LIMITS OF PRISON SENTENCE*

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The fundamental idea of the present paper was conceived when at the beginning of the 90's, which was believed to be the era of the change of the political regime, I read the following warning at the end of the decision of the Hungarian Constitutional Court on the abolition of death penalty:"Since punishments in the Penal Code form a coherent system, the abolition of the capital punishment, as an element of the whole system, makes the revision of the entire penal system necessary, however, that is not the duty of the Constitutional Court." [1] Indeed, the aim of the resettlement of the legal system was to reconstitute the three large criminal branches, i.e. the criminal, the criminal procedure and the penitentiary law in a coherent way.

Approximately in the last twenty years the issue of the new Penal Code has squirmed into scientific proposals[2] and in the last three years into the drafts of codifiers.[3] The social-economic processes, diverted into a new channel, have disfigured the Penal Code of 1978 not just legally and aesthetically, but the large number of amendments[4] ha disrupted the coherence and harmony of the system of the sanctions in the Penal Code. Nevertheless, the consecutive overall codifications, bills (called "novels") and smaller bills were born on the grounds of various aspects of criminal policy, enhancing the chaos in the limits and in the means of intervention of criminal law. The legislature has markedly abandoned the conception of regulating the area of criminal law in a coherent manner. The logical harmony has also disintegrated, since the very end of the criminal procedure, i.e. the criminal enforcement preceded all the other areas with the modification of the Penitentiary Code in 1993. The desperation did not lead to a new penitentiary code: the penitentiary system, which contains several new and modern European resolutions, still operates on the basis of the law-decree of 1979, kept alive with several modifying laws.[5]

The reconsideration of the penal system is as current a topic as it was twenty years ago. The limits of imprisonment have to be redrawn within this system. This should be done in a way which ensures that the system orientates to its own hundred-year-old values, and that the genuine features of prisons are taken into consideration. Regarding the conceptual

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[1] This is the last sentence under V/1. of Decision 23/1990. (X. 31.) of the Hungarian Constitutional Court.

[2] Imre, WIENER A.: A Btk. Általános Része de lege ferenda. *MTA Jogtudományi Intézete Közlemények* N° 17, Budapest, 2003, and Ferenc, NAGY: *Tanulmányok a Btk. Általános Részének kodifikációjához.* HVG- ORAC Kft. Budapest, 2005.

[3] Katalin, LIGETI: Az új Büntető Törvénykönyv Általános Részének Koncepciója. *Büntetőjogi Kodifikáció,* 2006. no. 1. and Attila, GÁL - Kálmán, GYÖRGYI: A Btk. Általános Része (text of the norm, manuscript). The Ministry of Justice and Law Enforcement published a bill for the General Part to the Penal Code in 2007 and 2008.

[4] Until today there have been 3 law-decrees and 59 (!) laws that have altered and supplemented the Penal Code, and there are 11 constitutional decisions that have annulled parts of the Penal Code.

[5] To date, at least 3 full norms have been prepared, however, none of them has reached parliamentary debate.

morphology of the system of sanctioning the imprisonment has widely expanded since the abolition of capital punishment. The upper limit of the strictly taken penal system is signified by the real lifelong imprisonment, the next layer is the classical life imprisonment, next on the scale a wide layer is represented by several types of long-term imprisonment, and the last one is the short-term imprisonment, which is the lowest limit of sanctions. At the upper limit the imprisonment replaces the capital punishment, and at the lower one the imprisonment is replaced by community service order and fine, the supplementary punishments applied on their own, the probation, and the newest one, the diversion as the means of criminal procedure law.

The two extremes essentially reflect a choice of values, and they do not only draw borderlines between the sanctions, but they also indicate a remarkable change in penal philosophy. The main characteristic of capital punishment has been and still is the following: it maintains the talio principle and "it uses the ritual features of vengeance, which is practiced on the body of the convict".[6] The techniques of criminal enforcement granted the final solution for making the prisoner harmless.

The basic idea of sentencing to prison broke with the concept of the traditional punishment, because it preserved the life of the culprit, and it was satisfied with the temporary and interim deprivation of the convict of his or her liberty. Thus deserts became the fairest punishment of penology, which soon abandoned its corporal feature, and later, following the requirements of correction, reclassification, rehabilitation and treatment, reached the principle of prevention. All these can be measured by the changes and the humanizing of the methods of law-enforcement, which finally became ready for the reception of the concept of convict's human rights.

The theories of the significant part of criminal sciences, mostly those of the opinion leader criminology, progressed on the trails of criminal prevention and searched for the alternatives of imprisonment. Abolition gained a new sense in Europe. After the abolition of capital punishment it proclaimed its new goal, the final derogation and reduction of prison sentencing.[7] The majority of the moderate theories announced the program of multi-track criminal policy, which desired to apply different systems of sanctions for the crimes meaning serious threats to society and for the smaller delicts, respectively. Accordingly, the aim to reduce the proportion of imprisonments was meant to be really effected. The new challenge gave birth to a new theory, namely the restorative jurisdiction, which has developed the concept of prevention.[8] Among the instruments offered for the precipitation of prison sentence

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[6] Michel, FOUCAULT: *Discipline and Punishment, the History of Prison*, Gondolat, Budapest, 1990. p. 177.

[7] See the essays of Louk HULSMAN, Christian-Nils ROBERT, Michel de KERCHOVE and Jaques FAGET on the French homepage of the movement: www.abolition.prisons.free.fr.

[8] Here are some examples from the very broad range of monographs: Klauss SESSAR: Büntetés helyett az okozott kár jóvátétele? Vizsgálódások e gondolat lakossági fogadtatásáról, *Jogtudományi Közlöny,* 1987. no. 8. pp. 433-442.; Ferenc, NAGY: A jóvátétel, mint a konfliktust feloldó büntető igazságszolgáltatás egyik formája, *Jogtudományi Közlöny* 1993. no. 3.; Klára, KEREZSI: Az alternatív szankciók helye és szerepe a büntetőjogi szankciórendszerben, *Büntetőjogi Kodifikáció* 1st issue (2001) no. 2, pp. 14-24.; József, VIGH: A kárhelyreállító igazságszolgáltatás eszközei a hazai büntető igazságszolgáltatás rendszerében, *Acta Fac. Pol. et Iur. Univ. Bud.* XL (2003), pp. 193-221.; A. Tünde, BARABÁS: *Börtön helyett egyezség?* KJK-KERSZÖV Kft. Budapest, 2004; Katalin, GÖNCZÖL: A szolgáltatott igazság In: V. Országos Kriminológiai Vándorgyűlés (Szeged, 2005. október 6-7.) Bíbor Kiadó, Miskolc 2006, pp. 3440; Klára, KEREZSI: Kontroll vagy támogatás: az alternatív szankciók dilemmája, Complex Kiadó Kft, Budapest, 2006; A

we can find not only the good old fine and community service order and the new collective and ambulant[9] sanctions, but also the so-called cocktail punishments,[10] and the diversion, included in the criminal procedure law as well.

The main question is: what is the function of prison sentence in the 21st century? It also has to be clarified where the limits of sentencing to prison are in penology. It can be heard many times that regarding its core, prison sentencing can be nothing else than the deprivation of the convict of his or her liberty. Time may have passed over the diagnosis of Sykes in connection with the American prisons in the 50's.[11] Visiting the national prisons, I am not convinced that Sykes' truth is covered with dust. He said that apart from the deprivation of liberty, the convict has to suffer from the deprivation of his goods, services, his heterosexual relations, personal autonomy and security as well. Our regulation does not drive us to despair, setting out that during the imprisonment the convict cannot practice his right to vote, to assembly, to strike and to parental supervision.[12] Moreover, the convict may enjoy his or her right of association, the right to public information, the freedom of expression, and the protection of personal data in a very restricted form. The right to family privacy and integrity, guaranteed in the Constitution, undergoes a special metamorphosis, thus only means the possibility of principally - in frequency and length - unlimited correspondence, one visit of the relatives per month, receiving and sending packages and making a phone call once a week.

The refinement of the content of the prison sentence is important for the comprehension of this legal instrument, but it is not enough for the determination of its place within the system of sanctions. The prison sentence and its enforcement is a value in itself both in penology and in the penitentiary system. However, its real value can only be assessed on the one hand, when its organic characteristics, together with their pros and cons, are measured, and on the other hand, if its social function and its role in the penology of the 21st century is determined.

It is beyond dispute that prison sentence and its enforcement is in a grave crisis, as many times during its career. I do not want to plead for prisons, yet, I recommend considering the immanent, congenital features and the present state of prison sentences, which would hardly be five-generation old before we sentence them to death.

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helyreállító igazságszolgáltatás lehetőségei a bűnözés kezelésében - research leader: Klára KEREZSI (ed.: Erzsébet, Tamási), Budapesti Szociális Forrásközpont, Budapest, 2006.

[9] I consider as collective sanction everything that allows the community to enter the field of enforcement or when the sanction provides symbolic reparation to the community. Any form of conditional sentence, arbitration, diversion and community service order for the general interest belong to this field, if the enforcement is controlled by the community.
I consider as an ambulant sanction, borrowing a medical expression, the one that can be executed at large. These are restricted liberties that cause the loss of free time, for example the Swiss semi-detention or the Italian controlled liberty. Their common feature is that they demand only the free time of the convict.

[10] By eliminating the difference between the main and supplementary punishments, the judge has a wide range of options while considering both the characteristics of the offender and the offence, so that a proper mixture of sanctions can be imposed. It is not a brave new solution, since the present Penal Code is aware of the practice of applying supplementary punishments instead of the main ones. This cocktail punishment is definitely a progress in the aspect of imposing sanctions without limits.

[11] Gresham, M. SYKES: *The society of captives: A study of a maximum security prison.* Princeton University Press, Princeton, 1958.

[12] The creators of the Penitentiary Code were forgetful, because they have failed to include the right to social security in the list. The convict, even if he or she is employed in prison, does not have an official employment status, so he or she is not able to receive pension or unemployment benefits.

The best way to start is to realise that the prison sentence's substantive attributions are as old as the prison sentence itself. From this aspect, we see prison as a form of modern-day prison sentence, which has come into existence as the general equivalent of crime. It is important to recall that the birth of imprisonment was not only the criminal law accom- panyment of the rise of the Bourgeoisie. On the basis of the belief deeply rooted in the ideas of the Enlightenment, the appearance of the prison, following the first attempts to derogate the capital punishment and the abolishment of corporal punishments in general, cannot be considered only a simple change of sanction. Something happened which had never occurred before in the history of societies ruled by a state. This was by virtue neither a divine annunciation, nor a royal will, but the community of the free people measured the limits of the liberty and crime, and determined the punishments of the guilty.

The majority of the early characteristics of prison has certainly vanished, altered or changed in the course of time. However, there are some immanent features that are still in effect nowadays, which I regard as fundamental ones. For that very reason, these features give the core of the sentence, which differentiates it from the other sorts of penalties. What is the point of the research on this core? Beyond the pleasure of scientific revelation, it is the fact that by virtue of analysing them, the qualities of prisons can be revealed. We can determine the functions in penal and penitentiary law which prisons are capable to fulfil by taking these features into consideration, in order to avoid the danger that Tuskens already warned us about twenty years ago: "Why have prison and prison sentence been ineffective? We expected from it too much, we wanted to achieve too many aims with it, but all of these with very little money." [13] The incautious codifier takes a great risk because it ignores the basic nature of prisons, and it simply plays with the prison like an instrument in criminal policy on the shuffleboard of penal sanctions. The codifier can hardly reckon upon any favourable penal result, moreover, I am sure that it will not have any chance to counterbalance the birth defects of prison.

To outline the birth defects of prison a historic analysis is superfluous, it is sufficient to recall its universal features.

a) The modern prison was constructed by the people of the Enlightenment, who were building a new world and a new order in it. In the constitutional order built on the ideas of the state of the Enlightenment, only the declaration of the deprivation of rights, regulated and declared by laws, was held just as a punishment. And it was liberty, personal liberty, which, due to the letters of the constitutions, everyone enjoyed equally. The penal law philosophy secularized the principle of guilt and put prison sentence into the centre of its penal system. The intention of the legislator was to create a perfect punishment, which is in harmony with the sense of natural justice of the community. In principle, nothing could have stand in the way of success due to the flexibility of the prison sentence, thus the seriousness and the dangerous nature of the crime in proportion with the duration and rigour of the punishment

[13] Hans H. TULKENS: *A kezelés fogalma az Európai Börtönszabályokban.* In: Európai Börtönszabályok, Büntetés-végrehajtási Szakkönyvtár (published by: Ministry of Justice and Law Enforcement and the Hungarian Prison Service and Headquarters, Budapest) 1990. no. 5. p. 49.

guaranteed the measurement of just retribution. The imprisonment became temporary in contrast to the several forms of corporal punishment.

b) At the beginning of the 19th century it seemed obvious that there was no other task than to find the perfect framework for the enforcement of the rationally constructed, flexible, pliable and perfect punishment, regulated by law, which was of course the prison sentence. The four different great prison systems, which were partly derived from each other, partly existing parallel to each other, are well known from the literature,[14] so I would like to highlight only their main common features.

ba) In all classical prison systems the starting point was the separation of the convicts. The consideration behind the regulation, regarded appropriate in the 19th century, was that the malefactors in prison should be protected against the harmful influence of each other. The exhortation of the prison director and the connection with the priest and the instructor ensured the model of the proper behaviour for inmates.

bb) The renewal of the prisons proceeded from the Anglo-Saxon countries, especially from the USA.

The peculiarity, which made the American way of prison proceedings very different from that in other states was the search for a practical, and not a theoretical answer to an enforcement problem, and the fact that after a time they tried to derive the theories from their practical experiences.[15]

bc) The third characteristic was the universality of prison models, and that prisons expanded as a chain reaction in the civilized world.[16] In the first third of the 19th century many people from most of the countries in Europe travelled to America, and not only to see the developed industry, transport, commerce and culture, but to examine the new penitentiary systems as well.[17] The result of this was the first globalized product of the American penitentiary instruments: the solitary and the silent system. The second great wave of the unification of the prison systems was also initiated by the Anglo-Saxon empiricism and pragmatism, which became famous on the continent through the definitions of the English (1857, 1864) and Irish (1856) progressive system.[18]

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[14] Ágost, PULSZKY - Emil, TAUFFER: *A börtönügy múltja, elmélete, jelen állása, különös tekintettel Magyarországra,* Pest, 1867; Jenő, BALOGH: *Börtönügyi viszonyaink reformjához.* Budapest, 1888; Ferenc, FINKEY: *A börtönügy jelen állapota és reformkérdései.* Budapest, 1904; Barna, MEZEY: *A magyar polgári börtönügy kezdetei.* Osiris - Századvég Kiadó, Budapest, 1995; György, VÓKÓ: *A magyar büntetés-végrehajtási jog.* Campus Dialóg Kiadó, Budapest - Pécs, 2004; Csaba, KABÓDI - József, LŐRINCZ - Barna, MEZEY: *Büntetéstani alapfogalmak.* Rejtjel Kiadó, Budapest, 2005.

[15] The European method is just the opposite. First of all it creates the new theory of the problem, then tries to apply it in practice.

[16] The extension of the solitary system is represented by the various institutions throughout Moabit, Münster, Ratibor, Bruchsal, and later in France, Belgium and the Netherlands.

[17] Sándor, BÖLÖNI FARKAS: *UtazásÉszak-Amerikában,* Kolozsvár, 1834, X. fejezet. Sándor, Bölöni Farkas reported that in Auburn he met a French Commission having a field trip.

[18] In the 1880's Austria, the German Empire and most parts of Switzerland followed the English and Irish progressive system as a model. We cannot forget that the Csemegi Code also took over both systems.

c) The unification of prison systems was the result of the fact that prison specialists were the first to hold international congresses[19] in order to debate over their views, exchange their experiences and formulate resolutions in important questions. - After returning home, experts did not only present the common resolutions and solutions in scientific forums, but in the Parliaments or in the public administration as well.[20]

From the turn of the 19th and 20th centuries, the individual trait and criminological concepts fought their first battles in the congresses. The professional answer to be given to new forms of crime was at stake. The results were for example the recommendations for an indefinite and specially controlled secured custody in the framework of which hard labour was recommended for incorrigible people.[21] Due to this development, workhouses established as a result of the demand of criminal laws to give similar reactions to the same crimes in different European countries mushroomed throughout Europe.[22]

It is also widely known that the prison as an instrument of law is capable of development, both in terms of content and of form. With regard to its formal features, a specific correlation may be declared: while the punishments of the age of traditional law became more and more strict, rigorous and cruel, the main tendency regarding the prison system was the progress towards a more humane law enforcement.

The relationship between the prisoner and the detaining state changed notably. In the beginning, the anonymous prisoner, deprived of all his or her rights, was totally defenceless before its detainer; at most diligence in work or good behaviour could gain the detainee certain allowances. At the beginning of the 20th century the rights of a convict[23] were only mentioned among jurists, which meant that there was a legal relationship between the prisoner and the state. The undoubted achievement of the international prison cooperation was the Model Prison Rules accepted by the League of Nations in 1935, because it treated prisoners as entities with limited rights.[24] The relative stability that featured prisons was not only their moment of inertia, but professionalism as well, which in a normal social and political environment made prisons to be always able to fulfil their basic function, i.e. the protection of the society and the secure custody of the convict.

After World War II several forms of imprisonment evolved, making it very difficult to determine the definition of prison. The leading concepts had already perished, and the several

[19] The series of congresses started with meetings in Italy: in Florence in 1841, in Padova in 1842 and in Lucca in 1843. The real congresses took place in Frankfurt in 1846 and 1857, and later in Brussels. Having regular meetings for the Commission of International Criminal and Penitentiary Law was decided in London in 1872. There were 11 conferences held before World War II. The International Criminal Law Association established by Liszt, Prins and Hamel in 1889 had a similar considerable effect on the harmonization of criminal law.

[20] For example Hungary was represented at the 2nd conference in Stockholm by Károly Csemegi, secretary of state of the Ministry of Justice, and Emil Tauffer, who did not work anymore in the Hungarian Ministry of Justice at that time, and represented the Croatian government as the director of the Institution of Lep- oglava. It is more than a coincidence that at the Conference of Stockholm the majority supported the Irish progressive system, and the Hungarian Penal Code also took it over.

[21] 1900 - Brussels, 1925 - London

[22] Act about the social protection for vagrants and beggars adopted in 1981 in Belgium; Prevention of Crime Bill in England in 1908; act against beggars and vagrants adopted in 1910 in Norway; the workhouses in Hungary established in 1913; etc.

[23] *At first: B. FREUDENTHAL: Die staatsrechtliche Stellung des Gefangenen, 1910, Jena.*

[24] „Ensemble des Règles pour le traitement des prisons" accepted as a Resolution by the 16th General Assembly of the League of Nations. In: Ferenc Finkey: A XX. század büntetési rendszereinek reformkérdései, Budapest, 1935. p. 2.

model prison rules did not result in any uniform system.[25] We may state very bravely that there is not one single European prison model, yet, after World War II the process continued, and the European progress of the harmonization of prisons improved largely. Today decisions and recommendations of the mainly international human rights organizations and the enforcement of declarations have the same effect as criminal sciences in terms of the penitentiary system.[26] However, we should not forget about the fact that those sitting at the conferences aimed at forming professional rules of international treaties and declarations are the representatives of the criminal science, and if science wants to achieve changes, then it has to bear being desacralized.

Anyway, the concept of human rights was an incantation in terms of prisons, since criminal policy was neutral in this regard. Prisons and their nature and operation were examined, regardless of the actual direction of the swing of criminal policy, i.e. whether the pendulum was on the side of prevention (offender-based theory) or that of retribution (offence-based theory). However, the idea of human rights is lead by a simple logic, which reflects and demands the generally recognized catalogues of human rights (enshrined either in international documents or in constitutions) regarding the regulation of the prison sentence enforcement, meanwhile determining the content and limits of prison. Drawing the limits of deprivation and restriction of rights actually means the "malum-content" of the punishment.

The principle of human rights is appreciable for prison specialists as a practical solution, giving a wide and free scope for the soaring of the concepts of penology. What is the message of human rights to prisons? The answer may be derived from the practice of the European Court of Human Rights the least of all, because it is not the task of the Court to take sides in debates concerning penology or penitentiary matters.[27] If we want to orientate ourselves towards the European prison systems, it is necessary to review the recommendations (the soft law) issued by the Committee of Ministers of the Council of Europe.

I have to briefly elaborate on the peculiarities of the Hungarian prison system, with special regard to the fact that the Hungarian system has been forced to leave the Western European way several times, which has influenced its progress. As unpleasant as it may be, we have to admit that the origin and institutionalization of the Hungarian prison system and most of the changes of the paradigms occurred due to external effects. It started with the development of the Austrian prison network at the beginning of the 1850's and continued almost one hundred years later with the reception of the Soviet pattern. The latest external influence was the message of Strasbourg. I do not want to say that there has not been a Hungarian prison science,[28] but only would like to refer to its derivative characteristics.

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[25] Neither the UN minimum standards, nor the 3rd Prison Rules of the Council of Europe intend to give a model. Anyway, they do not have the legal possibility for it.

[26] The most important four international conventions are: the International Covenant on Civil and Political Rights (1966), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the European Convention on Human Rights (1950), the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987).

[27] The Court protects the rights declared in the European Convention, and examines whether states comply with their duties set out in the Convention.

[28] I would mock the memory of Ágost Pulszky, Emil Tauffer, Károly Csemegi, Ferenc Finkey, Jenő Balogh, Károly Vajna and Oszkár Szőllősy, if I stated the opposite.

The scientific enthusiasm hardly met the capability and willingness of the climate of the public opinion and that of the politics to achieve the professionals' aims. The best and most regretful example is the destiny of the bill on prisons of 1843. If Mittermaier's praise may be believed, the best legal product of the era went to pot.[29] The Csemegi Code had a particular role in this regard, because although the legal settlement of the prison was not a question of politics, it was crucial for the professionals.[30] After World War II legal norms were mostly made to fulfil the commissions of politics.[31] Later on, such as in 1966, in 1979 and in 1993 the procurer was always the politics, but in the last two cases it took the advice of specialists.[32] Let me mention two positive examples here. In 1878 and in 1993 Hungary eliminated its underdevelopment in social, political and economic fields, as well as in legal and penitentiary areas with prompt rapidity. Naturally, it followed only the European prison trends of the day.

The state being belated can relatively easily make up the leeway: it is enough for the codifier to look around in the world to find the most up-to-date solutions in prisons, and if it can, convince the legislator about its proper choice.[33] However, the implementation of a modern prison system could never go without any difficulty. As a result, the concepts in the norms and the expectations have been distorted due to the lack of facilities and opportunities or their limited number, and this heritage still determines our prison system. According to the history of criminal law, the prison was not always treated as an ultima ratio in the field of punishments; it was distorted as a means in the war against crime in several revolutions and counterrevolutions. The prison in its eras served as a mere place where corporal and capital punishment could be enforced.

The history of the Hungarian prison system in the last 40 years was filled with educational activity defined in several ways. This latter phrase brings up unpleasant reminiscences just because of its political-legal history. Yet, principally it always indicated the very activity aimed at helping and supporting detained persons, in order to lead them back to normal, free life. Formally from the second half of the 80's the inner life of the prison was subordinated to educational purposes. Due to this regulation, even if nothing more happened, a humane tone prevailed in the prisons. The most serious and open problem in present day prison education is that the profession itself has not been able to decide what to do under these changed conditions.

In the wrings of the reality of the end of the 20th century, the return to Europe did not succeed as many had expected. The initial euphoria passed in no time, and the confrontation with the West easily surfaced the unsolved problems of the Hungarian prisons. The sensation of being belated dominates again, and the fear from falling behind emerges again and again. This latter sensation is enhanced by the fact that Hungary has joined the Council of Europe and adopted

[29] The Collection of the Penal Proposals of 1843. ed. László, Fayer vol. I. p. 191.
[30] There was no law about the criminal enforcement, decrees of Ministries regulated the penitentiary system.
[31] For example: the appendix of Order 1105/1954. Mt., the so-called Regulation of Prison Institutes and Direction 8/1959 of the Ministry of Internal Affairs.
[32] Tibor, HORVÁTH: Gondolatok a büntetés-végrehajtási jog kodifikációjához. *Jogtudományi Közlöny,* 1978. no. 6.
[33] See: Csaba, KABÓDI: Csemegi Károly, a magyar börtönügy elfeledett alakja. In: *A praxistól a kodi- fikációig. Csemegi Károly emlékére.* (ed. Barna, Mezey) Bibliotheca Iuridica Libri Amicorum 5. Osiris Kiadó, Budapest, 2001, p. 46.

other international documents, thus it cannot ignore the recommendations and the establishments of the international system of control. [34]

Prison sentence is in crisis, as I stated it before, but I have to add that it will go through rather a constructive crisis than a destructive one if it will be approached in a professional, specialist way; for example if it is understood that prison can never be perfect, because it collects and detains the not perfect members of society. And of course the punishment itself cannot be perfect either, because it is knowingly of malice prepense, but the solution of the offender-based or the offense-based criminal policy (or both) has not been found in the last two hundred years. Of course it could work better if its features were recognized and utilized, which could imitate the co-partnership in a closed exigency and then it could really be suitable "to sustain self-respect and to develop the sense of responsibility and encourage those attitudes and skills that would assist them [detainees] to return to society after the release"[35] As to this, the history of prison sentence has to be known not for the sake and pleasure of itself, but to recognize the sanction's organic features and facilities.

This work cannot be substituted by the examination of international recommendations and frameworks. The authority gets into the most direct, we might as well say intimate relationship with its own citizens during the imprisonment. This means that both sides take part entirely in this persistent and intensive relationship. This is not only a legal relation; it is more a cultural one. In the course of the reception of foreign methods one has to be very careful and should have due foresight. Lastly, I would like to outline some thoughts about the metes and bounds of prison sentence. These should be emphasized because any legislative and legal-political decision concerning them may have an effect also on the part in between.

a) I want to deal with real life imprisonment only from a penological and law enforcement point of view. As far as I am concerned, real life imprisonment is not a kind of prison sentence. If we examine the history of penology it is clearly revealed that prison sentence was originally aimed at the deprivation of the liberty of the convict. The im-prisonment is immanently a temporary punishment. Accordingly, real life imprisonment is a strange component in the field of prison sentence. We get to a similar conclusion if we examine the social function of punishments. The retentiveness is guaranteed by the total physical neutralization of the detainee, thus it is similar to a postponed capital punishment.[36] This punishment crosses the Rubicon in this way. Real life imprisonment cannot suit the very social function of sanctions, i.e. tracing back the convict into society after having suffered the punishment, so it outcasts the principle of reintegration.[37]

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[34] See: CPT/Inf(96) 5; CPT (2000) 21; CPT/Inf (2004) 18; CPT/Inf (2006) 20; CPT/Inf (2007) 25, CPT/ Inf(2009)13.

[35] Penitentiary Code, Article 38 (1) There is no problem with the text of the norm, moreover, it is the plain translation of the European Prison Rules from 1987.

[36] After the abolition of the capital punishment, which cannot be re-codified because of the international obligations, real life imprisonment is a real experiment for the return of a punishment having a final solution. I do not intend to appraise the legal-political causes; I am just not very fond of intervention into criminal institutions through mere political messages.

[37] This duplicates the penitentiary rules, because in case of real life sentence the conditional release as such cannot be interpreted. Moreover, the function of prison sentence, regulated by law, and the principles of opening and normalizing can work only in a disrupted way, i.e. a great amount of amendments is necessary as to the code's provisions s saying "except in case of real life sentence".

Real life imprisonment causes several problems for the penitentiary system. It starts with the reception of the detainee, and then the endlessness of the sentence and its nature makes the educational process impossible. Achieving the cooperation of the convict or inspiring him or her to take part in any activity is hopeless. The fundamental problem is the establishment of the enforcement in a way that it does not breach the regulation of the prevention of torture and inhuman or degrading treatment or punishment, and at the same time meets security requirements.[38]

b) The other endpoint of prison sentence is short-term detention. Sometimes we can feel that the crusade started by Franz von Liszt is ahead again. I think that the alternative, collective and ambulant sanctions and the restorative jurisdiction[39] are able to replace short-term imprisonment. However, I am not convinced that the limit of shortterm detention is the five-year term sentence. The consequence will be that the composition of the convicts will change in an unfavourable direction. It is to be feared that the Strasbourg principles of the European recommendations cannot be enforced. Prison will be a severe place, and at the same time there will be no chance for reintegration. That is why I fear for the middle layer of convicts. I am afraid of the oppression of multitrack criminal policy on the middle layer of the prisoners. It is more than enough that the conferences, meetings and interviews are about the width of the tracks. Presumably to a reduced extent, but we have to count with the prison sentence in the future as well. Unsuccessful collective sanctions, i.e. unpaid fines[40] turn into prison sentences in a very notable extent.[41] Nothing explains that this turn has to be enforced as a prison sentence. We can challenge the new methods of execution in case of these forms of crimes through semi-prison sentence or electronic control of the convict.[42]

I guess the inventory is ready - for the legislator as well.

[38] The difficulty related to these two requirements was revealed in Szeged, in the Special Security Area. The CPT found the architectural solutions of that area solicitous and held an ad hoc visit in 2007.

[39] The restorative jurisdictional system, mostly the mediation, means the renewal of a private judicial system declaring the form of consensus of the parties. Actually it is an out-of-court procedure; it is only an island in the criminal procedure. My only professional fear is that it is not a real collective punishment, since the small, destroyed communities of the society cannot be restored by criminal methods. At present, the negotiator does not represent a community, but a profession.

[40] In case someone does not pay the fine, the fine should not be turned automatically into a prison sentence: community service order could be positioned in between, as it happens in a lot of European countries. Naturally, if community service order is unsuccessful, the prison sentence cannot be ignored.

[41] Approximately half of the detainees in the first rank of prison are those not paying the fine.

[42] I behold the electric control of the convict during the enforcement to be used. Yet, before all this, there are many constitutional problems to be clarified. See more: György, VÓKÓ: Az elítéltek elektronikus felügyeletével kapcsolatos véleményekről. *Börtönügyi Szemle* 2004. no. 3. pp. 91-102.

SUMMARY

Limits of Prison Sentence

CSABA KABÓDI

The way we know prison sentences today is a product of the Modern Age. Such prison sentences were first used during the Enlightenment. Until then severe forms of punishment were applied: corporal punishment, the severance of limbs and even capital punishment in the presence of the public. Incarceration, thus, is a modern "invention". It rejects the cruel forms of punishment of the past and is motivated by the hope that a criminal leaves prison as a better person. The inventors of the prison sentence were convinced that imprisonment deprived criminals of their liberty - which is a universal right under modern constitutions - proportionately to their crime. Experts in the 19th century originally believed that imprisonment seemed to be an ideal solution from the viewpoint of constitutionality and penology, supposing that ideal techniques of its implementation are found. Endowed with hindsight we now know that there is no Grand Solution to punish- ment. Imprisonment has certain unique characteristics that must not be ignored. It would be a mistake to suppose that it can substitute capital punishment, which in Hungary has been abolished. It cannot replace alternative punishments or community sanctions either because they have a different penal logic.

RESÜMEE

Die Grenzen der Freiheitsstrafe

CSABA KABÓDI

Die Freiheitsstrafe in ihrer heutigen Form ist eine Erfindung des modernen, bürgerlichen Zeitalters. Sie wurde von der Zeit der Aufklärung geformt, entgegen dem früheren tra- ditionellen Recht, das die Grausamkeit der spektakulären Todes- und Körperstrafen am Körper der sündigen Menschen mit der Kraft der und dem Anspruch auf Endgültigkeit vor der breiten Öffentlichkeit, auf der Bühne des Schafotts vollstreckte. Die Freiheitsstrafe ist eine „erfundene" Strafe, die sich teilweise aus der Verneinung des Strafsystems der Vergangenheit und teilweise aus dem auf Besserung zielenden Gedanken der zukünftigen, hoffnungsvollen Persönlichkeit nährt. Worin sich die „Gründerväter" einig waren, war der Gedanke, dass die neue Strafform einen wertentsprechenden Entzug der Freiheit - dieses von den bürgerlichen Verfassungen gebotenen universellen Rechts - bedeutet. Die Freiheitsstrafe erschien von vornherein aus der Sicht der Verfassungsmäßigkeit und der Straflehre als eine ideale Lösung, und nur die Methode ihrer perfekten Vollstreckung musste gefunden werden - so sahen es

zumindest die Fachleute des 19. Jahrhunderts. Heute wissen wir bereits, dass die Große Lösung nicht existiert, aber es ist auch offensichtlich, dass die Freiheitsstrafe über individuelle - wie wir gesehen haben: über seit ihrer Entstehung gegebene - Charakteristika verfügt, deren Außerachtlassung mit ihrem Wesen, ihrem Inhalt unvereinbar ist. Gerade deshalb ist es falsch anzunehmen, dass sie die „wegen ihr“ abgeschaffte Todesstrafe ersetzen kann, wie sie gemäß einer anderen Logik der Straflehre auch keine Rivalin der Todesstrafe ist. Sie ist jedoch in der Lage, die sogenannten alternativen und Gemeinschaftssanktionen „zu ersetzen“.