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The Dispositive and the Cogent in Sentencing: Theoretical Issues and an International Overview

I Introduction

With an *absolutely indeterminate* criminal sanction, the lawmaker intends only to codify which acts should constitute an offence; the determination of the type and degree of penalty is left to the judiciary. At the other end of the spectrum are *absolutely determinate sanctions.* Here, the legislator prescribes, in addition to the punishable behaviour, the precise manner and severity of punishment. The task of those applying the law (mostly, but not always, the courts) in this instance is reduced to determining the applicability of an offence and its classification under criminal law. After this, the exact outcome as outlined by the legislative must be pursued.[1]

Historically speaking, absolutely arbitrary penalties were typical initially. Then – for example, due to the need to counter judicial tyranny, which arose during the enlightenment – mandatory sentencing came to the forefront. The latter was not unknown to the Hungarian criminal law of old. According to László Fayer's posthumous work,

> since the beginning of the 19th century, the development of criminal law went through two distinct stages. First, the punishment decreed by the law and to be applied by the judge went from being absolutely determined to relatively determined. The judge's power triumphed over the generalisation of the lawmaker. Around the middle of the century, these efforts went a step further: not only should the imposable penalty be of a relative character, but the penalty imposed by the judge, too. While in the previous era the judge issued an order for punishment, according to the understanding of the more recent period, he issues permission.[2]

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1 See Földvári József, *A büntetés tana (The Doctrine of Punishment)* (Közgazdasági és Jogi Kiadó 1970, Budapest) 98–99; Rendeki Sándor, *A büntetés kiszabása. Enyhítő és súlyosító körülmények (The Imposition of Sanctions. Mitigating and Aggravating Circumstances)* (Közgazdasági és Jogi Kiadó 1976, Budapest) 39.

2 Fayer László, 'Fayer László irodalmi hagyatékából' (From László Fayer's literature legacy) (1909) (21) Jogtudományi Közlöny 181.

The direction of development was towards softening and relativising absolutely determinate sanctions. Still, it can be highlighted that even Act V of 1878 (the Hungarian penal code on felonies and misdemeanours; colloquially called the Csemegi Codex) in its section 278 contains – though extraordinarily – a provision that precludes judicial discretion: 'He who kills a man with premeditated intent commits murder and shall be punished by death.'

The adjudication of criminal penalty in the modern legal systems of the 20th and 21st centuries is generally conducted through the application of *relatively determinate* sanctions. Under this configuration, the power to sanction is *divided* between the lawmaker and the applier of the law. The former determines, in addition to the punishable acts, the range of applicable sanctions and their severity (length, sum etc.), thereby leaving room for the legal practitioner to apply the penalty (or measure) to the case in question. This solution is usually sufficient to resolve the potential friction between abstract and real-life scenarios. While the lawmaker can only evaluate the general harm a given criminal phenomenon may cause to society, the practitioner may consider unique (aggravating or mitigating) circumstances in a particular case.

Recently, however, our domestic criminal law has seen a resurgence of efforts that serve or served to limit – or at least to better determine – judicial room to manoeuvre. In consideration of this, my study will examine the types of solutions to limit or withdraw a judge's power to deliberate, contained in Act C of 2012 on the Criminal Code (hereinafter referred to as the *Btk.*). This is followed by a jurisprudential evaluation and brief critique of absolutely determinate sanctions. This introduction must also mention that the criminal law of Anglo-Saxon nations has been on a different trajectory, on which mandatory sentencing has been long known and applied.[3] As a short introduction to regulatory models and practice may be beneficial for Hungarian criminal law, the work closes with a review of international practice.

II The Dispositive and the Cogent in Sentencing

The differentiation between dispositive and cogent (also known as categorical or imperative) norms is not at all an exclusive characteristic of criminal law. It features similarly in both private and employment law.

In the terrain of civil law, 'dispositivity *[sic]* is a main rule in contract, which expresses that contracting parties can determine, through consensus, the content of their agreement – that is to say, their rights and responsibilities vis-à-vis each other – as per the principle

[3] See Gary T. Lowenthal, 'Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform' (1993) (1) Law Review 67–69; and Paul J. Hofer, Mark. H Allenbaugh, 'The Reason Behind the Rules: Finding and Using Philosophy of the Federal Sentencing Guidelines' (2003) (1) American Criminal Law Review, 20–26.

of freedom of contract'.[4] The cogent norm signifies the opposite of this: statutory determination. The literature of both employment[5] and company law[6] understand dispositive and cogent norms in similar terms.

1 The Dispositive, Orientative, and Cogent Rule in Hungarian Criminal Law

In terms of the study of legislation, we have no reason to treat dispositive and cogent provisions markedly differently than do other fields of law. Consequently, in addition to considering this treatment as axiomatic, we only need to look to the way their unique aspects manifest in this legal field. Accordingly – *mutatis mutandis* – those legal provisions of the criminal sanction system that allow for judicial (prosecutorial) discretion may be regarded as dispositive. By contrast, provisions that tie the court's (prosecutor's) hands are cogent. These do not offer any deliberative powers or only do so in a limited way.

With regard to the unique aspects of the effective Hungarian criminal law to be detailed below, it is justifiable to interject the so-called *orientative* sanction rule as an intermediate step between dispositive and cogent provisions. The essence of this category is that while it does not bind the judicature's hand in sentencing, it sets a standard, from which deviation is only possible if the duty of special justification is discharged.

2 Examples of Dispositive Rules in the Criminal Code

We may come across several dispositive provisions in the Btk's sanction-related chapters. First, a definitive everyday example may be found in section 33(4). In cases where the minimum punishment for an offence is less than a one-year custodial sentence, the provision's *alternative penalties* allow for the imposition of confinement, community service, fine, a disqualification from professional activity, a disqualification from driving, a ban on entering certain areas, a ban on visiting sporting events or expulsion. These provisions mean that the court, in cases where the criminal offence is punishable with a custodial sentence between three months and five years, is empowered to use softer penalties, either in a standalone or combined configuration. This solution is clearly agreeable, because it may contribute greatly to individualised sentencing, and it has a welcome effect on the size of

[4] Jójárt Eszter, 'Diszpozitivitás a régi és az új Polgári Törvénykönyvben' (Dispositivity in the old and in the new Civil Code) (2014) (12) Magyar Jog 674.

[5] Berke Gyula, 'Kógencia és diszpozitivitás. Eltérő szabályozási lehetőségek az új Munka Törvénykönyvében' (Cogency and Dispositivity. Different Regulation Options in the New Labour Law) (2013) (10) HR & Munkajog 42–43.

[6] See Kisfaludi András, 'Kógencia vagy diszpozitivitás a társasági jogban' (Cogency and Dispositivity in Company Law) (2006) (8) Gazdaság és Jog 3–5.

the prison population.[7] It may also be highlighted that the application of this provision is an unconditional prerogative of the courts – it does not necessitate the predominance of mitigating factors, as is the case in the mitigating rules contained in the Btk's section 82.

The courts have similarly remarkable discretionary powers in relation to *probation.* According to section 65(1) of the 2012 act, 'the court may defer the imposition of a sentence conditionally if it is for an infraction or felony punishable by imprisonment of up to three years if there are reasonable grounds to believe that probation will serve the purpose of punishment'. In examining whether it is reasonably prognosticated that the purpose is met even without exacting the prescribed penalty, the courts have significant discretion. The same is true for the Btk's reparation *work* provision, which is contained in section 67 (1).

3 The Appearance of the Orientative Rule in the Criminal Code

The clearest example of a rule that simply orients judicial deliberation is the duty of *median sentencing*, which has a varied regulatory past. According to section 80(2), 'where a sentence of imprisonment is delivered for a fixed term, the median of the prescribed scale of penalties shall be applicable'. The median serves as a kind of starting point – for example, in the case of a basic robbery, which carries the possibility of two to eight years in prison, the median would be a five-year custodial sentence. The court may choose to impose a longer or shorter period, but it must justify this in its ruling.

It can be highlighted that, according to the Constitutional Court's 13/2002. (III. 20.) AB ruling, the median rule in the then-effective Act IV of 1978 on the Criminal Code did not violate the constitutional principle of judicial independence; therefore, it could not be regarded as unconstitutional. Simultaneously, it must be noted that the concept was criticised by prestigious scholars such as Tibor Király[8] and Kálmán Györgyi[9]. Nonetheless, Balázs Gellér's observation, that the motive for the reintroduction of the median rule was 'not stringency but the uniformity of sentencing and the promotion of appropriate judicial justification', can be supported.[10]

4 Cogent Sanction Rules and Their *De Lege Lata* Categorisation

As we have seen, cogent norms preclude or at least limit the sentencing discretion of the acting authority in a criminal case. Based on the Btk. and relevant practice, cogent catego-

[7] See Nagy Ferenc, 'Az európai börtönnépességről' (About the European Prison Population) (2016) (3) Börtönügyi Szemle 19–21.

[8] Király Tibor, *Büntetőítélet a jog határán (Judgment at the Border of Law)* (Közgazdasági és Jogi Könyvkiadó 1972, Budapest) 292–294.

[9] Györgyi Kálmán, *Büntetések és intézkedések (Penalties and Measures)* (Közgazdasági és Jogi Könyvkiadó 1984, Budapest) 274–280.

[10] Gellér Balázs, 'Büntetéskiszabás Magyarország negyedik Büntető Törvénykönyvében' (Sentencing in the Fourth Hungarian Criminal Code) (2015) (2) Jogtudományi Közlöny 75.

ries may be divided into *four subcategories*. We may distinguish between *true*, *apparent*, or *de facto cogent norms*. A special case of true cogent norms are the *absolutely determinate sanction rules* introduced in the title of this study.

From a grammatical perspective, cogent norms contain imperative language (e.g. 'shall'), but they can also appear in the indicative. In reality, as we shall soon see, the latter category tends to be 'stronger' (e.g. the perpetrator 'is subject to' a given measure). Rules that allow for deliberation typically contain the word 'may' or conditional suffixes. However, a problem of interpretation may arise, because the Btk. – in a somewhat confusing manner – uses the imperative in determining the criteria systems for some penalties, but it chooses to include conditions with a deliberative element among these.

My position is that, in this sense, it is necessary to distinguish between *true and apparent cogent penalties.*

A characteristic of a *true cogent* rule is that there is no place for discretion – once criminal responsibility is established then it must be applied at all times. At most, the court (or prosecutor) may decide on the question of severity.

Grammatically, an *apparent* cogent rule is in the imperative. At the same time, the legislator loosens its criteria regime with discretionary elements. Ultimately in these instances, it depends on the court's (or prosecutor's) discretion whether the sanction type is applied after criminal responsibility is established.

In addition to true and apparent cogent sanction rules, we may also speak of *de facto cogent* rules. Some features of these theoretically do contain discretion, but in practice this discretion is objectively lost beyond a certain level (e.g. sum).

Finally, *absolutely determinate sanction* is the true and 'strongest' variety of a cogent rule, in which the lawmaker not only prescribes a particular sanction if statutory requirements are present, but he also orders its extent precisely.

a) Examples of true cogent sanction rules

Section 69(2) of the Btk. contains a *true cogent* norm in relation to *parole with supervision*. Using the indicative (!), it states that 'probation with supervision shall be ordered: a) for the convicted perpetrator if released on parole from life imprisonment; b) for the recidivist if released on parole or sentenced to a term of imprisonment, the execution of which is conditionally suspended.' The latter rule is repeated – probably redundantly – in the second sentence of section 86(6). Furthermore, as per section 119(1), a minor will remain under supervision, no matter how he is liberated or remains at liberty.

Confiscation is always mandatory in relation to the product of a crime, or an object that is dangerous to the public, or possessing which is illegal. Media products, in which a criminal act is realised, are similarly subject to it [Btk. section 72(1)(b), (d), and (2)]. The same is true for the *confiscation of property* and for *irreversibly rendering electronic information inaccessible* (Btk. section 77).

Section 60(2a) of the Btk., in reference to the special part offences created due to the migration crisis, states – effective from 15 September 2015 as per Act CXL of 2015 – that, in addition to a custodial sentence for illegally crossing the border barrier (Btk. section 352/A), damaging the border barrier (Btk. section 352/B), and obstruction of border barrier-related construction (Btk. section 352/C), and, in the case of the suspended prison sentence of section 82(1a), *expulsion is unavoidable*. This means that the court can only forego expulsion if it does not impose a custodial sentence (including a suspended one), but it issues, for instance, a warning instead (Btk. section 64).

b) Examples of apparent cogent sanction rules

Expulsion is a primary *apparent cogent* norm. As per section 59(1) of the Btk., a non-Hungarian perpetrator whose presence in the country is undesired must be expelled from Hungary. Though the legislation is worded in the imperative, deciding which non-Hungarian citizens' presence is undesirable clearly falls within the courts' discretion.

Similarly, when entertaining the secondary penalty of *exclusion from participation in public affairs* – imposed together with an implementable custodial sentence due to an intentional offence – the courts have the discretionary power to decide who is unworthy to participate in public life [Btk. section 61(1)].[11]

The same can be stated regarding the *loss of military rank* and *military demotion*. The former must be applied when the 'perpetrator becomes unworthy of a rank' [Btk. section 137(1)], while the latter is appropriate where the rank's reputation has been damaged but no need exists for loss of rank [Btk. section 139(2)].

Among preventive measures, *admonition* may serve as an example. The wording of the Btk's section 64(1) suggests mandatory application, but its use nonetheless 'depends on the judge's or the prosecutor's assessment, because the determination of whether the threat to society is absent or minimal requires a careful analysis of unique circumstances.'[12]

By the phrasing of the law, *compulsory psychiatric treatment* also *must be utilised* if its statutory requirements are met but, once these are reviewed, it is clear that several of them (e.g. a prognosis of repetition, presumption of a custodial sentence if the perpetrator were mentally fit) contribute to apparent cogency (Btk. section 78).

c) Examples of *de facto* cogent sanction rules

The *de facto* cogent norm is a special form of the apparent cogent norm, serving as a transitional category towards true cogency. Its identification and definition cannot be satisfacto-

[11] See BH 2007. 3.

[12] Tóth Mihály, 'A büntetőjogi jogkövetkezmények' (Criminal Sanctions) in Belovics Ervin, Nagy Ferenc, Tóth Mihály, *Büntetőjog I. Általános Rész. (Criminal Law. General Part)* (3rd edn, HVG-ORAC 2015, Budapest) 433. Also see BH 1989. 260.

rily undertaken purely based on the Criminal Code's text; it requires exploration of criminal case law. In the underlying case for the decision published as EBH 2016. B.6., the Supreme Court of Hungary (hereinafter *Kúria*) had to decide the relationship between expulsion and the circumstances for the mandatory application of a *fine*.

In this decision, the Kúria ruled that

> the substantive offence of violating the ban on imposing both a fine and expulsion during sentencing must be remedied in consideration of the fact that a penalty that must be imposed by the court by statute cannot be ignored. Therefore, due to the mandatory fine imposed on the economically-motivated perpetrator sentenced to a fixed term of imprisonment and endowed with a sufficient income, expulsion – as the undesirability of him remaining in the country depends on deliberation – cannot be ordained.

Thus, the Kúria implicitly differentiated between true and apparent cogent (though, due to the ban on joint application,[13] inapplicable) criminal sanctions while comparing expulsion and the so-called mandatory fine.

Though the requirements of expulsion are, as we have seen, phrased in the imperative [as according to section 59(1) of the Btk. the non-Hungarian citizen 'shall be expelled'], the determination of whose presence is 'undesirable' in the country *(persona non grata)* requires judicial consideration. Consequently, we are clearly faced with an apparent cogency.

Simultaneously, according to section 50(2) of the Btk., the economically-motivated perpetrator who is sentenced to fixed-term imprisonment and has sufficient income or wealth *must be fined*. Here too, the wording calls upon the judge to impose a sanction, but it retains the possibility of discretion. The presence or absence of an economic motive is not a question of sentencing but of the classification of the charge, and this would still allow for a true cogent rule. In some instances, whether the perpetrator is given a fixed-term imprisonment extends to the area of sentencing. Here – based on the previously-cited section 33(4) of the Btk. – the court may impose an alternative sentence for an offence that is punishable by up to three years' custody. Additionally, the penalty might be mitigated in relation to offences punishable by one to five years' imprisonment by way of resorting to confinement, community service, or a fine [Btk. section 82(2)(d) and (3)]. The court's discretion extends only up to this point. It is clear that if the court established an economically-motivated offence punishable by two to eight years' imprisonment (e.g. robbery), it would have no deliberative power – it must imprison (potentially in addition to other permitted sanctions). Nonetheless, section 50(2) of the Btk. adds a final condition for the mandatory imposition of a fine: the presence of sufficient income or wealth. Fundamentally, this might once again

[13] See Ambrus, István, 'A szankciós szabályok és a büntetéskiszabás néhány dilemmája Magyarországon (2010–2017)' (Some Dilemmas of Sanctioning Rules and Punishment in Hungary (2010–2017) in Homoki-Nagy Mária, Karsai Krisztina, Fantoly Zsanett, Juhász Zsuzsanna, Szomora Zsolt, Gál Andor (eds), *Ünnepi kötet dr. Nagy Ferenc 70. születésnapjára (Festive Volume for Ferenc Nagy's 70. Birthday)* (SZTE ÁJK 2018, Szeged) 16–22.

allow for judicial contemplation. According to an unbroken tradition of sentencing practice, 'considering the goal of the law – in terms of a fine – salary or income is deemed sufficient if the perpetrator is able to pay the fine, even if in instalments. The question of whether the accused's salary is sufficient can only be decided based on a thorough investigation of the given circumstances.'[14]

Based on the above, it appears that both expulsion and the imposition of a mandatory fine contain elements affected by judicial deliberation, and both could be viewed as apparently cogent. At the same time, while in expulsion there exists no further statutory barrier to discretion, the court's options can become quite limited with a fine. On this basis, in addition to true and apparent cogent sanction rules – and basically as a special subcategory of the latter – we may also speak of *de facto* cogent rules, in which some conditions allow for discretion in theory, but in practice the possibility for consideration is often unavailable. The justification for the previously-mentioned document by the Kúria illustrates this well: 'It is true that the court sentenced the perpetrator to fixed-term imprisonment as well, and his €800/month salary – the equivalent of approximately 250,000 forints – qualifies as a sufficient income in Hungarian terms.' Therefore, while there are borderline cases where the judicial prerogative is present, above a certain objective limit, the determination of an appropriate income cannot be neglected. However, we have to mention that three later decisions of the Kúria stated that the cogent imposition of expulsion is a stronger rule than the imposition of a mandatory fine.[15] According to this legally uncertain situation, the Hungarian legislator decided to amend the Btk., thus, from 1 January 2021, if it is mandatory to impose an expulsion (e.g. in the case of human trafficking), the otherwise mandatory fine cannot be imposed simultaneously.[16]

Another entry in the category of *de facto* cogent rules is a special case of *disqualification from driving motor vehicles.* According to the Btk's section 55(2), a driving ban shall be imposed for the criminal offences of driving under the influence of alcohol or driving under the influence of drugs. In cases deserving special appreciation, the disqualification may be forgone. The latter rule, which allows a special waiver of the mandatory imposition of a driving ban, may be applicable if the perpetrator has a clean traffic record and his BAC does not exceed the 0.50 g/l limited prescribed in Btk. section 240(3). If these mitigating factors are absent – e.g. the perpetrator was moderately or severely drunk – the waiver would not be appropriate. A disqualification would consequently be *de facto* obligatory.

The latest example relates to the regime of *disqualification from a profession*. Effective from 1 December 2017 (as per Act CXLIX of 2017), Btk. section 52(4) states that a person guilty of *endangerment of a minor* must be disqualified from the practice of a profession or other activity, in the course of which he may undertake the education, care, custody or medical treatment of a person under the age of eighteen years, or if it involves a position of

[14] See 25. BKv and BH 2012. 112.

[15] See BH 2017. 208., BH 2017. 285., BH 2020. 132.

[16] See 2020. XLIII Act 47. §.

authority or influence over such person. In cases meriting special commendation, disqualification from a profession may be waived.

d) Examples of absolutely determinate penalties

We may also find Hungarian examples that completely remove judicial discretion from sanctioning. As per the Btk's section 52(3), 'in connection with any criminal offence against sexual freedom and sexual morality, if at the time when the crime was committed the victim is under the age of eighteen years, the perpetrator *must be permanently* banned from the exercise of any professional or other activity that involves the responsibility of undertaking the education, care, custody or medical treatment of a person under the age of eighteen years, or if it involves a position of authority or influence over such person'. This special case of *disqualification from a profession* differs from the *endangerment of a minor* offence mentioned in the category of *de facto* cogent rules in two respects. First, here it is not only obligatory to disqualify the perpetrator, but this must exclusively be done permanently. Second, the rule allowing the court to avoid this measure in cases of special commendation is absent. Therefore, the court cannot circumvent disqualification, no matter the preponderance of mitigating circumstances.

A so-called 'three-strikes rule' that tolerates no deliberation applies to violent recidivists.[17] The Btk's section 90(2) states that, in instances of imprisonment, the upper limit of the penalty range for a violent recidivist's primary offence to establish him as such must be doubled. If the thus-inflated sentence exceeds twenty years or may carry a statutory possibility of life imprisonment, the perpetrator *shall be sentenced to life imprisonment*. It is important to note that the mutual presence of the aforementioned conditions would mean that the mandatory life sentence is *without the possibility of parole*, because section 44(2)(a) of the Btk. *precludes the possibility of parole* if the perpetrator is a violent recidivist.

III The Problems of Absolutely Determinate Sanctions

Determinate sanctions and their consequences for the practice of law must be the subject of separate studies. Therefore, in this section, I will simply discuss briefly the reservations which have occurred to me in relation to these sanction rules.

1 The Absence of Individualisation

The argument customarily made in favour of mandatory sentencing is that it promotes legal certainty and predictability, because the lack of judicial discretion means that the accused

[17] See Kónya István, 'A három csapás bírói szemmel' (The 'Three Strikes' from a Judge's Point of View) (2011) (3) Magyar Jog 129–135.

can know precisely the consequences of carrying out a punishable act. On the other hand, a classic counterargument is that a stiff rule that does not allow for weighing the situation can give rise a ludicrous outcome, as it prevents the exploration of the unique circumstances of a given case, which in turn might lead to injustice. The Constitutional Court's 23/2014. (VII. 15.) AB decision, which squashed the three-strikes rule for multiple offences, highlighted that it 'unreasonably restricted courts' constitutional functioning in the field of criminal law by withdrawing judicial discretion, and it therefore does not allow for judicial individualisation.'

2 The Impossibility of Proportionality

The Constitutional Court expressed in several of its decisions that criminal penalisation must be suitable for its goal, and, furthermore, that criminal sanction must be proportionate to the severity of the act (its harm to society). Accordingly, Constitutional Court decision 11/1992. (III. 5.) AB ruled that 'criminalisation and the threat of punishment must be founded on constitutional justification: they must be necessary, proportionate, and, ultimately, utilised.' 30/1992. (V. 26.) AB relied on this same position: 'Criminal law instruments necessarily limiting human rights and civil liberties must only be used in cases of absolute necessity and to a proportionate degree.' Finally, Constitutional Court decision 1214/B/1990. (ABH 1995, 571–578) may be highlighted, according to which 'the function of a legal punishment under the rule of law is proportionate and deserved reciprocation. Proportionate and deserved reciprocation promotes preventive punitive goals.' The European Court of Human Rights and several nations have crafted their own necessity/proportionality tests.[18] Foregoing a detailed description of these, I will only discuss a single issue related to the three-strikes rule. The duty to issue a mandatory life sentence in cases where personal injury might not have occurred but, according to the Btk's section 459(1)(26)(k), the matter is classified as a violent crime against the individual – e.g. an armed robbery for substantial value, as per section 365(4)(b) – is sure to cause a disproportionate result. This is especially true if we consider that if the robbery is undertaken by a 'simple' (but nonviolent!) recidivist who kills five people in its course, his deed, economically-motivated and a homicide against multiple persons, will fall under Btk. section 160(2)(b) and (f), to which issuing a mandatory life sentence is not obligatory. It is simply an option, in addition to a ten to twenty-year fixed term imprisonment.

3 Discrepancy within the Criminal Code

The aforementioned provision on violent recidivists may cause a discrepancy within the criminal code. According to the Btk's section 80(1), '[p]unishment shall be imposed within

[18] See Gellér Balázs, Ambrus István, *A magyar büntetőjog általános tanai I. (The General Part of the Hungarian Criminal Law I.)* (ELTE Eötvös Kiadó 2017, Budapest) 88–90.

the framework provided for in this Act, having in mind its intended objective, as consistent with the severity of the criminal offence, with the degree of culpability, the danger the perpetrator represents to society, and with other aggravating and mitigating circumstances'. But the criteria cited are impossible to fulfil, if section 90(2) simultaneously decrees that the court must disregard all circumstances during sentencing to administer the penalty declared as mandatory by the lawmaker.

4 Alienness to Continental Criminal Law

As already indicated in the introduction, determinate sanctions were not previously unknown in Hungary. With the modernisation of criminal law, however, these solutions gradually disappeared and allowed space for judicial discretion. Therefore, the efforts to preclude judicial discretion appear debatable based on historical experience, too.

It is worth noting that in Anglo-Saxon countries (to be discussed in the international comparison section), the argument that mandatory sanctions *(sentencing guidelines)* promote legal certainty may truly be well-founded. The reason for this is that English (Anglo-Saxon) criminal law is based on common law; its procedural law is developed, but its substantive criminal dogmatics, which would ensure countrywide uniformity of practice, has not really taken shape. If we only take into account legislative regulation, Hungary's German-based, nearly 140-year old dogmatic tradition must ensure that comparable deeds are adjudicated similarly in the courts of Budapest, Szombathely or Debrecen. For this reason, too, the legislative inhibition of judicial discretion cannot be supported.[19]

5 Correct Criminal Classification *Contra* Absolutely Determinate Sanction

Finally, I will highlight a point based on the sociology of law. It is unfortunate to tie the hands of the judge during sentencing, because the adjudicator, who was socialised for a profession of deliberation, will deliberate, if he cannot do so at sentencing, at the last stage where he may still be allowed: at the initial classification of the offence. Absolutely determinate sanction rules are therefore pre-programmed to derail criminal classification. For instance, the judge may regard a legally qualifying homicide as simply battery resulting in death [Btk. section 164(8)]. The penalty for the latter is only two to eight years imprisonment. If the eight years are doubled under the three-strikes rule, they still remain below twenty years, and therefore the judge will not be compelled to issue a mandatory life sentence. It may be even more troubling, of course, if the scenario happens the other way around.

[19] See Békés Imre, *A gondatlanság a büntetőjogban (Negligence in Criminal Law)* (Közgazdasági és Jogi Könyvkiadó 1974, Budapest) 22.

IV International Practice

Through introducing the constitutional experiences of three Anglo-Saxon countries, I briefly examine the degree to which the constitutional configurations of the discussed states allow the maintenance of mandatory sanctions.[20] The section closes with a review of an ECHR case.

1 United States

Historically, the union's states often prescribed mandatory sanctions, many of which could be considered crude (e.g. mandatory death sentence). The US Supreme Court examined relevant cases based on the Eighth Amendment of the Constitution, which forbids cruel and unusual punishment. The practice emerging from this constitutional rule is that the US Supreme Court regards disproportionate punishment as a cruel and unusual result.

In *Solem v Helm,* U.S. 277 (1983), the Court held that the proportionality of punishment must be subject to criteria based on the gravity of the offence, the value involved, and sentences imposed for similar crimes in the same and other jurisdictions. *Roberts v Louisiana* 431 U.S. 633 (1977) was an important decision as well; it declared the mandatory death sentence unconstitutional because it did not allow the court to consider mitigating factors. A recent continuation of this case is *Miller v Alabama* 567 U.S. 460 (2012), in which the Supreme Court quashed mandatory life sentences without the possibility of parole for juveniles.[21]

In contrast, in *Ewing v California* 538 U.S. 11 (2003), the Court did not find California's three-strikes law to be cruel and unusual and accordingly held it constitutional. At the same time, the aforementioned law – especially because in its original version the third offence could have been an insignificant nonviolent act (e.g. theft, possession of drugs), and it still would have resulted in a 25-year minimum prison sentence – was subject to much jurisprudential criticism.[22] The most pragmatic critique highlights the fiscal burden of the prison population's extreme inflation.[23] Considering this argument, it is perhaps not accidental that the California law was amended in the summer of 2016. Today, the third crime can only trigger the three-strikes law if it is a *serious or violent felony*.

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[20] For an overview see Anthony Gray, 'Mandatory Sentencing Around the World and the Need for Reform' (2017) (3) New Criminal Law Review 392–412.

[21] In the Hungarian literature see Lévay Miklós, 'Az Amerikai Egyesült Államok Legfelsőbb Bírósága a fiatalkorúakkal szembeni halálbüntetés és a tényleges életfogytig tartó szabadságvesztés alkotmányellenességéről' (US Supreme Court on the Unconstitutionality of the Death Penalty for Juvenile Offenders and of Life Imprisonment) (2013) (2) Jogtudományi Közlöny 593–600.

[22] Michael Vitiello, 'Three Strikes: Can We Return to Reality' (1997) (2) Journal of Criminal Law and Criminology 395–462. and Franklin E. Zimring, Gordon Hawkins, Sam Kamin, *Three Strikes and You're Out in California. Punishment and Democracy* (Oxford University Press 2001, Oxford – New York).

[23] In the newest literature see Hamish Stewart, 'The Wrong of Mass Punishment' (2018) (1) Criminal Law and Philosophy 45–57.

2 Canada

According to criminal rules that surfaced in Canada in the 1980s, a *mandatory minimum sentence* of seven years' imprisonment had to be issued for drug smuggling. The Canadian Supreme Court, in *Smith v the Queen* [1987] 1 S.C.R. 1045 ruled that the aforementioned provision violates section 12 of the Canadian Charter of Rights and Freedoms, which, similarly to the American Eighth Amendment, states the unconstitutionality of cruel and unusual punishment. The Court found the seven-year minimum sentence to be blatantly disproportionate, and it was held to disregard the severity of the crime and the personal circumstances of the offender. In sum, *it did not fulfil the goals of punishment.*

3 Australia

The Australian starting point for mandatory sanctions differs from the previous case studies in that no constitutional provision exists for cruel and unusual punishment. Perhaps it was due to this that the High Court did not find the country's five-year minimum prison sentence for people smuggling – a provision targeting illegal immigration[24] – to be unconstitutional. The decision's main feature is that while the courts do have discretion in sentencing, this power is not uncontrollable by the legislature. Therefore, the framework created by the lawmaker, unless it is incompatible with the principle of proportionality, must be upheld by the courts.

4 European Court of Human Rights

The ECHR's recent case law on life sentences was the subject of numerous excellent studies, and thus I will limit myself to discussing a single relevant feature. In *Harkins and Edwards v The United Kingdom* (nos. 9146/07 and 32650/07), the ECHR's 2012 ruling stated that a sentence of life imprisonment without parole may violate the European Convention on Human Rights' article 3 concerning the prohibition of inhuman and degrading treatment whether the imposition of a life sentence is mandatory or optional. Simultaneously, it highlighted that the likelihood of a grossly disproportionate punishment is higher in cases where its imposition is obligatory.

V Concluding Thoughts

In this study, I examined the theory of absolutely determinate sanctions – which, as an abstract category in the study of punishment, form an extreme variety of true cogent penal rules. My primary aim was to place this regulatory solution in its proper context. The novel

[24] § 233C of the Migration Act 1958 (Cth).

categorisation concerning the power to sanction is based on the mode of the division of labour between the lawmaker and the applier of the law.

In sum, my view is that the maintenance and potential proliferation of absolutely determinate sanctions does not appear fortunate or supportable. Looking to the future, it is impossible to take a position on the extent of an applicable penalty without knowing its characteristics. Therefore, the generally-prominent understanding of modern continental criminal law is much more preferable. This divides sentencing between the legislative and a judiciary that may assess the specific case at hand. In our dogmatics-based criminal law, it would be similarly worthwhile to avoid the implementation of Anglo-Saxon legal institutions without adaptations, because these are the products of a different legal socialisation and philosophy. Such institutions may lead the classification of offences astray, and thus their existence may prove counterproductive.