HUNGARIAN HELSINKI COMMITTEE

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Alternative Measures

Review and Analysis of Hungarian Law on Sentencing with Regard to Vulnerable Social Groups

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Contents

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1. Introduction

1.1 The problem of the prison population growth trend

As is globally, both violent crime and crime against property have been declining almost steadily in Hungary since the early 2000s, while at the same time there has been a noticeable toughening of criminal policies – as if it needed to respond to an increasingly worsening crime situation.[1] According to the annual prison population statistics of the Council of Europe,[2] Hungary has one of the highest prison populations.

*Countries marked with an asterisk (*) were not members of the Council of Europe at the time of reporting or no data were available for them.

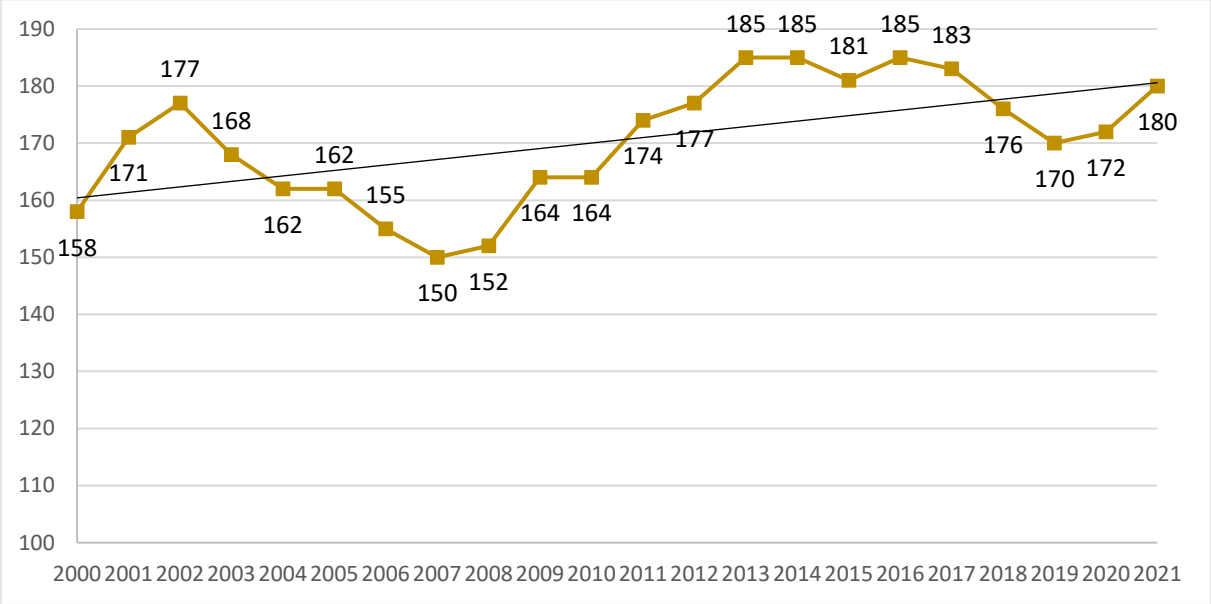
The map[3] shows that the Eastern half of Europe typically has higher prison population rates than Western countries. In this comparison, lower prison population rates than that of Hungary can be observed in Poland, Estonia, Albania, Moldova, Serbia, Montenegro, Ukraine, Romania, Bulgaria, Croatia, Armenia and Slovenia among the countries of the former socialist bloc that provided data.

In Hungary, the overall trend in the number of prisoners is on the rise. While between 2002 and 2007 the number of prisoners per 100,000 inhabitants showed a clear decrease (it dropped from 177 to

[1] Kerezsi, K. (2020). Why has crime fallen? *Studies on Criminology*, 57, pp. 39-67.
[2] Aebi, M. F., Cocco, E., Molnar, L. - Tiago, M. M. (2022). SPACE I - 2021 – Council of Europe Annual Penal Statistics: Prison populations. Council of Europe
[3] The map is based on data from SPACE I - 2021. In Aebi, M. F., Cocco, E., Molnar, L. - Tiago, M. M. (2022). *SPACE I - 2021* – Council of Europe Annual Penal Statistics: Prison populations*. Council of Europe*, p. 32.

150), the slight upward trend that started in 2008 peaked in 2012 (185 persons). It stabilized at this level until 2017, and, after a slight decline, is now on the rise.

Number of prisoners per 100,000 inhabitants in Hungary 2000-2021

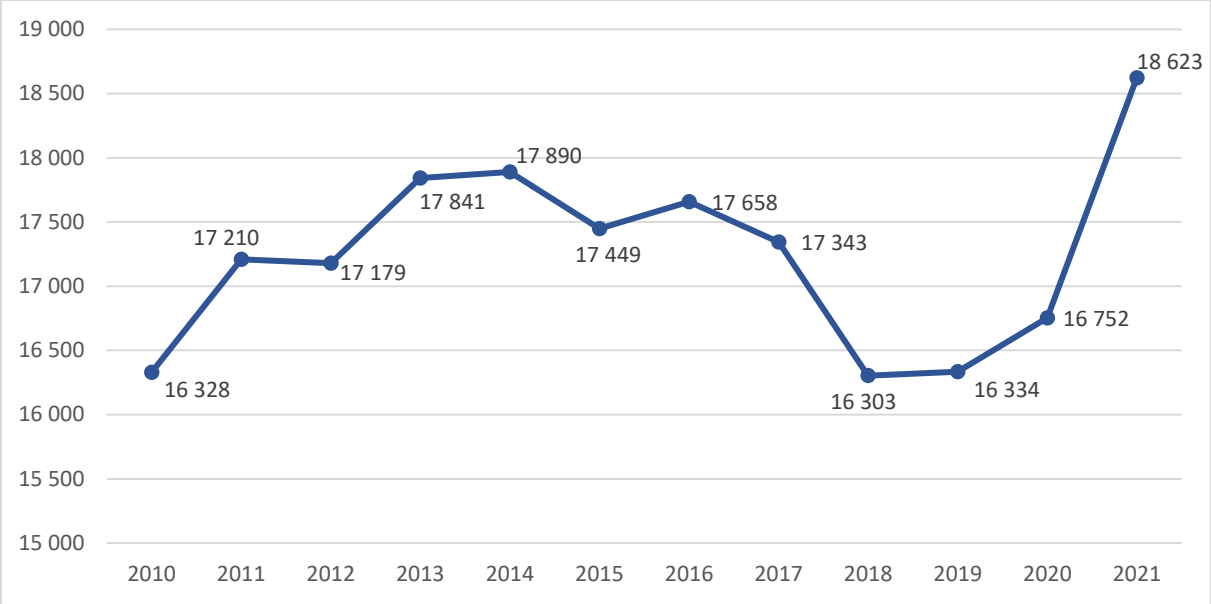


Meanwhile, according to the Hungarian Central Statistical Office (hereinafter: HCSO),[4] the number of registered crimes has been decreasing steadily over the past 20 years, but the real decline started in 2012 (2000: 451,000; 2021: 154,000).[5] Crime rates have therefore been on a downward trend for longer than the observed upward trend in the prison population. It can therefore be assumed that the rising incarceration rate is not the result of the characteristics of the crime, but of the response to crime, i.e. a strict and imprisonment-centred penal policy.

A particularly worrisome trend is the sharp increase in the number of prisoners between 2019 and 2021, which includes the period of the coronavirus pandemic: while most countries in Europe saw a decrease in the prison population over the same period, in Hungary the prison population increased by more than 2,000 in three years, a rate of more than 10 percentage points.

[4] Hungarian Central Statistical Office: Registered offences by county and region, url Accessed: 20 June 2022.
[5] Among the factors behind the downward trend in the number of registered offences after 2012, a number of legislative changes play an important role.

Number of prisoners in the Hungarian penitentiary system on the last day of the year 2010-2021[6]



According to the Hungarian Helsinki Committee's field experience and public data analysis, the reasons for the acute increase in the prison population may include:

- in 2020, after a previous downward trend, the number of individuals under pre-trial detention started to rise again, which, according to the Hungarian Prison Service Headquarters (hereinafter: BvOP) and the Office of the Prosecutor General, is partly due to an increase in the length of pre-trial detention,
- custodial sentences are longer than before,
- access to legal institutions related to early release has been partly reduced due to legislative changes, which may have affected the extent to which they are imposed:
    - the government tightened the conditions of the release on parole on the occasion of the "Győr child murder case" at the end of 2019, which seems to have had an impact on the sentencing practice regarding release on parole – it seems that since then a smaller proportion of those who are eligible to it are granted release on parole,
    - the number of application of reintegration custody has been decreasing since 2018 (2018: 682; 2021: 509).
- From 2018, there has been a sharp increase in the number of detentions as a criminal sanction and in the number of people subject to a detention for minor offences. (2018: 392; 2021: 1125),
- meanwhile, alternatives to imprisonment are rarely used, even where the law allows it – e.g. the rate of use of the community service penalty has shown a steady downward trend between 2013 and 2019.[7]

An examination of the reasons for the growth of the prison population and the impact of penal policy certainly needs a deeper analysis. However, based on the above data and our previous research[8] on the use of alternative sanctions in Hungary, we believe that it is worth raising the question of how to facilitate greater use of non-custodial sanctions. International standards, recommendations and

[6] Statistics of BvOP
[7] Krámer, L.- Lukovics, A. – Szegő, D. (2022). Alternatives to Prison: Hungarian Law and Practice on Non-custodial Sentences. *Hungarian Helsinki Committee* (hereinafter: Research) p. 36. url Accessed: 5 May 2022.
[8] Ibid.

commitments or the National Crime Prevention Strategy of Hungary may provide pivot for this. We believe there is scope for a wider use of alternative sanctions (e.g. the number of short-term custodial sentences could be reduced), which is why we looked at the practice of alternative sanctions and some of its aspects. However, besides all the above mentioned, we have a further goal with the research.

1.2. Lack of guidelines concerning uniform jurisdictional practice, under-reflection of vulnerable groups' perspectives

It is common knowledge among legal practitioners that offenders may face different penalties for similar offences depending on the county in which they are convicted. More than a decade ago, Mátyás Bencze undertook an academic study of the practice,[9]in which he provided scientific evidence of this presumption. Even though his study analysed judicial decisions from the mid-2000s, researchers have also examined the issue over the past decade. An excellent study published in 2020 by György Ignácz gives an account of the research carried out since then and their methodological challenges,[10] and its introduction actually captures the problem we wanted to address in more detail.

> Even judges are not aware of the full details of sentencing practice. A judge is thoroughly familiar with the practice of the criminal offences he or she frequently tries, but even in these cases he or she is usually only aware of the practice of the tribunal or court of appeal that reviews his or her convictions. This is mainly due to the fact that the judge's profession is one of the few where, once appointed, there is no role model for the judge to follow. He or she is alone in the courtroom, he or she does not see his or her colleagues at work, he or she sees other judges' judgments only by chance, in connection with a specific case, and he or she receives feedback only through the second instance review.[11]

In light of this, it is not surprising that there is no uniform practice, let alone a uniform set of criteria, as to what and how to weigh in the case of particular vulnerable social groups when a judge is to decide whether to impose a sanction restricting personal liberty on a defendant, to order his or her detention, or to order the release on parole or reintegration custody of a person already convicted.

Within this framework, the motivation for our research is to understand what binding or non-binding sources of law are known and/or used in the Hungarian criminal justice system to guide the jurisdictional practice, and how - if at all - the specific perspective of vulnerable groups is addressed in these sources. And, of course, how the problems we identify could be tackled.

1.3 The narrower objective of the study

The primary objective of this study is to promote the implementation[12] of the Council conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of

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[9] Bencze, M. (2011). Elvek és gyakorlatok. Jogalkalmazási minták és problémák a magyar bírói ítélkezési gyakorlatban, Monográfia tudományos eredményeit összefoglaló tézisek. A Debreceni Egyetem habilitációs füzetei [Principles and Practices. Patterns of Argumentation in Hungarian Judicial Practice. Theses Summarizing the Scientific Results of a Monograph*. University of Debrecen Habilitation Booklets*] url Accessed: 1 June 2022.

[10] Ignácz, Gy. (2020) A büntetéskiszabási gyakorlatra irányuló empirikus kutatások elmélete és módszertana [Theory and methodology of empirical research on sentencing practices]. *MTA Law Working Papers* 2020/1., p. 2. url Accessed: 29 June 2022.

[11] Ibid. p.2.

[12] The research is part of the international project "Promoting equal access to alternatives to imprisonment" (EU Just Project 10100746) coordinated by the Penal Reform International (hereinafter: PRI) and supported by the European Commission, conducted with the participation of the Hungarian Helsinki Committee and the University of Coimbra (hereinafter: UC) as partners.

criminal justice (2019/C 422/06) (hereinafter: Council conclusions).[13] We have reviewed the relevant binding and non-binding legal sources in relation to sanctions that may be imposed as alternatives to imprisonment. Our focus has been to identify whether the currently existing criteria may have an impact on vulnerable social groups, and whether the criteria set out in international standards and guidelines may be found in those documents. The target audience of our present paper are decision-makers in the field of justice, and professionals working in that field (judges, prosecutors, attorneys, probation officers).

We have identified people living in material deprivation, people struggling with homelessness, persons with physical and/or mental disability, foreigners, the elderly, women, young adults, and members of ethnic minorities as vulnerable groups. As for the binding sources of law, we took into account the Fundamental Law of Hungary (hereinafter: Fundamental Law), Act C of 2012 on the Criminal Code (hereinafter: CC), and Act CCXL of 2013 on the Execution of Punishments, Measures, Certain Coercive Measures and Confinement for Petty Offences (hereinafter: Prison Act), all criminal uniformity decisions (hereinafter: CUD) in force relating to sentences imposing penalties as alternatives to imprisonment and as well as the Government Decree 1744/2013 on National Crime Prevention Strategy 2013-2023 (hereimafter: Strategy).

In view of the scope of the present study, as non-binding sources of law, we have, of the most common normative and individual legal acts, reviewed the opinions of the Criminal Division of the Kúria of Hungary (hereinafter: Kúria)[14] concerning alternatives to imprisonment, opinions of the Criminal Division of the Kúria of Hungary, without aiming at completeness, the decisions of the Kúria capable of being applied as binding case-law, and all relevant summarising opinions of the Working Group for the Analysis of Case-law of the Criminal Division of the Kúria concerning the sentencing practice of non-custodial alternative penalties, as the most frequently applied normative and individual legal acts.[15]

In the case of the legal sources listed on the Kúria's website, we searched for the designation of vulnerable social groups and for the specific sanctions identified as alternatives to imprisonment in the site's search engine. For the other sources of law, we searched for the above terms in the texts of the relevant legal sources.

For the purposes of a random check of the effective application of non-binding sources of law in practice, we have interviewed five judges.

2. Hungarian binding sources of law

The present analysis does not intend to repeat the content of the Research,[16] and accordingly, we mention only briefly the following.

2.1. The Fundamental Law

Pursuant to Article 28 of the Fundamental Law: „In the course of ascertaining the purpose of a law, consideration shall be given primarily to the preamble of that law and the justification of the proposal

[13] Council conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of criminal justice (2019/C 422/06)

[14] The Kúria of Hungary is the highest instance judicial forum of the country. The court deals with decisions of administrative, labour, civil, criminal and economic matter, except for those in competence of the Constitutional Court of Hungary.

[15] In addition, we also identified explanatory memoranda to acts as non-binding sources of law, however, since the Research already contains a detailed analysis of the Explanatory Memoranda relating to the provisions of both the CC and the Prison Act relevant for the purposes of the present study, we find it unnecessary to repeat its findings.

[16] See the Research for further details.

for, or for amending, the law. When interpreting the Fundamental Law or laws, it shall be presumed that they serve moral and economic purposes which are in accordance with common sense and the public good." [17]

2.2. The Criminal Code

The CC sets out the sanctions (penalties, concurrent penalties, and measures) which can be imposed due the commission of criminal offences (felonies and misdemeanours). The penalties of

- community service,
- fine,
- disqualification from a profession,
- disqualification from driving a vehicle,
- ban on entering certain areas,
- ban on visiting sports events, and
- expulsion,

and the additional penalty of exclusion from participating in public affairs,

which may be imposed as alternatives to imprisonment or confinement are relevant for the purposes of the present study.

From among the measures set out by the Act, the measures of

- reprimand,
- release on probation,
- reparation work,
- probation supervision,
- confiscation,
- forfeiture of assets,
- rendering electronic data permanently inaccessible, and
- measures applicable to legal persons

are relevant for us. Moreover, suspended imprisonment, and release on parole and reintegration custody, as legal institutions related to early release, have also been classified as alternatives to imprisonment and confinement.[18]

Under the CC, the aim of a punishment is to prevent - in the interest of the protection of society - the perpetrator or any other person from committing further criminal offences.[19] When imposing a punishment, the court shall take into account the following factors, bearing in mind the objective of punishment: the actual material gravity of the act committed by the accused, the degree of guilt, the circumstances of the commission of the criminal offence, the danger represented to society by the perpetrator, and other aggravating and mitigating circumstances. [20] Furthermore, the Act provides that where a sentence of fixed-term imprisonment is imposed, the median of the prescribed scale of penalties shall be applicable. [21]It should be noted, however, that the court has further discretion in the

[17] Article 28 of the Fundamental Law.
[18] See the Research for further details.
[19] Section 79 of the CC.
[20] Section 80(1) of the CC.
[21] The median value shall be equal to half of the sum of the minimum and maximum of the penalty range. See Section 80(2) of the CC.

cases specified in the Act.[22] If it considers that even the minimum level of the penalty is too severe, it may impose a more lenient penalty than the minimum level, in accordance with the principles for imposing penalties set out above and in specific cases,[23] it can impose, among other things, community service or a fine.

Overall, from the point of view of the defendant – with the exception of juvenile perpetrators – the CC does not provide on any criteria related to belonging to a vulnerable social group, and which should be considered when imposing a sentence.

Under the CC, juvenile offender shall mean any person between the age of twelve and eighteen years at the time of committing a criminal offence. The Act sets the primary objective of assisting the perpetrator concerned to develop in the appropriate direction and that the defendant should become a useful member of society; and the court, therefore, should take into account the education and protection of the juvenile concerned when imposing sanctions. The above penalties and measures shall apply to juveniles with the derogations specified; [24] moreover, education in a reformatory institution is also a measure applicable under the Act. [25]

2.3. The Prison Act

Point j) of Section 122 of the Prison Act provides that women, juvenile persons, persons with disabilities, and, scattered throughout the law, that persons in a vulnerable state of health, illiterate convicts or convicts who do not speak Hungarian shall be entitled to special protection with the derogations specified in their respect; as we shall see later on, that does not appear in the non-binding legal sources with regard to alternative sanctions.

In case of women convicts, the act provides on special rules derogating from the general provisions with respect to pregnancy on the one hand, and motherhood with small children, on the other hand. From among alternative sanctions, it is with respect to community service that the Prison Act provides explicitly that community service shall be interrupted, *ex officio*, or on the request of the convict from the twelfth week of the pregnancy until the first year of age of a child brought up in the household. Moreover, community service shall be interrupted, *ex officio*, or on request, in case the convict receives childcare allowance or childcare benefits, for the remaining time thereof, but not more than for a period of one year. [26] The Prison Act lays down, as a general rule, that the rights of pregnant woman convicts and convicted women with small children, which ensure the protection of the woman's health and serves the development of the child, and which are not regulated under the Prison Act, shall not be restricted. [27]

With respect to the health condition of any convict, community service shall be interrupted temporarily, in case a permanent change thereof renders the performance of work impossible. In addition, community service may be interrupted on request based on important grounds, especially with respect to the convict's family situation or health condition. [28]

It must be highlighted that the term "juvenile" used in the Prison Act is different from the definition under the CC. Under the Prison Act a juvenile person shall include any person serving juvenile

[22] Section 82 of the CC.
[23] If the minimum penalty is one year imprisonment. See Section 82(3) of the CC.
[24] Chapter XI of the CC, Provisions on Juveniles.
[25] We have not identified education in a reformatory institution as an alternative to imprisonment. For more details see the Research, pp. 23-29.
[26] Section 288(2) of the Prison Act.
[27] Section 128(1) of the Prison Act.
[28] Sections 288(1) and (2) of the Prison Act.

imprisonment who has not yet attained the age of twenty-one.[29] Moreover, in addition to the fact that the Prison Act includes special rules on the execution of imprisonment in case of juvenile persons[30], the act contains further – scattered – provisions on juvenile persons. A part of those is included in the general provisions. For the purposes of the present study, the provisions of the act on reintegration custody and release on parole are relevant. As a precondition to release to reintegration custody – in addition to the general requirements –, with respect to juveniles the law requires *inter alia* that they should participate at one family therapy session or family consultation during the period of imprisonment.[31]

The relevant provisions on persons with disabilities, illiterate convicts or convicts who do not speak Hungarian can be found among the general provisions of the Act which lay down their right to a legal remedy, and the facilitation of the effective application of their right to be informed.

The rules on reintegration custody and on release on parole were explained in detail in the Research.[32] With respect to the fact that the description of the regulatory framework of the act is also included in the summarising opinion of the Working Group for the Analysis of Case-law of the Kúria, those legal institutions are discussed in more details under the heading "National non-binding sources of law."

2.4. Uniformity decisions

The CUDs are normative acts of the Kúria, regulated by the Fundamental Law[33] with the constitutional purpose to ensure uniform jurisdictional practice. Their role is to provide precisions concerning the provisions of laws, in this case the CC, and to ensure a uniform application of law. Their application is legally binding for all courts as from their publication in the Hungarian Gazette.[34]

We performed the review of thirty-five CUDs concerning penalties and measures under the CC as alternatives to the penalties of imprisonment and confinement. The CC does not contain any mitigating or aggravating circumstance relating to the offender's belonging to a vulnerable group. Consequently, it can be said about all CUDs that, from the point of view of sentencing practice, they assess exclusively the provisions of the act relating to the statutory elements of the given criminal offence, while aspects related to the offender's personality and his or her belonging to a vulnerable social group does not appear as a factor influencing the sentence.[35]

2.5. National Crime Prevention Strategy

For the purposes of our study, we have used as a guideline the Strategy, [36]which, under the title of Prevention of Re-offending, distinguishes between more serious and less serious offences that pose a threat to society. In response to the latter, it calls for "diversionary solutions" and "the use of alternative sanctions" to imprisonment in order to reduce crime and reduce the burden on the justice system. As an intervention to prevent recidivism, the government decree identifies two instruments: the promotion of the reintegration of prisoners into the labour market and society, and the

[29] Point 1 of Section 82 of the Prison Act.
[30] Sections 192-204 of the Prison Act.
[31] Section 200/A of the Prison Act.
[32] Research, pp 23-29.
[33] Article 25(3) of the Fundamental Law.
[34] Section 42(1) of Act CLXI of 2011 on the Organisation and Administration of Courts (hereinafter: OACA)
[35] For the Hungarian criminal justice practitioners it is without question that a uniformity decision does not deal with points of fact but with points of law, i.e. it is not by its nature suitable for dealing with points of fact. However, in view of the international context of the project and the problems it poses, we felt it necessary to elaborate on the above.
[36] The source of law sets out the launch of the actions set out under title 8: Areas of intervention, objectives, measures (Action Plan 2013-2015) (hereinafter: Action Plan) for the period 2013-2015, with the Action Plan setting crime prevention objectives for the period up to 2023. Strategy, point 8.

strengthening of alternative sanctions and restorative methods to compensate for the harm caused by the crime.[37]

The Strategy, which reflects the Council Conclusions, should therefore provide guidance to both legislators and practitioners on the use of alternative sanctions.

3. National non-binding sources of law

Decisions capable of being applied as binding case-law[38] are decisions of the judicial chambers of the Kúria adopted in individual cases and published in the Reports of Court Decisions. [39] In the course of their judicial decision-making activity, courts shall always take into account the decisions of the Kúria capable of being applied as binding case-law and in case they intend to diverge from their principal substance in matters of law, courts are under the obligation to provide justification for such divergence from the given precedent.[40] Until the year 2020, the Kúria published decisions adopted by its judicial chambers that had implications on wider society and that concerned questions of principle, in case it considered it justified to do so, on the basis of the decision by the head of division as "court rulings of principle (hereinafter: CRP)". Moreover, until the year 2020, the Kúria was to decide on the publication of decisions of tribunals or courts of appeal that had implications on wider society and that concerned questions of principle, as "court decisions of principle (hereinafter: CDP)". However, due to the 2019 modification of Act CLXI of 2011 on the Organisation and Administration of Courts (hereinafter: OACA) these have lost their special importance, and the Kúria shall not be authorised any more to publish rulings of principle (CRPs) in criminal matters nor decisions of principle (CDPs) in criminal matters since 2020. The mandatory application of previously published CRPs and CDPs was also terminated as of 1 January 2020. The importance of CRPs has been preserved in as much as those are regarded as equally capable of being applied as binding case-law, identical to all court rulings published by the Kúria since 1 January 2012. Opinions of court divisions are normative acts adopted by any court having a criminal division (i.e. the Kúria and a tribunal or court of appeal) delivered in disputed jurisdictional matters, and are strongly recommended for courts to follow, but formally not binding. The Kúria regularly carries out analysis of the case-law with respect to final and binding court decisions or court decisions that have become final, in order to identify and examine jurisdictional practice of courts, and it expresses either its supporting opinion or its disagreement as to the appropriateness of the given practice.

3.1. Decisions capable of being applied as binding case-law

All decisions of the judicial chambers of the Kúria adopted in individual cases and published in the Reports of Court Decisions[41] have the force of precedent. Decisions capable of being applied as binding

[37] Strategy, point 8.4.

[38] Guidelines, resolutions of divisions, and decisions of principle adopted before 1 January, 2012 by the Supreme Court, the legal predecessor of the Kúria, can be regarded as uniformity decisions: these must be applied until a uniformity decision to the contrary is adopted. See Section 195(2) of the OACA.

[39] The Reports of Court Decisions is the official journal of the Kúria.

[40] The obligation to state reasons is laid down by the acts of procedure: point g) of Section 561(2) of the Code of Criminal Procedure (hereinafter: new CPC) and Section 346(5) of the Code of Civil Procedure (hereinafter: Civil Procedure).

[41] The Reports of Court Decisions contains approximately 40 000 decisions capable of being applied as binding case-law. However, the content of decisions capable of being applied as binding case-law, are not to be considered as precedent as a whole, only the principal content expressed in relation to one of the legal issues of the decision. From 1 January 2021, the decisions of the Kúria may be included in the Reports of Court Decisions only by indicating the principal content or shortened content of the decision [Section 163(1b) of the OACA.] In addition to the decisions adopted between 1 January 2012 and 31 December 2020, and published in the Reports of Court Decisions, the principal content, or in lack of that, the shortened content of the decision and the applied legal provisions must be indicated until 31 December 2023 as provided for in paragraph (1b) of Section 163 as introduced by Act CLXV of 2020 on the amendment of certain justice related acts.

case-law shall be taken into account by courts in their jurisdictional activity, divergences from the principal substance of precedents must be duly justified. With respect to the fact that CRPs and CDPs which used to have a special importance, but, as from 1 April 2020, they are on the same level in the hierarchy of legal sources as all other rulings published by the Kúria in the Reports of Court Decisions, we discuss them in the present subchapter.

Based on the interviews with the judges, we have come to the conclusion that the thousands of case decisions do not guide individual discretion of the courts. Furthermore, due to time constraints, we randomly reviewed thirty out of thousands of decisions on alternative sanctions. Criticism of the methodology is of course accepted. Of the cases reviewed, two were considered relevant to our topic.

The first one is Decision No. Bfv.1431/2019/8 that – in a case concerning the felony of unlawful taking of a vehicle – confirmed that under the CC, the measure of release on probation (applicable in place of a penalty) shall not be applied in addition to sentencing simultaneously, not even with regard to juvenile perpetrators. We welcome the practice of the Kúria with regard to the prohibition of the co-application of the above-mentioned penalty and additional penalty.[42] [43]

The other decision is Decision No. Bfv.843/2017/6.[44] adopted in a case concerning the felony of drug-trafficking, which pointed out that although under the CC, the median value of the penalty range shall be the reference value when imposing a sentence of fixed-term imprisonment, another provision must also be taken into account, according to which "punishment shall be imposed by the court within the framework laid down in the Act in proportion to the gravity of the crime committed, bearing in mind the requirement that the penalty must be individual and specific to the offender [Section 80(1) of the CC], accordingly, it shall be possible to diverge from the median value, and a due justification thereof should be provided only in cases when such divergence is significant."[45]

Overall, it can be concluded that in the individual court decisions we examined, the potential vulnerability of social groups did not serve as an orientation criterion for those adopting the decisions.

3.2. Opinions of Criminal Divisions

We have reviewed altogether twenty-four opinions by Criminal Divisions (hereinafter: Opinion 'BK'). As mentioned above, the opinions of court divisions are acts delivered in disputed jurisdictional matters, which are strongly recommended for courts to follow, but formally not binding. One seem to be relevant for the subject matter of our study.

Opinion 56. BK enumerates factors to be assessed when imposing penalties. This source of law was mentioned by all the judges as a non-binding source of law actually influencing practice.

[42] For further details see the following decisions of the Kúria: No. 2012.113, No. 2012.279 and No. 2014.260. In Csertyaszki, M.(2019). A járművezetéstől eltiltás*, Jogi Fórum Publikáció*. Accessed: 3 August 2022. url

[43] One of the judges participating in the roundtable discussion pointed out the following. In the present case, the imposition of the penalty is mandatory under the CC, given that the offence was committed while intoxicated. The court of first instance, however, also considered it necessary to grant probation, during which juveniles are subject to mandatory probation supervision by force of law. Given that it was not the first time that the Kúria has ruled on this matter, there may therefore be instances where the application of a penalty is mandatory by law, but the court considers that the imposition of a certain measure is also desirable. The principle of individualisation cannot therefore apply in such a case. In our view, it would be appropriate to give preference to discretion over mandatory sentencing for juveniles.

[44] Decision No. Bfv.843/2017/6 of the Kúria, capable of being applied as binding case-law, concerning the felony of drug trafficking

[45] Ibid. para. [58].

Under point II/1. a clear criminal record shall be considered to be one of the mitigating circumstances, except when the convict is a juvenile person or a so-called young adult, who is a few years older than a juvenile person.[46]

When discussing the aggravating circumstances in its point II/2. the Opinion states that „the relevance of a criminal record should be strengthened if a series of convictions, the lifestyle of the perpetrator and a repeated commission of a crime suggest a criminal lifestyle." That view can be accepted in general. However, in practice, at small areas in a cumulatively disadvantaged situation and at localities where residents are unemployed and have no stable means of living, due to the application of point bi) of Section 370(2) of the CC[47] that interpretation may give rise to a situation where criminal lifestyle could be established with regard to such persons even during a single winter season. In our view, therefore, disregarding the social and economic situation and context of the perpetrator, a judgment with regard to the lifestyle lead may bring about discriminative judicial practices.

Under point II/4., the age of the perpetrator may be relevant. Young age is not among the mitigating circumstances, but it may be assessed as such, if the perpetrator is not much older than the age of fourteen which is the minimum age of liability to punishment, or if the perpetrator was a young adult when committing the crime.

Old age – due to the fact that it is regularly accompanied by a physical and mental decline, and a decrease of tolerance – is one of the mitigating circumstances; usually the age older than the age of pension may be assessed as such.

Pusuant to point II/5. an „activity or service performed for the benefit of community free of charge (performing charity work, the creation of a foundation, gifts, donations, etc.) may be one of the mitigating circumstances." Especially the second part of the guidance clearly favours persons having significant assets, while social groups with modest financial means are, as a matter of course, excluded from this possibility. Furthermore, working for the public good without remuneration is always welcome, as it portrays the image of a responsible citizen. However, in our view, it is essential to see that mainly an autonomous individual endowed with sufficient material and cultural capital can act for the public good without remuneration. Those without these resources are much less likely to be able to meet this requirement.

Point II/9. concerns the assessment of perpetrators in a difficult financial situation and lays down that in case of crimes against property, the perpetrator's financial difficulties that are not imputable to him or her can be assessed as mitigating circumstances, especially if those are reflected by his or her unsatisfied basic necessities, and the commission of the crime remains within the scope of such satisfaction. In other words, a situation of financial deprivation may be one of the mitigating circumstances. In our view, it is essential that the lifestyle described under point II/2. be read in conjunction with this point, also, it would be appropriate to join these two points.

Under point II/12. health condition may be one of the mitigating circumstances regarding the illness or the severe disability of the perpetrator or any other circumstance that makes the penalty harder to bear, it should have a mitigating effect, and should be taken into account even if it emerged only after the commission of the crime.

[46] Juveniles are subject to different, lighter sentencing rules than adults. See below on young adulthood as a mitigating circumstance.

[47] Theft, even if committed for a value up to the infraction threshold, shall be considered as a criminal offence if committed by cutting down any tree in a forest illegally. Thus, if someone cuts down trees in a forest in winter time on several occasions in order to get fuel and to avoid freezing, criminal lifestyle may be established even during one winter season.

Point III/9. sets out that „it should be assessed for the benefit of the perpetrator if he or she compensated, wholly or in part, the damage caused, and with less emphasis, if the damage was compensated independent from him or her." That guideline, even if indirectly, clearly discriminates against people without assets or with very modest financial means, as they do not even have the chance to make use of that possibility, and, therefore, are in a less favourable situation when compared to others. However, we have no intention to deny the need to compensate the victim. Nevertheless, given the inequalities that exist in the society, it would be important for the restorative approach to be more widely applicable, i.e. to include as a mitigating circumstance the fact that the offender has made reparation for the harm caused by him or her in a manner and to an extent acceptable to the victim.[48]

In light of the above, it is reasonable to revise the Opinion 56. BK in the context of the challenges that society faces today.

3.3. The summaries of the Working Group for the Analysis of Case-law of the Criminal Division of the Kúria

As mentioned before, the Working Group for the Analysis of Case-law of the Criminal Division of the Kúria identifies and examines jurisdictional practice of courts, the results of which it presents in a summarizing opinion and expresses either its supporting opinion or its disagreement as to the appropriateness of the given practice. Based on the analysis, the Head of Division of the Kúria may initiate a procedure for the uniformity of law or may refer the issue to the president of the National Office for the Judiciary in order to propose legislation. Summaries are intended for courts for information purposes.

For the purposes of our study, three opinions were relevant with regard to the practice of non-custodial sentencing:

Summary report No. 2018.El.II.JGY.B.2. concluded on 31 January, 2020 on the examination of national sentencing practice (hereinafter: Report), [49] Summarising opinion No. 2017.EL.II.H.13. concluded on 7 March 2018 on the judicial practice of penitentiary judges with special attention to reintegration custody (hereinafter: Summarising opinion on reintegration custody), [50] and Summarising opinion No. 2020.EL.II.JGY.B.1/23., concluded on 1 July, 2021, entitled "Compensation and the conditions of release on parole in the judicial practice of penitentiary judges" (hereinafter: Summarising opinion on release on parole). [51] With respect to the fact that the Kúria discusses the legal institutions below in different depths, we also follow the extent of the relevant analyses in our study. That is the reason why reintegration custody is discussed in a much more detailed manner than any other legal institution.

3.3.1. The Report on the assessment of national sentencing practice covers adults convicted by a final judgement at second instance by tribunals due to theft or causing grievous bodily harm. Theft and causing grievous bodily harm are crimes with regard to which the range of penalties are identical under the CC. The representative survey concluded that in case of theft, judgements are altogether more severe than in the case of causing grievous bodily harm, and that perpetrators of theft have almost

[48] The new CPC includes this form of compensation as well in the mediation procedure. See Section 412 (3) of the new CPC.
[49] Kúria. (2020). Summary report on the examination of national sentencing practice. Accessed: 20 February 2022. url
[50] Kúria. (2018). On the judicial practice of penitentiary judges with special attention to reintegration custody. Summarising opinion. Accessed: 22 February 2022. url p.70.
[51] Compensation and the conditions of release on parole in the judicial practice of penitentiary judges. Summarising opinion. Accessed: 20 February 2022. url

twice as high the chance to be sentenced to imprisonment to be served that those convicted for being guilty of the felony of causing grievous bodily harm. [52]
There is a visible difference in sentencing practice between counties, which reflects the criminal characteristics of each county, that is, from what kind of social background the convicts come from, what the typical circumstances of the commission of the crime are (e.g. drunkenness, joint offending), and it also indicates the work load of the given tribunal (e.g. the lapse of time as a mitigating circumstance). In case of causing grievous bodily harm, sentencing practice has a more uniform nature, there is no significant difference between the tribunals with respect to the expected chances to be sentenced for imprisonment to be served. In case of felony of theft, however, two separate groups of counties with more severe or with more lenient[53] judgments may be distinguished. [54] The estimated chances to be sentenced for imprisonment to be served depends on the county and there is also a statistically significant difference between the most severe and the most lenient tribunals (counties).[55]

Judicial practice attributes different emphasis to the circumstances of sentencing although Opinion 56. BK enumerating the aggravating and mitigating circumstance does not make a difference between them. There are eight circumstances of sentencing in case of theft and six in case of causing grievous bodily harm that – either to a mitigating or an aggravating effect – receive typically greater emphasis when sentencing compared to other circumstances. In case of causing grievous bodily harm, committing the crime as abettor, the crime remaining in the stage of preparation, a clean criminal record, non-recidivism in case of a criminal record, recidivism, and if the act is an act constituting concurrence, while in the case of theft, in addition to the former, the damage being compensated, partially or in whole, can be considered as circumstances having a significant impact on sentencing.

Although the CC provides that the median value of the penalty range shall be the reference value when imposing a sentence of fixed-term imprisonment [Section 80(2)], the Kúria concludes in its Report that a sentence should be considered as appropriate if it fits in the national sentencing practice applied at a given period of time, and should be considered as inappropriate in case it significantly diverges therefrom. Moreover, the all-time application of the median of the penalty range would treat different life situations identically, instead of differentiated sentencing, which would amount to at least as great a mistake than treating identical life situations differently. With respect to that, Opinion 56. BK mentioned before provides guidance to courts on factors beyond those mentioned in the CC, and which should be taken into account when imposing a sentence.

[52] The Report raises several possible explanations to that. First, it identifies the causing of grievous bodily harm in general as an act that is impulse-driven, committed mostly by people with clear criminal records, and pardon by the aggrieved party is common. Secondly, it classifies the perpetrators of theft and the causing of grievous bodily harm as „mostly professionals" and „mostly amateurs". Thirdly, it refers to the English "Big Data" analytics according to which, with the passage of time, the protection of property is more and more neglected by criminal law, while the protection of persons is more and more frequent, but the increased protection of property is, however, some kind of an "archaic relic" that remained in Hungary (see the differences in the assessment of robbery and insult committed by an act). Furthermore, with the exception of Budapest, there are few devisions operating in the courts, so the severity or leniency of even one or two trial judges can have a decisive impact on the whole county. Kúria. (2020).

[53] The Report determined the severity of the individual courts relying on the criteria based on the severity of penalties and measures in relation to each other. The most severe penalty on top of the range was imprisonment (above 3 years), while the least severe sanctions were reprimand and the measure of ban on visiting sports events. See Kúria. (2020). Summary report on the examination of national sentencing practice. Ibid. p.11.

[54] Ibid. p. 32.

[55] The Report indicates four possible reasons for geographical differences. 1. The hypothesis of "the level of criminality", according to which lower rates of criminality mean that criminal offences are less of a threat to persons, property and public order, therefore, sentencing practice is more lenient, and that difference is not reflected in an adequate manner by the mitigating and aggravating circumstances. 2. Career aspects may be prevalent: the district judges of a given tribunal may adapt their decisions to the practices of tribunal judges. 3. The sentencing practice of tribunals is rarely subject to control by a higher-ranking court, therefore, differences between tribunals as to the severity of jurisdiction are possible. 4. With the exception of the central region, due to the low number of second instance judicial chambers at tribunals, judicial practice is formed by a relatively small number of people, whose personal set of values is decisive when sentencing, therefore sociological reasons (the level of criminality, for example) may also be overshadowed. Ibid.

We find that it is problematic in general that there is a difference between the assessments of theft and the causing of grievous bodily harm analysed in the Report, favouring those committing the causing of grievous bodily harm. The Kúria noted that it would be necessary to adopt a judicial practice that ensures the protection of physical integrity at least to such an extent as the interest in property. With respect to the fact that physical and mental integrity of the individual form part of the right to human dignity, we are of the view that the protection of the integrity of the human body should be of primary importance, in a way, however, that imprisonment to be served should serve as *ultima ratio*.

3.3.2. As for the Summarising opinion on reintegration custody the analysis of release on parole and reintegration custody are of relevance from the point of view of the present study. Namely, these legal institutions may be classified as types of early release and have the aim to allow the convict to spend the penalty or – in case release on parole or reintegration custody are ordered – a part of it outside the penitentiary institution (hereinafter: pen. institution). [56] The Summarising opinion identified the judicial practice primarily of pen. judges concerning all reintegration cases concluded as final and binding in the years of 2015 and 2016, and pen. cases concluded in the first half of the year 2016[57], assessed the the law in force, as appropriate[58], and mentioned the following.

a) Release on parole

Release on parole is regulated both under the CC and the Prison Act. Serving the period of imprisonment determined in the decision of the court of the case is laid down by the Prison Act as an objective condition, while the Act requires, as a subjective condition, that there should be reasonable ground to believe that the objective of punishment can be achieved even without further imprisonment. [59]

In the course of its analysis of the legal institution, the Kúria refers to one of the research projects carried out by the National Institute of Criminology (hereinafter: OKRI) [60] that concludes that comparability is problematic between counties with regard to the differences between pen. institutions, the different distribution of convicts and criminal offences (pen. judges must face a very heavy work load in the Capital, in Fejér, Pest, Bács-Kiskun, and Csongrád Counties). [61] However, as to the judicial practice of pen. judges, their interpretation and application of laws, and their individual methods of decision with regard to the different types of institutions for the execution of imprisonment can be considered as comparable. Pen. judges approved of 70-100 percent of the

[56] For more details see Research, pp. 23-29.

[57] The pen.judge, unlike the judge of the case, is a special forum of justice and legal remedy on the one hand, and on the other hand, has an administrative role, supervises and manages the work of the prison service group and prison service employees; in his or her role as a judge, he or she is authorised to shape the penalty (measure) in the course of the enforcement of punishment.

[58] It should be noted that following the reference period examined by the analysis, the legislator made the conditions of release on parole stricter on several occasions, sometimes in an unjustified and excessive manner, *inter alia*, the Prison Act makes the authorisation of release on parole subject to further conditions. See Section 188(2a) of the Prison Act, and the Research, p.25., as well as A Magyar Helsinki Bizottság észrevételei a hozzátartozók sérelmére elkövetett súlyos személy elleni erőszakos bűncselekmények áldozatainak fokozottabb védelme érdekében egyes törvények módosításáról szóló előterjesztésről. [Observations of the Hungarian Helsinki Committee on the bill concerning the amendment of certain acts for the increased protection of victims of grievous violent crimes against persons, committed against relatives]. *Hungarian Helsinki Committee*. 27 January 2020. Accessed: 23 April 2022. url

[59] For more details see pp. 24-25. of the Research.

[60] The Summarising opinion on reintegration custody refers to the research as a research assignement of OKRI, but does not specify its title, its authors, nor its availability.

[61] The geographical distribution of convicts released on parole: 90% of the prisoners in county pen. institutions, 66% of the convicts in national pen. institutions, 20% of the convicts in the Kalocsa High-security Pen. Institution, 95% of convicts in the Baracska Object of the National Pen. Institution of the Central Transdanubia Region are released on parole if its conditions are fulfilled. Kúria. (2018)

initiatives by pen. institutions in the reference period. Potentially different practices are due to different interpretations of the Prison Act and the personal convictions of pen. judges, and also to the difference of data on which decisions by pen. judges are based. [62]According to a majority of pen. judges, release on parole is a trial of the success of future integration.

b) Reintegration custody[63]

The convict may be placed into reintegration custody before the due date of release on parole, or in case release on parole was or shall be excluded, before the expected date of release provided that the objective of punishment may be attained also that way. This special form of detention puts an end to the full deprivation of the liberty of the convict but restricts his or her right to free movement and the free choice of the place of residence. This legal institution offers a relative liberty for the convict, subject to residence in an apartment, and the leaving of the apartment is subject to authorisation. It aims at decreasing prison population, on one hand, and at facilitating the family and social integration of convicts, and their law-abiding conduct, on the other.[64]

With respect to the fact that reintegration activities are carried out during imprisonment, in the assessment of the Kúria, this legal institution is adapted thereto in an effective manner.

The Kúria concludes in its opinion that the pen. judge has a margin of appreciation even in case the preconditions of reintegration are fulfilled, it is not mandatory for the judge to order reintegration custody against his or her conviction. Moreover, citing one of the courts of appeal, it pointed out that the fact that the rate of appeals against rejections of reintegration requests was almost insignificant, suggests that it was not clear for convicts which conditions are subject to appreciation and which ones are not.

During the period under review by the Kúria, reintegration custody introduced in 2015 could be regarded as a new legal institution that, in the view of the court, necessarily raises problems of interpretation of norms. The analysis, however, pointed out that the judicial practice of pen. judges had, already back then, gone beyond formal interpretation, and they recognised that certain obstacles of ordering the legal institution as set out in an exhaustive and alternative list in the Prison Act can be considered to be permanent, while others temporary.

Judicial practice considers the following to be permanent obstacles:

- if another sentence of imprisonment – except for imprisonment replacing a fine or community service – must be executed with regard to the convict,
- if the reintegration custody authorised during his or her imprisonment was terminated on grounds imputable to the convict.
- if his or her expulsion was ordered by a court.[65]

[62] Details are not provided concerning, *inter alia*, law-abiding lifestyle, the personality assessment, and sound behaviour, which – coupled with different assessment methods – leads to different results. Furthermore, there is no uniform practice in determining the period on which to base the assessment of disciplines, rewards and institutional behaviour in the case of continuous serving of several sentences. Due to the elevated workload of probation officers, requests for risk and needs assessments, and probation officers' opinions often remain unsuccessful. It must be noted, however, that the Prison Act was amended as of 1 January 2019, which already incorporates certain assessment criteria into the legislation, and the explanatory note also gives guidance concerning the question of statements of diverging practices. See in more details under point 3.3.

[63]The Kúria carried out an examination of the practice concerning the legal institution.

[64] Kúria. (2018), and Research, pp.27-29.

[65] In the current version of the law: the court or aliens policing authority. See: point f) of Section 187/C of the Prison Act.

The following may be regarded as temporary obstacles:

- if another sentence of imprisonment replacing a fine or community service must be executed[66],
- the pre-trial detention ordered in a pending criminal case against the convict was interrupted for the duration of the execution of imprisonment,
- the convict has not yet served at least three months from an imprisonment of a duration not exceeding one year, or at least six months from an imprisonment of a duration exceeding one year, or
- the designated apartment (residence) cannot be equipped with an electronic appliance for remote surveillance.

The ordering of reintegration custody is not automatic, with respect to the fact that Section 187/A(1) of the Prison Act makes it subject to the fulfilment of the aims of punishment, in addition to the conditions laid down by law. With the proviso that a careful assessment must be carried out in each case, the Kúria concludes as follows:

- when deciding upon whether reintegration custody can be ordered, it is always the imprisonment to be served which must be taken into account,
- it should be considered as an effective obstacle to release to reintegration custody, if the execution of suspended imprisonment is subsequently ordered,
- the sentences of imprisonment should not be taken into account with respect to which the convict has already been granted expungement,
- reoffenders who are, however, not recidivists may be released to reintegration custody,
- reoffending is not an obstacle to the ordering of the legal institution,
- a multiple criminal record may be an obstacle,
- the law does not make a distinction between suspended prison sentences and prison sentences to be served (i.e. reintegration custody shall not be ordered in either case),[67]
- disciplinary punishment should be an obstacle if the act punished is not imponderous,
- the benefit of reintegration custody may not be denied on the grounds that the ordering of reintegration custody would already pose a threat to the fulfilment of the objective of punishment due to the fact that the convict had already been granted benefits earlier.

Moreover, the active conduct of the convict is necessary, in the course of which he or she must undertake to be in reintegration custody, and a previous declaration to that end should be required from the convict.

In the decision on ordering, the pen. judge, in addition to determining the period of time and the destination, should also provide on the purposes of leaving the place of residence, such as, especially, obtaining the usual necessities of everyday life, work or medical treatment, and participation in education or training.[68] The Kúria pointed out that reintegration custody should be flexibly adapted to the given life situation and primarily to the documented performance of work, with respect to the fact that „the possibility to perform work is the essence of reintegration custody" [69]. Accordingly, the performance of work according to different timetables should be made possible for the convict. Contacts with relatives and other persons may be limited as far as it would be possible during actual

[66] „Due to the special nature of imprisonment replacing a fine or community service, that prison sentence, after having been enforced, allows for release to reintegration custody. In that case (too) a new initiative may be submitted."Kúria. (2018). p. 65.
[67] Moreover, imprisonment imposed as a result of conversion belongs to this group of cases, too.
[68] Sections 61/A (3) and 187/A (4) of the Prison Act.
[69] Kúria. (2018).

imprisonment under the Prison Act.[70] Moreover, in the course of obtaining the usual necessities of everyday life, it is not necessary to set out in details the activities to be carried out in the decision on ordering the custody, but it should be sufficient to recall the provisions of the law together with the indication of time-limits. In general, the Kúria considered it appropriate to authorise the leaving of the place of residence within the administrative boundaries of the locality or the county, but these boundaries should not be interpreted in a rigid manner, with respect to the fact that distance is irrelevant from the point of view of remote surveillance (within Hungary; working abroad shall not be authorised).

The examination refers to a tribunal that found it problematic from the point of view of the effectiveness of the legal institution that assisting organisations are missing from or participate only to a limited extent in the process of facilitating social reintegration. As a consequence, reintegration custody serves solely the purposes of decreasing prison population. In the opinion of other tribunals and courts of appeal, reintegration custody is a living and well-functioning legal institution. All is all, the examination concludes that in the vast majority of courts the existence and functioning of the legal institution have not been questioned not even partially, but there are some problems as to its application.

It is a precondition of the use of electronic appliances for remote surveillance that the real estate designated is equipped with a) electric network and continuous (electric) power supply and b) network coverage and signal strength (field strength) necessary for the communication of data with electronic appliances for remote surveillance. As a consequence, many convicts do not have the possibility to be released to reintegration custody, because in lack of relatives or contact persons, they cannot designate a real estate. Therefore, the Kúria agreed with the proposal put forward by the Hungarian Prison Service Headquarters (hereinafter: BvOP) that in such cases, provided that the convict is entitled to reintegration custody, the designation of real estates of churches, health care institutions or community real estates operated by non-governmental organisations should also be allowed.

It should be noted that, since its entry into force, the Strategy contains that municipal, civil and church organisations play an important role in both prevention and reintegration.[71] As a result, the so-called half-way programme was implemented with the Váltó-sáv Foundation for released persons.[72] Furthermore, as of 27 April 2022, the "Half-way house programme" for persons in reintegration custody has also been included in the Decree of the Ministry of Public Administration and Justice No. 8/2013 on the activities of the Probation Service (hereinafter: the Probation Service Decree).[73]

As for the grounds for terminating reintegration custody, in the Summarising opinion on reintegration custody the Kúria highlights the conduct of the convict for which he or she is liable, so in case the custody is not terminated on grounds imputable to the convict, re-ordering is a possibility guaranteed by law. In lack of liability, there is no grounds for sanctioning, and re-ordering based on a new request is not subject to a decision *ex gratia*.

The Prison Act lays down the minimum periods of time; in case of imprisonment not exceeding the period of one year, at least three months, while in cases exceeding the period of one year, at least six months of imprisonment should be served by the convict, so that his or her conduct may be assessed by the pen. institution for the substantiation of the initiative.

[70] Thus, it can be restricted if the contact is contrary to the objective of punishment or the order and security of the institution. [Sections 83(6), 164(6), and 172(1) of the Prison Act].
[71] See Strategy, title 7. Actors in crime prevention.
[72] HALF WAY – Half-way house for former detainees, BM-19-E-0043, and also the Assisted housing programme with complex services for released persons BM-20-P-0007. For further details see url, as well as url Accessed: 10 May 2022.
[73] See Section 62/G (1)-(8) of the Probation Service Decree.

The period of reintegration custody may not be longer than one year, if the convict was sentenced to imprisonment for committing a negligent criminal offence, in any other case, it may not be longer than ten months. The pen. judge is not authorised to shorten the possible periods, maximum periods should be understood to mean that ordering should not be prevented by the fact that the remaining period to serve from the penalty is shorter than the maximum duration allowed; the period of time spent in reintegration custody should be calculated to the period of imprisonment, and the starting date is to be determined subject to the date of the decision.

A guarantee of the reintegration custody is that it cannot be carried out without an electronic appliance for remote surveillance.

The competent correctional probation officer is to monitor, among other things, the behaviour of the convict in custody and the observance of the behavioural rules set by the pen. judge in the decision on ordering. Rules of behaviour, in the interpretation of the Kúria, cover primarily the scope of authorisation to leave the designated apartment.

In case the modification of certain provisions in the decision on ordering is necessary, or if a request for individual authorisation is received, the pen. judge has five days to change the decision, in accordance with the law. The pen. judge has a freedom of decision when assessing the request, similarly to the ordering of reintegration custody. With respect to the fact that the missing of the deadline is not sanctioned, the Kúria does not find it necessary to support a proposal introduced by a court of appeal for the extension of the deadline. In case of changing the decision on ordering, an appeal may be filed against the decision, while in case of an order on individual authorisation, with respect to the fact that authorisation is classified as a measure, no appeal may be filed against the decision.

The Kúria examined what effects reintegration custody may have on release on parole. If the pen. judge ordered the release on parole of the convict, but the pen. institution notifies the pen. judge until the due date thereof that the convict committed a breach of the rules of behaviour of reintegration custody, or the rules of use of the electronic appliance for remote surveillance, the pen. judge re-examines release on parole. In light of that, the order may be put aside, and a convict liable for his or her behaviour may lose the opportunity to be released on parole, in addition to being refused reintegration custody.

The pen. institution shall submit its statement initiating the termination of reintegration custody to the pen. judge in the following cases:

- the designated apartment has become inapt to be equipped with an electronic appliance of remote surveillance, or the host who had made a declaration earlier revoked his or her declaration and the convict cannot indicate another apartment that would be appropriate for the execution of reintegration custody,
- during the period of reintegration custody, a notification takes place regarding imprisonment to be served or initiation of a new criminal procedure ,
- the convict commits a breach of the rules of behaviour or the rules of use of the electronic appliance of remote surveillance, damages the electronic appliance of remote surveillance, or renders it unusable,
- if the personal conditions were lacking already at the time of ordering.

The pen. judge, however, is not obliged to decide on termination automatically, only in the case when he or she did not release the convict on parole.

As the Kúria notes, all in all, reintegration custody supports the procedure of general reintegration activities of the penitentiary, and mitigates over-crowdedness in prisons, so it is a legal institution

appropriate to attain its purpose. However, it makes the system of enforcement of a sentence of imprisonment more complicated, presents a heavy burden for those participating in the enforcement, it requires institutional, human and other resources, and raises problems in connection with the application of the law. However, both the institutions of release on parole and reintegration custody are good alternatives to mitigate the over-crowdedness of prisons, while, on the other hand they facilitate the reintegration into society in an effective manner.

In addition to the above, we would like to highlight the fact that since the publication of the Summarising opinion on reintegration custody, the legislator also tightened the rules on reintegration custody. At a national meeting of court division leaders in 2016, it was unanimously agreed that the duration of pre-trial detention "shall be taken into account" in relation to the due date for release on parole and " [also] when determining the possible duration of reintegration custody."[74] Nevertheless, as of 1 January 2021, the amendment to the Prison Act came into force, according to which the criterion for reintegration custody is that the detainee must serve three or six months of the prison sentence in the security level determined by the court. The period of pre-trial detention can therefore no longer be taken into account as far as reintegration custody is concerned, which was justified by the legislator on the grounds that there was a lack of consistency in practice "according to the indication received from the judiciary."[75]In our view, it is discriminatory that the period of pre-trial detention is to be counted in the case of release on parole, but not for detainees to be released on reintegration custody. Furthermore, it not only contradicts what the Strategy sets out, but it also unjustifiably ignores what the court division leaders stated, adding to prison overcrowding in a completely unnecessary way. In fact, in pre-trial detention the restriction of liberty is no different in substance than in the case of a custodial sentence imposed by a final decision.

Besides, in agreement with what was said by a defence lawyer during our roundtable discussion, we would like to draw attention to the discriminatory regulation of expelled foreigners.[76] As pointed out above, under the Prison Act, a person who has been ordered to be expelled by a court or the aliens policing authority cannot be placed in reintegration custody. We took the Explanatory note to bill No. T/17572 (hereinafter: Explanatory note)[77] as a basis in order to understand on what grounds the legislator based the exclusion of the application of reintegration custody in the event of expulsion. According to the Explanatory note, reintegration custody is incompatible with the very essence of expulsion, "since, in ordering the expulsion, the court took the position that the offender's stay in the country was undesirable and that he/she was likely to pose a threat to public safety."[78] Given the fact that, as a general rule, the offender being a danger to public security is not a prerequisite for expulsion,[79] in our view, if the expulsion decision does not contain the criterion of the offender posing a danger to public security, the exclusion of foreigners from reintegration custody is unnecessary and disproportionate.

On the other hand, we welcome the fact that the "Halfway-house programme" has been incorporated in the Probation Service Decree since the publication of the Summarising opinion on reintegration

[74] See Kúria. (2018). p. 67.
[75] See the Detailed explanatory memorandum to Sections 94 and 116 of the Final explanatory memorandum of Act XLIII of 2020 amending the Criminal Procedure Act and other related acts (hereinafter: Explanatory Memorandum of Amendment of the new CPC)
[76] See point f) of Section 187/C of the Prison Act.
[77] Given that the amending legislation does not have a formal explanatory note adopted by the Parliament, we took as a basis the publicly available Explanatory note to bill No. T/17572 on Act XIX of 1998 on the Code of Criminal Procedure, on the amendment of certain criminal laws and laws regulating EU and international cooperation in criminal matters.
[78] Explanatory note, title To Section 89-122, part To Section 187/C of the Prison Act.
[79] See Section 59 of the CC.

custody, in addition to the Strategy. As a result, the BvOP may run a halfway-house programme to facilitate the social reintegration of prisoners in reintegration custody, those released on parole and those on aftercare.[80] Nevertheless, it would be reasonable to monitor regularly the need for participation in the programme among detainees who meet the requirements for reintegration custody. Furthermore, the conditions for civil society participation in the programmes should be made transparent.

3.3.3. From the point of view of the present study, the Summarising opinion on release on parole is of relevance for the present study with regard to the part on the conditions of release on parole. In its survey carried out in 2017, and discussed in detail above, the Kúria concluded that there was no bifurcating judicial practice concerning the basic issues of the legal institution, existing differences could be ended by following the dominant solutions. In 2019, as a corollary of a tragedy that occurred during a period of release on parole, on a proposal from the Minister of Justice, the President of the Kúria ordered a new examination of judicial practice as to the conditions of application of the legal institution. [81] The survey, that had an additional character, concerned the conditions of release on parole related to the amendment of the Prison Act effective from 1 January, 2019 [[Section 188 (1a) of the Prison Act] (hereinafter: Amendment), and it also analysed whether judicial practice took into account the considerations in the Decision of Principle No. EBD 2019.B.8. (hereinafter: Decision of Principle) [82] and the theses of the Decision of Principle as introduced by the Amendment. [83] The Working Group for the Analysis of Case-law concluded that it was contrary to the intended purpose of parole if the practice of the pen. judge extended the possibility of parole to an unjustified extreme, therefore considered the possibility of release on parole on the basis of other criteria not specified in the law, in relation to subjective criteria (e.g. if the committed criminal offence or the duration of the sentence were assessed). Furthermore, the restrictive interpretation randomly present in practice before the entry into force of the Amendment also had an undesirable effect, e.g. when certain pen. judges examined exclusively the behaviour of the convict during the enforcement of punishment.

The ministerial explanatory note to the Amendment set out the following non-exhaustive criteria for the purposes of judicial practice of pen. judges:

1. the importance of joint (complex) assessment;
2. taking into account of the behaviour following sentencing;
3. with respect to the behaviour during the enforcement, the assessment of respect for prison order (i.e. punishments and rewards, and progress made in reintegration programmes);
4. as part of the ability to conduct law-abiding lifestyle, the statements of the convict on his or her plans on future housing, employment, lifestyle may also be assessed together with the submitted related supporting documents, criminal records data received during the time of the interview, or the opinion of the correctional probation officer, and in case of off-setting, the behaviour of the convict who was at liberty and against whom coercive measures (including reintegration custody) were applied, in the period running till the decision on his or her release on parole.

[80] See f.n. 66.

[81] In spite of the conclusions of the Working Group for the Analysis of Case-law, as mentioned above, the statutory conditions of release on parole have become stricter.

[82] According to the decision, if the objective criteria of release on parole are fulfilled, and the pen. judge, in addition to the behaviour of the convict during the enforcement of punishment, also examines the nature of the committed criminal offence, and the role of the convict in the commission of the criminal offence, that should not be considered as the assessment of those conditions twice (CDP 2019.B.8.)

[83]The Amendment put aside the restrictive interpretation based on the legislative text in force before 1 January 2019, and provided, *inter alia*, for the pen. judge to examine the committed criminal offence and the duration of the sentence imposed, with respect to the fact that the aim of the enforceability of imprisonment is special prevention.

The report mentioned that in order to establish whether the objective of punishment was attainable without further deprivation of liberty, as required by the Prison Act, the pen. judge was to examine *inter alia* the behaviour of the convict resulting in or aiming at reparation; however, the convict's inability to work might be an obstacle to perform reparation work, as well as the low level of prisoners' wages.[84] At the same time, the Kúria approved of the practice according to which pen. judges, when releasing on parole, provided for probationary supervision, and ordered reparation.

In connection with reparation, it is worth mentioning that it may even amount to discrimination if applied without due consideration for the personal circumstances of the convict, as it may favour convicts who are better off, as opposed to those whose family cannot afford the payment of damages. That is especially true with respect to a provision of the Prison Act in force as of 1 January 2021[85] which provides that in case of release on parole it must be taken into account whether the convict, in lack of an aggrieved party, had made a payment to the funds „for the compensation of victims of crime" maintained by the Ministry. With regard to the appropriate compensation of victims, we would consider the broader applicability of the restorative approach mentioned in relation to the 56th BK opinion to be beneficial, by taking into account the personal circumstances of both the victim and the offender.[86]

The Kúria held in connection with the fulfilment of the subjective conditions of release on parole that the act required a probability and not substantiation by evidence. As a consequence, whether the decision was right remains to be seen after it was made. The ordering of release on parole was usually efficient, the number of terminations was low compared to the number of releases. Before 2019, one third of the tribunals extended the scope of assessment to aspects not provided for in the legislation, while after the entry into force of the Amendment, two-thirds of the tribunals took into account the aspects provided for in the text of the legislation. In case of other tribunals, the court of second instance corrected the decisions to comply with the Amendment, which demonstrated the appropriateness of judicial practice.

However, the Kúria reiterated its proposal out forward in its earlier Summarising opinion, according to which it would be important for the pen. judge to be able to decide on release on parole, departing from the provisions of the case court, following that the convict has served one half of the prison sentence, or, respectively, in case the case court excluded the convict to be released on parole, or release on parole was excluded by the law, the pen. judge should be able to decide on the release on parole of the convict, following that the four-fifths of the prison sentence has been served. Moreover, in the view of the Kúria, it would be important to make release on parole possible also by using electronic appliances for remote surveillance.

We consider the repeated proposal of the Kúria as progressive. However, we think that it is important to note that we consider neither the Amending Act, nor the subsequent amendments to the legislation as appropriate for attaining the goals set, moreover, we do not consider those as efficient means for attaining the objective of punishment. In our view, *inter alia*, the placing of further burdens on the

[84] With respect to the fact that the employment of detainees shall not be considered as employment relationship under Act I of 2012 on the Labor Code (hereinafter: Labor Code) but a penitentiary legal relationship under the Prison Act, the wages of convicts under Section 258(1) of the Prison Act shall not be less than one third of the statutory minimum wage (minimum wage). *Under The Instruction of the BvOP on work wages, scholarships of detainees, the reimbursement fees of employment for the purposes of work therapy for the year 2022 and contributions to maintenance costs No. 42/2021. (XII. 16.)*, as from 1 January 2022, the base wage of detainees participating in employment and employed in full-time shall not be less than 321 HUF (at the exchange rate of 26.07. 2022 approx. 0,8 EUR) in case of hourly wages (cf. the net minimum wage is HUF 767, appr. EUR 1,9).

[85] Point d) of Section 188(1a) of the Prison Act.

[86] See Section 3.2.

already overburdened pen. institutions[87], and refusing convicts the opportunity to be released on parole renders the fulfilment of the functions of the prison service much more difficult, elevates security risks, and decreases the chances of reintegration of the detainee into society. [88]

3.4. Punishment orders

In view of the fact that in the interviews with the judges, as well as at the roundtable discussions we organised, the legal institution of punishment order and the claim that it raises constitutional problems were raised several times, we consider it necessary to briefly address the issue and we consider the following to be worth mentioning.

The increasing use of punishment orders is noteworthy.[89] In the final decision, the court may, as a general rule, impose suspended imprisonment, community service, a fine, disqualification from a profession, disqualification from driving a vehicle, a ban on visiting sports events, or expulsion, without a hearing, on the basis of the case file. Therefore, in addition to suspended imprisonment, it may also apply all alternative penalties to imprisonment, as well as reparation work, release on probation or reprimand, or, under certain conditions, other measures not involving deprivation of the liberty, as specified in the CC.[90] According to the latest data published by the Office of the Prosecutor General, in 2020, the prosecution proposed punishment orders in 72 percent of all indictments,[91] which is an increase of nearly 23 percent compared to the previous year, while in 2018, the share of decisions not to bring a case to trial barely reached 38 percent of all indictments.[92] The fact that the legislation has broadened the conditions for punishment orders during the emergency regime plays a prominent role in this regard.[93] In contrast, the number of prosecutions has been steadily decreasing, from 64 025 in 2014 to 47 381 in 2020. [94] According to Recommendation No. R (87) 18 of the Committee of Ministers to Member States concerning the Simplification of Criminal Justice of the Council of Europe (hereafter: CoE Recommendation), the range of penalties that may be imposed as a result of a procedure without trial "should be limited to pecuniary sanctions and forfeiture of rights, to the exclusion of any prison

[87] For detailed data see: A Magyar Helsinki Bizottság észrevételei a hozzátartozók sérelmére elkövetett súlyos személy elleni erőszakos bűncselekmények áldozatainak fokozottabb védelme érdekében egyes törvények módosításáról szóló előterjesztésről. [Observations of the Hungarian Helsinki Committee on the bill concerning the amendment of certain acts for the increased protection of victims of grievous violent crimes against persons, committed against relatives]. *Hungarian Helsinki Committee.* 27 January 2020. Accessed: 23 April 2022. url

[88] Ibid.

[89] The predecessor of this legal institution can be considered to be a waiver of trial, which was introduced by the repealed Act XIX of 1998 on the Code of Criminal Procedure (hereinafter: the old CPC) with effect from 1 July 2003. The court could impose suspended imprisonment, a fine or a measure as an independent punishment, or release on probation, on condition, among other things, that the accused confessed. The new CPC, however, makes a distinction between a defendant accused of an offence punishable by imprisonment for a term of less than three years and a defendant accused of an offence punishable by imprisonment for a term of no more than five years: only in the case of the latter is a confession a mandatory requirement, among other things, while no such requirement is imposed on a defendant facing imprisonment for three years. Although there is no right of appeal against a punishment order, the accused can, among other things, request a hearing if he or she disagrees with the decision, which will result in proceedings being conducted according to the general rules. See Sections 740-743 of the new CPC.

[90] For further details see Section 741(1)-(2) of the new CPC.

[91] Office of the Prosecution General. (2021). Prosecution Statistics Bulletin (Criminal Law Section) Annual Activity Report 2020. Accessed: 26 July 2022. url p. 44.

[92] Office of the Prosecution General. (2019). Prosecution Statistics Bulletin (Criminal Law Section) Activity in the first half of 2018., url p. 33. and Office of the Prosecution General. (2019). Prosecution Statistics Bulletin (Criminal Law Section) Activity in the second half of 2018. url p.42. Accessed: 26 July 2022.

[93] See Article 89 of Governmental Decree No. 74/2020 on certain measures applicable during the period of state of danger, repealed as of 18 June 2020, which had allowed for the for the issuing of a punishment order in the case of an offence punishable by imprisonment of not more than eight years, regardless of the confession of the accused.

[94] See Recommendation No. R(87)18 Adopted by the Committee of Ministers of the Council of Europe on 17 September 1987 and Explanatory Memorandum.

sentence."[95] It is beyond the scope of the present study to evaluate the legal institution of punishment order, however, it is important to note that, with regard to sanctions, the possibility of applying suspended imprisonment in view of the CoE Recommendation, which excludes all sanctions of restriction of liberty in the case of proceedings without trial, is problematic.[96] Nevertheless, facilitating the imposition of alternative sanctions to imprisonment in a simplified procedure would be acceptable, provided that appropriate safeguards are in place as follows.[97] The CoE Recommendation emphasises the need for the accused to be properly informed and to be given sufficient time to seek legal advice. Knowing the circumstances in Hungary, we would consider it important if the accused were to receive more comprehensible information from the prosecuting authority than at present, appropriate to their personal characteristics, about the nature and consequences of the punishment order to be issued, so that specific prevention could be guaranteed, and also if the authority provided the accused with adequate information about the possibilities of legal remedies and with adequate legal defence. Knowing the situation in Hungary, we would consider it important if the accused were to receive more comprehensible information from the prosecuting authority than at present, in accordance with their personal characteristics, about the nature of the punishment order to be issued, the legal remedies available and the consequences of the punishment order, in order to ensure special prevention. It would also be necessary to ensure adequate protection of the accused in the procedure. In addition, it would be important, and would have a particular impact on vulnerable social groups, to allow longer time to initiate a trial.

3.5. Interviews with judges

The method of interviewing, the characteristics of the interviewed persons (not allowing for their personal identification) for the purposes of the survey

We interviewed the judges on the basis of contacting them personally, some of them refused our request, while others were ready to share their experiences. We did not inform the judges about the questions previously, we merely told them that we would ask questions concerning sentencing practice and the conversation would not last more than an hour. We talked to some at the court, with others at a café, and others online.

One of the judges is in service in the country, and four are in service in the capital. Two of them have been working as criminal judges for approximately ten years, one of them approximately for twenty years, another one of them for more than twenty years, and there is one judge among those interviewed who has a career of more than thirty years, who has also been holding a court leader position for a longer period. The work experience of those concerned covered the areas relevant from the point of view of the research, because the interviewed judges included judges with experience as an investigating judge, a judge of a juvenile court, a judge of a district court of first instance, a judge of a tribunal, and also a judge who is in charge of the training of judges in his or her court. Therefore,

[95] Ibid. Recommendation, Part II, section c, point 3 of the CoE Recommendation. Note: The CoE Recommendation uses the term penal order, which by definition corresponds to the punishment order: "in the case of offences which are minor due to the circumstances of the case, where the facts of the case seem well established and it appears certain that the person charged is the person who committed the offence, recourse may be had to simplified procedures, that is written procedures carried out by the judicial authority, dispensing with the hearing stage and leading to decisions equivalent to sentences, for example the penal order procedure." Recommendation, Part II, section c, point 1 of the CoE Recommendation.

[96] We consider it problematic, despite the fact that we have included suspended imprisonment as an alternative sanction to imprisonment in our study. The legal instrument is in fact a custodial sentence, the execution of which is suspended by the judge for a probationary period.

[97] On the concerns raised by the institution of the confession at the preparatory session of the court see Novoszádék, N., Szegő D. (2021). Trial Waiver in Hungary, Research report, *Hungarian Helsinki Committee*. Accessed: 28 July 2022. url

although only a total of five judges were interviewed, the experience and knowledge of the interviewed persons have proved to be useful for the purposes of the research, and since their answers pointed in one direction in relation to the substance of the research, we would not expect to get different results by interviewing more judges. We give a summary of the questions asked and the answers given as follows:

1. *In addition to the principles of sentencing under Chapter IX of the CC, what normative sources are there to regulate the cases when the judge, based on a margin of manoeuvre/appreciation provided for by the CC, may apply a sanction other than imprisonment or confinement, in case criminal liability is established?*

The judges considered the provisions of the CC unanimously as ensuring a large margin of manoeuvre but remarked that there were very few other legal sources to provide guidance for making their decisions within that margin of manoeuvre. In that regard, all of them referred to Opinion 56. BK on the circumstances that may be assessed when imposing sentences, as one known legal source. They have not mentioned any other legal source, and all of them commented that Opinion 56. BK refers to assessments related to all sentencing, and that there was no normative legal source of any kind providing specially on alternative sanctions. That is, there was no legal source mentioned by them, which would provide on whether imprisonment to be served or suspended imprisonment should be imposed, and similarly, there were no provisions regulating what a judge should take into account when carrying out the assessment of alternatives to imprisonment.

As a matter of course, that does not mean that the considerations included in Opinion 56. BK or in sporadically mentioned case-law (judicial decisions, 'BH') would not *de facto* guide judicial assessment, but merely means that there is no known uniform legal source in the broad sense relevant from the point of view of the present research (a written material effectively influencing judicial decision-making and assessment, irrespective of its normative/binding force). On the basis of the answers given to the fourth question, it has become clear that the legal sources thus interpreted are nevertheless present in judicial thinking, even though those are not necessarily formally referred to in the reasoning of court judgements. According to the judges, if the mitigating and aggravating circumstances are listed in the judgment, and those are appropriately reflected according to their importance in the sentence, that reasoning will be sufficient for the court of second instance as well. Taking all these together, at the same time, knowledge of customary law and experience, and individual thinking also influence the assessment, and accordingly, practice may be different in each county.

2. *In addition to case-law (judicial decisions/'BH', opinion 'BK's, uniformity decisions, summaries by working groups for the analysis of case-law, etc.) are there any further criteria or legal sources in the broad sense (i.e. anything actually influencing judicial decision-making) that could be relevant from the point of view of the previous question?*

One of the interviewees, who was also in charge of the training for judges, was not aware of any legal literature pertaining to sentencing. The training of would-be judges included the subject matter of sentencing, but that was basically limited to the discussion of Opinion 56. BK, and there was no material specifically related to alternative sanctions. The training of newly appointed judges did not concern the issues investigated by the research. Furthermore, the interviewed judges mentioned a

recently organised central training on sentencing but that did not concern alternative sanctions either.[98] Also recently, there has been a training held by probation officers, where practical feedback has been given on realistic behavioural rules, essentially on cases when it is highly probable that alternative sanctions become unenforceable. The interviewees also mentioned that when the limited precedent system was introduced the issue was raised that it would be appropriate to carry out an overall assessment encompassing all the decisions of the Kúria, but has not yet started, and therefore, there was no such material on sentencing practice neither of a general nature or with a special focus on alternative sanctions, nor about what must be or should be assessed in connection with the different vulnerable social groups when sentencing in addition to those mentioned in Opinion 56. BK. The interviewed judges would find a similar survey or collection of case-law typically useful. One of them mentioned, however, that in case the legal source was binding, he or she would consider it as a violation of judicial independence, because it would be contrary the principle of being subject to legislation, if non-legislative provisions were binding on judges.

3. What are the most important or most often referred sources of law that You apply, and which are relevant from the point of view of questions 1. and 2.?

Typically, the judges have provided no substantial answer to this question.

4. Does any of the legal sources mentioned include the following considerations or aspects, if yes, which are those?

When this question, and the sub-questions of the question were asked, it has become clear that certain aspects were assessed very similarly or even identically by the judges, while other aspects were taken into account based on individual professional or moral concerns. They have described certain characteristics typically as obstacles to applying alternative sanctions, while other aspects were treated as non-assessed or as aspects that contradict prison sentence or support prison sentence of another security-level.

a) Material deprivation

Material deprivation is taken into account by judges from several aspects: when deciding upon criminal liability and as one of the mitigating circumstances related to certain criminal offences, and when choosing the appropriate sanction.
An example for the first type of cases was a case mentioned by one of the judges concerning the endangering of a minor where the severe material deprivation of the family had to be taken into account, and together with the fact that the parents „could not make do", and accordingly, the question emerged what minimum level of due care might be reasonably expected, bearing in mind the best interest of the child. In the view of this judge, poverty, in the specific case, might exclude criminal liability if it amounted to a circumstance that excluded reasonableness.

[98] According to one judge who is familiar with judicial case law, the law places a disproportionate emphasis on judicial discretion, which overburdens judges. In his view, there would be a need for guidelines and criteria in this regard. He argues that sentencing is subject to the current needs of the society, rather than long-term considerations. - Presented at the roundtable discussion on 10 June 2022.

Another judge mentioned the failure to provide maintenance as a criminal offence in the case of which poverty might be one of the grounds for acquittal, but only if it was apparent that the defendant did everything to produce the necessary resources to fulfil his or her obligation to provide maintenance but did not manage to do so.

In the view of the same judge, in case of subsistence crimes, material deprivation may be one of the emphatical mitigating circumstances, but only with respect to the satisfaction of basic necessities, so in a case where the defendant steals cars regularly for generating income, poverty cannot be given consideration or only to a substantially smaller extent.

When selecting the sanction to be imposed, financial situation is taken into account from several aspects by judges. Several judges mentioned that although in principle a fine is a less severe sanction than suspended imprisonment, if the defendant does not have an appropriate income, a fine is not imposed, and rather release on probation or suspended imprisonment is applied, which, in the given case, may favour the specific defendant, because he or she is not threatened by the risk of conversion of the penalty in case of non-payment. One of the judges said that he or she typically refrains from imposing community service on defendants in such a situation, because if the defendant is able to work, he or she should be allowed to earn money.

It must be noted that that solution may be counterproductive, because if release on probation is a too lenient sanction in a case, and neither a fine nor community service can be applied, only suspended imprisonment remains a real option for the judge. That is problematic because if a theft of minor value or another criminal offence of similarly insignificant gravity is committed during suspension, the enforcement of the formerly suspended imprisonment must be ordered in the judgement on sentencing without any possibility of discretion, and therefore, as a result, the outcome can be worse for the defendant at issue as if, say, community service had been imposed on him or her.

Another one of the judges does not impose a fine in case of subsistence crimes, because by doing so, he or she might make the defendant commit another criminal offence in order to be able to pay the fine.

A third judge said that if a decision must be made about the sentence of a defendant who lives in financial difficulty, he or she takes into account criminal costs, too, when determining the daily amount of the fine, because if the defendant cannot pay, chances are higher that the imposed fine needs to be converted in the future. This very same judge prefers to impose community service, if possible, but there are cases when suspended imprisonment is a less severe sanction in practice, for example, in case of a poor family, especially if the defendant is the breadwinner in the family.

In connection with imprisonment, one of the judges said that in case of subsistence crimes, if the criminal offences are not committed on a regular basis, he or she does not apply imprisonment. Another judge, on the other hand, argue that, in some cases, he or she imposes an imprisonment of longer duration on poorer defendants, because some of the accused persons arrive from such unfavourable circumstances that, for them, sanctioning in prison environment is not as severe as for a well-situated “white-collar criminal”. That is interesting from the point of view of the deterring force of punishment and special prevention, because it means that a different – shorter – deprivation of liberty deters a white-collar criminal than someone living in extreme poverty.

b) Homelessness

Several of the interviewed judges said that although in principle a defendant struggling with homelessness might also have an income, imposing a fine is usually not an option in their case. Also, several of the interviewees noted that the enforcement of community service is made very difficult when the defendant is a person living in homelessness, because the judge cannot be sure that the organs responsible for the enforcement will find the person concerned, and thus chances are higher that the penalty will need to be converted, and as a matter of fact, it is an important examination criterion, whether there is any real chance that the convict will actually perform community service as imposed.

With respect to that, the judges are of the view that, for defendants, suspended imprisonment is a less severe sanction than community service which is almost sure to be converted. Due to the difficulties of contacting by the authority, release on probation is not a real option in the view of the judges, if regular contacts are necessary with the probation officer.

In the view of another judge, however, if „there is a phone number on which the accused is likely to be reached, probation officers will also try to contact him or her by that means, and in such a case, community service may be an option in case of homeless persons, too."

In connection with homelessness – in addition to the opinion of one of the interviewed judges according to which it is almost an automatic reason for pre-trial detention in case of criminal offences of greater material gravity – the interviewees also mentioned that defendants struggling with homelessness sometimes expressly request or tacitly acknowledge a sentence of imprisonment in winter.

Concerning community service, it has also been mentioned that nowadays judges do not even meet the accused in most of the cases, because judges are to decide by means of a criminal order, and thus have no information on the health condition of the defendant, and do not know, therefore, whether at the time of decision-making, a successful execution of community service can be reasonably expected.

c) Physical and/or mental disability

In connection with mental disability, several judges emphasised that in case of criminal offences of minor gravity, it can be taken into account as one of the mitigating circumstances even if it does not exclude criminal responsibility. Also, it is taken into account when assessing the ability to tolerate prison, which means that in case of a defendant with mental disability, in certain cases, a prison sentence of a security-level lower than prescribed by the governing rules may be an option, where the deprivation of liberty is less severe.
Due to work ability criteria, community service sentence is very difficult in cases of physical or mental disability. There are only a very limited number of employers who can receive persons with a mental disability, and the possibility of community service sentence may be precluded even by diabetes with regard to work ability criteria.

d) Foreigners

Opinions diverged in relation to what extent foreign citizenship increases the chances of imprisonment. In the view of one of the interviewed judges, due to the risk of escaping or hiding, it is more typical for foreigners to be ordered under pre-trial detention, especially if there is no extradition treaty with the country of origin. However, another judge said that that tendency has changed, and nowadays it is not so typical to order foreigners under pre-trial detention, as it used to be before.
In relation to sentencing it was mentioned that judges must take into account that the negative consequences of imprisonment are much graver in case of a foreigner as in the case of a Hungarian national, especially if the convict does not speak Hungarian.

Language competence as an aspect to consider was also mentioned in connection with community service. In the view of the judge interviewed, that sentence is practically excluded in the case of foreigners: first, due to language barriers, and second, due to the fact that it cannot be reasonably expected from the person concerned to remain in the country to perform penalty work, and accordingly, a fine or suspended imprisonment may be available, if imprisonment to be served is otherwise not justified.

e) Elderly people

The judges interviewed mentioned in relation to old age that, in case of a clear criminal record, it is one of the important mitigating circumstances.
In connection with the sanctions applied, they primarily highlighted that community service is typically not applied in case of elderly defendants (according to one of the judges, that means persons older than the age of 70 years), and a fine is also rarely imposed. Imprisonment to be served is imposed only as *ultima ratio*, and even in that case, the sentencing to lower security-level imprisonment is typical. The most typical sanctions in relation to this group of defendants are measures.

f) Ethnic origin

All of the judges emphasised that if the ethnic origin of the defendant influences the sentencing by a judge, then that judge shall be considered as incapable to perform its tasks. The interviewees unanimously found it unacceptable if a judge's decision is consciously diverted because the accused is e.g. a Roma. The interviewees acknowledged that due to other reasons inherent in the system or due to social problems (there are more people experiencing homelessness, ill and poor persons among the Roma) may result in ethnic disproportionalities, but they did not consider it as discrimination on an ethnic basis.
One of the judges noted that in case of hate crimes, it can be one of the aggravating circumstances if the person committing the crime is a member of an ethnic or national group whom the victim should traditionally be protected from. As an example, the judge mentioned the case of the Azeri military officer who killed his Armenian fellow-student with an axe.

g) Women:

The sentencing of women is closely related to the question of raising children. Taking care of small children is an important aspect when determining the sanction to be applied: in case of babies, for example, the committed criminal offence must be of great gravity to induce judges to impose imprisonment to be served.
Even in such cases, it may result in a mitigation both with respect to the security-level and the duration of imprisonment.

h) Young adults:

Several of the judges emphasised that the maturity of the defendant must be taken into account when imposing sanctions. Provided that the educational objective of criminal sanctioning appears to be attainable by its application, it is appropriate to apply suspended imprisonment or community service. The latter may be supported, for example, with regard to the fact that it may have an educating effect if the young person concerned must be publicly present as a convicted person. On the other hand, the educating effect of a fine is questionable, because that is most likely to be paid by the family of the defendant, so community service or release on probation are more likely to be applied in such cases. For the sake of education, it is common for judges to apply other sanctions together with probationary supervision.

4. Conclusion

Acts and explanatory notes to acts contain references to the basic principles on international conventions. However, we find it problematic that the sanctions applied as alternatives to imprisonment are, in many cases, more likely to be available as real alternatives only for the financially better off. This comprises the fact that, in the absence of well-functioning institutions outside the criminal justice system, offenders without private property and/or social networks are not, or are much less likely to be placed in reintegration custody than their better-off peers in a comparable situation. Furthermore, different sentencing practices can be identified with respect to the location where the criminal offence is committed. Taken as a whole, those practices reflect the social background of the perpetrators, the typical circumstances of the commission of the offence, and the workload of the given tribunals. With respect to the fact that our study has the aim of providing a survey of non-custodial sentencing practice as reflected in the binding and non-binding sources of law, an outlook on the institutional system outside the criminal justice system and on its functions falls outside the scope of our analysis. In conclusion it can be said that criminal justice in Hungary relies upon a vision of society and a set of norms according to which the vulnerability of social groups is only narrowly addressed. A striking example of this is that there is, based on the interviews with the judges, for example, much more room for assessment of vulnerability than what is or could be reflected in the relevant Opinion BK 56.

Consideration should be given to the introduction of instruments aimed at the harmonisation of jurisprudence in order to achieve uniform judicial practice, which in our view, is mainly the task of the judiciary.