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## Tartalom / Table of Contents / Inhaltsverzeichnis

Előszó.....	
Introduction.....	
WALTER GROPP: Strafrechtsvergleichung als Partnerschaftsprojekt .....	
WALTER GROPP: Büntetőjog-összehasonlítás mint partnerségi projekt. Előadás a Szegedi Tudományegyetem Napjának (2014. november 15.) előestéjén.....	
ANETT ERZSÉBET GÁCSI: Unlawfully Obtained Evidence in the Hungarian Criminal Procedure .....	
ANDOR GÁL: The Regulation on the Preparation of Criminal Offences in Hungary .....	
ANDREA ERIKA JUHÁSZ: Execution of Juvenile Prisoners' Imprisonment with Special Regard to Juveniles' Education .....	
NÓRA KUPECKI: Das System der Zwangsmaßnahmen und die Regelung der Untersuchungshaft in Ungarn.....	
SOMA MÁROK: Sanctions against Recidivists in the Hungarian Criminal Code – the “Three Strikes Law” .....	
ERZSÉBET MOLNÁR: Einführung in das Institut der Criminal Compliance. Die strafrechtliche Verantwortung des Betriebsinhabers für die Verletzung der Aufsichtspflicht im ungarischen, deutschen und türkischen Rechtssystem .....	
GERGELY TORNyai: Organized Crime-related Legislation in the Hungarian Criminal Law with a Comparison to the Turkish and German Regulation .....	
Participants of the Bosphorus Seminar / TeilnehmerInnen des Bosphorus Seminars .....	

## The Regulation on the Preparation of Criminal Offences in Hungary

The questions of preparation of criminal offences belongs to the substantive criminal law, specifically the topic of the stages of crime-realization. Hungarian criminal law distinguishes between completed and incompleting criminal offences and my paper focuses only on the incompleting criminal offences, which are also called as inchoate offences of crime. Alongside the examination of Hungarian regulation, this paper also contains a short summary about the results of a team-work – between colleagues from Justus-Liebig Universität Gießen, University of Istanbul and University of Szeged –, which were achieved in the course of the Bosphorus Seminar in Istanbul in June 2014.

### I. About the reasons of the punishability of incompleting criminal offences (*ratio legis*)

Obviously, to achieve a deterring effect, criminal law needs to punish phases of criminal offences prior to completion.<sup>1</sup> Bringing forward the criminal liability<sup>2</sup> in time is – as a part of the penal power of the state – the exclusive and arbitrary decision of the legislature.<sup>3</sup> Certainly, this decision is influenced by the current criminal policy. However, because of the complexity of this question, the necessity of criminalization can be different in case of different legally protected interests. Nevertheless, according to *Claus Roxin*<sup>4</sup> and *Hans-Heinrich Jescheck*,<sup>5</sup> some general reasons of the criminalization of incompleting criminal offences can be determined:

- the unlawful intent connected to these actions (based on the mixed objective-subjective theory),
- the manifestation of the violation of law in the outside-world (based on the objective theory),
- dangerousness adequate to statutory definitions (based on the objective theory),
- impression defying the law (based on the impression-theory).

1 KARSAI, KRISZTINA – SZOMORA, ZSOLT: *Criminal Law in Hungary*. Kluwer Law International, Alphen aan den Rijn, 2010. p. 90.

2 In the German literature, this phenomenon is known as the so-called *Vorverlagerung* regulation-technique. See more on this, ARNDT SINN: *Vorverlagerung der Strafbarkeit – Begriff, Ursachen und Regelungstechniken*. in: ARNDT SINN – WALTER GROPP – FERENC NAGY: *Grenzen der Vorverlagerung in einem Tatstrafrecht. Eine rechtsvergleichende Analyse am Beispiel des deutschen und ungarischen Strafrechts*. V&R unipress, Universitätsverlag Osnabrück, Göttingen, 2011. p. 15-18.

3 According to the generally and constitutionally recognized *nullum crimen sine lege* (legality) principle, a criminal law norm must be regulated in an act. NAGY, FERENC: *A nullum crimen/nulla poena sine lege alapelvöl*. Magyar Jog, (42) 1995, p. 257. According to the Hungarian Constitution (hereinafter: Alaptv.), an act must be legislated by the Parliament (inevitable legislator of acts). cf. Alaptv. Article 1, paragraph 2; Article XXVIII, paragraph 4.

4 CLAUDIUS ROXIN: *Strafrecht. Allgemeiner Teil. Band II. Besondere Erscheinungsformen der Straftat*. Verlag C. H. Beck, München, 2003. p. 361.

5 HANS-HEINRICH JESCHECK – THOMAS WEIGEND: *Lehrbuch des Strafrechts. Allgemeiner Teil. 5. Aufl.* Duncker & Humblot, Berlin, 1996. p. 512-518.

Also, *Arndt Sinn* examined the reasons of extended criminal liability and he specified the possible *ratio legis* of this kind of criminal regulation. According to him, the key-reason of this legislation is to ascertain the inner safety of the state.<sup>6</sup> Consequently, the legislature has an obligation to protect the citizens from the criminally relevant dangers, especially the new, serious and increasing ones: terrorism, organized crime, cybercrime, etc.<sup>7</sup>

## II. Regulation on preparation of criminal offences in Hungary

As an introduction of this examination, it has to be emphasized that the Hungarian criminal policy nowadays has a repressive character, with the idea of extending criminalization as the only way to combat crimes. Therefore, the number of actions criminalized is continually increasing and this tendency also has a significant effect connected to the punishability of incompletely criminal offences. The efficiency of this tendency is arguable and it can be – in some extreme cases – contradictory to the *ultima ratio* principle.<sup>8</sup>

### 1. The criminal offences from the view of preliminary stages

These preliminary phases – preparation and attempt – are called preliminary stages of criminal offences. It has to be stressed that in the Hungarian criminal law only intentional offences have preliminary stages, offences committed by negligence can be punishable only if completed.<sup>9</sup> Also, these preliminary stages are known as inchoate offences. These phrases have the same meaning, they are synonyms. Hungarian Criminal Code (Act C of 2012, hereinafter referred to as Btk) distinguishes between two preliminary stages: preparation and attempt.<sup>10</sup> Between these two categories, the main differences are as follows.

### 2. About the differences between the preliminary stages of intentional criminal offences

The *preparation* is punishable only if the Btk. specifically prescribes. That's why the punishability of preparatory acts is exceptional. The regulation of this *explicit* legal prescription is not homogeneous and it's not unified because the Btk uses several legal forms to punish preparatory acts. It has also to be noted that the Btk. always provides a lower range of penalty for preparation of offences than that provided for completed offences. For instance, the preparation of kidnapping shall be punished with imprisonment not exceeding three years, while completed kidnapping (basic offence) shall be punished with imprisonment from two to eight years.<sup>11</sup> The reason of this legislation is quite simple: there are no doubts that preparatory acts have less social dangerousness than completed criminal offences.

6 SINN 2011, p. 19-20.

7 SINN 2011, p. 20.

8 This principle means that criminal law can be used as a method of last resort among other legal institutions and sanctions. NAGY, FERENC: *Anyagi büntetőjog. Általános Rész I.* Iurisperitus, Szeged, 2014a. p. 88-90. It is worth mentioning that – in accordance with Krisztina Karsai's opinion – this principle can only be examined, when the relevant legally protected interest can be increased following from its nature. KARSAI, KRISZTINA: *Az ultima ratio elvről – másképpen.*, in: JUHÁSZ, ZSUZSANNA – NAGY, FERENC – FANTOLY, ZSANETT: *Ünnepi kötet Dr. Cséka Ervin professzor 90. születésnapjára.* Acta Jur. et Pol. Tomus LXXIV., Szeged, 2012. p. 259.

9 NAGY, FERENC: *Anyagi büntetőjog. Általános Rész II.* Iurisperitus, Szeged, 2014b. p. 24.

10 See Art. 11-12 Btk.

11 Cf. Art. 190 Btk.

Dogmatically, the definition of *attempt* has three main elements: a) intention; b) commencement of the perpetrator's conduct laid down in the statutory definition of a certain criminal offence; c) incompleteness.<sup>12</sup>

The *attempt* of the intentional criminal offences is punishable generally. There are some exceptions in the criminal law doctrine when the attempt of a crime is impossible. For example, the attempt is not conceivable in case of preparation, accessoryship or offences committed by negligence.<sup>13</sup> The Btk provides the same range of penalty for attempt as that for completed offences, though the judge has the opportunity to mitigate the punishment by two degrees.<sup>14</sup>

Several legal theories have been elaborated in the criminal law doctrine to draw the line or to make distinction on an abstract level between the preliminary stages of criminal offences.<sup>15</sup> The scope of attempt is rather narrow in Hungarian criminal law as the definition of attempt is based on the so-called formal-objective doctrine.<sup>16</sup> This theory was emerged in the German criminal jurisprudence in the 1930s<sup>17</sup> and its speciality is the restriction of the scope of attempt with moving the importance of the perpetrator's guilty mind into the background.<sup>18</sup> According to this concept any action of the participant that is different from the perpetrator's conduct laid down in the statutory definition of a certain criminal offence does not constitute an attempt and can only be punishable as preparation at most, if the Btk specifically prescribes.<sup>19</sup> Attempt always presupposes a conduct laid down in the statutory definition. Therefore, none of the preparative actions may embody a perpetrator's conduct laid down in the statutory definition of criminal offences in the Special Part of Btk, otherwise the criminal offence is not more prepared but at least attempted.<sup>20</sup>

Considering this legal background it can be ascertained, that drawing the line between inchoate offences is an interpretative questions based in the Special Part of the Btk. In addition, it has to be emphasized, that, in Hungarian substantive criminal law, the line between attempt and preparation cannot be drawn effectively in an abstract level, because of the potential diversity of legal cases in the view of preliminary stages. Therefore, the *subsumtion*<sup>21</sup> plays a very important role in the regulation, which is based on the formal-objective doctrine.

### 3. The legal definition of preparation

Hungarian criminal law provides a substantive definition of preparation. Preparatory actions have to correspond with those actions, which have been listed in the legal definition of preparation in the criminal code. A legal definition for preparatory acts in the Hungari-

12 NAGY 2014b, p. 22.

13 NAGY 2014b, p. 24-25.

14 See Art. 82 Btk.

15 See more about these theories ROXIN 2003, p. 360-377; REINHART MAURACH – KARL HEINZ GÖSSEL – HEINZ ZIPP: *Strafrecht. Allgemeiner Teil. Teilband 2*. C. F. Müller Juristischer Verlag, Heidelberg – Karlsruhe, 1978. § 41. I. b.

16 SZOMORA, ZSOLT: *Die ungarische Versuchsdogmatik*. in: ARNDT SINN – WALTER GROPP – FERENC NAGY: *Grenzen der Vorverlagerung in einem Tatstrafrecht. Eine rechtsvergleichende Analyse am Beispiel des deutschen und ungarischen Strafrechts*. V&R unipress, Universitätsverlag Osnabrück, Göttingen, 2011. p. 164.

17 ROXIN 2003, p. 362.

18 JESCHECK – WEIGEND 1996, p. 513.; WALTER GROPP: *Strafrecht. Allgemeiner Teil. 3. Auflage*. Springer, Berlin – Heidelberg, 2005, p. 309.

19 KARSAI – SZOMORA 2010, p. 90.

20 KARSAI – SZOMORA 2010, p. 91.

21 Subsumtion is a legal process, which is applied by the criminal law practice, and it corresponds the conduct to the statutory definition of a relevant criminal offence. NAGY 2014a, p. 118.

an substantive criminal law has existed from 1950<sup>22</sup> and this regulation hasn't changed greatly since that time.

The current definition of preparation in Article 11, paragraph 1, Btk is as follows: "A person who, for the purpose to commit a criminal offence, provides the conditions that are necessary for the perpetration or facilitate the perpetration, who undertakes or offers the perpetration, invites for it, or agrees on joint perpetration, shall be punishable for preparation if this Act specifically prescribes."<sup>23</sup>

The jurisprudence analyzes this definition from two sides: the *objective* and the *subjective* one.<sup>24</sup>

### 3.1. Objective side

The *objective* side of the preparation is corresponding to the certain types of preparatory actions:

- providing the conditions that are necessary for the perpetration or facilitating the perpetration;
- undertaking a criminal offence;
- offering a criminal offence;
- inviting for the perpetration of a criminal offence;
- agreeing on joint perpetration.

#### 3.1.1. Providing the conditions that are necessary for the perpetration or facilitating the perpetration

The first action can be regarded as a catch-all clause that applies – except the other preparatory acts: the listed verbal forms – to each and every action that needs to be made to be able to commit a certain criminal offence or that facilitates the perpetration. The possible meaning of this statutory element is so wide that it could be critical from the view of the principle of legality. In accordance with the *nullum crimen sine lege certa* the imprecise statutory element in criminal law is prohibited.<sup>25</sup> In my opinion, the Hungarian legislator (parliament) has to consider the revision of this legal definition in the future. Fortunately, the Hungarian criminal law practice interprets this preparatory action restrictively.<sup>26</sup>

#### 3.1.2. Verbal preparatory actions

The last four preparatory actions are verbal forms. Examples are given:

- If *A* invites *B* to kill his enemy, he is liable for the preparation of homicide irrespective of whether *B* actually undertakes to kill the victim (*inviting*).
- If *B* accepts *A*'s invitation and undertakes to kill *A*'s enemy, *B* is also liable for the preparation of homicide (*undertaking*).

22 Cf. Act II of 1950 (called: Bt.) Art. 19.

23 Translated by Krisztina Karsai and Zsolt Szomora. KARSAI – SZOMORA 2010, p. 91.

24 HOLLÁN, MIKLÓS: *Stádiumok*. in: KIS NORBERT – HOLLÁN MIKLÓS: *Büntetőjog I. Általános rész. Alapismertetek a közigazgatási szakemberképzés számára. 2., átdolgozott kiadás. Dialóg Campus, Budapest – Pécs, 2013. p. 200-201*; SZOMORA, ZSOLT: *III. Fejezet. A büntetőjogi felelősség*. in: KARSAI, KRISZTINA (szerk.): *Kommentár a Büntető Törvénykönyvhöz. Complex, Budapest, 2013. p. 63-64.*

25 NAGY 1995, p. 258.

26 Cf. the following judgments: Debreceni Ítéletábla Bf. 105/2012/9.; Fővárosi Ítéletábla 3.Bf.272/2011/5.

- If *A* invites *B* to kill *A*'s enemy together and *B* accepts this offer both of them are liable for the preparation of homicide (*agreeing on joint perpetration*).
- If *B* offers himself to *A* to kill *A*'s enemy, but *A* is not interested in this, *B* is liable for the preparation of homicide irrespective of any other's conduct (*offering*).<sup>27</sup>

### 3.2. Subjective side

*Subjectively*, the purpose of a concrete criminal offence is the key aspect for distinguishing punishable preparatory actions from impunitively conducts. It presupposes that preparation must be committed by direct intent.

### 3.3. Participation

Hungarian criminal law distinguishes between two categories of parties to criminal offences: the *participants* are the perpetrators and accessories. This distinction is unnecessary in case of preparation of an offence because each participant of a punishable preparation shall be liable for his/her own conduct, irrespective of any other's conduct.<sup>28</sup> Thus, there is no accessoryship in the field of preparation.

### 3.4. Abandonment

There are three *abandonment* opportunities for the participant(s) of the preparation.

"Shall not be punishable for preparation:

- The person, due to the voluntary desisting of whom the perpetration of the criminal offence has not been commenced. (The offender carries out his conduct alone and his/her action is irrespective any other conduct.)
- The person who withdraws his or her invitation, offer or undertaking with the aim of the prevention of preparation, or makes efforts so that the other participants desists from preparation, provided that the commencement of perpetration does not take place for any reason whatsoever.
- The person who reports the preparation to authorities."<sup>29</sup>

If the preparation in itself constitutes another criminal offence, the participant shall be punishable for that criminal offence. This is the so-called residual offence. The residual offence can be only a completed one. For example, the participant desisted from the perpetration of homicide, however, he previously had bought a gun (for the commission of homicide) without a permission. He is not liable for preparation of homicide but for unlawful possession of fire arms.

## 4. The forms of punishability of preparatory acts

The criminal legislation of preparatory actions is based on the general definition of preparation. However, the Btk uses several legal forms to punish preparatory conducts, therefore the legislation is complex.<sup>30</sup> These legal solutions are as follows.

<sup>27</sup> KARSAI – SZOMORA 2010, p. 91.

<sup>28</sup> Also, the Hungarian Supreme Court (Kúria) confirmed this consequence. See 5/1999. BJE III/2.

<sup>29</sup> Cf. Art. 11; Translated by Krisztina Karsai and Zsolt Szomora. KARSAI – SZOMORA 2010, p. 91.

<sup>30</sup> NAGY 2014b, p. 20.



## 4.1. Punishability based on the legal definition

### 4.1.1. All of the listed acts are criminalized

According to this kind of punishability form, the Special Part *refers to the general legal definition / applies the general definition*. In this case all of the listed preparatory acts are punishable. The preparation is punishable in this way in case of the most severe felonies, for example homicide, kidnapping, crimes against the state, crimes against humanity, causing public danger, robbery etc.

The latest (nowadays') legislation shows a tendency of increasing the number of criminal offences the preparation of which is punishable. The reason of this increasing tendency is the severe Hungarian criminal policy, which often extends the criminal liability.

This punishability form has the following consequences:

- attempt is impossible (dogmatically it is preparation, too),
- accessoryship is impossible,
- special abandonment opportunity (potentially) is available.

### 4.1.2. One preparatory action is criminalized

In other cases, the Special Part refers to only one element of the legal definition, therefore, the other preparatory acts listed in the general definition are not punishable, these acts – which are not mentioned in the statutory definition of a crime – are unpunished. Dogmatic consequences are the same.

Example:

Money laundering (Article 399, paragraph 5 Btk)

“Any person who agrees on perpetration of money laundering commits a misdemeanour, and is punishable by imprisonment up to two years.”

## 4.2. *Sui generis* preparatory criminal offences<sup>31</sup>

The last group of the punishability forms is represented by the *sui generis* preparatory criminal offences. These criminal offences have the same specialities than the other – completed – crimes in the Special Part. In comparison with the other punishability forms, it leads the following consequences:

- attempt is possible,
- accessoryship is possible,
- special preparatory abandonment is impossible,
- abandonment is possible from attempt.

Example:

Subornation of false testimony (Article 276 Btk)

„The person who strives to persuade another person to give false testimony in criminal proceeding commits a felony, and shall be punishable up to three years imprisonment.”

Striving to persuade means inviting – which is a listed preparatory act – for perpetration, that's why this crime belongs to the *sui generis* preparatory acts.

31 See more about this category GÁL, ANDOR: *A sui generis előkészületi bűncselekmények egyes dogmatikai kérdéseiről*. in: HACK PÉTER – KOÓS NÉ MOHÁCSI BARBARA (szerk.): *Emberek őrzője*. Tanulmányok Lőrincz József tiszteletére. ELTE Eötvös Kiadó, Budapest, p. 99-101.

## 5. Results of the workshop

Finally, as a summary of my paper I refer to the results, which were achieved in our workgroup at the Bosphorus Seminar. Obviously, our work had a comparative legal character with the examination of the regulation of Germany, Turkey and Hungary.

We collected the following similarities and differences between these countries.

### 5.1. Similarities

- only intentional acts have preliminary stages,
- criminalization of preparatory acts is exceptional,
- making distinction between preliminary stages is problematic,
- all of the regulations use sui generis crimes to punish preparatory actions,
- increasing tendency of extending criminal liability.

### 5.2. Differences

The main differences are shown by the following table.

	Hungary	Germany	Turkey
Leading theory in the field of preliminary stages	formal-objective <sup>32</sup>	mixed objective-subjective <sup>33</sup>	material-objective <sup>34</sup>
Legal definition of preparation	Art. 11 Btk	–	–
Interpretation of the scope of attempt	narrow	wide	wide
Sui generis preparatory crimes from the view of protected interests	individual and collective	individual and collective <sup>35</sup>	collective

32 Cf. 2. in this paper.

33 GROPP 2005, p. 310-311. p.; Walter GROPP: *Vom Rücktrittshorizont zum Versuchshorizont. Überlegungen zur Abgrenzung zwischen Vorbereitung und Versuch.* in: Dieter DÖLLING – Volker ERB (Hrsg.): *Festschrift für Karl Heinz Gössel zum 70. Geburtstag.* C.F. Müller Verlag, Heidelberg, 2002. p. 179.

34 ADEM SÖZÜER – LIANE WÖRNER: *Der unbeendete Versuch – eine systematische Verortung.* in: WALTER GROPP – BAHRI ÖZTÜRK – ADEM SÖZÜER – LIANE WÖRNER: *Die Entwicklung von Rechtssystemen in ihrer gesellschaftlichen Verankerung.* Nomos, Baden – Baden, 2014. p. 372-373. See more about material-objective theory GROPP 2002, p. 178.

35 See WOLFGANG MITSCH: *Vorbereitung und Strafrecht.* Juristische Ausbildung 2013/7. p. 696-704; PATRICK M. PINTASKE: *Ankündigungspunkte für eine Vorverlagerung im deutschen Strafgesetzbuch – Eine Bestandsaufnahme.* in: ARNDT SINN – WALTER GROPP – FERENC NAGY: *Grenzen der Vorverlagerung in einem Tatstrafrecht. Eine rechtsvergleichende Analyse am Beispiel des deutschen und ungarischen Strafrechts.* V&R unipress, Universitätsverlag Osnabrück, Göttingen, 2011. p. 278-282.

## ÖSSZEFOGLALÓ

### **Az előkészületi cselekmények szabályozása a magyar büntetőjogban**

A magyar büntetőjogban a szándékos bűncselekmények megvalósulásának első szakasza az előkészületi stádium. Jelen tanulmány az előkészületi cselekmények magyar szabályozását több megközelítésből is elemzi. Vizsgálat tárgyává teszi ugyanis a kriminalizáció lehetséges indokait, céljait, a kísérlettel való elhatárolás ismérveit, az előkészület legáldefinícióját, az önkéntes visszalépés lehetőségét, valamint az előkészületi büntetendőség hatályos büntetőjogban ismert egyes formáit is. A tanulmány összefoglalja továbbá a Bosphorus Seminar keretében e témakörben lefolytatott török-magyar-német jogösszehasonlítás egyes eredményeit is, amelyeket a dolgozat végén található táblázat szemléltet.