The Hungarian legislator introduced this methodology in case of violent crimes against a person. In such cases, the police has to acquire a statement of the victim whether they wish to be contacted by the competent victim support service.⁴⁸ This was already a significant step in the direction of an opt-out scheme as before 1 January 2021, the police could not forward the data of victims under any circumstances to victim support offices or centers. However, on 1 November 2021, this system was further modified with the inclusion of six more offenses in this area, and the police now has an obligation to inform the victims of such offences about the transmission of their data to the competent victim support services against which they may object. If they do not do so, their data is automatically transmitted.⁴⁹

This opt-out scheme has also contributed to the realization of a single point of access model in the Hungarian state victim support system, as the police is now required to send every important detail about the offense that was committed against the victim to the victim support services, which makes it unnecessary for the victim to recount the offense all over again when they apply for services to any victim support service.⁵⁰ As such, even though the opt-out system does not formally realize the single point of access, it significantly lessens the effects of secondary victimization through practice.

4. Discussion

The findings shed light on various systemic issues that existed in the Hungarian state victim support system for a long time. However, they also show that the Hungarian system has gone through various structural changes in the last few years with new state actors appearing and other state actors, such as the police taking on more responsibilities while the legislator also introduced an opt-out

⁴⁷ Oleksandra Boychenko, Nikolas Konstantinou, Levent Atlan and Aleksandra Ivankovic, *Report on the practical implementation of the EU victim's rights directive 2018–2024* (Victim Support Europe, 2025), 191.

⁴⁸ Act no. CXXXV of 2005 on Assistance to Victims of Crime and State Compensation (effective between 1 January 2021 and 31 October 2021) § 43/A.

⁴⁹ Act no. CXXXV of 2005 on Assistance to Victims of Crime and State Compensation (effective from 1 November 2021) § 43/A.

⁵⁰ Act no. CXXXV of 2005 on Assistance to Victims of Crime and State Compensation § 43/A(1)c).

scheme in connection to several offenses. As such, it is worth exploring whether the above changes managed to mitigate at least some of the listed shortcomings of the Hungarian system.

First, it should be reiterated that the Hungarian state victim support system had many flaws in the first two decades of the new century. It is clear that it provides insufficient monetary services to victims of crime, because state compensation for damage is maximized and provided to a very limited group of victims. Furthermore, even though immediate financial assistance is provided to victims regardless of the offense, the financial aid provided therein has much less monetary value. Additionally, the Hungarian state victim support system has lacked meaningful territorial coverage for a long time with Victim Support Offices having been operated in the capital city and administration centers. Finally, Victim Support Offices offer a rigid and official setting where victims are supposed to seek help which also hinders their willingness to turn to the authorities in such a delicate matter.

However, the structural and methodological development introduced in the past 10 years seems to mitigate some of these shortcomings. Most importantly, the introduction of a new methodology focusing on the emotional needs of victims in Victim Support Centers offers an alternative to the official environment provided by Victim Support Offices. Nevertheless, regardless of the new methodology, Victim Support Centers also lack significant territorial coverage. Instead, they are mostly located in the capital city and administration centers together with Victim Support Offices. Consequently, the introduction of Victim Support Centers to the Hungarian state victim support system solved only one shortcoming that is the insufficient provision of services in kind to victims of crime in Victim Support Offices. On the other hand, though, the police managed to mitigate the problem of territorial coverage with the deployment of more than 200 victim support rapporteurs who operate under the county level administration, namely, in districts which usually consist of 20-30 municipalities as opposed to counties consisting of more than 100 municipalities. Consequently, through focusing on increasing the number of victim support rapporteurs, the police managed to create a victim support network that is capable of reaching more victims of crime near to their place of residence. From this point forward, state actors only needed to work out an efficient form of cooperation to effectively channel victims of crime from the police to the Victim Support Offices and Victim Support Centers.

As indicated in the findings, quite elaborate institutional relations were developed between these actors. Many county police headquarters concluded agreements with Victim Support Offices and Victim Support Centers to be able to refer victims of crime to the competent authority. Additionally, the newly introduced opt-out scheme in the Hungarian state victim support system further enhanced cooperation between the competent state actors. These changes eventually lead to a significant increase in the outreach to victims by state victim support organizations. For example, while only 7238 victims requested victim support in

2021, in 2022, there was already a greater number of 14624 victims who contacted victim support offices and centers.⁵¹

Contrary to that, though, the financial compensation for damages provided to victims of crime has not changed since the adoption of the VSA in 2005. As a result, the Hungarian state victim support system still lacks meaningful ways to compensate financial damages of victims of crime. This shortcoming is only slightly mitigated by the fact that the police victim support networks cooperate with civil society organizations which are willing to provide aid even to those victims who do not qualify for state compensation for damage.

5. Conclusion

In conclusion, the Hungarian state victim support system has undergone a great development in the past 10 years. With the gradual shift in the role of the police in victim support, and the establishment of a new actor, namely the Victim Support Center, some shortcomings of the Hungarian system have been mitigated. Victim Support Centers take over the provision of services in kind with specialized case management techniques tailored to the needs of victims from Victim Support Offices such as advocacy and emotional help – something for which Victim Support Offices lack the qualified staff. As a result, victims turn to the Centers in cases that differ from those for which they contact Victim Support Offices. This change in organization and in methodology yielded better outreach to victims supported by the partly introduced opt-out system.

In addition, the increased efforts of the police in this field resulted in reaching out and informing more victims about their rights in the victim support system. With the employment of victim support rapporteurs in every district police department by the Hungarian police, the lack of territorial coverage of the victim support system seems to be mitigated. This solution is surely not ideal, since the police cannot and do not take over the provision of victim support services, however – as demonstrated above – it has the possibility to become a single-point-of-entry where victims can turn to if they need assistance navigating the victim support system.

The single-point-of-entry model does not only mitigate the lack of territorial coverage of the dedicated state victim support organizations, but it also helps the efficient flow of information between these actors. With this, the need to individually reach out to every actor is mitigated. Therefore, the administrative process is shortened, and the victims do not have to recall the crime that was committed against them, thus decreasing the chances of secondary victimization. This methodology is reinforced by the newly introduced opt-out scheme as well. As such, it can be stated that the Hungarian state victim support system has gone through major development over the last eight years. It has taken significant steps in the direction of a general opt-out system with new organizations well suited for the emotional assistance of victims and the establishment of new roles for old actors such as the police with the necessary personnel. It would be best if the

⁵¹ Statistical data provided by the Ministry of Justices.

system is developed in the direction of an even closer cooperation of the above actors in the form of written institutional agreements which are still lacking though.

In addition to that, the legislator could also consider the further development of the current opt-out scheme, which only involves violent crimes against a person. If every other offense was incorporated, undoubtedly more victims could be contacted by Victim Support Offices and Victim Support Centers. However, this development has its challenges, because it would result in a significant increase in the number of victims who should be contacted by victim support officials. As of now, the state victim support system is not prepared for such a model, which is why the government should primarily focus on increasing the staff employed by Victim Support Offices and Victim Support Centers.

Finally, it would be worth considering abolishing the limitation placed on state compensation for damage. The state could provide full compensation for damage incurred by violent crimes against a person, especially because these crimes have severe consequences. Addressing those should not be a question of monetary issues.

Planning Decommissioning at the Early Stages of the Lifecycle of Nuclear Power Plant: International Legal Framework

TAZBIR, BŁAŻEJ*

ABSTRACT *Amid growing global energy demand and recent crises leading to energy shortfalls, nuclear energy has regained political and economic momentum as a reliable, low-emission energy source. The global revival of nuclear projects brings challenges extending beyond the construction and operation of facilities, particularly the issue of their future decommissioning. Decommissioning is a process of administrative and technical actions leading to the removal of the facility from regulatory control. These actions include, inter alia, facility and site decontamination, dismantling and materials management. Taking into account the complexity of the decommissioning process, international organisations such as the IAEA or the OECD NEA advocate for the introduction of regulations requiring decommissioning planning at the early stages of nuclear projects. It should be emphasised, however, that international legislative efforts remain confined to the development of soft law instruments, with no corresponding establishment of legally binding regulations. Therefore, the ultimate responsibility for establishing sufficient regulation lies with the national legislation. The goal of this research study is to analyse existing international standards that have the potential to serve as a foundation for the development of binding legal provisions concerning early decommissioning planning. The analysis demonstrates that, while the international hard law instruments do not impose specific obligations for early decommissioning planning of nuclear power plants, the IAEA Safety Standards provide comprehensive non-binding guidance that can effectively fill this gap. The study concludes that transforming selected elements of these standards into binding international obligations would significantly strengthen nuclear safety and regulatory consistency across jurisdictions.*

KEYWORDS *nuclear decommissioning, decommissioning planning, International Atomic Energy Agency, hard law, soft law.*

* PhD student, University of Miskolc, Faculty of Law, Deák Ferenc Doctoral School of Law, Central European Academy; ORCID: 0009-0005-1948-4839.

1. Introduction

The global energy transition and recent energy crises have brought nuclear power back to the centre of policy debates. Governments view it as a means to secure energy independence and meet climate commitments. Some authors claim that the world is entering the era of a nuclear renaissance.¹ Whether or not the term is overused, the fact remains that approximately 65 reactors are currently under construction worldwide, with about 90 more planned.² It appears that the focus on the development of nuclear projects often overlooks the other side of the coin, namely the challenge of decommissioning. Failing to consider decommissioning at an early stage of the project³ should be considered as a significant mistake. As the International Atomic Energy Agency (IAEA) persuades, planning decommissioning from the design stage has numerous advantages, such as facilitation of conducting the process and optimisation of protection of decommissioning workers, the public and the environment.⁴

The importance of planning for decommissioning in the early stages may have been demonstrated by the experience of some countries, especially in cases where nuclear units were built at a time when awareness of the problem was not yet widespread. Such an example is Finland, which, in April 2024, completed the decommissioning of the FiR1 TRIGA research reactor built in the 1960s.⁵ However, due to the absence of contracts for nuclear waste management, which, in the case of Finnish policy, are concluded with commercial companies, the process of reviewing the application for the decommissioning licence took about

¹ Alexander Wimmers, Fanny Böse, and Leonard Göke, “Assessing the Viability of Non-Light Water Reactor Concepts for Electricity and Heat Generation in Decarbonized Energy Systems,” *arXiv working paper*, (2024): 1–2, <https://ideas.repec.org/p/arx/papers/2412.15083.html>; Erik Funkhouser, “Why the Nuclear Energy Renaissance Is Real — and Necessary,” *Utility Dive*, July 21, 2025, <https://www.utilitydive.com/news/nuclear-energy-renaissance-smr-good-energy/753471/>; Andries Lodewikus Lombaard and Ewert P.J. Kleynhans, “The Feasibility of a Nuclear Renaissance: A Cost-Benefit Analysis of Nuclear Energy as a Source of Electricity,” *Acta Commercii* 16, no. 1 (2016): 10, <https://doi.org/10.4102/ac.v16i1.373>.

² “Plans for New Reactors Worldwide,” World Nuclear Association, updated October 29, 2025, <https://world-nuclear.org/information-library/current-and-future-generation/plans-for-new-reactors-worldwide>.

³ Planning decommissioning at the early stage of the project will be considered in this research study as planning decommissioning until the operation stage, including also planning decommissioning during the application process for an operation license.

⁴ IAEA, *Decommissioning of Nuclear Power Plants, Research Reactors and Other Nuclear Fuel Facilities*, IAEA Safety Standards, Specific Safety Guides, No. SSG-47 (IAEA, 2018), 41, https://www-pub.iaea.org/MTCD/Publications/PDF/P1812_web.pdf.

⁵ Antti Ketolainen, “First Lessons Learned from Nuclear Decommissioning in Finland,” *Fortum*, November 6, 2024, <https://www.fortum.com/news-and-publications/forthedoers-blog/first-lessons-learned-nuclear-decommissioning-finland>.

four years.⁶ This appears to be relatively long, considering the estimated length of the procedure.⁷

Moreover, during the early preparations for the process of decommissioning, the details required for the design and planning of work to meet regulatory criteria were underestimated, which affected the aspects of funding and timeline.⁸ Due to this fact, the operator encountered a funding gap, which resulted in an application to the Government for additional funds to be paid into the Nuclear Waste Management Fund.⁹

The case study described above illustrates the necessity of ensuring early considerations on the decommissioning stage during the design stage and maintaining appropriate plans throughout the lifetime of the facility. Afterwards, Finland adopted amendments to the Nuclear Energy Act 1987 (1987 Nuclear Energy Act) (No. 990/1987)¹⁰ and the YVL guides, which were issued by the Radiation and Nuclear Safety Authority (STUK).¹¹

The Finnish experience not only highlights the practical challenges of inadequate early decommissioning planning but also underscores the importance of a coherent international regulatory framework. While national amendments, such as those adopted in Finland, can address gaps at the domestic level, they also reveal the limitations of relying solely on national initiatives in an increasingly interconnected nuclear sector. These lessons reinforce the need to examine whether existing international instruments sufficiently promote early decommissioning planning, or whether a stronger, binding global standard is required. The following sections, therefore, analyse the extent to which international law currently addresses this issue and identify potential pathways for enhancing regulatory consistency worldwide.

⁶ IAEA, *Considerations on Decommissioning in the Design and Operation for Research Reactors*, IAEA Technical Reports Series, No. XXX (IAEA, 2023), 110, https://nucleus.iaea.org/sites/connect/RRIHpublic/Documents/Considerations%20on%20Decommissioning_RRs_Draft%202023_04_26.pdf.

⁷ IAEA, *Considerations on Decommissioning in the Design and Operation for Research Reactors*, IAEA Technical Reports Series, No. XXX (IAEA, 2023), 110, https://nucleus.iaea.org/sites/connect/RRIHpublic/Documents/Considerations%20on%20Decommissioning_RRs_Draft%202023_04_26.pdf.

⁸ IAEA, *Considerations on Decommissioning in the Design and Operation for Research Reactors*, IAEA Technical Reports Series, No. XXX (IAEA, 2023), 113., https://nucleus.iaea.org/sites/connect/RRIHpublic/Documents/Considerations%20on%20Decommissioning_RRs_Draft%202023_04_26.pdf.

⁹ IAEA, *Considerations on Decommissioning in the Design and Operation for Research Reactors*, IAEA Technical Reports Series, No. XXX (IAEA, 2023), 113., https://nucleus.iaea.org/sites/connect/RRIHpublic/Documents/Considerations%20on%20Decommissioning_RRs_Draft%202023_04_26.pdf.

¹⁰ Finland Nuclear Energy Act 1987 (1987 Nuclear Energy Act) (No. 990/1987).

¹¹ IAEA, *Considerations on Decommissioning*, 113.

2. International agreements

Upon analysing various binding international instruments, it can be initially observed that the decommissioning phase of nuclear power plants is largely neglected within the framework of international legislation. No binding international instrument deals specifically or comprehensively with this issue. Even international agreements addressing related areas, such as nuclear safety or radioactive waste management, fail to provide an adequate or detailed regulation of decommissioning. The only provision explicitly related to this issue, within the framework of international regulations, is Article 26 of the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management (Joint Convention),¹² concluded on 5 September 1997 in Vienna.¹³ It is Article 26 of the Joint Convention, which stipulates that:

Each Contracting Party shall take appropriate steps to ensure the safety of decommissioning of a nuclear facility. Such steps shall ensure that:

- (i) qualified staff and adequate financial resources are available;
- (ii) the provisions of Article 24 with respect to operational radiation protection, discharges and unplanned and uncontrolled releases are applied;
- (iii) the provisions of Article 25 with respect to emergency preparedness are applied; and
- (iv) records of information important to decommissioning are kept.¹⁴

According to the definition set out in Article 2(f) of the Joint Convention, “‘nuclear facility’ means a civilian facility and its associated land, buildings and equipment in which radioactive materials are produced, processed, used, handled, stored and disposed of on such a scale that consideration of safety is required.”¹⁵ A nuclear power plant, by its very nature, involves the use of nuclear material and inherently requires rigorous safety measures. Consequently, nuclear power plants fall within the scope of this definition and, as a result, are subject to Article 26.

As it can be derived from linguistic interpretation, this provision does not impose *expressis verbis*, the requirement to ensure the existence of comprehensive decommissioning plans at the early stages of a nuclear project. Nor does it place an obligation on the regulatory body to provide sufficient legal mechanisms to enforce such a requirement on the operator.

¹² Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management (1997), IAEA Doc. INFCIRC/546, 2153 UNTS 357, entered into force 18 June 2001 (Joint Convention).

¹³ Christian Raetzke, “Licensing & Regulation of Decommissioning and Spent Fuel & Radioactive Waste Management,” slideshow presented at the International School of Nuclear Law, NEA and University of Montpellier, Montpellier, France, 29 August 2024.

¹⁴ Joint Convention, Article 26.

¹⁵ Joint Convention, Article 2 (f).

Point (i) of the analysed provision obliges the Contracting Parties to ensure qualified staff and adequate financial resources,¹⁶ which undoubtedly requires prior planning. However, it is not indicated at which stage these requirements should be ensured. References to the Joint Convention's other provisions in point (ii) and (iii) relate, in turn to radiological protection and emergency preparedness.¹⁷ While these aspects could potentially be included in a comprehensive decommissioning plan, the Joint Convention does not impose any requirement for planning these issues specifically for the decommissioning phase at the early stages of nuclear projects. Point (iv) of Article 26 mandates the Contracting Parties to store the relevant records from the operation and other stages of the nuclear power plant lifecycle that may be relevant for the decommissioning phase.¹⁸ In fact, such records containing, for example, site characterisation, types and quantities of materials used in the construction or abnormal occurrences reports¹⁹ might prove crucial for the decommissioning. What is important in the context of the absence of the requirement to ensure a comprehensive decommissioning plan is that the IAEA, in its guidance, emphasises that the early establishment of such plans would facilitate the selection of the records relevant to the decommissioning phase.²⁰

Considering the above analysis, Article 26 of the Joint Convention, to some extent, enforces planning for certain aspects of decommissioning at the earlier stages of the nuclear power plant lifecycle. However, as has already been emphasised, it does not impose an obligation of structured and comprehensive planning of this process, beginning from the design stage.

In relation to the issue of an early decommissioning plan, it is necessary to mention two other provisions included in the Joint Convention namely, Article 7 (ii) and Article 14 (ii).

Article 7 (ii) states that: "Each Contracting Party shall take the appropriate steps to ensure that at the design stage, conceptual plans and, as necessary, technical provisions for the decommissioning of a spent fuel management facility are taken into account".²¹ The content of Article 14 (ii) is essentially the same, except that it involves another facility. According to this provision: "Each Contracting Party shall take the appropriate steps to ensure that at the design stage, conceptual plans and, as necessary, technical provisions for the decommissioning of a radioactive waste management facility other than a disposal facility are taken into account".²² As can be derived from these provisions, the Joint Convention imposes an obligation on Contracting Parties to ensure appropriate planning of

¹⁶ Joint Convention, Article 26 (i).

¹⁷ Joint Convention, Article 26 (ii-iii).

¹⁸ Joint Convention, Article 26(iv).

¹⁹ IAEA, *Record keeping for the Decommissioning of Nuclear Facilities: Guidelines and Experience*, Technical Reports Series, No. 411 (IAEA, 2002), 2, https://www-pub.iaea.org/MTCD/Publications/PDF/TRS411_scr.pdf.

²⁰ IAEA, *Record keeping for the Decommissioning of Nuclear Facilities: Guidelines and Experience*, Technical Reports Series, No. 411 (IAEA, 2002), 12–13.

²¹ Joint Convention, Article 7.

²² Joint Convention, Article 14.

decommissioning, beginning as early as the design stage. These provisions regard, however, only the facilities for disposal of spent nuclear fuel and radioactive waste. Nuclear power plants do not fall under the scope of these norms. The Joint Convention does not preclude any provision that would impose similar obligations on Contracting Parties with regard to the nuclear power plants. As one of the main focuses of the Joint Convention is to establish a legislative and regulatory framework for spent fuel and radioactive waste management,²³ and a nuclear power plant, by its nature, is not intended to serve as a disposal facility for nuclear waste or spent fuel (although disposal facilities may be integrated within a nuclear power plant), one may consider this approach is justified. However, taking into account the other objectives of the Joint Convention, expressed in its Preamble – such as promoting an effective nuclear safety culture, and the absence of sufficient provisions regulating early planning of decommissioning with regard to nuclear power plants in other instruments constituting the international framework of nuclear law, it could be reasonable to include such provision in the Joint Convention. This is especially justified since the Convention already contains a more general provision concerning decommissioning of nuclear power plants in Article 26.

3. The European Union legislation

Similarly, as in the case of the international legal system, the EU legislative legal framework does not provide sufficient measures concerning the issue of early planning of decommissioning. Council Directive 2009/71/Euratom of 25 June 2009 establishing a Community framework for the nuclear safety of nuclear installations²⁴ appears not to address the issue of decommissioning at all. The other directive that could seem relevant from the perspective of the analysed issue – Council Directive 2011/70/Euratom of 19 July 2011 establishing a Community framework for the responsible and safe management of spent fuel and radioactive waste²⁵ – admittedly refers in some provisions to the problem of decommissioning. However, it does not establish solutions related to decommissioning planning at early stages, especially for nuclear power plants. Within the framework of EU legislation, the act which addresses in the most explicit manner the issues connected with the decommissioning of nuclear facilities is the Commission Recommendation of 24 October 2006 on the management of financial resources for the decommissioning of nuclear

²³ Amelia de Kagenneck and Cyril Pinel, “The Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management,” *International & Comparative Law Quarterly* 47, No. 2 (1998): 410, <https://doi.org/10.1017/S0020589300061911>.

²⁴ Council Directive 2009/71/Euratom of 25 June 2009 establishing a Community framework for the nuclear safety of nuclear installations, *Official Journal of the European Union* (OJ) L 172 (July 2, 2009) (2009 Safety Directive).

²⁵ Council Directive 2011/70/Euratom of 19 July 2011 establishing a Community framework for the responsible and safe management of spent fuel and radioactive waste, *Official Journal of the European Union* (OJ) L 199 (August 2, 2011) (Waste Directive).

installations, spent fuel and radioactive waste.²⁶ However, the aforementioned recommendation focuses only on one issue concerning decommissioning planning, which is the funding of the decommissioning process. Moreover, it does not necessarily refer to ensuring funding at the early stages but as a general requirement. It should be noted that EU recommendations are non-binding instruments and do not impose legal obligations on Member States, which are therefore not required to comply with them.²⁷

In 2021, the European Union introduced two regulations – Council Regulation (Euratom) 2021/100 of 25 January 2021 establishing a dedicated financial programme for the decommissioning of nuclear facilities and the management of radioactive waste, and repealing Regulation (Euratom) No 1368/2013²⁸ and Council Regulation (EU) 2021/101 of 25 January 2021 establishing the nuclear decommissioning assistance programme of the Ignalina nuclear power plant in Lithuania and repealing Regulation (EU) No 1369/2013²⁹ – which addressed the issue of decommissioning plan and defined specifically what a decommissioning plan should contain. However, they were introduced in connection with the decommissioning of specific units within EU territory, rather than to impose general obligations on the Member States regarding decommissioning planning or early decommissioning planning. Therefore, according to the content of decommissioning plans, the specific provisions of these recommendations will not be further analysed.

In conclusion, the European Union also fails to provide a sufficient legal framework with regard to the issue of early planning of decommissioning.

4. *Soft law measures*

In light of the absence of sufficient legal solutions devoted to the issue of early decommissioning plans within the international *hard law* instruments, attention should be shifted to *soft law* measures. Such measures do not have a binding character. However, they may have a substantial role in framing the national legal frameworks. In some cases, especially regarding complex issues such as the use of nuclear energy, when states are reluctant to adopt international *hard law* measures, *soft law* may prove even more beneficial as a tool for the harmonisation

²⁶ Commission Recommendation of 24 October 2006 on the management of financial resources for the decommissioning of nuclear installations, spent fuel and radioactive waste, *Official Journal of the European Union* (OJ) L 330 (September 28, 2006).

²⁷ Klaus-Dieter Borchardt, *The ABC of EU Law* (Publications Office of the European Union, 2016), 108.

²⁸ Council Regulation (Euratom) 2021/100 of 25 January 2021 establishing a dedicated financial programme for the decommissioning of nuclear facilities and the management of radioactive waste, and repealing Regulation (Euratom) No 1368/2013, *Official Journal of the European Union* (OJ) L 34 (February 1, 2021).

²⁹ Council Regulation (EU) 2021/101 of 25 January 2021 establishing the nuclear decommissioning assistance programme of the Ignalina nuclear power plant in Lithuania and repealing Regulation (EU) No 1369/2013, *Official Journal of the European Union* (OJ) L 34 (February 1, 2021).

of legal standards and the development of safety culture. As it is highlighted in the literature:

When it comes to entering binding obligations, due to particular domestic sensitivities or sovereignty cost, soft law could be a preferred option. The threshold for states is lower when an instrument does not take from hard law. States that view a particular issue as falling squarely in the domestic realm may nonetheless be willing to coalesce around prescribed actions if they entail no legal obligation, nor, perhaps, more importantly, the possibility of being held responsible for a wrongful act.³⁰

4. 1 IAEA Safety Requirements

The IAEA Safety Standards play a significant role in the nuclear industry and in the system of international nuclear law, and they consist of three groups of publications: the Safety Fundamentals, the Safety Requirements and the Safety Guides. They are “recommended for implementation as part of the national regulatory system in order to ‘establish a consistent and comprehensive basis for the proper protection of people and the environment against radiation risk.’”³¹

Within the scope of IAEA publications, it is possible to find those related to the issue of decommissioning nuclear power plants. One of them is IAEA Safety Standards Series No. GSR Part 6, Decommissioning of Facilities (GSR Part 6)³² published in 2014.

It should be noted that all considerations regarding decommissioning included in this publication apply to nuclear power plants. This presumption can be derived from para.1.3 of the Introduction, which states that: “‘facility’ means buildings, and their associated land and equipment, in which radioactive material was or still is produced, processed, used, handled or stored on a scale with such a degree of hazard and risk that consideration of protection and safety is required.”³³ As the nuclear power plant constitutes a building in which radioactive material is used and due to hazard risk, it requires consideration of protection and safety; it undoubtedly falls under the scope of the definition provided in para. 1.3. of GSR Part 6.

In this publication, the IAEA also included requirements relevant from the perspective of early planning of decommissioning. At the very beginning of the publication – in para.1.6. of the Introduction –it expresses a conviction that:

Planning for decommissioning begins at the design stage and continues throughout the lifetime of the facility. It includes: preparation of an initial

³⁰ Jonathan Herbach, *International Arms Control Law and the Prevention of Nuclear Terrorism* (Edward Elgar Publishing, 2021), 131.

³¹ Stephen G. Burns et al., “Regulation, Licensing and Oversight of Nuclear Activities,” in *Principles and Practice of International Nuclear Law*, ed. K.S. Nick and Stephen G. Burns (OECD Publishing, 2022), 172.

³² IAEA, *Decommissioning of Facilities*, IAEA Safety Standards, General Safety Requirements, No. GSR Part 6 (IAEA, 2014), <https://www-pub.iaea.org/MTCD/Publications/PDF/Pub1652web-83896570.pdf>.

³³ IAEA, *Decommissioning of Facilities*, para 1.3.

decommissioning plan; collection of relevant information and data to facilitate future decommissioning; selection of a decommissioning strategy; radiological characterization of the facility; preparation of a final decommissioning plan; estimation of costs; identification of the provision of financial resources for the decommissioning project; submission of the plan to the regulatory body for review and approval; and any activities for public consultation in accordance with national requirements.³⁴

This approach is applied in the following part of the publication. Requirement 5 of GSR Part 6 focuses on the responsibilities of the regulatory body for decommissioning. A part of Requirement 5 is explicitly devoted to the issue of decommissioning planning, as it constitutes that: “The regulatory body shall regulate all aspects of decommissioning throughout all stages of the facility’s lifetime, from initial planning for decommissioning during the siting and design of the facility, to the completion of decommissioning actions and the termination of authorization for decommissioning”.³⁵ Para. 3.3. supplementing Requirement 5 later also indicates the requirements for decommissioning planning, which the regulatory body should establish. These requirements are as follows:

- Specification of the typical content of decommissioning plans and supporting documents for review or approval;
- Establishment of the review process for decommissioning plans and supporting documents (as prescribed in national regulations) and the timeframe for such reviews;
- Review of the initial decommissioning plan and updates, review and approval of the final decommissioning plan and supporting documents, and review and approval of updates after the final decommissioning plan has been approved.³⁶

Under Requirement 5 of GSR Part 6, the regulatory bodies are also mandated to inspect and review decommissioning actions, and, in case of non-compliance with the national legal and regulatory framework or with the authorisation or licence conditions, they should take appropriate enforcement actions.³⁷

Requirement 5 of GSR Part 6 is particularly important because it recognises the necessity of implementation by regulatory bodies, within national legal systems, such mechanisms that will enable enforcement of early decommissioning process planning by the licence holder. The responsibility of ensuring the safe and efficient decommissioning process is not only the licensee’s concern. Rather, the states shall actively enhance and enforce the comprehensive planning of decommissioning in advance. Nevertheless, it is a licence holder who will ultimately be responsible for conducting the decommissioning activities. Therefore, it is necessary to emphasise Requirement 10 of GSR Part 6, which mandates the licensee to plan for decommissioning. As outlined in its content: “The licensee shall prepare a decommissioning plan and shall maintain it

³⁴ IAEA, *Decommissioning of Facilities*, para. 1.6.

³⁵ IAEA, *Decommissioning of Facilities*, Requirement 5.

³⁶ IAEA, *Decommissioning of Facilities*, para.3.3.

³⁷ IAEA, *Decommissioning of Facilities*.

throughout the lifetime of the facility, in accordance with the requirements of the regulatory body, in order to show that decommissioning can be accomplished safely to meet the defined end state.”³⁸

In para. 7.1. following the content of Requirement 10 of GSR Part 6, the IAEA emphasises the role of a regulatory body, specifically in ensuring that the licensee will adopt the means facilitating the decommissioning process throughout all the stages of the facility’s lifetime.³⁹ The initial plan for decommissioning should be submitted together with the application for authorisation to operate the facility, and it should be updated periodically – typically every five years – or due to specific circumstances.⁴⁰ Moreover, in cases where a decommissioning plan was not drafted during the initial phases of the nuclear project, it should be prepared by the licensee as soon as possible.⁴¹ The licence holder should also retain appropriate records and reports drafted throughout the lifetime of a facility that might be relevant for the decommissioning stage.⁴²

With regard to the preparation of initial decommissioning plans, it is necessary to consider a graded approach. The graded approach is a method applied to any process that is related to regulatory control. It ensures that the degree of regulatory requirements correlates with the potential risk.⁴³ Such an approach is suggested in Requirement 2 of GSR Part6, stating that: “A graded approach shall be applied in all aspects of decommissioning in determining the scope and level of detail for any particular facility, consistent with the magnitude of the possible radiation risks arising from the decommissioning.”⁴⁴ In terms of early decommissioning planning, the content of the paragraphs following Requirement 2 appears to be even more relevant. According to para. 2.4.: “The type of information and the level of detail in the decommissioning plans and supporting documents, including the safety assessments, shall be commensurate with the type, scale, complexity, status and stage in the lifetime of the facility and with the hazards associated with the decommissioning of the facility.”⁴⁵

The conclusion drawn from the above guides is that the aspects to be included in the decommissioning plan should be tailored to the current needs. Therefore, regulations within legal systems should allow for some flexibility regarding these plans and avoid imposing an overly detailed structure in advance. However, the legal frameworks should clearly specify the main issues that should be considered in the decommissioning plan.

³⁸ IAEA, *Decommissioning of Facilities*, Requirement 10.

³⁹ IAEA, *Decommissioning of Facilities*, para. 7.1.

⁴⁰ IAEA, *Decommissioning of Facilities*, para. 7.5.

⁴¹ IAEA, *Decommissioning of Facilities*, para. 7.6.

⁴² IAEA, *Decommissioning of Facilities*, para. 7.7.

⁴³ “Applying the graded approach: Improving radiation protection in practice”, IAEA, accessed November 5, 2025, <https://www.iaea.org/sites/default/files/20/11/rasa-applying-graded-approach.pdf>.

⁴⁴ IAEA, *Decommissioning of Facilities*, Requirement 2.

⁴⁵ IAEA, *Decommissioning of Facilities*, Requirement, para. 2.4.

4. 2 IAEA Safety Guides

GSR Part 6 imposes the requirements both on the regulatory body and on the licensee to ensure a decommissioning plan from the initial phase throughout the lifetime of the facility. The next step should be the determination of essential aspects that the decommissioning plan should contain. Although providing some hints on that matter, the aforementioned publication does not explicitly provide a comprehensive list of all the essential elements that such a plan should include. The publication in some of the paragraphs indicates the necessity of determining a decommissioning strategy in the initial plan,⁴⁶ estimated costs of decommissioning and the mechanism of providing financial assurance,⁴⁷ or estimated categories and quantities of waste that will be generated during decommissioning.⁴⁸ These elements, although greatly important for the decommissioning planning, do not appear to cover the full scope of essential aspects that should be addressed in the initial plan and its updated versions throughout the lifetime of the facility. They are also not structured in a manner that facilitates their identification by potential users but rather are dispersed throughout the document. Moreover, the necessity of implementing these issues in the decommissioning plan is, in most cases, not explicitly expressed in the particular requirements. Instead, it is provided in the paragraphs following the main requirements.

Among the publications within the scope of IAEA Safety Standards, there is one published in the series of IAEA Safety Guides, which appears to be more specific in identifying the suggested essential elements of the initial decommissioning plan – IAEA Safety Standards Series No. SSG-47, Decommissioning of Nuclear Power Plants, Research Reactors and Other Nuclear Fuel Facilities (SSG-47).⁴⁹

As the publications in the series of IAEA Safety Guides provide recommendations and guidelines on how to align with the IAEA Safety Requirements,⁵⁰ this publication is complementary primarily to GSR Part 6. This relationship is explicitly expressed in para. 1.14.⁵¹

This paragraph also defines the scope of application for this publication, stating that: “This Safety Guide addresses decommissioning considerations and actions for decommissioning”, including, among other facilities, nuclear power plants.⁵² The essential elements for the initial decommissioning plan can be found listed explicitly in para. 7.10. According to this list, the initial decommissioning plan:

⁴⁶ IAEA, *Decommissioning of Facilities*, Requirement, para. 3.4.

⁴⁷ IAEA, *Decommissioning of Facilities*, Requirement para. 7.4.

⁴⁸ IAEA, *Decommissioning of Facilities*, Requirement.

⁴⁹ IAEA, *Decommissioning of Nuclear Power Plants*.

⁵⁰ For an overview of the structure of the publications within IAEA Safety Standards, see IAEA, *Decommissioning of Nuclear Power Plants IX*.

⁵¹ IAEA, *Decommissioning of Nuclear Power Plants*, para. 1.14.

⁵² IAEA, *Decommissioning of Nuclear Power Plants*.

- a) Should preferably be based on the immediate dismantling strategy; however, a deferred dismantling strategy for individual facilities might be considered, such as in the case of a multifacility site;
- b) Should include a generic feasibility study of decommissioning, based on the selected decommissioning strategy, which should consider design provisions and operating experience for facilitating decommissioning, including the proposed end state (preferably release without restrictions), related key decommissioning actions and basic safety issues;
- c) Should include a schedule for major decommissioning actions;
- d) Should include the approach for management of radioactive waste, and should provide initial identification of waste classes and an initial estimate of waste quantities;
- e) Should provide a basis for a preliminary cost estimate of the decommissioning project and should specify the means to ensure financial provisions for the decommissioning;
- f) Should demonstrate that the decommissioning can be performed in a safe manner.⁵³

As already noted, the publication under the current analysis – SSG-47 – is complementary to GSR Part 6. Therefore, it is remarkable that most of the issues covered by the paragraphs in the latter publication overlap with the elements indicated on the list above from SSG-47. One of them is the selection of a decommissioning strategy, which is included in para. 3.4 of GSR Part 6. Para. 7.10. (a) of SSG-47 specifies that immediate dismantling should be the preferred strategy over deferred dismantling or entombment.⁵⁴

The issue of preferred strategy requires further consideration. The main difference between immediate and deferred dismantling is the period between shut down of the facility and the beginning of the dismantling. The first one involves a period of a few years between these actions, while the latter strategy involves a period of *safe enclosure* between the removal of spent fuel and peripheral items and the beginning of dismantling. The period of *safe enclosure* lasts from 30 to 100 years.⁵⁵ The last strategy recognised within the nuclear industry is entombment, which involves “encapsulating the facility on site and keeping it isolated until the radionuclides have decayed to levels that allow the site to be released from nuclear regulatory control.”⁵⁶

Another overlapping aspect is listed in the para. 7.10. (d) of SSG-47. It is the identification of waste classes and an initial estimate of waste quantities, which is also indicated in para. 7.4. of the GSR Part 6. However, para. 7.10. (d) of SSG-47 additionally stipulates that the initial plan should include “the approach for the

⁵³ IAEA, *Decommissioning of Nuclear Power Plants*, para. 7.10.

⁵⁴ IAEA, *Decommissioning of Nuclear Power Plants*, para. 7.10.(a).

⁵⁵ NEA, *Selecting Strategies for the Decommissioning of Nuclear Facilities* (OECD Publishing, 2006), 12, <https://www.oecd-nea.org/upload/docs/application/pdf/2019-12/nea6038-decommissioning.pdf>.

⁵⁶ NEA, *Selecting Strategies for the Decommissioning of Nuclear Facilities* (OECD Publishing, 2006), 12.

management of radioactive waste”.⁵⁷ This term is not defined within the framework of SSG-47. Therefore, it is difficult to determine whether it presupposes solely strategic approaches as defined in IAEA Nuclear Energy Series No. NW-G-1.1, *Policies and Strategies for Radioactive Waste Management*⁵⁸ also takes into account more detailed technical solutions that can be found in IAEA Nuclear Energy Series No. NW-T-1.27, *Design Principles and Approaches for Radioactive Waste Repositories*.⁵⁹ From the systemic interpretation of the analysed publication, it can be concluded that this term regards the issues considered in paras. 8.34-8.43 as such delegation is provided concerning “approach for radioactive waste management” with regard to updating the decommissioning plan in para. 7.13.⁶⁰ Nevertheless, it can be derived from the content of para. 7.10. (d) that the sole identification of waste classes and their quantities in the initial decommissioning plan is not sufficient, and the issue of radioactive waste management should be addressed more comprehensively as early as drafting the initial plan for decommissioning. The ultimate aspects on the list, which overlap with the issues indicated in GSR Part 6 – particularly para. 7.4. – are connected to demonstrating the feasibility of the decommissioning and ensuring sufficient financial resources and included in para. 7.10. (b) and (e). The issue of funding the decommissioning is one of the most comprehensive aspects of the decommissioning plan, extensively analysed within the literature. In most of the states, according to the polluter pays principle, the licensee is obliged to provide sufficient financial resources.⁶¹ However, the states which are parties to the Joint Convention, on the basis of Article 26 (i), “are obliged to ensure that ‘qualified staff and adequate resources are available’ to ensure the safety of decommissioning.”⁶² The issue of funding of the decommissioning, being too comprehensive, will not be analysed in detail in this research study. The other aspects indicated on the list in SSG-47, apart from the “approach for management of radioactive waste”,⁶³ particularly the schedule of major

⁵⁷ IAEA, *Decommissioning of Nuclear Power Plants*, para. 7.10.(d).

⁵⁸ This publication recognises four strategic approaches towards the issue of nuclear waste management such as: waste recycling, immediate disposal, deferred disposal, a multinational solution, see: IAEA, *Policies and Strategies for Radioactive Waste Management*, IAEA Nuclear Energy Series, No. NW-G-1.1 (IAEA, 2009), 31–32, https://www-pub.iaea.org/MTCD/Publications/PDF/Pub1396_web.pdf.

⁵⁹ IAEA, *Design Principles and Approaches for Radioactive Waste Repositories*, IAEA Nuclear Energy Series, No. NW-T-1.27 (IAEA, 2020), https://www-pub.iaea.org/MTCD/Publications/PDF/PUB1908_web.pdf.

⁶⁰ IAEA, *Decommissioning of Nuclear Power Plants*, para. 7.13.

⁶¹ Kalman A. Robertson, “Decommissioning Nuclear Power Reactors,” in *Learning from Fukushima: Nuclear Power in East Asia*, ed. Peter Van Ness and Mel Gurtov (ANU Press, 2017), 299.

⁶² Kalman A. Robertson, “Decommissioning Nuclear Power Reactors,” in *Learning from Fukushima: Nuclear Power in East Asia*, ed. Peter Van Ness and Mel Gurtov (ANU Press, 2017), 299.

⁶³ IAEA, *Decommissioning of Nuclear Power Plants*, para. 7.10.(d).

decommissioning actions⁶⁴ and demonstrating that decommissioning can be performed in a safe manner,⁶⁵ are not explicitly addressed in GSR Part 6 as a necessary element of the initial decommissioning plan. It can be deduced that cost estimation will require some level of consideration on major decommissioning actions. It is also understandable that, in principle, the concept of early planning decommissioning ensures that the process is carried out safely. Nevertheless, it should be recognised that SSG-47 explicitly indicates them as essential elements of the initial decommissioning plan. Therefore, as noted before, the list of essential elements for the decommissioning plan indicated in SSG-47 appears to address these issues in a more comprehensive and clearer manner than they are addressed in GSR Part 6.

Apart from the elements included on the list, the Nuclear Energy Agency (NEA), in one of its reports – *Decommissioning Considerations for Nuclear Power Plants* – proposes also to address occupational exposure within the scope of the initial decommissioning plan.⁶⁶ This issue was not explicitly mentioned on the list. However, it may fall under the scope of para. 7.10. (b), which mandates that in the initial decommissioning plan, a generic feasibility study of decommissioning should be included, considering, among others, basic safety issues.⁶⁷ Nevertheless, this may be interpreted as only a broad acknowledgement of the necessity to manage occupational exposure. Therefore, national authorities could consider explicitly adopting occupational exposure as an element of the initial decommissioning plan within the national legal frameworks.

5. Conclusion

The comparative analyses of the presented legal frameworks lead to a set of conclusions regarding the issue of early decommissioning planning.

Early planning of decommissioning contributes to carrying out this process more efficiently. It enables proper estimation of the costs, reduces the time of the process and perhaps most importantly, enables to optimise the protection of decommissioning workers, the public and the environment.⁶⁸

The findings outline the gap within the international *hard law* instruments regarding the sufficient regulation of the analysed issue. The only international agreement which addresses the issue of decommissioning as the last stage of the nuclear power plant lifecycle is the Joint Convention. However, it does not constitute any provision that would impose an obligation on Contracting Parties to ensure planning decommissioning for nuclear power plants, beginning at the design stage and updating these plans throughout the lifecycle of the facility.

⁶⁴ IAEA, *Decommissioning of Nuclear Power Plants*, para. 7.10.(c).

⁶⁵ IAEA, *Decommissioning of Nuclear Power Plants*, para. 7.10.(f).

⁶⁶ NEA, *Decommissioning Considerations for Nuclear Power Plants* (OECD Publishing, 2010), 6, <https://www.oecd-neo.org/upload/docs/application/pdf/2019-12/nea6833-decommissioning-considerations.pdf>.

⁶⁷ IAEA, *Decommissioning of Nuclear Power Plants*, para. 7.10.(b).

⁶⁸ IAEA, *Decommissioning of Nuclear Power Plants*, para. 7.1.

Moreover, the European Union also fails to provide sufficient legal measures in the context of early decommissioning planning.

This absence in international law should be recognised as a regulatory shortcoming, especially considering the substantial benefits that early decommissioning planning provides. Addressing this gap would enhance global consistency and ensure that all States adopt proactive, safety-oriented approaches to decommissioning. Until such developments take place, the primary responsibility for ensuring adequate regulation lies with national legislators and regulatory authorities.

At present, the vacuum in binding international norms is partially filled by the *soft law* instruments developed by the International Atomic Energy Agency (IAEA). In particular, the IAEA Safety Standards – GSR Part 6 and SSG-47 – provide comprehensive guidance that may serve as a model for national frameworks and as a benchmark for regulatory bodies. Although non-binding, these documents play a crucial role in shaping consistent international practice.

It therefore appears that, in order to strengthen the global regulatory architecture for decommissioning planning, it would be necessary to move towards the adoption of binding provisions at the level of *hard law*. Incorporating early decommissioning planning obligations into international or regional treaties would not only harmonise approaches among States but also reinforce the fundamental objectives, such as nuclear safety, sustainability, and long-term environmental protection.

Focusing on Immigrant Communities: The Impact of the 287(g) Program Beyond Public Safety

TÓTH, SZIMONETTA *

ABSTRACT *The 287(g) program is a controversial element of the United States' immigration enforcement policy, which authorizes state and local law enforcement agencies to participate directly in the enforcement of federal immigration laws. The study examines in detail the program's origins, operation, and changes from the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to the second Trump administration, as well as its effects on immigrant communities and public safety. The work of civil organizations also plays an important role in the study, as these organizations provide essential assistance in legal representation and the documentation of violations, and support for the affected communities. Nevertheless, the program's negative impacts remain significant.*

KEYWORDS *287(g) program, immigration enforcement, USA, IIRAIRA.*

1. Introduction

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 amended the Immigration and Nationality Act (INA) by adding section 287(g),¹ which allows local and state law enforcement agencies to cooperate with the United States Immigration and Customs Enforcement in enforcing federal immigration laws. Over the years, the 287 (g) program has evolved, and different administrations have applied it in different ways. Although the program was originally intended to identify and deport immigrants who had committed serious crimes, it has been increasingly criticized for promoting racial profiling, resulting in false arrests, and operating in a fear-mongering manner that has particularly disadvantaged immigrant communities.^{2 3}

* PhD student, University of Szeged, Doctoral School of Law and Political Sciences.

¹ *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104–208, div. C, 110 Stat. 3009–546 (1996).

² N. Theodore and R. Habans, “Policing Immigrant Communities: Latino Perceptions of Police Involvement in Immigration Enforcement,” *Journal of Ethnic and Migration Studies* 42, (2016): 970–988.

³ E. Aranda, and E. Vaquera, “Racism, the Immigration Enforcement Regime, and the Implications for Racial Inequality in the Lives of Undocumented Young Adults,” *Sociology of Race and Ethnicity*, no. 1 (2015): 88–104.

This study examines the historical development of the 287(g) program, its impact on local law enforcement practices, and its consequences for immigrant communities. The structure and expansion of the program, particularly under the Trump administration, highlights the growing attachment between immigration control and local policing. However, research and case studies show that the program has resulted in widespread fear, a loss of trust in law enforcement agencies, and a decline in public safety. Immigrant communities, particularly families with mixed status, are often reluctant to report crimes or to seek basic services for fear of deportation.⁴

By analyzing racial profiling, community policing and civil rights concerns, this study demonstrates that the 287(g) program has significant flaws that undermine its stated objectives. While supporters argue that it improves public safety by identifying undocumented individuals with criminal records, critics contend that it has instead led to civil rights violations and weakened relationships between law enforcement agencies and the communities they serve.^{5 6} This analysis aims to provide a comprehensive understanding of how the 287(g) program works, its legal and social consequences, and whether it is consistent with broader public safety and human rights goals.

2. The 287(g) program: Structure, implementation, and enforcement models

The program has allowed the federal government to delegate immigration enforcement authority to state and local law enforcement agencies, thereby establishing a nearly three-decade long partnership between U.S. Immigration and Customs Enforcement (ICE) and state or local law enforcement agencies.⁷

There are various forms of enforcement cooperation between ICE and state or local law enforcement bodies, but the 287(g) program is the only one that authorizes state and local officials to *directly* enforce federal immigration laws. After completing an ICE-provided training, local law enforcement officers may be authorized to carry out certain immigration enforcement functions that would otherwise fall exclusively under federal jurisdiction.⁸

Participation in the program is voluntary but requires the signing of a Memorandum of Agreement (MOA) between ICE and local jurisdictions. Section

⁴ Laura Muñoz Lopez, “How 287(g) Agreements Harm Public Safety” (*Center for American Progress*, 8 May 2018) <https://www.americanprogress.org/article/287g-agreements-harm-public-safety/>.

⁵ ‘Enhancing National Security & Public Safety Through 287(g)’ (*America First Policy Institute*) <https://www.americafirstpolicy.com/issues/enhancing-national-security-public-safety-through-287g>.

⁶ Randy Capps, Marc R. Rosenblum, Cristina Rodríguez, and Muzaffar Chishti, *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement* (Washington, DC: Migration Policy Institute, 2011), <https://www.migrationpolicy.org/sites/default/files/publications/287g-divergence.pdf>.

⁷ *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104–208, div. C, 110 Stat. 3009–546 (1996).

⁸ *Immigration and Nationality Act* § 287(g), 8 U.S.C. § 1357(g)(1) (2025).

287(g) authorizes the Attorney General – whose authority over immigration control functions has been transferred from the Department of Justice to the Department of Homeland Security – to enter into formal agreements with state and local officials, enabling them to “act as immigration officers in connection with the investigation, apprehension, or detention of aliens in the United States (including the transport of such persons across state lines to detention centers)” at the expense of the state or community.⁹ Under the program, participating local officials may be appointed by ICE, authorizing them to perform the duties of federal immigration agents under the supervision and direction of the Attorney General.^{10 11}

This designation gives the right to officials to check the immigration status of individuals during routine law enforcement activities by accessing immigration databases to determine whether the person is legally present in the country. If an individual is found to be without lawful status and meets certain criteria, designated officers may arrest them on behalf of ICE.¹² In addition, in cases of immigration violations¹³, they may detain individuals until federal authorities take them into custody.^{14 15} By facilitating the direct involvement of local law enforcement, the 287(g) program integrates state and local agencies into the federal immigration system.

It is difficult to define what the goal of the program is. Should the primary goal of the 287(g) program be to identify and remove individuals previously identified by the federal government as enforcement priorities, or to deport as many undocumented immigrants as possible?¹⁶

Regarding the answers, the Migration Policy Institute study mentions two options: (1) targeted models or (2) universal models. *Targeted models* focus primarily, if not exclusively, on ICE's enforcement priorities and undocumented immigrants who already have removal orders. *Universal models*, on the other hand, take a comprehensive approach, seeking to identify and detain as many undocumented immigrants as possible, regardless of their criminal history.¹⁷

⁹ *Immigration and Nationality Act* § 287(g), 8 U.S.C. § 1357(g)(1) (2025).

¹⁰ *Immigration and Nationality Act* § 287(g), 8 U.S.C. § 1357(g)(8) (2025).

¹¹ *Immigration and Nationality Act* § 287(g), 8 U.S.C. § 1357(g)(3) (2025).

¹² Detention for up to 48 hours.

¹³ An immigration violation refers to any action by a foreign national that breaks the law or regulations established by the host country (in this case it is the USA) in order to regulate their entry, stay, or conduct within its borders.

¹⁴ *Immigration and Nationality Act* § 287(g), 8 U.S.C. § 1357(g)(8) (2025).

¹⁵ Randy Capps and others, *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement* (Migration Policy Institute 2011) 16 <https://www.migrationpolicy.org/sites/default/files/publications/287g-divergence.pdf>.

¹⁶ Specifically, those who pose a security threat, have a history of serious criminal offences, or have committed multiple immigration violations.

¹⁷ Randy Capps, Marc R. Rosenblum, Cristina Rodríguez, and Muzaffar Chishti, *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement* (Washington, DC: Migration Policy Institute, 2011), <https://www.migrationpolicy.org/sites/default/files/publications/287g-divergence.pdf>.

Both models have their positive effects: the targeted enforcement model seeks to ensure that ICE achieves security objectives by prioritizing enforcement resources, reducing threats to public safety and minimizing destabilizing effects on immigrant communities. Supporters of the universal enforcement model, which is used to identify as many undocumented immigrants as possible regardless of their criminal history, argue that deporting unauthorized immigrants reduces crime and increases the deterrent effect of law enforcement, potentially encouraging voluntary departure.¹⁸

3. History and evolution of the 287(g) program's objectives

3.1 2002-2005: Signing of the first agreements

The first agreement was signed with the state of Florida in 2002.¹⁹ Officers trained under the agreement were members of Regional Domestic Security Task Forces (RDSTFs). These task forces were established in Florida after the attacks of 11 September 2001 to focus on security concerns, particularly threats related to foreign nationals. In 2003, Alabama was the next state to enter into an agreement, as there were increasing instances of false documents being used to obtain driver's licenses.²⁰

In July 2005, a subcommittee of the House Homeland Security Committee held a hearing on the 287(g) program. During the hearing, Paul M. Kilcoyne, Deputy Assistant Director of ICE's Investigative Services, clarified that the program would continue to focus on organized crime groups and individuals who pose a border security risk, rather than minor offences such as broken headlights.²¹

At that time, Los Angeles County had recently implemented a 287(g) agreement, which allowed county jail officers to receive training in checking the immigration status of detainees after they had been convicted of a crime. Kilcoyne emphasized that participants in the program must maintain the approach outlined in the program's objectives in order to maximize the effectiveness of the available financial and managerial resources.²²

¹⁸ Randy Capps, Marc R. Rosenblum, Cristina Rodríguez, and Muzaffar Chishti, *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement* (Washington, DC: Migration Policy Institute, 2011), <https://www.migrationpolicy.org/sites/default/files/publications/287g-divergence.pdf>.

¹⁹ *The 287(g) Program: Ensuring the Integrity of America's Border Security System Through Federal-State Partnerships*, hearing before the Subcommittee on Management, Integration and Oversight of the Committee on Homeland Security, House of Representatives, 109th Cong., 1st sess., July 27, 2005, Serial No. 109-36, 9, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=f:28332.pdf.

²⁰ *The 287(g) Program*, 20.

²¹ *The 287(g) Program*, 62.

²² *The 287(g) Program*, 8.

3. 2 2006-2008: Emergence of a universal implementation model in the southeastern United States

By September 2006, the 287(g) program had increased the number of participating prisons. In some jurisdictions, the scope of the program began to extend beyond targeting dangerous criminals and security threats. This change was particularly noticeable in Mecklenburg County, North Carolina, where the 287(g) program was launched in 2006. This initiative targeted large numbers of undocumented immigrants on the assumption that they were more likely to commit crimes, and concerns were raised about the financial burden of their use of public services.²³ This expansion of jurisdiction resulted in a remarkably high number of cases, as the agreement allowed county officials to identify large numbers of civil immigration violators. According to Sheriff Jim Pendergraph, ICE was “overwhelmed by the number of deportations we generate in Mecklenburg County alone” and “had to reassign ICE agents to handle the number of cases we were seeing.”^{24 25}

Kenneth Smith, acting special agent in charge of the Atlanta ICE office, cited Mecklenburg County's participation in the 287(g) program as an example for the entire country. He firmly believed that the program not only helped identify criminal aliens, but also ensured that everyone who entered a jail participating in the program, was screened for civil immigration violations.²⁶ Smith added that the procedure “would not necessarily have a huge impact on the criminal justice system,” but “it would certainly have an impact on our detention and removal capabilities.”²⁷ The “Mecklenburg approach” significantly influenced the development of the 287(g) program in the southeastern United States. From 2007 to mid-2009, ICE signed 55 new agreements, all of which followed the Mecklenburg County framework.²⁸ Following the precedent set by Mecklenburg County, a clear *shift in the original focus* became apparent.

3. 3 A New Path: The Obama Administration's Unified Agreement

As the 287(g) program grew in size, numerous immigrant rights organizations and some law enforcement agencies expressed widespread concern, with some even calling for its termination. In January 2009, the U.S. Government Accountability Office (GAO) released a report evaluating existing 287(g)

²³ *Empowering Local Law Enforcement to Combat Illegal Immigration*, hearing before the Subcommittee on Criminal Justice, Drug Policy, and Human Resources of the Committee on Government Reform, House of Representatives, 109th Cong., August 25, 2006, Serial No. 109-243, <https://www.govinfo.gov/content/pkg/CHRG-109hhrg36029/pdf/CHRG-109hhrg36029.pdf>.

²⁴ *Empowering Local Law Enforcement*, 49.

²⁵ *Empowering Local Law Enforcement*, 70.

²⁶ *Empowering Local Law Enforcement*, 35.

²⁷ *Empowering Local Law Enforcement*, 35.

²⁸ Randy Capps and others, *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement* (Migration Policy Institute 2011) <https://www.migrationpolicy.org/sites/default/files/publications/287g-divergence.pdf>.

programs.²⁹ The GAO found that the program lacked basic control mechanisms, such as clear objectives, guidelines on the powers of local officials, oversight systems and data collection protocols, without which it was difficult for ICE to evaluate the program's effectiveness. In July 2009, signaling the Obama administration's intention to continue the program, Secretary of Homeland Security Janet Napolitano announced that ICE would sign 11 new agreements based on a standardized template.³⁰ The goal was to strengthen federal oversight and increase the focus on detaining and removing "dangerous" criminals. These processes led to negotiations with participating jurisdictions, which were required to sign the new agreement.

As the new template was created, every agency entering into a MOA was to take into account the following categories of offenders when it came to resources:

1. *Level 1 offenders*: Persons convicted or arrested for serious crimes, such as serious drug-related crimes and violent crimes such as murder, manslaughter, rape, robbery, and kidnapping.
2. *Level 2 offenders*: Persons convicted or arrested for less serious drug-related offences or primarily property offences, such as burglary, theft, fraud, and money laundering.
3. *Level 3 offenders*: Persons convicted or arrested for other crimes, including misdemeanors and civil offences.³¹

As mentioned before, the 2009 guidance for the 287(g)-program focused on the removal of offenders based on the seriousness of their crimes and required ICE supervisory approval for enforcement operations and arrests. It introduced new data collection standards and required annual reviews.³² Although the remodeling put a focus on *level one offenders*, it also allowed jurisdictions to continue to address less serious offenders and individuals who had committed immigration violations but no crimes. This change reflected the administration's broader approach to immigration control, which emphasized focusing on individuals who posed the greatest risk. Despite the attempts at remodeling and the modifications, persistent concerns regarding racial profiling and the potential erosion of community trust remained.

Although the 287(g)-program continued to operate based on a new template under the Obama administration, his government placed greater emphasis on

²⁹ US Government Accountability Office (GAO), *Immigration Enforcement: Better Controls Needed Over Program Authorizing State and Local Enforcement of Federal Immigration Laws* (Washington, DC: GAO, 2009), www.gao.gov/products/GAO-09-109.

³⁰ Department of Homeland Security, 'Secretary Announces New Agreement for State and Local Immigration Enforcement' (10 July 2009) <https://www.dhs.gov/archive/news/2009/07/10/secretary-announces-new-agreement-state-and-local-immigration-enforcement>.

³¹ Cristina Rodríguez, Muzaffar Chishti, Randy Capps, and Laura St. John, *A Program in Flux: New Priorities and Implementation Challenges for 287(g)* (Washington, DC: Migration Policy Institute, 2010), <https://www.migrationpolicy.org/sites/default/files/publications/287g-March2010.pdf>.

³² Rodríguez et al., *A Program in Flux*.

programs such as Deferred Action for Childhood Arrivals (DACA) and efforts to reform the immigration system.³³ This contrasted with the aggressive enforcement policies seen under previous administrations, although the 287(g) program continued to play a role in deportations, particularly for individuals with criminal convictions and without legal status.

3. 4 Measures taken by the first Trump administration

After his initial election, beginning in January 2017, President Donald Trump and his administration emphasized strict immigration control and sought to increase cooperation between federal immigration authorities and local law enforcement agencies. In his executive order on border security and immigration control, President Trump instructed the head of the Department of Homeland Security (DHS) to enter into more 287(g) agreements and to "structure each agreement to provide the most effective model for enforcing federal immigration laws and gaining operational control of the border in that jurisdiction."³⁴

Following the issuance of the presidential directives, then-DHS Secretary John Kelly issued a memorandum outlining the expansion of the 287(g) program.³⁵ He directed ICE to extend participation to any qualified law enforcement agency that applied and met the program requirements. In addition, the memorandum authorized Customs and Border Protection (CBP) to cooperate with states and take the necessary steps to enforce immigration laws under section 287(g) of the INA, which effectively allowed both CBP and ICE to enter into 287(g) agreements.³⁶

In contrast to the Obama administration's focus on *level 1 offenders*, the Trump administration took a broader approach, encouraging local authorities to assist in the identification and removal of undocumented immigrants, including those who had never been convicted of a crime or had only committed a minor offence. The strategy with Trump was to arrest and then detain, then deport as many people as possible. This led to an increase in the number of arrests and deportations under the 287(g) program. The Trump administration's aggressive use of the 287(g) program faced criticism and legal challenges, with many local governments and

³³ U.S. Citizenship and Immigration Services, "Deferred Action for Childhood Arrivals (DACA)," last modified 01/24/2025, <https://www.uscis.gov/DACA>.

³⁴ Exec. Order No. 13767, *Border Security and Immigration Enforcement Improvements*, 82 Fed. Reg. 8793 (Jan. 25, 2017).

³⁵ Department of Homeland Security, *Enforcement of Immigration Laws to Serve the National Interest* (Washington, DC: U.S. Department of Homeland Security, February 20, 2017), archived, <https://www.dhs.gov/archive/publication/enforcement-immigration-laws-serve-national-interest>.

³⁶ Department of Homeland Security, *Enforcement of Immigration Laws to Serve the National Interest* (Washington, DC: U.S. Department of Homeland Security, February 20, 2017), archived, <https://www.dhs.gov/archive/publication/enforcement-immigration-laws-serve-national-interest>.

sheriffs opposing the program or terminating their agreements with ICE.³⁷ Critics argued that the program contributed to the already existing criminalization of immigrant communities and undermined trust between local law enforcement and the public.

3. 5 Joe Biden's presidency

Taking office in January 2021, President Joe Biden introduced significant changes to immigration enforcement priorities, placing the emphasis on individuals who pose a threat to national security, public safety, or border security, rather than on widespread deportation efforts.³⁹ A key element of this change was the review of the 287(g) program, which had been significantly expanded under the Trump administration. During his campaign, Biden promised to terminate all 287(g) agreements signed under the previous administration, but this promise has largely remained unfulfilled. Although the Biden administration has not initiated any new 287(g) agreements, it has taken steps to roll back the program by terminating two existing agreements.⁴⁰ These steps reflect broader efforts to reform immigration enforcement, consistent with the administration's stated priorities of focusing resources on serious threats rather than indiscriminately targeting undocumented individuals.

Biden's approach to immigration policy has provided greater protections for immigrant communities, including preserving the rights of DACA recipients and promoting comprehensive immigration reform. The administration also increased oversight and transparency in immigration enforcement programs such as 287(g) to prevent them from being used to unfairly target vulnerable populations.

3. 6 President Trump's second term

After being elected for his second term, Donald Trump has sought to fulfill his campaign promises regarding immigration policy, aiming, among other things, to strengthen border control and increase the number of deportations. He promised that he would conduct the biggest deportation in US history by deporting 1 million illegal immigrants.⁴¹

³⁷ Ed Pilkington, "US Police Chiefs Warn Trump: Mass Deportations Will Make Cities Less Safe," *The Guardian* (1 March 2017) <https://www.theguardian.com/us-news/2017/mar/01/police-chiefs-letter-trump-deportation-immigrants>.

³⁸ Usaid Siddiqui, "Trump's Roadblock: The ACLU Filed 400 Cases Against Trump So Far," *Al Jazeera* (6 August 2020) <https://www.aljazeera.com/news/2020/8/6/trumps-roadblock-the-aclu-filed-400-cases-against-trump-so-far>.

³⁹ Department of Homeland Security, *Secretary Mayorkas Announces New Immigration Enforcement Priorities* (Washington, DC: U.S. Department of Homeland Security, September 30, 2021), archived, <https://www.dhs.gov/archive/news/2021/09/30/secretary-mayorkas-announces-new-immigration-enforcement-priorities>.

⁴⁰ National Immigration Project, *The Biden Administration's Track Record on Enforcement, Detention, and the Criminalization of Immigrants of Colour* (May 2023), https://nippnl.org/sites/default/files/2023-05/2023_May-Biden-Report-Card.pdf.

⁴¹ The White House. 2025. "America First in Action: Deportations Surge, Jobs Return, D.C. Gets Tough." August 13. <https://www.whitehouse.gov/articles/2025/08/america-first-in-action-deportations-surge-jobs-return-dc-gets-tough/>.

Upon his second inauguration on 20 January 2025, President Donald Trump signed several executive orders related to immigration, including one titled “Protecting the American People from Invasion” (PAPAI).⁴² This order outlines aggressive measures for internal immigration control, including the involvement of military forces and local law enforcement agencies. Prior to implementation, Trump’s transition team had already urged local law enforcement officials to support these expanded enforcement efforts. The PAPAI directs the Attorney General and the Secretary of Homeland Security to penalize “sanctuary cities” and jurisdictions that refuse to cooperate with federal immigration enforcement. The order follows an earlier 2017 presidential order by President Trump that sought to withhold federal funding from such jurisdictions, although parts of the order were blocked by the courts.⁴³

In addition, the PAPAI Presidential Order calls for the expansion of the 287(g) program, allowing DHS to increase partnerships with local law enforcement agencies to assist in the identification, detention, and removal of undocumented immigrants. The order also calls for the creation of Homeland Security Task Forces in every state to coordinate enforcement efforts at the federal, state, and local levels. These task forces are charged with combating transnational crime, human smuggling and organized criminal networks, while ensuring full enforcement of U.S. immigration laws.

PAPAI outlined an aggressive framework for immigration enforcement. In the executive order Donald Trump emphasizes the necessity of maximizing the use of state and local law enforcement agencies in enforcing federal immigration laws. With regard to reaching the required high number in deportations, it has become obvious that ICE alone cannot deliver on those numbers. Within the mentioned PAPAI executive order, President Trump reinstated the task force model version of the 287 (g) program by saying that the Secretary of Homeland Security should structure each agreement under Section 287(g) of the Immigration and Nationality Act “in the manner that provides the most effective model for enforcing Federal immigration laws in that jurisdiction.”⁴⁴ The TFM was disbanded back in 2012 for violations of civil rights.⁴⁵

Unlike ICE, the joining local agencies are not immune from liability. The return of the 287 (g) TFM has opened a critical legal window for civil lawsuits against lawbreaking sheriffs and municipalities, providing both remedy for individuals and a necessary check on potential overreach by the Trump administration.⁴⁶

⁴² The White House. *Protecting the American People Against Invasion*. Washington, DC: The White House, January 20, 2025. <https://www.whitehouse.gov/presidential-actions/2025/01/protecting-the-american-people-against-invasion/>.

⁴³ Exec Order No 13768, 82 Fed Reg 8799 (25 January 2017).

⁴⁴ Exec Order No 13768, 82 Fed Reg 8799 (25 January 2017).

⁴⁵ American Immigration Council, “The 287(g) Program: An Overview” (8 June 2023) <https://www.americanimmigrationcouncil.org/fact-sheet/287g-program-immigration/>.

⁴⁶ American Immigration Council, “The 287(g) Program: An Overview” (8 June 2023) <https://www.americanimmigrationcouncil.org/fact-sheet/287g-program-immigration/>.

The whole 287 (g) program was designed to create a force multiplier for ICE, and the best way to use this force multiplying effect is to use the TFM. As mentioned before, by signing the MOAs and entering these agreements, sheriffs, counties and municipalities may be held liable under 42 U.S. Code § 1983.⁴⁷ This federal statute makes it possible for individuals to sue state and local officials for constitutional violations.⁴⁸

Not only the mentioned federal statute and lawsuits could be a deterrent, but also the amounts paid in settlements and the pressure from the public. Municipalities across the USA take out insurance policies in order to indemnify themselves against liability for the acts of their law enforcement officers. These insurance policies come in handy when they save them from spending money on settlements in civil lawsuits. Insurers can also put pressure on local law enforcement agencies by increasing their rates or by reducing coverage in the case of high numbers of civil lawsuits, or if they identify patterns of risks.⁴⁹

Since taking office, the Trump administration has approved more than 424 new agreements under the 287(g) program, allowing state and local law enforcement agencies to cooperate with the federal government in enforcing immigration laws.

⁵⁰ In 2025, 593 agreements were for new taskforce-type 287(g) programs.⁵¹

4. Everyday policing and community relations in the shadow of 287(g)

4. 1 The political role of sheriffs

The 287(g) program is primarily based on cooperation between ICE and county sheriff's offices. While both city police departments and sheriff's offices were previously involved, most of the current 287(g) agreements are now exclusively with sheriffs. To understand the program, it is essential to examine the role of sheriffs in both jails and communities. In some regions, interactions with sheriffs and their deputies are primarily limited to local jails. In other areas, however, sheriffs' powers extend far beyond prison administration: they conduct traffic stops, investigate crimes, and patrol neighborhoods – often independently of other local law enforcement agencies.⁵² Unlike police chiefs, who are appointed and can be removed by local elected officials or, in some cases, civilian oversight

⁴⁷ 42 U.S.C. § 1983 (2025), <https://www.law.cornell.edu/uscode/text/42/1983>.

⁴⁸ A Fourth Amendment violation can occur by relying solely on an individual's race and ethnicity.

⁴⁹ Kari Hong, "The Return of 287(g): How Trump's Immigration Plan May Leave Sheriffs Liable," *Lawfare* (14 March 2017) [https://www.lawfaremedia.org/article/the-return-of-287\(g\)-how-trump-s-immigration-plan-may-leave-sheriffs-liable](https://www.lawfaremedia.org/article/the-return-of-287(g)-how-trump-s-immigration-plan-may-leave-sheriffs-liable).

⁵⁰ In contrast, between December 2020 and February 2025, no new agreements were signed under the program during the entire term of the Biden administration.

⁵¹ US Immigration and Customs Enforcement, "287(g) Participating Agencies" (*US Immigration and Customs Enforcement*, 23 January 2026) <https://www.ice.gov/doclib/about/offices/ero/287g/participatingAgencies01232026am.xlsx>.

⁵² James Tomberlin, "'Don't Elect Me': Sheriffs and the Need for Reform in County Law Enforcement," *Virginia Law Review* 104 (2018): 113, <https://ssrn.com/abstract=3135346>.

boards, sheriffs are elected officials. Because of their political status, they must organize campaigns, raise funds, and maintain a public profile, similarly to other politicians. In addition, because they are independently elected officials, many sheriffs also manage their own budgets, often with minimal oversight from local legislators.

Historically, particularly in the southern United States, sheriffs have played a central role in enforcing discriminatory laws, often using systemic, race-based violence to protect *white* property interests. Their actions led to widespread abuses that resulted in the loss of thousands of lives among Black, Latino, Native American, and other marginalized communities.⁵³ This legacy remains deeply ingrained in many regions, as sheriff's offices today often exhibit patterns of racially biased violence.

4. 2 The 287(g) program and racial discrimination

One of the most significant failures of the 287(g) program is the reinforcement of racial profiling, a practice that directly violates constitutional rights.⁵⁴ Sheriffs have often circumvented the prison enforcement limitations of current 287(g) agreements by using traffic stops, patrols, and criminal investigations to deport immigrants. To facilitate immigration control, the Frederick County (Maryland) Sheriff's Office implemented a policy requiring that all persons arrested be checked for immigration status at the county jail. As a result, deputy sheriffs often made arrests for minor offences, such as traffic violations, solely to initiate these checks, in the hope that the person could be deported at the end of the process.⁵⁵ According to a 2017 study, the 287(g) program in Frederick County led to a significant increase in arrests of people of Latin American descent and created a situation in which the Latin American community actively avoided contact with law enforcement agencies.⁵⁶ Research consistently shows that when local law enforcement agencies participate in immigration enforcement, it often involves targeting immigrants for minor offences and arresting them on dubious grounds. These actions lead to local detentions, which can then trigger deportation proceedings. According to a 2021 analysis by the *Washington Post*, sheriff's offices participating in the 287(g) program saw a significant increase in arrests

⁵³ Wenei Philimon, "Not Just George Floyd: Police Departments Have 400-Year History of Racism," *USA Today*, June 7, 2020, <https://eu.usatoday.com/story/news/nation/2020/06/07/black-lives-matters-police-departments-have-long-history-racism/3128167001/>.

⁵⁴ American Civil Liberties Union, *Statement Submitted to the U.S. House of Representatives, Committee on Homeland Security, 111th Cong., Examining 287(g): The Role of State and Local Enforcement in Immigration Law*, March 4, 2009, https://www.aclu.org/wp-content/uploads/document/asset_upload_file717_39062.pdf.

⁵⁵ *Medrano v. Jenkins*, 1:19-cv-02038-RDB (D. Md., July 11, 2019), https://www.aclu-md.org/sites/default/files/1_-_medrano_v_jenkins_compl.pdf.

⁵⁶ Michael Coon, "Local Immigration Enforcement and Arrests of the Hispanic Population," *Journal on Migration and Human Security* 5, no. 3 (August 8, 2018): 645–666, <https://doi.org/10.1177/233150241700500305>.

for low-level offences per officer after 2016.⁵⁷ These data suggest that officers were influenced either by explicit instructions or by an environment where they felt they did not have to account for their actions and therefore used the 287(g) program as a tool to arbitrarily arrest and remove those they considered to be “outsiders.”

Racial profiling flourished in places where the 287(g) program was expanded. In a widely condemned case in Davidson County, a pregnant woman driving without a license was handcuffed to her hospital bed while giving birth.⁵⁸ Data shows that a significant proportion of individuals arrested by officers authorized under the 287(g) program had only committed minor traffic violations, suggesting false arrests and racial profiling. For example, in Gaston County, North Carolina, 83% of those arrested under the program fell into this category.⁵⁹ Although reports of racial profiling and related civil rights violations have been received in several jurisdictions participating in the 287(g) program, the true extent of these abuses is likely to be much greater. Many victims and witnesses are reluctant to report incidents for fear of retaliation, particularly in households with mixed immigration status. Others see little hope for justice or distrust the legal system that has harmed them.⁶⁰ In addition, detained immigrants often lack access to legal representation, and some are deported before they have a chance to report these violations.

4.3 287(g): Fear and Consequences

In areas where the 287(g) program is in effect, many immigrants and their families live in constant fear of contact with local law enforcement, as even a minor encounter can lead to family separation or deportation. Research consistently shows that fear of discriminatory and anti-immigrant policing discourages undocumented individuals and their relatives from coming forward as witnesses, reporting crimes, or seeking protection.⁶¹

⁵⁷ Debbie Cenziper, Madison Muller, Monique Beals, Rebecca Holland, and Andrew Ba Tran, “Under Trump, ICE Aggressively Recruited Sheriffs as Partners to Question and Detain Undocumented Immigrants,” *Washington Post*, November 23, 2021, <https://www.washingtonpost.com/investigations/interactive/2021/trump-ice-sheriffs-immigrants-287g/>.

⁵⁸ Amanda Holpuch, “Migrant forced to give birth in shackles granted US visa,” *The Guardian* (27 October 2014) <https://www.theguardian.com/us-news/2014/oct/27/juana-villegas-migrant-shackles-granted-us-visa>.

⁵⁹ Deborah M. Weissman, Rebecca C. Headen, and Katherine Lewis Parker, *The Policies and Politics of Local Immigration Enforcement Laws: 287(g) Program in North Carolina* (University of North Carolina Immigration and Human Rights Policy Clinic & ACLU of North Carolina Legal Foundation, February 2009), <https://law.unc.edu/wp-content/uploads/2019/10/287gpolicyreview.pdf>.

⁶⁰ Naureen Shah, Brian Tashman and Kyle Berlin, “License to Abuse: How ICE’s 287(g) Program Empowers Racist Sheriffs and Civil Rights Violations” (American Civil Liberties Union 2022) 27 https://assets.aclu.org/live/uploads/publications/2022-06-02-sheriffresearch_1.pdf.

⁶¹ Reva Dhingra, Mitchell Kilborn, and Olivia Woldemikael, “When Local Police Cooperate With ICE, Latino Communities Under-report Crime. Here’s the Data,”

A study conducted in four metropolitan counties confirmed that members of Latino immigrant communities are often reluctant to report crimes, even when they themselves are the victims. This is due to concerns that law enforcement agencies may use the interaction to investigate their immigration status or that of their loved ones.⁶² The North Texas Human Rights Initiative, which assists U visa applicants, highlights this risk, noting that in 287(g) jurisdictions, there is no guarantee that law enforcement agencies will credit undocumented individuals for cooperating in an investigation.⁶³ In fact, police in these areas may even initiate deportation proceedings against victims or witnesses of crimes.

Tragically, numerous cases have confirmed these fears. In a 2020 case, a Latin American asylum seeker in Knox County, Tennessee, called 911 from her locked bedroom, where she was seeking refuge with her three children, to report that her partner was aggressive and possibly armed. However, instead of arresting her English-speaking, American citizen partner, the responding officers arrested the woman, resulting in her being held in ICE custody for more than two months.⁶⁴

Beyond its impact on public safety, fear and distrust of authorities among immigrants can have profound consequences for their communities. Studies on immigration policies have shown that many immigrants avoid using basic government services because they fear it may put them at risk. Evidence shows a direct link between fear of detention and reluctance to use health services. Many immigrants avoid seeking medical care because they fear encountering law enforcement agencies in hospitals or being stopped for traffic violations while travelling to receive treatment.⁶⁵

5. The role of civil society organizations in supporting immigrants affected by the 287(g) program

One of the most significant contributions non-governmental organizations (NGOs) make to addressing the consequences of the 287(g) program is providing legal assistance to detained individuals and their families. Organizations such as

Washington Post, February 5, 2021, <https://www.washingtonpost.com/politics/2021/02/05/when-local-police-cooperate-with-ice-latino-communities-under-report-crime-heres-data/>.

⁶² Naureen Shah, Brian Tashman and Kyle Berlin, "License to Abuse: How ICE's 287(g) Program Empowers Racist Sheriffs and Civil Rights Violations" (American Civil Liberties Union 2022) 8-16 <https://www.aclu.org/publications/license-abuse-how-ices-287g-program-empowers-racist-sheriffs>.

⁶³ Marcus Perkins and Christine Cooney Mansour, *The Misguided Expansion of § 287(g) Agreements Allowing Local Police to Perform Immigration Duties* (Human Rights Initiative of North Texas, May 1, 2019), <https://hrionline.org/wp-content/uploads/2022/06/MisguidedExpansion287gFINALFINAL.pdf>.

⁶⁴ *Oviedo-Granados v. Spangler*, 3:21-cv-412-TAV-JEM (E.D. Tenn., March 17, 2023), <https://casetext.com/case/oviedo-granados-v-spangler>.

⁶⁵ Omar Martinez, "Immigration Policy and Access to Health Services," *Journal of Immigrant and Minority Health* 16 (2014): 563–564, <https://link.springer.com/article/10.1007/s10903-013-9864-y>.

the National Immigration Law Centre (NILC) and the National Immigration Justice Centre (NIJC) provide free or low-cost legal representation to immigrants facing deportation as a result of contact with local law enforcement.^{66 67} These NGOs help immigrants understand their rights, navigate complex immigration procedures, and appeal unlawful detentions.

For example, the Southern Poverty Law Centre (SPLC) has filed class action lawsuits against local governments that have implemented the 287(g) program in an unconstitutional manner.⁶⁸ The American Civil Liberties Union (ACLU) has also successfully challenged several cases involving racial profiling and unlawful detention.⁶⁹ By providing legal resources, these NGOs help prevent unlawful deportations and hold law enforcement agencies accountable for civil rights violations.

Beyond legal representation, NGOs play a key role in promoting the abolition or reform of the 287(g) program. Several advocacy groups, including the Detention Justice Network (DWN) and Faith in Action, are actively lobbying federal and state legislators to limit the scope of 287(g) agreements. These organizations conduct research, publish reports on the harmful effects of the program, and work with legislators to promote immigrant-friendly policies.^{70 71}

For example, NILC and the ACLU have used policy campaigns to pressure local governments to opt out of 287(g) agreements.⁷² In addition, groups such as Families Belong Together organize protests, petitions, and social media campaigns to oppose harsh immigration enforcement tactics.⁷³

Civil society organizations play a key role in supporting affected communities by offering “Know Your Rights” workshops, financial assistance, and mental health support. The Texas-based Refugee and Immigrant Centre for Education and

⁶⁶ National Immigration Law Center, <https://www.nilc.org/>, National Immigration Law Center, “Our Rights, Our Work, Our Home” (*National Immigration Law Center*) <https://www.nilc.org/campaigns/our-rights-our-work-our-home/>.

⁶⁷ National Immigrant Justice Center, <https://immigrantjustice.org/>, National Immigrant Justice Center, “Immigration Legal Services and Know Your Rights for Immigrants and Asylum Seekers” (*National Immigrant Justice Center*) <https://immigrantjustice.org/for-immigrants/#rights>

⁶⁸ Southern Poverty Law Center, <https://www.splcenter.org/>, Southern Poverty Law Center, ‘Class Action Lawsuits’ (*Southern Poverty Law Center*) <https://www.splcenter.org/class-action-lawsuits/>.

⁶⁹ American Civil Liberties Union, <https://www.aclu.org/>, American Civil Liberties Union, “Court Cases: Racial Profiling” (*American Civil Liberties Union*) <https://www.aclu.org/court-cases?issue=racial-profiling>.

⁷⁰ Detention Watch Network, <https://www.detentionwatchnetwork.org/>.

⁷¹ Faith in Action, <https://faithinaction.org/>.

⁷² Naureen Shah, “How Expanded 287(g) Program Turns Local Police Into Deportation Agents” (*American Civil Liberties Union*, 10 September 2025) <https://www.aclu.org/news/immigrants-rights/how-expanded-287g-program-turns-local-police-into-deportation-agents>.

⁷³ National Domestic Workers Alliance, “Families Belong Together” (*National Domestic Workers Alliance*) <https://www.domesticworkers.org/programs-and-campaigns/developing-policy-solutions/families-belong-together/>.

Legal Services (RAICES) provides emergency assistance to families whose primary breadwinners have been detained under 287(g).⁷⁴

Faith-based organizations such as Faith in Action work directly with immigrant communities, offering sanctuary to individuals at risk of deportation and providing housing, food and emotional support to families affected by the 287(g) program.⁷⁵ Many NGOs collaborate with local community leaders to create support networks that help immigrants navigate the constant threat of deportation. Despite playing a key role, NGOs face numerous challenges in assisting individuals affected by the 287(g) program. Their work is complicated by limited funding, political resistance, and threats to organizations fighting for immigrant rights. The rise in the criminalization of immigration activism poses legal threats to some organizations and activists.⁷⁶ In addition, the constantly changing nature of immigration policy, particularly under different presidential administrations, makes it difficult to maintain long-term advocacy strategies.

Nevertheless, NGOs continue to adapt to coalitions, use technology for advocacy purposes, and seek alternative sources of funding to sustain their work.⁷⁷ Their resilience and commitment to social justice remain crucial in counteracting the negative effects of the 287(g) program.

6. Conclusion

The 287(g) program remains a controversial aspect of US immigration control, with significant implications for law enforcement practices, immigrant rights, and community trust. Although the program was intended to identify individuals posing a security threat, experience shows that it has primarily led to detentions and deportations for minor offences, often through racial profiling and sham arrests. It has also created a climate of fear, discouraging immigrants from contacting law enforcement agencies, seeking medical care, or reporting crimes – which directly jeopardizes public safety.

The expansion of the program under various administrations reflects broader political debates about US immigration policy and the role of local law enforcement agencies in federal immigration control. While the first Trump administration aggressively increased the number of 287(g) agreements, raising

⁷⁴ Refugee and Immigrant Center for Education and Legal Services (RAICES), “Legal Services” (RAICES) <https://raicestexas.org/legal>.

⁷⁵ Faith in Action, “Our Work” (Faith in Action) <https://faithinaction.org/our-work/>.

⁷⁶ *United States v Warren*, 446 F Supp 3d 574 (D Ariz 2020).

⁷⁷ United We Dream, “Defund Hate- A Vision for a Just Future: Defund Hate Coalition Releases Transformative Budget on Immigration Amidst FY23 Budget Negotiations in Congress” (United We Dream, 4 May 2022) <https://unitedwedream.org/press/defund-hate-a-vision-for-a-just-future-defund-hate-coalition-releases-transformative-budget-on-immigration-amidst-fy23-budget-negotiations-in-congress/>, National Network for Immigrant and Refugee Rights, “For Students and Youth” (National Network for Immigrant and Refugee Rights) <https://nnirr.org/education-resources/community-resources-legal-assistance-recursos-comunitarios-asistencia-legal/for-students-and-youth/>.

concerns about civil rights violations, the Biden administration sought to modify enforcement priorities. However, recent actions by the second Trump administration show that the 287 (g) program is getting out of control more than ever. News hit the media every day of police brutality towards immigrant communities, ending with death.

These abuses require policymakers to rethink its implementation and oversight. Important steps toward a fair and effective system include strengthening accountability, reducing racial disparities in enforcement, and prioritizing community trust over aggressive persecution of immigrants. A good first step would be to remove individuals (without criminal records) with pending immigration cases from the program's target list. This could be achieved by updating officer protocols to require verification of pending application prior to enforcement action. Ultimately, addressing the root causes of unauthorized migration and promoting inclusive policies will do more to improve public safety than programs that disproportionately target the most vulnerable communities.

Regulatory Environment for the Honey Trade

VARGA, CSABA KOPPÁNY*

ABSTRACT *This article reviews Hungary's beekeeping sector and its place in the EU honey market. Hungary is historically export-oriented, with most honey sold abroad in bulk, which depresses prices and obscures product quality. EU demand outstrips internal supply, leading to heavy reliance on imports and intense price competition. Adulteration, immature and low-quality imports—especially from China—and weak origin labelling undermine consumer trust and food safety. Market structures concentrate value away from primary producers, limiting branding, direct sales, and fair remuneration for beekeepers. The sector thus faces declining profitability and risk to colony numbers and rural livelihoods. Recommended responses include strict enforcement of EU honey definitions, clearer origin disclosure for blended honeys, unified standards and improved testing capacity, and a transparent market-monitoring system. Strengthening beekeepers' market position through collective marketing, local processing and risk-sharing schemes is essential. In conclusion, the author argues that coordinated regulatory and market reforms are needed to restore price fairness, protect product integrity, and ensure the long-term viability of Hungarian and EU beekeeping.*

KEYWORDS *agricultural law, honey trade, beekeeping, regulations, regulatory environment, food fraud, consumer protection, EU food law.*

1. Introduction

The *European Council Regulation*,¹ taking into account the importance and specificities of the beekeeping sector, contains measures and subsidies for the development of the beekeeping sector. In order to obtain subsidies, the *Hungarian National Beekeeping Programme*² has been developed in our country, which aims to improve the conditions for honey production and sales. The Programme includes a report on the domestic beekeeping sector. The following data are from the report of the Hungarian National Beekeeping Programme and its annex:

The beekeeping sector currently provides an additional or main source of income for the livelihood of about 15,000 families, thus indirectly contributing to the

* PhD student, University of Pécs, Faculty of Law, Doctoral School of Law.

¹ European Council Regulation (EC) No 797/2004.

² Annex to FVM. Decree 152/2004./X. 18.

population retention capacity of the countryside. The average bee colony density in Hungary is 9.0 bee colonies/km². The average number of apiaries over many years has been: 15-17,000, of which the number of professional apiaries – with a minimum of 150 bee colonies – is: 900-1000.

Hungary is historically one of the largest honey-producing countries. A significant part, about 80% of the honey produced, ends up in foreign markets, in recent decades almost entirely to Western European countries. The main export products are acacia honey and mixed flower honey, the proportion of which varies depending on the vintage. Hungarian trading companies export smaller quantities of other varieties and honeycomb honey, beeswax and propolis. It is typically an export-oriented sector. 95% of the acacia honey exported is delivered in barrels - in bulk.³ Bulk sales allow for the delivery of large volumes, but due to its nature, it does not ensure the emphatic appearance of Hungarian honey of special quality. Its prices are also below what would be expected based on quality. Based on this, Hungarian beekeepers only produce and do not trade with honey.⁴ Since 2005, Hungary has exported the most honey to Italy every year, with only 40% of all our exports going to Italy.⁵ This represents approximately 2/3 of Italian imports. Italy is followed by Germany, France and Austria.⁶ These four countries buy up almost 80% of all Hungarian honey exports.

They are followed by Japan in 5th place (about 900 tonnes per year), followed by other EU Member States. In order: Spain, Romania, Belgium, Denmark and Poland. Here it should be pointed out that the European countries written after Japan buy Hungarian honey mostly for re-export purposes, so after they have bought it, they also sell it. Consumption statistical surveys of different households confirm that the annual volume of domestic honey consumption is around 4000 tons. Based on this, the annual consumption per capita can be estimated at 0.4 kg. About 90% of domestic honey consumption is household consumption. The rest is used by industry - bakeries, canneries, pharmaceutical factories and cosmetics laboratories. The basic condition is bottling at a place specified in the Food Act, as well as the existence of a product sheet.⁷ In order to carry out the export, it is important to have the documents accompanying the goods (delivery note). It is important to know that sales revenue earned abroad must be declared at home, so the primary producer⁸ does not need to apply for a European tax number.⁹

³ Unpackaged, bulk goods (*lédig* in Hungarian).

⁴ Péter Fehér, "Mi a méz, és hogyan adjuk el?," *Méhészet*, 2020. 07., 17.

⁵ Jenő Szabó, "Magyar méz a német piacon," *Méhészet*, 2020. 04., 18.

⁶ Péter Bross, "Mézexport 2019," *Méhészet*, 2020. 07., 4.

⁷ A record kept by the food manufacturer regarding the food safety and quality characteristics of the processed food.

⁸ A primary agricultural producer is a natural person over the age of 16, registered in the primary agricultural producer register, who carries out primary agricultural production activities on his own farm.

⁹ A taxable person who establishes a commercial relationship with a taxable person established in another EU member state must have a Community tax number. The material contains a list of those who are required to request a tax number, as well as information on applying for a Community tax number and checking its validity.

Another case is if the goods are delivered to retail units by an individual or a partnership entrepreneur. In this case, the supplier must, in addition to the above, produce the parameters regarding the quality of the goods, the existence of which he previously undertook in the contract. In this case, it is also necessary to obtain an EU tax number.

2. The situation of beekeeping and the honey trade

Within the framework of the presentation of honey sales, I will first deal with the situation of the honey trade, with special emphasis on the problem of Chinese honey. This is followed by an overview of the regulations on the purchase and sale of honey, and finally, the study concludes with a description of the rules of retail sales.

The world's honey production is about 1.5 to 1.8 million tons per year.¹⁰ More than half of the honey produced is produced by six countries or groups of countries: China, the United States, Argentina, the European Union, the Commonwealth of Independent States and Mexico. Hungary has a 1% share of the world's honey production. The European Union is the world's second largest producer of honey after China, yet its degree of self-sufficiency is low, approximately 50%, making it the largest importer of honey.¹¹ About 650 thousand people are engaged in beekeeping, which means the management of 18 million bee colonies. Beekeeping is an environmentally friendly agricultural activity that can be carried out in harmony with the natural environment and ecosystem. Thanks to the pollination activity of bees, beekeeping is also essential for agricultural horticulture and biodiversity in Europe. However, *in this critical honey market situation, the vulnerability of our "bee-dependent" Earth is clearly visible.*¹²

85% of honey produced in the European Union is consumed by households, the remaining 15% is used industrially.¹³ More than 50% of the honey produced is sold directly to consumers or retailers by producers. In the Member States of the European Union, there are established traditions and cultures of honey consumption, so it can be generally stated that consumers prefer the much more expensive domestic honey to the cheap imported honey. At the same time, the situation is contradictory, since the Union has been able to satisfy its internal needs for many years only with high imports, with an annual volume of 130-150 thousand tons. In the European Union, which is the world's most significant consumer, trade between Member States is very significant.¹⁴ If we look back to the period between 1994 and 1999, we can see that competition has intensified between the three main suppliers of honey to the EU - China, Argentina and

¹⁰ <https://www.ksh.hu/docs/hun/xftp/idoszaki/regiok/meheszet.pdf>

¹¹ Krisztián Pályi, "Az EU mézpiacának helyzetjelentése," *Méhészet*, 2020. 06. 26.

¹² Phillips, Ron (transl. Péter, Bross): „International Honey Trade [Nemzetközi mézkereskedelem].” *Méhészet*, 2016. 04. 10.

¹³ <https://agraragazat.hu/hir/mezhamisitas-vedelem-mezogazdasag/>.

¹⁴ Krisztián Pályi, "A mézpiacról feketén-fehéren," *Méhészet*, 2021. 03. 19.

Mexico. Smaller EU suppliers such as Hungary, Romania and Bulgaria also faced fierce competition for markets. Romania's market share in Germany increased from 1.2% in 1994 to 5.8% in 1999, while Hungary's fell from 4.8% to 2.7% during the same period. The involvement of foreign capital-rich companies played a major role in the dynamic growth of Romanian honey exports. In the European Union, on average, the production of one kilogram of honey costs around 3.5-4 euros, but it should be noted that this price is constantly changing to a greater or lesser extent. However, in some countries the costs are much higher, in Belgium for example. it can reach up to 10 euros / kg. After a little investigation, it turns out that in many EU member states the purchase price is lower than the production price level, and in some it is almost the same, in Hungarian terms there is no profit in producing honey. This includes e.g. Slovakia or Spain too. Looking at the sales chain, after the beekeeper extracts the honey, the product changes hands at least two or three times before it reaches the final consumer. That is why it would be beneficial – in addition to the already noticeable growth – to further spread direct sales. However, it should not be forgotten that the majority of consumers purchase food in supermarkets, which offer them many advantages: competitive prices, a large selection and everything can be found and available in one place. It is also important to keep in mind the fact that honey is not a basic food, so an important task for a beekeeper is to create a private brand that indicates that their product is different from what can be purchased from the shelves of supermarkets.¹⁵ Our country cannot compete in quantity with large honey exporters, therefore domestic producers must appear on the EU honey market with branded products of impeccable quality. Cooperatives dealing with the purchase, packaging and marketing of honey already operate in EU member states. This is also important because it is not possible to raise the price of an average quality product. Currently, domestic honey processors and traders are mostly interested in the packaging and export of barreled honey. The ever-low purchase price is not favourable for producers, and traders pass on price decreases to producers. The slow but steady decline in honey production has not resulted in price increases, and in fact, based on the trends of recent years, prices have continued to fall in most Member States. A significant proportion of European producers are unable to cover their costs from honey sales. Given the ongoing processes, it can be concluded that the current number of 18 million bee colonies in the European Union will decrease to 10 million or even less in the near future.¹⁶ Imported products from outside the Union can be considered an important factor, as they have a compensating effect on both the EU product shortage and the price. Immediate and effective reforms are needed to remedy the worrying situation of the EU honey market. All parts of the market must operate in an integrated manner. It is not possible to achieve stability without understanding the reasons for the continuous price decline. The operation of indirect imports, honey adulteration, honey contamination, unfair procedures used during production, disguising the origin of honey and the

¹⁵ Tibor Csincsa, “Mit ér a méz, ha helyi,?” *Méhészet*, 2015. 11. 8.

¹⁶ <https://magyarmezgazdasag.hu/2020/07/22/az-eu-mezpiacanak-helyzetertekelese>.

irresponsible intention to distort the market are the phenomena that need to be considered in this case.¹⁷ It would be necessary to develop short, medium and long-term action plans. As a first and most important step, it is necessary to ensure that honey imported from third countries complies with the definition of EU honey - here I am primarily thinking of the already mentioned Chinese honeys. In the case of honeys originating from several countries, a detailed indication of origin would also be a particularly important step. The origin and proportion of all ingredients making up a given mixed honey should be indicated on the packaging, a practice that could increase the value of the European product and would also facilitate the smooth functioning of the internal market. In the case of other beekeeping products beyond honey – beeswax, pollen, royal jelly – a uniform, EU-level product description and standard system should be introduced, which could result in better pricing and quality assurance. I also consider it essential to set up a monitoring system that would truly ensure market transparency, instead of one that does not adequately serve the current situation. As a medium-term goal, it would be necessary to determine that EU member states receive support for the application of the most modern testing procedures in order to prove any possible cases of counterfeiting. In order to achieve higher sales revenues for beekeepers, it is of paramount importance that their role within the market is strengthened. Market practices that limit beekeepers' chances of direct access to the market must be eliminated. In the long term, in order to stabilize beekeepers' incomes, a risk-bearing plan and solution proposals must be developed through beekeeping organizations. I consider it *inevitable to support projects through which the beekeeping community can act together on the market to protect the price and quality of the products they produce*, as it is clear that their current representation of interests is not working satisfactorily.

2. 1 The problem of Chinese honey

In the early 2000s, China, which alone produces about 25% of the world's honey production, increased its EU exports from "nothing" to 80 thousand tons.¹⁸ This has now decreased to about 45 thousand thanks to Brexit, considering that Great Britain alone imports 35 thousand tons annually. This is obviously related to the fact that the British are dismissive of modern honey testing procedures – in return, they buy Chinese honey for about one dollar per kilo on average. There are several reasons for the growth of East Asian markets, starting with the sale of immature honey. Chinese beekeepers are constantly traveling with their bee colonies. Their trucks can hold 100-200 hives, which are also different from the types known to us. There is little space for honey in them, and there are hardly any honey chambers in them. For this reason, they have to be constantly turned, and the frames containing fresh nectar are collected in a cart. Their water content is over 30%, which is well above the 20% moisture content permitted in the EU. The high moisture content is later extracted in vacuum chambers in factories.

¹⁷ Phillips, Ron (transl. Hevesi, Mihály). „International Honey Market [Nemzetközi mézpiac]”. *Méhészet*, 2016. 07. 22.

¹⁸ <https://magyarmezogazdasag.hu/taxonomy/term/87?page=8>.

Enzymes produced in the bee's pharyngeal gland are added to the nectar by the bee to produce simple sugars. If the honey is not allowed to ripen completely by the bee, its beneficial elements for health are filtered out and the honey is reduced to a mere sweet additive.¹⁹ This in itself is a cause for serious concern. There are some Chinese beekeepers who insist on producing ripe honey, but the price of these products is much higher, so they do not reach Europe. It is therefore safe to say that all exported honey from China to the EU is immature (due to its price), and therefore does not comply with the EU honey directive. It is no coincidence that the Chinese are striving to have the ISO regulation allow the acceptance of immature honey as a kind of second quality. Another interesting fact is that China's honey consumption exceeds not only its domestic honey production, but also the amount increased by imports. In some regions, 100% of the honey available on store shelves contains added sugar, but even in the most favorable areas, the result is around 50%.²⁰

2. 2 Honey adulteration practices

In all cases, *the essential condition for adulteration is a cheaper, more easily accessible substitute product than the original product*. In the case of honey, this was sugar. In the early 19th century, its production began in sugar refineries in Hungary, and in the following years, sugar factories operating using the industrial method were founded one after another.²¹ This change also affected honey, which was the only sweetener available until then. Several erroneous state measures brought honey production to a low point. Partly due to the invention of mobile hives, partly due to the appearance of beekeeping associations, the beekeeping industry received new impetus. However, the cheap sugar and expensive honey produced in large quantities led to the appearance of adulteration. Due to the pressure exerted on the government by beekeepers, a law was soon passed prohibiting the adulteration of agricultural crops, products and articles.²² However, the legislation was not sufficient for its creation to bring the expected results. The reason for this was that the personal and technical background for continuous inspections was not available, and any detected violations of the law were only considered a violation, regardless of the extent of the actual damage caused. Contemporaries also recognized that results could only be achieved with the cooperation of the authorities, producers, distributors and consumers. The sale of honey became increasingly a matter of trust, due to the poor quality counterfeits entering the market. The interests of domestic consumers were protected by honey purchased directly from the producer, while the quality of export honey was guaranteed by the fact that the batches distributed through the Executive Representation of the National Hungarian Beekeeping Association were tested without exception and could be exported abroad with a certificate of

¹⁹ Gretchen D. Jones, and Vaughn M. Bryant, "Pollen Studies of East Texas Honey." *Palynology* 38, no. 2 (2014): 242–58.

²⁰ Phillips, Ron (transl. Péter, Bross): „International Honey Trade 2. [Nemzetközi mézkereskedelem 2.].” *Méhészet*, 2016. 05. 18.

²¹ László Szabó, "A mézhamisítás múltja," *Méhészet*, 2019. 22–23.

²² Act XLVI of 1895.

analysis. Based on the lessons learned in recent years, the demand for natural honey has increased worldwide, while at the same time the amount of honey produced has decreased.²³ Despite this, the honey supply is operating smoothly, so it can be concluded that the trade in fake honey is unfortunately becoming more and more widespread. In the event that bees cannot produce enough honey to meet the needs of the market, the selling price of honey should increase based on the principle of supply and demand. In the absence of this, however, it can be stated with certainty that the market has been flooded with products that are called and marketed as honey, but in fact are not, are not products produced by bees. Today, official bodies, institutions,²⁴ and various professional organizations²⁵ have begun to take action to curb honey adulteration. Natural honey²⁶ is a product consisting of constantly changing components, which is the result of the joint interaction of the flora and fauna. This is in complete contradiction to the current honey trade trend, of homogeneous honey with uniform parameters. The latter is manufactured, while the former is produced. Honey adulteration is a deliberate crime committed by perpetrators in order to gain an unfair market advantage by producing and then marketing beekeeping products that do not meet the globally accepted standards and quality criteria for honey.²⁷ One of the most important objectives of food law – as stated in Regulation 178/2002/EC – is to protect the interests of consumers, to provide adequate information to consumers, to prevent food adulteration and fraudulent or deceptive practices.²⁸ The authenticity of honey can be examined from two aspects. One is to assess whether the given honey is truly the result of the transformation of sweet juices collected by bees from flowers and plants. On the other hand, it is also considered adulteration if the geographical or botanical origin of the honey is not the same as that indicated. There are more than a hundred plants throughout Europe from which bees make varietal honey.²⁹ The geographical origin cannot be neglected either, as the soil, climate, and surrounding vegetation at the collection site are also factors influencing the composition and appearance of honey. The simplest way to adulterate honey is to use an artificial enzyme to imitate the process that takes place in the bee's stomach, i.e. the breakdown of sucrose into

²³ Péter Bross, “Csalás és bűncselekmény,” *Méhészet*, 2021. 22–23.

²⁴ Like Apimondia, which is the international association of beekeeping organizations.

²⁵ Example: The American Honey Producers Association filed a lawsuit against local honey importing companies that purchased honey from abroad at prices below the average import price, presumably to aid each other's commercial activities.

²⁶ A natural sweet substance collected by bees from plant nectar or living plant sap, or from the secretions of living plant parts by insects that suck plant sap, which is collected by the bees, transformed by adding their own substances, stored, dehydrated and matured in honeycombs.

²⁷ Aliz Feketéné Ferenczi, István Szűcs, and Viktória Vida, “A hazai méhészeti ágazat helyzetének elemzése (termelés, kereskedelem),” *Táplálkozásmarketing* 8, no. 2 (2021): 22.

²⁸ Regulation (EC) No. 178/2002, Article 8.

²⁹ Zsanett Bodor, “Újszerű módszerek mézek eredetének és hamisításának kimutatására,” *Méhészet*, 2020. 28–30.

glucose and fructose. This requires ascorbic acid or citric acid, which starts the breakdown of sugar by heating the syrup. There are two known forms of adulteration of honey with sugar syrup, direct and indirect adulteration. In the direct method, for example, corn, beet sugar or cane sugar is mixed with honey, while in the indirect method, sugar is given to the bees as food during the collection period. Mannose is one of the substances that confirms the adulteration of honey with sugar syrup.³⁰ It is very similar in structure to glucose. It is mostly produced by hydrolysis of complex plant sugars, but it can also be produced by converting fructose and glucose. This process takes place under alkaline conditions, and since honey is naturally acidic, this process cannot occur naturally in it. If the presence of mannose is proven in honey, the product can be considered adulterated.³¹ However, there is one exception, namely sweet dew honey, which, due to its specific properties, also contains a detectable amount of mannose in its natural form. Another form of adulteration is the resin filtration of honey. In this case, the honey is filtered in order to get rid of unwanted substances. However, the related labeling rules stipulate that since the pollen content may decrease during such filtration, the filtration must also be labeled. The absence of this labeling also constitutes adulteration. This method originates from China.³² It is important to note that this technology was not developed for the purpose of adulteration, but to purify honey coming from polluted environments. In China, resin-filtered honey is not considered a counterfeit product, but they do not take into account that in the process the honey is transformed, loses coloring substances and other ingredients, which significantly reduces the original taste and medicinal value of the final product. Another popular procedure for honey counterfeiters is to mix filtered honey with authentic honey, which is not allowed if the label refers to botanical or geographical origin. A further technology is the addition of pollen or enzymes to filtered honey, or overheating the honey, to prevent crystallization.³³ Products that have been changed in the above ways or mixed with these substances cannot be called “honey” under any circumstances, since international standards such as the Codex Standard and the Council Directive on honey only allow the mixing of pure honeys.³⁴

In one of the court judgments³⁵ examined on this subject, the Court concluded that the documentary evidence was not sufficient to prove beyond any doubt that the honey purchased by the plaintiff was identical to the product purchased from the defendant. According to the facts, the honey was delivered only four days after the purchase, in unmarked barrels. In these circumstances, there was a

³⁰ Mannose is a hexose monosaccharide sugar molecule. Its name comes from the biblical word manna(en): Latin manna, Greek manna.

³¹ QSI laboratory announcement, translated by Krisztián Pályi, “Mannóz – a mézhamisítás jele?,” *Méhészet*, 2016. 11. 17.

³² László Csujá, “A megoldás kézenfekvő, mégis kérdőjeles,” *Méhészet*, 2017. 18.

³³ According to the Hungarian Food Codex’s [Magyar Élelmiszerkönyv] guidelines for honeys with special markings, the core temperature of honeys during processing must not exceed 40 degrees Celsius.

³⁴ Directive 2001/110/EC.

³⁵ I.Pf.20.395/2010/5.

suspicion that the honey might have been substituted, in particular on the basis of the results of the analysis of the sugar content of the product. The presence of added sugar indicates that the honey was adulterated, which is a serious aggravating circumstance in legal terms.

A similar situation was observed in several other cases examined during my research,³⁶ which indicates that disputes regarding the authenticity and purity of honey are a recurring problem in the honey industry. This issue is of particular importance both from the point of view of consumer protection and ensuring the purity of market competition.

In another judgment issued in connection with the adulteration of honey³⁷ – which was issued on the subject of infringement of personality rights – the Court examined whether the second-tier defendant, as a publisher, committed an infringement when it published an announcement in a professional journal. The article reported that samples of various honey products were collected in Budapest and then transported to Bremen for laboratory testing. The results were documented in an English-language report and published in foreign professional journals. The reports contained the term “adulterated”, the Hungarian equivalent of which is “hamsított.” According to the plaintiff, the defendant’s statement was unlawful in two respects: firstly, because the honey tested was not “adulterated” in the sense that no fundamental material change had taken place, only foreign sugar content had been added to the product; secondly, because the method of the laboratory test³⁸ was – in its opinion – not certified, so its result could not be considered well-founded. At the same time, the Court found that the plaintiff’s personal rights had not been violated. In its decision, the Court took into account the expert opinion obtained, according to which, although the test method in question is not among the methods officially accepted in Hungarian legislation, its results are accepted by the professional community and can be considered reliable. Furthermore, based on the expert opinion, it also recorded that the presence of foreign substances added to the honey – in particular sugar – justifies the use of the term “adulterated”, which is generally accepted in professional practice. In its judgment, the Court emphasized the importance of the constitutional freedom of expression, according to which the expression of an opinion does not in itself constitute a violation of the law, even if not everyone agrees with its content.³⁹ The assessment of the contested communications must be carried out not from a formal point of view, but from a substantive point of view, i.e. the truthfulness of the communication and the intention to provide information in the public interest are the guiding principles.⁴⁰

Overall, both cases illustrate that of honey adulteration poses significant challenges in several respects. The lessons learned from these cases are that when

³⁶ A similar ruling was made in court decisions no. 4.P.20.428/2009/8 and no. 1.Pf.20.395/2010/5.

³⁷ 33.P.20.625/2008/7. BH

³⁸ LC-IRMS method, which is not included in the Hungarian Food Codex, Volume 3.

³⁹ LB BH 1993. 89. decisions.

⁴⁰ LB Pk. 12.

testing the authenticity and purity of honey, it is of paramount importance to use professional and recognized testing methods and to ensure that legal qualifications are made in accordance with professional customs and community expectations.

In 2018, the European Commission defined four basic elements that must be present in the case of adulteration: intent, violation of the law, - in the case of honey, violation of the provisions of the Codex Alimentarius - economic advantage, and consumer dissatisfaction. Instrumental analytical methods have also proven to be effective in identifying the origin and detecting adulteration techniques.⁴¹ However, these require significant time-, money- and labor-intensive tests, as well as serious sample preparation.⁴² Another problem is that none of the methods can detect honey adulteration with complete certainty, which is due to the diverse composition of honey. Due to oversupply due to adulteration, the price of pure, natural honey is decreasing. As a consequence, we can also expect the demand for traditional countries to produce and export pure honey, which has recently shown a significant decline in export volumes, and also the impact of this phenomenon is the emergence of new honey-producing countries that are re-exporting cheap imported honey directly or in a mixture, presented as a locally produced product. Adulteration threatens the image and attractiveness of honey as a naturally produced product among consumers, and also harms the interests of honest beekeepers. It also harms consumers, who often do not receive the product they intended to buy. *In conclusion, it can be stated that honey adulteration poses a direct threat to food safety.*

3. Regulations for the purchase and sale of honey

When purchasing honey, the beekeeper must obtain a veterinary certificate,⁴³ which - unless otherwise provided by law - is issued in four copies by the official veterinarian competent for the place where the honey is stored.⁴⁴ In the event that the place where the bees are kept and the place where the honey is stored are not the same, and therefore the examination of the bee colonies is not possible, the assistance of the official veterinarian competent for the place where the bees are kept must be requested. The owner of the honey keeps the original copy of the certificate, two copies must be given to the purchaser, and one remains with the official veterinarian. The purchaser must collect the certificates, register them, keep them at the place of purchase for three years and present them to the official veterinarian during an inspection. Only natural persons, legal persons or business associations with legal personality registered by the station are entitled to purchase honey. Purchase and storage may only take place at a location

⁴¹ These include high-performance liquid chromatography, measurements based on nuclear magnetic resonance, or mass spectrometric determination of the ratio of stable isotopes.

⁴² László Békési, Bohus, Magda, [Mézhamisítás mesterfokon,” *Méhészet*, 2017. 30.

⁴³ In accordance with Annex 5.

⁴⁴ Endre Buczkó, “Méhcsaládok adásvétele,” *Méhészet*, 2016. 04., 28.

authorized by the station, where the honey purchaser is required to display the permit in a clearly visible place. The purchaser must keep a record of the purchased honey, which includes the name and address of the beekeeper, the date of purchase, the type and quantity of the purchased honey, and the number of the veterinary certificate. If the honey is not processed at the purchaser's premises, the purchaser must attach a copy of the veterinary certificate to the shipment, and the record must state when and to which honey factory the honey was transported.⁴⁵

3. 1 Rules for the retail sale of honey

The primary agricultural producer may sell honey and other beekeeping products produced exclusively on his own farm in compliance with the specific legislation in force on the production and distribution of food.⁴⁶ The Food Act⁴⁷ introduced the following changes for primary producers selling beekeeping products directly to consumers: the obligation to obtain a permit before starting the operation of a food production site has been abolished, and from the entry into force of the Act, a product sheet must be prepared, which must include the following: the name of the producer, its location, the composition of the material per unit of the food produced, a brief description of the production, and the compositional characteristics of the food. In addition, a notification obligation has been introduced for the start and termination of the food producer's operation. This is done at the territorially competent veterinary station. The notification must include the name and address of the food producer, the place of production of the food, the scope of the food producer's activities and the requirements related to the food produced.

3. 2 The issue of distinguishing between breach of the contract of assignment and defective performance of the contract of sale in the honey trade

According to the facts of the case, the parties concluded a sales contract for the purchase of mixed flower honey, which was performed in two installments by the agent acting on the buyer's side, upon receipt of the honey.⁴⁸ The plaintiff brought an action against the first-degree defendant on the grounds of defective performance of the contract, and against the second-degree defendant, as an agent, for breach of the contract of assignment. According to the facts established by the court, the honey was transported in unmarked barrels, mixed with products from other producers, and was delayed, and no sampling was carried out during the performance of the contract. According to the plaintiff, these circumstances establish the fact of defective performance and the breach of obligations arising from the assignment. Based on the legal and food safety regulations regarding the storage of honey – as a food product – the storage containers must be clean, disinfected and suitable for food storage. The purchaser, processor and seller of honey must ensure that bees cannot enter empty and full containers. Producers

⁴⁵ FVM Decree 70/2003. (VI. 27.) 14. § (3).

⁴⁶ Government Decree 35/2005.

⁴⁷ Act LXXXII of 2003.

⁴⁸ 2.Pf.21.891/2005/3.

are subject to the same obligation regarding their own products. Furthermore, the purchaser must clean the containers after each emptying and, if necessary, disinfect them, and only clean containers may be issued to producers. However, in the circumstances of the case, the court concluded that the fact of defective performance could not be proven. The identity of the delivered and the originally purchased honey could not be established beyond doubt due to the circumstances of the transport, in particular, the mixing and the lack of sampling. Consequently, the claims brought on the grounds of defective performance or breach of the contract of assignment could not stand. The legal dispute clearly illustrates that strict adherence to storage, transport and receipt protocols during the trade of food products – especially high-value honey – is not only a food safety requirement, but also a civil law requirement. The lack of appropriate documentation (sampling, verification of storage conditions) may also make subsequent claims impossible, especially if proof of the origin, condition or quality of the goods becomes necessary.

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