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DO THE PENOLOGICAL THESISES OF THE CODE CSEMEGI SURVIVE IN THE PRESENT SANCTION IMPOSITION PRACTICE?

1. Penological Perspective of the Code Csemegi

The acceptance of the first significant Hungarian Criminal Code, the Clause No. V. of 1878, about the crimes and delicts took place on 29th of May 1878, the effective date of it is 1st of September 1880. The creator, Karoly Csemegi was the denominator of the Code Csemegi, which Code was the first criminal code, codificated and accepted by the Parliament in Hungary. The Code Csemegi was one of the most high-standard Code of its age, its professional value was well symbolized by the fact that the author, takes as a basis the coeval criminal codes and using their modern institutions and solutions, creating a code of criminal

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law, the excellence of which was recognized by both domestic and international jurisprudence.

The sanction system of Code Csemegi included the following penalties:

1.) death penalty,

2.) maximum security prison,

3.) prison,

4.) sate minimum security prison,

5.) minimum security prison,

6.) fine.

The death penalty could only be imposed in the case of aggravated murder and voluntary killing of a king in case the violator has reached the age of twenty years. Fayer compiled a chart for the years 1880 to 1899 showing that the death penalty was very rarely executed – in general, there were executions maximum once a year[2].

It is interesting to note that the Code Csemegi uses the term „freedom-penalty" instead of "imprisonment" of the current Criminal Code. In Récsy's point of view, the concept of freedom-penalty included all punishments, which in some way meant a restriction of freedom, such as arrest, exile[3], which approach is significantly different from today's dogmatic approach. Thus, the Code Csemegi, in its generic term "freedom-penalty", actually regulated, on one hand, certain stages of imprisonment as separated form of penalties, on the other hand using the today's notion, certain coercive measures involving the deprivation of liberty were counted in this circle.

According to the Code, the length of imprisonment - similarly to the effective Criminal Code – could be two types: first of all, for a definite-, and in case of

[2] László FAYER (1905): A magyar büntetőjog kézikönyve. (Handbook of Hungarian Criminal Law) Budapest, Franklin Nyomda. 159.

[3] Géza RÉCSY (1878): A büntetés rendszerének alapelvei (Principles of The Penalty System). *Jogtudományi Közlöny,* Vol. 20. 164.

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imprisonment in a maximum security prison, for an indefinite period, or life imprisonment. The minimum duration of imprisonment was 2 years and the maximum 15 years. As regards the duration of the sentence, it should be noted that similarly to the present effective Hungarian Criminal Code, the Csemegi Code also implemented a relatively definite system, defining the general minimum and maximum in the general part and special minimum and maximum in the special part.

From the point of view of our topic it should also be emphasized that the Code Csemegi contained a very detailed and modern regulation of sentencing to life imprisonment compared to the contemporary view. The Codex, on the one hand, knew the so-called institution of the "transfer to an intermediary institute". In essence, "who were sentenced to life imprisonment after the 10th year of their sentence" and, if "they shown good hope for improvement through their diligence and well-behaving ...," are sent to a mediation institution in order to complete the remaining of their sentence, where they still work but under a more lenient judgement. In case of the prisoners sentenced to life imprisonment, the rules governing conditional release in the context of a mediation institute were laid down in Articles 48 to 49 §. of the Code. According to these provisions, individuals who are arrested in a mediation institute may, upon their request and on the proposal of the Supervisory Board, be released on probation by the Minister of Justice if at least the ¾ of the imprisonment years have been filled or in case of criminals sentenced to life imprisonment filled at least 15 years of imprisonment ". Thus, the Code Csemegi laid down the legal basis for the use of life imprisonment and even introduced a moderately sophisticated regulation, allowing for the release on parole after the filling 15 years of life imprisonment. In addition, it is noteworthy that the Code does not recognize the actual life imprisonment sentence currently in force (hereinafter: TÉSZ). The provisions

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referred to illustrate well the "issues which, from the entry into force of the Code to the present, accompany the problems of regulation of life imprisonment"[4].

2. The Aims of Penalties and the Principles of Sentences

In spite of the above, it is important to point out that, despite the modern approach and some elements of the Code Csemegi, the Code in total was retaliatory, still reflecting the criminal policy approach of the last century, as the focus was on imprisonment and disregarded any special preventive measures that may arise. In contrast, Rustem Vámbéry later emphasized special prevention in addition to the retaliatory nature emphasized by the Code Csemegi, because in his point of view "punishment which does not adapt to the individual characteristics of the crime and the violator, does not differentiate the punishment according to the effect wants to reach him"[5].

According to József Földvári, the primary purpose of punishment is to protect society. Amongst the prevention aims, he considers the special preventive aim to be pursued, which aims the correction and re-education, for which he considers unjustified the imposition of both the death penalty and imprisonment[6]. On the other hand, Ferenc Nagy stated that in order to protect society, the special and general prevention objectives should not be separated, they should prevail jointly, so in his point of view the essence of the penalties is the retaliation – which is not the aim of the penalty[7].

[4] Lajos BALLA (2014): Az életfogytig tartó szabadságvesztés kiszabása a Debreceni Ítélőtábla gyakorlatában 2005. január 1-től 2014. május 31-ig terjedő időszakban (Legal Practice of Life Imprisonment in The Case-Law of The Court of Appeal of Debrecen in The Period of 1 January 2005 to 31 May 2014). *Magyar Rendészet*, 2014. Vol. 6.

[5] Rusztem VÁMBÉRY (1913): *Büntetőjog* (Criminal Law). Budapest, Grill Károly Könyvkiadóvállalat

[6] Tibor HORVÁTH (1981): *A büntetés elméletek fejlődésének vázlata (*Draft of the Development of Criminal Theories). Budapest, Akadémia Kiadó.

[7] Klára KEREZSI (2002): Az alternatív szankciók helye és szerepe a büntetőjog szankciórendszerében. (Place and Role of Alternative Sanctions in Criminal Law) *Kriminológiai tanulmányok,* Vol. 39.

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In connection with the above, Mihály Tóth emphasized that the two different criminal policy aspirations should go hand in hand, since according to his point of view, the protection of society can be ensured by different criminal law instruments for different groups of violators. He cites as an example the occasional misdemeanor criminals and the special offenders who specialize in a specific group of crimes, since they pose different threats to society and can therefore be dealt with by different criminal law instruments[8].

However, the periodically different objectives set by the criminal policy are not only achieved through the amendment of the criminal code and thus the rules of criminal law, but they also have an impact on the judicial practice of imposing penalties. In this connection, the Debrecen Court of Appeal stated that "the judgments about the danger to society of certain acts are also reflected, in accordance with the expectations of the legislator, in the field of imposing criminal penalties, sometimes towards leniency and sometimes more serious criminal law disadvantages." /Debreceni Court of Appeal: Bf.II.385/2011/45./

Like the provisions of the Code Csemegi, the legal justification of the Hungarian Criminal Code also states that imprisonment is to be imposed in the final case and only if the purpose of the punishment cannot be achieved by applying another punishment. Imre Kertész, however, illustrated[9] the low efficiency of the dissuasive effect of imprisonment with the following statistical data: in 2003, 57% of the persons serving their sentences were offenders and one third of them were multiple offenders.

As a result of his research on this topic, Mátyás Bencze drew attention to the following experiences. According to his conclusions, on one hand, the courts have hardly made any reference to judicial practice in order to justify the nature

[8] Imre KERTÉSZ (2002): Büntetőpolitika-bűnmegelőzés (Criminal Policy – Prevention of Crimes). *Cég és Jog,* Vol. 11.
[9] Imre KERTÉSZ (2003): A büntetés hozama és ára. (Profit and Price of Sanctions) *Belügyi Szemle,* Vol 1., 123.

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or extent of the sentence imposed by them. The uniformity of judicial practice has typically been referred only to questions of interpretation of law. In his point of view, this is one of the reasons why the practice of imposing penalties in Hungary differs significantly. He also highlighted the fact that in most cases the reasoning is not sufficiently individualized in the imposition, which may appear to impinge on impartial justice, since the real reasons of imposition of a penalty does not genuinely valued by the judge, as appropriate[10].

Conversely, Ágnes Pápai-Tarr correctly emphasizes that "the imposition of a sentence may never be a mechanical process for a judge, even if external coercion, such as the requirement of a quick closure of the criminal case, otherwise supports this attitude. The judge's punitive action must never be limited to the summary list of mitigating and aggravating circumstances"[11]. Earlier Paul Angyal declared that punishment should be "such that its execution does not cause the state, society, more trouble than the act to be punished"[12]. Specially considerable to keep in mind these principles when the many of the new legal institutions introduced by the new Hungarian Code on Criminal Procedure (hereinafter: Be.) have called for the simplification and acceleration of criminal proceedings, with the emphasis on opportunism.

It is a well-known fact in the practice of imposing sentences that there is frequent criticism in the public against judicial decisions. The nature of this criticism varies greatly, sometimes with judgments that are too mild and

[10] Mátyás BENCZE (2011): *Elvek és gyakorlatok – Jogalkalmazási minták és problémák a magyar bírói ítélkezésben*. (Principles and Practice – Samples and Problems in the Hungarian Jurisprudence) Budapest, Gondolat Kiadó. 167-168.

[11] Ágnes PÁPAI-TARR (2018): Alapelvek a büntetéskiszabásban (Principles in Penology). *Magyar Jog*, Vol. 2. 105.

[12] Pál ANGYAL (1909): *A magyar büntetőjog tankönyve.* (Book of Hungarian Criminal Law) Budapest, Athenaeum Irodalmi és Nyomdai Rt. 147.

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sometimes too severe, and sometimes because the response to similar crimes varies considerably across the country[13].

The legal literature attaches particular importance to the principles humanism and individualization in the context of imposing penalties[14]. The principle of individualization is one of the oldest, but still one of the most important, requirements of punishments. Ferenc Finkey summed it up as follows: "Each offender should be punished according to the magnitude, objective gravity of the crime he committed, and the quality and degree of his own subject-matter guilt, that is, according to the distributive and compensatory truth"[15]. There is basically 3 types of individualization: legal (e.g. privileged and qualified cases), of the judiciary (encountering specific phenomena in a particular life situation) and of the enforcement (influence on the perpetrator, all dependent on personal characteristics). Judicial individualization is "the totality and substance of the judicial prosecution activity, and not just the personality of the offender"[16].

It is important, however, that according to both the Code Csemegi and the regulations currently in force, all punishments are imposed within the statutory penal framework. Thus, the eternal question of the degree of judicial autonomy is rightly raised, as in the early 1900s Zoltán Halász stated that "one of the most important questions in the field of criminal law is how trusted the law should be with the judge to whom it applies"[17]

Greater legal certainty can undoubtedly lead to more uniform judicial practice, but excluding individual discretion could sometimes lead to judgments

[13] Mátyás BENCZE (2005): *A magyarországi büntetéskiszabási gyakorlat kutatásának hipotézise.* (Hypothesis of the Study of the Practie of Hungarian Penology) See: http://jesz.ajk.elte.hu/bencze21.html
[14] Tibor HORVÁTH (1961): Büntetés, illetőleg társadalmi intézkedés alkalmazása a társadalomra veszélyes cselekmények miatt. (Practice of Sanctions and Social Measures Against Socially Dangerous Conducts) *Jogtudományi Közlöny*, Issues 1-2. 115.
[15] Ferenc FINKEY (1933): *Büntetéstani problémák.* (Penological Problems) Budapest, Sylvester Irodalmi és Nyomdai Rt. 38.
[16] Ágnes PÁPAI-TARR (2018): Alapelvek a büntetéskiszabásban (Principles in Penology). *Magyar Jog*, Vol. 2. 107.
[17] Zoltán HALÁSZ (1910): Büntetéskiszabási kérdések. (Penological Questions) Budapest. 5.

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that are incompatible with substantive justice. The judge makes his decisions within the limits set by the legislator, but he is free to consider, within the framework of his sentence, including the legal possibilities of imposing, for example, a custodial sentence or alternative measure instead of imprisonment.

According to Földvári, the aims of the punishment should be given the greatest importance in determining the type and the extent of the punishment. Thus, only circumstances that are somehow related to the purpose of the punishment should be considered in the context of imposing a penalty. The purpose of the punishment is the Criminal Code. Article 79 states that, in order to protect society, prevent the perpetrator from committing any other crime[18]. Thus, similarly to the Code Csemegi, the extent of prosecution and punishment is filled with special and general prevention. In this regard, the opinion of the Curia BK No. 56 states that while the factors for imposing a sentence cannot be exhaustively determined, the principle of equality before the law requires the courts to reach a more uniform decision[19]. This was stated by Ágnes Pápai-Tarr as "at the same time the discretion of the judiciary is hindered by the provisions of the law"[20].

3. Evolution of the Penalty Approach - Applying the Medium Rule?

Section 90-91. § of the Code Csemegi stated that "if the aggravating circumstances are overwhelming in terms of number or weight: the maximum level of punishment for the act shall be approached or applied. And if the mitigating circumstances are overriding, the minimum penalty for the act shall be approached or applied. '

[18] József FÖLDVÁRI (1970): *A büntetés tana.* (Theory of Penalties) Budapest, Közgazdasági és Jogi Könyvkiadó. 204.
[19] Ágnes PÁPAI-TARR (2018): Alapelvek a büntetéskiszabásban. (Principles in Penology) *Magyar Jog*, Vol. 2. 112.
[20] id. 113.

In connection with the above, Mihály Tóth stated that "from this it follows logically that the medium rule is dominant, as the interpreters of the law pointed out almost unanimously at that time"[21]

Thus, the application of the medium rule was already published in the Code Csemegi and provided guidance to the law enforcement officer in imposing the sentence. Many well-known lawyers have expressed their views on the institution of the medium rule. For example, Paul Angyal said: "... if the reduction in the number and weight of the aggravating circumstances and the decrease in the number and weight of the mitigators bring the penalty upwards, it must be an ideal point for a mathematical center that corresponds to the center of the penalty frame, and it can be used when aggravating and mitigating circumstances offset one another or there are no mitigating or aggravating circumstances ... "[22]. In contrast, Károly Edvi Illés pointed out in connection with the use of medium rule that the judges often set the sentence at "below the minimum" although there are no extraordinary mitigating circumstances…"[23]. The lack of a definition of mitigating and aggravating circumstances and divergent enforcement trends made it necessary to clearly define the medium rule legislator to. Accordingly, in the Decision No 49 of the Curia on 26th of November 1885 on the medium rule of punishment, Royal Curia stated that "... the normal punishment (...) is the penalty at the midpoint ..."

In the legislation after the World War II the medium rule set in Code Csemegi was not indicated, however, the principle remained, and more than one and a half decade later, József Földvári declared the principle that "... the right

[21] Mihály TÓTH (2018): A hazai börtönnépesség újabb kori alakulásának lehetséges okai és valószínű távlatai. (Possible Causes of the Tendecies of the Domestic Prison Population and Probable Future) Büntetőjogi Szemle, Vol. 2. 110.

[22] Pál ANGYAL (1909): A magyar büntetőjog tankönyve. (Book of Hungarian Criminal Law) Budapest, Athenaeum Irodalmi és Nyomdai Rt. 472.

[23] Illés Károly EDVI (1914): Normális büntetés. (Normal Sanction) In Büntetőjogi dolgozatok Balogh Jenő születése ötvenedik évfordulójának ünnepére. (Criminal Studies on the 50th Birthday of Jenő Balogh) Pécs, Jogtudományi Közlöny. 96-97.

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sanction draws mid-range boundaries ..." . In his view, the majority of judges would consider facilitating their work if the legislature "were to play a greater role in imposing the sentence and provide the courts with an objective, or at least objective, basis for determining the amount of the sentence"[24].

Nonetheless, we can say that medium rule as a guiding principle when imposing a sentence is quite miserable in contemporary jurisprudence. All we have to think about is that during the period of application of the old Criminal Code, the provision of Section 83. § (2) entered into force on 1st of May, 1999, which states that when imposing imprisonment for a definite period of time the medium rule of the penalty shall be set as governing. However, this rule was subsequently repealed and was not applied again between March 2003 and July 2010. Subsequently, however, it seems that the legislature has consistently insisted on the application of the medium rule, which is currently in force in the Criminal Code, in line with established judicial practice. Section 80. § (2) has been redrafted at the legislative level[25].

Despite of the above, however, it can be clearly seen that from the Csemegi Codex, the medium rule - or its unnamed versions - appeared among the principles of imposing a sentence. From this we can conclude that since the entry into force of the Csemegi Code, the legislator intended to give law enforcement a framework to determine the appropriate level of punishment, ie, "did not completely release the hand of the judges".

[24] József FÖLDVÁRI (1970): *A büntetés tana.* (Penology) Budapest, Közgazdasági és jogi Könyvkiadó 192-193.
[25] See: László FÁZSI (2017): Az enyhébb elbírálás kérdésének dilemmái. (Dilemmas of Milder Jurisprudence) *Magyar Jog*, Vol 5/2017. 257-265.

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4. Comparative Analysis of the Statutory Penalty Item and the Penalty Enforcement Practice

The table below shows the evolution of the number of crimes, violators, offenders and prisoners in prison in Hungary over the past 6 years, based on the Hungarian prison system and the Central Bureau of Statistics.

	2013	2014	2015	2016	2017	2018.I-VI. hó
REGISZTRÁLT BŰNCSELEKMÉNYEK	377 829	329 575	280 113	290 779	226 452	120 827
ELKÖVETŐK	109 797	108 474	101 492	100 933	92 896	53 460
BŰNELKÖVETŐK	103 615	105 584	99 018	98 136	90 369	51 896
FOGVATARTOTTAK	18 146	18 204	17 796	18 023	17 944	-

1. Statistical rates of registered crimes and perpetrators between 2013 and 2018. "Self-editing"

The table shows that the number of crimes registered in Hungary has decreased by 70% and the number of registered offenders by 50% in the last 6 years. However, the number of registered crimes and perpetrators per se is rather misleading, as it does not faithfully reflect the number of actual crimes, such as the actual perpetrators, as according to various international statistics, the majority of crimes and thus perpetrators are actually undetected nor in crime statistics.

The number of inmates is well known to show a steady upward trend, despite the continued saturation of prison institutions. Smaller differences, even below

100 persons, have not affected trends that can be determined over the years, as the number of prisoners has practically been around 18,000 since 2013. Thus, the steady increase in the prison population is not due to the increase in the number of prisoners, but it is more likely that the real reason for this increase is to be imposed in the form of imprisonment. This also appears to be supported by data from the Central Bureau of Statistics, which shows a moderate increase in the number of prisoners sentenced in recent years, as illustrated in the following table.

ELÍTÉLTEK SZABADSÁGVESZTÉS TARTAMA SZERINTI MEGOSZLÁSBAN

	2013.VI.30.	2014.VI.30.	2015.VI.30.	2016.VI.30.	2017.XII.31
1 hónapnál rövidebb	61	77	74	52	49
1 hónap – 6 hónap	836	607	537	517	303
6 hónap – 1 év	1 645	1 531	1 474	1 373	875
1 év – 2 év	2 631	2 776	2 810	2 917	2 550
2 év – 3 év	1 776	1 896	1 801	1 982	2 047
3 év – 5 év	2 174	2 235	2 259	2 430	2 558
5 év – 10 év	2 522	2 674	2 894	3 091	3 459
10 év vagy több	757	824	877	944	1 613
Tényleges életfogytiglan	266	279	307	327	54
Összesen:	12 667	12 899	13 033	13 633	13 508

2. Convicts sentenced to length of imprisonment. "Self-editing"

From the data in the table above, it can be clearly seen that while the relatively mild, shorter imprisonment sentences have decreased significantly, the more severe, longer term imprisonment stagnates or may even increase. This tendency is well illustrated by the fact that from 2013 the number and proportion of imprisonment sentences over 5 years is outstanding, which, according to Mihály Tóth, significantly contributed to the "unfavorable development" of the

prison population in later years[26]. This may have been due to the fact that the repeated application of the "medium rule" introduced by the legislator did not initially produce the expected success, the full disclosure of mitigating and aggravating circumstances may have failed and the lawyer initially preferred "medium" rules interpreted and applied it as a tightening of penalties. Examining the data of the National Courts Office and the Prison Institutions, the values in the above table show that there has been a drastic increase in the number of imprisonments to be executed for 2015 and 2016, but no precise explanation can be given yet.

It is also clear from the table for the period from 2013 to 2017 that some of the terms of imprisonment to be served are decreasing, while some are showing a continuous increase. In the case of imprisonment sentences of less than 1 month, this number is reduced and the number of imprisonment sentences of 1 month to 6 months and 6 months to 1 year is very significant, since they are reduced by less than half. In the case of imprisonment for sentences ranging from 1 year to 2 years, this number continued to increase until 2016, while in 2017 a significant decrease was observed. It is interesting to note that between 2013 and 2014 the number of imprisonment sentences between 1 year and 2 years exceeded the maximum number of 5-year sentences, which were imposed the most commonly. There is also a gradual increase in the number of custodial sentences between 2 years and 3 years and between 3 and 5 years. The number of people sentenced to 5 years to 10 years imprisonment has increased by nearly 1,000 in 4 years and the number of sentences imposed for 10 years or more has doubled. This tendency is particularly interesting when one considers that, in general, however, the number of perpetrators has fallen. This means that fewer

[26] Mihály TÓTH (2018): A hazai börtönnépesség újabb kori alakulásának lehetséges okai és valószínű távlatai. (Possible Causes of the Tendecies of the Domestic Prison Population and Probable Future) Büntetőjogi Szemle, Vol. 2. 113.

offenders will receive more and, in view of the drastic reduction in the number of offenders, will enjoy significantly longer periods of imprisonment overall.

However, the number of substantive life imprisonment has decreased significantly, so according to the initial 2013 data, the court imposed an actual life sentence of 266 for the accused and 54 for the defendant. The drastic decrease in the sentences of life imprisonment raises the question of what has changed since the rate of imprisonment imposed, as shown in the tables above, has been higher overall since 2013.

5. The Problem of Substantive Imprisonment for Life

After the abolition of the death penalty by the Constitutional Court, life imprisonment has become the most severe penalty. Introduction of the TÉSZ by the Act LXXXVII. on March 1, 1999, with the possibility of excluding conditional release, was a sort of loophole on the part of the legislature to protect the society from perpetrators who face such extreme social standards they have shown that their reintegration into society is essentially hopeless. Part of the justification for the amendment:

'(...) The Act amends the current provision in the light of the fact that the regulation introduced by the Act XVII. 1993., which is based on the determination by the trial court of the offender's earliest date of conditional release, reflects a fundamentally correct approach, but setting the earliest date of conditional release to fifteen years resulted the easment of the expected effect of this sanction. regulation, according to the previous legislation where there was no chance for parole before twenty years. Therefore, the Act amends the provision introduced in 1993 and supplemented in 1997 so that the earliest date of parole is set at 20 years, similar to the one in force prior to the 1993 amendment, while also providing the opportunity for the court to rule out the

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possibility of parole on the basis of the nature of the crime and the weight of the act. In the event that, the case where a court imposes life imprisonment for a crime of which possibility to punish will not lapse the term of conditional release, the earliest date shall be in 30 years. "

Since its inception, the institution of substantive life sentence has been generating controversy between criminologists and criminal lawyers; mostly suggesting rethinking it. In this context, it is worth mentioning the lecture of István Kónya, head of the Criminal Chamber of the Curia, in which he expressed his opinion on a number of criminal policy tightening measures, the reintroduction of the medium rules and the institution of the "three strikes"[27]. The peculiarity of the study is that he writes as a head of the chamber, as a private individual, or as a scholar, and advocates a great deal of the principle of punishment, which has appeared since the Code Csemegi, even at the legislative level, including the medium rule. Kónya believes that the judiciary does not reject the use of medium rule and cites several examples to support this. At the same time, he emphasizes in principle that tightening up in the Criminal Code can only be an orientation for the judge, but the judge must not be deprived of the opportunity to make a decision. An imperative, non-discretionary rule aimed at tightening is contrary to the judge's view.

The review of the actual life imprisonment (TÉSZ) came into the spotlight in April 2014, when the Szeged Court of Appeal turned to the Constitutional Court, suspending the court of appeal, in the case of Attila P. and his associates with the subject of homicide and other crimes, and again in May, when Hungary has been condemned by the European Court of Justice (ECHR) for violating Article

[27] István KÓNYA: *A három csapás bírói szemmel.* (Three Strikes – From Judicial Aspect) Magyar Jog, Vol. 3/2011., 129–135.

3[28] of the European Convention on Human Rights (ECHR) in case of László Magyar[29]. To the latter, the policy responded immediately and sought to serve the society's demand for severe punishment, stating that the institution of TÉSZ should be maintained. In fact, the legitimacy of TÉSZ is a more nuanced issue, and the decision of Strasbourg, which persists in Hungary, does not require the complete abolition of life imprisonment from our country, only its unquestionable manifestation of reality in lifelong execution, which precludes judicial review.

Subsequently, in the decision of the actual revision of the regulation of the TÉSZ, 23/2014. (VII. 15.) Constitutional Court basically reflect the sentences contained in István Kónya's study and the decision in Strasbourg, namely that the principle of separation of powers is a fundamental pillar of the rule of criminal law and accordingly the discretion of the court cannot be taken by the state. The state shall not bind the judge or make the judge, after essentially carrying out an evidentiary procedure, without any consideration, automatically impose and apply the most severe penalty. As Kónya has pointed out, from the judiciary accustomed to a relatively definite system of punishment, whose duty under the Criminal Code is to investigate the special and general purpose of prevention, criminal policy should be able to wait and trust in it, that you will be wise and experienced enough to make the right decision.

In connection with the above, in a study published in the Prison Review, Ferenc Nagy conducted a comparative analysis to show the similarities and differences between the European legislations on life imprisonment[30]. The study divides the solutions under consideration into two groups: the first group

[28] Prohibition of torture: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
[29] Application no. 73593/10, 20 May 2014.
[30] Ferenc NAGY (2013): Gondolatok a hosszú tartamú szabadságvesztésről és az Európai börtönnépességről. (Thoughts on Long-Term Imprisonment and the European Prison Population). *Börtönügyi szemle,* Vol 1. 1-16.

includes states that do not recognize life imprisonment as an indefinite term of imprisonment. This group includes, for example, Portugal, Spain, Norway, Serbia and Croatia. He identified as a large second group the regulation of countries where life imprisonment appears as a punishment or measure, but the possibility of parole is differentiated. In terms of actual life imprisonment, Hungarian legislation was no stranger to Austria or Switzerland, but recently there have been several decisions before the ECHR, condemning the United Kingdom and Hungary, to limit actual life imprisonment, pending a predictable review opportunity[31].

It is a question of when to carry out the review, as setting it sufficiently high can empty the legal body. At this point, it is important to highlight the ECHR judgment in the Vinter case against the United Kingdom[32], which contains two very important elements. On one hand, it was stated that the review should take place within 25 years of the conviction or, if there is a review, it should be substantive. In the Vinter case, the violation of Article 3 was caused, inter alia, by the fact that the reason for maintaining the sentence during the review was retribution and deterrence, not the degree of personality change. This is what Miklós Lévay[33] points out when he emphasizes that is a violation of Article 3 is the legit poenological basis, which is de facto linked to the denial of mitigation. It is important to note, however, that in the light of the Törköly case[34], we cannot say that 25 years is carved in stone, as setting the earliest date of parole for 40 years did not in itself lead to a breach of convention. However, the quoted

[31] Mihály TÓTH (2012): Életfogytig tartó szabadságvesztés és a remény joga újabb emberi jogi döntésekben. (Life Imprisonment and the Right of Hope in the Recent Human Rights Decisions) Jogtudományi Közlöny, Vol. 6. 268-272.
[32] 66.069/09, 130/10 and 3.896/10., 9 July 2013.
[33] Miklós LÉVAY (2012): Az Emberi Jogok Európai Bírósága a tényleges életfogytig tartó szabadságvesztésről. (ECHR on Virtual Life-Imprisonment) Jogesetek Magyarázata, Vol. 3. 76.
[34] 4413/06, 5 April 2011.

study by Ferenc Nagy also shows that in most Member States the 25-year review date is also the most common.

We therefore see no obstacle to the legislature setting the earliest date of conditional release under the current rules for calculating length of time, but at the same time setting stricter, achievable parameters for ordering conditional release. It is clear that if the conditions are not fulfilled by the sentenced person, then the obligation to protect society will take precedence over the rights guaranteed in Article 3, so that the sentenced person can, in principle, only blame himself. However, if the judge or other authority finds that the degree of personality change is such that the danger of the convicted to the society is already low, then in his case conditional release carries the same risk only as whose was imposed by the trial court in its judgment - as regulated by the provisions of the Code Csemegi referred to at the beginning of my presentation. It may be a rare example, but according to the ECHR, this opportunity must be given to every person, who, in Csemegi's words, cannot be deprived of the hope of at least conditional release from those who "have given their hope for improvement through their diligence and well-being".

6. Closure Conclusions: Persistence of the Penological Principles of the Csemegi Code

Therefore, the question raised at the beginning of my presentation, that "The penological items of the Code Csemegi survive in the current practice of imposing sentences?", can be answered as yes, the modern approach of the Code Csemegi is still observed in our current criminal law. This is not only reflected by the effective Criminal Code, the relatively definite system of punishment, the enforcement of general and specific prevention objectives, but the reintroduction, perhaps definitive, of the medium rule. Legislative uncertainty

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about the application of the medium rule and the series of law enforcement anomalies that have emerged from it suggest that there are principles that are almost indispensable for the purpose of uniform and predictable judicial practice. It also illustrates the modern view of the Code Csemegi that included a clear reference to the application of this rule 140 years ago.

It also well illustrates the modernity of Károly Csemegi's work, and his - despite spirit of the times - humanitarian approach in his imprisonment for life provisions. It may be worth considering that, according to the approach of the 19th century's criminal law, the Code Csemegi, which has still retaliative nature and brings the principle of retaliation to the fore, has allowed the convicts after 15 years of service, at least their conditional release if they requested it, provided them the opportunity on a theoretical level. At the center of the ever-changing debate about the current Hungarian regulation of TÉSZ is the question of how compatible with human rights of the 21st century is that the clemency procedure is mandatory only after completing 40 years of imprisonment for those who were sentenced to life imprisonment

With all of this, we believe that by the use of the three strikes and life imprisonment institutions as such the entry into force of the Csemegi Code still does not undermine criminal policy, but the perceived social need for strict criminal treatment is satisfied so these institutions comply with the expectations of the modern constitutional state exclusively by the side of properly detailed and prudent legislation.

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Dr. Ádám Gergely Békés, Dr. Tamás Gépész

Do the Penological Thesises of the Code Csemegi Survive in the Present Sanction Imposition Practice?

The study focuses on the penological principles of Hungary's first criminal code, Code Csemegi and discovers the alleged relation and 'survival' of these principles in the recent legislation and case-law. In the frame of this the authors also examine the legal practice of life-imprisonment in Hungary and its compliance with the standards set by ECHR and the principles of Code Csemegi. Based on these, the authors finally draw conclusions concerning the recent Hungarian penological case-law and legislation both de lege lata and de lege ferenda.

Key words: international criminal law, European law

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