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THE THREE STRIKES PENALTY AND THE RIGHT TO LIFE IN HUNGARIAN LAW

According to the original' provision of the Criminal Code, if at least three of the offences in the group of offences are completed offences of violence against a person committed at different times, the maximum penalty for the group of offences is doubled. If the maximum sentence thus increased would exceed twenty years or if any of the offences in the group of offences is punishable by life imprisonment, the offender shall be sentenced to life imprisonment. In a pending case, the Metropolitan Court of Appeal turned to the Constitutional Court with a judicial initiative, in which it sought a declaration that this provision of the Criminal Code was unconstitutional and a prohibition of its application in the pending case. The Constitutional Court then examined whether the mandatory application of life imprisonment in the Criminal Code meets the constitutional criteria for a system of punishment under the rule of law derived from Fundamental Law. A key element of the constitutional limits on criminal law is the protection of the individual against arbitrary use of criminal law by the state. The extreme values of the constitutional framework of the applicability of criminal sanctions are the right to human dignity, the right to liberty and security of person on the one hand, and the prohibition of torture, cruel, inhuman or degrading treatment or punishment on the other.

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1. The purpose of punishment

The purpose of punishment is to prevent either the offender or others from committing a crime, in order to protect society.[1] The Criminal Code defines the purpose of punishment as the prevention of the perpetrator or another person from committing a crime, in line with the previous Criminal Code. The aim of punishment is thus to protect society, one aspect of which is individual crime prevention and the other general crime prevention. However, it reflects a change of approach from the previous Criminal Code in that the purpose of punishment has been placed at the beginning of the chapter on sentencing rather than in the chapter on penal theory, thus reflecting the fact that punishment is not an end in itself but a means to an end. The Penal Code refers to the punishment that can be imposed for each offence by the word "punishable", which means the potential harm to be suffered. For this very reason, it does not declare that "the punishment is the legal disadvantage caused by the commission of the offence". (Gál, 2003: 8.)

Punishment is only one of the means of prevention as an end. In a narrower sense, the threat of punishment, law enforcement, the effective functioning of the judiciary, the system of penal enforcement can also be included, but in a broader sense, the proper functioning of society, education, training, social institutions, adequate public lighting, etc. also serve the purpose of crime prevention.

Individual and social prevention are interlinked, since punishment and other legal disadvantages imposed on individuals have a general preventive effect, but effective social prevention also has an impact on the individual. Individual prevention can be achieved not only through education, but also through the imposition of proportionate punishment that complies with substantive law and the overwhelming majority of society's sense of justice. Individual prevention means that the punishment must be capable of deterring the offender from committing a new offence. In theory, individual prevention achieves its true purpose when the punishment changes the essence of the offender's personality so that he becomes a law-abiding citizen. Individual deterrence is also achieved if the offender does not commit a new offence for fear of punishment. By imposing a

[1] Hungarian Criminal Code (Act I of 2012) § 79

proportionate punishment, the objectives of punishment must also include retribution and deterrence, because punishment necessarily has a retributive character, but the Criminal Code makes it clear that the most important role is that of prevention. The aim should be to ensure that the punishment achieves its objective in such a way that the retributive effect is felt as little as possible outside the offender. The criminal power of the State is intended to protect the security of the individual. On the one hand, by retaliating against an assault or an insult, by inducing the offender to change his or her attitude, on the other hand, by deterring others from committing similar offences, and finally, by eliminating or minimising situations in which the life and dignity of a person may be threatened."[2] It should be noted that the right to life is a prominent issue in the academic literature of Central and Eastern European countries. (Stevanovic, Grozdic, 2021; Jovanovic, 2021; Boskovic, Gál, 2021.)

Punishment must also serve the purpose of deterring others from committing crimes. Punishment can be used to influence members of society in a particular direction. The effectiveness of the influence and the impact of the measure or punishment in society depend on the individual perception of the offence and the sanction imposed. Punishment serves the purpose of general prevention adequately if it contributes to the consolidation of positive values in the members of society, but in its absence it can also be achieved by the fear of a similar degree of punishment.

2. Principles for imposing the penalty

Within the limits set by this Act, the penalty shall be imposed in a manner commensurate with the gravity of the offence, the degree of culpability, the offender's danger to society and other mitigating and aggravating circumstances, bearing in mind the purpose of the offence. Where a custodial sentence of a definite duration is imposed, the average sentence shall be applicable. The average shall be half the sum of the upper and lower sentences.[3]

[2] Concurrent opinion expressed by Dr. János Zilinszky, Judge of the Constitutional Court on the unconstitutionality of the death penalty, in his decision 23/1990 (X.31.)

[3] Hungarian Criminal Code (Act I of 2012) § 79

The system of penalties in the Penal Code is relatively specific. Within the limits of the law, the court imposes a proportionate punishment or measure based on the principle of individualisation. Only the court is entitled to consider what punishment is proportionate to the gravity of the offence within the statutory range of penalties, and what punishment is in accordance with the principles of sentencing. The general principles of criminal law and the constitutional requirements arising from the Fundamental Law must also be taken into account when imposing sentences."[4] The limitation of rights by means of punishment must comply with the principles of proportionality, necessity and ultima ratio".[5] Proportionality of the penalty also means that the law imposes different penalties for different types of offence, which may be combined in proportion to each other. The punishment of the perpetrators of similar acts must be similar in relation to the act committed and the degree of culpability, but the proportionality test also requires the harm, the damage, the degree of culpability and the gravity of the offences to be taken into account. "The principle of proportionate punishment is the only possible constitutional punishment under the rule of law because it is the only one compatible with the ideal of equality of rights."[6]

Proportionality means proportionality of the offence, and in the case of multiple offenders, the internal proportionality of the sentence cannot be ignored, but the punishment must also be adapted to the personality of the offender. Individualisation must not, however, undermine the principle of the unity of judicial practice, which is fundamental to legal certainty and equality before the law. Accordingly, offences of similar gravity and offenders with similar personal circumstances should not be subject to substantially different penalties. (Bencze, 2011: 111.)

Where the law also allows for the application of a non-custodial measure or penalty, or alternatively a fine, community service or imprisonment, the court should choose the non-custodial measure or penalty if it is sufficient to achieve the purpose of the sentence. This follows from the fact that "criminal law is the

[4] 1214/B/1990 Constitutional Court decision

[5] 1214/B/1990 Constitutional Court decision

[6] 23/1990 (X.21.) Decision of the Constitutional Court on the unconstitutionality of the death penalty, concurrent opinion of András Szabó, Constitutional Judge

ultima ratio in the system of legal liability, its social function being to act as a sanctioning clause in the legal system as a whole. The role and function of criminal sanction, of punishment, is to maintain the integrity of legal and moral norms when the sanctions of other branches of law no longer help."[7]

The principles of sentencing set out the general criteria that the court must take into account when determining the type and level of punishment to be imposed as a legal consequence of the offence. As pointed out by the Constitutional Court in its Decision No 13/2002 (III.20.) AB, "the right to determine the penalty in the penal system of the Criminal Code is shared between the legislator and the law enforcer."

The starting point for the court is the range of penalties laid down in the special part of the Code, which is increased in the rules of the General Part of the Criminal Code on a mandatory basis from case to case, or, at the discretion of the judge, allows the lower limit to be exceeded. Pursuant to Article 81(3) of the Criminal Code, for offences punishable by at least two fixed terms of imprisonment, the maximum sentence is increased by half of the maximum sentence. By force of law, the penalty for an offence is increased by half in the case of imprisonment pursuant to Article 89(1) of the Criminal Code in proceedings against special and multiple offenders, where, in the absence of rules to the contrary, the maximum penalty for a new offence is increased by half in the case of imprisonment. A mandatory ring-fencing rule is provided for in Article 90(2) of the Criminal Code for violent multiple offenders, where the maximum penalty for a more serious offence of violence against a person is doubled. In the case of an offence committed by a criminal organisation, the maximum penalty for intentional offences committed by a criminal organisation is increased by two times the maximum penalty under Article 91(1) of the Criminal Code. The possibility of exceeding the lower limit is provided for in Article 82 of the Penal Code by applying the rules on reduction of sentence.

From the very beginning, jurisprudence has held that punishments must be economical, which means that "the punishment must be such that its execution does not cause the state or society more harm than the punishable act itself",

[7] Decision 30/1992 (V.26.) of the Constitutional Court, Decision 13/2000 (V.12.) of the Constitutional Court

(Angyal, 1909:147.) "i.e. it must be proportionate to the harm or danger caused by the punishment and must not inflict a greater injury on society than the punishable act itself." (Finkey, 1902: 377.)

According to Article 28 of the Fundamental Law, the courts, in the application of the law, shall interpret the wording of the law primarily in accordance with its purpose and in conformity with the Fundamental Law. "In interpreting the Fundamental Law and the legislation, it must be presumed that they serve a moral, economic purpose that is in accordance with common sense and the common good." The moral and economic framework for the imposition of sentences is also set out for the courts in the Criminal Code in accordance with the Fundamental Law. In general, therefore, it is not a matter of discretion what burden the execution of the expected punishment imposes on society, because the limits are set by the legislator. However, it cannot be ruled out that the Fundamental Law will ultimately incorporate these aspects into the reasons for the court's judgment.

As in the previous Criminal Code, the Btk. emphasises the degree of culpability of the offender, the offender's danger to society and other mitigating and aggravating circumstances as the main criteria for imposing punishment, and, in line with consistent judicial practice, also mentions the specific material gravity of the offence.

3. Material gravity of the offence

When determining the range of penalties, the legislator assesses the social risk and negative consequences of the offence it has defined and decides on the material gravity of each offence. The Penal Code does not define the material gravity of an offence as the abstract material gravity of the offence as already assessed by the legislator and defined by law, but as the concrete gravity of the offence committed. The substantive gravity of the offence corresponds essentially to the degree of danger of the act to society. The degree of danger to society, i.e. the gravity of the offence, is an objective category, and the perpetrator's knowledge and intentions are to be disregarded. The state of consciousness of the offender is a circumstance related to the guilt of the offence and can be assessed in the context of the guilt. The objective gravity of the offence (like the regularity of the offence) may be influenced by circumstances of which the offender was

unaware at the time of the commission of the offence or which occurred afterwards, so that the consequence of the offence outside the scope of the offence may be assessed in the imposition of the sentence even if the offender's knowledge did not extend to it.

The offence of damaging an object of law is obviously more serious than the offence of endangering an object of law. Within both the offence of criminal damage and the offence of endangering an object of law, there are numerous degrees of difference in the degree to which the offence is dangerous to society.

The substantive gravity of the act is lower if, for example, in the case of a crime against property, the damage is compensated independently of the perpetrator, but higher if the act has further serious consequences, even if the perpetrator is not guilty of the crime, for example if the victim of sexual violence commits suicide. (Földvári, 1998:280.)

The danger of the act to society is also affected by circumstances such as the manner, place, time and means of commission, but certain circumstances relating to the victim may also be assessed in this context, for example if the victim of the fraud is a young, immature child.

In the case of the offence of infringement of personal liberty, the duration of the restriction of liberty may be assessed as the concrete material gravity of the act for the purposes of imposing the sentence.[8]

The material gravity of the offence is largely determined by its consequences, so that in the case of assault the nature of the injury and the duration of the treatment may also differ greatly. In imposing a sentence, it must be assessed whether, for example, in the case of assault, the permanent disability is a minor, almost imperceptible loss of mobility of a finger of the hand, or whether the victim may become disabled and without aids may not even be able to walk for the rest of his life. An injury or danger that is significantly above the average is usually an aggravating circumstance, while a significantly less than average injury is a mitigating circumstance. Animals have been added to the list of protected subjects of law, where care must be taken not to disturb the proportions which should reflect the value of the punishment.

[8] Curia published Court Decision BH1998.258.

If the qualification depends on the threshold, a mitigating circumstance if the damage, value or material damage is at the lower limit, aggravating if it is close to the upper limit. The legislator also penalises, within a penalty range, the offender who commits an offence for a value just above the higher threshold, or the offender who actually commits the offence for the highest amount within the threshold.

The offender is considered to be liable if the offence is a basic offence but is close to a qualifying offence, such as homicide, which is considered to be particularly cruel.

4. The guilt of the offender as a sentencing factor

The penalty to be applied must also reflect the degree of culpability of the offender. Guilt can be interpreted as the psychological relationship between the offender and the acts that are dangerous to society. (Nagy, 2001: 419.)

Guilt is a component of the definition of the offence, but also a criterion for determining the level of punishment. It follows that the criminal liability and punishment of the perpetrator can only be established if the socially dangerous act punishable under the Criminal Code was committed culpably, i.e. intentionally, or, if the law also punishes negligence, recklessly.

The degree of culpability must be assessed in terms of the form of intentionality and negligence, recklessness and reckless disregard, and direct and reasonable intent. Negligent recklessness and reasonable intent always give rise to an inference of a lesser degree of culpability. A lesser or greater degree of intent or negligence may be inferred from material circumstances. The degree of culpability is also linked to the motive and purpose of the offence, the means and method of commission, which must also be taken into account when determining the level of punishment. The degree of culpability is usually lower in cases where the offence is occasional and the motive is excusable. A greater intensity of intent may be inferred from the persistent and consistent pursuit of the offence. A significantly higher degree of conscious recklessness than average, where there was a high degree of recklessness in relying on the lack of a result, indicates a higher degree of culpability. In the case of negligence, an aggravating circumstance may

be if the possibility of a serious consequence could have been foreseen even with the attention that could reasonably have been expected.

5. The offender's danger to society

The offender's danger to society must also be taken into account in the sentencing process, where the personality of the offender must also be taken into account, given that each offence has something of the offender's personality. The degree to which the imposition of a sentence is likely to achieve the aims of the punishment, and the kind of punishment that can have a positive influence on the behaviour of the offender after the crime has been committed, can be inferred from the offender's social dangerousness.

The social dangerousness of the offender can be inferred primarily from the nature of the offence itself. The way in which the offence is committed may also determine the material gravity of the offence, but may also characterise the personality of the offender. In this case, it is not really a question of assessing the same circumstances twice. It is ultimately the circumstances of the offender's personality which determine whether he is dangerous to society, and it is at most these circumstances which can be inferred from the act itself. The offender's danger to society as a person can also be inferred from his behaviour before and after the offence, and the different degrees of re-offending can be assessed in this context. The court also assesses the offender's criminal history and his behaviour after the offence. In assessing the personality of the offender, the law enforcement officer also examines his personal circumstances, including his lifestyle. The personal circumstances of the offender are favourable, for example, if he has no criminal record and has led an honest life in the past. The offender's danger to society can be inferred from his repetition of the offence and his behaviour, which shows signs of remorse.

The Penal Code mentions guilt and the offender's danger to society as separate elements in the principles of sentencing. The attributable psychological relationship to a specific act is not to be assessed in the context of the offender's danger to society, but as a degree of culpability. The guilt is a partial expression of the offender's personality, whereas the punishment affects the whole personality, so that the expected impact of the punishment must also take account of the

offender's danger to society within the framework of the offence committed. (Györgyi, 1983: 3)

By the offender's danger to society, the legislator refers to the offender's danger to personal society, but in doing so, the punishment must be determined in accordance with the principles governing the imposition of other penalties. The social danger inherent in the offender's person may be outstanding if the offence committed by him is of lesser gravity. The penalty must be determined in accordance with all the general principles governing the imposition of penalties, and no hierarchy can be established in the circumstances listed in the Criminal Code. The circumstances of the offence must be assessed in conjunction with each other and in their context. It is not their number, but their effect in a given case that is decisive in determining the penalty, which must be imposed in an appropriately individualised manner. Nor is it consistent with the purpose of the penalty and the requirement of proportionality if, in addition to the considerable material gravity of the offence, the court overestimates the relatively minor mitigating circumstances on the part of the offender.[9]

If the offender commits the offence while criminal proceedings are pending against him, with knowledge of the fact, and from this it can be inferred that he is a person of increased danger, irrespective of the outcome of the previous proceedings, the fact that he committed the offence while the criminal proceedings were pending is an aggravating circumstance. It is also an aggravating circumstance if the offender committed the offence during the probation period of a suspended prison sentence in another case, during the period of conditional release or before the pardon became final, since the fact that the threat of additional penalties did not deter him from committing the offence is an indication of the increased danger to his person. This does not constitute a double assessment, since the possible imposition of a suspended prison sentence, the termination of parole, the expiry of the pardon are not a legal consequence of the offence itself, but of the sentence imposed by the judgment.

[9] Curia published Court Decision BH1999.1, 1982.174

6. Other aggravating and mitigating circumstances

The sentence must also take account of other aggravating and mitigating circumstances. The material gravity of the offence, the degree of culpability and the personality of the offender are factors which themselves aggravate or mitigate the penalty. However, case-law has developed a number of other aggravating and mitigating circumstances, which it is impossible to list in the law because they are too numerous. It is not possible to provide a complete list of the factors that may be taken into account in imposing a sentence, and their specific importance and gravity vary from one offence to another. The correct procedure is for the judge to first take into account the mitigating and aggravating factors, to assess them carefully according to their weight, and then to impose the sentence accordingly, rather than to add up the other aggravating and mitigating factors after the sentence has been determined. The Penal Code imposes an obligation on the courts to identify all the material and non-material facts to be taken into account when imposing a sentence and to assess them when applying the legal consequences. The Supreme Court has pointed out that the factors for the imposition of sentences cannot be determined once and for all, but that the principle of equality before the law requires uniformity of sentencing, including the absence of striking and unjustified disparities in the assessment of the circumstances affecting the sentence. The circumstances influencing the penalty must therefore be assessed not in abstract general terms, not mechanically, but in relation to the facts of the specific case, and must be explained in the decision. A factor which is generally regarded as an aggravating or mitigating circumstance can be assessed as such in a specific case if the reason for which it has an aggravating or mitigating effect can be established in the case in question. The same fact may be indifferent or have the opposite effect in relation to another act or another offender. A given circumstance can be both an aggravating and a mitigating factor depending on the offence committed. Family status, care of minor children is usually a mitigating factor, but if the offence is committed to the detriment of the family, it is disregarded, possibly even an aggravating factor. It should also be noted that caring for minor children implies a greater presumption of abstinence from committing offences.

The prohibition of double counting also applies to the assessment of the circumstances that affect the sentence. A circumstance which is regulated by the legislator as an element of the offence or which gives rise to a more serious or less serious classification cannot be assessed separately as a mitigating or aggravating circumstance, but where the gravity of the specific circumstance is significantly greater than the degree of gravity required for classification, there is no obstacle to assessing it as an aggravating or mitigating circumstance in addition to the more serious or privileged classification.

A circumstance that is regulated as a more serious or less serious case for a particular offence may be aggravating or mitigating for the assessment of other offences that do not contain such a qualifying case.

Subjective factors affecting the punishment include the offender's criminal history, age, lifestyle, whether he has a job or is a job seeker, whether he leads a vagabond lifestyle, his education, his education, his activities for the public good, his alcohol abuse, his leadership role, his influence by others, the excusable or particularly reprehensible perpetrator of the offence, his state of health,

Juvenile age is not a mitigating circumstance, but may be considered as such if the offender was not much over the age of criminal responsibility or was a young adult when he committed the offence. The primary objective of the disqualification of juveniles is specific prevention, and the impact of the sanction imposed on the juvenile offender is therefore decisive in its choice, in addition to the material gravity of the offence. The imposition of a custodial sentence on a juvenile may, in the light of the more serious nature of the offence, be less likely to infringe the proportionality requirement, but, contrary to the special requirement for the imposition of a sentence on juveniles, it may also lead to a situation which adversely affects the development of the offender's personality, which is contrary to the rules of the Criminal Code.

Self-reporting by the offender is a mitigating circumstance. It is of particular importance if it made it possible or significantly facilitated the detection of the offence. It is also a mitigating circumstance if the offender cooperated in the investigation of the offence and played a role in the success of the investigation. A confession of guilt is an important mitigating circumstance, as is a partial confession. It has greater force if it is of an investigative nature; in such a case, a confession covering the whole of the offence has a mitigating effect even if it is

accompanied by a partial denial of guilt.[10] The effort to obtain a confession has lost much of its importance for the authorities, but it should be valued more highly by the offender. In the case of an offence committed in the act, only an admission of guilt and remorse are relevant.

Among the material circumstances (mitigating and aggravating) that influence the punishment, the practice of the Supreme Court emphasises in particular the fact that the act remains an attempt, the method of commission, the characteristics of the means of commission, the dangerousness, the endangerment of public safety, the permanent or serious disturbance of public peace, the commission in front of a wider public, the direct or indirect causal link, the role of proximate causes, the personal characteristics of the victim (sick, elderly, in need of protection, etc.), the victim's possible defiant behaviour, forgiveness, continuity, occasionality, the passage of time, the multiplicity of the offence.[11]

The role of the accomplice in the offence is usually less important than that of the offender, and therefore complicity is usually a mitigating circumstance, but the accomplice's culpability may exceed that of the offender, for example in the case of budget fraud, where the accomplice is the "account holder" for a fictitious tax deduction, enabling a large number of offenders to commit the offence. Similarly, the imposition of criminal liability which, by reason of the gravity and nature of the activity, results in the imposition of a penalty even more severe than that imposed on the perpetrator, is justified where the instigator, by virtue of his training and his managerial role, induces the perpetrators to abuse the victim, ultimately resulting in his death.[12]

7. The mean average penalty

Paragraph (2) of Article 80 of the Criminal Code provides for a comparison with the mean value of the given range of sentences as the starting point for the imposition of sentences. The question of the imposition of a median sentence can also be traced back to the Csemegi Code and its Ministerial Explanatory

[10] Curia published Court Decision BH1993. 480, BH1992. 291

[11] Curia Criminal Division opinion Bkv. 56

[12] Curia published Court Decision BH1994. 296

Memorandum, according to which, if neither aggravating nor mitigating circumstances are present or if they counterbalance each other, "the average between the maximum and the minimum shall constitute the period to be fixed as the term of the sentence". This was also confirmed by Full Court Decision No XLIX of 1885 of the Curia (Supreme Court), although the sentencing practice of the courts was generally below the mean. (Nagy, 2001: 419.)

If the legislator wishes to avoid a direct quantitative tightening, it can choose a solution that seeks to orient and guide judicial practice and the approach of the judiciary, and provide criteria for this. (Kónya, 2011: 129.) This is achieved by the imposition of average sentences, originally introduced by Act LXXXVII of 1998.

It should be noted that the requirement of an ideal starting point for the imposition of a fixed term of imprisonment had already been well established in judicial practice in judicial decisions published before 1999.[13]

The provision aims to ensure uniformity in judicial practice. In examining the provision, the Constitutional Court stated that "neither the value of the right of judicial discretion is called into question, nor does it follow from the constitutionally recognised aims of punishment that the law may not lay down rules of an indicative or even mandatory nature for the imposition of punishment. There is therefore no limitation derivable from the Constitution on the legislature's discretion to lay down, by means of legislation, criteria consistent with the constitutional principles of criminal law, either in order to standardise the practice of imposing sentences or to make it more stringent or less severe." [14] Constitutional Judge László Sólyom said that "the imposition of a sentence may be considered arbitrary if it leaves too much room for the judge's subjective decision." [15]

A simpler rule than in the previous Criminal Code is used to determine the average. The median is half the sum of the upper and lower limits of the pen-

[13] Curia published Court Decision BH.1978.420., BH.1980.157., BH.1987.66., BH.1987.67., BH.1989.48., BH.1996.350.

[14] Decision 13/2002 (III.20.) of the Constitutional Court

[15] Decision 23/1990 (X.21.) of the Constitutional Court on the unconstitutionality of the death penalty, concurrent opinion of Constitutional Judge László Sólyom

alty. For the offence of robbery (§ 365 of the Penal Code), which carries a sentence of 2-8 years, the mean is calculated by adding the upper limit of 8 years to the lower limit of 2 years, which totals 10 years, and dividing this by 2, and the result is 5 years. The median for a given qualification will be the range between three and seven years.

The reference to a median does not imply a narrowing of the possibilities offered by the range of sentences, does not make the sentencing regime absolutely definitive, and does not create a sentencing constraint. Nothing precludes the court from weighing and assessing the individual circumstances at its own discretion. The Criminal Code does not limit the court's discretion to assess the weight of the circumstances relevant to the imposition of the sentence within the statutory range of penalties, but it does draw attention to the fact that, in the interests of the unity of judicial practice, the average of the range of penalties should be taken as the benchmark, i.e. the sentence to be imposed should be set against it. (Elek, 2012: 20.)

The rule that the range of the sentence is to be regarded as the average does not affect the fact that the court must impose the proportionate sentence within the limits of the punishment prescribed by law, based on the requirement of individualisation. If the court does not impose a custodial sentence for a fixed term within the range of the average but deviates substantially from it, it must state the criteria on which it has based its decision.[16]

The law also reflects the legislator's expectation that the court should give exhaustive reasons for the use of the possibility of the range. In the reasons for the sentence, the sentence imposed must always be justified (Art. 258(3)(e) of the Criminal Code), but the imposition of a sentence different from the mean must be justified in detail if the difference is significant. The court is entitled to consider whether the penalty is proportionate to the gravity of the offence and other mitigating and aggravating factors within the statutory range of punishment.[17]

[16] Curia published Court Decision BH2001.354.

[17] Decision 13/2002 (III.20.) of the Constitutional Court

8. The cumulative penalty

A cumulative sentence shall be imposed for a set of offences. The cumulative sentence shall be imposed on the basis of the most serious of the offences or the most serious of the offences in the set. If two or more of the offences in the group of offences are punishable by a fixed term of imprisonment, the maximum sentence shall be increased by half of the maximum sentence, but shall not exceed the combined maximum of the sentences for each of the offences.[18]

Aggregation of offences is when one or more acts of the offender constitute several offences and are tried in one proceeding (Criminal Code. Article 6(1)), the court shall impose a cumulative sentence. The Criminal Code basically retained the previous provisions on cumulative sentencing. The cumulative sentence is a single sentence, regardless of the number of acts in the cumulative offence, and is a single sentence in form and content.

In the imposition of a cumulative sentence, it is of no doctrinal significance whether the offender has committed the statutory elements of several offences by a single act (formal cumulation) or whether he has committed acts that are materially cumulative, i.e. acts that are separate in space and time. There is a procedural barrier to the adjudication of formally cumulative offences in several separate criminal proceedings. A cumulative sentence is a single sentence, which also means that it is a single conviction, so that one date counts for the purposes of criminal record discharge, recidivism, specific recidivism, (violent) multiple recidivism.

One of the rules for imposing a cumulative sentence is the principle of absorption, which means that the cumulative sentence is imposed on the basis of the most serious of the offences in the offence category or the penalty range for the offences in the offence category. The penalty for the specific part of the offence is more severe if the maximum penalty range is higher or if, when several offences are taken together, imprisonment is obviously more severe than imprisonment. If the offence of aggravated homicide, which is punishable with imprisonment for a term of ten to twenty years or life imprisonment, is combined with

[18] Article 81(1) of the Criminal Code

any of the offences of theft, the applicable penalty will also be the one applicable to aggravated homicide.

The principle of asperation allows the upper limit of the applicable sentence to be broken if it is insufficient to deal properly with the offences in the group of offences. Under the grouping rule, the upper limit of the most serious statutory sentence is increased by half if the law imposes a sentence of imprisonment for a fixed term only for at least two of the offences in the group of offences. The Criminal Code retains the "increase" phrase of the previous Penal Code, making it clear that the sentence range is set by the legislator and that it is not for the legislator to increase it.

The increased ceiling may not be higher than the total duration of the ceiling for each offence, which means that it must be at least one day lower. For two offences, the maximum penalty for the more serious offence may be increased by half if it is less than the maximum penalty for the other offence. Otherwise, the maximum penalty for the most serious offence is increased only by one day less than the maximum penalty for the less serious offence. If the two offences of robbery as defined in Article 365(1) of the Criminal Code are committed together, both offences shall be punishable by imprisonment for a term of two to eight years. In such a case, the maximum sentence that can be imposed is twelve years, because the eight-year maximum is increased by half. (Two identical offences are obviously not more serious than one of them, so the maximum for the offence of robbery should be increased by half.) The maximum for the two offences combined would be sixteen years, which is more serious than the twelve years determined by increasing the maximum by half, so the lesser of the two would be the maximum sentence in the case.

However, in the case where the offence of aggravated robbery is matched by an offence carrying a penalty of up to three years imprisonment, increasing the aggravated robbery offence by half of the maximum would also result in a maximum of twelve years. The combined maximum for the two offences is eight plus three years, or eleven years, which is less than twelve years. The cumulative sentence cannot exceed the combined total of eleven years and must therefore be reduced by the minimum possible duration, which is one day. In this case, the maximum custodial sentence will therefore be eleven years minus one day. It

should be noted, however, that years and days are not the norm for cumulative sentences.

The cumulative sentence may not, however, exceed the general maximum of twenty-five years of imprisonment for a fixed term as laid down in the Penal Code.

The cumulative nature of the offence has the effect of raising the maximum sentence and cannot therefore be taken into account as an aggravating circumstance, because of the prohibition of double counting. Where more than two offences which were punishable by a custodial sentence of a fixed amount are grouped together, the offence committed in excess of two must be assessed as an aggravating circumstance, irrespective of whether the court uses the increased sentence limit under the rules of asperation when imposing the sentence or whether it imposes the cumulative sentence taking into account the sentence for the most serious offence.

9. The three strikes in Hungarian law

According to the original provision of the Criminal Code, if at least three of the offences in the group of offences are completed offences of violence against a person committed at different times, the maximum penalty for the group of offences is doubled. (Kónya, 2010: 513.)

If the maximum sentence thus increased would exceed twenty years or if any of the offences in the group of offences is punishable by life imprisonment, the offender shall be sentenced to life imprisonment. [19]However, if the General Part of this Act so permits, the sentence may be reduced without limit.

This original rule of the Penal Code, unlike the general cumulative rules, sentenced repeat offenders of violent crimes against the person with particular severity. It increases the maximum penalty for the most serious offence in the group of offences to twice the maximum penalty if at least three of them are crimes of violence against the person. The Criminal Code only provides for this in relation to completed offences committed at different times. A further tightening is that if the maximum sentence thus increased exceeds twenty years or if one

[19] Paragraph 81(4) of the Penal Code when it entered into force

of the offences in the aggregate is punishable by law with life imprisonment, the offender will be sentenced to life imprisonment.

The scope of violent crimes against the person is defined in the Criminal Code.[20] For offences of violence against the person, if the maximum sentence would exceed 20 years with a twofold increase, or if any of the offences in the offence group is punishable by life imprisonment, the Criminal Code shall be amended accordingly. Under Article 81(4) of the Criminal Code, life imprisonment was to be imposed. The judge had the discretion whether to exclude the possibility of parole from life imprisonment or to set it at between 25 and 40 years.

This rule had to be taken into account at the time of indictment and when cases were joined or separated. If several proceedings are opened, the cases must be joined or the offences of violence against the person in the same proceedings cannot be separated, because the strictness of the law would not have been as the legislator intended. In this respect, however, even before the adoption of the law, the Constitutional Court pointed out that "Decisions to merge and separate cases may have not only procedural but also substantive criminal law consequences (cumulative, cumulative punishment). The justification and arbitrariness of these decisions may be one of the elements in assessing whether or not the enforcement of a criminal claim can be considered fair."[21] The procedure is not fair if the decision as to which accused persons are to be joined by the authority in several pending criminal cases is made in an unpredictable and arbitrary manner. If cases of violence against the person were not merged during the investigation or at the latest at the trial stage, the legislative will to impose a more severe penalty would not be enforced. It is possible that in a particular case the court would apply a suspended prison sentence.

[20] Paragraph 459 (1) 26 of the Criminal Code

[21] Decision166/2011 (XII.20.) of the Constitutional Court, dissenting opinion of Miklós Lévai

10. Constitutional review of "three strikes" sentencing

In a pending case, the Metropolitan Court of Appeal turned to the Constitutional Court with a judicial initiative, in which it sought a declaration that this provision of the Criminal Code was unconstitutional and a prohibition of its application in the pending case.

In the opinion of the Budapest Court of Appeal, as the petitioning court, the contested provision is incompatible with the Fundamental Law in several respects.[22] If the acts of the accused are separated in time and space, the facts of the criminal proceedings may make it unpredictable and unforeseeable whether Paragraph 81(4) of the Criminal Code applies to the offender.

The referring court argued that the imposition of a mandatory life sentence does not allow for the examination and enforcement of the sentencing criteria, which is also contrary to the requirement of legal certainty that the criminal law as a whole, including the sentencing system, should not be contrary to itself. In the view of the referring court, the principle of equal treatment under Article XV of the Fundamental Law and the prohibition of discrimination against the accused are infringed by the fact that some persons who have committed the same acts are favoured and others disadvantaged by the fact that their acts are judged in one or more proceedings, depending solely on their procedural situation.

On the basis of Article I(3) and Article II of the Fundamental Law, the Court held that the imposition of a mandatory life sentence on first-time offenders who have committed offences which do not carry a life sentence does not satisfy the requirement of proportionality required by constitutional criminal law. In this connection, the petition also refers to the fact that, in the context of the current legislation, there is a real risk that, as the underlying criminal proceedings show, a defendant with no criminal record will not have the opportunity in criminal proceedings to have a cumulative sentence imposed on him by the court, taking into account aggravating and mitigating circumstances, in proportion to the actual material gravity of the offences committed. This circumstance infringes the requirement of a necessary and proportionate restriction of

[22] Fundamental Law of Hungary (Constitution)

fundamental rights to such an extent that it also infringes the prohibition of the inviolability of human dignity.

The Judicial Council also considered that it was incompatible with the provisions of the Fundamental Law which lay down the basis for the functioning of the courts, Articles 25(2)(a), 26 and 28 of the Fundamental Law, because it restricts the constitutional functioning of the courts in the area of criminal law by removing judicial discretion and thus preventing the individualisation of the judiciary. The mandatory imposition of the most severe penalty would empty the courts of their sentencing function, which would seriously infringe the principle of judicial independence.

The Constitutional Court has taken the following legal provisions into account in its proceedings:

11. The provisions of the Fundamental Law which are the subject of the petition:

"Article B (1) Hungary is an independent, democratic state governed by the rule of law."

"Article I (1) The inviolable and inalienable fundamental rights of the PEOPLE shall be respected. Their protection shall be the primary duty of the State. Article I (2) Hungary recognizes the fundamental individual and community rights of man. Article I (3) The rules relating to fundamental rights and obligations shall be laid down by law. A fundamental right may be restricted to the extent strictly necessary for the fulfilment of another fundamental right or for the protection of a constitutional value, in proportion to the aim pursued and with due regard for the essential content of the fundamental right."

"Article II Human dignity is inviolable. Everyone has the right to life and dignity, and the life of the unborn child shall be protected from the moment of conception."

"Article XV (1) Everyone is equal before the law. All persons have the capacity to have rights.

"Article 28 In the application of the law, the courts shall interpret the text of the law primarily in accordance with its purpose and in conformity with the Fundamental Law. In interpreting the Fundamental Law and legislation, it shall

be presumed that they serve a moral and economic purpose in accordance with common sense and the common good."

For the first time, the Constitutional Court reviewed provisions similar to the Hungarian legislation introduced in the United States of America and Slovakia to improve public safety.

The so-called "Three Strikes" law for recidivist, lifestyle offenders was first adopted in Washington State in 1993. The law provides for a mandatory life sentence for a third offence, with the possibility of parole after twenty-five years. By 2004, twenty-six of the fifty states had adopted "Three Strikes" laws for repeat offenders. A common feature of US law is that there are no time limits on the commission of offences, the rule applies only to multiple convictions if the new offence occurred after the previous conviction, and a third conviction for a minor offence can be punishable by life imprisonment. The US Supreme Court has examined the constitutionality of the "Three Strikes Law" in two cases, and in both cases concluded that it does not violate the Eighth Amendment and therefore does not constitute "cruel and unusual" punishment or treatment.[23]

In Slovakia, in 2004, it was introduced that if a defendant is convicted of one of the offences specifically enumerated in the statute and has been previously sentenced to imprisonment twice for such an offence and has served at least part of his sentence, he shall be sentenced to life imprisonment. The general condition for the application of a mandatory life sentence was that the degree of danger of the offence was very high, having regard to the particularly heinous nature of the offence, the motive or the particularly serious consequences. The law was later tightened up, whereby the general conditions no longer had to be met. Following the amendment of 1 January 2010, life imprisonment may be imposed only for offences that are punishable by this penalty in the specific part of the Penal Code. The imposition of life imprisonment is further conditional on the effective protection of society and on the offender's no longer being likely to be rehabilitated. It is important to stress, however, that the application of the stricter rules is conditional on multiple convictions, and that the "three strikes" rule cannot be applied in the case of cumulative sentences. The "three strikes" provision described in the US and Slovak legislation can be matched in Hungarian law by the rule for

[23] Ewing v. California, 538 U.S. 11 (2003); Lockyer v. Andrade, 538 U.S. 63 (2003).

violent multiple repeat offenders. According to this rule, anyone who commits a third violent crime against a person (constituting a repeat offence) - i.e. who has already been convicted twice - is subject to a maximum penalty of twice the maximum penalty. If it exceeds twenty years or if the offence is otherwise punishable by life imprisonment, life imprisonment shall be imposed.[24]

The subject of this case was not the "three strikes" for violent multiple offenders, but the constitutionality of the legal provisions relating to the aggravation of the cumulative sentence. Under the stricter cumulative rules challenged in the judges' motions, if a person commits at least three violent offences against a person and they are tried in the same proceedings, the maximum penalty for the most serious of these offences is doubled. If this would exceed twenty years, or if one of the cumulative offences is otherwise punishable by life imprisonment, then life imprisonment will be imposed.

The fundamental difference between the cumulative rules and the rules for violent multiple offenders is that the cumulative rules can apply to an offender who has committed three violent offences against a person for the first time at the same time or within a short period of time, but who has never been convicted before. However, multiple violent offenders have a criminal record and have been convicted twice before. The Under Article 81(4) of the Criminal Code, the violent offences against at least three persons had to be committed at different times and the rule applied only to completed offences, so that attempts and preparation did not justify the application of stricter rules.

It can therefore be concluded that for offenders who commit a violent crime against three or more persons, it is not foreseeable when the stricter cumulative rules, including the mandatory life imprisonment, may be applied. The possible different procedural status of these offenders creates the possibility that they will not face the same criminal threat, which makes the application of the contested provision of the Criminal Code unpredictable and unforeseeable for the addressees . Nor can the inconsistency of the legislation be adequately remedied by judicial interpretation, since it allows for conflicting interpretations which are not consistent with the legislative purpose.

[24] Section 90(2) of the Criminal Code

The infringement of fundamental law consists in the legislature's failure to create in full the substantive and procedural conditions of criminal law which would make it possible to impose the same conditions of sentencing, irrespective of the procedural position of the accused, that is to say, irrespective of whether their acts are the subject of one or more proceedings. In the light of the above, the Constitutional Court held that the Article 81(4) of the Criminal Code did not comply with the requirement of legal certainty arising from the rule of law under Article B(1) of the Fundamental Law.

The Constitutional Court then examined whether the mandatory application of life imprisonment under Article 81(4) of the Criminal Code meets the constitutional criteria for a system of punishment under the rule of law derived from Article B(1) of the Fundamental Law.

A key element of the constitutional limits on criminal law is the protection of the individual against arbitrary use of criminal law by the state. The extreme values of the constitutional framework of the applicability of criminal sanctions are the right to human dignity (Article II of the Fundamental Law), the right to liberty and security of person (Article IV of the Fundamental Law) on the one hand, and the prohibition of torture, cruel, inhuman or degrading treatment or punishment (Article III of the Fundamental Law) on the other. Article IV(2) of the Constitution has clarified the content of the right to personal liberty compared to the previous Constitution by not explicitly excluding the possibility of permanent deprivation of liberty, but only for the commission of a violent and intentional crime, on the basis of a final court judgment, with due regard to the criteria of necessity and proportionality.

The extent to which the State may interfere in the life of the individual and restrict his fundamental rights and freedoms through the application of penalties and measures is derived from the rule of law and the constitutional prohibition on restricting the essential content of fundamental rights. The Constitutional Court does not have the power in that regard to overrule the legislature's discretionary criteria, so long as it does not find that the coherence of the system of penalties, and thus legal certainty, has been infringed. The constitutional objective of coherent regulation is to exclude arbitrariness on the part of the State. The Constitutional Court has held that the threat of a more severe penalty for multiple offences is based on constitutional grounds. Legislative assessment of

multiple offences is necessary because it attaches particular importance to the maintenance of criminal law standards. Moreover, a more severe assessment may also be justified because it gives weight to the functioning of the criminal justice system.

A more severe assessment of multiple offences in the current criminal law system meets the requirements of constitutional criminal law, the legislator has the constitutional freedom to punish multiple offences more severely, but the limitation of the right to punish must also meet the constitutional requirements of criminal law.

It does not follow from the constitutionally recognised aims of punishment that the law may not lay down rules of an orientative or even mandatory nature for the imposition of punishment. There is, however, a single limit: it must be for a constitutionally justifiable purpose, respecting the criminal law guarantees expressly provided for in the Fundamental Law, as well as the other principles governing criminal law and fundamental rights.

The contested provisions of the Criminal Code treat all offences falling within the category of crimes of violence against the person in the same way as regards the mandatory application of the penalty, even though they are criminal offences with different substantive gravity. According to the Constitutional Court, the mandatory application of life imprisonment in certain cases, even in the case of multiple offences, cannot be constitutionally justified, even in the case of such a limited range of offences, which have different degrees of seriousness. The legislation at issue does not allow the court to assess the actual gravity of each offence committed, so that when imposing the sentence the court cannot properly assess the gravity of the offence and the danger to society of the offender, the degree of culpability, the other aggravating and mitigating circumstances, while taking into account the gravity of the offence, and thus disrupting the coherence of the system of penalties under the rules in force.

In the case of these special cumulative rules, differentiated sentencing in line with the gravity of the offences committed and in accordance with the fundamental criteria of the penal system would have been served if the legislator had created a discretionary power for the courts to decide between the applicability of a fixed-term sentence and life imprisonment, which would have allowed for the imposition of individualised sentences.

The Constitutional Court accepted the petition as well-founded and held that Article 81(4) of the Criminal Code was contrary to the Constitution and annulled it with retroactive effect to its entry into force on 1 July 2013, and also ordered a review of the criminal proceedings concluded by final decision.

12. Concluding thoughts

This case illustrates the need for judges to be constantly mindful of constitutional requirements in addition to written law. If they have concerns about the constitutionality of an applicable law because they consider it incompatible with the Fundamental Law, they must exercise their right to refer the matter to the Constitutional Court for review, in order to avoid arbitrary and unjust judgments.

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