DALLA COMUNITÀ INTERNAZIONALE

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Crimes committed under the influence of alcohol in the Hungarian criminal code's general section.

Legislative evaluation and regulation of alcohol related situations have been permanent for a long time. Alcohol 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 the commitment of a 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 and 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).

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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. The study reviews the effective regulation (Act C of 2012, Section 18), which is the same as the previous regulation (Act IV of 1978, Section 25).

The effective Penal Code, Act C of 2012 includes the following provisions:

«That person shall not be punishable, who perpetrates a culpable act in such an insane state of mental functions, which makes him unable to recognize the consequences of the act or to act in accordance with this recognition». (Section 17, § 1)

«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 17, § 2)

«The provisions of Section 17 shall not apply to persons, who perpetrate acts in a drunken or stuporous state through their own fault». (Section 18).

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 17 – should be regulated separately, taking over the provisions of the former penal codes almost in an unaltered form.

So, which factors may substantiate this method of the regulation?

Pursuant to Codex Csemegi (1878), 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, however, proving the above mentioned intent by using *actio libera in causa* ran into difficulties. The solution that Punitive Novella III (1948) 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 pun-

ishment. 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[3]. 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 in 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[4]. 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 and 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 18 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).
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

[3] BERKES, *Codificational Concepts Regarding the Criminal Legal Evaluations of Mental Capacity and Drunkenness*, in *Hungarian Law*, 1977, 12, p. 1049, 1055.
[4] It also functions as a special partial element of the drunken state's factum of crime (Btk 236, § *Driving in a drunken 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 18 of the Penal Code is not applicable.

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 18 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 18 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 behavior falls outside the field of criminal law. In some com-

mentaries 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[5].
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[6]. By all means, in Tokaji's opinion actionable conduct may not function as a supplement for culpability[7]. 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 17 of the Penal Code shall be applied. The application of Section 18 shall also be excluded if mental incapacity is the result of lunacy based on acute alcoholism[8].
From the aspect of the application of Section 18, 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[9].
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[10]. 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, un-criticalness 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 in fact totally unmotivated acts are

[5] BERKES, JULIS, KISS, KÓNYA, RABÓCZKI: *Hungarian Criminal Law Commentary for Pratice*, HVG-ORAC Periodical and Book Publishing House, Budapest.
[6] NAGY, TOKAJI, *The General Part of Hungarian Criminal Law*, Korona Publisher, Budapest, 2004, p. 241.
[7] GÉZA, TOKAJI: *The Fundamentals of Crime Science in Hungarian Criminal Law*, Economic and Legal Publisher, Budapest, 1984, p. 288.
[8] NAGY, TOKAJI, *The General Part of Hungarian Criminal Law*, cit., 2004, p. 241.
[9] FÖLDVÁRI, *Hungarian Criminal Law General Part*, Osiris, Budapest, 2003, p. 153.
[10] KÁDÁR, KÁLMÁN, *The General Studies of Criminal Law*, Economic and Legal Publisher, Budapest, 1966, p. 387.

most often committed[11]. 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.[12]
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[13].
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 17 of the Penal Code Section 18 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 18 shall not be applicable, but since BED III. provides that this state only*

[11] *Commentary of Act IV of 1978*, Complex CD Law Collection, KJK, Kerszöv, 2006; BELOVICS, GELLÉR, NAGY, TÓTH, *Büntetőjog I, A 2012 évi C. törvény alapjánévi*, HVG-ORAC, Budapest, 2012, pp. 231, 232.
[12] KÁDÁR, KÁLMÁN, *The General Studies of Criminal Law*, cit., 386.; Dr. Tibor Varga is quoted by Dr. Ágnes Fülöp, in FÜLÖP, GRÁD, MÜLLER, *Crimes related to Drugs and Alcohol*, HVG-ORAC Periodical and Book Publishing House, Budapest, 2000, p. 48.
[13] BERKES, JULIS, KISS, KÓNYA, RABÓCZKI: *Hungarian Criminal Law Commentary for Pratice,* cit.

limits the perpetrator's ability of recognition and will, Section 17 of the Penal Code shall be applicable».

Chronic alcoholism in itself cannot be considered a disorder of mental functions that would preclude the application of Section 18 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 17 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[14].

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 18 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*».

[14] *Ibidem.*

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 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[15].

In connection with the punishability of the act committed in a drunken state precluding mental capacity, the text book by Kádár and 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[16]. Tokaji states that Section 18 of the Penal Code establishes objective liability, thus as the only exception it breaches the principle of liability based on culpability[17]. 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[18].

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[15] WIENER, *Culpability – Punishability (Liability Studies)*, in *Culpability – Punishability Studies of Criminal Law*, edited by Wiener, KJK Kerszöv Legal and Business Publishers Ltd., Budapest, 2000, p. 220.

[16] KÁDÁR, KÁLMÁN, *The General Studies of Criminal Law,* cit., p. 389.

[17] GÉZA, TOKAJI: *The Fundamentals of Crime Science in Hungarian Criminal Law,* cit., p. 288.

[18] KIS, *The Deterioration of the Principle of Culpability in Criminal Law*, UNIO Publisher, Budapest,

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 favor 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 BKv 56 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.
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[19]. This is evaluated by BKv 56 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

2005, p. 26.
[19] *Commentary of Act IV. of 1978. Complex CD Law Collection*, cit.; BELOVICS, GELLÉR, NAGY, TÓTH, *Büntetőjog I, A 2012 évi C. törvény alapjánévi,* cit., p. 233.