

**Examining the possible application of chemical castration as a sanction for sexual offences, with particular attention to offences against minors**

Statements of doctoral dissertation

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## **I. Brief summary of the research objective**

The vulnerability of victims of sexual offences and the sanctioning of the perpetrators is as old as the civilisation itself. The perception of crime has not changed as societies have evolved, but the punishment of these crimes has undergone constant changes as society and the rights of individuals have evolved. To this day, legislators are still looking for appropriate ways, whether individual or complex, first of all to protect potential victims and deter offenders from re-offending. This problem is still open and unresolved, as no country has fully achieved these objectives. Of course, the absence of sex offences and therefore of their perpetrators is only possible in a utopian world, so such efforts are doomed to failure, but the effort to reduce the number of perpetrators of these crimes to the lowest possible level, by the appropriate legal means, is a goal that the legislator must strive to achieve.

In this struggle, a very powerful tool in Hungary could be the consideration of the adoption of procedures and practices used and operating in other countries, of course only if, after examining these legal instruments, a reassuring position can be reached that these practices can be adopted on the basis of the moral and legal principles prevailing in Hungary and can be applied by adapting them to the Hungarian legal system.

The examination of this issue is of particular importance in the present times. Human moral standards are constantly evolving according to the prevailing views of the time. The threshold of "acceptable" violence for sexual offences is lower and lower, whether the victim is male (boy) or female (girl). The body and its inevitably linked sexuality have now - for a very long time - been strongly protected not only by morality but also by law itself. However, the argument that rape is not rape, because it was committed against my wife, simply does not hold water. The body has now acquired a kind of private property status, and as such the owner has a right to protect it.

Unfortunately, however, in the case of sexual offences, victim blaming still plays a very important role, which is why there is still a very high latency to bring these crimes to light. However, unlike in past times, people today have second-class access to information and news, whether real or untrue. Thus, whereas in the past, news of a woman being raped while running or of a minor child being the victim of a sexual offence in a primary school could only become news in the immediate vicinity of the place where the crime took place - if it was known to anyone other than the victim or the authorities - in today's information world, sometimes the news is available on social networks and electronic news portals before it is available to the general public or the authorities. These acts can no longer remain a secret, and more and more of them are reported in the press every day. Accordingly, society is reacting more and more vigorously to these crimes and is demanding that they be prevented and the perpetrators punished. The fact that news, social or community grievances are immediately, even from all over the world, made the subject of public discourse, tends to increase the pressure and expectations of society towards greater trust and swift and effective justice.

That said, I believe that social pressure alone cannot justify a legislative decision, but it can certainly be a good starting point for examining and considering the possible adoption of various foreign practices.

For these reasons, I have decided to attempt a penetrating examination of the practice of chemical castration at world level, the problems and difficulties it raises from both a legal and a health point of view, and to try to answer the question of whether this practice could be adopted into Hungarian law, specifically at the level of criminal law, and if so, how and by what regulation.

The relevance of my research can be articulated around three main questions:

First of all, it is important to take into account the trends of the last decades, namely that in many countries of the world, such as the Czech Republic, France, Denmark, Ukraine, Indonesia, India, the possibility of introducing chemical castration has been introduced or is being considered, and, in recent weeks, the institution of chemical castration has also been an increasingly frequent topic of discussion in various media in our country, given the increasing frequency with which sexual offences are being committed or coming to light, and the growing social expectation that the legislator should take effective action. It cannot be overlooked that the increasing frequency and scale of these offences affecting minors is a source of a protective instinct in all societies, but perhaps even more so in Hungary, which is increasing the expectation that the legislator will take even tougher action.

Secondly, a critical issue in this context, not only from a jurisprudential but also from a legal-philosophical point of view, is the issue of the inviolability of the body, which goes beyond the current practice of chemical castration, to the detection and stopping of certain unwanted brain activities through the use of an AI-controlled chip implanted in the brain.

Thirdly, one of the most important and critical concepts to be examined is free will and, through it, free choice free from influence and coercion, which, in my experience, is one of the most divisive issues in the authorisation of the use of chemical castration.

My aim is therefore, on the one hand, to examine the issue of chemical castration holistically and, on the other hand, to draw general lessons applicable to other legal practices, thus contributing to the academic dialogue of ex-ante legal philosophy.

## **II. Research methods and thesis structure**

In the course of my research - in view of the fact that there is almost no source material in the Hungarian legal literature, or only mentions of the topic - my PhD thesis was based on foreign, mainly English-language literature, journals, PhD theses and studies. In addition, an important part of my research was the examination of international conventions, the case law of the European Court of Justice and the laws and legal sources of countries that have introduced chemical castration as part of their criminal law or in some complementary way. It should be stressed that, due to the sensitive nature of the subject from a health point of view, not only the legal aspects had to be taken into account, but also the biological, health - physical and psychological - aspects, so that in the course of my research I reviewed a number of studies and articles on health, psychology and psychiatry, also generally in English. Taking into account that in my thesis, as it follows from the title, there was a strong emphasis on the study of paraphilic offenders, I contacted Dr. Andrea Somogyi, forensic psychiatrist, clinical

pharmacologist, who, based on her decades of professional experience, supported the findings of foreign articles by answering my questions.

In the first chapter of my dissertation, I consider it necessary to define the concept of chemical castration and to clarify the procedure, because based on my experience, without knowing the exact term, it often provokes strong emotional reactions from laymen and non-laymen alike, which is not surprising, since the word castration stigmatizes the whole process and gives a kind of pejorative charge to the procedure itself. I will try to point out that the name itself is a mistake, as this medical procedure has nothing to do with the real, medical meaning of the word castration.

I will then, as I wrote above, look at chemical castration from a medical point of view, in which I will try to explain the mechanism of action of the drugs currently used and their possible side effects, without, of course, any professional knowledge, solely by means of a presentation of the medical articles and research used, and I will describe an experimental method that has not yet been used and which, according to some, could be a pioneering method in the field of medicine, certainly, but also, if the appropriate legal framework is created, in the field of jurisprudence, including criminal law.

In the following chapter, I will attempt to present - without claiming completeness - international practice. Given that I want to provide a clear and transparent insight into the practices in different countries, I have selected four countries for which I can present a realistic and comprehensive picture of the use of chemical castration and the lessons learned from the literature.

Given that my aim is to answer the question whether chemical castration can be introduced into the Hungarian legal system within the framework of criminal law, an introduction to the theories of justice and the doctrine of sanctions is an indispensable part of my study. In the course of my thesis, I could not attempt to create something new in these areas, as this has already been done to a high standard by respected and respected academics, whose knowledge I have thus called upon.

In the following section, I have seen the need to examine the history of the sanctioning of sexual offences, the legislation in force and the issues relating to sex offenders, as it is essential to have a clear understanding of the range of offences and offenders that could potentially give rise to the use of chemical castration when committed and by whom.

In my research, I have placed great emphasis on the study of paraphilic offenders, reviewing paraphilias from a medical perspective, whereby I am able to share not only the literature but also the experience of a respected medical expert, in order to gain a more substantiated picture of offenders suffering from these mental illnesses.

One of the most important parts of my dissertation is a comprehensive and careful presentation of the ethical aspects of the case, in which I will present the opinions of those who are for or against the decision of the European Court of Justice, as described by various legal scholars in different countries, the analysis of the case law of the American courts, the pro and con arguments on the ethical issues of chemical castration, in the light of international conventions that protect human rights. In my view, ethical considerations are the most crucial of all in deciding whether chemical castration should be introduced at all and, if so, under what conditions.

### III. The research results

In my dissertation, my aim was to examine the international practice of chemical castration in as comprehensive and in-depth a way as possible. I explored the ethical, legal and medical aspects that have emerged over decades of practice, examining them holistically and placing them in the context of international human rights conventions.

From the beginning of the research, it was clear to me that the issue of the introduction of chemical castration was not a clear-cut question. As the literature was analysed, new layers of the problem emerged. In the course of my research, I have been able to find patterns that provide workable, meaningful answers in the areas of target group and regulatory model. The result of my research is who, why and how can be conceived as the subject of chemical castration in the Hungarian legal system.

When examining the practice of the different states, it was found that most states have introduced this procedure for socio-political reasons, which have received widespread media attention, particularly in the light of specific cases of egregious sexual offences and the social outcry in response to them, and the demand for immediate and strict action to be taken by the legislature. As a result, in most cases the laws on chemical castration have been very 'sudden', without careful thought and without specifying all the details, and their justification is based on generalisations about sex offenders, perpetuating two contradictory ideas:

- The first justification was based on the idea that all sex offenders are evil people who can be deterred by the threat of severe punishment. This implies that if sex offenders can be deterred from committing a crime, they are cognitively capable of choosing to commit a sexual crime.
- The second justification is that all sex offenders suffer from OCD and need treatment. Since sex offenders are unable to overcome their urges, the state must suppress these urges by imposing castration. Thus, the political sphere has designed these laws to ostensibly protect the public while 'helping' sex offenders, ensuring both the protection of society and human rights.

In some countries, the compulsion to comply with the law has gone so far as to "order" the law enforcement authorities to impose compulsory chemical castration. This provision can be truly dangerous when such interventions are intended by the law enforcement officer to be ordered in isolation, without recognition of the larger rehabilitative purpose, and with the sole aim of retribution. This tendency is perhaps disappearing today, and has been replaced by a legislative consideration that emphasises the therapeutic nature of chemical castration as opposed to punishment, and is now moving legislation towards a procedure or procedures that have been shown to be effective by the findings and research results that have emerged over time. The initial measures were inexperienced and hasty, but now a wealth of legislative and medical knowledge has been accumulated on the subject.

In the time since the first law on chemical castration was passed, and with the help of the dedicated research work of medical and legal scholars, we know much more about chemical castration as a medical process and the trend in the legally relevant issues (e.g. recidivism, recidivism).

The results of all the research, both health and legal, point in one direction, namely that chemical castration only achieves the results expected by legislators when it was first introduced, namely an exponential reduction in re-offending and recidivism, for paraphilic sex offenders.

The current legislation - which in most cases was triggered by serious but isolated incidents that caused panic throughout the community and thus "fear" became the legislator - does not distinguish between groups of sex offenders. This is because states of fear tend to stereotype groups of individuals rather than correctly identifying the continuum of seriousness of offenders. Of course, there is nothing unusual about the response of legislation to community concern: this is the function of representative democracy. And, after all, 'public confidence in criminal justice policies and practices is necessary for a well-functioning system'.<sup>1</sup> Problems arise, however, where concern is irrational or irrationally high because it is fuelled by fear rather than reason. For in most cases where chemical castration has been made mandatory, this is exactly what has happened. Whereas the principle of nonmaleficence, not only in medicine, explicitly requires and encourages the use of chemical castration where it is appropriate (i.e. effective) and discourages it where it has no therapeutic value. In view of the bioethical imperative of avoiding harm, withholding effective treatments from those for whom they have been shown to be effective is unacceptable, but requiring treatment for those for whom they are clearly ineffective also falls into this category. From this point of view, in answering the question of whether chemical castration can be introduced - on the basis of the principle of justice - sex offenders must be divided into two distinct groups: paraphilic and non-paraphilic offenders.

From the above, it is also clear that the use of chemical castration for non-paraphilic sex offenders is completely unnecessary. This is because for this group of offenders, the use of pharmacological agents has no therapeutic value, so the treatment does not justify the harm caused through side effects. For this population, chemical castration really achieves nothing more than a mere reduction in sexual desire, a potential inability to achieve erection or satisfaction, and all the potential side effects of being at risk. In fact, according to some views, in the case of mentally "healthy" - at least not paraphilic - offenders, chemical castration can have the opposite effect, as anger, despair or even shame over lost sexual abilities can lead to aggression and a desire for revenge that, once released, can lead to the person committing even more serious crimes (e.g. The victim, who has to "suffer" the chemical castration, may be driven to kill the victim or to commit sexual violence by other means. Therefore, for this group of offenders, both the imposition of compulsory chemical castration and the offer of the possibility of it are completely unacceptable. It can be stated that chemical castration is not applicable to non-paraphilic sex offenders.

By rejecting the possibility of applying chemical castration to non-paraphilic offenders, the range of offenders to be examined has been greatly reduced, since from now on the possibility of applying it must be examined with regard to paraphilic offenders.

When examining this group of offenders, it can be concluded, both in view of the protection of human rights and the results of research, that compulsory chemical castration cannot be applied. Mandatory chemical castration would be an interference with human autonomy and a violation

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<sup>1</sup> Harry HOBBS and Andrew TROTTER (2018): Lessons from History in Dealing with Our Most Dangerous, University of New South Wales Law Journal, 41(2), 319-354.

of human rights to the extent described in the previous chapters, which is incompatible with the Fundamental Law of Hungary and international conventions.

At this point, only one question remains to be investigated, namely the offer of chemical castration as an option for paraphilic offenders.

As a conclusion of my research, I can say that this is the only option that I see as feasible and thus introducible within the framework of Hungarian criminal law.

However, in order to answer the question "how", more details need to be examined.

József Vigh<sup>2</sup> - already in an article published in 2002 - stated that in the field of justice, new principles have become justified in (a) the ideological basis, (b) the definition of the aims of punishment and (c) the choice of the means to achieve these aims.

Namely:

(a) In order to explain the causes of justice, the reasons for committing crimes and criminality, it is appropriate to focus on the determinative processes rather than on free will independent of objective conditions, and to focus on the laws of causality, both in the biological endowments of the perpetrator, in his social conditions in the broadest sense, and in his personal state.

b) Accordingly, instead of retributive and deterrent objectives, it becomes necessary to set prevention objectives, the conscious pursuit of norms (specific and general prevention).

c) Instead of punishment in proportion to the offence, the effective means of reducing crime is to impose punishment that is tailored to the offender's personality and living conditions.

Most people recognise that imprisonment alone will not solve the problem of sex offending. Treating offenders is key to the approach to preventing sexual offending and reducing victimisation. Imprisonment may prevent a paraphilic offender from committing illegal sexual acts - for example, a paedophile against children - but it does not change the offender's internal sexual orientation and so once released, the internal paraphilic sexual urge will 'compel' him to commit the same acts. Paraphilic offender treatment offers a more humane and durable solution than incarceration, but at least it can be applied concurrently. It is of paramount importance that whatever treatment or procedure the offender is subjected to should be part of the rehabilitative aspect of the sentence.

Consequently, the first and most important point is that the offender must be subject to expert examination and observation during the criminal proceedings. Any procedure may be offered to the offender only if an expert examination reveals that the offender suffers from a paraphilia. The best way is to set up a multidisciplinary and multidisciplinary team of experts, who can use the full range of clinical, psychometric and psychophysiological tests. From there, we could talk about paraphilic offenders.

It should be noted that the vast majority of research and literature on the castration of sex offenders (if not all) focuses on male paraphilias. This is at least partly due to two facts: first,

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<sup>2</sup> Vigh József: A büntető igazságszolgáltatás néhány alapelve (Acta ELTE, tom. XXXVIII-XXXIX, ann. 2001-2002, 213-222. o.)

the majority of sex crimes are committed by men, and second, paraphilias are more common in men than in women.<sup>3</sup>

For female sex offenders, there was no research available until the end of 2012, nor any research on the usefulness of chemical castration as an intervention. The limited data available on female offenders suggest that a female paraphilia population exists, but it is very small.<sup>4</sup> Female sex offenders commit only about ten percent of all sex crimes, and it follows that the proportion of female paraphilic sex offenders is even lower.<sup>5</sup> Regardless of the small population size of female paraphilic sex offenders, the fact remains that there is no recognised drug intervention for this group that is effective in reducing the urge to reoffend.

The research clearly shows that the effectiveness of chemical castration is greatly enhanced when used in conjunction with psychotherapy or other forms of cognitive behavioural counselling, so that the two together are in fact the appropriate approach to create a treatment programme for the offender.

The treatment programme should be governed by clear legal rules. There should be clear legal guidance on safeguards for the offender and the appropriateness of treatment.

One of the issues to be addressed, given that the use of chemical castration is applicable within criminal law, is the location of the procedure within the sanctioning regime. The first solution is to make chemical castration a punishment, which, in my opinion, cannot be appropriate, because if castration is considered a punishment, it raises a series of ethical issues that do not contribute to this solution. It would mean punishing the offender with artificial suppression of sexual desire, artificial impotence and other side effects of hormonal punishment, as well as unnecessary retribution. Obviously, any sanction is not possible without some sense of retribution, but to declare chemical castration a punishment and not a medical measure is to accept corporal punishment in the criminal sanction system.

In my opinion, the only applicable solution in our legal system would be to consider chemical castration as a measure, even creating a new concept of medical or safety measure within the measures, thus reinforcing the therapeutic, rehabilitative and preventive purpose. The institution of the security measure, which later became known as the medicinal measure, is an emerging concept in Macedonian criminal law, applied in response to a dangerous illness of the offender, and aimed at eliminating, by curing the offender, situations and dangerous conditions that could affect the offender and thus lead him to commit future crimes. Under the Macedonian Penal Code, this measure is specifically applicable to sexual offences committed against

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<sup>3</sup> Center for Sex Offender Management. (2007). Female sex offenders. Retrieved from <https://forensiccounselor.org/images/file/Female%20Sex%20Offenders.pdf> (megtekintés időpontja: 2023.05.12.)

<sup>4</sup> Graham, A. (2007). Simply sexual: The discrepancy in treatment between male and female sex offenders. *Whittier Journal of Child and Family Advocacy*, 7, 145- 167.

<sup>5</sup> Center for Sex Offender Management. (2007), l.m.



children under the age of 14.<sup>6</sup> This is clear evidence that the Macedonian system also distinguishes between categories of paraphilic offenders.

It must then be determined whether the measure can be applied on its own or only after the custodial sentence. Although foreign regulations differ considerably on many issues, there is a clear convergence of views on this point, which is that a custodial sentence, precisely because of the nature of the punishment, cannot be dispensed with. The difference lies in the way the custodial sentence is imposed. In some cases it is possible to impose a suspended prison sentence, in others the possibility of an earlier consideration of the possibility of parole is offered to those who undertake chemical castration, and in others the possibility of release from an indeterminate prison sentence may be offered by the possible undertaking of chemical castration. It can also be noted that the vast majority of countries have much higher minimum and, if any, maximum sentences for sexual offences than is currently the case in our country.

If we say that chemical castration can only be used in conjunction with a custodial sentence - bearing in mind also that if chemical castration is not seen as a punishment, then the social expectation to punish the perpetrator is also satisfied - then the question of the validity of the consent of the perpetrator to chemical castration, which arises from the right of informed and voluntary consent, inevitably arises.

The Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007) stressed that perpetrators of sexual exploitation and sexual abuse who are subject to intervention measures must consent to the procedures in full knowledge of the facts. The Convention allows for intervention programmes to be conditional on parole, but notes that offenders must be informed of the consequences of refusing intervention programmes.

Although the Council of Europe documents do not define chemical castration as a treatment, "intervention programmes" is a general term for programmes aimed at preventing re-offending. These potentially include pharmacotherapy. Another Council of Europe body, the European Committee for the Prevention of Torture (CPT),<sup>7</sup> recently commented in its report on the Czech Republic specifically on the castration of sex offenders in psychiatric hospitals, stating that "medical interventions, and in particular medical interventions with irreversible effects on persons deprived of their liberty, should normally be carried out only with their free and informed consent" and that "consent should not be given under duress, either directly or indirectly". This, and the discussion in chapter eight of this thesis, also suggests that chemical castration cannot be considered torture, inhuman or degrading treatment or cruel or unusual punishment, if properly regulated.

The validity of consent implies an understanding of the nature and effects of the treatment that is the subject of the consent and that the consenter is not being coerced into making decisions that he or she would not have made otherwise. Consent must be free and informed. In the case of chemical castration, the offender should be informed in his or her own language of the drugs used, the duration of their use, the expected benefits and adverse side effects, the consequences for his or her release, and the possibility to refuse the procedure or to change his or her mind at any time during the procedure, with the consequences of this decision. In the light of the ECtHR

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<sup>6</sup> Olga KOSHEVALISKA (2014): Medical Pharmacologic Treatment (A. K. A. Chemical Castration) in the Macedonian Criminal Code, *Balkan Social Science Review*, Vol. 4, 25-45

<sup>7</sup> CPT/Inf (2007) 32. jellentés

ruling referred to above, all this information must be provided both orally and in writing, and the offender must sign a declaration that he has received the information in full, that any questions he may have been asked have been answered, that he understands the information and that the decision is taken without coercion.

The issue of volunteering should also be examined. On this issue, I agree with the view that although the choice between a further custodial sentence or accepting chemical castration may put pressure on the offender to consent to chemical castration, this does not necessarily mean invalid consent, because the choice is still "voluntary". I believe that, on the one hand, the offender thus actually has more options than if he were faced with the option of imprisonment alone, and on the other hand, the majority of paraphilic offenders wish to be free from the desires caused by their illness - desires they are ashamed of, desires that make their daily lives miserable - so that this option, rather than taking away their rights, gives them the right to live a life free of their undesirable desires, in a way reclaiming their human dignity.

In addition to the above, the principle of proportionality, which classically means that the harm caused by the punishment must not be greater than the harm caused by the offender to other people, must be taken into account. Therefore, if we assume that there is a possible violation of voluntariness, in my opinion, we can clearly invoke the incalculable extent of the harm caused by the offender on the victim and social side.

In my opinion, the Danish legislation, which contains the following, may be a guideline for the detailed rules of the procedure itself:

- Prior to the start of treatment, the detainee will undergo a thorough, interdisciplinary clinical discussion and a comprehensive somatic examination programme. In addition, the detainee meets regularly with a psychiatrist/psychologist.

- The detainee must give written consent to treatment, as well as being informed of the treatment. This form of treatment is carefully considered and closely monitored.

So, to sum up, in my opinion, there is only one group of offenders that could be considered for the introduction of chemical castration in Hungarian criminal law, and that is the group of paraphilic sex offenders. In this case, a very comprehensive mental examination, even by several experts, must establish that the offender suffers from a paraphilia and that the offence he committed was committed as a result of this paraphilia. A team of medical specialists should then determine the offender's suitability to undergo chemical castration, both physically and mentally. If the offender is found fit, chemical castration may be offered as a medical measure in addition to a custodial sentence, provided that its acceptance modifies the length of the custodial sentence in some way that is positive for the offender. The offer must be made in writing, but must be accompanied by a medical team who will explain to the offender in precise oral detail the procedure itself, the effects of the drugs, the expected benefits and harms, the expected duration of the treatment and any further questions the offender may have. In addition, the information should include the consequences of accepting or refusing the chemical castration measure. The perpetrator must then sign a declaration that his/her decision was informed and voluntary.

This is the only way I see to introduce chemical castration as a criminal sanction in Hungarian criminal law.

#### **IV. List of publications on research topics**

- Németh-Szebeni Zsófia: A kémiai kasztráció mint büntetés és terápia általános bemutatása, Büntetőjogi Szemle 2022/1. szám, 80-86. oldal
- Németh-Szebeni Zsófia: A mesterséges intelligencia fejlesztésének helyzete és trendjei a világban, Ludovika.hu, 2022.07.28., <https://www.ludovika.hu/blogok/itkiblog/2022/07/28/a-mesterseges-intelligencia-fejlesztesenek-helyzete-es-trendjei-a-vilagban/>
- Németh-Szebeni Zsófia: A Miskolci Törvényszék ítélete a közösség tagja elleni erőszakról, JEMA, 2016/3., 43-49. oldal
- Zsófia Németh-Szebeni: Ethical analysis of the possible introduction of chemical castration as a criminal sanction, Lex Prudentium, Vol 2, Number 1, 2023 (megjelenés alatt)
- Németh-Szebeni Zsófia: A parafiliák és a szexuális bűncselekmények elkövetése közötti ok-okozati kapcsolat fennállásának vizsgálata, Büntetőjogi Szemle (megjelenés alatt)
- Németh-Szebeni Zsófia: A kémiai kasztráció, mint büntetőjogi szankció lehetséges bevezetésének etikai vizsgálata, Büntetőjogi Szemle (megjelenés alatt)
- Németh-Szebeni Zsófia: A kémiai kasztráció, mint büntetőjogi szankció egészségügyi megközelítése, Büntetőjogi Szemle (megjelenés alatt)
- Németh-Szebeni Zsófia: A kémiai kasztrálás rövid története, valamint kitékintés a nemzetközi gyakorlatra, Magyar Jog (megjelenés alatt)