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Lectures on Legal History

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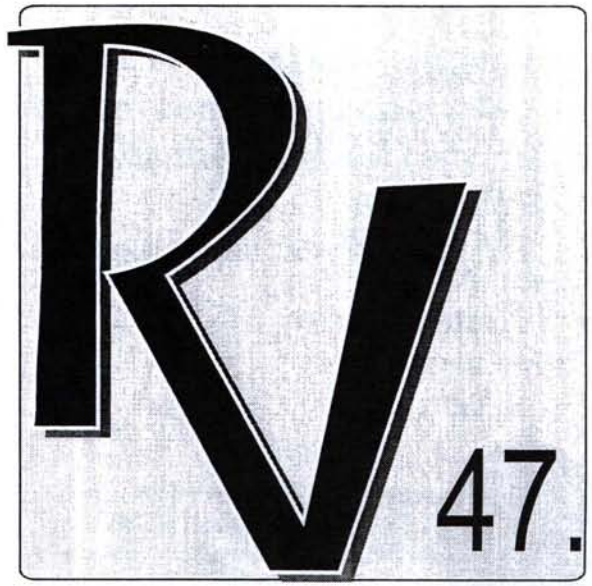

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The criminal substantial law's evaluation of crimes committed under the influence of alcohol in the criminal code's general section

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1. Basic principles

Legislative evaluation and regulation of alcohol related situations have been permanent for a long time. Alcohol, as it was detailed in previous chapters, is a psychoactive material. Its harmfulness for health is known and this feature of it is a reasonably big burden on the Hungarian public health care. At the same time consumer satisfying services are not considered to be criminal activities and even consuming itself is legal, not illegal. So being under the influence of alcohol (to be drunk) is not regulated by the legislatures in the field of criminal law, but crimes committed under the influence of alcohol are evaluated and sanctioned separately.

If the consumption of alcohol leads to commitment of crime, the influence of alcohol will be direct or indirect.

- Owing to the consumption of a certain amount of alcohol the perpetrator becomes drunk, intoxicated and if in this condition he commits a crime, it will mean that it is committed under the direct influence of alcohol. Crimes of violence especially sex offence, affray, brawl, crimes against human life are most often committed in the state of such an acute drunkenness – especially in the first-mid „excitement" section of it.

- It is possible that the perpetrator commits the crime under the influence of alcohol, but previously the alcohol has created such a pathological state (pathological or abortive pathological intoxication) because of which the perpetrator is either not punishable or the abatement of punishment can be unlimited.

- The crime is a result of the perpetrator's alcohol consuming lifestyle or his alcoholic way of life. This may, not necessarily but possibly, have pathological consequences relevant to the criminal law, may cause enduring or definitive changes in the perpetrator's state of mind (e.g. delirium tremens or other pathological kinds of state of mind).

To be able to declare the commitment of a crime, the analysis of the perpetrator's state of mind is indispensable. Commitment of a crime in an intoxicated state obviously raises the problem of the criminal liability. Should someone be considered to be criminally liable if he commits a crime under the influence of alcohol? The legal regulation of criminal liability for the commitment of a crime in an intoxicated state began somewhere around the 18th century.

a) The beginning of the legal regulation

In the early centuries there were no elaborated general criminal law concepts, although the still existing decrees of our first kings contained a number of criminal law by-laws, and the aim of those were to strengthen the power of the king and to protect the basis of the new legal system, namely the property rights. Punishing crime against human life or the crime of injuring someone was meant to decrease the number of blood feud, and to force the afflicted person to take the so called compensation – basically money for the loss –, which was defined in the decrees, and not to choose private fight. The criminal offences not mentioned in the decrees were punished on the basis of customary law or according to the free will of persons controlling the public authority.[1] Criminal law was not known as a separate field of law even in developed feudalism. Although some basic principles were established by *Werbőczy* in fact these did not really affect the practice. There was no existing Hungarian criminal code (quite a large number of acts and also attempts of codification took place however: Tripartitum, Quadripartium). All these factors caused uncertainty in law and a lot depended on the judges.[2]

The feudal criminal law, the criminal judicature between the 16th and the 18th centuries was the age of „wildness and cruelness", and the regulations of criminal law, which were not collected in to one place, served the interests of the landlords.[3] In the Hungarian law history there were times when the opportunities of the codification and the clarification of the Hungarian criminal law arose.[4] In the first one, dated from 1795, we can already find

[1] Andor Csizmadia-Kálmán Kovács-László Asztalos: Magyar állam- és jogtörténet. (Hungarian Political Science and Legal History) National Publisher, Budapest, 1995. p 241.
[2] A. Csizmadia-K. Kovács-L. Asztalos 1995. p 246.
[3] Pál Angyal: A magyar büntetőjog tankönyve (Coursebook of the Hungarian Penal System) Athenaeum Literary and Typographic Ltd., Budapest, 1909. p 30-31.
[4] The system of Hungarian penal laws was in fact based on the regulations of the Tripartitum, Praxis Criminalis and Corpus Juris. Later Maria Theresa's Code of penal laws was used by courts as associate regulations and transitionally Codex Josephinus, Josef II.'s Code of penal laws came into force in Hungary.

clear definitions and regulations of the criminal act, criminal liability, criminal acts committed under the influence of alcohol and the forms of guilt.

According to the major concept of the 18th century, a person without his free will (decision making) could not be considered as the perpetrator of a crime.[5] In 1795 the basic principles of the first criminal code's draft state that only such a person is considered to be able to commit a crime that has the ability of free will and is aware of his actions or at least he could have been aware of it. In the procedural part of the draft where extenuating causes and factors excluding criminal liability can be found, the draft declares that these factors should be considered in relation with the person's will and intention. The lack of free will absolves everyone of criminal liability; as an example for this the draft states the drunkenness of the perpetrator when he does things without direct intention, somehow accidentally. In addition, it mentions the state of total drunkenness – which is not caused accidentally but without the intention of committing a crime - , which on the basis of the wise judge discretion and depending on the circumstances, however, does not exclude but decreases the punishment if it reaches such a level that takes away the controlling of the mind from the perpetrator totally.[6]

Carrara in his work titled Program of Penal Jurisprudence points out that the strength of a crime morally and subjectively depends on movements which form the inner action, beginning with the first thought and ending with the final decision. For a crime to have a total moral strength, however, it is necessary for the perpetrator to have completely free will when the decision and the intention occurs to him, and to have clear mind at the same time. If, concerning the perpetrator, there is no or only a decreased level of free will or clear mind, criminal liability will be decreased or excluded.[7] Connected to this he talks about the level of the crime (and about the decreasing of it) in relation on the one hand with the state of mind of the perpetrator, and on the other hand with the free will of him. The role of the mind in the action can be smaller or absent because of physiological-physical reasons (age, gender, deaf-muteness, insanity) and because of ideological-moral reasons (misjudgment, lack of information) as well.[8]

Carrara writes in details about the intoxication among the reasons which have smaller effect on the free will (duress or moral violence, sudden anger, intoxication).[9] In the writer's opinion the intoxication can be looked at from

[5] Mathias Bodo: Jurisprudentia criminalis secundum praxim et constitutiones hungaricas. Pozsony, 1751. p 95.
[6] Lajos Hajdu: Az első (1975-ös) magyar büntetőkódex-tervezet. (The First Hungarian Scheme of Code of Penal Laws (1975) KJK, Budapest, 1971. Appendix: Codex of Criminal Offences and Their Punishments. (A bill – scheme of a statute coming into force) Part I, Section XII, 3.§, 9.§, 12. §
[7] Ferencz Carrara: A büntető jogtudomány programja I. kötet. (Program of Penal Jurisprudence) Volume I (translator: Gusztáv Beksics) Publisher-office of MTA, Budapest, 1878. p 145.
[8] F. Carrara 1878. p 146.
[9] F. Carrara 1878. p 187-188.

different points of views as we analyze its reasons or results, and he gives special importance to the physiological and psychological situations. The intoxication at first takes effects on the organs of the body (causing only material results), secondly it starts to take effect on the will and limits its freedom, and finally it has sometimes such an effect on the mind that for moments it deprives all capabilities of it (however, he considers the latter effect to be exceptional contrary to the effect on the free will which is constant). The author fully analyzed the solutions and concepts from the 14th century on and came to the conclusion that the effect of the intoxication on the free will is always proportionate with the effect on the human body. In addition he states that the intoxicated state can be analyzed in relation with its level and reasons.

Concerning the level of it we can define whether drunkenness „left some ray of light of brightness" or not:

- in the forensic medicine: happy, aggressive, sleeping-sickness[10], while
- in the jurisprudence complete (whole) or incomplete (half)

intoxicated state are named.

He lists four reasons for intoxication:

1. accidental: it is not caused by major quantity of alcohol, but by the illness of the individual or by others who manipulated his drinks
2. negligent: the person drinks a major quantity of alcohol, but does not foresee the drunkenness
3. deliberate: the person drinks a major quantity of alcohol with the intention of becoming drunk, but doesn't foresee the crime which he will commit
4. artificial (forethought): this perpetrator, after deciding to commit a crime, causes the intoxicated state in order to have more courage or to suppress his hesitation caused by the conscience or to arrange an excuse for the action.

In the first case we cannot even talk about negligence. In the second and third case according to *Carrara* the intoxicated state, if complete, excludes criminal liability concerning the deliberativeness but confirms criminal liability for negligence (but if it is incomplete it only decreases the criminal liability). The latter form of drunkenness cannot decrease the punishment with regard to the level of intoxication.[11]

[10] See also: Puccinotti: Lezioni di medicina legale. Pisa, 1840. Lez. 23
[11] F. Carrara 1878. p 218-231.

b) Explanations about Act 5. (1878) (hereinafter Codex Csemegi)

Our first criminal code was based on the ideas of the classical school, so it copies the concepts of the classical criminal codes. The 8th chapter of the code regulates the exclusions and the limitations of the criminal liability:

76 (par) „The person shall not be liable for the actions, if done by them in the state of unconsciousness, or if the mind was disturbed at the time, and due to these did not bear the capability of the free will."

This section was applicable for the actions made in an intoxicated state.

However the level of drunkenness which did not cause the necessary level to have the expected unconsciousness, to comply with the 76.§, was not considered to exclude criminal liability.

In *Károly Csemegi*'s opinion the intention must bear the recognition, so the capability to think, and the freedom. Criminal liability is not applied by the criminal code if either of them was missing. Concerning criminal liability besides the expressions of insanity *Csemegi* mentions the level of intoxicated state which totally deprives the person of his consciousness. In this state the person does not know what he is doing although the mind is not disturbed, and if such a thing happens the judge finds regulation which excludes criminal liability and instructs a doctor to ascertain whether it is true that the perpetrator was unconscious at the time of the crime. *Csemegi* also points out that in other cases certain circumstances fade the mind but do not nullify the free will hence the ability of decision so free will is not excluded.[12]

Illés Károly Edvi also mentions besides the unconscious states of sleeping-sickness and sleepwalking the level of such an intoxicated state (with distinguishing it clearly from insanity[13]), which totally deprives the person of his consciousness. At this occasion the perpetrator's mind is not disturbed, but he does not know what he is doing. According to *Edvi* the unconsciousness contains the impossibility of free will based decisions.[14] To give us examples *Edvi* mentions a number of cases from the practice of the „Curia" (previously Hungarian appeal court).[15] At first some acquittals are mentioned by him when the 76.§ was applied in the case (a person attempted

[12] Csemegi Károly művei II. kötet (Anyagi büntetőjog. Bűnvádi eljárás.) (Works of Károly Csemegi, Volume II. (Substantive penal law. Criminal procedure.) Edited by Illés Károly Edvi and Zsigmond Gyomai. Budapest, Franklin company, 1904. p 215-221.
[13] Edvi, however, noted that unconsciousness and mental disorder can occur together as well.
[14] In contrast, mental disorder has so-called smaller degrees as well which just limit free will, but never exclude it. Mental disorder therefore only excludes sanity when it is so large scaled that it ceases the ability of the will to make a free decision.
[15] In a collection (statute book) edited by Edvi, published in 1901, similar, but more detailed ad hoc decisions were added to statute regulations. See: Substantive Criminal Code and Press Law, Completed with all of the Secondary Statutes and Decrees and Resolutions of Superior Courts. (editor: Illés Károly Edvi), Bookstore of Károly Grill, Budapest, 1901. p 126-133.

to commit rape in the state of complete intoxication, but for his state he was not able (VI. 221.); a person who after drinking in the pub from 9 a.m. till 11 p.m. went home and quarreled with his brother then burnt the house in which he kept his belongings (VII. 9.). Afterwards he mentions some cases in which the Curia only limited the liability and declared the perpetrator to be guilty for deliberately committing a crime (a person during the quarrel with his wife stabbed her three times, and with this caused serious injury, according to witnesses because of his drunkenness he was not even able to talk, but it was not a complete drunkenness because he could recall the details of the events (VII. 376.). In the last group he details those doubtful cases when the action cannot be considered as a deliberate one, but the perpetrator was negligent concerning the drinking or actions before drinking. In connection with this he draws attention to the principle contrary to these judgments which states that if someone commits a crime in the state of total drunkenness and it cannot be considered as deliberate the criminal liability is excluded (and the liability for negligence as well). In his opinion a judgment contrary to this principle was held for example in the case where a person shot his brother who wanted to silence a quarrel between him and his wife, because he was not criminally liable for deliberate action due to the major drunkenness of his (X. 43. C.). According to *Edvi* at the negligent delicts, which can be committed by omission, it may occur that even the omission can be considered as a negligent crime if during practicing his profession he becomes deliberately or negligently drunk, and he does not fulfill his duty because of it, for example a railway worker gets drunk and due to this he forgets to give the mandatory sign.

Edvi considers alcohol illness (alcoholism) to be a form of insanity.[16] He talks about two kinds of this in general and in relation with the „legislature": acute alcoholic poisoning and chronic alcoholism. In the unconscious state of acute alcoholic poisoning the person commits the most cruel crimes and a feature of this state is the complete amnesia, but it is often pretended (experts ascertain whether it is real or pretended). The person usually can recall the actions clearly (e.g. attacking others, causing fire) which he did during the longer hallucinatory or distressed period of the alcoholic poisoning. The chronic alcoholism causes pathological anger or declining mind which may lead to commitment of a crime.[17]

According to *Ferenc Finkey* only total drunkenness, as a state of unconsciousness, excludes criminal liability, in addition he mentions as a form of insanity the alcoholic psychosis, the chronic alcoholic poisoning, the delirium tremens. The consciously decided crime perpetrated in the state of

[16] Edvi reviews certain groups of mental disorder on the basis of the latest contemporary psychopathological work, The Coursebook of Psychopathology by Dr. Jakab Salgó.
[17] Illés Károly Edvi: A büntetőtörvénykönyv magyarázata. (An Explanation of Criminal Code) Edited by Révai brothers, Budapest, 1894. p 264-274.

total drunkenness which aims at crime commitment does not exclude criminal liability, and should be considered as actio libera in causa. In addition, he does not only value drunkenness as a state of unconsciousness but as a punishment decreaser (in some cases increaser) factor and as a factor of criminology.[18]

Pál Angyal emphasises not only the responsibility of the individual but the responsibility of the society; the crime can be caused by factors other than the personal responsibility (poorness, alcoholism, bad education), and the society is expected to weaken the strength of these factors. He details this idea, the idea of sharing responsibility. In connection to this he mentions the term of limited criminal liability, and notes that the old classics[19] are against this.[20]

According to *Angyal* the unconscious state can be permanent (pathological) and temporary (physiological), an exhaustive listing of its forms is impossible. He says that from the definition in the law the conclusion can be drawn that even the unconscious state results the exclusion of criminal liability only in that case "if the perpetrator could not control her/his free will at the time of the crime". Drunkenness as a temporary (physiological) state excludes criminal liability only if it is complete and was not caused in order to commit crime, but in the case of actio libera in causa even complete drunkenness does not exclude criminal liability. Incomplete drunkenness, since it weakens the normal free will, must be considered as extenuation. *Angyal,* concerning criminal-political aspects, drew attention to alcoholism; in his opinion the government and society should prevent it, and not only fight against the existing illness.[21]

Contrary to *Angyal Zsigmond Várady* on a session of the Hungarian Lawyer Association explicitly proposes, that „it would be reasonable to define drunkenness as a crime itself, and to punish it with confinement"[22]. Várady thinks that moral and physical degeneration, caused partially by the government monetary policy, must be fought against by means of criminal law, as a means of self-defence, in order to keep away from it the people who are, for any reasons, longing for this passion.

[18] Ferencz Finkey: A magyar büntetőjog tankönyve. (Coursebook of Hungarian criminal law) Politzer Publishing Company, 1905. p 176-181.
[19] Namely the Codex Csemegi, therefore, pertinent regulation in it represents the view of classical criminal law.
[20] P. Angyal 1909. p 370-379.
[21] P. Angyal 1909. p 412-416.
[22] Zsigmond Várady: Észrevételek Dr. Reichard Zsigmond úr törvénytervezetére. (Remarks on the Bill of Dr. Zsigmond Reichard) Discourses of Hungarian Jurist Association, Volume XXIII, booklet 2., Press of Franklin-company, Budapest, 1901. p 14.

In later publications[23] *Angyal* explains the judicial practice from the point of view of a number of judgments from the Curia. Thus he quotes the „Curia 8004/19066. B. H. T. IV. 292. advisory judgment, which holds that „ if the accused caused the unconscious state of his, and because of it he is not able to carry out the due diligence in relation with others' life or health, the 76.§ of the criminal code does not exclude the liability of negligent homicide".

Moreover, the Curia made significant statements to our topic – and also to the effective legal regulations - in the following cases:

- Temporary defects in the consciousness and free will, due to drunkenness, are not identical to the complete lack of the consciousness which is regulated by the criminal code 76. § (C. 1914. 01. 20. 438. B. VIII. 67.)
- For the cruelest and wildest crimes only one excuse is possible, that the accused inherited serious defects, and the previously consumed alcohol caused a sudden fit of anger, and the accused became a toy of his instincts. Under these conditions criminal liability is excluded. (C. 1225/1933. G XXVI. 401.)
- Alcohol does not have the same effect on everyone; the effect of it on the consciousness will be relatively weaker or stronger depending on the physical and mental condition so the level of resistance will be different. So the question of consciousness is only adequate to talk about if not only the quantity of the consumed alcohol but the individual's special features are taken into consideration as well. (C. 2049/1937. Bj. LXXXIX. 56.)
- Only drunkenness which causes unconsciousness and the lack of free will may exclude criminal liability. (C. 3771/1939. J. H. XIII. 976.)

According to *Irk Albert* the unconscious state has different levels: it may exclude the free will, but if it only limits the free will, it will be an extenuating cause. He notes that in practice drunkenness and anger are the most common factors, and above all he points out that nowadays it is a common opinion that drunkenness may not enjoy its privileges any more. He considers it to be an aggravating circumstance if it is contrary to duties, and he regards it to be an extenuating cause if it is accidental.[24]

Zoltán Bursics attorney at law states in relation with drunkenness that only total drunkenness is considered to be an unconscious state excluding criminal

[23] Pál Angyal-Gyula Isaák: Büntető törvénykönyv a büntettekről és vétségekről (1878:V. törvénycikk). (Criminal Code of Criminal Actions and Delicts (1878: Statute V.) Publishing company of Károly Grill, Budapest, 1941. 58-60. and: Pál Angyal: A magyar anyagi büntetőjog hatályos jogszabályai. (Operative Statutes of Hungarian Sunstantive Criminal Law) Publishing company of Károly Grill, Budapest, 1941. p 27.

[24] Albert Irk: A magyar anyagi büntetőjog. (Hungarian Substantive Criminal Law) Dunántúl University of Pécs Publisher and Press Ltd., Pécs, 1933. p 101-102., p 324.

liability by the judicial practice, but only in that case if actio libera in causa is missing. According to the judicial practice, intoxication may be an aggravating circumstance for persons who are supposed to pay a higher level of attention in cases of certain activities (e.g. a driver) and when doing this activity, they commit a crime in such a state.[25]

Obviously, in regulations of the early times drunkenness, intoxication excluded criminal liability, but at least it served as an extenuating cause, later on developed the concepts which said that the exclusion of criminal liability is not an automatic consequence of this state (e.g. limited criminal liability, actio libera in causa). What is more, it can even be an aggravating circumstance in some cases.

c) The Post-World War II. Era

The general part of the Codex Csemegi and within this the provision which is governing in respect of the subject of the present essay was in force for 70 years. Several modifications of it are known, among them the Punitive Novella I. II. and III. (hereafter BN), from which the regulations concerning drunkenness were first set forth by BN III., Section 14 of Act XLVIII of 1948 about the termination and correction of some of the deficiencies of penal codes in that it regulated the act committed under drunken or stuporous state as a sui generis factum of crime.

14 (par) Anyone committing an act under a drunken state or drug use which, pursuant to the penal codes, is a felony or is a misdemeanor punishable with more than one year minimum security prison – if such a state of mind precludes its inclusion, shall be punishable with minimum security prison sentences for one year.

An act committed by someone lacking criminal capacity was called basic act and obviously it was a moderate one. According to some views, the ground for culpability is intentional or negligent drunkenness (voluntariness is first mentioned here as a precondition, element of factum of crime of sui generis crime), whereas others appointed the basic act as a ground of culpability. The representatives of the former view considered the regulation as one compatible with the principle of liability based on culpability but advocated of the other view were of the opinion that since liability is objective, the new regulation breaks through the principle of criminal liability.

According to *Tokaji*, the sui generis crime is a negligent act of crime in which the basic act is quasi its result and this result should be affected by the so

[25] Zoltán Bursics: A magyar anyagi büntetőjog vázlata. (Scheme of Hungarian Substantive Criminal Law) Publishing office of Károly Grill, Budapest, 1936. p 153., p 187.

called general negligence. In this case the general nature of the negligence is multifold. It means that it can be foreseen that drunkenness may lead to an act threatened by some kind of punishment. It also determined that general negligence may only be lacking in some exceptional cases (e.g. someone never caused any trouble by his occassional drunkenness for several decades)[26]

The Act II of 1950 about the General Part of the Penal Code (Btá) brought a fundamental change. The second chapter of the Btá regulatest punishability. Section 10 (1) precludes the punishability of those perpetrators who commit a felony in such an insane state of mental functions or cognitive disorder which made him unable to recognize the social danger of his act or which unabled him to behave according to his will. However, if the perpetrator was only hindered by his insane state of mental functions or cognitive disorder in the recognition of the social danger of his act or the behaviour in accordance with his will, he was punishable, but the punishment could be mitigated without limitations.

These regulations could not be applied in favour of those perpetrators who, in order to commit felony, caused his own state or circumstances.

Section 10 (1) A person shall not be punishable who perpetrated the crime in such an insane state of mental functions or cognitive disorder which made him unable to recognize the social danger of his act or which unabled him to behave according to his will.

[...]

(3) If the perpetrator was only hindered by his insane state of mental functions, cognitive disorder, constraint or menace in the recognition of the social danger of his act or the behaviour in accordance with his will, he was punishable, but the punishment could be mitigated without limitation (Section 52.)

(4) The previous regulations shall not be applicable in favour of those perpetrators who, in order to commit felony, caused his own state or circumstances.

In this regulation that perpetrator's liability, who has limited mental capacity and committed his act consciously – in order to commit a crime (actio libera in causa presupposing outright intentionality) already appears.

While in the first case the legislator provides possibility for the judicature to mitigate – even without any limitations – the punishment, in the second case it is the possibility to determine the mitigated judgment, the lack or limitedness of mental capacity that the legislator precludes.

[26] Géza Tokaji: A bűncselekménytan alapjai a magyar büntetőjogban. (The Fundamentals of Crime Science in Hungarian Criminal Law) Economic and Legal Publisher, Budapest, 1984. p 283-288.

The next comprehensive penal code, Act V of 1961 about the Penal Code of the Hungarian People's Republic regulates the obstacles of punishability in Article IV of its Chapter II, which chapter is about the regulations of punishablity. Here it provides an itemized listing of the grounds for preclusion of punishability (Section 19), then it inserts into its detailed regulations, namely the provisions about lunacy, imbecility and cognitive disorder (Section 21), as Section 22 the liability for felonies commited in drunkenness or stupor, virtually according the effective technical solutions. In the history of relevant substantive legal regulations, actionable conduct or more precisely the drunken (or stuporous) state is mentioned again in Section 22. According to this, regulations set forth in Section 21 – in case of states listed there and under defined conditions, the preclusion of mental capacity or the limitedness of it (and thus the unrestricted possibility of punishment) – cannot be applied in favour of those perpetrators, who committed their crimes under the state of drunkenness or stupor resulting from actionable conduct.

Section 21 (1) A person shall be punishable who perpetrates his act in such an insane mental state, imbecility or cognitive disorder which made him unable to recognize those consequences of his act that are dangerous for society, or to act in accordance with this recognition.

(2) If the perpetrator is only hindered by his an insane mental state, imbecility or cognitive disorder in the recognition of those consequences of his act which are dangerous for the society, or to act in accordance with this recognition, his punishment may be mitigated without limitation.

Section 22 The provisions of Section 21 may not be applied in favour of those perpetrators who perpetrated the act under the state of drunkenness or stupor resulting from actionable conduct.

Accordingly, the law determines liability under a crime committed in drunken (stuporous) state.

Punitive theoretical decision No. XXVIII. made by the Supreme Court in respect of Section 22 stipulates that the perpetrator's drunkenness and his state under the influence of alcohol in itself cannot be evaluated among the circumstances of culpability. In most cases alcohol consumption just limits the capacity of recognition and will and only occasionally causes such an acute alcoholic state that it precludes mental capacity. Should the latter occur, the subjective side of the crime is lacking, and if Section 21 cannot be applied, the perpetrator is punishable. In this case, two fundamental criminal legal and criminal-political principles collide and also the social interest connected to them: one is the principle of nulla poena sine culpa and the requirement that criminal law should not be passive to the perpetrator having committed an act under drunkenness, which precludes mental capacity. Pursuant to the theoretical decision, the position of the sentencing practice was that according to Section

22, the liability is not an objective one, but it necessarily deviates from the general form of culpability. According to the theoretical decision only culpability should be examined on the subjective side. The cognitive disorder. The cognitive disorder of the person whose drunkenness results from actionable conduct is the consequence of such a cause for which the perpetrator can be made liable. The act committed under the influence of drunkenness resulting from actionable conduct may be classified as an intentional or negligent felony according to the profound examination of the objective side, namely how the felony would be classified in case of the subjective side's totality.[27]

2. The effective regulation

The effective Penal Code, Act IV of 1978 includes the following provisions:

Section 24 (1) That person shall not be punishable, who perpetrates an act in such an insane state of mental functions - thus in particular lunacy, imbecility, dementia, cognitive or personality disorder -, which makes him unable to recognize the consequences of the act or to act in accordance with this recognition.

(2) The punishment may be mitigated without limitation if the insane state of mental function hinders the perpetrator in the recognition of the consequences of the act or in acting in accordance with this recognition.

Section 25 The provisions of Section 24 shall not apply to persons, who perpetrate acts in a drunken or stuporous state through their own fault.

From the regulations above it becomes obvious that the legislator continued to deem it advisable that perpetration in a drunken or stuporous state – and with respect of it precluding the application of provisions of Section 24 – should be regulated separately, taking over the provisions of the former penal codes almost in an unaltered form.

Which factors may substantiate this method of the regulation?

The historical analysis presented above showed that pursuant to Codex Csemegi, if the degree of drunkenness was so high that it precluded mental capacity, the perpetrator had to be acquitted, except for the case of actio libera in cause, which constituted the subject of theoretical disputes. Pursuant to this rule, the perpetrator can be made liable if it was he who disrupted the continuity of mental capacity in order to commit a crime. It is even drunkenness that may cause the disruption of mental capacity in the present case. At that time,

[27] Miklós Kádár - György Kálmán: A büntetőjog általános tanai. (The General Studies of Criminal Law) Economic and Legal Publisher, Budapest, 1966. p 385-393.

however, proving the above mentioned intent by using actio libera in causa ran into difficulties. The solution that BN III. applied – the regulation of the act committed under drunken or stuporous state as a sui generis crime – was an attempt to harmonize with the principle of liability based on culpability. It was also in connection with this that the concept of general negligence appeared as a foreseeability that drunkenness may also lead to some kind of act threatened by punishment. In the effective regulation the legislator also paid regard to the robust criminogenic nature of the drunkenness.

The social experience, the sentencing practice, criminology and criminalistics unambiguously show the strong coherence between crime and alcohol consumption[28]. To restrain this phenomena, mainly not means of criminal law should be used, but with respect to the coherence, it would be a mistake to put the perpetrator, who commits crime a drunken state, into a more favourable position. This, however, created the problem that the expedience requirement of criminal-political measures in the effective regulations contradicts the traditional theoretical concepts concerning liability in criminal law, namely in the present case the maintenance of the principle of culpability (nulla poena sine culpa). The maintenance of the provision is justified by all means from criminal-political aspects.

The legislator does not intend to classify the drunken state in itself in terms of criminal law, the consumption of alcohol does not perform any factum of crime[29]. Alcohol consumption resulting from actionable conduct is special because „the material" influences the mental-cerebral processes, and depending on several circumstances, this affects the mental capacity to a certain degree. But for the evolution of this effect (for the perpetrator to get into the drunken, state influencing mental capacity, the perpetrator's act is needed, he himself causes the state in which he commits and act by which he performs the factum of crime. The drunken state is a special form of the cognitive disorder. The perpetrator having become drunk as a result of actionable conduct, however, lacks mental capacity totally or partially in vain, the legislator attributes the perpetration of crime to him. His culpability should be determined, and it should be deemed as if he had committed his act under a sober state. Section 25 concerns acute drunkenness (the direct alcohol-effect) and it precludes both impunity and the limitless mitigation of punishment, apart from some defined exceptions (pathological and abortive pathological intoxication).

[28] György Berkes: A beszámíthatóság és az ittasság büntetőjogi értékelésére vonatkozó kodifikációs elgondolások. (Codificational Concepts Regarding the Criminal Legal Evaluations of Mental Capacity and Drunkenness) In.: Hungarian Law 1977/12. p 1049-1055.

[29] It also functions as a special partial element of the drunken state's factum of crime (Btk 188.§ Driving in a drunken or stuporous state). This factum of crime considers the drunken state itself, or more specifically the state under alcoholic influence crime on condition of special circumstances. With respect to this factum of crime Section 25 of the Penal Code is not applicable.

According to the direction which aims at standardizing sentencing practice related to substantive source of law, punitive theoretical decision No III. (BED), the cognitive disorder caused by drunken state fundamentally differs from other cases of mental disorders. The cognitive disorder resulting from actionable conduct is a consequence of a cause for which the perpetrator can be made liable. It depends on his voluntary accord, intent, whether with his alcohol consumption exceeding his tolerance level, he causes the cognitive disorder precluding or limiting mental capacity. BED No. III. also declares that liability pursuant to Section 25 necessarily deviates from the general form of culpability.

In order to determine the perpetrator's liability two factors have to be evaluated:

firstly, the existence of actionable conduct, secondly the classification of the act committed in a drunken state resulting from actionable conduct.

- Actionable conduct is a specific legal phrasing in the substantive source of law, basically, it is a special form of liability. The theoretical decision about actionable conduct includes the designation of own voluntary accord, intent, from which the conclusion may be drawn that with respect to actionable conduct, the perpetrator shows – in terms of culpability forms – at least gross negligence. At the same time, the decision immediately adds that from the general form of culpability the liability defined by Section 25 differs.

Actionable conduct is not related to the perpetration of the crime, but to the causing of cognitive disorder under which mental state the crime is committed. The question is, whether one can talk about categories of culpability, and whether actionable conduct covers them. With respect to actionable conduct, this is what BED No. III. adapts when it elaborates upon own voluntary accord and mentions the subjective side, which bears significance, but in the examination phase of actionable conduct only to the extent that the court has to examine only if the drunkenness of the accused, causing cognitive disorder, resulted from actionable conduct or not. Accordingly, it does not establish actionable conduct or the lack of it with regard to the given factum of crime (classification of crime) committed under drunken state, as only the drunken state causing cognitive disorder results from actionable conduct, but in terms of crime classification actionable conduct cannot be interpreted. Looking back at the determination of actionable conduct, the question of reckless disregard is problematic. By this category of culpability the foresight of causing the danger of cognitive disorder, the awareness is lacking, which pursuant to BED No III. is characteristic of actionable conduct. As a result of this may be, that in order to classify something as actionable

conduct BED No. III. requires the presence of one of the three culpability forms (specific intent, foreseeable intent, or gross negligence) and reckless behaviour falls outside the field of criminal law. In some commentaries one may read the definition that a person becomes drunk as a result of actionable conduct if he causes his state intentionally or by negligence.[30]

According to the interpretation done by Tokaji–Nagy, actionable conduct should be considered as the intention or negligence affecting the causing of drunken or stuporous state that precludes mental capacity[31]. By all means, in Tokaji's opinion actionable conduct may not function as a supplement for culpability.[32] The precondition of actionable conduct is that at the beginning of his alcohol consumption, the perpetrator should at least have a limited mental capacity. If the perpetrator has not become drunk as a result of actionable conduct, Section 24 of the Penal Code shall be applied. The application of Section 25 shall also be excluded if mental incapacity is the result of lunacy based on acute alcoholism.[33]

From the aspect of the application of Section 25, differentiation should also be made between the various levels of drunkenness. Actionable conduct is almost always present in case of ordinary (typical) intoxication. The perpetrator has to be made liable as if he had committed his act having full mental capacity.[34] If a person is mistaken in the quality of the alcohol, it may be regarded as an exception. Only rarely may cause the consumption of alcohol a state which leads to inability of recognition or the paralysis of the intention. It only limits the ability of recognition and will/intent.[35] They symptoms gradually appear depending on the amount and quality of the consumed alcohol and on the individual tolerance level. In the first phase of ordinary intoxication the heart function accelerates, and with the extraordinary mood changes a general state of excitement goes together, which often leads to a great intensification of irritation, uncriticalness euphoria, the intensified libido. As time passes, the impetuous reactions are getting increasingly stronger, and this is the phase of drunkenness when, due to the largely reduced inhibitions and presumed high ability of achievement, the aggressive and

[30] György Berkes - Mihály Julis - Zsigmond Kiss - István Kónya - Ede Rabóczki: Magyar Büntetőjog Kommentár a gyakorlat számára. (Hungarian Criminal Law Commentary for Pratice) HVG-ORAC Periodical and Book Publishing House, Budapest p 65.

[31] Ferenc Nagy - Géza Tokaji: A magyar büntetőjog általános része. (The General Part of Hungarian Criminal Law) Korona Publisher, Budapest, 1998. p 172.

[32] Géza Tokaji: A büncselekménytan alapjai a magyar büntetőjogban. (The Fundamentals of Crime Science in Hungarian Criminal Law) Economic and Legal Publisher, Budapest, 1984. p 288.

[33] F. Nagy – G. Tokaji 1998. p 172.

[34] József Földvári: Magyar Büntetőjog Általános Rész (Hungarian Criminal Law General Part) Osiris, Budapest, 2003. p 153.

[35] Miklós Kádár - György Kálmán: A büntetőjog általános tanai. (The General Studies of Criminal Law) Economic and Legal Publisher, Budapest, 1966. p 387.

in fact totally unmotivated acts are most often committed.[36] As drunkenness increases (towards the grave affectedness), the perpetrator becomes dejected, uncommunicative, his speaking will become impeded, he will get into a depressed and aggressive mood, indisposition, and he will become disoriented and then will suffer from equilibrium disorder, vomiting and symptoms of paralysis. His comprehension will become limited, and finally his symptoms can become so intensified that in his drunken state he loses his consciousness and falls into a deep sleep.[37]

In cases of pathological (acute) and abortive pathological intoxication sentencing practice deviates from the approach followed by the substantive source of law, and regarding the perpetrator's liability it draws conclusions from the nature of cognitive disorder. In such case, the examination of actionable conduct is precluded. Acute drunkenness rarely appears, qualitative and quantitative features defined in BED No. III. differentiate it from ordinary intoxication. By these forms of drunkenness, a relatively smaller amount of alcohol consumption preceded drunkenness. Recent psychiatric studies, however, point out that the concept according to which one of the criteria of acute drunkenness is that it is followed by a small amount of alcohol consumption should be considered out of date, because the diagnosis of acute drunkenness is based on psychopathological mutations and not on the consumed amount of alcohol. Thus it may be the case with regularly drunken alcohol-addicts.[38]

In BED No. III. the qualitative change characterizing acute drunkenness is that here "such temporal disorders of mental functions resulting in mental disturbance are dealt with which (...) can be regarded as equal with a state of acute lunacy. In such a state, instead of Section 24 of the Penal Code Section 25 shall be applicable."

With abortive pathological intoxication, "the particular symptoms do not appear so intensively" as with total acute drunkenness. "At the same time (...), the disturbed state consciousness in most cases occurs rapidly and with greater intensity, but without (...) the recognition of coherence and situational circumstances, as well as of orientation totally disappearing." In this case, Section 25 shall not be applicable, but since BED III. provides that this state only limits the perpetrator's ability of recognition and will, Section 24 of the Penal Code shall be applicable."

[36] Commentary of Act IV. of 1978. Complex CD Law Collection, KJK Kerszöv

[37] Miklós Kádár - György Kálmán: quoted work. 386.; and Dr. Tibor Varga is quoted by Dr. Ágnes Fülöp (in.: Ágnes Fülöp - András Grád - Mária Müller: Droggal és alkohollal összefüggő büncselekmények. (Crimes related to Drugs and Alcohol) HVG-ORAC Periodical and Book Publishing House, Budapest, 2000. p 48.

[38] Gy. Berkes – M. Julis – Zs. Kiss – I. Kónya – E. Rabóczk p 62.

Chronic alcoholism in itself cannot be considered a disorder of mental functions that would preclude the application of Section 25 of Penal Code, although it may cause an abnormal personality. Should this state lead to a degradation of personality which is already be deemed as an insane state of mental functions and this precluded or limited the perpetrator's mental capacity, Section 24 of the Penal Code shall be applicable.

Finally, looking at the sentencing practice, it can be determined that the question of actionable conduct hardly appears, the lack of it is referred to neither by the accused nor by the defense. [39]

- The second phase is the classification of the act committed by the person in a drunken state. The act committed in a drunken state resulting from actionable conduct may be deemed an intentional or negligent crime. With crimes committed in a drunken state resulting from actionable conduct, mental capacity is only limited or is completely lacking. One of the elements of culpability is therefore partly or totally missing. In spite of this, in accordance with the substantive source of law, the perpetrator is punishable, his culpability shall be determined, and he shall be made liable for the criminal offense committed. It shall be regarded, as if he had complete mental capacity.

To determine the crime, one must take a stand on the question of culpability. In practice, Section 25 of the Penal Code is mainly applied when mental capacity is limited. The classification here is not problematic: regarding as intentional or negligent has to be independent from the fact that the perpetrator was limited in his ability of recognition and will or not. With increased thoroughness and by comparing all the circumstances of the case does the court have to examine whether the accused was unable to recognize consequences of the act that can be dangerous for society and whether he was unable to act in accordance with this recognition.

During this, the court may also hear a mental specialist, and in cases of pathological and abortive pathological intoxication, experts' opinion cannot be ignored. Heavy drunkenness in itself, or the fact that the perpetrator did not have due motive for committing the crime can serve as a ground for determining cognitive disorder precluding mental capacity. BED No III. also emphasizes that *drunk but imputable perpetrators often realize not duly motivated – violent – crimes such as homicide, battery, rowdyism-like crimes*. Limitless mitigation cannot be applied during the infliction of punishment. However, in the other case, the case of drunken state resulting from actionable conduct – which takes place more rarely – the subjective side is lacking. Authoritative is the guideline according to which the court has to examine within its classification how the

[39] Gy. Berkes – M. Julis – Zs. Kiss – I. Kónya – E. Rabóczki p 65.

crime would be classified in case of the completeness of the subjective side on the basis of the circumstances of crime perpetration. Pursuant to Bed No. III. the judicature resolves this problem by applying a specific technique: the court has to draw the conclusion from the objective circumstances of the act with respect of the perpetrator's culpability if he committed his act a drunken state resulting from actionable conduct which precluded his mental capacity. With crimes committed in a drunken state, the liability for result serving as aggravating circumstance, and in case of error in fact this rule prevails.

With factum of crimes defined by law, where negligent perpetration shall not be punished, the evaluation affects punishability as well.[40]

In connection with the punishability of the act committed in a drunken state precluding mental capacity, the text book by Kádár-Kálmán quotes *Aschaffenburg*, who considered it unnecessary to examine mental capacity and culpability in cases of acts committed in a drunken state. He presumed violating the principle of liability based on culpability is more appropriate than authorizing people to commit grave and punishable crimes under a unconsciously drunken state.[41] *Tokaji* states that Section 25 of the Penal Code establishes objective liability, thus as the only exception it breaches the principle of liability based on culpability.[42] On the other hand, *Norbert Kis* argues that taking the decision made about the psychic and subjective components of intentionality and negligence for a presumption has become the criticism of substantive culpability. This criticism reveals that the positive legal definition of culpability does not adequately express the presumed nature of psychic content, and the sentencing practice suppresses these presumptions. *Kis* points out that this process can be characterized as one where the search for psychological elements of culpability must be terminated, and it should be acquiesced that culpability is not a psychological but an evaluating value concept.[43]

By the infliction of punishment the drunken state cannot be adjudged in favour of the accused. The drunken state, however, does not preclude the determination of heat of passion in favour of the perpetrator if its features can be discerned irrespective of the drunken state (BH 1993/594.)

It is considered to be an aggravating circumstance by BK 154. opinion if the perpetrator commits the crime in a drunken state resulting from actionable conduct, and such a state contributed to the perpetration of the crime.

[40] Imre A. Wiener: Büntetendőség – Büntethetőség (Felelősségtan). (Culpability – Punishability) (Liability Studies). In.: Culpability – Punishability Studies of Criminal Law (edited by.: Imre A. Wiener). KJK Kerszöv Legal and Business Publishers Ltd., Budapest, 2000. p 220.
[41] M. Kádár – Gy. Kálmán 1966. p 389.
[42] G. Tokaji 1984. p 288.
[43] Norbert Kis: A bünösségi elv hanyatlása a büntetőjogban. The Deterioration of the Principle of Culpability in Criminal Law. UNIO Publisher, Budapest, 2005. p 26.

As a result of the alcohol's effect, the drunken state often motivates the perpetrator to commit fundamentally unmotivated crimes against persons and other violent acts.[44] This is evaluated by BK 154. opinion when *it imposes special emphasis on unscrupulous, rowdy-like crimes against life, physical integrity, or sexual morality* Drunken life style is also evaluated as an aggravating circumstance, as from the intensified aggressivity, the serial violations of the rules of cohabitation it may be concluded that the perpetrator's personality is increasingly dangerous for the society.

In modern penal codes the criminal-political considerations regarding drunkenness usually surmounted the classical theoretical views of criminal law, and this obviously prevails in the Hungarian solution as well. Undoubtedly, persons who themselves cause a state that precludes or limits their mental capacity cannot be ensured impunity by the aim of law-making.

Finally, the current work of codification should be mentioned: the new penal code would not modify the presently effective regulations about drunken state in the Penal Code. According to the Concept, the drunken state resulting from actionable conduct is a special version of cognitive disorder for which the new Penal Code codifies a liability presumption equivalent with the Penal Code in force. Consequently, the perpetrator committing a crime in a drunken state resulting from actionable conduct shall continue to bear full liability.[45]

[44] Commentary of Act IV. of 1978. Complex CD Law Collection, KJK Kerszöv 2006.
[45] Büntetőjogi Kodifikáció (Codification of Criminal Law) 2006/1.

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