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The Driving Forces of the Penal Policy of Hungary in the 2010s with Special Regard to the Preparation of the Criminal Code of 2012

The concept of codification has always meant – and still means – more than a simple act of legislation in the Hungarian jurisprudence and legal culture. In several branches of law, Codes (e.g. Criminal Code, Civil Code) were typically prepared by codification.

This paper will focus essentially on whether the Hungarian Criminal Code of 2012 is a product of codification. The following topics will be addressed within this framework:

– the concept of codification in recent Hungarian legal literature,

– whether the Code of 2012 was based on any penal policy concept or guidelines,

– the role of research findings in preparing the Criminal Code of 2012.

Regarding the topics studied here, the question of whether there was a pressure from codification to create a new code will not be addressed. This is discussed in adequate detail in the legal literature of the Criminal Code of 2012 (henceforward CrC of 2012), from which numerous sources are cited in this paper.

I On the Subject of Codification

1 The Concept of Codification

In the introduction of his monograph presenting codification as a sociohistorical phenomenon, Csaba Varga captures that 'codification is no more than a neutral form in itself, only an instrument to alter the structure or the content of law'.[1]

The author quoted above later points out that, for the rationalisation of law by codification, two great alternatives had developed. One of them – legal objectification – is the objective collection of all legal standard structures: minimal items, characterised by relative independence, which are meaningful by themselves […] However, the second is legal

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[1] Varga Csaba, *A kodifikáció mint társadalmi – történeti jelenség (Codification as a sociohistorical phenomenon)* (Akadémiai Kiadó 2002, Budapest) 10.

objectification as a new quality, organising 'a hierarchically ordered set of elements in a contiguous system'[2].

As Barna Mezey phrases it regarding codification, 'it is not only legislation but a higher, more systematic clearing of the given branch of law, a work uniting regulations and jurisprudence'[3].

Mihály Tóth differentiates the broader and narrower concepts of codification precisely in his study concerning the Criminal Code of 2012:

'In the narrower concept, a collection encompassing the legal regulations regarding similar living conditions within a coherent code is sufficient.' As for the broader concept – as Mihály Tóth wrote – 'codification is the organic unity of compilation, classification and standardisation, the conceptual revision of the binding regulations of a given branch of law and, based on these, the presentation of these regulations in a unified, transparent and coherent system.'[4]

Based on the standpoints of the literature cited above, codification in the narrower sense is the creation of a legal code, which is formally an activity towards the production of a code. However, in its content it is a systematic, conceptual reconsidering, and based on that to some extent, the contextual reforming of an area of law behind the code.

2 The Hungarian Tradition of Codification in Criminal Law

The tradition of codification in modern Hungarian criminal law can be traced back to the bills of 1843, even though they never became law or codes. The policy of preparing bills, their standards, and especially, the domestic and foreign response to these criminal law bills justifies a brief review of the Hungarian tradition of codification in criminal law, starting with the proposals of 1843.

The codification commission started to work in 1841 based on Act V of 1840, then published and presented the substantive criminal law bill to the Parliament in 1843, titled The Criminal Code on criminal acts and penalties. Among others, Ferenc Deák, József Eötvös, Gábor Klauzál, László Szalay and Ferenc Pulszky were members of the commission.[5] Regarding the substantive bill, in his work titled *The Textbook of Hungarian Criminal Law* Ferenc Finkey wrote that it is 'a completely self-reliant construction, far surpassing all European criminal codes of its age, a masterpiece of humane and legal mentality'[6]. According to the German author C. J. A. Mittermaier 'no other legislative work bears the signs of ambi-

[2] Varga (n 1) 375.

[3] Cited by Barna Attila, 'A büntetőjog története' (The history of penal law) in Barna Attila, Horváth Attila, Máthé Gábor, Tóth Zoltán József, *Magyar Állam- és Jogtörténet* (NKE 2014, Budapest) 505–564, 519.

[4] Tóth Mihály, 'Magyarország negyedik Büntető Törvénykönyve' (2014) (10) Jogtudományi Közlöny 439–452.

[5] Barna (n 3) 528.

[6] Cited by: Belovics Ervin, Gellér Balázs, Nagy Ferenc, Tóth Mihály, *Büntetőjog I. Általános Rész. A 2012. évi C. törvény alapján (Penal law I. General Part. Based on Act C of 2012)* (HVG-ORAC 2014, Budapest) 32.

tion to create a code fitting the progress of the era, the requirements of justice and the novel ideas of criminal law as much as the Hungarian bill'[7].

The collection of the Bills of 1843 not only supports the statements of the above authorities; it is also credible evidence of the standards of the bills.[8]

For various reasons, neither the substantive law bill, nor the criminal procedure bill, nor the bill on the prison system were enacted.

Covering the facts relevant to the subject of the present paper, I will review the domestic codifications resulting in the criminal code based on Kálmán Györgyi's presentation titled The History of Codification of the New Criminal Code.[9]

The first Hungarian criminal code was the Codex Csemegi, Act V on criminal acts and offences of 1878. Károly Csemegi, the secretary of state of the Ministry of Justice, was commissioned in 1871 to prepare the Codex. He had developed the first draft by 1873. The draft was proposed to the judicial committee of the house of representatives at the end of October 1873 by Tivadar Pauler. However, the draft was not discussed as the Parliament was dissolved. Following this, Károly Csemegi revised the draft, regarding which the minister of justice at the time (Béla Perczel) called forth a meeting for 'reviewing' it. The draft was discussed in the meeting, between 3 and 15 August 1875, followed by Csemegi's further revision. This second draft was proposed to the chamber of deputies in November 1875.

'Seven hundred pages of ministerial reasoning in two volumes – the first includes the general questions, the general part and the comparative law materials, while the second includes the reasoning regarding the specific section – were sent to the printing-house, all exclusively in Csemegi's handwriting. The judicial committee of the house of deputies discussed the draft from April 1876 to September 1877. The president of the commission was Pauler, while the government was represented by the minister of justice Perczel and secretary of state Csemegi. Csemegi delivered 101 speeches during these discussions.

Two reports were prepared on the commission's work. The discussion of the bill in the chamber of deputies started on 22 November 1877. The first discussion lasted for 13 days while some provisions were returned to the commission. These were discussed in January 1878. The third reading in front of the chamber of deputies occurred on 18 January. The king assented to it on 27 May and it was published in both houses of the parliament on 29 May.'[10] Act V of 1878 entered into force in 1880.

The general part of the Codex Csemegi was in force until 1951 (Act II of 1950: General Part of the Criminal Code) whereas the specific section operated until 1962 (Act V of 1961: the CrC of 1961).

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[7] Cited by: Györgyi Kálmán, *Az új Büntető Törvénykönyv kodifikációjának története.(The history of the codification of the new Criminal Code).* The paper was presented on the conference introducing the new CrC arranged by the publisher company HVG-ORAC on 4 September 2012. <http://ujbtk.hu> accessed 28 February 2018.

[8] Fayer László, *Az 1843-iki büntetőjogi javaslatok anyaggyűjteménye (The collection of penal law proposals of 1842)* (Vol. I–IV, Magyar Tudományos Akadémia 1896–1902, Budapest).

[9] Györgyi (n 7).

[10] Györgyi (n 7).

Kálmán Györgyi wrote the following about Csemegi's work and achievements:

> With the impressive knowledge of the century's notable criminal codes and by processing the specific questions to a monographic depth, Csemegi created a work of such high scientific standards and self-reliance that it cannot be doubted even by the most rigorous critics. […] If we wish to identify his historical role and professional excellence, we should borrow László Fayer's words: Károly Csemegi should be credited for the codification of substantive criminal law in Hungary. It was a landmark event in the history of Hungary, which had numerous effects on both public and private life. It is one single structure, laying the foundations of state life.[11]

The text of the Codex Csemegi, the proposals, the ministerial reasoning, the record of the ministerial meetings and the collection of the discussions in the chamber of deputies and in the house of lords was published in the two-volume work by Tobias Löw (ed), *The Collection of the Hungarian Criminal Code I–II*. (Pest Printing Company 1880, Budapest).

The next full code was the CrC of 1961 with the adoption of Act V of 1961, the first full (including both general and specific sections) criminal code of the socialist era.

The CrC of 1961 was developed slowly and deliberately between 1953 and 1960 with a background of authors long overshadowed or even replaced during domestic political storms.[12]

Regarding the CrC of 1961, Kálmán Györgyi points out that the mechanism of codification had been transformed. The codification of the CrC of 1961 started in 1953 and the government established a government commission to create the code. The commission started its work in January 1954 and involved different government agencies and academic institutions: the Supreme Court, the Supreme Prosecutor, the Ministry of Interior, the Jurisprudence Institute of the Hungarian Academy of Sciences and also the law faculties of Szeged, Pécs and Budapest. The draft of the Criminal Code was presented for public debate in 1960. The debates were organised by the Ministry of Justice and the Hungarian Lawyers' Association.[13] The Code entered into force in 1962.

The CrC of 1961 was replaced by the Criminal Code of 1978 with the adoption of Act IV of 1978. The preparation of the Code started in the autumn of 1974. First, a product titled 'The objectives of the preparation of the new Criminal Code' was completed. Following this, 22 working groups were formed with the aim of issue-based processing of selected topics. The working groups contained 77 members. The proposals of the working groups were discussed by the Codification Committee, which had 19 members and held 102 meetings; however, further professionals – altogether 128 of them – took part in the discussion of specific topics. The Coordination Committee held 26 meetings.[14]

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[11] Györgyi (n 7).

[12] Tóth Mihály, 'Az új Btk. bölcsőjénél' (By the cradle of the new CrC) (2013) (9) Magyar Jog 525–534, 525.

[13] Györgyi (n 7).

[14] Györgyi (n 7).

The draft of the new Criminal Code was widely discussed among both citizens and professionals. Judges, prosecutors, police officers and other practitioners, as well as the academic fora, delivered their opinions on the draft.[15]

The parliament adopted Act IV of 1978 on the Criminal Code at the end of that year, and it. entered into force on 1 July 1979. The Ministry of Justice began publishing the committee's materials in 1984 titled 'The Preparation of Act IV of 1978' edited by Jenő László. The last, eleventh volume of the collection on the Criminal Code of 1978 was published in 1990.

Based on the previously outlined review we can establish that, in view of the Hungarian tradition of criminal codification, the codification leading to a criminal code is a process. Except for the Codex Csemegi, codification usually occurs by committee framework; however, in that case, on one hand Csemegi was an expert with thorough knowledge of European criminal codes and a vast experience in legal practice (he had 22 years of experience as a lawyer), also versed in ministerial work; on the other hand there was a regular, long-lasting debate in the judicial committee of the chamber of deputies about the draft. This shaped the final bill, which was thereafter discussed over several days in the chamber of deputies.

It is characteristic of codification occurring in the context of a committee that different orders, legal professions and representatives of academic sciences play a significant role in the process of codification. At the time of preparing the Codex Csemegi, one of the criticisms was exactly that

> although legal practitioners are adequately represented by the community of attorneys and only the narrow-minded and even shorter-sighted, malcontent people could be shocked by the fact that during the creation of such a momentous systemic code – as the criminal code –, the contribution of the faculties of teachers, judges and prosecutors was neglected.[16]

In the codification based on committee activity the National Assembly played a smaller role, although this can be traced back to the meagre political significance of democratic representation in the contemporary political system (namely at the end of the 50s, the beginning of the 60s and in the second half of the 70s). It can be considered as a part of the tradition that the collection of codification material is published after a shorter or longer period of time allowing the most important questions, documents and progresses of the code to become transparent for those who are interested.

[15] Györgyi (n 7).

[16] Dárdai Sándor, Kőrösi Sándor, Schnierer Aladár (1876) cited by Tóth (n 12) 528.

II Preparing the Criminal Code of 2012

The preparation of Act C of 2012 on the Criminal Code had both a 'hidden' and an open period.

The 'hidden' period can be traced back to 1999, when Mihály Tóth, Zoltán Márki and László Soós worked out the preparatory text 8 at the Ministry of Justice[17] for the concept of the new Criminal Code to replace the CrC of 1978. The discussion material is available in Mihály Tóth's publication from 2012. The introduction of this text could have served as an example to follow for the preparation of the CrC of 2012:

> All codifications must be preceded by a comprehensive analysis that should equally cover the following: the experiences of the evolution of domestic criminal science, the analysis of both short- and long-term trends of criminality in Hungary, research into the composition and criminal characteristics of crime and their changes, the review of case law, the evaluation of prison service experiences and the consideration of the international evolutionary trends in criminality and law enforcement.[18]

However, the discussion paper containing the recommended crime policy concept, organisational framework and scheduling of codification was not followed by codification.

Shortly, Ibolya Dávid, the Minister of Justice, assembled a committee to revise the CrC of 1978 and to create a new code. The chairperson of the commission founded on 14 March 2001 was Kálmán Györgyi while the co-chairperson was Ferenc Nagy. Kálmán Györgyi summarises the work of the committee in his publication quoted earlier as follows:

> The Committee included both theoretical and practicing actors of criminal law: professors, judges, prosecutors, lawyers and the associates of the Ministry of Interior and of the Ministry of Justice as well… Following the start of the work of the Committee, the journal titled Criminal Law Codification was started, which on one hand published the studies conducted to establish the codification process; on the other, it reported on the meetings of the Committee… It is not an overstatement to say that, at the time of codification, the scientific debate on criminal law had gained momentum. Valuable works were published, out of which I should mention professor Ferenc Nagy's paper written for the codification of the General Part of the Criminal Code. Dr Imre A. Wiener completed his book titled *The Theoretical Foundations for the Codification of the General Part of the Criminal Code* (Budapest, 2000) which was published immediately before

[17] Mihály Tóth as the Deputy State Secretary of Justice, Zoltán Márki as the Head of the Department of Criminal Law Codification, while László Soós as Deputy Head took part in the preparations. See: Tóth Mihály, 'A legújabb büntetőjogi kodifikáció kezdetei' (The beginnings of the latest criminal law codification) in Boóc Ádám, Fekete Balázs (eds), *„Il me semblait que j'étais moi-même ce dont parlait l'ouvrage – Liber Amicorum Endre Ferenczy"* (Patrocinium 2012, Budapest) 282–297. See also Tóth (n 12) 527.

[18] Tóth (n 12).

> the Committee started its work and was prepared in connection with the Committee's work and also prepared the draft text concerning the General Part of the Criminal Code (The General Part of the Criminal Code de lege ferenda, Budapest 2003).[19]

In April 2005, József Petrétei, the Minister of Justice and Law Enforcement gave his appreciation for the activities of the committee and informed that 'the preparation of the new Criminal Code is continuing within new organisational settings'[20]. Following this, subsequent committees were formed and multiple proposals were completed for the general part.[21]

A codification committee was formed in the beginning of 2008 supervised by state secretary Katalin Gönczöl.[22] As a result, the plan of Act LXXX of 2009 on the revision of the Criminal Code of 1978 was created.[23] Act LXXX of 2009 significantly altered the General Part of the Criminal Code of 1978, with special regard to the penalties.

With the 2009 reform of the Criminal Code of 1978, the 'hidden' period of the preparation of the new Criminal Code ended and the open period started the following year.

The coalition government of FIDESZ–KDNP, which won the 2010 elections and gained a two-third parliamentary majority – the 'Government of National Cooperation' – followed neither the codification mechanism of 1999–2009 nor the previously detailed codification tradition. In November 2010, a preparation committee was founded in the Ministry of Justice in order to prepare the new Criminal Code. The committee of fifteen was led by Barna Miskolczi, the prosecutor summoned to the Ministry from the Chief Prosecutor's Office.[24] Among other things, Barna Miskolczi publicly commented the following about the activity of the committee:

> In contrast to our predecessors, we did not invoke a codification establishment consisting of well-renowned professionals. When we started preparing the law in November 2010, the first step was to lay down the criminal policy concept. This was synthetised based on the government programme of 2010 and various policy documents. Subsequently, developing the text of the law was started in the codification section of the justice department – which was strengthened by further prosecutors, police officers and judges. With a slight exaggeration, we only codified in our free time in the first eight months, because the department was performing tasks in connection with the EU presidency as well.[25]

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[19] Györgyi (n 7).

[20] József Petrétei cited by Tóth (n 12) 527, footnote 8.

[21] The proposals of Katalin Ligeti, co-authors Endre Bócz and Attila Gál and also the proposal supervised by Katalin Gönczöl as State Secretary with special responsibility. Tóth (n 12) 528.

[22] Practical and theoretical professionals were both involved in the work of the committee.

[23] The preparation documents supporting the proposal were created by Katalin Ligeti and Miklós Ligeti, with the assistance of Ákos Kara and Balázs Rajmond, associates of the Department of Codification of the Ministry of Justice and Law Enforcement.

[24] Györgyi (n 7).

[25] Babus Endre, 'Interjú a főkodifikátorral' (Interview with the Head Codifier) (2012) (28) HVG 19–22.

No professors were involved in the work of the committee. However, four young university associate professors contributed to the work as external experts. They were 'connected' via one strand: all of them were and are practicing lawyers.[26]

By March 2012 – that is to say in 17 months – the draft and the reasoning were completed. This was followed by an appraisal period called 'social reconciliation' during which judges, prosecutors and professors could also study and appraise the text. As Mihály Tóth pointed out, 'in spite of significant conceptual objections followed by more than 200 amendments from MPs, the original version, including only minor changes, was pushed through the machinery of legislation […].'[27]

Act C of 2012 on the Criminal Code was adopted by the National Assembly on 25 June 2012. This means that the fourth criminal code of Hungary was developed in 20 months in terms of the known period of its preparation.

The question is whether we can ignore the 'hidden' period of preparation in considering temporality. My standpoint is that ignoring the 'hidden period' is justified based on the available literature in that there is no available document or unequivocal proof of what was used from the concepts and drafts created between 1999 and 2009 during the preparation of the CrC of 2012, and how.

Still, it is undeniable that there are references regarding this. The most specific one comes from Barna Miskolczi, who stated the following in the previously cited interview: 'We relied on the Györgyi committee's proposals on several points. One of their innovations, mental abuse between people living together was dismissed by the parties forming an ad hoc coalition.'[28] Róbert Répássy, the state secretary responsible for the preparation of the Criminal Code in the Ministry of Public Administration and Justice, mentioned the following at a conference shortly preceding the adoption of the law: 'The codification managed by the Government of National Cooperation […] relied on works prepared in previous periods as well'[29]. However, the presentation did not address the exact meaning of this.

However, Mihály Tóth indicated that the assessment of the 1999 discussion papers is 'seen again' in the reasoning of Act C of 2012.[30] Miklós Hollán pointed out that two innovations in the Criminal Code of 2012 are both based on proposals in the works of Imre A. Wiener and Ferenc Nagy created in the course of the committee operating between 2001

[26] On the composition of the commission see Tóth (n 12) 528, footnote 13.

[27] Tóth (n 12) 528.

[28] Babus (n 25).

[29] Presentation by Répássy Róbert on the conference organised by the Faculty of Political and Legal Science of Károli Gáspár University on 4 May 2012 in Antalóczy Péter, Deres Petronella (eds), 'Magyarország Új Büntető Törvénykönyve' (The New Criminal Code of Hungary) Acta Caroliensia Conventorium Scientiarum Iuridico-Politicarum III. Budapest, 2012. 9–21, 10.

[30] 'I was glad to see the following review word by word here and there in the general reasoning of the new law which also proves that not much have changed in the last ten years in regards of the assessment.' Tóth (n 17) footnote 9.

and 2005.[31] Meanwhile, Ferenc Nagy identified that the penalties of the Criminal Code of 2012 'are basically built on the provisions introduced by Act LXXX of 2009'.[32]

In spite of the previous examples, we can still state that Act C of 2012 was completed in 20 months. Although codification does not have a temporal measure or standard, this time period is still worryingly short to complete a new criminal code by codification. Creating the CrC of 2012 would have already taken a longer time if a preliminary impact assessment, made mandatory by Act CXXX of 2010 on legislation, would have been prepared. Even so, there is no trace of this in the available documents and publications on the CrC of 2012. The efficiency assessment would have been especially reasonable with regard to the penalties (e.g. the expected changes in the prison population, the expected number of those under probation in case of juvenile and adult offenders). A bill consisting of nearly 500 sections, which is, furthermore, the draft of the Criminal Code, the duration of its discussion being less than two months[33] – considering even the mechanism of its preparation – is unusual in a parliamentary democracy.[34]

The frequent modification of the Code can partly be traced back to the haste of creating the CrC of 2012 and to the lack of codification in view of the content. The CrC was amended 33 times between 13th July 2012 and 31 December 2017 (32 times by acts and once by the decree of the constitutional court), the modifications affecting 160 paragraphs.[35]

We can conclude from one part of the statements of reasons of the revising acts that certain corrections could have been avoided with more thorough preparation. It is a recurring reason that the given modification 'contains a clarification of the text', it is 'for the consistency of application' or it is 'made relevant by the resolution of legal interpretation problems'. It is undeniable, however, that a notable part of the modifications are explained by carrying out international legislation obligations.

We can make conclusions on the nature of the preparation of the CrC of 2012 from the comments from politicians and legislators regarding the new Criminal Code and the reasoning of Act C of 2012.

Róbert Répássy said the following, among other things, in his presentation cited previously:

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[31] Hollán Miklós: 'A negyedik magyar büntetőkódex – összegző tanulmány' (The fourth Hungarian Criminal Code – a summary study in Hollán Miklós, Barabás A. Tünde, *A negyedik magyar büntetőkódex régi és újabb vitakérdései (Older and newer discussion points of the fourth Hungarian Criminal Code)* (MTA TK – OKRI 2017, Budapest) 363–380, 375.

[32] Nagy Ferenc, 'A szankciórendszer' (The system of penalties) (2015) 70 (1) Jogtudományi Közlöny 1–15, 1–2.

[33] The Government submitted the bill on the new Criminal Code to the Parliament on 27 April 2012 and – as I mentioned earlier – it was entered into force by the legislature on 25 June 2012.

[34] However it is not unusual in legislation after 2010. See: Gajduschek György, 'Előkészítetlenség és utólagos hatásvizsgálat hiánya' (The lack of preparation and follow-up efficiency assessment) in Jakab András, Gajduschek György, *A magyar jogrendszer állapota (The state of the Hungarian legal system)* (MTA TK JTI 2016, Budapest) acquired: <http://jog.tk.mta.hu> 8 February 2018, pages 796–822, especially: 816–819.

[35] I am grateful to András Vaskuti, assistant university professor (Department of Penal Law, Faculty of State and Legal Science, ELTE), judge of the Supreme Court for the information on the amendments.

> The Government did not wish to change the doctrinal basis of the laws in force, since those worked well […] as it is not the objective of the Government to revise by any means, to change the doctrinal basis developed and adequately applied over decades. […] The codification of the new CrC should not be defined by innovation by any means but the intention to make it consistent, more balanced and easier to apply.[36]

According to Barna Miskolczi, the 'intention of the Ministry of Justice was to finally create a law that is operational; user-friendly, so to say, according to the practitioners of law […] Rather that the text should be comprehensible and the penalties to be free of internal disproportions'[37].

The general reasoning of Act C of 2012 prompts the objective of the Code in agreement with the previous comments:

> The act brings about significant changes in a way that it does not mean a full doctrine shift from the CrC in force as, despite many revisions and additions, the CrC provides adequate legal protection for our fundamental values. However, the problems originating from disrupting the unity of the code can eventually be solved only by a new code.[38]

Based on these, we can state that this preparation of law was basically creating a criminal code similar to the CrC of 1978 in essence while adjusting to the needs of legal practice. Jurisprudence literature identifies this objective in analysing and evaluating the CrC of 2012. In connection with the new aspects, Mihály Tóth points out that 'only the general reasoning of the Code uses the words 'new' and 'novelties' several dozen times and mentions 'significant change' multiple times, but what follows thereafter are mostly corrections of formal and structural wording not affecting substantial questions and are actual novelties only for those in the process of familiarising themselves with penal law'.[39] The standpoint of the author is that 'the new CrC is in fact the modest and inevitable correction of the former CrC'.[40] Miklós Hollán differentiates formal and substantive changes in his paper titled The New Criminal Code. 'Substantive change is that affecting criminal liability and the degree of penalty and demonstrability. In comparison', writes the author, 'I classify changes affecting only the structure of the code and the order of provisions (and not the penalties) as only formal ones.'[41] Comparing it with the CrC of 1978, Hollán concludes, using the typology of Csaba Varga, that 'thus concerning the novelties, the new CrC is rather a codification aimed

[36] Répássy (n 29) 1.
[37] Babus (n 25).
[38] Reasoning of Act C of 2012. Quote from the prologue of point I. Jogtár.
[39] Tóth (n 12) 529.
[40] Tóth (n 12) 534.
[41] Hollán Miklós (2016), 'Az új Büntető Törvénykönyv'(The new Criminal Code) in Jakab, Gajduschek (n 34) 344–384 and 344.

at "summarising the accumulating changes in laws" or at organising (classifying) the laws enacted'.[42]

Based on the previous statements, my point is, based on the content of the CrC, in the view of legal science and the tradition of criminal law codification, we cannot state that Act C of 2012 would have been preceded by codification in its substantive sense. By this, of course, I do not wish to question the efforts and intensive work of those who compiled and worded the CrC of 2012 over 20 months. I am merely stating that this work cannot be classified as codification but 'only' as preparation of a law.

I also do not think it well-founded that the preparation of the CrC of 2012 was based on a criminal policy concept or any penal policy one.

This issue will be discussed in the following section.

III On Criminal Policy

1 Criminal Policy in a Criminological Approach

Criminological literature usually differentiates between criminal policy and penal policy.[43] In the definition by Andrea Borbíró, criminal policy – as policy-making – 'in its most general meaning is the overall objectives and tasks undertaken by the state in connection with crime, offenders and phenomena related to criminality and also establishing and operating the institutions connected to them.'[44]

Criminal policy – accepting Katalin Ligeti's classification[45] – has the following components: law enforcement policy, crime prevention policy, victim protection policy and penal policy. Therefore, penal policy is a subsystem of criminal policy. The components of the subsystem are criminal law policy, criminal justice policy and the policy of corrections.

Regarding my topic, I will only discuss the questions in the scope of criminal law policy. These are in particular the following: the decision of criminalisation-decriminalisation regarding specific acts; stance on the objectives of penalty; decisions regarding restorative justice, options of diversion and the material legal conditions in connection with them; identifying the scope of defences; defining the scope of penalties and the conditions of

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[42] Hollán (n 41) 352.

[43] In Hungarian literature, see Gönczöl Katalin 'A bűnözés társadalmi reprodukciója, devianciakontroll, bűnözéskontroll' (The social reproduction of crime, control of deviance and crime) in Borbíró Andrea, Kerezsi Klára (eds), *A kriminálpolitika és a társadalmi bűnmegelőzés kézikönyve (The textbook of criminal policy and crime prevention)* (IRM 2009, Budapest) 21–36; and Ligeti Katalin, 'Kriminálpolitika' (Criminal policy) in Borbíró, Kerezsi (n 43) 59–85.

[44] Borbíró Andrea, 'Kriminálpolitika' (Criminal policy) in Borbíró Andrea, Gönczöl Katalin, Kerezsi Klára, Lévay Miklós (eds), *Kriminológia (Criminology)* (Wolters Kluwer 2016, Budapest) 711–764, 711.

[45] Ligeti Katalin, 'Kriminálpolitika' (Criminal Policy) in Gönczöl Katalin, Kerezsi Klára, Korinek László, Lévay Miklós (eds), *Kriminológia – Szakkriminológia (Criminology – Applied criminology)* (Complex 2009, Budapest) 599–626.

their application; creating perpetrator typologies and the special rules adjusted to these; and defining the content of exemption rules considering penalty objectives and perpetrator groups.[46]

In my opinion, in the event of a government intent of codification to create a new criminal code, the criminal law policy concept must be formed based on taking a stand on the previous questions or, from another point of view, a criminal law policy concept is defined by the consideration of the previously listed questions. At the same time, the criminal law ambitions of a party or a government do not equate to criminal law policy.

Which factors should be considered when taking a stand on the previously listed questions? The usual formative factors: constitutional limits; previous criminal codes and the experiences in connection with them; international directions and obligations; experiences of jurisprudence; foreign examples based on comparative law; research results and scientific standpoints, conclusions of literature; further subsystems of criminal policy (e.g. crime prevention); and other components of penal policy (e.g. criminal justice policy); apart from these, administrative criminal law; strategies for other deviancies; and financial factors.

2 Penal Policy, Particularly Criminal Law Policy and the Criminal Code of 2012

There was neither a penal law concept in the scientific sense behind the CrC of 2012. nor is such a document available for a broader or a professional audience. It is without doubt that Barna Miskolczi, in charge of the preparation of the CrC of 2012 said the following in the previously quoted interview: 'When we started preparing the law in the November of 2010, the first step was to establish the penal policy concept. This was synthesised based on the government programme of 2010 and various policy documents.'[47]

However, we have no knowledge of the completion of a penal policy concept as the result of the synthesis, unless those preparing the law viewed the direction and content of the action against crime laid out in the Programme of National Cooperation as a penal policy concept and considered the basic professional deliberations of this to be satisfactory. Most likely this was the case, since the relevant text of the document mentioned and the professional requirements stemming from it were included in the reasoning of the CrC of 2012, namely into Point I of the General reasoning titled 'I. The fundamental reasons for creation and substantive directions of the new code'.

[46] On the subject see also Borbíró (n 44) and in the literature of criminal law science for example: Belovics, Gellér, Nagy, Tóth (n 6) 90.

[47] Babus (n 25). It does not become clear which professional political documents these are from, but neither the literature nor the statements of reasons of the CrC. Moreover, two such documents, the National Crime Prevention Strategy and the National Anti-Drug Strategy 2013–2020 were only published in 2013.

According to the referred text

> [The] Programme of National Cooperation phrases that 'The full force of law, longer sentences, the more frequent use of life imprisonment and greater protection for victims will restrain offenders and make it clear to members of society that Hungary is not a paradise for criminals. A strong Hungary can only be born if such laws are created in the Parliament that mean guarantees to the law-abiding'… Therefore, rigour is one of the important expectations regarding the new Criminal Code, which does not necessarily mean increasing the maximum sentences; instead, a more accentuated representation of a crime-proportionate approach. Rigour is primarily manifested in provisions applied to recidivists; in the case of first-time offenders… the new CrC enables the implementation of preventive considerations. The final objective is to create a coherent, consistent and effective code based on this reform so that penal policy regains its role as a last resort in the regulatory system.[48]

Barna Miskolczi emphasises the following concerning the quoted part of the reasoning in his study: 'This text contains the catalogue of codification policies, along which those preparing the law envisaged creating the text. The policies of the catalogue – effectiveness, simplicity, modernity and rigour – are inherent to the penal policy of the Government.'[49] I do not dispute the author's statement; I only dispute that the penal policy of any government and a professional penal policy concept could be equal. My standpoint is that a professional penal policy concept developed according to those outlined in the previous point are needed in the case of codification. However, there is no evidence of such a concept in the published documents regarding the CrC of 2012.

Certainly, we cannot state that there are no identifiable penal policy efforts past the codification policies and also that only the previously mentioned policies would affect the development and content of the CrC of 2012. For example, Ferenc Nagy makes the following point: 'The CrC in force and its penalties do not in fact stand as the basis of a two but as a "three-tyres" penal policy.'[50] Miklós Hollán identifies and evaluates the role of the following factors – 'impulses' in his wording – which played a part in the creation of the new Code: the experiences of previous codes, legal science impulses, jurisprudence impulses, effects of international and EU law and the role of foreign laws.[51] In my opinion, constitutional obligations can be added to these.

The following part of the paper will deal with the degree to which criminal law and criminological theories and research findings affected the contents of the Code.

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[48] Reasoning of Act C of 2012. Quote from point I, (n 38).

[49] Miskolczi Barna, 'Kodifikátori gondolatok az új Btk. Különös részéről de lege lata és de lege ferenda' (Thoughts of Codification on the Special section of the new CrC de lege lata and de lege ferenda) (2015) (5) Jogtudományi Közlöny 281–291.

[50] Nagy (n 32) 1.

[51] Hollán (n 31) 373–378.

IV The Role of Criminal Law and Criminological Theories and Research Findings in the Preparation of the Criminal Code of 2012

Theories and research findings of criminal law, especially in view of the reasoning of the CrC, played a meagre role in its creation. However, it must be added that, as Balázs Elek and Miklós Hollán point out, some concepts of the CrC of 2012 are based on professional literature notions and recommendations even though the reasoning of the specific provision does not suggest it.[52] However, due to the government's and preparers' forbearance of novelties, the discussion of important conceptual questions (for example, the terminology of the criminal offence and penalty,[53] the relation between penal law and administrative offence[54]) was foregone; moreover, specific and elaborated recommendations were neglected during the preparation of the law.[55]

The knowledge and research findings of criminology did not get a role, at least not in the known period of the preparation of the CrC of 2012. If we acknowledge that Act C of 2012 is not a result of codification then this is not surprising. However, it is surprising if we look at the neglect of discipline from the aspect of the subject area of criminology.

In the classic subject definition by Edwin H. Sutherland:

> Criminology is the body of knowledge regarding crime as a social phenomenon. It includes within its scope the processes of making laws, of breaking laws, and of reacting to the breaking of laws. These processes are three aspects of a somewhat unified sequence of interactions.[56]

Based on the definition quoted above, we can state that nowadays criminology is not only a discipline established to study violations of the law and crime but it also covers the process of the formation of law, respectively criminal law and research into the reactions to crime.

In the initial period of preparing the Code, using the criminological knowledge of all three areas would have been beneficial.

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[52] Elek Balázs, 'A jogirodalom által közvetített jogtudomány és a büntető ítélkezés' (Jurisprudence as conveyed in legal literature and criminal case law) in Bódig Mátyás, Ződi Zsolt (eds), *A jogtudomány helye, szerepe és haszna. Tudománymódszertani és tudományelméleti írások (The place, role and use of jurisprudence. Writings in scientific methodology and scientific theory)* (Magyar Tudományos Akadémia Társadalomtudományi Kutatóközpont Jogtudományi Intézete – Opten Informatikai Kft. 2016, Budapest) 152–176, acquired: <www.jog.tk.mta.hu/upoads/files/A_jogtudomány_helye_szerepe_es_haszna.pdf> accessed 10 February 2018; and Hollán (n 31) 375.

[53] See at: Mészáros Ádám, 'Bűncselekmény és büntetés az új Büntető Törvénykönyvben' (Crime and punishment in the new Criminal Code) in Mészáros Ádám (ed), *Fiatal büntetőjogászok az új Büntető törvénykönyvről (Young criminal attorneys on the new Criminal Code)* (Magyar Jog- és Államtudományi Társaság 2014) 9–12, acquired: <www.mjat.hu> 20 February 2018.

[54] Tóth (n 12) 529–530.

[55] See at Hollán (n 31) 375.

[56] E.H. Sutherland, *Principles of Criminology* (3rd edn, J. B. Lippincott Company 1939, Philadelphia) 1.

Its use would have been especially justified by the fact that, due to the interactionist and critical paradigms of criminology, the established understanding of criminal law categories of classical and positivist paradigms had already been called into question. The rules and concepts of criminal law are norms based on consensus but the paradigms mentioned before doubted the consensus behind criminal law norms and pointed out that criminal law is not self-explanatory but an institution dependant on its social and cultural context.[57] For this reason, when evaluating activities subject to diverse social judgement, it is especially important to consider the results of criminological research in order to shape penal policy.

One negative example of this is the assessment of recreational drug use. Until the 1998 modification of the CrC of 1978, drug use was penalised through punishable possession ('obtains', 'keeps'). With the 1998 amendment, 'use' became a separately penalised act. However, with the 2003 amendment of the CrC of 1978, the situation of 1998 returned (to be exact, the one before 1 March 1999). During the preparation of the CrC of 2012, it would have been beneficial to assess the consequences of the specific solutions – along with the changes in the regulation and the practice of diversion. For this, encompassing foreign regulation, a vast literature was and is available.[58] What happened compared to this? Paragraph 178 section 6 of the CrC of 2012 again declared drug use penalised separately. Concerning this, the reasoning of the Code in the section titled 'The revisions of the Specific Part of the new CrC' contains the following: 'Drug use will be a distinct specific conduct (subsidiary offence that falls under the same evaluation as procuring a small amount of a drug)…'[59] However, the quoted text neither contains scientific arguments nor a real argumentation regarding why drug consumption should be punishable *per se*.

I should mention two novelties of the CrC that would have also justified the inclusion of criminological competency in the preparation of the Code. One of them is the regulations regarding juveniles, in particular the lowering of the age-limit of criminal liability; the other is the new rules of self-defence.[60]

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[57] In connection with this see: Győry Csaba, 'Címkézéselmélet' (Labeling theory) in Borbíró, Gönczöl, Kerezsi, Lévay (n 44) 167–176.

[58] See for example at Lévay Miklós, 'A kriminálpolitika szerepe és jellemzői a kábítószerek kínálatának és keresletének csökkentésében az Európai Unióban (The role and characteristics of criminal policy in decreasing the supply and demand of drugs in the European Union) in Gellér Balázs (ed), *Györgyi Kálmán ünnepi kötet (Kálmán Györgyi anniversary volume)* (KJK-Kerszöv 2004, Budapest) 357–371; Rácz József, Takács Ádám (eds), *Drogpolitika, hatalomgyakorlás és társadalmi közeg. Elemzések foucault-i perspektívából (Drug policy, exercising power and the social context. Analysis from a Foucaultian perspective)* (L'Harmattan 2006, Budapest); Ritter Ildikó, *(T)örvény. A kábítószerrel való visszaélés büntetőjog megítélésének hatásvizsgálata – 1999. március 1. után (Law – The impact assessment of the criminal legal evaluation of drug abuse)* (L'Harmattan 2003, Budapest).

[59] Reasoning of Act C of 2012 (n 38) IV. 5.

[60] See the criminological review of the new regulation of justifiable protection in Bolyki Orsolya, 'Dilemmák a jogos védelem új szabályozásával kapcsolatban' (Dilemmas regarding the new regulation of justifiable protection) in Mészáros (n 53) 25–28. Criticism of criminal legal science e.g.: Tóth (n 12) 531–532.

Here I would like to point out a – not necessarily criminological – fact only in relation to the regulations regarding juveniles. This is the 'validity' and 'reasonability' of the regulation. Ervin Belovics said the following at a conference on the 4 May 2012 on 'childhood':

> The draft included a norm consistent with the law currently in force until actually the very last minute, which is that those already 14 years old when committing the criminal act are not punishable. However, by today the draft [the Government handed the draft of the Criminal Code to the National Assembly on 27th April 2012] was supplemented with the entry that the perpetrators of homicide, voluntary manslaughter and the most severe forms of assault are held criminally responsible for it if they were at least 12 years old at the time of the offence and had the required level of discretion to recognise the consequences of the offence.[61]

What happened is still shocking, even considering the rather fast legislation. The need for a formidable change in the view of penal policy, child protection, children's rights and the cultural views regarding children did not emerge in 18 months but did so practically in a week and in fact, even the legislative text was prepared during this time.

The former illustrates that there is no evidence, either in the provisions or in the reasoning of the CrC, that the 'legislative process' would have been affected by the results of either Hungarian criminological thinking or research.

The consideration or the effect of the second component of the area of criminology, research regarding the violations of the law, namely regarding crimes and, along with this, perpetrators is also not detectable. Not even when this is the area of Hungarian criminology with an abundance of research.[62] We also have no knowledge of any analysis of the characteristics of and expected changes in domestic criminal activity or of the criminality of specific crime groups or victimology research carried out during the preparation of the Code.

The area of reactions to offences would have required utilising criminological research results and, most importantly, in the starting phase of the preparation of the code, preliminary impact assessments (e.g. the analysis of the effect of sentencing practice and planned penalties on the prison population). However, these were neglected and only ex-post publications usually address the issues.[63]

For future reference, it is important to note that evidence-based penal policy could apply primarily in the area of reactions (beyond penalties, the institution of diversion could also be classified as such). However, this assumes evaluative research and substantive ef-

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[61] Presentation by Belovics Ervin on the conference organized by the Faculty of Political and Legal Science of Károli Gáspár University on 04 May 2012 in Antalóczy, Deres (n 29) 30–36.

[62] See for example in Borbíró, Gönczöl, Kerezsi, Lévay (n 44) studies before 2012 in chapter III.

[63] Also see, for example, right before the new CrC entering into force: Vókó György's presentation on the previously mentioned conference organised by the Faculty of Political and Legal Science of Károli Gáspár University on 4 May 2012 in Antalóczy, Deres (n 29) 48–55, or, after it e. g. Antal Szilvia, 'A szankciótan változása az új Btk.-ban' (The change of penalties in the new CrC) in Mészáros (n 53) 29–33.

fectiveness tests. In criminology – as Friedrich Lösel notes – such research 'aims to create a consistency between the requirements of science and practice'.[64]

V Conclusions

Based on the issues previously described, the conclusions regarding the three questions examined in my paper are the following.

– From a scientific point of view, and with regard to the Hungarian traditions of codification, the CrC of 2012 is more than a product of legislation yet less that of substantive codification.

– The new CrC is not based on an elaborated, reasoned professional penal policy concept or, if it is, that it hidden from the public sphere.

– The research findings of criminal law affected the CrC of 2012 to only small extent. Moreover, those preparing the CrC of 2012 did not draw on the results of criminological research at all.

[64] Friedrich Lösel quoted by Maxfield, M. G., Babbie, E. R., *Research Methods for Criminal Justice and Criminology* (7th edn, Cengage Learning 2008) 364.