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CHALLENGES OF CRIMINAL LAW IN THE 21ST CENTURY – CHANGES IN THE GENERAL PART OF THE NEW HUNGARIAN CRIMINAL CODE

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Abstract:

The new Criminal Code (hereinafter CC) came into force in Hungary on the 1st of July in 2013. In my study I attempt to present a selection of the significant innovations which the legislator of the new Criminal Code kept in mind during codification.

Among them, I would like to introduce the changes to the general part of the CC, not including changes to the penalty system.

I focused especially on the questions of the age of punishability, legal defense, and the term of limitation of the crimes.

Keywords: *new Hungarian Criminal Code, juvenil, legal defense, emergency, term of limitation.*

Introduction:

The new Criminal Code (hereinafter CC) came into force in Hungary on the 1st of July in 2013. The previous Criminal Code (Act IV, 1978), has been altered over a hundred times since 1979, the entry into force.

During the last three decades, the legislators have amended the Criminal Code over ninety times (i.e. more than once every year on average) and more than ten Constitutional Court's decisions have been applied. These changes amended, introduced, or repealed more than 1600 provisions.[1] *These numerous changes were due not only to the differing criminal policies of the successive governments which often conflicted the previous ones, but, at the same time, also to the technical and scientific development, and the obligation to harmonize the law system to the EU, after Hungary's accession.*

These factors explain the urge to create a new Criminal Code in Hungary. The legislator's chief concern during the codification work of the Criminal Code was that it should meet the challenges of our modern age, while respecting and following the traditions of national criminal law.

The new Criminal Code does not break completely with the previous Criminal Code, since, although it required changes and additions, the previous Criminal Code was also an effective protection of our fundamental values.

In my study I attempt to present a selection of the significant innovations which the legislator of the new Criminal Code kept in mind during codification. Among them, I would like to introduce the changes to the general part of the CC, not including changes to the penalty system.

The new Criminal Code, like most foreign Criminal Codes, sets out the principles of *nullum crimen sine lege* and *nulla poena sine lege*. These principles were previously

[1] Justification of Law 100, year 2012 about the Criminal Code.

expressed only in the Constitution and the Basic Law of Hungary, but the Criminal Code did not declare them. The new Criminal Code aimed to amend this shortcoming by including this principle in the chapter of *Basic Provisions*[2].

Regarding the question of scope, the Criminal Code defines a new exception from the prohibition of retroactivity in accordance with the Basic Law. The principle of the criminal law continues to be that there is a serious criminal law with retroactive effect, an exception to this rule is punishable under the scope of the generally recognized rules of international law acts. During these war crimes and crimes against humanity understand that without transformation are part of domestic law and which may be applied retroactively, even if at the time of committing the offense under Hungarian law did not constitute a criminal offense.

As an innovation, the Criminal Code introduced the so-called passive personality principle in order to protect Hungarian citizens more effectively. The new Criminal Code creates the Hungarian jurisdiction for the case of a non-Hungarian citizen committing an offense against a Hungarian citizen abroad, or a Hungarian legal person or other entity without legal personality.

The Criminal Code limits the age of punishability to the age of 12 for certain offenses. The 16th § of the Criminal Code contains provisions which forbid the punishment of the young person charged who has not been in the fourteenth year of age when the offense was committed, with the exception of homicide [160 § (1)-(2)], manslaughter (161 §), assault [164 § (8)], robbery [365 § paragraphs (1)-(4)], and plunder [366 § (2)-(3)], given that the perpetrator of the offense committed the crime after the twelfth year of age, and the person possessed the necessary insight to recognize the offense.

Previously the law uniformly classified the person who has reached the age of 14 when the crime was committed juvenile. The reason for this was that the majority of children finish their primary education and achieve a level of physical and mental maturity which classifies them criminally liable. When creating the new Criminal Code, the legislator considered the fact that nowadays the development of children accelerated significantly, and before reaching the age of 14 they are affected by certain effects from which they had previously been protected. There has been an increasing rise in violent advocacy among children between the ages of 12 and 14, which fact made it was necessary to mitigate the minimum age for criminal liability in cases of abnormally aggressive and violent crimes. If the offender completed the age of 12 at the time of the offense, two factors must be considered. On the one hand, the classification of the offense, since impeachment is possible only in offenses listed in the Criminal Code. On the other hand, it has to be considered whether the perpetrator of the crime had the insight necessary to recognize the offense. The prosecutor is obliged to rebut the presumption that the 12-year-old person had the discretionary insight in the particular case which obviously means "imputation". Consequently, an appropriate expert's opinion can have a determining role before decision. Predominantly a psychologist's evidence is justified, but the prosecutor must also obtain information on the antecedent factors, school opinions, and environmental studies. In the case of a person who has not completed the age of fourteen at the time of the offense, only measures can be taken. The most severe penalty can be reformatory education. According to the precept, the perpetrator counts as a child on their 14th birthday, and exceptionally on their 12th birthday, and juvenile age begins on the day after their birthday[3].

The rules of lawful defense have also changed in the new Criminal Code. Article Five of the Basic Law of Hungary states that "Every person shall have the right to repel any unlawful attack against his or her person or property, or one that poses a direct threat to the

[2] About this topic in more details, see: BLASKÓ, Béla, *Hungarian Criminal Law*, „General Part", 5th revised edition, Rejtjel, Budapest—Debrecen, 2013. Pp. 69 - 72.

[3] See: GÖRGÉNYI, Ilona, GULA, József, HORVÁTH, Tibor, JACSÓ, Judit, LÉVAY, Miklós, SÁNTHA, Ferenc, VÁRADI, Erika: Hungarian Criminal Law, General Part, Complex Kiadó, Budapest, 2012. p. 524.

same." As a consequence, defense against an illegal attack is declaredly a constitutional fundamental right, thus the every citizen of Hungary has become empowered with the fundamental right of natural resistance to injustice, which is no longer an exceptional opportunity. As a result, the new Criminal Code allows a wider codification for the rules concerning legal protection than ever before.

The legislator primarily kept in mind the aspects that the risk of unfair attacks must be borne by the illegitimate attacker and the repelling action of the attacked must be judged fairly.

The new Criminal Code creates the case of the so-called situational self-defense establishing statutory presumption that there are cases when the unlawful attack happens in such a way that the attacked may assume that the attack was directed against their life, and in such cases the circumstances of the unlawful attack give the possibility to overrun the extent of the necessary defense. In such the situational self-defense is established and the unlawful assault should be treated as if it were intended to extinguish the life of the defending if the assault against a person is committed at night, armed, or by armed groups. It is also presumed to be considered lethal attack in the cases of unlawful intrusion into an apartment at night, armed, or in a group, or in the case of wrongful intrusion by force of arms into an enclosed space that belongs to the dwelling.

In these cases the court does not have to consider the issue of necessary extent. The Act disposes that a person who has been attacked at night, or who is attacked with a gun, may rightly presume that the attack was aimed at taking their life, and they have the right to choose the way of defense accordingly. This assumption may be based on the numerical superiority of the attackers as well. By this the legislator intended to broaden the case of legitimate defense to ensure effective action against violent crime, and they set up a statutory presumption in regard to the time, manner, and circumstances of the attack. The legislator appreciated that the person has multiple handicaps compared to the attacker, since the attacker decides the place, the way, the time, the purpose of the attack, and gets ready for this, while the attacked is taken by surprise, unexpectedly.

The Supreme Court of Hungary has recently adopted a new uniformity resolution in accordance with the new rules of self-defense. [4] It gives a new meaning to the previous rules, and, with regard to the response actions, it states that the only measure is the necessity of remedial action, but there is no need for a proportionality test any longer, given that the Criminal Code disposes that the person who exceeds the level of necessary measure of self-defense as a result of fright or passion, is not punishable. The defensive person is responsible for exceeding lawful self-defense only if the unlawful attack did not cause fright or anger in the attacked, and they deliberately disregarded the more moderate repelling when choosing the more serious outcome. In the latter case, the lawful self-defense is used as revenge, for which, of course, the criminal law does not authorize the attacked person.

The rules of proportionality in emergency have also been altered in the new Criminal Code. A person acting in emergency prevents danger created accidentally or by another person. If the emergency is avoided by means of a minor or the equivalent harm as the threat, and the action does not threatens society, then the offender can not be punished. If the response action causes more harm, but this is caused by fright or excusable emotion, it also results in the impunity of the defendant. Under the previous rules, in an emergency only minor harm was proportional, the equivalent harm exceeded emergency. The consistent application of the previous rule could create a situation which demanded self-sacrifice in order to save the life of another person. This is completely contrary to human nature, to the fact that the instinct of self-preservation overcomes all moral and legal considerations. A

[4] 4/2013 BJE Resolution (Criminal Law Harmonization Resolution).

person in emergency can not be expected to renounce their own life or physical integrity for the sake of saving another person. [5] The principle can therefore be considered appropriate that the new Criminal Code considers it proportionate if the defendant causes equivalent harm to the one to be repelled.

In the system of impediments of culpability the measure allowance is declared. By the regulation of measure allowance the law expresses that the legal system as a whole must be considered in determining criminal responsibility, as laws other than criminal law may exclude criminal liability. This can not be considered criminal offense what another law allows or declares impunity. However, it should be emphasized that only a statutory provision can exclude the unlawfulness of an action that is declared to be a crime. A regulation of a lower level does not create a criminal offense; consequently it cannot declassify the provisions of the Criminal Code. The legislation may be an abstract or a specific permission.

The new Criminal Code aggravates the rules of limitation compared to the previous provisions. The limitation period for criminal liability uniformly spans the upper limit of the appropriate punishment according to law, but at least five years. Under the previous rules it was three years. Offenses that are punishable by life imprisonment became imprescriptible offenses unanimously. With regard to EU law harmonization, for certain offenses the limitation period is extended in order to give opportunity to make a complaint or private motion by the victim after reaching the age of eighteen, in the cases when the rightful person had not done it previously. Therefore, in the cases of offenses such as strong emotion manslaughter, intentional assault which is punishable with less than three years of imprisonment, kidnapping, trafficking, violation of personal freedom and sexual morality, if the victim has not reached eighteen years of age at the time of the offense, and the punishability of the offense would expire before reaching the twenty-third year, the period of limitation is extended until the person reaches the age of twenty-three, or the date on which they reach the age of twenty-three.

Conclusions

With regard to sentencing, the new Criminal Code, in accordance with recent amendments of the old Criminal Code, preserved the tighter action and sentencing requirements against recidivists, and there are also more severe rules concerning those who commit the offense in an organized criminal group. The most severe action will prevail against violent multiple offenders. As part of the stringent action against recidivists, the law does not allow probation for recidivists, and does not allow suspended imprisonment for multiple recidivists.

One of the key requirements for the new Criminal Code is rigor which means the accentuated representation of the sentencing which is proportionate to the crime. Strictness is principally manifested in the rules concerning recidivists. In the case of first time offenders, the new Criminal Code allows the validation of preventive aspects. The question of how much the stricter Criminal Code will live up to the expectations, will be proved by practice.

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[5] GÖRGÉNYI, Ilona, GULA, József, HORVÁTH, Tibor, JACSÓ, Judit, LÉVAY, Miklós, SÁNTHA, Ferenc, VÁRADI, Erika: work cited, p. 193.