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Tézisfüzet

dr. Pálvölgyi Ákos

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dr. Pálvölgyi Ákos

A SZABADSÁGVESZTÉS-BÜNTETÉS FELFÜGGESZTÉSÉNEK INGAMOZGÁSA A MAGYAR BÜNTETŐJOGBAN A CSEMEGI KÓDEXTŐL NAPJAINKIG

Doktori értekezés tézisei

Témavezető:
Prof. Dr. Gál István László
tanszékvezető egyetemi tanár

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I. A brief summary of the research task

"That the unconditional truth and the interest and the interest of the society - that is, the just and useful - constitute a necessarily important factor in the criminal system: it is self-evident that this is in some respects commonly used in common sense.
The unification theory is therefore the principle of the cultured world sanctioned by science and the laws; this is our principle too!"

As a creed ROSSI, ORTOLAN and HÉLEIE, as a result of the unified theory, the Legislator launched the draft of the Csemegi Code, which is a remarkable and compelling idea. The legislator should not, however, the law-appliers, regardless of the essence of the unification theory, may ask the question whether "just" and "useful" and "common sense" have set foot in criminal law-making and in criminal law practice. Can we use these three concepts at all, or have their meanings - the limitations and the purpose of the reasonable exercise of punitive power - need to be replaced or defined?

Our research, goals, hypotheses and responses to them were inspired and motivated by a single criminal case.
It is a case that, after a certain point, has completely contradicted the aforementioned idea, and more over after this it could not be stated that criminal law, despite the fact that the court has made a verdict, had reached its purpose. What is the purpose of criminal law? – referring to the purpose of substantive law, procedural law and enforcement, we can ask the question.
The offense committed should be reintroduced in a statutory manner, in a manner determined by law, so that it would not cause any unreasonable or disproportionate disadvantage, which is sufficient and feasible under the circumstances of the offense was committed. No more or less.

Although the inspiration for our research is a single concrete case, our task is not the case itself but the comprehension of "all circumstances" of the case. In the course of this work, we evaluate the legal institutions that as circumstances, similarly to the applicable criminal law principles and the applicable law institutions.

While we focus on the central issues of conclusion as a law-applier, we are trying to carry out the evaluation as a researcher, so we review not only the provisions in force but also the way in which we can reach the existing provisions.
Thus, our research uses some devices of law history and comparative law and partly dogmas, since we are examining the criminal law and its results of a specific period, which fit in with our central questions, and as a continuation, some areas of existing legislation. In doing so, we are analyzing the products of legislation from a critical point of view and asking what kind of institutional reforms are plausible and desirable regarding the existing law.

Our research is focused primarily on mapping the rules on suspending punishment. However, as we have pointed out in our introduction and highlighted in our assumptions, the institution

of the law - because of its role - has the significance that entitles us to not just treat it as a punishment tool, but also as a guarantee of some of the criminal law principles, and we also analyze it from this point of view.

In order to base our research on the foundations of our research and its legal history, we need to build up a pass to the Csemegi Code as starting point of our final conclusions, which already refers to the "motion movement" indicated in the title. In doing so, we take into account the turning points of the historical or legal significance, which impacted the Csemegi Code in respects of its content or formality.
However, we do not undertake to analyze these turning points or events in details, as our goal is simply to select only a track and not a detailed analysis.

In this regard, we must point out that in the history of the institution of the suspended sentence the legislature regulated the suspension of the custodial sentence or the fine. The execution of the fine could be suspended - from the first novel - until April 30. 2010. From 1 May 2010, only the imprisonment sentence can be suspended. In view of the fact that the current legislation only suspends the execution of the custodial sentence, the above-mentioned fundamental and subsequent research objectives cover the institution of the suspension of custodial sentences in full depth, with regard to fines only tangentially.

Our aim is to take a look at the legislation in force, from the entry into force of the Csemegi Code, to some minor changes, novel modifications and new codifications, which are relevant to our research. Our goal is also to gain insight into the codification processes, but more importantly, we can document the legitimacy and codification of the right-holders and codifiers of the age by means of the former sources, mostly its position of personal conviction but not without professionalism, and to draw further conclusions from it.

In addition to our existing legislation and practice, our aim is to process cases that are already pointing to our assumptions and raise questions that we are looking for: whether the institution of the suspended penalty is fulfilled, whether the guarantee principles chosen by us are enforced in criminal law.
It is also our expressed aim to examine the relationship between the circumstances to be evaluated in the imposition of the sentence and the actual purpose of the punishment and to raise the ideas in connections with our theses and to put into shape and formulate our proposals for the law-applier and the legislator.

However, our aim is not to elaborate a more extensive, more comprehensive legal history analysis, and we will not discuss other legal arrangements in details, either. We cannot even say that we are examining all principles of criminal law or the institution of principle, doe to the limited nature of this work on the one hand, and, on the other hand it would significantly divert us from our subject-matter.

Therefore, we are standing by the ideas that have been made in connection with the principles of law and rule of law, and the proportionality, according to which the researched legal institution is placed in relation to proportionality.

In the legislation and law enforcement personalization has a major role as a proportionate legal reaction, ie the personality and the living conditions of the accused person, which led to the perpetration of the criminal offense, and which followed it. One of the most important instruments of it is the institution of the suspended sentence.
The suspension of the execution of the sentence may be appropriate to influence the conduct of the convicted person, whose behavior may affect the enforcement of the sentence. A perpetrator who has committed a minor offense and who can be punished without actually enforcement should not be sanctioned by the detrimental effects of law enforcement. This is especially true for short-term imprisonment. It should be added that this type of control over the fate of the convicted person does not only take place in the case of the suspended sentence, but in my view in the case of all the penalties where the lack of cooperation provides the legislator with a transition to imprisonment.

We have passed a significant legislative period, the new Criminal Code, the new Penal Code, have came into force and the legislator has accepted the new Criminal Procedure Code.
Observing and evaluating the correctness of the legislator's right intention in practice is, in particular, under such circumstances, always interesting. How have certain legal institutions changed - in particular the suspended punishment and the relationships of some of the principles we have examined - in the history of lawmaking and law enforcement? How does law enforcement practice, which is suitable for its intended purpose, apply in the current legal environment?

In our research we start from hypotheses and look for answers:
• The imposition and enforcement of the sentence are a public and social interest.
• The imposition and enforcement of punishment does not in themselves ensure the integrity of those interests.
• The violation of these interests also constitutes a violation of the principles and legal institutions of principle.
• Proportionality is highly reactive, at the same time fragile and one of the most fundamental principles of criminal law.
• The breach or enforcement of proportionality can be linked to the amount and quality of the information available in criminal proceedings.
• The institution of suspension of punishment cannot fully serve the principle and requirement of proportionate punishment if it does not take into account the secondary effects of punishment.
• To eliminate secondary impacts, all tools are available to the law-applier and the legislator, but they are not used or recognized by the legislator.

II. A brief description of the tests, analyzes carried out, methods of processing

VOKO says that we have always to keep in mind that the criminal liability is for the most dangerous violations of norms to society. For protection of the society and the people as the members of the society and for the purpose of guaranteeing their rights the offenders must be called to account.

However, the criminal sanctions imposed by the court must be enforced against the offenders, in accordance with the requirements of the rule of law, that means, according to the needs of society.

Law comparison

"According to the author, Zweigert-Kötz, the essence of law comparison - perhaps to say that the genus proximum - is its international character. Comparative law is therefore a spiritual activity in which we compare the provisions of the different legal systems of the world. "

Later on, we find that the dissertation uses multiple comparisons in order to better understand national law or law, and find either benchmarks or bad or good practice. How and why are the legal systems we are looking at or the ones that we take for comparison at the time of comparison?
It is a historical and legal fact that Hungarian legislation is not free from the influence of international law. What exactly was the course of the international legislative process was determined by the given historical and political situation. With this in mind, the historical and contemporary results of Hungarian legislation are transposed into the filter of former Austrian, German provincial and imperial, partly French, Soviet jurisprudence and modern Austrian and German legal systems, and we record its results.

Legal history analysis

With the help of legal history analysis, we can discover and identify the causes of international and Hungarian law-making in historical terms, which we try to designate as a codification development process for the establishment of the underlying legal institution.

In our opinion, the comparison of law and legal history necessarily complement each other, as a result we do not intend to use these two methods, separately more over we try to exploit their symbiosis.
In this process, we take into account the impact of policy ideas on the policy of law and its codification. We use all the sources - justifications, commentaries, journals, court judgments - which, on the one hand, give back the above-mentioned processes on a timely basis, and on the other hand, those that form a scientifically substantiated and forward-looking statement.

It is so appropriate to use these two methods together that we extend the limitations of legal history analysis up to the present legislature, while not forgetting the continuation of the international outlook.

Quantitative basic research

Quantitative methods are based on the fact that human attitudes and behaviors can be measured and quantified, and the data obtained in this way can be analyzed by statistical methods. As a result of this approach, the reliability and accuracy of the results can be determined provided that the quantitative procedure is performed on an appropriate number of samples of the elements. Quantitative procedures require the use of a standardized questionnaire complying with the requirement of measurability.

Although we do not use standard questionnaires because of our limited possibilities, but our data collections can be regarded as representative for Budapest Capital, and the collected data can be analyzed using statistical methods (averaging).

Use of concept definitions of different social science

We acknowledge the words of Professor VÓKÓ, who stated that in the life of society, there are more and more problems that arise in the intersection of the institutions, which are on the borderland of these institutions. This issue has to be focused in particular on the effects of criminal justice, as we believe that we should not only take account of the direct but also the indirect effects here, however, are not primarily criminal, but social sociology, sociology and psychology and which can be measured and evaluated outside the scope of criminal law. In view of this, it may be necessary to use the terminology of the applied science we have called for help and interpret them in criminal law.

Summarizing practical experience methods

Last but not least, we want to exploit to the rich knowledge base that has emerged in the practice of law-applier, which includes authority, experience and observations in the field of defense, prosecution and judiciary as well as enforcement. This sphere of our sources makes our research realistic and lifelike

III. A brief summary of the scientific results, their utilization and the possibilities of utilization

1. Vulnerable interest

The interest is not violated if it is fully enforced. In our case, however, it is not enough simply to impose a penalty on the perpetrator and to enforce the punishment imposed. It is also necessary for the punishment to be imposed and enforced legally, that is, to comply with all

the requirements of the rule of law and the general and specific conditions laid down by law. If this is not the case, despite the fact that a lawsuit has been imposed by the court against a perpetrator of a possible offense or has applied a measure that is being executed, we cannot declare that the interests of the punishment and its enforcement were without prejudice.

2. Vulnerable principle

We must reiterate, first and foremost, the basic principle of the Constitutional Court, that punishment, just as public power is general, is not unlimited. Due to the constitutional fundamental rights and the constitutionally protected freedoms, public authority can only interfere with the rights and freedoms of the individual by constitutional authorization and constitutional grounds. Criminal material law threatens to punish, the court imposes it in the procedure governed by the law, and the state enforces it by means of the executing bodies: this is the complex, coherent rule and institution system of criminal justice. The constraints imposed by constitutional criminal law cover all elements and institutions of the criminal liability system. In this unit, the system of penalties that conforms to the nature and weight of each offense and the normative provisions of punishment serve together with the legal punishment function of the rule of law; the proportional and deserved retribution with the sanction.

In our research, the question arises again what can be considered a proportionate or disproportionate retribution. Here we do not doubt or question criminal codification in general, or general theses, absolute or nominal proportionality, but specifically about the lawfulness of the individual, that is to say, if you like the real content of the nominal proportionality , which rather raises the issue of sanctioning the true purpose of the punishment, and the individualization, that takes the person's personality, living conditions, and his lifestyle before, leading to, and after committing the crime, into account.

It can therefore be concluded that, in the case of proportional repayment, that is, proportionality, the functioning of the broader criminal law institutions must be assessed in individual cases, taking into account the true purpose of the possible sanction.

Only the necessary and proportionate, as well as the individualized and sensible punishment may be fair, that is, one that respects the human rights of the sentenced person.
Criminal proceedings in the broader sense are closely related stages in the process of criminal prosecution, and any of its roles, such as the investigation, the court's judgment, and the execution of the sanction as well, are not in all respects, even in terms of timeliness, and the loosening of the link between the various sections may degrade the efficiency of the whole process.
This means that there is a need for complex control in the specific case so that the application of substantive and procedural institutions related to the individual case is not dysfunctional or these possibilities may be excluded.

3. Thesis-level statements regarding proportional repatriation in legal history

We cannot ignore the fact that in a considerable part of our research we have a legal history theme. However, its results are also worthy of attention, as they point to the contexts and conclusions of those who have come to terms with the legal and practical experts of the age, whose significance is beyond dispute. Beyond their own inherent scientific value, following each other, almost building on each other, and ensuring continuity to the final findings of the dissertation. They include all the scientific knowledge and practical experience that today's legislator and law enforcement should use.

From the point of view of the conclusion, the following details are considered the most important:

CSEMEGI points out that the legislator must take into account the needs of society in relation to the penalties. A penalty, which violates the social sense of justice, may turn the antipathy for the felony into pity for the perpetrator. The penalty will lose its effect and purpose because it becomes hateful.

But we have to pay attention to the other side of proportionality, as LÖW and CSEMEGI also refer to. Disproportionately mild penalties can carry the proliferation of offenses. The crime will be encouraged and win a freeway.

KAUTZ summed up the punishment requirements or props in terms of the "justice" of punishment and the purposes of punishment, of which the most important ones for our research are:
The punishment should be personal, that is, it may impose only the convicted person. Penalties do not have an indirect effect, the indirect effects of penalties are confined to the narrowest possible range. The penalty should be "estimable", that is, the judge should be able to assess the impact of the punishment before making use of it. Corrective, that is to say, to "curse his guilty supplications, to promote his own self, and to impute to him the paths of sin, to establish a sure direction for his improvement," and to promote the re-socialization and reintegration goals.

The followers of the criminal reform movements preceding the first criminal novel, who also called for the introduction of a conditional conviction institution, wanted to use new tools and methods against altered crime. Like so many times in the later history of codification, it was primarily intended to put the penalty system on new foundations, in which one of their main ideas was individualization.
Useless retribution was replaced by practical and useful prevention, and this was considered feasible by aligning the penalties with the characteristics of offenders and offenses. However, these ideas cannot be considered as new because KAUTZ's 1881 textbook has formulated the need for individualization.

According to the French example, the expectation of differentiated punishment can be summarized as "the more closed prisons are in front of the initiating sinners, the less we will have to open them to the repeating offenders."

IRK captured the essence of any suspended sentence when he stated that the dissuasive force of the damned sword of Damocles is more intense than the punishment to be executed - which is a stance, let us add, one can understand - since the feel of being threatened, and the fear that the punishment still occurs, prompts greater caution. It is also true that it depends on personality that this caution is intended to prevent the further commitment of offense or to commit further offenses in a way that the law enforcement authority cannot cover it.
The fact of the suspension does not stop the punishment, it does not deprive it of its moral nature and weight, it does not leave the plot unpunished, no matter how the ones opposing the institution claim so.

The reasoning of the I. novel pointed out, that when punishment is founded and applicable for someone, then the resulting moral effect is appropriate legal disadvantage for him. In his case being sentenced alone has serious effect on him.

The 1961 Btk. pointed out the significance of the subject matter and the material side of the crime for suspension. The united view of both sides may give rise to the conviction in the court that the purpose of the punishment is to be expected without its implementation.
We can agree that the educational effect of the criminal punishment is always enforced in the punitive and forcible elements inherent in punishment. This is not the case for the punishment itself, but also for the suspended sentence. In the case of conditional sentences, the punishment and the constraints inherent in the imprisonment and the financial punishment apply in particular, not to the physical existence of the sentenced person, but to the psychic of the sentenced person and promote the aspects of education.

An international circumstance relevant to the final conclusions of our research is the provision of the second paragraph of Section 56a of the German criminal law, which stipulates that the probation period commences on the day when the suspending judgement comes into effect, but the law provides an opportunity to reduce the probationary period to the legal minimum or to extend it to the maximum.

4. Suggestions for the law-applier

4.1. Identification of the causes of breach of proportionality

4.1.1. Raising of a question

We have depicted in a number of specific cases the phenomenon where nobody in fact violates neither substantive rules nor procedural rules in the proceedings, but the interests of applying legal consequences or the imposition and enforcement of punishment are

nevertheless violated; either in the decision of the public prosecutor, or in the execution of a court judgment, or it must necessarily be abandoned.
As a reminder, let's look at the two typical occurrences that help us identify our hypothesis.

4.1.1.1. Residence, place of residence, lack of language skills as a barrier to enforcement

The first case is where objective circumstances such as residence or place of residence, language skills, or more precisely the lack thereof, may create a situation where these interests are in any case compromised.
Because of the frequency of its occurrence, which made it almost a phenomenon, the problem of the lack of knowledge of the Hungarian language and of the place of residence was examined.

In the cases discussed in the dissertation, probation supervision was generally ineffective, which could have negative procedural consequences for the defendant, as the prescribed rules of conduct and contact could not be enforced due to geographical distance and lack of knowledge of the Hungarian language. The decisions of the prosecutor have failed, so according to the current Enforcement Act. an indictment should have been made in all cases.

The dilemma is caused by the fact whether disadvantageous consequences can be applied when the defendant has exercised his rights under the principles set out in the relevant procedural rules and that the authority is not limited, and has not behaved in a manner which can be seen as lack of cooperation or outright refusal.
On the other side of the dilemma, we cannot let that either because of the lack of Hungarian language knowledge or the foreign place of residence, the defendant would be discharged from the disadvantageous consequences or received disproportionately mild treatment.

4.1.1.2. Behavior and state of health

One of the causes of the failure lies in the behavior of the defendant - especially in the fact that the convict is unwilling to cooperate - in which case the public labor punishment will be transformed. Ultimately, the prisoner ends up in the position that the court tried to avoid. The other reason is an objective - usually poor health - circumstance, in which the punishment of work in the public interest must be eliminated. In these cases, the proportionality of a criminal offense against the offender is, in all respects, only apparent and cannot fill its original purpose.

4.1.2. Identification result: lack of information

Not only linguistic issues mean difficulties in criminal procedure necessarily, but other circumstances and causes inherent in the subject. If these are detected and assessed in a timely manner, the legal reaction will be more solid and ultimately proportionate.

VÍGH pointed out that the punishment cannot be built solely on the gravity of the act, and thus the perpetrator's personality, genetic and social characteristics should be taken into account during the judgment. Let us broaden the understanding of genetic and social conditions in such a way that it means the physical state on one hand, and on the other, the state affiliation. Retaliation and deterrence cannot be the main purpose of the punishment, but the perpetrator's personality, genetic conditions and social circumstances must also be taken into account and, on this basis, the prevention of crime should be highlighted as the main purpose of the punishment and the punishment should be measured not proportionately, but individually tailored to the offender's personality and living conditions.

In the light of the above, it can be stated in the first case that the public prosecutor's task is to acquire the data or the knowledge which put him in a position to be able to make a valid decision on the issue of prosecution, and in cases where it decides to postpone the prosecution, it imposes obligations, that can be enforced in the light of all the circumstances of the case.
In the second case, the court failed to properly evaluate the data that it has acquired. By the assessment, we must understand that based on the data obtained it will come to a conclusion on which it can make a well-founded decision or recognizes that additional data is required. In the greater part of cases, we saw that in possession of some data more would have been required, but were not obtained.

It can be stated that, in the cases that are included in our research, the lack of information or lack of detection caused the violation of the interests of the proportional repayment and, ultimately, the punishment.

4.2. Suggestions

4.2.1. The possibility of transfer of execution in the case of a foreign convicted person

4.2.1.1. Transfer of enforcement in the light of the specific case

With this in mind, the prosecutor should be aware, whether the conditions for postponement of the prosecution can be fulfilled, before the prosecution is postponed. This is the second part of our proposal.

In the present case, it is argued that although the defendant is co-operating, however, its possibilities are so limited that it cannot stay in Hungary or that there is no organization in which a compulsory participation obligation may be enforced in a foreign language. So the conditions of the postponement of the prosecution are not fulfilled for substantive reasons.

We recommend to the law-applier prosecutor that in this case, despite the fact that all the conditions support the postponement of the prosecution, he should decide to prosecute, and propose to apply the probation measure and to impose specific rules of conduct. In that case, given that a measure of action is applied against the defendant, the requirement of a

proportionate return and the interests of the punishment, in this case action and its implementation are either not injured or only minimally, but less than in the case, if the implementation of measures to postpone the prosecution would fail for fair reasons.

4.2.1.2. Transfer of enforcement in general

Considering the provisions of §§ 136 of Act CLXXX of 2012 on the Law of Criminal Cooperation with Member States of the European Union (Tv.), we regard it appropriate to apply the prosecution, the case law to institutions assigned to the transfer by the law, or to apply or impose a sufficiently differentiated, individualized and proportionate legal reaction.

In particular, in connection with transfer of enforcement before deciding on the prosecution we propose to obtain information that a specific conduct, punishment or measure may be enforced in the Member State responsible for the nationality or the place of residence of the accused. Here we note that in case of conditional prosecutor's suspension, the law regulates in detail the data that the prosecutor has to obtain prior to the rules of conduct specified in the suspension, which basically lay down the rules of conduct.

In the case of transfer of enforcement, in order to consolidate the uniform case law, it is recommended that if the court of the verdict has ordered only probation supervision without the imposition of a special rule of conduct, the person who is entitled to law to decide on the transfer of the enforcement, should treat it as if the court had ordered the contact with the probation officer separately.

According to our practical experience, in some cases of transfer of enforcement, the dissimilarity of interpretation was a problem. Accordingly, enforcement of the supervision by probation officer cannot be delegated, provided that the court did not determine the contact with the probation officer as a special rule. Here we have to highlight a legal collusion. According to Article 71 (1) of the new Btk, the ordering of probation supervision - as a general rule of conduct - includes the contact with the probation officer, which does not need to be provided as a specific rule of conduct. Contrary to the regulation of the TV, the two provisions of the law are in conflict, for which the legislator's attention should be drawn.

4.2.2. Obtaining a Probation Inspector's Opinion

VASKUTI already pointed out the importance of probation officer's opinion in his 2006 article, when the separated, independent probation officer institution only just started to spread its wings. Then – and according to our technical experience even now – only a few could see the serious potential hidden in the probation officer activities, the officer's opinion, that is important for the conduction of the procedure and reaching the appropriate legal consequence, and imposing and effectively enforcing the sentence. For some cases and procedures – like for juveniles - the Be. makes it mandatory, to approach a probation officer, but usually these are measures to prepare environment studies, rather than to give a probation

officer’s opinion. However, the difference between the two institutions is large, though it is not obvious in their shape, but in their content it definitely is.

4.2.3. The importance of the probation officer’s opinion as a tool for proportionate return

The probation officer's opinion can be basically requested by the court and the public prosecutor's office, before the imposition of a penalty or the use of a measure, the postponement of the prosecution (from the effective date of the new Act, conditional attorney's suspension) or referral to mediation proceedings, to support the decision. The law can make obtaining the opinion compulsory.

The aim to order the probation officer before the imposition of the penalty or the application of the measure is, beyond getting to know the personal circumstances, the social attachment, and network of the defendant, getting to know the defendant’s relation to the crime committed by him and the criminal proceedings against him. These data are needed to create customized criminal justice implications.

4.2.3.1. We can refer again to the definition of KAUTZ or VÍGH, but above all to Tibor HORVÁTH's statement, that there is no measuring tool for individual cases as to which punishment or what degree of punishment can be considered as a retentive, deterrent force.

In light of this, it is right to conclude, that in each individual case, all information must be obtained separately, that provides an insight on the subject side beyond the material side is, and leads to the determination of the proportional return.

We see a need for a change in the role of law enforcement and the role of probation supervisor in the aspect, that the probation officer's activity should also gain the expert status in the practice of law. However, for this to happen, it is necessary, that law enforcement applies the probationary officer's opinion as a means of proportionate repayment in the event of any lack of information or doubt in each individual case.

5. Proposals to the legislator de lege ferenda

5.1. Preventive probation supervision

We mentioned the importance of probation supervision in several places. On this subject, several scientific papers have expressed their strong views. In this context, we are solely interested in how probation supervision can contribute to ensuring a proportionate legal reaction.

We have also referred to the fact that we are trying to approach each idea through a specific or concrete example, and then formulate a general conclusion after answering it. In this case, we

also do this, especially since the age characteristics are perhaps the most significant characteristics of the material side of the offense.

5.1.1. First, we must record, that the preventive probationary supervision is not equal to the preventive patronage. Preventive patronage is an existing legal institution regulated by the legislator in the child protection system with the aim of ensuring the most effective protection of vulnerable children through a system, that incorporates the experience of child protection and probation officers' experiences.
Preventive patronage is a child protection legal institution. Preventive patronage is actually risk management to which, or with respect to, criminal lawsuits do not have legal consequences.

5.1.2. Youth is determinative in the aspect of behaviors leading to crime, as a social phenomenon, as well as crime prevention and criminal law, criminal procedural law and the right to enforce punishment.

For juvenile offenders, the new Btk. uses different rules. The new Btk. makes a stand for the purpose of the punishment or measure applied to juveniles is primarily to develop the juvenile in the right direction and to become a useful member of the society, and in this regard the education and protection of juveniles should be kept in mind, when the measure or punishment is chosen.

Penalty for a young person is to be imposed if the application of a measure is inappropriate. For those, who did not complete the fourteenth year when committing the offense, only a measure can be applied.
To apply a deprivation of liberty to a young person or to impose a sentence of deprivation of liberty is only applicable, if the purpose of the measure or punishment is otherwise not achievable.
With this in mind, therefore, primary consideration is education, and the retaliation of the crime, or punishment can only be the ultimate solution.

The question that the legislator has to ask from itself, is whether a criminal or substantive presumption of juvenile delinquency can be upheld and whether the law-applier has the means by which the specified expectation can be enforced at an appropriate level and with efficiency, so whether there is an adequate institutional background available.

If we ask the same question from ourselves, our answer is that the conceptual approach in itself can and must be held, but the material and procedural tools need to be expanded and the existing institutions should be applied consistently.

In the case of juveniles, the new Btk. makes it possible to apply different penalties and measures, but in case of juveniles measures should primarily be used, and as it has already been said, punishment can only be the ultimate solution. In practice this means, that

punishment is likely to be imposed in the case of acts that are particularly dangerous for society.

Among the measures that can be taken in the case of juveniles, mention should be made of penitentiary and probation supervision. Penitentiary can be used as an autonomous measure instead of a punishment by a judge, while probation supervision is always a compulsory and enforceable measure in the cases specified by law, which may also be ordered in the final judgment, except as otherwise provided in the law.

We have to point out a very important common feature for both penalties and measures: in the case of punishment, the prosecution may take place at the end of the criminal proceedings, in the decision closing the proceedings, while applying measures can take place earliest in the stage following the recommendation of indictment, at the prosecutor's phase. It can be stated, therefore, that in both cases we are far from the time of committing the crime, because it is not uncommon for the investigative authority to work for several months or even more than a year.
We have to note that the new Be. allows the investigation of juvenile offenders to continue for one, or at most two years.

5.1.3. A clear view of the experts working with juvenile perpetrators is that the existing institutional system is capable of performing certain tasks, but the actual goal needs to be more, since the current system is more suited to "symptomatic treatment" than to eliminate the actual problem.
In order to reach any effect in the juvenile offender by the investigative authority or the juvenile prosecutor, but most of all, the probation officer who actually deals with the perpetrator, so the retention from further acts and the resocialization can be realized, an immediate reaction is needed.
In itself, the fact that a juvenile is prosecuted does not necessarily have the effect that the legislator requires. Criminal proceedings objectively respond to the crime committed and do not care neither can care about the offender's personality in the degree required for socialization or resocialization. We note that it does not want to do so because it provides the tools that the law-applier can use during the procedure.

In the light of the above, we are therefore right to question whether the present instruments are suitable to achieve the purposes described in Article 106 of the new Btk.

We consider as a matter of principle, that in the criminal law system the actual probationary activity that takes into account the circumstances necessary for the development of the individual is performed by the probation officer.

During criminal proceedings, according to the rules currently in force, not considering the data gathering activity of the investigating authority, where the probation officer is preparing

the environmental study for the juvenile on the request of the investigating authority, is the kind of activity which is not solely for the purpose of establishing the criminal liability ie the detection of the criminal offense , the perpetrator may not encounter a measure that deals with the act as a sociological phenomenon until the prosecution is prepared. In the course of criminal prosecution, the juvenile prosecutor is the one who, after evaluating the act determined in the investigating authority's proposal for indictment, may postpone the indictment and ordain to follow a specific code of conduct for the juvenile perpetrator, and for the enforcement of such rules the probation officer will be responsible.

However, in agreement with VASKUTI's position, until this can happen, a significant amount of time is spent after the commitment of the act, so it cannot be a timely intervention.

5.1.4. The aim is to prevent the perpetration of further offenses, since we can only talk about probation supervision after an already committed crime. It should be clearly stated that, in this case, advocacy should be preventive not only in the purpose but also in the timing, therefore, unlike the "ordinary" probation supervision, it must precede further procedural actions during the proceedings. Last but not least, it should be noted that the possibility of preventive probation supervision should be ensured immediately in the initial stage of the proceedings, ie in the investigating authority's proceeding, following a criminal offense, in cases described by the law.

In our view, in this case, the authority has the opportunity to intervene in time after the crime. By the time when the perpetrator still knows and embraces the significance of his act, and the danger it means to society, and cannot occur, as in cases of juveniles unfortunately many times, that at prosecution, due to the passage of time, the subsequent intervention has no such significance or educational effect, the purpose of punishment or lawsuit is not fulfilled, the repatriation in this respect will not be proportionate.

5.1.5. That is why we consider it necessary to introduce an institution of preventive probation supervision measures.
Especially in the case of juvenile offenders, it is conceivable that in case of an assault, a misdemeanor in traffic or against property, or a crime punishable by less than five-year imprisonment, with the use of patronage, the defendant may be exempted from the scope of the criminal proceedings, the imposition of punishment, application of additional measures or be granted unlimited relief. At the same time, with the goal of educating - and thus with the aim of having the desired effect – the defendant may enter the line of sight of the probation officer, or behavioral rules could be prescribed for him, so at this stage of the process, individualization can be realized.

Placing before preventive patronage, to prevent duplicate and cumulative procedures, the investigative authority offers the juvenile defendant - in the case of admission and

volunteering - the possibility of participating in preventive probation supervision, if the law does not exclude that for offense in question.

With the analogy of the mediation process and the diversion of the drug addicts, the preventive probationary supervision would be carried out with the voluntary participation of the defendant and his legitimate representative, so that the fundamental rights and principles laid down in the Basic Law, the Criminal Procedure Act (presumption of innocence) would not be violated (in the latter case it should be noted that acting on a mandatory basis and not only in the event of a risk of perpetration of a criminal offense).
If the defendant does not submit himself to the previous probation officer or is excluded by the law, the proceeding would continue in the normal way, and according to the information provided by the police, the competent guardianship authority would decide on the taking under protection and, if necessary, ordering the preventive patronage. And in this case, probation officers could continue to be ordered with the imposition of punishment or measure. The solution would unite the system of child protection (taking under protection) and probation supervision, and would relieve the prosecution and the court.

If the conditions for the defendant are met, the investigating authority will search the probation officer for a probation officer's opinion. Subsequently, on the basis of the probation officer's opinion, the prosecutor would decide, in his discretion, to order pre-trial probation and behavioral rules while suspending the investigation (to the analogy of the diversion of drug addicts and the mediation process). He would send his decision to the probation officer, the guardianship authority, the investigating authority, the legal representative and the juvenile defendant:
The duration of the preventive probationary supervision is 1 year, which can be extended once, for 6 months.
At the end of the preventive probationary supervision, the probation officer assesses compliance with the rules of conduct and the effectiveness of the preventive probation supervision.
If the preventive probation supervision has been successful, it will be closed. The prosecutor may terminate the proceedings. If it is unsuccessful or for any other reason - according to the prosecutor's discretion - the proceedings may not be terminated, the prosecution will continue.
If the preventive probation supervision was effective, but the procedure may not be terminated, the effective probation supervision may provide unlimited relief.

The essence of the institution is immediate reaction, volunteering, individualization, which in itself carries the guaranties required or required by both substantive and procedural rules.

However, we agree with András VASKUTI, who did not rule out the introduction of an institution of any probative probation supervision measure for adult offenders, but he imagined it’s timing after the introduction of an institution involving juvenile offenders, taking the business of probation officers into account.

5.2. Secondary penalization

We can conclude that the concept of secondary penalization is not available in the literature, but as a result of our research, we have come to the conclusion that we must introduce it in our legislature.

Penalization is a punishment, so our concept is a secondary punishment. But what can this really be?

Secondary victimization as a non-appropriate legal institution has been set up for a specific purpose in our research. When defining the term, we have highlighted the meaning of being secondary. According to which, secondary victimization is a consequence of an effect that is not a direct result of the crime, but a secondary victimization caused by the criminal justice system or the society. Using a more plastic example, it is a secondary victimization if the victim during the supportive official procedure, instead of being supported effectively, has to directly face being the victim repeatedly, because of submissions, hearings and ineffectual actions, and thus becoming a victim multiple times.

During our research, we have shown in many cases, that unnecessary side effects may occur during a criminal procedure. In more serious cases, a side effect may go beyond the actual purpose of criminal prosecution and punishment and creates a disadvantage or forces the defendant into a disadvantage that even the law-applier did not want to achieve. We have to talk about the cases, which we proved during our research, when – according to Sándor KEREKES- the external effects of the criminal justice system occur, and cause disproportion.

Legal certainty requires from the state, and primarily from the legislator, that the law in its whole, and its parts and rules should be clear, unambiguous, predictable and foreseeable to the addressees of the norms as well. The Constitutional Court attributed importance to the general fact, which has significant content in terms of our research as well, according to which the rules excluding the enforcement of penalties restrict the exercise of the state's criminal authority between limits, because criminal law does not want to keep either society or the perpetrator on an unreasonable basis or for unreasonably long in uncertainty, regarding the legal consequences of the offense committed.
The requirements of constitutional criminal law, as set forth by the Constitutional Court and contained in the Fundamental Law, extend to all institutions of the criminal justice system, from the criminal offense, through the procedure, up to the legal consequences suffered during enforcement.

During our research, we have come to the conclusion, that these effects can be reduced, both in law enforcement and in legislation.

In the case of judicature, the minimization or compensation of the effects of the procedure, that are beyond the purpose of the procedure and punishment, has to be sought, which may be achieved, among others, by the tools recommended by our research.

In the course of the legislative process, the legislator should conduct codification to ensure that the law to be drafted excludes these undesirable - since the disproportionate criminal consequences, as we have shown, are violating the interests related to the penalty and its enforcement, thus undesirable – effects.

In view of the above, we have created and recommended to the law-applier and the legislator the secondary penalty as a category to be avoided or compensated.

5.3. The retrospective set-off institution in the case of a custodial sentence suspended in its implementation as a means of proportionate legal reaction

As a matter of fact, continuing with our proposal of secondary penalization, we turn to the final milestone of our research, our final thesis, which is an unprecedented in the criminal justice environment, but still not a foreign legal institution.

5.3.1. According to the reasoning of the aforementioned decision of the Constitutional Court, the unlawfulness caused by prolonged criminal proceedings can be remedied during the imposition of penalties. If it can be stated from the reasoning of the judgment that the court, with regard to the prolongation of the proceedings, granted the defendant a 'discount' in the imposition of the sentence, so due to the time-lapse or prolongation it imposed a lighter punishment, or applied a measure instead of punishment, then the breach of the defendant’s right for timely judgement has been repaired, thus it no longer can be referred to.

What the legislator may not do, however, the law-applier must at least notice, take into account, or evaluate at least in the final decision. This is none else, but the human factor, the subject, or the subjective side, which, as we have already stated several times, in terms of proportionality, is one of the most important circumstances to be assessed. Our opinion is that the court must perceive and evaluate the secondary impetus of the procedure.
For example, this is what we have pointed out in the course of examining the effect of the procedure as a real obstacle to the exercise of certain occupations and activities. The relevant restrictions are contained in individual sectoral laws (eg Act XCVII of 1995 on Air Transport), and the data contained in the register allow for effective enforcement of these restrictions.

The aforementioned have been illustrated with figures in our research, which is summarized below.
According to this in the researched area, the average duration of criminal proceedings in the last five years with suspended custodial sentences is 3 and half years, and there is an average

of eight and a half months between the first instance verdict and the final conviction, while the court imposed an average two years four months (ca 27.8) suspended sentence in the specified period of time. This means that on average, one and a half times the amount of time is spent in criminal proceedings than the suspended sentence - also on average - imposed by the court, and the nearly one third of the suspended sentences' duration passes until coming to effect, to the point of time, when the calculation of the probation period of the suspended sentence may begin.

5.3.2. The role of the institution of suspending the sentence, also in view of the results of our research, is unquestionable for us. Suitably serves both the requirement of individualization and proportional repatriation.
Suspension of the execution of the punishment would give the offender an opportunity to live a life without committing any offense and to avoid enforcing the punishment. The new Btk. detailed justification pointed out the essential characteristic, that we had previously lacked in the justification for partial suspension, namely that the sentence suspended in its implementation does not break the convict from its normal community and thus avoids the disadvantages of a short-term imprisonment. So this institution seeks to keep the individual in society.
It should be pointed out, that this institution actually fulfills the above-stated purpose if, beyond the threat of the possibility of enforcement, it does not exert any further effect which restricts the life of the convicted person in a direction which, ultimately, inspires him to cover his living costs by further criminal acts.
We need to be aware that this is a question of the procedural circumstance, that is the secondary penalty, related to imposing the judgement, not one related to the punishment, or its suspension.

5.3.3. In view of the fact that, by applying the legal institution, during the execution of the sentence, according to its purpose, there is no deprivation of freedom for a certain period of time, the law-applier does not have the possibility to compensate for the effect of the secondary penalty by offsetting the deprivation of freedom. In regards to the legal institution, account must be taken of the legal limitation, that the probation period of the suspension may not be shorter than the length of the suspended term of imprisonment. Our research, however, pointed out that the prolongation of the procedure defined by the Constitutional Court and the ECtHR and the procedure we have defined as a second pending decision, or being under the effect of the procedure averages of at least one third of the probation period of the suspended sentence. In view of this, the court does not have the possibility, with regard to the statutory limitation, to make such compensation in the final decision.
It should also be noted, however, that such compensation, with respect to the circumstances inherent in the subject side, may not always be justified even in view of a significant time interval.

5.3.4. That is why we have the possibility that, if the law correctly regulates the conditions, legislation can be used to minimize secondary penalization cases where the custodial sentence is suspended by the court. Given that the law restricts the possibility of reducing probationary duration, we had to find a solution that would allow the court to compensate in legal terms and conditions so that the length of the suspended term of imprisonment finally enforced would not actually decrease, so proportionate repayment requirement shall not be impaired.
In our opinion, this can only be achieved by bringing the start time of the probationary period, which is disproportionately distant in many cases, nearer to the date of the first instance judgment. This means a retroactive offsetting, not the reduction of the probation period.

5.3.5. In the current regulatory environment, although we did not encounter a possible retrospective set-off institution, we have found, in many cases, that the law-applier has the possibility of a flexible procedure that takes into account the principle of prudence when imposing a penalty.
There is a regulatory environment in which the legislator is may give the law-applier the possibility to subsequently change the duration of the sentence that has already been pronounced. In examining the German example, it can be stated that the second paragraph of Section 56a governing the probationary period stipulates that the probationary period commences on the day when the suspending judgment comes into effect, but the law provides an opportunity to change the probationary period afterwards, to reduce to the minimum, or to extend to the maximum allowed by the law.
In the current Hungarian law practice, we have also pointed out cases where, in the interests of expediency, the law enforcer applied the means at his disposal in a flexible way when imposing a penalty.

5.3.6. We propose to the legislator a new Section 92 / B of the new Btk. to regulate the retrospective calculation of the time until the coming to effect. In doing so, it is advisable to regulate that pursuant to Article 85 (2) of the Btk., the time elapsing until the suspended imprisonment sentence comes into effect, shall be counted for the duration of the probationary period, provided
a) in the case of a first-instance judgment imposing a suspended imprisonment, the prosecutor, the law-applier of the defendant, submitted an appeal, and
b) no further criminal proceedings have been initiated against the defendant until the final judgment has been reached, and
c) the court making the final decision did not change the judgment of the court of first instance in suspending the custodial sentence.
In a separate paragraph, it is proposed to be regulated, that retrospective offsetting should not be applied to those who, when making a judgment at first instance, are considered to be a repeating offender.

It means the basis of the legal institution, when the judgment at first instance does not become final, because the problem is raised by the fact that the starting point for calculating the

probationary period is related to the raise to legal force. Our intention is to shorten this time period when the conditions laid down by law are met.
The base of our statements is that in every case our thesis should point in to a proportionate, expedient and justified, and at the same time individualized criminal return. With this in mind, we consider the findings that have been repeatedly referred to, which have drawn our attention to the evaluation of the subject side. Along with the fact that the punishment can be proportionate, when the right legal disadvantage is applied against the right person, we do not consider this legal institution to be applicable to everyone, irrespective of whether the court considers the suspended sentence to be appropriate and proportionate.

In applying the novel amending the 1961 Btk., the legislator expressed the conviction, that a person who had already been punished could only be considered for suspended sentence, after living lawfully in freedom for a longer period of time.

In our opinion, the legal institution is sufficiently and reasonably strict in view of the above. The condition is on one hand, that the convicted person may not be a repeating offender at the judgment at first instance. On the other hand, the convicted person may not commit any other offense before or after his conviction, as further prosecution may be an excluding circumstance, that is to say, a law-abiding lifestyle may be presumed. Thirdly, the convicted person is awaiting the judgment to come into effect after the announcement, knowing the legal consequences of the suspension, without knowing the actual content of the judgment when coming to effect. With this in mind, however, the time elapsed until coming to effect can be considered as an effective probation period.
It is a substantial condition, that the court making the final decision does not change the legal institution, ie the suspension, but we may not rule out the possibility of a retrospective offsetting in the event that the suspended sentence or probation period changes in the final decision, since it is a question of discretion.