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Some Thoughts on the Hungarian Criminal Sanctioning System

The current Hungarian Criminal Code (Act C of 2012; hereinafter referred to as *Btk*) entered into force on 1 July 2013. There were several – official and professional – reasons for creating a new Penal Code. The official explanation in connection with the Btk appeared first time after the elections of 2010. The new Government laid down in the Program of the National Cooperation System 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 the criminals".[2] Although, the Explanatory Memorandum of the Btk stated that the code „does not necessarily imply increasing the level of the sentence, but a greater emphasis on the enforcement of the proportional sentencing-based criminal law approach in the law". These aims presumably can be obtained via a new act. The professional reason was, above all, that the previous Criminal Code (the Act IV of 1978; hereinafter referred to as *previous Btk*) has been modified for over a hundred times,[3] and it has been effected by more than ten Constitutional Court decisions.[4] Thus, the effectiveness, consistency, simplicity and modernity is also required by the new legislation.[5]

The recent Hungarian Btk is not a revolutionary one, it is based – approximately in ninety percent – on the previous Btk. Although a few relevant modifications took place related to the sanctioning system.[6] Hence, this study focuses on some problematic issues of the Hungarian Criminal Sanctioning System.

Since 2012, plenty of papers and books analysed the Btk.[7] Also many – mandatory and recommended – decisions of the Curia (the Hungarian Supreme Court) appeared in

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[2] „Program of the National Cooperation System"; source: http://www.parlament.hu/irom39/00047/00047.pdf (2016. november 1.). Also see Lévay Miklós: Penal Policy, Crime and Political Change. In Serih, Alenka – Zavrsnik, Ales (ed.): Crime and Transition in Central and Eastern Europe. Springer, New York, 2012, pp. 135-137.

[3] Kőhalmi László: The New Hungarian Criminal Code. In Kilysová, Zuzana (ed.): The Milestones of Law in the Area of Central Europe 2013. 2nd part. Comenius University in Bratislava, Faculty of Law, Bratislava, 2013. p. 969. Sadly, this tendency has not stopped. Btk has been already modified for several times since 2012, last occasion with the Act CIII of 2016. This act modified for example the rules of the confiscation (one of the measures).

[4] Kovács Gábor: New Instruments in the General Part of the New Criminal Code. In Smuk Péter (ed.): The Transformation of the Hungarian Legal System 2010-2013. Wolters Kluwer, Budapest, 2013. p. 389., Tóth Mihály: Magyarország negyedik Büntető Törvénykönyve, p. 443. In Jogtudományi Közlöny, 2014/10. sz. pp. 439-452. Beforehand, in 2006, Attila Gál categorically wrote that a new criminal code was inevitable. See Gál Attila: Néhány büntetéskiszabást érintő kérdés és az új Btk. In Nagy Ferenc (ed.): Bűnügyi mozaik. Tanulmányok Vida Mihály 70. születésnapja tiszteletére. Pólay Elemér Alapítvány, Szeged, 2006. p. 53. Though in Tóth's opinion there was no pressure for the codification. See Tóth Mihály: Széljegyzetek a negyedik Btk. általános részének tervezetéhez, p. 44. In Rendészeti Szemle, 2007/7-8. sz. pp. 43-57.

[5] Changdong, Wei: The Hungarian Economic Criminal Law in the New Hungarian Criminal Code, p. 4. In Büntetőjogi Szemle, 2012/3. sz. pp 3-5. We have to say, that there were a criminal codification in progress between 2000 and 2008 too, but codificators of the the recent Btk did not – or just in a minimal extent – build the Code on the results of this era.

[6] And it is also a fact that the Hungarian prisons are supercharged, thus its background probably needs a deeper overview. Cf. Lőrincz József: A büntetőpolitikai változások hatása a börtönnépesség alakulására. In Kriminológiai Közlemények 70. (Magyar Kriminológiai Társaság) http://www.kriminologia.hu/publikaciok/kriminologiai-kozlemenyek-70 (2016. november 10.) p. 121.

[7] Generally see Karsai Krisztina – Szomora Zsolt: Criminal Law in Hungary. Second Edition. Wolters Kluwer International BV, The Netherlands, 2015. p. 45-137., Gellér Balázs: Büntetéskiszabás Magyarország negyedik Büntető Törvénykönyvében. In Jogtudományi Közlöny, 2015/2. sz. pp. 69-78., Belovics Ervin: Jogalkotói

connection with the Btk and its sanctioning system. Nevertheless, the Constitutional Court nullified some rules of the Btk. Therefore, this study is aimed to concerning the recent criminal-legal literature and the jurisdiction too.

1. New criminal sanctions – new problems?

According to the new Btk, the Hungarian criminal law still uses a dual system of sanctions: it regulates the penalties and the measures.[8] Penalties are: imprisonment (Articles 34-45 Btk), confinement (Article 46 Btk), community service (Articles 47-49 Btk), fine (Articles 50-51 Btk), disqualification from a profession (Articles 52-54 Btk), disqualification from driving motor vehicles (Articles 55-56 Btk), a ban on entering certain areas (Article 57 Btk), a ban on visiting sport events (Article 58 Btk) and expulsion (Articles 59-60 Btk).[9] Secondary penalty is exclusion from participation in public affairs (Articles 61-62 Btk). Measures are: admonition (Article 64 Btk), probation (Articles 65-66 Btk), compensational service (Articles 67-68 Btk), probationary supervision (Articles 69-71 Btk), forfeiture (Articles 72-73 Btk), confiscation (Articles 74-76 Btk), rendering electronic data irreversibly inaccessible (Article 77 Btk), compulsory psychiatric treatment (Article 78 Btk). Measure only against juveniles is the special education in a reformatory institution (Articles 120-122 Btk).
Sanctions only against military personnel[10] are also penalties: loss of military rank (Article 137 Btk) and dishonourable discharge (Article 138 Btk); and secondary penalties: military demotion (Article 139 Btk) and extension of waiting time (Article 140 Btk).
Finally, Act CIV of 2001 introduced some criminal sanctions applicable to legal persons. These are liquidation of the legal person (Article 4 Act CIV of 2001), limitation of the legal person (Article 5 Act CIV of 2001), and fine as a measure (Article 6 Act CIV of 2001).[11]
Overviewing the penalties and measures above, we can say that there are four new sanctions in the Btk. These are confinement as a penalty, a ban on visiting sport events, compensational

tévedések az új büntető törvénykönyvben. In Finszter Géza et al. (ed.): Egy jobb világot hátrahagyni… tanulmányok Korinek László tiszteletére. PTE ÁJK, Pécs, 2016. pp. 180-190., Nagy Ferenc: A szankciórendszer. In Jogtudományi Közlöny, 2015/1. sz. pp. 1-15., Mészáros Ádám: Észrevételek az új büntető törvénykönyv egyes felelősségtani rendelkezéseihez. In Belügyi Szemle, 2013/3. sz. pp. 87-116., Gál István László: Új magyar büntetőjog a XXI. században. Szemelvények az új Btk. Különös Részének újdonságaiból. In Jogtudományi Közlöny, 2015/7-8. sz. pp. 325-336., Sódor István: Az új Btk. szankciórendszerének újdonságai és érvényesülése a büntetéskiszabási gyakorlatban. In Vókó György (ed.): Tanulmányok Polt Péter 60. születésnapja tiszteletére. Országos Vezetői Értekezlet, Budapest, 2015. pp. 112-123.

[8] According to the criminal-legal literature, this is a widely supported settling. See Nagy Ferenc: Stádiumok, elkövetők és szankciók (Gondolatok és reflexiók az új Btk. általános részi Tervezetéhez), p. 774. In Magyar Jog, 2008/12. sz. pp. 769-782.

[9] After that the Constitutional Court in its decision declared capital punishment unconstitutional and repealed all the statutory provisions concerning the infliction and execution of death penalty, life imprisonment is the most severe sanction. See Horváth Tibor: Abolition of Capital Punishment in Hungary. In Acta Juridica Hungarica. Hungarian Journal of Legal Studies, 1991/3-4. sz. pp. 153-166. For a recent overview about the capital punishment in Hungary see Tóth J. Zoltán: The Capital Punishment Controversy in Hungary: Fragments on the Issues of Deterrent Effect and Wrongful Convictions. In European Journal of Crime, Criminal Law and Criminal Justice, 2013/1. sz. pp. 37-58.

[10] As Article 127, paragraph 1 Btk states, members of the regular force of the Hungarian Armed Forces, and the professional staff members of the police, the Parliament Guard, the department of corrections, the professional disaster management body and the civilian national security services shall be deemed servicemen. To this issue see Hautzinger Zoltán: A katona büntetőjogi fogalmának metamorfózisa. In Mészáros Ádám (ed.): Fiatal büntetőjogászok az új Büntető Törvénykönyvről. Magyar Jog- és Államtudományi Társaság, Szeged, 2014. pp. 34-38. and Fejes Erik: A katona büntető anyagi jogi fogalma a magyar jogrendben. In Magyar Jog, 2016/5. sz. pp. 263-267.

[11] In the newest literature see Sántha Ferenc: Criminal Sanctions Applicable to Legal Entities in Hungary. In Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht. 2016/1. sz. pp. 15-22.

service and rendering electronic data irreversibly inaccessible. This chapter analyses some problematic issues related to these new sanctions, also in the light of practice.

1.1. *Confinement* was adopted from the administrative law: it can also be found in the Administrative Offences Act (Article 9-10 Act II of 2012; hereinafter referred to as *Szabs. tv.*). Confinement – under this name[12] – was implemented in the Hungarian Criminal Law first time in the current Btk. Confinement as a penalty – just like imprisonment – is one of the *custodial* penalties. Its duration is determined from 5 to 90 days and it has to be enforced in prison. So, it is a true and inclisive point of view in the criminal-legal literature that „confinement actually is an extremely short imprisonment".[13] The existence of this sanction – as per the general opinion – is considerably problematic.[14] Short termed imprisonment is expensive for the society, compared to for example fine or even community service.[15] It can also violate the equality before the law. According to the Explanatory Memorandum, confinement could be an appropriate penalty especially against those offenders, whom social, economic, family or age circumstances make other penalties unsuitable for them, or this penalty can effectively serve the aim of the special prevention in their cases. This can probably mean in the practice that wealthy perpetrators will be sentenced to a fine, and on the other hand, those who cannot pay it, will be sent to prison. Prison infection[16] and prison crowdedness[17] are also very serious problems. That is why it is not sure that the best solution is to send the perpetrators to prison for just maximum 90 days. Nevertheless, it also does not seem fair that the duration of the shortest imprisonment is 3 months (which is equal with 90 days in practice), and there is opportunity for parole after 2 months. Nevertheless, Btk does not adjust any rules for parole in connection with the confinement. Finally, the fact that confinement can be also imposed against juvenile perpetrators, might violate the Convention on the Rights of the Child (New York, 1989),[18] and the Council of Europe Committee of Ministers Recommendation No. R (92) 17.[19]
Reviewing the criminal practice, we can say that confinement has yet been a rarely imposed sanction. It is common that the perpetrator's attorney proposes the judge to impose confinement against his/her client, but the judge imposes imprisonment instead.[20] However, we also have to mention that the number of sentencing for confinement is arising very quickly. It was imposed in 2014 for 455 times (it was the 0.7% of all penalties), but in 2015 courts imposed confinement for 938 times (almost two-time, than in 2014; it was the 1.5% of

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[12] In the '90s the general minimum of the fix-term imprisonment was one day, so it was almost compatible with the confinement as a penalty in the current Btk. See Article 40, paragraph 2 previous Btk.
[13] Karsai – Szomora: i. m. p. 117.
[14] See Nagy Ferenc: A rövid tartamú szabadságvesztés és szurrogátumai. In Magyar Jog, 1991/10. sz. pp. 588-593., Sós-Tóth Adrienn: A rövid tartamú szabadságvesztés dilemmái. In Börtönügyi Szemle, 2006/4. sz. pp. 13-28.
[15] About the financial aspect see Kerezsi Klára: Cost of Alternative Sanctions in Hungary. In European Journal on Criminal Policy and Research, 1998/4. sz. pp. 561-572.
[16] Gócza Ágnes: Az elzárás mint új büntetési nem a 2012. évi C. törvényben, p. 25. In Büntetőjogi Szemle, 2016/1-2. sz. pp. 23-26.
[17] Juhász Zsuzsanna: A börtönügy aktuális kérdései. pp. 77-78. In Jogelméleti Szemle 2016/2. pp. 58-79., http://jesz.ajk.elte.hu/2016_2.pdf (2016. november 14.)
[18] Article 37 Act LXIV of 1991: „States Parties shall ensure that: […] No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time".
[19] Cf. Bárándy Péter: Jogállami garanciák a Btk.-ban. In Borbíró Andrea et al. (ed.): A büntető hatalom korlátainak megtartása: a büntetés mint végső eszköz. Tanulmányok Gönczöl Katalin tiszteletére. ELTE Eötvös Kiadó, Budapest, 2014. p. 15.
[20] See for example Győri Ítélőtábla Bhar.60/2015/5., or Debreceni Ítélőtábla Bhar.III.534/2015/7. In both of these cases the judge imposed executable imprisonment, and the attorney proposed in his/her appeal to impose confinement instead, even in its maximum duration (2016. szeptember 15.).

all penalties). As the Prosecutor General's Report to Parliament summarized in 2015: „the practice accepted this penalty, and it has found its own place in the penal system".[21]

Based on practical experiences we have noticed that confinement usually imposed for a kind of substitutive reason.[22] To understand this aspect we have to cite a verdict wherein the Supreme Court confirmed that it is necessary to impose community service instead of fine if the perpetrator of the drink driving has already found guilty with the same charges before, and that time fine had been imposed.[23] It follows that community service is more serious penalty than fine, and also that imprisonment is more serious than community service. The current Btk inserted confinement among community service and fine, so we have to say that confinement is a more severe punishment than community service. The other reason of the conclusion is that confinement is a custodial punishment, but community service is not. Thus, there is an invisible ranking of the penalties from fine to imprisonment. We can call this phenomenon the *principle of gradualism*. So what can the court do, if the perpetrator had already been imposed – maybe not just once – for fine and community service, but his/her newest criminal offence is not quite serious to send him/her to prison for a considerable time? Maybe confinement – as the „less bad" choice – can be a solution in this situation. This kind of cogitation could be more established if the perpetrator commits the crime during the conditional release or the suspension of imprisonment. Because in these cases the conditional release shall be terminated (Article 40, paragraph 1 Btk), and the suspended sentence shall be carried out (Article 87 Btk), if the convict is imposed for imprisonment too, which probably means long years in prison. This situation can be solved with confinement, because this penalty does not generate duty for the court to impose executable imprisonment.

1.2. A *ban on visiting sport events* is also one of the new penalties in the Btk. Appearance of this sanction in the Btk also demonstrates typically the phenomenon which can be described as the mutual approximation of criminal law and administrative law (Article 19 Szabs. tv.). Considering the increasing rate of crimes related to sport events, in order to combat the presence of sport hooliganism, the law introduced this new penalty.[24] The ban on visiting sport events may be imposed individually and in combination with other punishments. The condition of its application is that the perpetrator has to commit the offence during his/her participation, arrival at or departure from the venue of the sports event. The court determines in the judgement which sport event the perpetrator will be banned from visiting, organised by which sport alliance, in which sport or sports facility (Explanatory Memorandum).[25] If we take a look on the Prosecutor General's Report to the Parliament again, we can note that Hungarian courts imposed ban on visiting sport events 15 times in 2014 and 28 times in 2015.[26] Thus, the practice of this penalty is not evolved. The cause is probably that the necessary technical requirements are not ensured yet, especially in the case of smaller sport facilities in the countryside.

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[21] Source: http://ugyeszseg.hu/pdf/ogy_besz/ogy_beszamolo_2015.pdf (2016. november 6.) p. 23.

[22] These impressions naturally are not based on a representative reseach, but I think they are instructive anyway.

[23] BH 1996. 73.

[24] As Tóth states, it was a „spectacular declaration of war against sport hooliganism". See Tóth Mihály: Most szép lenni büntetőjogásznak. In Kriminológiai Közlemények 69. (Magyar Kriminológiai Társaság) http://www.kriminologia.hu/publikaciok/kriminologiai-kozlemenyek-69-kozbiztonsag-es-tarsadalom (2016. november 14.) p. 181.

[25] See Tóth Andrea Noémi: A sportrendezvények látogatásától való eltiltás. In Elek Balázs et al. (ed.): Igazság, ideál és valóság. Tanulmányok Kardos Sándor 65. születésnapja tiszteletére. DE ÁJK Büntető Eljárásjogi Tanszék, Debrecen, 2014. pp. 363-375.

[26] Source: http://ugyeszseg.hu/pdf/ogy_besz/ogy_beszamolo_2015.pdf (2016. november 6.) p. 23.

1.3. *Compensational service* is one of the new measures.[27] Above all, the name of this sanction is not very precise. If the service would be truly „compensational", that should mean the perpetrator must compensate the harm he/she caused to the victim. Despite this grammatical meaning, the compensational service is a type of the labouring sanctions. This labour can be usually fulfilled for the state or the church. Mapping the nature of this measure, it can be described as a *mixture* of community service and the probation.[28] So the perpetrator has a duty to work (24 to 150 hours) while he/she is under a probation (1 to 3 years) simultaneously, which „combination of an existing measure and an existing penalty is pretty strange to the hungarian system of sanctions".[29] Compensational service may be imposed in cases of perpetration of a misdemeanour, or of a felony which is punishable by no more than three years of imprisonment. The legislator's aim was with this new kind of measure is to enable a more individual way of sentencing. This time compensational service is fairly infrequent yet. In 2014, it was imposed in 116 cases, and in 2015, for 183 times.[30] Just for comparison: community service was imposed 15.034 times in 2014, and 12.940 times in 2015.[31] Maybe courts are averse from this measure and prefer to impose community service instead, because the administrative tasks could be much more difficult in connection with compensational service than community service. My personal experience is that courts may not impose compensational service even if the prosecutor proposes this sanction on the perpetrator.

1.4. Implementing *rendering electronic data irreversibly inaccessible* as a new measure in the Btk, the Hungarian legislator satisfied EU requirements according to Article 25 of the Directive 2011/93/EU. Data that are available in electronic information systems shall be rendered irreversibly inaccessible, if making them available for others constitutes a criminal offence; if they were used as an instrument for the commission of a criminal offence; if they were created by the way of criminal offence. This measure shall be imposed for example if child pornography is commited using the internet. However, rendering electronic data irreversibly inaccessible is actually a non-existence measure in Hungary. As Prosecutor General's Report to the Parliament indites: „rendering electronic data irreversibly inaccessible had not been imposed in 2015".[32]

2. Concurrent imposition of criminal sanctions

2.1. One of the aims of the Btk was a more individual sentencing system (Explanatory Memorandum). Therefore, Btk allows criminal sanctions to be imposed individually, or concurrently with other punishments almost every time. There are only few exceptions. For example, among the penalties, imprisonment may not be imposed concurrently with confinement or community service. It is also forbidden to impose imprisonment and

[27] Its – far-away – ancestor could be the correctional-educational service from the age of the socialist criminal law. See Györgyi Kálmán: Büntetések és intézkedések. Közgazdasági és Jogi Könyvkiadó, Budapest, 1984, pp. 226-232.

[28] See more on this Sipos Ferenc: A jóvátételi munkáról. In Magyar Jog, 2015/2. sz. pp. 94-99., Gröpler Anita: A Büntető Törvénykönyv új intézkedése a helyreállító igazságszolgáltatás jegyében. A jóvátételi munka előzményei és szabályozása. In Büntetőjogi tanulmányok 15. Magyar Tudományos Akadémia Veszprémi Akadémiai Bizottság. Veszprém, 2014. pp. 309-328.

[29] Cf. Hegedűs István: A jóvátételi munka elméleti és gyakorlati problémái. In Varga Zoltán (ed.): A jogegység szolgálatában. Kónya István ünnepi kötet. HVG-Orac, Budapest, 2014. p. 93. Cited by Karsai – Szomora: i. m. p. 122.

[30] Source: http://ugyeszseg.hu/pdf/ogy_besz/ogy_beszamolo_2015.pdf (2016. november 6.) p. 24.

[31] Source: http://ugyeszseg.hu/pdf/ogy_besz/ogy_beszamolo_2015.pdf (2016. november 6.) p. 23.

[32] Source: http://ugyeszseg.hu/pdf/ogy_besz/ogy_beszamolo_2015.pdf (2016. november 6.) p. 24.

community service together, if the imprisonment has been suspended.[33] It is not permitted furthermore to impose expulsion in combination with community service or fine (Article 33, paragraphs 5-6 Btk).[34]
The complication is that the legislators have not considered the concurrently imposition of *confinement* and some other penalties. Confinement (as a penalty) is – as we saw it – one of the *custodial* penalties. Thus, if it is forbidden to impose imprisonment concurrently with community service, a consistent legislation should prohibit imposing confinement as a penalty parallelly with community service too.
Szabs. tv. – as we have already seen – also maintained its own confinement sanction (Article 9-10 Szabs. tv.). Article 7, paragraph 3 Szabs. tv. does not allow to impose confinement concurrently with community service (Article 14-15 Szabs. tv.). Adjustment of this regulation would be recommended to the Btk. The explanation of this advice is that the imprisonment and the confinement as a penalty withdraws the freedom of the perpetrator, and the community service bounds it too, so they should not be imposed concurrently because of the principle of *ne bis in idem*.[35]

2.2. The single secondary penalty in Btk is exclusion from participation in public affairs. This penalty may only be imposed in addition to executable imprisonment. Hence, that was an undue verdict, wherein the municipal court imposed the perpetrator 4 months imprisonment that has *suspended*, and also excluded him from public affairs.[36]

2.3. Also measures cannot be always imposed concurrently. Admonition, probation and compensational service may be ordered only independently, in place of a penalty (Article 63, paragraph 2 Btk). This rule has been violated often by courts recently. A very typical example for this mistake is related to *disqualification from driving a motor vehicle* (briefly usually called: driving ban). It is a mandatory penalty if the perpetrator is found guilty of drink driving or driving under the influence of drugs (Article 55, paragraph 2 Btk).[37] Despite *probation* is a measure that cannot be ordered concurrently with a penalty, a few municipal courts sentenced the perpetrator for the – obligatory – disqualification from driving a motor vehicle and also ordered probation (instead of imposing fine for example) in the same case. It was a very widespread issue in the last few years, thus the Supreme Court had to conduct more (so-called) Curia *Reviews* as extraordinary legal remedies for healing these defects of the decisions of the municipal courts.[38] The correct solution in this kind of case is to impose solely disqualification from driving a motor vehicle, or – even more properly – fine or community service and parallelly disqualification from driving a motor vehicle. Or, on the other hand, to order probation, but in such case driving ban should be dismissed.

2.4. As Article 55, paragraph 3 Btk rules, *probationary supervision* may only be ordered concurrently with a penalty or another measure. Although Article 69, paragraph 1 Btk allows to link probationary supervision not only to penalties and measures, but also to apply it if the

[33] See BH 2015. 210. (Kúria Bfv.I.158/2015.). It is a bit shocking, that the Supreme Court had to made more decisions about this issue, so the wrong jurisdiction was not sporadical. See BH 2014. 3. (Kúria Bfv.II.353/2013).
[34] One of the municipal courts violated this rule in a human smuggling case through imposing expulsion and fine concurrently againt a Russian perpetrator. See EBH 2016. B.6. (Kúria Bfv.III.892/2015.).
[35] See Article XXVIII paragraph 6 of the Fundamental Law of Hungary.
[36] BH 2004. 399. (Legf. Bír. Bfv. I.121/2004.).
[37] However in cases deserving special consideration, mandatory driving ban may be dismissed. If driving ban is dismissed, court has to explain this decision (see BKv 56.).
[38] See EBH 2011. 2390., BH 2012. 113. (Legf. Bír. Bfv. II.582/2011.); BH 2012. 279. (Legfelsőbb Bíróság Bfv. III.384/2011.); BH 2014. 260. (Kúria Bfv.II.55/2014.).

indictment has been postponed. *Postponement of the indictment* is a kind of legal institution, wherein the public prosecutor has the right to postpone the indictment for 1 to 2 years generally in petty cases. The discrepancy is that postponement of the indictment is neither a penalty nor a measure, but an institution regulated by the Code of Criminal Procedure of 1998 (Act XIX of 1998; hereinafter referred to as *Be*).[39] This situation definitely needs to be fixed by the amendment of the Btk, with a supplement of the Article 55, paragraph 3 Btk, which states that probationary supervision also may be ordered if the prosecutor postpones the indictment.

3. „Three strikes" rules in the Hungarian Sanctioning System

Introducing „three strikes" rules in the Hungarian criminal law – originally based on the American and the Slovak model – was one of the new government's first criminal legislative actions. The aim with this innovation was the exclusion from the society of those who commit violent offences again and again.[40]
Three strikes rules – in a modern form – first appeared in Washington, 1993, but the most often cited legislation is California's from 1994.[41] The essence of „three strikes" is, that the multiple recidivist, if he/she is convicted of any criminal offences with two or more prior strikes, the law mandates a state prison term of at least 25 years to life. During the last two decades the violent crime rate – including murder, robbery, rape and assault – declined below by half than it was.[42] Though there is a great debate in the literature, whether the decline of crimes is actually in connection with the three strikes law or not.[43] On some legal writer's opinion the whole „three strikes" in only a manifestation of populism,[44] and also „the most notorious example of the wave of mandatory sentencing reforms that swept the United States from the late 1970s through the '90s".[45] Not detailing the arguments, in addition we have to say that in May 2016 an important amendment of the three strikes sentencing law in California came into force. „While the original version of the law applied to any new felony committed with two or more prior strikes, the new law requires the new felony to be a serious or violent felony with two or more prior strikes to qualify for the 25 year-to-life sentence as a third strike offender".[46] This is a very important modification, because one of the most eligible argument against California's three strikes was that the third crime could be a theft of few dollars or even a slice of pizza.[47]

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[39] Articles 222-226 Be
[40] See Explanatory Memorandum of LVI Act of 2010.
[41] See Act effective Mar. 7, 1994, ch. 12, 1994 Cal. Stat. 71, originally codified at Cal. Penal Code § 667.
[42] Nash Parker, Robert: Why California's 'Three Strikes' Fails as Crime and Economic Policy, and What to Do, p. 206. In California Journal of Politics and Policy, 2013/5. sz. pp. 206-231.
[43] See Austin, James – Clark, John – Hardyman, Patricia – Henry, D. Alan: The Impact of 'Three Strikes and You're Out'. In Punishment & Society, 1999/10. sz. pp. 131-162., Janiskee, Brian P. – Erler, Edward J.: Crime, Punishment, and Romero: An Analysis of the Case Against California's Three Strikes Law, pp. 44-45. In Duquesne Law Review, 2000/1. pp. 43-69., Zimring, Franklin E. – Kamin, Sam: Fact, Fallacies, and California's Three Strikes. In Duquesne Law Review, 2001/1. sz. pp. 605-614.
[44] Shichor calls this phenomenon „the McDonalization of Punishment". See Shichor, David: Three Strikes as a Public Policy: The Convergence of the New Penology and the McDonalization of Punishment, p. 470. In Crime & Deliquency, 1997/4. sz. pp. 470-492.
[45] Sutton, John R.: Symbol and Substance: Effects of California's Three Strikes Law on Felony Sentencing, p. 37. In Law & Society Review, 2013/1. sz. pp. 37-71.
[46] Source: http://www.courts.ca.gov/documents/Three-Strikes-Amendment-Couzens-Bigelow.pdf, (2016. november 10.); for some reforms before see Vitiello, Michael: Reforming Three Strikes' Excesses. In Washington University Law Quarterly, 2004/1. sz. pp. 1-42.
[47] Vitiello, Michael: Three strikes: can we return to rationality?, p. 396. In Journal of Criminal Law and Criminology, 1997/2. sz. pp. 395-481.

Overviewing the Slovak legislation, it can be stated that their „three strikes" also softened during the years.[48] Hungary's three strikes also changed many times in the last 6 years, but it was not always a decision of the legislation. As I analysed in one of my essays last year, Hungarian criminal law regulated two types of „three strikes" until 2014.[49] The first variation was applicable for a special kind of concurrence of offences. In case the concurrence of offences contained at least three criminal offences involving violence against person, the upper limit of the most serious offence arised to twice as much. If this increased limit exceeded twenty years or one of the offences was punishable with life imprisonment, the perpetrator had to be sentenced to life imprisonment. This rule – which never existed in the US or Slovakian legislation – appeared in 2010, and has significantly modified in the Btk. (originally Article 81, paragraph 4 Btk). From 1 July 2013 at least three criminal offences had to be in a real concurrence (they had to commited in different times), and each offence had to be completed. After all, in 2014 the Constitutional Court No. 23/2014. (VII. 15.) AB decision annulled this kind of „three strikes", because it violated the constitutional rule of legal certainty (Article B of the Fundamental Law). For instance, it allowed to sentence unpunished perpetrators for a real life imprisonment, without killing anybody.[50]
The second possibility – which is in force currently too – is applicable on multiple violent recidivists.[51] For them, the upper limit of imprisonment applicable to the criminal offence that serves as the ground for multiple violent recidivism shall be doubled. In case the increased upper limit of imprisonment exceeds twenty years or the criminal offence is also punishable with life imprisonment, it is *mandatory* to sentence the multiple violent recidivist to life imprisonment (Article 90, paragraph 2 Btk). In this case, the multiple violent recidivist is also excluded from the possibility of parole (Article 44, paragraph 2 Btk), so this is actually a real life imprisonment. This rule has a few problematic elements. The largest of all is that it is mandatory, so it ties the hand of the judge, and does not allow him/her to consider the general sentencing principles of the Btk, for example the severity of the criminal offence, the degree of culpability, or the true danger the perpetrator represents to society (Article 80, paragraph 1 Btk).[52] This serious disprecancy should be eliminated urgently by giving right to the judge for a sentencing discretion in such cases.

4. One question about sanctioning juvenile offenders

The previous Btk set the age limit of minority at 14 years. Above 14, but under 18 years this act called the perpetrator juvenile, and above 18 adult. Nowadays, according to

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[48] Fábry, Anton: A „Három csapás" büntetési elv bevezetése és ennek tapasztalatai Szlovákiában. In Ügyészek lapja 2010/6. sz. pp. 127-134. „Three stikes" also appeared in the Italian criminal legislation in 2005. Despite, that it was a considerably milder variation of three stikes than the American, the Slovakian or the Hungarian one, the Italian criminal literature attecked it from the beginning. See Della, Bella Angela: Three strikes and you're out: la guerra al recidivo in California e i suoi echi in Italia. In Rivista Italiana di Diritto e Procedura Penale, 2007/2-3. sz. pp. 832-859.

[49] Ambrus István: Az Alkotmánybíróság határozata a halmazati három csapásról. A jogbiztonság elvét sértő büntetőjogi rendelkezés alaptörvény-ellenessége, valamint az alaki és az anyagi bűnhalmazat eltérő megítélésének lehetőségei. In Jogesetek Magyarázata, 2015/4. sz. pp. 5-16.

[50] Márok Soma: Sanctions against Recidivists in the Hungarian Criminal Code – the „Three Strikes Law". In Karsai Krisztina – Szomora Zsolt (ed.): Bosphorus Seminar. Papers of a bilingual seminar on comparative criminal law. SZTE-ÁJTK, Szeged, 2015. p. 84.

[51] A multiple violent recidivist is a multiple recidivist who committed a criminal offence involving violence against person at least three times [Article 459, paragraph 1, number 31 pont c)]. Violent criminal offence againt person means for example genocide, homicide, kidnapping, rape, robbery, etc. (Article 459, paragprah 1, number 26 Btk).

[52] Tonry claims that the most serious problems in the sentencing system of the US are the mandatory sentencing rules. See Tonry, Michael: Sentencing in America 1975-2025. In Crime and Justice Vol. 42 (2013). p. 144.

Article 16 Btk, a person under the age of 14 years (child) at the time the criminal offense was committed shall be exempt from criminal responsibility too. However, with the exception of homicide (Article 160, paragraph 1-2 Btk), voluntary manslaughter (Article 161 Btk), battery (Article 164, paragraph 8 Btk), acts of terrorism (Article 314, paragraph 1-4 Btk), robbery (Article 365, paragraphs 1-4 Btk) and plundering (Article 366, paragraphs 2-3 Btk), if over the age of 12 at the time the criminal offense was committed, and if having the capacity to understand the nature and consequences of his/her acts. So in some cases the law lowered the age limit of culpability.[53] In connection with this rule we have to say, that during the codification process a lot of arguments were given for and against the alteration of the age limit of punishability.[54] This decision of the legislator is quite controversial in the criminal-legal literature recently too.[55]

As per Article 106, paragraph 2 Btk, if the perpetrator has not turned 14 at the time the criminal offence was committed, no penalties, only measures should be imposed. So the most severe sanction in that case is special education in a reformatory institution (Article 106, paragraph 2 Btk). It is a special, custodial measure for juveniles only. As a fresh research states, education in a reformatory institution usually imposed if the juvenile commits robbery, theft, battery or public nuisance.[56] It is not a likely punishment for criminal offences against life (for example homicide).

As we have seen, only measures are applicable for perpetrator between the age of 12 and 14. So it is forbidden to impose imprisonment for a perpetrator in this age. It is also true, if the imprisonment is not executable, just suspended. Unfortunately, one of the municipal courts violated this rule in April 2015, when it sentenced the 12 years old perpetrator for 1 year imprisonment – which has been suspended for 3 years – in a robbery case. The Supreme Court had to modify this decision and ordering 2 years of probation instead.[57]

[53] Nevertheless Article 105, paragraph 1 defined „juvenile offender" as a person between the age of 12 and 18 at the time of committing a criminal offense. Article 16 is a generally, but Article 105 is a special rule, so the principle 'lex specialis derogat legi generali' should be applied in the case of their collision. The problem is that the 'lex specialis' has in this case a wider scope than the 'lex generalis', because Article 105 allows to punish any kind of perpetrators between 12 and 14, but Article 16 only if they commit one of the cited six crimes (and moreover having the capacity to understand the nature and consequences of his/her acts). Thus, in point of fact it is not sure that the cited legislation is in consonance with the principle of legal centainty. See Nagy Ferenc: Alkotmányosan megkérdőjelezhető szabályokról az új Btk. kapcsán. In Hack Péter – Koósné Mohácsi Barbara (ed.): Emberek őrzője. Tanulmányok Lőrincz József tiszteletére. ELTE Eötvös Kiadó, Budapest, 2014. p. 129-130.; Tóth Mihály: Vélemények és várakozások. In Hack Péter (ed.): Új Büntető Törvénykönyv. Hagyomány és megújulás a büntetőjogban. ELTE Bibó István Szakkollégium, Budapest, 2013. p. 45. We should remark that some more issues can be found about age in the Special Part of the Criminal Code too. For example Article 204 deals with Child Pornography. The victim of this crime can be a person who has not turned 18. Or Article 212 deals with Nonsupport, when the victim can be even a university student already reached the age of 18. So the expression 'child' have at least four meanings in the current Btk concurrently.

[54] See Kőhalmi László: A büntethetőségi korhatár kérdése. In Jogelméleti Szemle, 2013/1. sz. pp. 1-15. http://jesz.ajk.elte.hu/kohalmi53.pdf (2016. november 11.).

[55] See Pallagi Anikó: Büntethető gyermekkorúak. In Pro Futuro, 2014/1. sz. pp. 97-111.

[56] Farkas Henrietta Regina: A javítóintézeti nevelés kiszabásának bírói gyakorlata Magyarországon, p. 87. In Iustum Aequum Salutare, 2015/4. sz. pp. 79-94. Also see Lőrincz József: Helyzetjelentés a javítóintézeti nevelés végrehajtásáról. In Juhász Zsuzsanna et al. (ed.): Sapienti sat. Ünnepi kötet dr. Cséka Ervin professzor 90. születésnapjára. SZTE-ÁJTK, Szeged, 2012. pp. 287-297. and Burus Renáta: Kit és mit javít a javító? A fiatalkorúak javítóintézeti nevelésének egyes kérdéseiről alapjogi aspektusból. In Ügyészek lapja 2008/Különszám. pp. 65-73.

[57] See BH 2016. 195. (Kúria Bfv.II.1.618/2015).