SIC ITUR AD ASTRA

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Eötvös Loránd University / Faculty of Law / Department of the History of Hungarian State and Law / 2024

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Kincső Johanna KESZI: Provisions of the First Amendment to the Csemegi Code

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Modern development has brought striking changes in society, politics, culture, as well as in the field of criminal law. The Hungarian medieval criminal law was based on customs mostly, but in the modern era, the lack of a criminal code has become unsustainable. The large population growth that took place in Europe also brought with it an increase in the number of criminals. Consequently, a new demand appeared: many European leaders realized that the creation of various criminal laws would serve their state's interests.

Hungarian lawmakers came to the same conclusion as well, but the development was significantly hampered by the Ottoman conquest. Therefore, in Hungary, codification began quite late compared to the Western states of Europe, and the real breakthrough only came in the second half of the 19th century.[1]

Still, the codification attempts in criminal law began immediately after the Peace Treaty of Szatmár. The first milestone was the Bencsik Bill in 1712, which was followed by the Proposals of 1795, 1830, and 1843. In 1867, Boldizsár Horváth, the Minister of Justice of the Andrássy Government initiated the detailed development of the 1843 draft right after his appointment. However, this attempt failed, so in the early 1870s, state secretary Károly Csemegi was commissioned to prepare a new bill for a criminal code. The draft was completed in 1873, but it was not enacted until 1878. The

[1] See: KÉPESSY, Imre: The Consolidation of Hungarian Legal Practice with the Austrian Norms in 1861. *Studia Iuridica*, No. 80, 2019. pp. 155-168. DOI: doi.org/10.5604/01.3001.0013.4797

completed work, the so-called Csemegi Code entered the Corpus Iuris Hungarici as Act 5 of 1878.[2]

The Code entered into force on 1st September 1880, and it received serious criticism. Practice has quickly shown that its provisions were incomplete, since it established the same provisions for almost all criminals and tied the hands of the judge in many places in imposing the punishment, which led to harsh sentences in some cases. In addition, the economic and social changes led to the emergence of new criminal habits, which were not punished by the law. It also became clear that regarding the punishment of juveniles, the Code's system was completely flawed, and action against recidivist criminals has become urgent.[3]

In addition, the fact that Károly Csemegi presented the basic tenets of the so-called classical school of correctional science in the Criminal Code also posed a problem.[4] This school is characterized by one-sidedness and generalization, a typical idea that all crimes are completely attributable to individual responsibility. However, thanks to the changed social conditions and the boom in criminological and criminal policy science, new trends and ideas, and the so-called reform schools appeared in the 19th century.

Adolphe Quetelet formulated the idea in his work "Physique sociale" (which was published in 1836), which later became the starting point of the changes. He argued that "*in a certain sense, society is what prepares crimes, the criminal is only the instrument that executes them*". This statement is especially true in the case of abandoned social classes, for example, juveniles who are at risk of moral corruption.

[2] BALOGH, Elemér: A magyar büntetőjogi dogmatika kezdetei [The beginnings of Hungarian criminal law dogmatics], *Jogtörténeti Szemle [Legal History Journal]*, No. 4., 2008.
[3] FINKEY, Ferenc: *A magyar büntetőjog tankönyve [The textbook of Hungarian criminal law]* Budapest, 1905., 4. átdolgozott kiadás, Grill Károly Könyvkiadóvállalata, pp. 85–86.
[4] KÉPESSY, Imre: Az osztrák büntetőjog hatása a magyar büntetőjogi kodifikációra. *Jogi Tanulmányok [Papers on Jurisprudence]*, No. 1., 2018. pp. 260–271.; KÉPESSY, Imre: The Influence of the Austrian Laws on the Creation of the first Hungarian Criminal Code. In: GOSZTONYI, Gergely – MILOTIĆ, Dunja – BÓDINÉ BELIZNAI, Kinga (eds.): *Sic itur ad astra III: Collection of student papers on Hungarian and Croatian legal history*. Budapest, 2019, ELTE ÁJK Magyar- Állam- és Jogtörténeti Tanszék, pp. 4–12.

Quetelet's theory became the cornerstone of criminal sociology, which later split into many branches, such as the French sociological school, the Italian positivist school, the Italian third school, and the socialist school.

In addition, only a few months after the publication of Csemegi's second draft, in 1876, Cesare Lombroso's work *L'uomo delinquent* was published, in which the author states that there are so-called "born criminals" (*delinquente nato*) who commit crimes because of their mental and physical disabilities, and against whom punishment is completely ineffective. This concept became the foundation of criminal anthropology, which's main goal was prevention.

In the late 19th century, Franz von Liszt's school appeared, the purpose of which was to bring the opposing views, the exaggerated and one-sided ideas, and aspirations into harmony.[5] This concept did not see crime as an abstract concept, but as a human act, which is also a moral, legal, political, and social phenomenon. Its followers believed that besides the fact that every criminal is naturally affected by various external and internal factors, they can be held responsible for their actions, and their punishment should contribute to the maintenance of public welfare and social order, as well as to the prevention of crime.[6] Ferenc Finkey states that "*[the mediating tendency] sees the measure of punishment in the proportionality demanded by justice, as well as in the retribution measured to the guilt of the delinquent, and in the application of humanism and fairness must be kept in mind, the specific punishment must always be individualized to the perpetrator's social conditions and the motives of the act*."[7] It is important to note that the reform trends did not seek to destroy the classic criminal law dogma but rather to modernize and further develop it.

[5] RIGÓ, Balázs: A büntetőjog történetéből II. Kora újkor – újkor. [From the history of Criminal Law II. Early modern – modern era]. In: FÖLDI, András (ed.): *Összehasonlító jogtörténet [Comparative Legal History]*. ELTE Eötvös Kiadó, Budapest, 2018, pp. 325–354.

[6] BALOGH, Jenő: *Fiatalkorúak és büntetőjog [Juveniles and criminal law]* Budapest, 1909. Athenaeum Irodalmi és Nyomdai Rt., pp. 54–63; BALOGH, Jenő – BERNOLÁK, Nándor: *A büntetőtörvények és a büntetőnovella*. *[Criminal laws and the Amendment]* Budapest, 1908. Grill Károly Könyvkiadó Vállalata, pp. 21–28.

[7] FINKEY, *op. cit.*, p. 49.

The Hungarian legislators had to react to the shortcomings described above, as well as to the new trends in criminal law, because it became obvious that the provisions of the Csemegi Code could not serve as an effective solution to the emerging problems. This is how László Fayer saw the situation in 1900: "*...the amendment-movement was awakened not so much by the lack of a criminal code, but rather by the errors of practice. Even today, the scope of the amendment could be significantly reduced if the practice itself established those that can be established within the framework of the law. This is also its job and duty*".[8]

The first and one of the most important corrections to the Csemegi Code was the First Amendment i. e. Act 36 of 1908. In its preparation, the first step was when, in May 1888, the Minister of Justice Teofil Fabinyi turned to the Royal Curia of Hungary and the Royal Table and asked for the advice of its presidents regarding whether it was necessary to amend or replace certain provisions of the Csemegi Code, and if so, what the most important changes would be. Károly Csemegi opposed any kind of amendment and fought against the proposals, however, the first draft of the Amendment was published in 1891, which only aimed to modify a few sections. At the same time, the specialist committee dealing with the matter wanted to broaden the scope of the issues affected by the amendment, so they made a new draft. On 19th May 1892, the Minister of Justice, Dezső Szilágyi submitted it to the House of Representatives.[9]

This bill would have modified 76 sections of the Code and included reforms such as the suspension of the execution of imprisonment, the reformation of the punishment for theft, the punishment for self-administered justice, the establishment of new facts in the case of fraud, etc. However, even though the bill would have helped

[8] P. SZABÓ, Béla: Bernolák Nándor, az I. büntető novella egyik kodifikátora és kommentátora [Nándor Bernolák, one of the codifiers and commentators of the First Amendment to the Csemegi Code], *Jogtörténeti Szemle [Legal History Journal]*, No. 4., 2008.

[9] LÉVAY, Miklós: Az I. büntető novella fiatalkorúakra vonatkozó rendelkezései [The provisions of the First Amendment to the Csemegi Code concerning juveniles], *Jogtörténeti Szemle [Legal History Journal]*, No. 4, 2008.

with the most pressing problems, it was not put on the agenda of the parliament, nor did the judicial committee begin its deliberation. Then, when it would have taken place in 1894, the new Minister of Justice, Sándor Erdélyi, withdrew it.

Erdélyi commissioned Károly Illés Edvi to prepare a new bill. Illés Edvi edited new drafts in 1898 and then in 1900, which were then sent to lawyers Pál Angyal, Ferenc Finkey, and Jenő Balogh. Angyal and Finkey prepared two larger drafts, but Balogh represented a different point of view. He believed that due to the lack of suitable conditions, instead of an extensive revision of the Code, it would be advisable to remedy only the most pressing shortcomings. Most of the expert committee established to discuss the content of the Amendment took the side of Jenő Balogh.

In 1905, Géza Polónyi, the Minister of Justice at the time commissioned Jenő Balogh to draft a new bill, which contained only the most important changes.[10] The first draft, published in October 1906, was criticized in Hungarian legal journals and in the debates of the Hungarian Lawyers Association. In 1907, the Minister of Justice established a committee to discuss the bill. As a result, the draft was completely remade. The law finally took its final form after its third revision, thus creating Act 36 of 1908. It received royal assent on 30th July 1908, and it was promulgated in the 12th issue of the Hungarian Corpus Juris, published on August 6, 1908. Its first chapter took effect on 1st October 1908, while the provisions concerning juveniles entered into effect on 1st January 1910.[11] In the 19th December 1909 issue of the country's official journal, several ministerial decrees regarding the second chapter of the Amendment were published. The decrees were as follows: Decree 27100/1909 of the Minister for Justice and Decree 160000/1909 of the Minister for Internal Affairs; Decree 27200/1909 of the Minister for Justice; Decree 27300/1909 for the Minister of Justice; Decree 27400/1909. of the Minister for Justice; finally, Decree 149500/1909 of the Minister for Culture. These decrees dealt with the actual enforcement of the Amendment, the

[10] P. SZABÓ, *op. cit.*; BALOGH – BERNOLÁK, *op. cit.,* pp. 35–36.
[11] LÉVAY, *op. cit.*

regulation of corrective education, the enforcement of prison, state prison, and confinement sentences for juveniles, the organization of the Supervisory Board for juveniles, and the regulation of the scope and method of school punishment applied to children and juveniles by the school authorities.[12]

The Amendment dealt exclusively with the case of juveniles and the suspension of the execution of imprisonment. The main goal was to understand the factors and causes of juvenile delinquency and to remove children from the environment that set for them a bad example. Instead of a prison sentence, education with appropriate employment and sufficient education was prioritized, and education was envisioned in separate institutions, set up either by the state, private charity, or social organizations.

The other guiding principle was to introduce juveniles who had committed crimes to the possibility of an honest life so that they would choose it of their own free will. They realized that young people who have gone astray are often themselves victims of circumstances. The Code consists of 52 sections and five chapters, which are as follows:

- Chapter One: Suspension of the Execution of Imprisonment (Sections 1–14)
- Chapter Two: Provisions concerning minors (Sections 15–35)
- Chapter Three: Provisions on ancillary penalties and confiscation (Sections 36–38)
- Chapter Four: Provisions relating to certain offenses (Sections 39–51)
- Chapter Five: Enforcement Clause (Section 52)[13]

The system of punishments of the Csemegi Code was based on imprisonment, so one of the aims of the reforms was the penal system. As a result, suspension of the

[12] MAGYAR István: A fiatalkorúak bírósága. Fiatalkorúak büntetése. *Ügyvédek Lapja [Journal of Lawyers]*, No. 2., 1910.
[13] LÉVAY, *op. cit.*

execution of imprisonment appeared for the first time in Hungarian legal history, which was already used in several places in Western Europe. In Hungary, the so-called Belgian-French method was adopted. Section 1 of Act 36 of 1908 stated that "*The court may suspend the execution of the jail sentence for a period not exceeding one month and a fine for a reason deserving of special consideration, if it expects a favorable effect on the behavior of the convicted person, taking his personality, living conditions, and all other circumstances of the case into account*." In Section 2, the law also stipulated in which cases the possibility of suspension must be ruled out. For example, a person whose punishment was imposed for an act for which the law stipulates a correctional institution or penitentiary sentence could not be placed on probation. Furthermore, if the perpetrator has previously been legally convicted or has been sentenced to detention or imprisonment within ten years, or if the convicted person committed the crime out of malicious motive. The law defined the probationary period in three years.

It is worth examining the Amendment in comparison with today's regulation. Section 85 of the current Criminal Code (Act 100 of 2012) now makes it possible to suspend the execution of a term of imprisonment of two years or less. In addition, the current law also establishes exceptional cases, so Section 85, paragraph (1a) states that in the case of crimes related to the border barrier (illegal crossing of border barriers, damage to border barriers, and obstruction of construction work related to border barriers), imprisonment of not more than five years execution may be suspended. Another change, compared to Act 36 of 1908, is that the probationary period is no longer defined uniformly. Paragraph (2) of Section 85 of the now effective Criminal Code states that "*Unless otherwise provided for in this Act, the period of probation shall be between one to five years, however, it may not be less than the term of imprisonment imposed. The period of probation shall be defined in years, or years and months*.", while paragraph (2a) states that "*Illegal crossing of the border barrier (§ 352/A of the Criminal Code), damage to the border barrier (§ 352/B of the Criminal Code), and in the case of obstructing construction work related to the border barrier (§ 352/C of the Criminal Code), the probationary period may be between two to ten years, but may not be shorter*

than the period of expulsion imposed for these crimes.". In addition, the reasons for excluding enforcement have also been changed, so the execution of a sentence of imprisonment may not be suspended if the perpetrator is a repeat offender, committed the crime in the framework of a criminal organization, or committed a criminal offense intentionally before he has finished serving his sentence, or during the probation period of a conditional sentence.

It is also worth comparing the part of the Amendment concerning juveniles with today's regulation. The Amendment reinterpreted juveniles. According to the Csemegi Code, the minimum age of criminal responsibility was twelve, between the ages of twelve and sixteen criminal liability had been established by the judge on a case-by-case basis, and then criminal liability began from the age of sixteen, however perpetrators under the age of twenty could not be sentenced to death or life imprisonment. Other than these cases young age (perhaps beyond the age of twenty) was only considered as a mitigating circumstance. The amendment did not change that a person who was under the age of twelve at the time of committing the crime or misdemeanor cannot be charged or prosecuted but in Section 16 it states that "*Any person between the ages of twelve and eighteen years at the time of committing a criminal offense cannot be called to account if they did not have the intellectual and moral development necessary for criminal liability*." This type of classification has remained to this day, as Paragraph (1) of Section 105 of the now-effective Criminal Code states that "'*juvenile offender' shall mean any person between the age of twelve and eighteen years at the time of committing a criminal offense*."

Section 16 of the Amendment (quoted above) binds the criminal liability of juveniles to additional condition: the *mental and moral development* necessary for criminal liability. The determination of this, however, depended on the judge's assessment, and if the judge decided that the juvenile did was not intellectually and morally developed, they could not be held criminally responsible. However, the practice of so-called domestic discipline was ensured, which means that the school

authority could reprimand or put the juvenile who has committed a crime or misdemeanor into custodial arrest.

However, against those whom the court found to have the appropriate intellectual and moral development reprimand, probation, correctional education, jail, or state jail sentences could be applied, according to Section 17 of the Amendment. Among the main punishments of the Csemegi Code, death penalty, and correctional institution sentence as well as penitentiary sentence were not applicable against them, and among the ancillary penalties, loss of office, suspension of the exercise of political rights, and additional fines were not applicable.[14]

The effect of the criminal law reform trends described above can be seen in Section 18, which formulates the principle of individualization. The Amendment states that "*For the measures (Section 17), the following must be considered: the personality of the juvenile, the degree of their intellectual and moral development, their living conditions, and all other circumstances of the case. Compared to these, the court applied the measures determined […] within the limits set by law, which is desirable from the point of view of the future behaviour and moral development of the juvenile defendant*.".

Among the measures involving deprivation of liberty, the court ordered correctional education for an indefinite period, but it could not extend beyond the juvenile's twenty-first birthday. In contrast, today's regulations established the duration of correctional education in years and months – just like in the case of prison sentences. Correctional education can last from one to four years, and Section 120 of the contemporary Criminal Code also states that "*Placement in a reformatory institution may not be ordered against a person over the age of twenty years at the time of sentencing*."

The Amendment set the shortest term of jail sentence at fifteen days, while the longest term – if the juvenile was fifteen years old at the time of committing the crime and the law stipulates the death or penitentiary sentence for the crime – was ten or

[14] *Ibid.*

five years. The shortest duration of the state jail sentence was one day, and the longest was two years. Sentences involving imprisonment had to be carried out in juvenile detention facilities. However, it is important to point out that the institution of the juvenile courts was established in Hungary by Act 7 of 1913, so it was not yet separated from the court system for people of legal age.

In the case of reprimands, legislators thought that a serious and loving reprimand can achieve a much more favourable result for an uncorrupted person than a sentence of imprisonment. The scope of its imposition was determined by the Amendment not positively, but negatively, thus it stated that reprimanding cannot be applied if a prison or state prison sentence of more than one month could be established if the juvenile was already punished with a prison sentence exceeding one month and if the juvenile lived in a bad environment.

Probation served as a solution between reprimands and prison sentences, so it could be used in cases where reprimanding was not sufficient, but the defendant did not show any tendencies that would justify corrective education or the imposition of a prison sentence. It essentially followed the construction of suspension of the execution of imprisonment. The amendment defined the scope of applicability negatively here as well, so it is established that probation cannot be applied if the juvenile has already been punished with a prison sentence of more than one month (Paragraph (2) of Section 21), if the juvenile has started to become delinquent, or if, for the sake of their intellectual and moral development, corrective education is necessary (Section 26), and if the juvenile is exposed to the risk of deterioration in their current environment (Paragraph (1) of Section 24).

In addition, patronage was introduced. The court appointed a guardian for the juvenile, whose task was to provide the court with information about the person, as well as to possibly be present at the hearing of the case. Anyone could be a patron. In the case of probation, someone had to be entrusted with supervision. This trustee

could be the legal representative of the minor, but also the state children's shelter, the child protection association, or an individual suitable for this purpose.

Despite its progressive spirit and modern provisions, the First Amendment received many criticisms. Many laywers believed that the law punished juveniles too lightly and complained that caning had not been brought back. In professional circles, the Amendment mostly received positive feedback, however, the already mentioned "intellectual and moral development" provoked debates, as it was not clear what this phrase meant, and the connection between this category and responsibility was not clear either, despite its importance. Regardless of this, the minister's explanation only mentions that this is a measure of guilt. That is why they tried to clarify the concept mainly during the application of the law. The unpreparedness of the enforcement was also a problem, as well as some solutions that were debatable according to the rule of law (e.g., for preventive purposes, a criminal sanction [correctional education] could be applied to juveniles who – due to the lack of proper intellectual and moral development - did not meet all the conditions of criminal liability).[15]

Despite the above deficiencies, in 1910 Ferenc Finkey stated that: "*Act 36 of 1908, the so-called First Amendment accepts the most modern ideas on the issue of juvenile offenders and lays the criminal law of juveniles in our country on such correct foundations that we can stand firmly on for decades. The second chapter of the Amendment is the one that made our country one of the countries with reformed criminal law, and even if we were late with the introduction of Suspension of the Execution of Imprisonment, which is also of epoch-making importance, we have become one of the leading states in the issue of juveniles*." Nothing proves the success of the Amendment better than the fact that in 1921, 987 juveniles had to be sent to prison for more serious crimes, but in 1930, this number was only 787, and it can also be

[15] FINKEY, Ferenc: Büntetőnovellánk a vádlottak padján [The Amendment to the Csemegi Code on the Bench]. *Magyar Szemle [Hungarian Review]*, 1934, pp. 230–235.

generally said that the criminality of young people has decreased, since in 1921 the total number of convicted juveniles was 7197, while in 1930 it was only 4995.

Time also seems to confirm the correctness of the provisions of the Amendment as it was in effect until 1st January 1952, and the basic principles created in it can still be found in our Criminal Code to this day.