EÖTVÖS LORÁND UNIVERSITY
DOCTORAL SCHOOL OF LAW

GYÖRGY IGNÁCZ:

THE INTERPRETATION AND PROOF OF DRUG-RELATED CRIMES EXCERPTS FROM THE JUDICIAL PRACTICE

SUMMARY OF DOCTORAL THESIS

SUPERVISOR: PÉTER HACK

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I. The objectives of the research and the research questions

There have been serious problems in the jurisprudence of drug-related crimes for decades.[1] The social phenomena that the criminal law is intended to cover, i.e. drug crime and the so-called drug subculture, are in a constant and extremely rapid state of flux, which the legislature has tried to keep pace with in recent decades, often through amendments based on different regulatory concepts. The uncertainty in judicial practice is illustrated by the fact that within a decade three uniformity decisions have been issued by the Supreme Court on the interpretation of the provisions of misuse of narcotic drugs in the 1978 Criminal Code. The 2/2003 Uniformity Decision is a perfect illustration of the challenges posed by rapid legislation: by the time it was issued, the interpreted norms of the criminal law were no longer in force. The legal practitioner is rarely helped by the literature of commentaries and textbooks, which typically do not deal with problematic issues of legal interpretation, mostly contenting themselves with quoting the 1/2007 Uniformity Decision, and the published case-law does not even attempt to provide more detailed dogmatic deductions. The reasoning technique of the 1/2007 Uniformity Decision does not make the situation any easier: it simply adopts the content of previously published case-law, so the uniformity decision does not contain a detailed, theoretically sound interpretation of the law. The fact that the judicial practice has made this case-law the central instrument of legal interpretation is also problematic because the Supreme Court interpreted the rules of the 1978 Criminal Code in it – and the Criminal Code in force is different on several points.

Although drug-related crimes are a relatively well-researched area of criminal law, no comprehensive analysis of judicial practice has been carried out in recent decades. The most recent such research was carried out by Judit Fridli, Andrea Pelle and József Rácz for the period 1990-1992. This research was closely linked to the period of the regime change, as the central question was whether the judicial practice of the period before the amendment of the Criminal Code came into force on 21 May 1993 justified the stricter rules: whether there was a sharp increase in the number of prosecutions against drug dealers, and what differences could be detected in the outcome of prosecutions against the two groups of offenders, distributors and consumers.[2] At the turn of the millennium Ildikó Ritter carried out a study to assess the impact of the amendment of the Criminal Code in 1998.[3] However, this research did not cover judicial practice, its main focus was on the practice of investigating authorities and prosecutors' offices. Melinda Rupa's study, published in 2000, focused explicitly on judicial practice, but only on cases tried before the courts of Zala County.[4] Attila Csik also focused on the practice of one county in his 2005 paper.[5]

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[1] For a summary of the legal interpretation uncertainties that arose in the period up to 2009, see FRECH Ágnes: „Jogalkotás és jogalkalmazás" in FELVINCZI Katalin – NYÍRÁDY Adrienn (szerk.): *Drogpolitika számokban* (Budapest, L'Harmattan, 2009) 279-306.

[2] FRIDLI Judit – PELLE Andrea – RÁCZ József: „A kábítószer kérdés társadalompolitikája a rendszerváltás előtt és után" in KEREZSI Klára (szerk.): *Kriminológiai Közlemények 49.* (Budapest, Magyar Kriminológiai Társaság, 1994) 115-116.

[3] RITTER Ildikó: *(T)örvény. A kábítószerrel való visszaélés büntetőjogi megítélésének hatásvizsgálata – 1999. március 1. után* (Budapest, L'Harmattan, 2003)

[4] RUPA Melinda: „A kábítószer probléma nemzetközi és hazai büntetőjogi szabályozásának áttekintése és a jogalkalmazói gyakorlat alakulása" in KAHLER Frigyes (szerk.): *Büntetőjogi Tanulmányok II.* (MTA Veszprémi Területi Bizottság, Veszprém, 2000) 143-177.

[5] CSÍK Attila: „A Legfelsőbb Bíróság jogalkalmazói gyakorlatának alakulása különös tekintettel a jelentős mennyiség határainak változására és a jogszabály-módosításokra" in KAHLER Frigyes (szerk.): *Büntetőjogi Tanulmányok VI.* (MTA Veszprémi Területi Bizottság, Veszprém, 2005)

The focus of my doctoral research was on judicial practice. The basic reason for this is that problems of interpretation of the criminal law first appear in judicial practice. The research of judicial practice was also motivated by the fact that the characteristics of the publication process of the case-law of the Curia prevent the anomalies from being highlighted. The Curia understandably – and in accordance with its constitutional duty – publishes those decisions that fit into its own practice. This, however, represents a narrow range of cases as the Curia only encounters these offences in review procedure or third-instance proceedings. The lack of consistency in practice suggests that the interpretation of the law which the highest judicial forum considers to be the correct one has not been fully transferred to the practice of the lower courts. These anomalies can only be revealed if the researcher examines the decisions in the individual cases themselves. In this way sound theoretical conclusions can be drawn and it is possible to explore how the various legal institutions actually operate in daily legal practice.

Jerome Frank put it this way: lawyers have to work with the law as it is in practice, so the theory that does not grow out of practice is a bad theory.[6] Dogmatic analysis and judicial interpretation of the law interact: dogmatics provides the epistemological framework for judicial interpretation of the law by elaborating and systematising the definitions that practice will use, and practice provides the examples on which the analysis is based for dogmatics.[7] In developing definitions dogmatics is attentive to practice: in doing so, it acts in the light of case-law and, where conceptual consistency permits, in accordance with practice. The starting point should therefore be the content of legal definitions as accepted by the relevant legal actors.[8]

The first step of the research was to define the subject of the research: the definition of „drug-related crime" had to be clarified. This was based on the assumption that the colloquial and criminal concepts of drugs are not completely overlapping. In the Hungarian scientific literature on drugs István Bayer's definition is generally accepted: the term „drug" covers substances used to produce intoxication, whether or not they are called narcotic drugs, psychotropic substances, medicinal products, magic potions, stimulants or other substances, and whether or not they are subject to international or national control regimes.[9] In colloquial language the term „drug" covers illegal drugs. Administrative rules use the terms „narcotic drug", „psychotropic substance" and „new psychoactive substance", while criminal law uses the terms „narcotic drug" and „new psychoactive substance". It does not make it any easier to understand that the latter two concepts are interchangeable, as a new psychoactive substance can change its classification and become a narcotic drug. After the turn of the millennium the term „designer drug" also appeared in the vernacular. The substances in this category are undoubtedly drugs in the scientific sense, but in criminal law they can be narcotic drugs, new psychoactive substances, or even non-controlled – and therefore legal – substances.

The category „drug-related crimes" is not recognised either in criminal law or in criminal procedural law. It is obvious that many offences can be linked to drugs or new psychoactive substances, the two most obvious examples being driving under the influence of narcotic drugs and robbery by disabling a person by rendering him unconscious. The link between drugs and

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[6] Jerome FRANK: „Are Judges Human? Part 2: As Through a Class Darkly" *University of Pennsylvania Law Review* Vol. 80. 1931. 243.

[7] Aulis AARNIO: „Paradigms in Legal Dogmatics: Toward a Theory of Change and Progress in Legal Science" in Aleksander PECZENIK – Lars LINDHAL – Bert van ROERMUND (eds.): *Theory of Legal Science* (Dordrecht, Springer, 1984) 30.

[8] SZABÓ Miklós – JAKAB András: „A jogdogmatikai kutatás" in JAKAB András – MENYHÁRD Attila (szerk.): *A jog tudománya: Tudománytörténeti és tudományelméleti írások, gyakorlati tanácsokkal* (Budapest, HVG-ORAC, 2015) 54.

[9] BAYER István: *A drogok történelme* (Budapest, Aranyhal, 2000) 13.

certain offences is also historically defined. In the seventies and eighties the use of certain prescriptions drugs, often combined with alcohol, was extremely widespread. The drugs were typically obtained by consumers using forged or counterfeit prescriptions, therefore the scientific literature of the time included document forgery among the drug-related crimes.[10] This link has now largely disappeared as consumption patterns have changed.

Drug crime is a phenomenon described in the criminological literature. According to Miklós Lévay's classification drug-related crimes can be divided into two main categories: supply-side and demand-side. Supply-side offences serve to supply drug users through the illegal production, distribution and propaganda of drugs. Demand-side crimes can be further subdivided into three groups: direct drug crime covers offences that fall within the criminal law provisions relating to the drug problem, indirect drug crime covers offences committed in order to obtain drugs, and consequence crime covers offences committed under the influence of drugs and offences arising from drug-related lifestyles. Indirect drug crime can be further subdivided into two sub-categories: acquisitive crime, where the offender's aim is to obtain drugs directly, and income-generating crime, where the offender obtains money for drugs through criminal activity.[11] Imre Kertész linked crime of consequence to supply-side offences, and included competition between organised crime groups, corruption by drug-related criminal organisations and money laundering.[12]

My doctoral research focused on the legal elements governing supply-side offences and – within demand-side offences – direct drug crime. Thus the research did not deal with either consequential crime or indirect drug crime. Translating this into the criminal acts covered by the Criminal Code the research covered those offences which are committed with drugs in the common sense, i.e. drug trafficking, possession of narcotic drugs and abuse of new psychoactive substances.

The research is based on that the substantive criminal law and the criminal procedure cannot be separated, since substantive criminal law is only applicable in criminal proceedings. This implies the need for a complex analysis of substantive and procedural issues. Accordingly the focus of the research has been narrowed down to the three basic elements of criminal judges' thinking: when the judge resolves the case, he first proves the facts, then completes the legal qualifications and finally imposes the sentence. Of course, in practice, this is a highly complex thought process, where the elements, in particular proof and qualification, interact with each other: to know what are the relevant facts to prove, one needs to know how the act commited by the defendant can be qualified.[13] Scientific inquiry must therefore also anticipate the problems of classification and examine the evidentiary issues in relation to them.

The research has common features with the jurisprudence analysis carried out by the Curia, so Zsolt Ződi's insight can be applied: when a research is aimed at exploring a specific problem, a tension in the application of the law, the hypothesis that the problem exists can be a minimum, but that this is „a very thin starting point and the chances of rejecting it are very small".[14] This

[10] POLT Péter: „Kábítószer-élvezet?" *Szakszervezeti Szemle* 1986/4. 57.
[11] LÉVAY Miklós: *A kábítószer-probléma és a bűnözés összefüggései* Kandidátusi Disszertáció, 1991, *real-d.mtak.hu/49,* 56-57.
[12] KERTÉSZ Imre: „Kábítószer-bűnözés I. rész – Jegyzetek egy vita margóján" *Belügyi Szemle* 1995/11. 31-32.
[13] In the case of drug-related crimes, it is a long-standing problem that the complexity of the text of the criminal law and the resulting difficulties in classification have a negative impact on the evidentiary activities of the investigating authority, see RITTER 2003 81.
[14] ZŐDI Zsolt: „Módszertani javaslatok és gyakorlati megjegyzések a Kúria joggyakorlat-elemző tevékenységéhez" *Forum Sententiarum Curiae* 2018/2. 16.

is true to a certain extent: it is almost impossible to examine an interpretation problem of the law where it would not be possible to identify court decisions with conflicting principles. It is therefore also necessary to determine when judicial practice can be considered to be divided and, in comparison, when a judicial decision should be assessed as an error of judgment against a uniform practice. According to the test developed by the European Court of Human Rights, the jurisprudence of Hungarian courts can be considered divided when 1) the practice of the Curia is fraught with serious and long-standing inconsistencies, 2) the Curia has not or has not adequately applied the possibilities open to it to unify the case law in order to resolve the inconsistency in question, 3) the practice of a particular court of appeal differs, 4) the practice followed by the courts of appeal differs.

Based on the above, one of the hypotheses of the research could be considered to be the assertion that the judicial practice of drug-related offences is divided, but, following Zsolt Ződi's line of thought, there was very little chance of rejecting this hypothesis. Therefore, the basic aim of the research was not to show whether the jurisprudence of drug-related offences is divided, but to explore the reasons behind the divergent interpretations of the law. This was the starting point for formulating the hypotheses of the research, broken down into the different sub-areas examined.

Regarding the definition of drugs in criminal law I formulated the hypothesis that the complexity of international, EU and national legislation on the definition of drugs and new psychoactive substances and on the scheduling of controlled substances is the cause of the difficulties in law enforcement. The problem could be divided into several sub-issues: (1) does the complexity of the legal system behind the definition of drugs in criminal law violate the requirement of clarity of the norms, (2) can a legal norm be found to be contrary to the Fundamental Law of Hungary in the light of the practice of the Constitutional Court, (3) does the complexity of the legal regulation allow for a well-founded plea of error, (4) what questions of legal interpretation are raised by the frequent changes in the background norms in the Criminal Code, (5) does the complexity of the legal system in the field of drugs in the EU give rise to a lack of clarity of the norms, (6) whether the difference between the harmful effects of different drugs is reflected in judicial practice.

My second hypothesis was that the boundaries between the offences of drug trafficking and possession of narcotic drugs are not clear and are becoming increasingly blurred in jurisprudence, which leads to unresolved demarcation issues. The hypothesis testing in this case could also be extended to several specific areas of investigation: (1) whether the regulation of the Criminal Code follows the system of the relevant international conventions, (2) whether the unification activities of the Curia over the past two decades have produced adequate results, and whether the guidelines and case law decisions issued, in particular the 1/2007 Uniformity Decision, are suitable for shaping the practice of the lower courts. Ildikó Ritter concluded in a study[15] that the legal environment has not been able to keep pace with the changes in the drug market, so that the offence commited by the defendant have to be judged based on unrealistic standards. The research also provided an opportunity to test this claim and a third question could be asked: (3) whether the Curia has successfully adapted its interpretation of the norms of criminal law to the new phenomena of drug trafficking in its published case law.

The discrepancies between the judges' decisions may also be due to the different bases on which the evidence was assessed. This is also a valid concern, because daily experience shows that in

[15] RITTER Ildikó: „Az ördög a részletekben lakozik 1. Az országos büntetési gyakorlat alakulása a kábítószer-kereskedelem miatt indult ügyekben" *Ügyészségi Szemle* 2020/3. 42-60.

many cases the evidence available on the defendant's intentions and the factual and legal conclusions drawn from it are not clearly distinguished in the reasoning of court decisions. This part of the research is purely descriptive, and therefore my primary objective was to answer basic questions such as (1) on what facts do courts base the legal conclusions on the defendants intent to distribute, (2) on what evidentiary tools do they base these facts, and (3) can procedural issues specific to drug-related crimes be identified in relation to these evidentiary tools.

The quantity of drugs involved is of particular importance in the classification of drug-related crimes. Here, too, the legislation and judicial practice are complex: the fact-finding process is different for seized and unseized drugs, and the way in which the Criminal Code regulates the legal quantity of the drug in question is also of fundamental importance. My hypothesis was that section 461 (4) of the Criminal Code has caused insoluble difficulties of interpretation for the judiciary. The hypothesis test in this section also assumed the examination of several sub-problems: (1) what kind of evidence should be evaluated when the drug has been seized during the investigation, (2) how the quantity of the unseized drug can be established beyond reasonable doubt, (3) how courts interpret section 461 (4) of the Criminal Code, (4) how evidence can be provided for the average effective dose of the non-accustomed user.

With regard to sentencing practice several hypotheses could be formulated: (1) sentencing practice does not treat the offence of drug trafficking committed in respect of a substantial quantity of narcotic drugs as an offence punishable by life imprisonment, (2) the judicial practice is far from using the available sentencing range, (3) the territorial differencies in sentencing are caused by different assessments of sentencing factors, (4) the prosecutor's sentencig motions are not in line with the sentencing practice of the courts and therefore cannot be effective – in other words current prosecutorial practice is unsuitable for achieving the legislative objective of simplifying the procedure.

II. The research method

Since the subject of the research was the judicial practice of drug-related crimes, a research method had to be chosen that was suitable for examining judicial practice in depth. To achieve this objective methods of legal dogmatic alone did not seem sufficient. Historical analysis, the study of the scientific literature and the processing of published decisions of the Curia do not provide an answer to the question of whether the interpretation of the law that the Curia considers to be correct is actually applied in the legal practice of the lower courts, nor do they provide an answer to the question of whether there are regional differences or the reasons behind the different sentencing practices. For these reasons the research has taken on a distinctly empirical character during the analysis of the decisions, which has been further strengthened during the analysis of sentencing practice.

Through the historical analysis, my aim was not only to show the path leading to the current legislation, but also to identify the roots of the problems of interpretation of the legal norms that still exist today. The development of the legislation governing drug-related crimes has not followed a straight line: there are a number of issues that have been unresolved for decades, but there are also issues for which the legislator has developed solutions that previously seemed appropriate, only to revert to a version that could be criticised (e.g. the definition of quantity and the definition of drugs in the Criminal Code). The historical analysis also provided an opportunity to review the scientific literature to see whether the problems raised by science and the responses to them have been reflected in the legislation and in the application of the law.

As the focus of the research was on the definition of drugs, punishable offences, quantification and sentencing, I have narrowed the historical analysis to these sub-issues.

The main aim of the research was to analyse the content of judicial decisions in individual cases, where the content analysed was the court decisions issued in individual cases. The basic methodical question was the selection of the judgments to be analysed and the compilation of the sample. Detailed knowledge of the case-law required a comprehensive data collection in order to identify not only the predominantly followed practice of the courts, but also divergent solutions and possible regional variations.[16]

The sample was selected from cases of drug trafficking, possession of narcotic drugs and abuse of new psychoactive substances falling within the jurisdiction of the regional courts. The reason for this selection is that these judgments are fully available in the Collection of Judicial Decisions. Based on the section 163(1) and (3) of the Act on the Organization and Administration of Courts the Collection of Judicial Decisions contains all the judgments issued in cases which have been tried at first-instance by a regional court and in which an appeal has been filed. The collection also contains the judgments issued in cases in which a regional court of appeals has acted as a court of third-instance.

Although final judgments at first-instance were not included in the sample, it is rare in first-instance cases of regional courts in general and particularly rare in high-profile drug cases for both the prosecution and the defence to declare that they accept the conclusive decision. The absence of cases that have become final at first-instance does not impose methodological probles, because the primary task of the analysis of the decision is to analyse the legal reasoning of the courts, and this reasoning cannot be revealed in a judgment with a short statement of reasons pursuant to Article 562(1) of the Code of Criminal Procedure.

The procedural provisions that came into force after the start of the research, which allow the court to give a short statement of reasons for the judgment if the conviction was based on the defendant's guilty plea or if an appeal was filed only on the application of the sentence and/or on ancillary issues, have caused a problem. These judgments only give detailed reasons for the imposition of the sentence and other provisions, so that neither the procedural problems raised during the proceedings nor the legal reasoning behind the conviction can be reconstructed from the text of the judgment. This has reduced the sample, but does not necessarily mean that the number of relevant decisions has been reduced, as these sentences weren't challenged in the court of appeals neither on the basis of the facts established, nor the legal classification given by the first-instance court. So it can be assumed that in these cases there was no legal problem affecting the merits of the case, and the sentencing issues can be investigated on the basis of the short statement of reasoning.

Regarding the section 20(1) of the Code of Criminal Procedure drug-related crimes falling in the jurisdiction of the regional courts are as follows: drug trafficking under the sections 176(3) and 177(2) of the Criminal Code, possession of narcotic drugs under sections 178(2) (c) and 179(3) (b) of the Criminal Code. The abuse of a new psychoactive substance is generally not falling in the jurisdiction of the regional courts, but such cases were included in the sample because drug trafficking and possession of narcotic drugs are often committed by offenders who also deal with new psychoactive substances. And since the offences of drug trafficking and possession of narcotic drugs or abuse of a new psychoactive substance are essentially identical,

[16] HAJDU Gábor: „A kvantitatív és a kvalitatív társadalomtudományi kutatás módszerei – dióhéjban" *Forum Sententiarum Curiae* 2018/2. 4.

the interpretation of the law developed in relation to the former offences is by definition also applicable to offences involving the latter (BH2016. 76.).

The provisions in sections 177 and 179 of the Criminal Code are of no practical relevance, and therefore the basic characteristic of the cases in the sample was the quantity of drugs which reached a significant quantity. This does not mean, however, that minor offences could not have been analyzed through this sample. Drug-related crimes are characterised by cooperation of several perpetrators, so the court will typically examine the actions of multiple defendants in one case. This also means that offences that would otherwise fall within the jurisdiction of the district court are often brought before a regional court. In addition, it is not uncommon for the court to rule in the judgment that the offence committed by the defendant did not involve a significant quantity of drugs, so that the qualification of the judgment will no longer cover an offence that falls within the jurisdiction of the regional court.

It follows from the fact that the jurisdiction of the regional court can be established on the basis of the quantity of drugs that there is no substantive difference in the other characteristics of the offence in cases falling within the jurisdiction of the regional court and the district court, and that the questions of interpretation of the law raised are therefore similar. However, cases before the regional court typically involve complex, multifaceted evidentiary issues, so both substantive and procedural issues of interpretation and evidentiary problems are more likely to arise.

For these reasons, the sample was suitable for generalisation in relation to drug trafficking cases. However, cases of possession of narcotic drugs were problematic in this respect, as practical experience shows that offences involving the possession of small quantities of drugs are rarely treated by investigating authorities in conjunction with cases involving a more serious offence. Investigating authorities seek to remove cases against consumers from the cases against drug traffickers and therefore encourage diversion. If, due to the failure of the diversion, the prosecution is filing charges, the case will be brought before the district court.

Preliminary surveys indicated that the number of cases to be sampled would remain in the hundreds, so that full data collection was feasible. I completed the data collection phase of the research on 30 August 2022, when I had 656 decisions available, distributed as follows: Debrecen-Regional Court of Appeals – 124 cases, Budapest-Regional Court of Appeals – 231 cases, Győr-Regional Court of Appeals – 117 cases, Pécs-Regional Court of Appeals – 47 cases, Szeged-Regional Court of Appeals – 137 cases. The number of judgments was close to the upper limit of the amount that could be processed alone, but I decided not to narrow the sample down as this could only have been done by appropriate statistical sampling, which would have been another labour-intensive exercise. Therefore, the decision analysis was carried out on the full sample. In total 28 cases were identified in the sample where the final judgment was issued on the third-instance. This is such a small number that it was not necessary to analyse these cases separately.

The analysis of the decisions is not a re-examination of the underlying case, nor is it intended to verify the correctness of the judgments, and in particular not to review the assessment of the evidence and the interpretation of the law. The aim was to filter out generalisable legal principles and abstract interpretations of the law that could be used as guidelines from the reasoning of the decisions. Since the basic aim was to identify the problem I was primarily interested in where the court of appeal had entered into a dispute with the court of first-instance. However, it was also relevant to the research questions if the regional court and the

court of appeals had reached a uniform interpretation of a particular question of interpretation of the law, and if this interpretation had not been reflected in the practice of other courts.

The decisions of the court of appeals do not give a complete picture of the evaluation of the evidence. In the criminal procedure the court of first-instance is the factfindig court, the taking of evidence takes place at the trial at first-instance and the full assessment of the evidence is carried out by the court of first-instance in its judgment. The court of second-instance may overrule this assessment of the evidence if the facts and/or the classification are also subject to an appeal, but even then it will only deal in detail with those evidentiary issues where it has identified a problem. For the judgment of the court of appeal to contain a detailed legal reasoning on the assessment of an evidentiary element, it is necessary that new arguments are raised in the appeal procedure or that the court of appeal disagrees with the trial court's assessment of the evidence. In all other cases the court of second-instance merely records that it agrees with what the court of first-instance has stated. This is compounded by the fact that the judgments of first-instance usually only refer to the unproblematic evidence without going into detail about their content, so that in many cases the assessment of the trial judge made by analysing the case file (whether the evidence is legal, relevant and credible) is not reflected in the judgment.

These characteristics mean that an analysis of the judgments at second-instance does not provide a complete picture of the evidence of drug-related crimes. However, I did not have the resources to carry out a case file research based on a nationwide sample. I have therefore decided to use the decisions of the courts of appeal as a basis for examining, in particular, the points in the deliberative activity of the courts of first-instance on which elements are typically challenged in appeals. In this way, it was possible to filter out the evidentiary issues that could be considered decisive for the classification of the acts.

The evidentiary issues thus identified were also examined through a case study. A case study is primarily intended to provide a detailed, in-depth examination of a particular situation, but is not generally suitable for drawing general conclusions.[17] Therefore I did not look for a typical case, as typical evidentiary issues could be identified in the analysis of the second-instance judgments. The aim was to find a critical case in which several evidentiary issues were raised. In this way it is possible to identify procedural actions typical of drug-related crime investigations where there is a greater chance of procedural errors that could later make it more difficult to prove the prosecution's case in court. It also provided an opportunity to study the judicial handling of investigative errors.

To select the case I had to draw on my experience as a judge as I did not have the opportunity to select a „problematic" case based on extensive preliminary research. I therefore chose a case that I had heard at first-instance at the Budapest-Regional Court. The investigation and adjudication of the criminal case against A.S.E. and his associates[18] involved a number of evidentiary issues: the use of a drug-sniffing dog, the opening of a postal package and the discovery of its contents, the lawful conduct of a search, the use of undercover agent and covert surveillance. The data in the case also gave me the opportunity to study, by means of a concrete example, the evidence taken on the demarcation issues of drug trafficking and possession of narcotic drugs. As a number of evidentiary problems had already come to light in the first-

[17] Lisa WEBLEY: „Qualitative Approaches to Empirical Legal Research" in Peter CANE – Herbert M. KRITZER (eds.): *The Oxford Handbook of Empirical Legal Research* (Oxford, Oxford University Press, 2010) 940.
[18] The study of the case documents was made possible by a research permit issued by the deputy president of the Budapest-Regional Court under number 2023.El.XI.F.50/5.

instance proceedings, the investigators involved in the investigation were also examined as witnesses at the trial. Therefore the data in the case provided insight into the thinking of experienced investigators in drug crime investigations and the considerations behind tactical decisions in investigations.

In the initial phase of the research I focused on the methodological issues of analysing sentencing practices and published a paper on this topic in 2020.[19] I have taken the theoretical considerations and methodological principles detailed in this study as a guideline for the preparation of the thesis.

The research on sentencing practices required a complex study combining qualitative and quantitative research methods. The first research question was how the sentencing practice for drug-related crimes evolves in the sentencing of each court. This question was answered by using a sample drawn up as detailed in the decision analysis, but the sample had to be narrowed down.

As explained in detail in the aforementioned methodological study, quantitative analysis gives reliable results only if the sample is homogeneous. This homogeneity can be ensured by including in the sample only convictions for which the court has imposed a sentence for the same offence within the same penalty range. This means that first of all the qualification of the offence must be identical. This meant that only convictions for drug trafficking under the section 176(3) of the Criminal Code and possession of narcotic drugs under the section 178(2) (c) of the Criminal Code could be included in the sample.

Since the penalty range had to be the same, any conviction where the court had to apply a special sentencing rule that increases the upper limit or give an opportunity to cross the lower limit of the penalty range had to be excluded. Thus the sample excluded convictions where (1) a cumulative sentence was to be imposed, (2) the sentencing rules for special, multiple and violent multiple recidivists were to be applied, (3) reduction of punishment was available, (4) the defendant commited the criminal offence in a criminal organisation or (5) the defendant was a juvenile. The composition of the sample thus narrowed down is shown in Table 1.

	DIT[20]	FIT	GYIT	PIT	SZIT
Drug trafficking	128	207	100	25	57
Possession of narcotic drugs	6	23	2	1	65
Total	134	230	102	26	122

Table 1: Number of convictions selected for the analysis of sentencing practices

The number of convictions in the sample was suitable for territorial comparison in the case of drug trafficking. However, in the case of possession of narcotic drugs, only the decisions of the Budapest- Regional Court of Appeal and the Szeged-Regional Court of Appeal could be used to achieve this objective. Therefore, the comparative analysis concentrated on the decisions of

[19] IGNÁCZ György: „A büntetéskiszabási gyakorlatra irányuló empirikus kutatások elmélete és módszertana" *MTA Law Working Papers* 2020/1.

[20] In the dissertation I abbreviate the names of the regional courts of appeal in the manner customary in court administration: DIT – Debrecen-Regional Court of Appeal, FIT – Budapest-Regional Court of Appeal, GYIT – Győr-Regional Court of Appeal, PIT – Pécs-Regional Court of Appeal, SZIT – Szeged-Regional Court of Appeal.

these two courts, otherwise the comparison of the sentencing practices of the two offences could be made through the national averages.

The data of convictions alone were sufficient to answer the question of whether the courts are exhausting the entire penalty range and how sentencing practices for drug trafficking and possession of narcotic drugs compare. However, answering the question of why sentencing practices have developed in this way has required the use of qualitative methods. Content analysis provided the opportunity to analyse the aggravating and mitigating circumstances taken into account in the decisions, and thus to draw conclusions about the factors that influenced the specific amount of the penalty.

A further hypothesis of the research was that life imprisonment for the offence of drug trafficking committed with a significant quantity of drugs does not arise, despite the fact that the law allows the possibility of indefinite imprisonment. The data of convictions provided an opportunity to test this hypothesis. In answering this question, I also checked the full sample used for the content analysis, as it could not be excluded that the most severe sentence was reserved by the courts for multiple recidivist offenders or for offences committed in a criminal organisation. Here, too, I supplemented the analysis of the data with a content analysis, in which I examined, on the basis of the text of the reasonings given by the courts, whether the courts were even keep in mind the fact that this offence is punishable by life imprisonment. In principle, for such offences, the court should first decide whether an indeterminate or determinate imprisonment is appropriate and only then assess the sentencing factors against the median value of the penalty range.

The final step in the research on sentencing practice was to examine the effectiveness of the prosecutor's sentencig motions. The aim was to answer the question of whether the prosecutor's sentencig motions based on section 422(3) of the Code of Criminal Procedure in drug trafficking cases contain sufficient motivational force to induce the defendant to adimt guilt in the crime charged at the preliminary hearing. The fact that the indictments were not publicly available posed a serious problem here, so I could only work from data to which I had access as a judge. During the data collection phase of the research, this was the register of criminal cases at the Budapest-Regional Court, so I used this database to collect the data on the basis of the criteria already analysed.[21] Since the appellate forum of the Budapest-Regional Court is the Budapest-Regional Court of Appeal, I compared the data from this court from the sample used to examine sentencing issues with the data extracted from the indictments.

III. Answers to the research questions

The analysis of the international drug control system has shown that the objectives of the international community in the area of drug control have remained essentially unchanged since the conclusion of the 1912 Opium Convention: ensuring the availability of medically useful drugs for medical and scientific purposes, preventing the diversion of these drugs from licit use, and restricting the supply and use of drugs for medical and scientific purposes only.[22] One of the most important achievements of the international drug control regime established by the

[21] The research permit referred to in footnote 18 also covered the processing of these data.
[22] Bernard LEROY: „Drug Trafficking" in Neil BOISTER – Robert J. CURRIE (eds.): *Routledge Handbook on Transnational Criminal Law* (London-New York, Routledge, 2015) 232.

UN conventions has been the harmonisation of national legislations.[23] This is mainly due to the fact that the conventions are universally accepted and they set out the fundamental features of the criminal legislation of the States Parties.

With regard to the definition of drugs, the only possible derogation from the rules of the Single Convention on Narcotic Drugs and the Convention on Psychotropic Substances is stricter control, i.e. the control of the substances listed in the schedules of the two Conventions is compulsory for all States Parties. The scope and definition of the punishable offences are also set out in the UN conventions: the obligation to criminalise supply-side offences is unquestionable, but there is some leeway for national legislations on the criminalisation of the use of drugs. There is also a narrow margin for the States Parties when it comes to determining the range of penalties, since the Conventions consider imprisonment to be the appropriate sanction, which may be supplemented at most by financial sanctions or, in the case of demand-side offences, the possibility of criminal justice diversion programs.

The history of criminal law shows that the legislation has constantly tried to keep pace with changes in the drug market and drug use patterns, and the judicial practice has tried to adapt to the constantly changing legal environment. The fact that the drug problem was politicised after 1989 made the situation more complicated: not only the constant changes in the text of the Criminal Code, but also the changing penal policy every four years had a considerable impact on legislation at the turn of the millennium. The history of the regulation also shows that these phenomena have led to serious problems of legal interpretation over the last forty years, mainly around the interpretation of offences, the drawing of quantitative limits and cumulative issues. The situation has been complicated by the designer drug explosion, which made questionable even the criminal definition of drugs.

The uncertainties of interpretation surrounding the offences may be surprising, since the production, cross-border transport and sale of drugs have been a punishable offence since the beginning, i.e. since 1930. Even the 1961 Criminal Code, which contained relatively simpler rules, covered the import, export and distribution of narcotic drugs. The 1978 Criminal Code adopted the offences outlined in the Single Convention on Narcotic Drugs, and the definitions contained therein became applicable in the domestic legislation, and the amendment of 1993 was specifically designed to comply with the rules of the 1988 UN Convention. Despite all this there was not any decision from the higher courts in the last half century which refers to the definitions of the UN conventions.

The questions of interpretation of the text of the Criminal Code, which arose in relation to the distinction between trading and placing on the market, and between the conduct of distributors and that of purchasers and producers were not fully resolved by the 1/2007 Uniformity Decision. In addition with adopting the interpretation published in the BH2002. 175. decision, the uniformity decision became conflicting with the legislative interpretation of trading. The amendment of 1993 described trading as a broader activity than placing on the market, including, inter alia, the concealment, packaging and transport of goods. In contrast, the uniformity decision only referred to the regularity and the profit-making as the demarcating criterion, and otherwise gave the two types of conduct essentially the same interpretation. The uncertainty is illustrated by the fact that the applicability of a 1989 court decision has been the subject of debate after each amendment and even in 2012.

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[23] Allyn L. TAYLOR: „Addressing the Global Tragedy of Needless Pain: Rethinking the United Nations Single Convention on Narcotic Drugs" *O'Neill Institute Papers 6.* (2008) 560.

Overall the recent attempt by the Supreme Court to define the offences can be assessed as the vague legal reasoning and the references to previous guidelines made the case-law itself, and thus the judicial practice, difficult to interpret. This problem is exacerbated by the fact that the uniformity decision interprets the text of the 1978 Criminal Code, which are not fully identical to those of the Criminal Code in effect, hence the uniformity decision is only partially applicable in the current legal context.

The guidelines of the Supreme Court have been rarely able to orientate judicial practice, and the fact that the Supreme Court has issued three uniformity decisions on the same legal text within less than a decade indicates that the practice is unable to keep up with changes in the wording of the law. Since 2007 no new guidelines have been published, which is a very serious problem mainly due to the fact that the legal interpretation of the 1/2007 Uniformity Decision is already unclear and controversial on several points, but even more so because the text of the Criminal Code has changed substantially since the uniformity decision was issued. Thus instead of providing clear guidance, the uniformity decision has itself become a source of law open to interpretation.

From 1971 onwards the definition of quantitative limits, which fundamentally influences the classification of drug-related offences, was the task of the judicial practice. These efforts were not successful and thus uniform judicial practice could not be developed. Therefore in 1999 the legislator enacted a law specify the quantitative limits for the most common drugs, which was an acceptable solution until the designer drug explosion. From the mid-2010s, however, it became increasingly common to base the classification on the average effective dose of the non-accustomed user, which raised new interpretation problems because of the vagueness of the text.

With regard to the definition of drugs in criminal law, the research was based on the assumption that the complexity of international, EU and national legislation on the definition of drugs and new psychoactive substances and on the scheduling of controlled substances is the cause of the difficulties in law enforcement. The problem was divided into several sub-issues: (1) does the complexity of the legal system behind the definition of drugs in criminal law violate the requirement of clarity of the norms, (2) can a legal norm be found to be contrary to the Fundamental Law of Hungary in the light of the practice of the Constitutional Court, (3) does the complexity of the legal regulation allow for a well-founded plea of error, (4) what questions of legal interpretation are raised by the frequent changes in the background norms in the Criminal Code, (5) does the complexity of the legal system in the field of drugs in the EU give rise to a lack of clarity of the norms, (6) whether the difference between the harmful effects of different drugs is reflected in judicial practice.

Based on my analysis of the international and EU regulatory environment, I have found that the system for scheduling drugs was already not clearly regulated in the Single Convention on Narcotic Drugs, and the problems were further exacerbated by the partly different regulatory concept of the Psychotropic Convention. The procedure for amending schedules is slow and cumbersome, and the criteria for listing have never been clearly defined, so that the explosion of designer drugs has not been effectively addressed by the UN and by the States that have developed national regulations based on the UN Conventions. The focus of action against designer drugs has thus shifted to individual states and, in Europe, to the European Union.

On the basis of a historical analysis of Hungarian legislation, I found that the definition of drugs in criminal law was already missing from the norms of criminal law when the 1925

International Opium Convention was transposed. In the first decades the legislator applied the scheduling regulation whereby the substance included in the list and „suitable for pathological enjoyment" was considered a drug from the point of view of criminal law. It was only in 1993 that this provision was dropped, making the legislation purely schedular, but a decision of the Constitutional Court in 2004 was necessary to comply with the constitutional requirement of clarity of norms – until the mass appearance of designer drugs in the country. In Hungary, as in other parts of the world, the designer drug explosion undermined the scheduling system based on the UN Conventions, and the legislator attempted to solve this problem by codifying the list and generic regulations in parallel.

This is undoubtedly an effective way to control the new substances that have emerged, but the generic legislation clearly violate the constitutional requirement of normative clarity, as developed in the 2004 and 2021 decisions of the Constitutional Court: the legal norms must be such that a citizen without specialist knowledge can determine which substances are currently classified as drugs. It can therefore be concluded that the complexity of legal system underlying the definition of drugs in criminal law infringes the requirement of clarity of norms, hence the Controlled Substances Regulation is unconstitutional.

Based on the analysis of the decisions it was found that the problems of law enforcement arising from the complexity of the underlying norms (i.e. how the offender can know that he is committing an offence with a prohibited substance) are solved by the judiciary with a relatively simple test: if the offender obtains the substance for the purpose of mind-altering and/or treats it as an illegal substance, he must at least have had the eventual intent to obtain a controlled substance. It can be seen that in the light of judicial practice there is no meaningful latitude to plead error, this defence cannot realistically lead to an acquittal in drug-related offences.

The research data show that the questions of application of Article 2 of the Criminal Code remain unresolved: some of the judgments analysed, in the light of 1/1999 Uniformity Decision, do not apply the law in effect at the time of adjudication, while other judgments consider the law more favourable to the defendant to be applicable. Judicial practice is fragmented, the decisions do not even show a majority view and the two competing interpretations of the law cannot be brought closer together.

In examining the justification for differentiating on the basis of the harmful effects of drugs I concluded that differentiation at the level of written criminal law could be a supportable solution according to the relevant international and EU legal standards. Judicial practice is divided on the issue, but the arguments against differentiation are not tenable from a dogmatic point of view. However, the lack of an accepted scientific definition of the categories of soft and hard drugs and the fact that it is not for the judiciary to identify the harmful effects of certain drugs and to classify them in this way are identified as serious problems.

In the field of drug-related offences, my starting point was the empirical fact that the boundaries between the different types of conduct are not clear and are becoming increasingly blurred in the case law. On this basis, I asked three questions: 1) does the regulation of the Criminal Code follow the system of the relevant international conventions, 2) has the unifying activity of the Curia in the last two decades had the right results, is the guidelines and case law decisions issued, in particular the 1/2007 Uniformity Decision, are suitable for shaping the practice of the lower courts, 3) whether the Curia has successfully adapted the interpretation of the substantive criminal law rules to the new phenomena of drug trafficking in its published case law decisions.

The conclusion to be drawn from the historical analysis is that the 1998 amendment broke with the regulatory logic of the UN Conventions when it split the conduct of distributors and suppliers into two categories of offences. The system established in the amendment has been carried over into the current Criminal Code without any substantive change, so the Criminal Code regulates, under the subheading of possession of drugs, conducts which, according to the UN Conventions, fall under the definition of „illicit drug trafficking". The EU has developed its own legislation on the basis of the UN Conventions, and Article 2 of Framework Decision 2004/757/JHA of 25 october 2004 laying down minimum provisions on the elements of criminal offences also excludes acts committed for the purpose of personal consumption from the definition of drug trafficking.

The solution chosen by the UN and the EU is more in line with the everyday concept of drug crime. Anyone who cultivates, stores or smuggles drugs in large quantities is certainly not doing so for their own use, in which case the only logical conclusion is that they are trying to channel the drugs into the commercial market. Whether this is done by him personally or by another perpetrator is in fact irrelevant, given that the act itself is linked to the trafficking of drugs.

In the past, these features have appeared in the legislation. For example, the 1961 Criminal Code did not include a detailed list of conducts because, according to the Ministerial Explanatory Memorandum to the Act, import, export and distribution are all included in the concept of „placing on the market".[24] The clear break with this legislative concept was the 1998 amendment, one of the aims of which was to „provide for a higher threshold of punishment for offences involving the 'distribution' of drugs than for those involving the 'production' or 'transport' of drugs". In this way, the legislator wanted to make it clear that the „distribution" type of conduct is of paramount importance from the point of view of danger to society.[25]

This seems a flawed concept, because the purpose, content and means of criminal intervention are different for consumers and for producers and traffickers of drugs: while the former are primarily targeted at treatment and resocialisation, the punishment of illegal drug producers, manufacturers and traffickers is aimed at retribution and deterrence.[26] The legislation can also be criticised for moving away from the roles of the drug market. It is clear from the common understanding that anyone who cultivates, stores or smuggles drugs in large quantities intends to channel the drugs into the commercial market, and is therefore engaging in drug trafficking irrespective of the fact that he or she will no longer be the one who will be selling the drugs.

These aspects do not appear at all in the judicial practice. Despite the fact that the legislation is explicitly based on the UN Conventions and the Framework Decision, the relevant case law published by the Curia does not deal with these legal instruments and the definitions contained therein, not even by reference.

Thus, the answer to the question of delimitation is therefore clear: the substantive criminal law does not follow the logic of the international conventions and the regulatory solution chosen by the EU, and is also divorced from the real nature of the social phenomenon it is intended to

[24] NÁNÁSI László: „A kóros élvezetre alkalmas anyagok a magyar büntetőjogban" in NAGY László (szerk.): *Jogász Szövetségi Értekezések* 1986/2. (Budapest, Magyar Jogász Szövetség, 1986) 126.
[25] Ministerial Explanatory Memorandum to the Act LXXXVII of 1998 section 62-63. §
[26] LÉVAY Miklós: „A kábítószer-probléma büntetőjogi szabályozásának egyes kérdései az Európai Unió országaiban" in GÖNCZÖL Katalin – KEREZSI Klára: *Tanulmányok Szabó András 70. születésnapjára* (Budapest, Magyar Kriminológiai Társaság, 1998) 164., KARSAI Krisztina: „A kábítószer-fogyasztás büntetendősége (elvek, elméletek pro és kontra)" *Acta Universitatis Szegediensis: Acta Juridica et Politica* 54 (11) (1998) 4., 18.

regulate. The discrepancies between the characteristics of the drug market, the regulatory concept and the interpretation of the law by the courts mean that the judicial practice cannot provide a consistent solution to a situation where it is clear from the relevant facts that the offender did not intend to use the large quantities of drugs in his possession for his own consumption, but the details of the distribution cannot be clarified in sufficient depth.

The 1/2007. Uniformity Decision was not suitable for standardising practice even at the time of its drafting, mainly due to the contradictory and vague legal reasoning it contained. These shortcomings are now even more pronounced, as not only has the drug market undergone fundamental changes since the uniformity decision was issued, but the substantive legal norms have also changed. The shortcomings of the guidelines of the Curia are also reflected in the fact that the judicial practice is fragmented on a number of issues of legal interpretation, with different regions defining the scope of the facts that may support the conclusion drawn to drug trafficking differently, and the boundary between the offences of placing on the market and trafficking is not clear. In the light of the above it must be concluded that the 1/2007. Uniformity Decision no longer fulfils its role as a means of unification of the judicial practice.

Among the recent decisions published by the Curia I have analysed in detail the case-law decisions published under BH2019. 38. and BH2023. 89. As a criticism, I have stated that neither of the analysed decisions can be integrated seamlessly into the judicial practice of the lower courts, nor even into the own practice of the Curia. It is also not clear what justified the change in previous practice with regard to the definition of attempted trafficking and the definition of the offence of acquisition, since the judicial practice has so far given largely uniform answers to these two questions. It is also not entirely clear what theoretical considerations underlie the use of the definitions developed by civil law, nor have I found any explanation as to why the Curia did not introduce these definitions into the criminal law reasoning in accordance with their precise content. Thus, on the basis of the analysis, the answer to the third question is that the Curia has not reacted adequately to recent changes in the drug market, and that the published case law is not suitable for providing adequate guidance for the judicial practice.

The final conclusion of the research on the analysis of punishable conducts was that the delimination issues are not resolved on a unified theoretical basis, but on a case-by-case basis. Therefore, it is of particular importance which facts are recorded in the statement of facts, as even the slightest discrepancies can lead to fundamentally different legal conclusions. This conclusion has raised research questions aimed at analysing the evidentiary activity: (1) on what facts do courts base the legal conclusions on the defendants intent to distribute, (2) on what evidentiary tools do they base these facts, and (3) can procedural issues specific to drug-related crimes be identified in relation to these evidentiary tools.

The research findings suggest that the role of physical evidence in proving drug-related crimes is diminishing, with courts typically basing their findings on physical evidence seized from the defendant, electronic data proving the defendant's communications, data recorded during telephone intercepts, and documentary evidence of the accused's assets, income and financial transactions.

In the context of witness testimony I have identified the problem of advising the witness who have previously been the suspect of the case: there is a greater chance of procedural error due to the complexity of the relevant procedural provisions. I have identified conflicting jurisprudence in the way courts assess the defence's attempt to exclude testimonies in court

proceedings on the basis of the defendant or witness was under influence during the interrogation. One solution to this situation, which is neither practical nor sufficiently supported by procedural arguments, is to question the investigator who conducted the interrogation, which seems to be a standard solution for the control of investigative acts of doubtful legality. The case study has highlighted the limitations of this method: it cannot be expected that police officers will admit the investigative errors and procedural irregularities in court, nor that they will be able to recall all the details accurately years later.

The analysis of the decisions and the data processed in the case study also show that there is no clear protocol in the practice of investigating authorities as to when it is appropriate to conduct a search and when it is appropriate to conduct an inspection in the investigation of a drug-related crime. I have also shown that physical evidence is of great importance in proving drug trafficking and must be assessed not only on its own but also in conjunction with each other and with the characteristics of the property used by the defendant for trafficking. Therefore, the failure to conduct an inspection can be identified as a problem, as not all relevant data are recorded during the search.

The increasing use of postal services by drug traffickers to transport drugs in recent years has led to a demand from law enforcement authorities for stricter control of postal items.[27] In the analysis I have shown that the distribution of drugs by this method raises a number of problems of legal classification, to which the Curia has not always provided a dogmatically acceptable answer. The interception and opening of international postal consignments under customs procedures were identified as a very serious procedural problem on the basis of the case study data. It is the practice of the National Tax and Customs Administration to open a consignments where the risk analysis and other preliminary information already give rise to suspicions of drug-related offences. It can be argued that in such cases, the postal consignment can only be opened with a judicial authorisation, failure to obtain such authorisation will result in the exclusion of evidence. Since this evidence is the drug itself, this decision could undermine the prosecution's case in court.

The jurisprudence on the use of undercover agents for the purpose of undercover shopping is essentially based on the case-law of the European Court of Human Rights and no uncertainty has been identified in the analysis. On the basis of the case study data, it can be concluded that it was justified to clarify the definition of undercover agent in the procedural law. It should be noted that there is also an opinion in the scientific literature that the current definition is not sufficiently detailed.[28] The case study has also provided an instructive result in that it has been found that, in daily practice, investigating authorities apply a relatively simple test for the introduction of a covert agent: if the procedural act in question is presumed to involve the commission of a crime, it can only be carried out by a covert investigator.

With regard to the evidence taken on the quantity of drugs, I formulated four questions: (1) what kind of evidence should be evaluated when the drug has been seized during the investigation, (2) how the quantity of the unseized drug can be established beyond reasonable doubt, (3) how courts interpret section 461 (4) of the Criminal Code, (4) how evidence can be provided for the average effective dose of the non-accustomed user.

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[27] Communication from the Commission to the European Parliament, the Council, the Europaen Economic and Social Committee and the Committee of the Regions EU Agenda and Action Plan on Drugs 2021-2025 COM/2020/606 final, MÁTYÁS Szabolcs: *A kábítószer-bűnözés elleni küzdelem mint stratégiai kihívás a magyar bűnüldözésben* (Budapest, Nemzeti Közszolgálati Egyetem, 2020) 76.
[28] MÉSZÁROS Bence: *Fedett nyomozó alkalmazása bűnüldözésben* (Budapest, Dialóg Campus, 2019) 19.

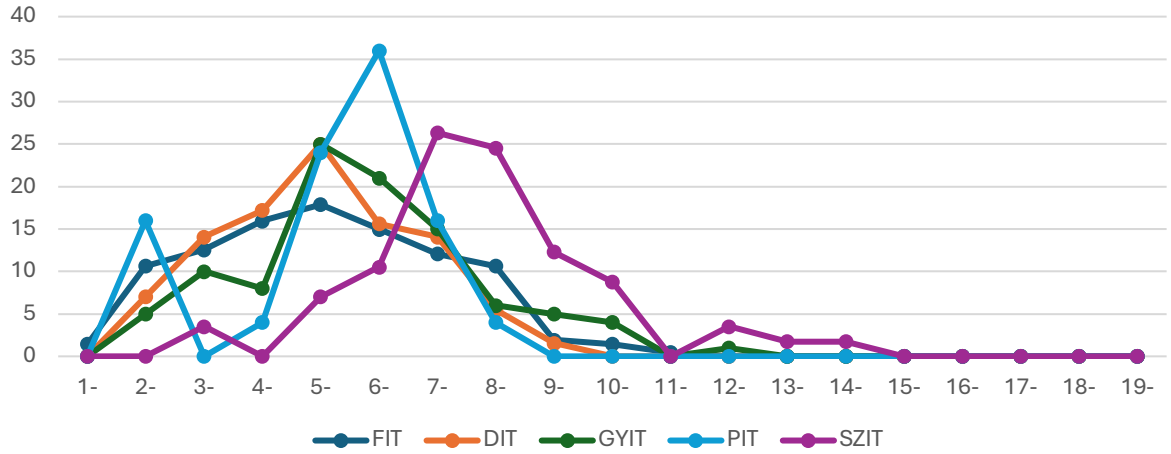
Based on the data of the content analysis, I found that the judicial practice does not pose any problems to be solved when determining the type and quantity of the seized drugs, the courts solve this evidentiary issue on the basis of uniform and proven methods. The examination of the legal practice also showed that opinions of forensic chemists are well founded and are very rarely challenged in court proceedings, and that there has never been an example of an opinion of forensic chemist being disqualified by the court. Judicial practice has also been consistent with regard to evidence of the quantity of the drug not seized: the type and quantity of the drug must be established on the basis of the available evidence, and the quality of the drug can then be established on the basis of the data provided by the Hungarian Institue for Forensic Sciences, in accordance with the principle of in dubio pro reo. I identified as a problem that courts accept testimony on the type of drug, despite the fact that after the designer drug explosion, it is rarely possible to establish facts beyond reasonable doubt in a judgment based on such evidence.

As regards the average effective dose for an non-accustomed consumer, judicial practice is consistent in that the courts predominantly set quantitative limits on the basis of the medical expert's opinion obtained during the investigation. However, it is clear that expert practice is fragmented, with courts setting different quantitative limits for the same drug in several cases. I have also shown in detail that most of the issues raised in the judicial practice can be resolved on the basis of the guidance of the Constitutional Court and the data presented in detail in the research, in addition to the established methods of interpretation of the law. The solution to the problem is therefore essentially in the hands of the experts.

With regard to sentencing practice several hypotheses could be formulated: (1) sentencing practice does not treat the offence of drug trafficking committed in respect of a substantial quantity of narcotic drugs as an offence punishable by life imprisonment, (2) the judicial practice is far from using the available sentencing range, (3) the territorial differencies in sentencing are caused by different assessments of sentencing factors, (4) the prosecutor's sentencig motions are not in line with the sentencing practice of the courts and therefore cannot be effective – in other words current prosecutorial practice is unsuitable for achieving the legislative objective of simplifying the procedure.

The first hypothesis is fully supported by the analysis of the judicial practice. The fact that in the history of Hungarian criminal law there has been only one case of life imprisonment for drug-related crimes is in itself significant, but the attitude of the courts towards the sentence limit is best illustrated by the fact that the possibility of an indeterminate sentence is not even analysed at the level of a possibility in the judgments.

The data of the research also support the second hypothesis. As can be seen from Graph 1, which shows the distribution of sentences, the Budapest-Regional Court of Appeal, the Debrecen-Regional Court of Appeal, the Pécs-Regional Court of Appeal and the Győr-Regional Court of Appeal impose sentences between 5 and 6 years on average for qualified cases of drug trafficking, an offence punishable by up to 20 years' imprisonment. In other words, based on the length of the final sentences, drug trafficking appears to be an offence punishable by imprisonment of between two and eight years. The data also showed that the Szeged-Regional Court of Appeal imposes significantly more severe sentences, with an average of between 7 and 8 years, more than two years above the average of other courts of appeal. I have also identified as an anomaly that courts impose more severe sentences for the less punishable possession of narcotic drugs than for drug trafficking.



Graph 1.: Distribution of imprisonent for drug trafficking with a significant quantity of drugs

The reasons for the relatively light sentences compared to the applicable range are not clear based on text of decisions analyzed in the research. The main reason for this is that the sentencing circumstances are not uniformly assessed and applied by the courts and that the reasoning put forward in this context is somewhat schematic. The frequent use of the provision on reduction of punishment, particularly in the practice of the Budapest-Regional Court of Appeal, suggests that the courts do not reserve this legal instrument for exceptional cases, but already reduce the range of sentences in all cases and do not even consider the median value of the penalty range at 10 or 12.5 years. This phenomenon is nothing new, as research carried out at the turn of the millennium had already pointed out, in order to avoid the need to apply the strictest possible legal penalties to offenders who are not subject to diversion, judicial practice has responded by applying the provision on reduction of punishment, which was invoked by the courts in almost all cases.[29] The dangers of this sentencing solution are well known: excessive use of the the reduction of punishment can distort sentencing ratios.[30] The research data clearly show that this is happening in the judicial practice of drug-related crimes.

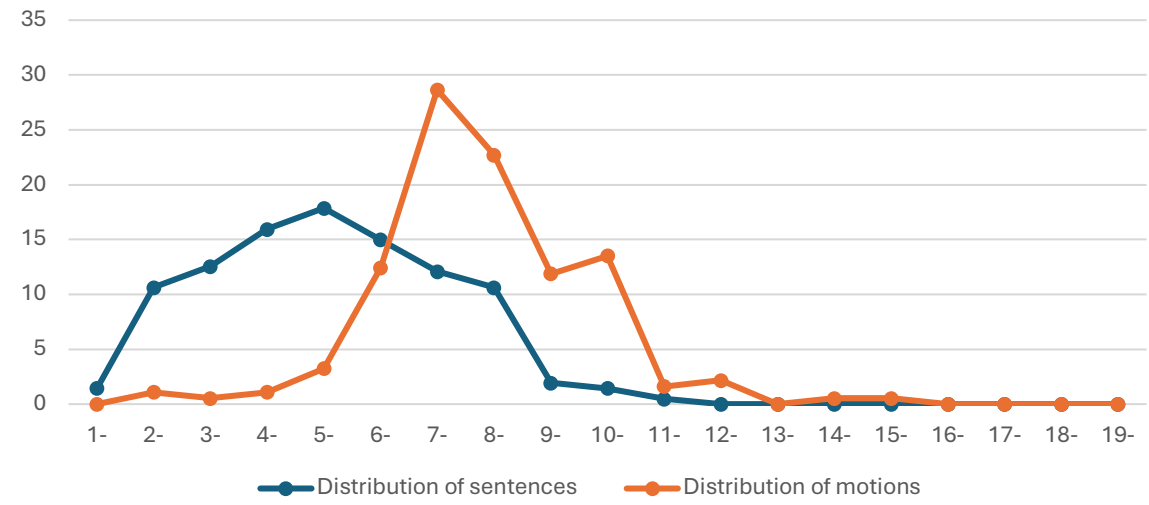
The research data allowed me to formulate new hypotheses about the reasons for the discrepancies, which will be supported by further empirical research. The primary reason for the relatively mild sentences may be assumed to be the fundamental differences between the assessment of the offences in question by legislators and law enforcement. As a result of an analysis of the judicial practice of the stricter rules of the criminal law between 1999 and 2003, Ákos Ujvári pointed out that judges react to undifferentiated repression by applying sentencing reduction options in an inappropriate way.[31] This idea is reinforced by the fact that the offences that are the subject of this research are falling in the jurisdiction of the regional courts, and are therefore tried by judges who also try homicide cases on a daily basis. It can be assumed that judges do not relate to the abstract material gravity of drug-related crimes considered by the legislator as a guideline, but to the concrete material gravity of intentional crimes with lethal results.

[29] RUPA 2000 153., CSIK 2005 139.
[30] RENDEKI Sándor: *A büntetés kiszabása – Enyhítő és súlyosító körülmények* (Budapest, KJK, 1976) 48-49., 94.
[31] UJVÁRI Ákos: „Hazánk büntetéskiszabási gyakorlatának sajátosságai" *Iustum Aequum Salutare* 2006/1-2. 306. A kérdéses időszak statisztikai adataira lásd SÁROSI Péter: „A kábítószer-jelenség bűnügyi vonatkozásai 2000 és 2007 között" in FELVINCZI Katalin – NYÍRÁDY Adrienn: *Drogpolitika számokban* (Budapest, L'Harmattan, 2009) 328.

Examination of the sentencing factors has shown that, although specific aggravating and mitigating circumstances for drug-related crimes are identified in judicial practice, their uniform assessment varies considerably not only between regions but even within individual courts. This finding is in line with the results of recent empirical research.[32] The earlier finding that the reasoning of the judgements are mostly limited to a list of sentencing circumstances without substantive consideration, is also supported by the research data.[33] This is not a new problem either, Pál Angyal and György Rácz already formulated a similar conclusion in 1937:

> „It is a regrettable fact, however, that the reasoning of our judgments merely points out the mitigating and aggravating circumstances taken into account, or the indifferent circumstances that are ignored, and briefly lists them, while the internal reasons and the principled basis of the assessment are not expanded upon at all, or only exceptionally."[34]

The research also sought to answer the question of whether the prosectutor's sentencing motions are effective in drug cases. The answer is clear from the data shown in Graph 2: the significant discrepancy between the average length of imprisonment found in the motions and the average length of imprisonment in the judicial practice means that there is no real motivation for the defendant to plead guilty at the preliminary hearing. This motivating force is further reduced by the fact that, according to the data on final judgments, the likelihood of a denying defendant receiving a longer sentence than the one provided for in the prosectutor's sentencing motion at the end of the proceedings is extremely low.



Graph 2.: Distribution of final convictions and prosectutor's sentencing motions in the practice of the Budapest-Regional Court

[32] BENCZE Mátyás – BADÓ Attila: „Területi eltérések a büntetéskiszabási gyakorlat szigorúságát illetően Magyarországon 2003 és 2005 között" in FLECK Zoltán (szerk.) *Igazságszolgáltatás a tudomány tükrében* (Budapest, ELTE Eötvös Kiadó, 2010) 138.

[33] BOLYKY Orsolya: *Az emberölések kriminológiai jellemzői, különös tekintettel a mentális tényezők büntetőjogi értékelésére* (Doktori értekezés, Pázmány Péter Katolikus Egyetem Jog- és Államtudományi Kar Doktori Iskola, 2017) 173. *real-phd.mtak.hu/698/1/Bolyky_O_dolgozatv.pdf*, GÓCZA Ágnes: „Egységes-e a büntetéskiszabás emberöléses ügyekben? – A magyar táblabíróságok büntetéskiszabási gyakorlatának összehasonlító vizsgálata" *Állam- és Jogtudomány* 2018/1. 3-31.

[34] ANGYAL Pál – RÁCZ György: *A büntetés kiszabása bírói gyakorlatunkban. Az enyhítő és súlyosító körülmények rendszeres feldolgozásban* (Budapest, Attila-Nyomda, 1937) 26.

The research has revealed a divergence of jurisprudence across almost the entire spectrum of the legal interpretation issues examined. According to Article 25(3) of the Fundamental Law, the Curia shall ensure the uniformity of the application of law by courts, and shall make uniformity decisions which are binding on courts. The Curia also has the possibility to examine the application of a given legal instrument in the framework of a jurisprudence-analysing working group, and on the basis of the results of the examination, it is possible to initiate the adoption of a uniformity decision or the submission of a legislative proposal. Based on the results of the research, it can be concluded that one of the reasons for the divergent jurisprudence is the legal interpretation of the 1/2007 Uniformity Decision: the decision ignores the definitions and the principles of the relevant international conventions, its application to the current legal environment is limited, the legal reasoning is incomplete and contradictory, and the applicability of the case-law on which it is based is questionable in the current drug market context. Therefore arises the need for a new uniformity decision which could resolve most of the problems of legal interpretation identified in the research, at least in the medium term.

In this context, the primary task is to define all the means of drug trafficking and possession of narcotic drugs, taking into account the definitions contained in the UN Conventions and EU legal standards. It should then be possible to draw a clear distinction between the various types of conduct and, through them, between drug trafficking and drug possession. The Curia should also state to what extent the previously published case-law can be relied upon and how the case-law published in BH2019. 38. and BH2023. 89. can be incorporated into judicial practice without gaps. It is also necessary to address the situation raised by the change in the classification of drugs with regard to the application of the provisions on the temporal scope of the Criminal Code.

Lastly, the difficulties of interpretation arising from the merging of the means of trafficking and placing on the market should also be addressed. It does not seem appropriate to depart completely from the ordinary meaning of the concepts: placing on the market is the act of commercial channeling of a product, while trafficking is the continuous sale of a product on the market. In this interpretative framework the interpretation of the law based on the 2002 case-law decisions cannot be upheld, since placing on the market as a single act does not presuppose the complex series of acts described in the court decisions referred to in the 1/2007. Uniformity Decision.

Most of the problems identified in relation to the evidence can be addressed in a new uniformity decision. The Curia can answer the question of when the interrogation of a suspect or witness who has taken drugs prior to questioning is lawful. However, this problem cannot be fully solved without the involvement of the prosecution and investigating authorities: the police force have the expertise to develop a set of professional guidelines on the conditions under which a suspect or witness may be questioned in drug-related criminal proceedings. Investigating authorities can also solve the problems identified in relation to the conduct of searches and inspections, i.e. they usually conduct searches in cases where the conduct of an inspection would greatly facilitate the proof of the offence in court proceedings.

The solution of the difficulties of legal interpretation identified in the context of paragraph (4) of Article 461 of the Criminal Code is also primarily in the hands of the Curia, as the chamber of forensic experts is responsible for the development of a uniform expert methodology. Given the complexity of the problem the most effective solution would be for the two bodies to publish

harmonised guidelines based on a uniform theoretical basis. A further possible solution is the acceptence that it is sufficient to define the quantitative limits of a drug once and after that it is unnecessary to employ an expert to deal with the same issue. The determination of the quantitative limit does not depend on the specific characteristics of the case, as the characteristics of drugs do not vary from case to case. Consequently, if the facts of a final judgment contain a quantitative limit for a given drug, this can be the basis for all subsequent cases. The theoretical basis for this solution already exists in the legal literature: according to the commentary to the 1998 Code of Criminal Procedure in exceptional cases the employment of an expert may be unnecessary if the fact to be proved can be proved by other means not contested by the parties, such as documentary evidence, and in certain cases previous expert opinions may be used.[35] In addition, the normative basis is also ensured by the fact that, according to Section 197(5) of the Code of Criminal Procedure, the expert opinion of an expert employed in other proceedings on the same subject may be taken into account as an expert opinion in criminal proceedings.

The Curia has very narrow room for maneuver in standardising sentencing practice. This is coupled with a kind of self-restraint which is primarily reflected in the fact that the Curia (like the Supreme Court in the past) refrains from giving guidance on specific sentencing factors for certain offences. A striking sign of this is the fact that 56. BK opinion discusses the specific sentencing circumstances almost exclusively in general terms, and does so despite the fact that there is no normative or theoretical obstacle to the inclusion of specific mitigating and aggravating circumstances for the more frequent offences. The revision of the 56. BK opinion offers a solution to this problem. In its report summarising its examination of sentencing practice, the Curia concluded that there is a need for a database of sentences imposed by the courts.[36] This would not only facilitate the uniform application of the law, but could also provide information to prosecutors, who would then be able to file sentencing motions that could substantially promote the defendant's cooperation with the prosecution.

It seems to be a difficult task to implement the distinction between the harmful effects of certain drugs into judicial practice. For the time being, the need for the implemantation is reflected in the fact that in the practice of several courts the fact that the defendant commited the crime on cannabis is a mitigating circumstence. If this is accepted, and the principles behind it are consistently applied, there will be a need to assess the harmful effects on health of all drugs, or at least of the more common ones. However, this is not a judicial task, only the legislation can provide a satisfactory solution.

The research results suggest that the difficulties in interpreting drug-related crimes are largely due to the fact that the wording of the Criminal Code is not in line with the functioning of the drug market and the regulatory concept of the UN Conventions that underpin the legislation. This tension cannot be resolved even by a more rigorous orientation of judicial practice, and only the legislator can provide a complete and definitive solution, which presupposes a fundamental rethinking of the relevant provisions.

This also raises the question of whether it is justifiable to split drug trafficking, possession of narcotic drugs and the abuse of new psychoactive substance into separate offences, with the only substantive difference being in the penalty range. If the legislator were to opt for a uniform

[35] BODOR Tibor – CSÁK Zsolt – SOMOGYI Gábor – SZEPESI Erzsébet – SZOKOLAI Gábor – VARGA Zoltán: *A büntetőeljárási törvény magyarázata* (Budapest, KJK, 2009) 342.

[36] Kúria: Összefoglaló jelentés a büntetéskiszabás országos gyakorlatának vizsgálatáról. *kuria-birosag.hu/sites/default/files/joggyak/az_orszagos_bunteteskiszabasi_gyakorlat_vizsgalata.pdf* 49.

treatment of the definition of drugs in criminal law, it would have to bear in mind that the concept of the new psychoactive substance cannot be excluded from the Criminal Code, as it is a basic concept of EU action against designer drugs and thus part of both the EU and Hungarian legal systems. Taking this into account two solutions for merging the offences can be outlined: (1) amending the interpretative provisions on the definition of drugs in such a way it also includes new psychoactive substances; (2) defining new psychoactive substances as an object of commission in the case of drug trafficking and possession of narcotic drugs (in addition to drugs).

I see the solution to the demarcation problems in a more sensible separation of distributor (including buyer-producer) and consumer behaviour, adapted to the characteristics of the drug market, based on the definitions of the UN Conventions. The possession of drugs should cover only consumer behaviour in the narrowest sense, i.e. it should essentially be covered by section 178(6) of the Criminal Code: acquiring and keeping small quantities of drugs for personal use and consuming drugs. There is also no theoretical obstacle to adding the production and cultivation of small quantities for own use to the text. The arguments against this solution are that the production for such purposes would be of almost no practical significance, while the cultivation of cannabis would pose additional problems. In the case of the cultivation of cannabis plants, the upper limit for a small quantity is five plants, provided that the plants are still standing in the time of the seizure. However, if the plants are harvested, the quantity harvested from these five plants could be several hundred grams, which would certainly exceed the upper limit of the small quantity and, depending on the quality, could also exceed the lower limit of the significant quantity.

Even so, the aim is to ensure that possession of narcotic drugs covers only conducts for the purpose of personal consumption and that drug trafficking covers all conduct aimed at making the drug available to others, whether directly or indirectly. This solution would be in line with the actual functioning of drug trafficking, where producers, manufacturers and couriers are all part of the same system of supplying drugs to consumers.

The redefinition of the offences cannot ignore the need to comply with Article 4 of the Framework Decision. This section lists among the qualifying circumstances to be taken into account the large quantity of the drug, the commission of the drug having the greatest harmful effect on health and the significant damage to the health of several persons. The quantity of the drug is also a qualifying fact in the current legislation. Substantial damage to the health of several persons is reflected in the fact that in the judicial practice it is an aggravating circumstance if the defendant dealt with drugs for a period of long times, covered sales to several consumers or resellers, or had an uppper position in the distribution chain. However, there is a complete absence of any consideration of the harmful effect on health in the text of the criminal law and there is no uniform jurisprudence in this area.

Legislative intervention is also needed to address the most serious problem identified in relation to the criminal definition of drugs, namely the unconstitutionality of the generic legislation. It is regrettable that the corrections necessitated by the Constitutional Court's decision of 2021 have not resolved this issue, so even though the legislator has laid new foundations for the regulation, it is still not fully in line with the Fundamental Law. However, it should also be stressed that a simple repeal of the generic legislation, while solving the problem of the unconstitutionality of the norms in effect, would remove a cornerstone of effective law enforcement against designer drugs. Addressing the problem therefore requires considered legislation.

The problem of quantification of drugs can also be solved through legislative intervention: if the legislator is committed to the existing legal solution, it must ensure that only new psychoactive substances whose essential characteristics have been clarified at least to allow a position to be taken on the question of the quantitative limit are scheduled.[37] The legal basis for this is given, since new psychoactive substances can only be added to the drug lists once a risk assessment has been carried out. The results of the risk assessment justify a change in the classification of a substance if it is shown that it may pose a threat to public health comparable to that of drugs. This provision alone shows that a substance can only be added to the list of drugs if scientific studies confirm that it poses a risk to health. When such a study is carried out, there should be no particular obstacle to determining the properties of the new drug which then makes it possible to carry out an informed decision on the quantitative limits.

The limitation of a research method based on published judgments in the Collection of Judicial Decisions is that it is almost exclusively suited to the study of judicial practice in relation to offences falling in the jurisdiction of the regional courts. In the present case, this did not have a significant impact on the research results, since the questions examined were also adapted to this characteristic of the research method, but a complete picture of the practice of drug-related crimes can only be obtained from a research that also covers the judicial practice of the district courts. This may shed light on the practice of diversion and the use of drugs, including in particular the offences under section 178(6) of the Criminal Code, and the interpretation of the subsidiarity of the offences of collective consumption and social supply. The conduct of such a study, particularly if it is intended to explore national practice, presupposes a case file examination, which is within the competence of the jurisprudence-analysing working group of the Curia.

In the context of this research, I could identify anomalies in the sentencing practice for drug-related offences, but I was unable to provide an answer to the reasons. Since court judgments typically provide short explanations of sentencing considerations, these can only be explored by interviewing judges with more experience in such cases. The research on sentencing also failed to provide an answer to the question of how non-custodial sanctions developed in the practice of the courts. In this context, the main issue of interest is how the courts punish typical consumer behaviour, i.e. offences committed by acquiring, keeping or consuming a small quantity of drug. A nationwide survey with appropriate sampling could answer this question.

The research carried out on evidence issues has shown that the courts go to great lengths to correct erroneous investigative acts, with evidence being excluded only as a last resort. The question may be raised as to what is the theoretical background of this judicial attitude and what techniques have been developed in judicial practice to correct investigative errors. This question is not specific to drug-related crimes and can therefore be examined on a much broader sample.

The basic aim of my research was to explore whether legal unity prevails in the judicial practice of drug-related crimes. The results have revealed significant anomalies in this area, which can be clearly attributed to the shortcomings and contradictions in the legislation and the case-law and other practice orienting instruments issued by the Curia. Divergence of jurisprudence can be detected at almost all essential points of sentencing, so it may happen that two identical acts, which are identical in terms of the legally relevant facts, are examined by different courts, partly

[37] MÓRÓ Levente – MAJOR Magda – KALÓ Zsuzsa: *Az új pszichoaktív anyagok hazai kockázatértékelésének felülvizsgálata* (Budapest, Nemzeti Drog Fókuszpont, 2019) 82.

on the basis of different evidentiary procedures and thus not on the same factual basis, and then, based on different interpretations of the relevant text of law, sentenced based on different principles.

According to the practice of the ECHR the right to a fair trial under Article 6 of the Convention may be infringed by the practice followed by national courts if the practice of the national supreme court is loaded by serious and long-standing inconsistencies, if the national law does not provide a mechanism capable of resolving those inconsistencies, or if that mechanism has not been applied in the particular case, or has been applied but not with the appropriate result. It is also a breach of due process if the practice of the same court of appeal differs or if a divergence in the legal practice of the higher courts can be identified.

These elements can be detected without exception in the judicial practice of drug-related crimes, therefore intervention is inevitable. Since the roots of the problem lie in the text of the Criminal Code, the solution is also in the hands of the legislator. This does not, however, absolve the Curia, which can only fulfil its constitutional duty of unifying the application of the law if it uses the means at its disposal to steer the currently divergent judicial practice in the right direction.

IV. List of publications on the research topic

„Kábítószer-kereskedelem és kábítószer birtoklása a Fővárosi Ítélőtábla gyakorlatában" *Büntetőjogi Szemle* 2017/1. 43-62.

„A Kúria határozata a kábítószer-fogyasztás szubszidiaritásáról: a kábítószer-kereskedelem és a kábítószer birtoklása egyes halmazati kérdései" *Jogesetek Magyarázata* 2017/3. 41-49.

„A kábítószer és az új pszichoaktív anyag fogalmának aktuális jogértelmezési problémái" *Jogelméleti Szemle* 2018/2. 84-97.

„A büntetéskiszabási gyakorlatra irányuló empirikus kutatások elmélete és módszertana" *MTA Law Working Papers* 2020/1.

„»Hozzá nem szokott fogyasztó átlagos hatásos adagja« – A bírói gyakorlat válaszai egy természettudományos problémára" *Büntetőjogi Szemle* 2020/2. 39-56.

"A mértékes indítványok hatékonysága a törvényszéki kábítószeres ügyekben" *Jogi Tanulmányok* in FAZEKAS Marianna (szerk.): *Jogi tanulmányok 2021* (Budapest, ELTE Állam- és Jogtudományi Doktori Iskola) 243-256.