Introduction to Hungarian Law

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Second Edition

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Krisztina Karsai & Zsolt Szomora

§17.01 INTRODUCTION

Hungarian criminal law belongs to the family of civil law (continental) systems and has been significantly influenced by the German and Austrian model. It has been codified on a high level; that is, both the criminal code (hereinafter referred to as CC) and the Code of Criminal Procedure are unified codes containing the rules of the entire substantive and procedural criminal law. This chapter contains the description of the present Hungarian criminal law that dates back to the political transition in 1989. The entire legal construction of the criminal justice has been amended many times since the political change, and the new pieces of legislation were introduced during the past few years. The new Code on substantive criminal law (CC) was issued in 2012 and came into force on 1 July 2013; the new Code on the penal execution (CEP) was passed in 2013 and came into force on 1 January 2015; and recently, the fresh code on criminal procedure (CCP) was issued in 2017 and came into force on 1 July 2018.

§17.02 BACKGROUND DEVELOPMENT

[A] Previous Historical Development

As the historical development regards the codification of both substantive and procedural criminal law was successful only in the 1880s and 1890s, unlike numerous Western European countries. During this long period, the customary law was the primary source of criminal law that can be characterized by a significant particularity and a strong influence of Austrian and German codifications. Due to the particularity of customary law, criminal law did not function as a precedent law. This feature makes it difficult to find and analyse the sources of criminal law; therefore, a significant part of

customary criminal law had long remained undisclosed. In the period of customary law, some draft codes were elaborated from the end of the eighteenth century. The Drafts of 1795, 1830 and 1843 can be regarded as unsuccessful codification attempts since these codes could never come into force. However, these draft codes also had an influence on the customary law. The first Criminal Code of Hungary, created by and named after Assistant Minister Károly Csemegi, was enacted in 1878 and came into force in 1880. The Csemegi Code (*Csemegi-kódex*) can be regarded as the last and youngest representative of criminal codes following purely classical doctrines in Europe. The Csemegi Code was based on the system of trichotomy. It provided a complete regulation for felonies and misdemeanours and was supplemented by the Act XL of 1879 on contraventions. The Code contained the so-called formal legal conception of criminal offence by laying down the maxim *nullum crimen/nulla poena sine lege parlamentaria*. According to this declaration, Hungarian criminal law ceased to be customary law. This Criminal Code was based, following from the classical doctrine, on a 'conduct-oriented approach'; that is, the liability was based on the act and not on the person of the perpetrator. The age of punishability was twelve years, and no special rules applied to juvenile offenders. The system of criminal sanctions was a monistic one; that is, only penalties were regulated in the Csemegi Code, not measures. The Csemegi Code was followed by dozens of amending statutes, three of which are acknowledged as significant: the 1908, 1928 and 1948 amendments. The statutory amendment of 1948 had to be matched to the system of the Csemegi Code and to the new requirements towards criminal law occurring after the intensification of Soviet influence at the same time. It introduced regulation on the security detention of insane offenders and several modifications of the Special Part (a part of these modifications aimed at an intensified protection of working class property). In 1950, a new Act on the General Part of Criminal Code was enacted. Consequently, the new General Part had to function together with the Special Part of the classical Csemegi Code and a huge number of amending acts. The General Part of 1950 defined the criminal offence from a material point of view; the so-called social dangerousness became a constitutive element of the criminal offence. The Code, as a result of communist influence, acknowledged the possibility of retroactivity to the detriment of the perpetrator. The basic human rights could be violated not only by the retroactivity of the statute but also by the fact that the legislature no longer intended to follow the principle of *nullum crimen/nulla poena sine lege parlamentaria*; consequently, statutory definitions of criminal offences and criminal sanctions were enacted by law decrees and ministerial orders as well. The criminal law of this period significantly deviated from the conduct-oriented approach of the Csemegi Code; this led to basing criminal liability on the social and financial situation of persons undesirable in the new political and social system (e.g., industrialists, wealthy farmers or clergymen were prosecuted by means of criminal law). The first complete Criminal Code of the communist area, which provided regulation on the entire scope of substantive criminal law, was enacted in 1961. This was the first unified code in Hungary containing also the regulation on juvenile and military offenders. The new Criminal Code significantly broadened the scope of criminal liability by creating new statutory definitions.

[B] Criminal Code of 1978

Concerning the evaluation of criminal law of the communist era, two codes have to be mentioned: the CC of 1961 and the CC of 1978. The CC of 1961 can already be regarded as an important step towards consolidation after the fully Soviet influenced criminal law of the 1950s, but a certain level of normalization was achieved with the CC of 1978. After undergoing amendments, it has proven suitable to meet the requirements of a legal system founded on the rule of law. The provisions on the fundaments of criminal liability could be maintained without any remarkable modification, which has to be acknowledged as a major advantage of this Code. The Code of 1978 was built up on the firm basis of *Tatstrafrecht* (i.e., criminal liability is based on the perpetrator's action), and it broadened the scope of the principle 'criminal liability based on culpability' (*nullum crimen sine culpa*) compared to the CC of 1961. This means that Article 15 CC of 1978 abolished the objective liability also in case of offences qualified by a result. This Article provided that the qualified result shall be at least covered by the negligence of the perpetrator. Needless to say that economic crimes and criminal offences against the State, also in the CC of 1978, had a character that necessarily followed from the communist state and economy system. Important to mention that despite the communist era, a clear continuity can be observed concerning the basic doctrines of criminal offences: e.g., the doctrine of attempt (inchoate offences) or that of the parties to criminal offences has been standing on the same basis for more than 100 years now.

The CC of 1978 was in force until 2013, and, after the transition, was characterized by the following features:

> An authoritarian, discriminatory and arbitrary criminal legislation and criminal judicature have no longer been present for many decades now and they have left no significant traces in Hungarian criminal law.
>
> Even the current Hungarian criminal law based on the rule of law goes back to the fundaments of the consolidated CC of 1978. This can be seen most clearly concerning the basic provisions on criminal liability in the General Part of the Code, which provisions have extensively been maintained in the new CC of 2012. This was only possible because the first steps towards a criminal law based on the rule of law had already been made in the 1970s and 1980s.

Concerning criminal jurisprudence, negative consequences of the past era can be seen and addressed even today. The prosperity period of Hungarian criminal jurisprudence, which had commenced after the Csemegi Code's coming into force (1879; *see below*), definitely discontinued after the Second World War. This led to a sort of destruction of jurisprudence. Several fields of criminal law count as *tabula rasa* even today, that is, extensive research has been done on them neither before nor after the transition (e.g., doctrines of intent or that of mistake; grounds of justification and excuse; doctrines of inchoate offences). A welcome expansion of research in criminal law can be observed only after 1990, but the time elapsed since then has not been enough to make up all the deficiencies in criminal legal literature. The clearest evidence of the incomplete development of criminal jurisprudence is that today's scholars still have to rely on the basic works that were published in the period of the Csemegi Code. These essential works from the late nineteenth century and the early twentieth century

are often referred to even in papers published these days. Despite the development of criminal jurisprudence having been interrupted after Second World War, Hungarian criminal law fortunately has older traditions that make possible the reconstruction of criminal jurisprudence on a European level.

The legal conception of the communist system has left traces both in legal thinking and legal practice. The negative impacts of the past era are noticeable even today. The official communist ideology about the legal system's being non-essential, which was determined as the final goal of the communist way of social and state development, led necessarily to a sort of destruction of legal thinking and to a significant positivism in legal interpretation and judicial practice. The criminal courts adhered to legal positivism even after the transition; judges made use of other interpretative methods only in a limited scope. For example, the purposive interpretation was re-discovered only after the turn of the millennium (the so-called Szeged School of Criminal Law aims at embedding the purposive interpretation in legal literature and at displaying it for the practice). Despite the fact that the courts have recently started to move apart from exclusive grammatical positivism and case law has newly started to regain its importance, judicial practice has not yet reached the required quality of interpretation. A number of judgments can be found even today, the reasoning of which is rather reticent; such judgments also occur, in which certain legal problems are not even noticed and addressed by the judge. Nonetheless, it has to be emphasized that, since the transition, the courts have made important steps towards a more autonomous judicature. Traces of continuity with the period of the Csemegi Code can also be found nowadays: in certain cases, the Supreme Court (Curia) refers to the Csemegi Code or judicial decisions of that period in the argumentation of some recent judgments. However, the positivistic way of thinking as a heritage of the pre-transition period is still an important characteristic of the court practice.

In order to conclude the evaluation of the communist period of criminal law and to shed light on the recent period, it is worth mentioning that criminal law and criminal scholars of today focus at four different targets: the old dogmatic traditions of the Csemegi Code; the important traditions of the (still communist) CC of 1978; the requirements following from the rule of law and international obligations; the punitive expectations of the society that are more and more considered in the course of recent legislature.

[C] Intertemporal Criminal Law: Criminal Justice in Transition (1989–1990)

The phenomenon of intertemporal criminal law had its own character also in Hungary but, fortunately, the transition process did not lead to any serious problems in our country. The prohibition of retroactivity to the detriment of the perpetrator became more and more important as the consolidation started from the 1960s. Retroactive legislation ceased to exist even before the transition. With the major 1989 amendment to the Constitution (the so-called Republic Amendment), the *nullum crimen/nulla poena sine lege parlamentaria* principle was enacted. Since then, the legislator is also

obliged to respect this fundamental guarantee of human rights. Decriminalization concerning the criminal offences against the State or economy offences was without any problems accepted and enforced by the courts as well. In this context, it has to be stressed that the *lex mitior* was applied not only in ongoing criminal proceedings but also in case of prisoners or those being issued with a final sentence. This was made possible by the Amnesty Acts of 1989 and 1990.

The problem of intertemporal criminal law was solved with a scratch of pen in Hungary unlike the problem of accounting for the past, i.e., the question of criminal liability for offences committed by the communist regime. A Bill of 1992 (known as *Lex Zétényi-Takács*), which intended to retroactively extend the statute of limitations for offences not punished during the communist crimes, was annulled by the Constitutional Court in the course of a preliminary judicial review. Thus, the HCC declared the primacy of legal certainty as the formal aspect of a state founded on the rule of law. In another decision of the Constitutional Court of 1993 it was stated that the statute of limitation can be excluded only and exclusively in case of war crimes and crimes against humanity, since these offences are *ab ovo* not subject to statute of limitations under international law.

As per the present historical knowledge, there were about seventy to eighty volleys during the 1956 Revolution, where unarmed civilians were shot. Around thirty criminal proceedings for these volleys were instituted after the transition. Perpetrators were found guilty only in four cases, in which the Supreme Court based the criminal liability of the convicts directly on international law.

With the new Hungarian Constitution (the so-called Fundamental Law) of 2012, a new chapter was introduced in the post-transition period of Hungarian criminal law by excluding the statute of limitation regarding serious offences that had been committed against individuals and had not been punished due to political reasons prior to the transition. The provisions concretizing the exclusion of statute of limitations are laid down in a separate Act of 2012. Since then, two criminal proceedings have been instituted. Due to the modification of the Constitution, the criminal liability's conformity with the Constitution can no longer be challenged. However, the question still arises: can the past really be coped with twenty-two years after the transition?

[D] Recent Criminal Code

The reform process has recently been closed by the new Criminal Code of 2012 being passed. The CC 2012 entered into force on 1 July 2013. The re-codification process lasted for ten years; but the majority of the normative content of the CC of 2012 is similar to the prescriptions of the CC of 1978; the most important reforms were already introduced into the CC of 1978. Only few clearly new provisions can be identified in the CC of 2012 in comparison with the CC of 1978: modifications in the criminal law of juvenile offenders (descending the age of criminal responsibility from 14 to 12 years in case the child commits one of the serious felonies exclusively listed in Article 16 CC 2012) or the questionable extension of the rules on justifiable defence.

The transition period pointed out that the basic provisions of the General Part on the criminal liability (*Straftatlehre*) had proved themselves solid. This stability and constitutional conformity were in fact due to the legislature of the late communist era. The relatively smooth transition from a communist criminal law to a criminal law based on the rule of law can be deemed exemplary. It was the co-operation between the legislature, the Constitutional Court and the criminal courts to make this exemplary transition possible. On the contrary, the opinion is unfortunately negative about the quality of the legislation techniques after the transition and about the recent tendencies in criminal policy.

§17.03 SOURCES OF CRIMINAL LAW

[A] Single Uniform Criminal Code: No Separate Acts

If we look at the history of the technique of legislation in Hungary, a clear tendency can be seen beginning with particular criminal statutes and ending with a single uniform Code containing the entire substantive criminal law. There were numerous supplementary statutes to the Csemegi Code, which amendments were not incorporated into the Code. The first Criminal Code of uniform structure was that of 1961. Nonetheless, it has to be mentioned that, besides the dominance of the CC 1961, there were scattered decrees and other pseudo-legal norms in force, which laid down criminal liability or penalty rules. This legal situation was abolished through the 1989 and 1990 amendments to the Constitution. Between 1989 and 2004, not a single separate criminal act existed; each rule of substantive criminal law was contained in the CC 1978. Special fields such as provisions for juvenile offenders, military criminal law or economic offences are even today entirely included in the CC. Naturally, there were always framework definitions in the CC, the substance of which was provided by non-penal legal norms outside the CC. Legal norms of penal character did not exist outside the CC.

This situation of legislation technique partially changed in 2001 (2004). In 2001, a separate Act on preventive measures applicable against legal persons was passed, which Act became effective on the day Hungary became a Member State of the European Union (EU) (1 May 2004). Like mentioned above, a separate Act on excluding the statute of limitation in case of criminal offences committed during the communist regime and not punished due to political reasons came into force on 1 January 2012. Despite the existence of these two separate statues, it still has to be stressed that, in Hungary, no separate statutes (*Nebenstrafrecht*) exist, the addresses of which are natural persons of today. In Hungarian criminal law, the tradition of an all-encompassing single uniform Criminal Code seems to be firmly established. This tradition was in addition enhanced as the pseudo-legal norms were abolished at the beginning of the transition period. While there are legal scholars who criticize these kinds of legislation techniques, the legal practice still insists on the Code's uniform structure's being maintained. The latter opinion is supported by other scholars who emphasize that the foreseeability of criminal liability and sanctions can be best ensured this way.

[B] Quality of Legislation

Besides the structural features of criminal legislation, its quality is also a fundamental issue. As to that, the opinions are unfortunately definitely negative: a radical decline in quality of the legislation technique can be observed after the transition, which tendency became more radical after the turn of the millennium. It is to be acknowledged even after the political transition and in view of a criminal law founded on the rule of law that the Criminal Codes of 1961 and 1978 were of such a high technical quality, which has not been achieved ever since. The collection of materials of the Codes of the communist era reflects a high professional level of preparatory work. The explanatory notes of the Minister of Justice to both the Codes were very helpful for the legal practice as well.

[C] Structure of the Recent CC

The CC of 2012 contains in its General Part all the relevant provision on principles, on the definitions of elements of offences, on the requirements of the criminal responsibility (of natural persons) and on the obstacles of criminal responsibility. It contains the description of all criminal sanctions and the main rules of sentencing. The specific sanctioning provisions in case of juvenile offenders have got their place in the General Part as well. The military criminal law is traditionally part of the unified CC, this means that the norm on the special responsibility and the very specific sanctions as like as the special military offences are also incorporated into the CC. The Special Part of the CC contains the description of the offences based and classified according to the social or individual interests protected by them (*see below*).

§17.04 MAIN PRINCIPLES OF CRIMINAL LAW

The evolution of the basic principles of criminal law was fundamentally generated by the development of philosophy and politics. The current principles of criminal law have their origin in the social development and in the appearance of the first generation of human rights at and from the Age of the Enlightenment. The general principles of Hungarian criminal law can be divided into groups in different ways. We will apply these classifications.

(1) Principles having influence on the whole legal system:
   - the idea of the state founded on the rule of law that represents the requirement of legal certainty on the one hand (formal aspect) and of justness on the other (material aspect); and
   - the idea of humanity – that is, each field of the legal system must respect the fact that those to whom the legal norms are addressed are human beings.

(2) Principles that are especially characteristic of criminal law:
   - the principle of legality;

- the basis of criminal liability on the action of the perpetrator (liability based on the act) and not on his/her person or personality (liability based on the perpetrator's person);
- the principle of criminal liability based on individual guilt;
- the principle of proportionality;
- the prohibition of double adjudication (*ne bis in idem*); and
- the subsidiarity (*ultima ratio* character) of criminal law.

In the current legal environment, the principle of legality is not only declared by the CC of 2012 (Article 1), but also by the Fundamental Law. The Fundamental Law stipulates that 'nobody can be declared guilty and be punished for a conduct that was, at the time of its perpetration, not a criminal offence either under Hungarian law or provided for by an international convention or a legal instrument of the European Union' (Article XXVIII, paragraph 4). Thus, the principle of non-retroactivity as the temporal condition of the principle of legality is provided by the Fundamental Law itself. Article XXVIII read in conjunction with Articles I ('basic rights and duties shall be determined in an Act of Parliament') and IV ('one can be deprived of his/her liberty only on the ground of an Act of Parliament and in a way determined therein') makes clear that criminal offences and penalties shall be laid down in an act of Parliament. The joint interpretation of these three Articles of the Fundamental Law excludes not only case law but also other statutes of a lower level than an act of Parliament to be the basis for criminal liability and penalties.

The principle of legality is the source of the prohibition of retroactive criminal law. According to CC 2012, a committed act shall be adjudicated in accordance with the law in force at the time of the perpetration (*lex temporis delicti*). This provision implies that Hungarian criminal law has no retroactive force. A person must be able to know that his/her 'future' conduct (act or omission) is classed as a criminal offence and what penalty is prescribed by the law for such conducts. In this way, the rule of law prevents the abuse of state power against individuals. The prohibition of retroactivity is part of the requirements derived from the principle of legality (rule of law). The applied criminal law – both the criminal offences and the penalties – must have been defined when the act occurred (*nullum crimen/nulla poena sin lege praevia*). The CC creates an exception to the prohibition of retroactivity as well; if the conduct no longer embodies a criminal offence or shall be adjudicated milder according to the new Act of Parliament, then the new regulation has retroactive force. In this context, the time of legally binding adjudication is proper. Even if the new law qualifies the conduct, however, as a regulatory offence (formal decriminalization), the retroactivity is still given. The so-called mildest criminal law is not accepted in Hungary: if there is a milder new law during the interval between the commission and the adjudication of the act, and this Act has been abolished by the time of adjudication, its provisions cannot be applied to the case.

The principle of *ne bis in idem* is closely related to the principle of legality and can be derived from the idea of the state founded on the rule of law. As a widely acknowledged constitutional principle, it has been introduced in Article XXVIII,

paragraph 6 of the Fundamental Law. This prohibition means in a broadest sense that an offender may not be sentenced twice for the same criminal offence.

The principle of individual guilt is also a leading principle of Hungarian criminal law that can be derived from the fundamental right to human dignity (Article II of the Fundamental Law). As the HCC pointed out, there is no concrete prohibition of strict liability laid down in the Constitution (as is the case in the Fundamental Law), but the right to human dignity postulates that only offenders who have a guilty mind may be punished. In addition to its constitutional relevance, this principle has important consequences on substantive criminal law. The individual guilt (in the sense of personal blameworthiness) is a basic element of the concept of crime in Hungarian criminal law; that is, no unlawful conduct can constitute a criminal offence without guilt.

The principle of proportionality can be derived from the constitutional postulate of the State founded on the rule of law, as it is one of the principles that are not mentioned by name in statutes. The Constitutional Court has refined the ways of application of this principle to criminal law in several of its decisions, primarily in terms of the restriction of fundamental rights by criminal law. Thus, criminal legal intervention must be suitable to achieve the purpose it is intended to serve. Furthermore, criminal-legal intervention shall be necessary; that is, no lesser instruments that could lead to the same result may be available. Third, the criminal-legal intervention shall be proportionate to the result and advantages that can be achieved by it. These three components of proportionality (suitability, necessity and proportionality in a narrower sense) are guidelines for the question of criminalization on one hand and for determining the type and range of sanctions on the other.

§17.05 COMPONENTS OF CRIMINAL RESPONSIBILITY

[A] The Concept of Criminal Offence

In Hungary, a material concept of criminal offence prevails in the doctrine as well as in the Criminal Code. The doctrine was strongly influenced by the German criminal doctrines. The concept of criminal offence consists of four conjunctive elements in the prevailing opinion:

(1) conduct;
(2) fulfilment of the statutory elements of criminal offence;
(3) unlawfulness; and
(4) guilt (the latter in a subjective and not procedural sense).

The CC lays down also a material concept of criminal offence, which is an obvious legacy of the communist period. The statutory concept of criminal offence currently in force is equal to that of the CC 1961, only the sequence of the single elements were changed in 1978. Judges and prosecutors insist on this concept being maintained, which wishes were accepted by the legislature, since the statutory concept

of 1978 (practically that of 1961) was without changes introduced into the new CC 2012 (Article 4, paragraph 1 CC 2012, 'criminal offence is a conduct perpetrated intentionally or – if this Act also punishes negligent perpetration – by negligence, which is dangerous for the society and punishable by this Act').

However, respectful opinions criticize the conceptual element of 'social dangerousness', which was introduced via Soviet transfer in Hungary, and plead for its abolishment, partly because of its negative historical connotation and partly because of its dogmatic inaccuracy. In current court practice, the social dangerousness takes the role of material unlawfulness, is used for purposive interpretation and serves as means of canalizing grounds of justification based on customary law (e.g., the consent of the victim) into the CC.

An important characteristic of Hungarian criminal law is that not only an 'academic concept' of criminal offence has been developed but the CC also contains a 'statutory concept'. According to the definition laid down in Article 4 of CC, 'criminal offence is a conduct perpetrated intentionally or – if this Act also punishes negligent perpetration – by negligence, which is dangerous for the society and punishable by this Act'. The elements of the two different concepts mainly correspond to each other: 'conduct' to 'conduct'; 'intent' and 'negligence' to 'guilt'; 'social dangerousness' to 'unlawfulness'; 'punishability' to the 'fulfilment of the statutory elements of an offence'.

These elements are difficult to align with the common law classification of *actus reus* and *mens rea*, since the statutory elements of an offence are composed of both objective and subjective elements, and guilt comprises, beyond legal capacity and intent or negligence, other elements that cannot be related to *mens rea*.

[B] Subjective Guilt or Culpability

The *maxim nulla poena sine culpa* is a leading principle of Hungarian criminal law. Consequently, the individual guilt (in the sense of personal blameworthiness) is a basic element of the concept of criminal offence in Hungarian criminal law; that is, no unlawful conduct can constitute a criminal offence without guilt. Strict criminal liability and vicarious liability are not recognized in Hungarian criminal law, as is the case in most civil law countries. The concept of guilt in Hungarian criminal law can be given as follows: guilt is the perpetrator's blameworthy mental state in relation to his/her conduct and the consequences of his/her conduct. This concept of guilt is based on a four-element model that comprises both ontological components relating to the mental state of the perpetrator and normative components expressing the legal blameworthiness of this mental state. The conjunctive components of guilt are the following:

(1) The age of punishability, being 14 or, in exceptional cases, 12 years of age under the current legal regulation (cf. Article 16 CC). This is a normative component of guilt stating that, should a mental state in the form of intent or

negligence come to being in case of a child, this mental state is not legally blameworthy, and the child may not be punished.

(2) The legal capacity to be adjudged guilty, which is an ontological prerequisite for intent or negligence.

(3) The intent or negligence, being the central mental element of guilt and determining the two forms of guilt.

(4) The expectability of a behaviour in conformity with the law, which is another normative element expressing that the perpetrator's legally acting has to be expectable in order to establish his/her guilt (e.g., if a relative of the perpetrator would commit abetting after the fact by hiding the perpetrator).

[C] Extension of Criminal Responsibility

In Hungary, the person who had not turned 14 at the time of committing the offence shall not be punishable for the commission of an offence, unless the perpetrated offence is homicide, homicide committed under the influence of sudden or extreme passion, causing bodily harm with life-endangering or fatal consequences, terrorist act, robbery or qualified plundering (objective criterion), and provided that the perpetrator of these listed offences has turned 12 at the time that theses offences were committed and is capable of recognizing the consequences of his/her conduct (subjective criterion: 'mental-moral maturity') (Article 12 CC). The examination of this capacity requires special expertise; the investigating authorities shall order a special expert to investigate whether a child could be regarded as a liable person in relation to the listed offences. However, this rule has been in force only since July 2013; to date, no remarkable such cases have occurred that would provide us a descriptive basis as to how this rule could be applied in every day practice. In itself, the evaluation of mental-moral maturity is an innovative element of establishing criminal responsibility, but, as mentioned above, reducing the age limit has faced general rejection in both academic debates and among practitioners.

[D] Obstacles of Criminal Responsibility

If an action or omission is covered by the definition of a criminal offence, the punishability of the perpetrator is given, unless special circumstances provided by law occur: these are the grounds of impunity or the obstacles to punishability. Hungarian criminal law, which follows civil law tradition, does not deal with defences unlike American and English criminal laws. The obstacles of punishability can be primary and secondary ones. The primary obstacles are the grounds of justification and the grounds of excuse or exemption from culpability, both of which exclude a formal realization of the criminal offence. If any of the primary obstacles is realized, an offence – in criminal law terms – does not come about. As regards participation in the criminal offence, it means that not only the perpetrator of the action (omission) is free from punishment but also all of his/her accessories. The secondary obstacles do not affect the fact that an offence has been perpetrated, but the special grounds of preclusion or termination of

punishability make possible that the offender cannot be prosecuted for his/her criminal conduct. Resulting from this distinction, the impunity arisen from the secondary grounds affects only the perpetrator; other participants of the offence are not free from punishment.

Hungarian criminal law distinguishes between justification (treating the action/omission as not unlawful) and excuse (merely considering that subjectively the perpetrator is not blameworthy). Grounds of justification are circumstances that make an act or omission lawful and justify the conduct, although it violates the literal terms of criminal law. Examples include justifiable defence, necessity, permission by law, public duty or orders of authorities, duty of a certain profession, consent of the victim, allowed risk and collision of duties. In Hungarian criminal law, grounds of excuse are infancy, insanity, duress, coercion, mistake of law or fact and other circumstances that exclude the expectability. An excused action (or omission) is not an offence in terms of criminal law but remains unlawful with the consequence that justifiable defence may be carried out against an excused conduct, and the law of torts remains applicable.

The secondary obstacles are divided into two groups of grounds precluding punishability and grounds terminating punishability. The absence of certain declarations excludes the punishability of the perpetrator; these are the private motion in case of specific crimes (e.g., inflammation), the request of the General Public Prosecutor in case of extraterritorial jurisdiction and the request for suspension of immunity. In Hungarian legal doctrine, the immunity based both on international public law and national law causes impunity for the person, but the committed act (omission) remains an offence in terms of criminal law, and all consequences of this distinction are valid. Other circumstances can induce impunity (termination of punishability), but they arise after the perpetration of the offence, possibly already during the criminal procedure. Examples are the death of the perpetrator, the pardon or amnesty, the limitation of punishability by the lapse of time, the active repentance of the perpetrator in case of listed offences and other defined circumstances (e.g., voluntary abandonment of offence, probation).

§17.06 SANCTIONING OF LEGAL PERSONS FOR CRIMINAL OFFENCES

The criminal responsibility of legal persons is not an acknowledged doctrinal concept in the Hungarian criminal law. However, the possibility to 'punish' or to sanction legal person was introduced already in 2001 (the relevant act came into force only on 1 May 2004 the day Hungary joined the EU).

The Hungarian regulation has been elaborated based on the so-called measure model, by which measures are imposed on legal persons without establishing their criminal liability but only if a certain natural person was found guilty. Furthermore, the offence must have been committed intentionally by the natural person and that person must have been punished with a penalty or certain measures including probation, admonition, forfeiture or confiscation for that offence.

Three different measures are applicable to legal persons as the following ones:

(1) the liquidation of the legal person;
(2) the limitation of its activity; and
(3) the fine (considered to be a measure too).

Without entering into a theoretical debate, it seems fair to label these criminal measures as a 'foreign body' in the Hungarian system of criminal sanctions. This opinion can be supported, for instance, by the fact that the related provisions have not been incorporated in the CC; and also, that these rules are not really applied at all in courts' practice.

§17.07 INCHOATE OFFENCES

To prevent offenders from committing and completing criminal offences, criminal law needs to intervene not only in the case when an offence has already been committed but also before a criminal offence has been completed. To achieve a deterring effect, criminal law needs to punish phases of criminal offences prior to completion. These phases are called preliminary stages of criminal offences. Only intentional offences have preliminary stages; offences committed by negligence can be punishable only if completed. Two preliminary stages of intentional criminal offences are dealt with by both Hungarian criminal law doctrine and the CC: preparation and attempt. The definition of preparation in Article 11, paragraph 1 CC 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.' Article 10 CC defines attempt as follows: 'The person who commences the perpetration of an intentional criminal offence shall be punishable for attempt.'

As it can be seen, the preparation is punishable only if the CC specifically prescribes it attached to certain criminal offences in the Special Part. In these cases, the CC always provides a lower range of penalty than that provided for completed offences. For example, the preparation of homicide shall be punished with imprisonment not exceeding five years (Article 160, paragraph 3), while completed basic homicide shall be punished with imprisonment from five to fifteen years (Article 160, paragraph 1). While the punishability of preparatory acts is exceptional, attempt is punishable generally – that is, in case of all intentional criminal offences (Article 10 CC). No distinction is made between felonies and misdemeanours (*see below*); the attempt of both kinds of criminal offences is punishable. The CC provides the same range of penalty for attempt as that for completed offences (Article 10, paragraph 2); the fact that the criminal offence has not yet been completed can be regarded as a mitigating circumstance during the infliction of penalty. Moreover, the CC provides the possibility of the so-called mitigation by two degrees of penalty (Article 82, paragraph 4) in case of attempt.

One might have the impression of an extensive criminalization in Hungarian criminal law because the preparation of a criminal offence can also be punishable.

To provide a more accurate picture of the scope criminalization, we shall also discuss how the line is drawn between the preliminary stages of criminal offences. 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. Consequently, 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 CC specifically prescribes.

§17.08 PARTIES TO THE OFFENCES

The Special Part of Hungarian CC mostly defines criminal offences by describing one perpetrator's action or omission. However, it often happens that more persons are involved in the commission of the offence; their co-operation can happen in many ways and in various kinds of participation possibilities. Thus, the task of criminal law is to lay down the possible types of participation to meet the principle of legality. The statutory definitions of criminal offences mostly cover only the participation of one offender; therefore, they usually would not constitute a proper legal basis for the criminal liability of more persons' participation in the same criminal offence in different ways. Criminal legislation had to find other ways in the General Part of CC to determine the types of participation of two or more persons.

Hungarian criminal law distinguishes between two main categories of parties to criminal offences: In Article 12 CC, the participants are the perpetrators and the accessories. Thus, Hungarian criminal law follows the so-called dualistic system of participants with a restrictive concept of perpetrators. Under Article 13 CC, perpetrators are the sole or direct perpetrator, the indirect perpetrator and the joint perpetrators. Under Article 14 CC, the accessories are the instigator and the abettor. The penalties provided for perpetrators by the Special Part of CC shall apply also to accessories; that is, the type of participation is irrelevant concerning the range of penalty on the statutory level but can have a role during the judicial infliction of penalty. The distinction between perpetrators is important to determine the legal basis of criminal liability precisely and so to meet the principle of legality. This function of the regulation is especially important in the case of accessories and the indirect perpetrator who never act within the frame of the statutory definitions of criminal offences.

In addition to perpetrators, accessories constitute another group of parties to criminal offences. As their name shows, the participation of accessories in criminal offences and their criminal liability have an accessory character; that is, the participation of accessories presupposes a perpetrator's offence, and their criminal liability is generally related to the qualification of the perpetrator's offence. Furthermore, the liability of accessories requires, following from the legal definitions of accessories (Article 14 CC), an intentional participation in the commission of criminal offences; an accessory participation by negligence is excluded.

§17.09 CLASSIFICATION OF CRIMINAL OFFENCES

The dichotomy of offences means that the CC distinguishes between felonies and misdemeanours. These categories are defined by reference to both the form of guilt (intentional or negligent offence) and the penalty: A felony is an offence that is intentionally committed and punished by the CC with imprisonment exceeding two years. Misdemeanours are either intentional offences punishable with imprisonment not exceeding two years or negligence offences (Article 5 CC). This division is important because it has consequences in the field of substantive criminal law. For example, the rules of probation and suspended imprisonment or the regimes of penal execution are different depending on whether the criminal offence is a felony or misdemeanour.

§17.10 THE SYSTEM OF SANCTIONS

[A] Penalties and Measures

Hungarian criminal law is based on a dual system of sanctions: penalties and preventive measures are laid down in the CC 2012.

Penalties are as follows:

- imprisonment;
- custodial arrest;
- community service;
- fine;
- disqualification from a profession;
- disqualification from driving motor vehicles;
- ban on entering certain areas;
- ban from visiting sport events; and
- expulsion.

Apart from few constellations, these penalties are applicable both alone and combined with each other, which serves the individualization of penalty and a broad applicability of alternative sanctions as well. The CC 2012 provides for one secondary penalty that can be applied only and exclusively in addition to imprisonment: exclusion from participation in public affairs.

Preventive measures are as follows:

- admonition;
- probation;
- compensational service;
- probationary supervision;
- forfeiture;
- confiscation;

– irreversibly rendering electronic information inaccessible; and
– compulsory psychiatric treatment (and the measures against legal persons).

Table 17.1 System of Sanctions in the Criminal Code

Penalties		*Preventive Measures*	
Penalties	*Secondary Penalty*	*Including Deprivation of Liberty*	*Without Deprivation of Liberty*
1. Imprisonment. 2. Confinement. 3. Community service. 4. Fines. 5. Disqualification from a profession. 6. Disqualification from driving motor vehicles. 7. A ban on entering certain areas 8. A ban on visiting sport events. 9. Expulsion.	Exclusion from participation in public affairs.	1. Compulsory psychiatric treatment. 2. Only against juveniles: special education in a reformatory institution.	1. Admonition. 2. Probation. 3. Compensational service. 4. Probationary supervision. 5. Forfeiture. 6. Confiscation. 7. Rendering electronic data irreversibly inaccessible. (8. Against legal persons: – liquidation of the legal person; – limitation of the legal person's activity; – fine as a measure.)

The applicability of alternative sanctions to substitute imprisonment has considerably been broadened after the transition. Furthermore, the possibility of active regret and mediation procedure was introduced into the CC and the Code of Criminal Proceedings. It can be said generally that a possibility to apply alternative sanctions is provided if the maximum of the penalty range applicable to a certain criminal offence does not exceed three years. Since the middle of 1980s, it has been the fine to be applied most frequently. The proportion of fine fluctuates between 45% and 50%. That is, imprisonment lost its dominant role in the system of sanctions right before the transition already. In this context, it becomes apparent that the legislature was dissatisfied with sanctioning practice of the courts that had got milder by the time. This view of the legislature was more times expressed in explanatory notes to amending acts to CC as well. In order to motivate the courts to inflict harsher penalties, the so-called average model as a rule of penalty infliction was introduced into the CC. Under provisions currently in force, the court shall take the average of the range of penalty as a starting point when inflicting an imprisonment lasting for a determinate period (e.g.,

if the punishment written in the CC is an imprisonment exceeding from two to eight years, the average is at five years). A deviation from the average shall presuppose solid reasons and detailed reasoning by the court.

[B] Stringency of Criminal Law

Besides the broadened scope of applicability of alternative sanctions, considerable stringency can be observed regarding imprisonment. In 1998, the so-called real life imprisonment was introduced into the CC. Since that time, the judge has had the possibility to exclude the conditional release even in the judgment and without the possibility of later revision (*see* more below).

Another example of the stringency is the so-called three-strikes-and-you-are-out rule which was introduced into the CC in 2010. On the one hand, the rule applies to multiple recidivists provided that each relevant criminal offence committed by them includes violence against an individual (Article 97/A CC 1978). On the other hand, the rule applies to those having committed at least three criminal offences including violence against an individual, in case these offences constitute a real concurrence (Article 85, paragraph 4 CC 1978). This latter 'three-strikes rule', however, was found unconstitutional and quashed by the Constitutional Court (23/2014. (VII. 15.) AB hat.). In both cases, the range of penalty applicable will be doubled. If this increased range of penalty exceeds twenty years, the perpetrator shall be sentenced to life imprisonment. The court has no power of discretion. Consequently, these two provisions lay down a mandatory sentence, which is an unprecedented, 'foreign body' in the Hungarian system of sanctions. In these kinds of stringency, the American law and order model can be recognized.

[C] Real Life Imprisonment

Life imprisonment has become the most severe sanction in Hungarian criminal law due to the abolition of the death penalty. It can be imposed in the case of about thirty criminal offences but, in judicial practice, it is imposed only for qualified homicide (Article 160, paragraph 2 CC). In the most relevant cases for which life imprisonment is provided by the CC, the sentencing judge also has the choice to impose a fixed-term imprisonment (i.e., imprisonment ranging from five to twenty years or from ten to twenty years depending on the offence). Moreover, life imprisonment may be imposed only if the perpetrator has turned twenty at the time the criminal offence was committed (Article 41 CC).

In terms of its substance, life imprisonment can be subdivided into two types under Article 42 CC 2012: Regarding criminal offences punishable also by life imprisonment, it is at the discretion of the judge whether to grant or to exclude the possibility of conditional release a priori when imposing a life sentence. In case the possibility of release will not be excluded by the judge, then, the minimum period (before granting parole) must be ordered by the sentencing judge between twenty-five and forty years (Article 43 CC).

On the other hand, by the possibility of the 'a priori exclusion' of conditional release, Hungarian criminal law has created the so-called real life imprisonment (in other words, whole life sentence). Furthermore, two mandatory cases are provided for by Article 44 CC, in which the judge has to exclude the possibility of conditional release: first, when imposing life imprisonment for a criminal offence that was committed in a criminal organization, second, when imposing life imprisonment in case of multiple violent recidivists.

After the real life imprisonment had been introduced in the system of sanctions, complaints were filed to the Constitutional Court in order to contest the constitutionality of this penalty. The Constitutional Court did not make a decision for a decade, and its proceedings were terminated in 2012 due to procedural reasons following from the new Constitution, the Fundamental Law. Furthermore, the Fundamental Law affects the substance of this penalty as well: in order to prevent constitutional concerns, Article IV provides that real life imprisonment may be imposed only in case of an intentional criminal offence involving violence. This provision has both a limitative and a legitimating function – that is, it restricts the State's penal power regarding the most serious penalty on the one hand and aims at providing a constitutional exception to the constitutional prohibition of inhuman or degrading penalty (which prohibition is laid down in Article III of the Fundamental Law). In order to be in conformity with this constitutional provision, an exclusive list of violent offences, in case of which real life imprisonment may be inflicted, has been introduced in Article 44 CC.

However, in view of the latest developments of the European Court of Human Rights (ECtHR) case law, this aim of the Hungarian legislature seems to fail since the ECtHR stated in the Case of *Vinter and Others v. the United Kingdom* (*Vinter and Others v. the United Kingdom (Grand Chamber)*, Nos 66069/09, 130/10 and 3896/10, 9 July 2013) for the first time that imposing a life sentence without any possibility of revision and conditional release already violates Article 3 of ECHR at the imposition of the whole life sentence. In October 2014, the Case of *László Magyar v. Hungary* (*László Magyar v. Hungary*, No. 73593/10, 20 May 2014) became also final. The ECtHR unanimously held that Hungary violated Article 3 of ECHR by having imposed whole life sentence on the applicant László Magyar.

In Hungary, the conclusions drawn from these ECtHR judgments are rather controversial. In April 2014, the High Court of Appeal of Szeged suspended a case and referred it to the Constitutional Court with regard to the judgment made in the Case of *Vinter*. The criminal court alleged the violation of international law and therefore proposed the annulment of the whole life rules in the CC. While this judge's proposal was pending at the Constitutional Court, the judgment in the Case of *Magyar* primarily adjudicating the rules of the Hungarian CC and stating the violation of Article 3 ECHR was also passed. Consequently, the legislature amended the law and enacted the rules of the so-called compulsory procedure for pardon applicable to whole life prisoners in order to comply with the requirements following from the *Magyar* judgment.

It took the Constitutional Court nine months to decide about the criminal judge's proposal: referring to the aforementioned modification of the law, the Constitutional Court refused the examination of the proposal and stated that the reasoning given by the criminal court became obviously frustrated due the changes of law (AB ruling

3013/2015 (I. 27)). In our view, this decision is more than critical since it, without giving a single reason, avoids examining the merits of the case and clearly disregards the obligations of the Constitutional Court concerning the review of Hungarian law's conformity with international law (following from Articles Q and 24 of the Fundamental Law). The Constitutional Court should have reviewed the 'whole life rules' laid down in the CC in conjunction with the newest amendments made to the law on enforcement of sanctions on the 'compulsory procedure for pardon' in the light of ECtHR case law. Also with regard to the fact that the ECtHR, unlike Constitutional Courts, is not entitled to annul domestic law provisions of the Member States.

As for the so-called compulsory procedure for pardon, its rules have been enacted in the CEP (Articles 46/A–46/H), while the rules on the real life sentence have remained untouched in the CC. This compulsory pardon procedure applies to convicts in case of which the possibility of conditional release has been excluded by the sentencing judge. After the whole life prisoner served forty years of imprisonment, the Minister of Justice shall launch the procedure of pardon provided that the prisoner consents to it. The possibility of a conditional release will then be examined by a clemency board composed of five criminal judges. This examination has to be carried out on the basis of a comprehensive documentation, and the prisoner has to be heard as well. The reasoned opinion of the clemency board has to be transferred to the President of the Republic who is not bound to the opinion of the clemency board and makes a discretionary decision about the release without any reasoning. Despite introducing this compulsory procedure for pardon, concerns under international law still remain, since this procedure can take place only after serving forty years of imprisonment, which period significantly exceeds the twenty-five-year period given in the *Vinter* and *Magyar* judgments of the ECtHR. Furthermore, the discretionary decision of the President of the Republic eventually annuls the guarantees, which are characteristic for the functioning of the clemency board. In 2016, the ECtHR found in its *T.P. and A.T. v. Hungary* judgment (Application Nos 37871/14 and 73986/14) in particular that making a prisoner wait forty years before he or she could expect for the first time to be considered for clemency was too long and that, in any case, there was a lack of sufficient safeguards in the remainder of the procedure provided by the new legislation. The ECtHR was not therefore persuaded that, at the present time, the life sentences (of more applicants) in the given case could be regarded as providing the applicants with the prospect of release or a possibility of review; despite the newly introduced procedure their sentences remained inhuman and degrading as they had no hope of release, consequently the legislation was not therefore compatible with Article 3 of the Convention.

[D] Death Penalty

The death penalty was abolished by the Constitutional Court on 31 October 1990. Although it was not the Parliament to make this indispensable decision, it entered later into international obligations aiming at the abolition of capital punishment. The Hungarian legislature ratified Protocol No. 6 to the ECHR in 1993 and the second

optional protocol to the UN Covenant on Civil and Political Rights in 1995. The most important development was the 2004 ratification of Protocol No. 13 to the ECHR that concerned the abolition of the death penalty in all circumstances (ratified by Act III of 2004). It has however to be noted that neither the Constitution (until 31 December 2011) nor the Fundamental Law (the new Constitution in force from 1 January 2012) provides an explicit prohibition of the death penalty, unlike the Constitutions of numerous other European countries. The prohibition follows only from the above-mentioned decision of the Constitutional Court and the international treaties.

As for the provisions on death penalty and its application, the CC 1978 provided death penalty for twenty-six criminal offences, whereas imprisonment was also applicable alternative to death penalty. Consequently, no mandatory cases for death penalty existed. The courts imposed the death penalty only in case of aggravated intentional homicide (military offences not inclusive). During the last years before its abolition, death penalty was imposed only on one to five convicts a year. The last execution took place in 1988.

§17.11 JUVENILES AND SOLDIERS

As mentioned, the Hungarian CC contains all the criminal law relevant norms of substantive character; this means also that both the juvenile criminal law and the criminal law of soldiers (military criminal law) are part of the Code.

If a juvenile (or a child) perpetrates an offence, his/her criminal responsibility is full, the structure and the elements of the guilt are the same as in case of adult offenders. Important to note, the juvenile offenders have special treatment in all other aspects of criminal justice: the sanctioning system, the criminal procedure carried out against them and the penal execution against juveniles consider the youth (i.e., young age) of the offenders and the consequences of this status. At least this is so according to theoretic conceptions and the operation of the legal framework so far. The special provisions of CC concerning juvenile offenders do not establish special rules for their criminal liability, there are only different provisions for the applicable penalties and measures. As the sanctions, the special provisions have primacy to the general rules. Therefore, the latter can be applied in the absence of special provisions or with their appropriate alteration.

According to Article 79 CC the aim of a punishment is to prevent the offender, or others, from committing a further offence in order to protect society. Article 108 CC redefines more precisely the aim of the punishment against juveniles: '(1) The aim of a penalty or measure applied against a juvenile offender is primarily that he / she should develop in the right direction and become a useful member of society, the education and the protection of the juvenile have priority. (2) A penalty shall be inflicted when the application of a measure does not fully suit the purpose. Only a preventive measure shall be applied if the offender has not turned fourteen. (3) A measure or penalty involving custody may only be applied, if the aim of the measure or penalty may not otherwise be achieved.' The cited Article provides a compulsory sequence of sanctions: the court has to analyse the ability/suitability of the sanction for

achieving the mentioned aims. Penalty or deprivation of liberty may be applied only if the legal aim of punishment cannot be achieved in any other way.

Important to see, that the sanctioning of the juvenile offender has its upper limit in the proportionality between the severity of the offence and the level of the guilt. Below this limit, the judge can move to the 'preventive' threshold (lower limit). This means that the imposed sanction shall follow the aim of the penalty between the objective proportionality and the preventive minimum.

The hierarchy of sanctions emphasizes the importance of the moral salvation and education of the juvenile and the intention not to separate the juvenile from his/her social environment except as a last resort. Only a proper evaluation of all circumstances in the given case can lead to the fulfilling of the legal requirement of suitability. Both the objective and subjective facts of the offence committed by the juvenile can call for a more severe sanction. Objective circumstances are the serial perpetration, the cumulating of crimes, the special method of perpetration and the aggravating circumstances. The co-principality, the perpetration in a group or in a criminal organization, the special motives of the juvenile offenders could be considered as subjective facts.

In case of soldiers, even specific responsibility forms are acknowledged by the criminal law, and very special sanctions are also applicable, however, in this chapter we do not provide detailed explanation to military criminal law.

§17.12 GENERAL REMARKS ON THE SPECIAL PART OF THE CC 2012

In respect of the structure of the Special Part of the CC 1978, it has to be emphasized that statutory definitions protecting individual interests were placed immediately after the war crimes, crimes against humanity and against the State. This was already the case in the original version of the CC 1978. Thus, the CC of the pre-transition period cannot be blamed for having symbolically preferred the protection of collective interests since the statutory offences protecting collective interests were placed only subsequent to offences against individuals and after sexual offences. The structure of the Special Part has more or less been maintained in the CC 2012. Criminal offences against intellectual property are now placed in a separate chapter apart from the offences against property, which can be regarded as a symbolic distinguishing and accentuation of these interests.

§17.13 JURISDICTIONAL ISSUES

Article 3, paragraph 1 CC 2012 prescribes that Hungarian law shall be applied to criminal offences committed on Hungarian territory. This rule embodies the territorial principle based on state sovereignty and on its complete power and authority over its territory and applies it in all its consequences. Committing a criminal offence in two or more countries, the application of Hungarian law is already given, if either the act (omission) or the relevant effect (result) of the conduct has been realized in Hungary. The same paragraph of Article 3 CC 2012 extends the scope of the territorial principle

to conducts committed on Hungarian ships or aircraft that are situated outside the borders of Hungary (quasi-territorial principle).

As regards the extraterritorial jurisdiction, the principle of active personality has the same ranking as the territorial principle according to Article 3, paragraph 1 CC 2012. If a Hungarian citizen commits a criminal offence abroad, Hungarian criminal law shall be applied. Persons with dual citizenship (Hungarian and that of another country) fall under this rule as well. This principle applies to any criminal offences under Hungarian criminal law that were committed by Hungarian citizens abroad. The applicability of criminal law to offences committed outside Hungary and by non-Hungarians represents an exception to the two basic principles. The legislature has accepted the active personality principle, the universality principle and the state protection principle (*principium reale*). The universality principle (or universal jurisdiction) allows the application of domestic criminal law against persons whose alleged criminal offences were committed outside the country, regardless of nationality, country of residence, or of any other nexus with the prosecuting state.

Article 3, paragraph 2 CC 2012 contains a list of cases in which Hungarian criminal law is applicable to offences committed outside of the country by non-Hungarian perpetrators. Keeping in mind that Hungarian citizens while travelling or living fall under Hungarian criminal law without restriction, the groups of offences committed by non-Hungarian perpetrators are as follows:

- criminal offences under Hungarian law that are also punishable acts in accordance with the law of the location of commission (including espionage against allied armed forces under Article 262 CC 2012);
- criminal offences against the State (except espionage against allied armed forces under Article 262 CC 2012), regardless of whether the offence is punishable in accordance with the law of the country where committed; and
- criminal offences against humanity or any other criminal offences, the prosecution of which is prescribed by an international treaty (e.g., money laundering, crimes against environment, drug offences).

There is an important distinction in the first group, since the rule of the double criminalization relates only to this case; that is, it is required only in this case that the conduct should be a punishable act abroad. Should any circumstance of impunity according to the foreign law exclude the punishability, Hungarian criminal law cannot be applied. In cases of extraterritorial jurisdiction, the prosecution can only be ordered by the General Public Prosecutor.

The principle of passive personality is also acknowledged by the CC 2012. Article 3, paragraph 2 section b states that Hungarian criminal law shall be applied to any act, which is punishable under Hungarian criminal law and has been committed by non-Hungarian citizens abroad against a Hungarian national or against a legal person or unincorporated business association established under Hungarian law.

§17.14 THE ROLE OF THE CONSTITUTIONAL COURT

The Constitutional Court was established in 1989 and, within two or three years, made the most important decisions that enabled a criminal law under the rule of law to take shape. The decisions on intertemporal criminal law were already mentioned. These decisions gave legal certainty priority over the demands for retroactive punishability of criminal offences committed by the communist regime, by declaring the retroactive excluding of the statute of limitation for unconstitutional. From the postulation of a state based on the rule of law, the Constitutional Court derived the principles of proportionality, the 'ultima ratio' character of criminal law and the prohibition of '*ne bis in idem* as well. The requirement that criminal liability shall be based on culpability (*nullum crimen sine culpa*) was derived from the absolute right to human dignity. In the first half of the 1990s, these principles found entrance into the preparatory materials of the legislature.

While the practice of criminal courts had predominant features of positivism, the so-called first Constitutional Court, under the presidency of *Sólyom*, acted out on the basis of judicial activism, which was necessary in order to secure a relatively fast transition to a state under the rule of law. The judicial activism of the first Constitutional Court was also supported by the unlimited institution of 'action popularis' that enabled anyone to initiate an abstract constitutional review of any legal norms. The keystones of the practice of the Constitutional Court relevant to criminal law are as follows:

- abolishment of death penalty in 1990, which has to be regarded as a revolutionary step made by the Constitutional Court, particularly regarding the fact that the prohibition of death penalty has not even been specified in the new Constitution of 2012, unlike Constitutions of many other European countries;
- prohibition of retroactive exclusion of the statute of limitation on the ground of national criminal law (1992, 1993);
- detailed interpretation of the freedom of speech and its limits laid down in criminal law (1992, 1999, 2004, 2008, 2013, 2015, 2018);
- enforcement of the prohibition of discrimination in respect of criminal offences against property and sexual offences (1992, 1999, 2002) or in respect of the sanctioning system (2014, 2015);
- drawing the line between the admissible scope of judicial interpretation of substantive criminal law and unconstitutional judicial lawmaking, in connection to the basic principle of separation of powers (2016, 2017).

A judicial activism can be observed only concerning the limits to the penal power of the state. Regarding the competence of the legislature to criminalize certain conducts, the Constitutional Court has always remained clearly restrained and has not prescribed the legislature duties of criminalization. In generally, the Constitutional Court does not deem the decision of the legislature about which conduct to criminalize and which ones not to criminalize relevant to Constitution unless the decision of the legislature violates the prohibition of discrimination.

Finally, it is to be emphasized that the new Fundamental Law of Hungary opened a new chapter also for criminal law by enacting the constitutional complaint that has not existed in the Hungarian legal system before. Consequently, the constitutional control is thereby extended over the practice of criminal courts as well. Dates after 2012 and indicated above refer already to decisions that were made upon constitutional complaints.

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