

APPLICABILITY AND NEEDS FOR SHORT TERM INCARCERATION (*CUSTODIAL ARREST*)

ANDRÁS PAYRICH*

History

The so-called Csemegi Code (Csemegi Kódex), meaning Act V of 1878 set up a three-tier system for criminal activities based on their severity: felony, delict and delinquency. The Csemegi Code determinates the loss of freedom of punishment by five separate possibilities: in jail, state prison, prison, detention house or occlusion.¹

The occlusion was the sanction of violent crimes. As for the delinquencies, they started to be regulated by Act XL of 1879 on special Penal Code (Kbtk.), the custodial arrest can be found in Article 15 of the Kbtk. among the punishments of delinquencies. Generally, the shortest time one could be incarcerated was as little as three hours. The maximum length depended on what level of legal regulation established the delinquency: two months, if by law; fifteen days if by ministerial decree; five days if by local governmental decree; three days if by a city regulation.

To replace part of the general part of the Csemegi Code, about the re-creation of the general part of the Penal Code - the Act II of 1950 (the so-called and hereinafter mentioned: Btá) remade the penalty system of Csemegi Code (appreciably simplifying) and instituted the uniform imprisonment. The Btá. regulated only one kind of imprisonment, namely the prison. It also so retained the occlusions for offence.²

There has been no research into custodial arrest, although it has come up as a possibility in OKRI (*National Institute of Criminology*). Right now, we can only use the relevant legal acts as foundation.

Rules in Force

Incarceration is found at Section 33. (1) point b) of the current Penal Code in effect described by Article 46. (1) and specified by the Section 111.

* Attorney-at-law and PhD student, Széchenyi István University, Postgraduate Doctoral School of Law and Political Sciences. Email: payrich@yahoo.com.

¹ See Csordás Sándor – Csóti András – Garami Lajos – Müller Anikó: Szabadságvesztés végrehajtási fokozatok nélkül? (Gondolatok az új Btk. kodifikációjához) [Deprivation of Liberty without Degrees? Thoughts on the Codification of the New Criminal Code.] *Büntetőjogi Kodifikáció*, 2001, No. 2. (<http://ujbtk.hu/buntetojogi-kodifikacio-2001-2/>).

² See Csordás–Csóti–Garami–Müller: *op. cit.* 26.



Section 46.

(1) The duration of custodial arrest shall be determined in days. The minimum and the maximum duration of custodial arrest shall be five days and ninety days, respectively.

(2) Custodial arrest shall be carried out in a penal institution.

Section 111.

The minimum duration of custodial arrest to be imposed upon a juvenile shall be three days, its maximum duration shall be thirty days.

Based on these, custodial arrest is a genre of punishment resulting in imprisonment. The Government of Hungary submitted the new Criminal Code (later known as Act C of 2012) as legislative proposal T/6958 to the National Assembly. The reasoning contains the following:

“Custodial arrest is a punishment of imprisonment to be used in case of culprits sentencing whom to other types of punishment is deemed unreasonable due to their social, economic, family of age issues, or special prevention can be better served by this type of punishment. Custodial arrest may last from five days until ninety days. According to the Special Part, for criminal activities punishable by incarceration, custodial arrest can be set as sentence instead of imprisonment separately or in concert with other types of punishment. Should a criminal activity be punishable by custodial arrest, other types of punishment can be set instead of or beyond imprisonment.”³

This reasoning is criticized by *Ferenc Nagy* when elaborating that based on financial situation, the more wealthy culprits can get away with a fine for something that will result in a custodial arrest for those less well-off.⁴

According to the current Criminal Code in effect, the following criminal offences can be punished by custodial arrest: i) Criminal offenses with Toxic Substances; ii) Invasion of Privacy; iii) Mail Fraud; iv) Criminal offenses with classified information; v) Misleading Authority; vi) Unlawful Refusal to Give Evidence; vii) Suppressing Exculpatory Evidence; viii) Escape from Custody; ix) Use of Symbols of Totalitarianism; x) Forgery of Administrative Documents; xi) Violation of Epidemic Control Regulations; xii) Counterfeiting of Cash-Substitute Payment Instruments; xiii) Breach of Discipline in the Line of Duty and xiv) Disobedience. Beyond these, custodial arrest may be set as sentence in case of commutation or unlimited mitigation.

³ See Legislative proposal T/6958 on the Criminal Code

<http://www.parlament.hu/irom39/06958/06958.pdf> (hereinafter: T/6958) 232-233.

⁴ See Nagy, Ferenc: A szabadságelvonással járó szankciókról az új Btk.-ban [On Sanctions with Deprivation of Liberty]. *Börtönügyi Szemle*, 2014. 4., See in detail:

<http://bv.gov.hu/download/8/1a/01000/B%C3%B6rt%C3%B6n%C3%BCgyi%20Szemle%202014-4.pdf>, 11.

The Act CCXL of 2013 (Bvtv.) about penalties, actions, some of coercion and misdemeanour detention implementation and Decree 16/2014. (XII. 19.) IM (Minister of Justice) about the detailed rules of imprisonment, detention, preliminary arrest and entering replaced with fines short-term prison execution – contain the following important rules relevant to the topic being discussed concerning custodial arrest:

- ❖ Custodial arrest shall take place in a penal institute appointed by law [Bvtv. Section 273 (2)],
- ❖ Implementing custodial arrest shall be performed under the governance of rules stipulated to minimum security prisons and the culprit sentenced to custodial arrest is entitled to the rights provided to imprisoned culprits [Bvtv. Section 273 (3)],
- ❖ Those sentenced to custodial arrest and those imprisoned for summary offenses can stay in the same quarters [Bvtv. Section 273 (4)],
- ❖ While performing custodial arrest, those under custodial arrest have to be separated from those imprisoned or under preliminary detention [Bvtv. Section 273 (5)],
- ❖ Those sentenced to custodial arrest shall the term of custodial arrest appointed by criminal proceedings authorities [Bvtv. Section 274 (3) a)],
- ❖ Those sentenced to custodial arrest shall keep the house order of the penal institution and perform according to the orders received [Bvtv. Section 274 (3) b)],
- ❖ Those sentenced to custodial arrest shall occasionally participate in cleaning and supply work of the penal institute without expecting remuneration [Bvtv. Section 274 (3) c)],
- ❖ Those sentenced to custodial arrest, if within school age, shall perform primary educational studies [Bvtv. Section 274 (3) f)],
- ❖ Those sentenced to custodial arrest may wear their own clothes [Bvtv. Section 275 (1) a)],
- ❖ Those sentenced to custodial arrest may keep correspondence with their relatives and the persons approved by the penal institute [Bvtv. Section 275 (1) b)],
- ❖ Those sentenced to custodial arrest may spend ten minutes using the phone, at least three times a week, while providing an opportunity of monitoring [Bvtv. Section 275 (1) c)],
- ❖ Those sentenced to custodial arrest may receive a visitor at least twice a month [Bvtv. Section 275 § (1) d)], lasting 90 minutes [16/2014. (XII. 19.) Decree of the Minister of Justice, Section 179 (3) a)],
- ❖ Those sentenced to custodial arrest may be away for 4 hours a week [Bvtv. Section 275 (1) e)],
- ❖ Those sentenced to custodial arrest may receive a parcel [Bvtv. Section 275 (1) g)],
- ❖ Those sentenced to custodial arrest may utilise the sport and public education opportunities arising in the penal institution [Bvtv. Section 275 (1) b)],
- ❖ Those sentenced to custodial arrest may stay in open air for at least an hour a day [Bvtv. Section 275 (1) i)],
- ❖ Those sentenced to custodial arrest may participate in employment and offsite work [Bvtv. Section 275 (7) a)],
- ❖ Those sentenced to custodial arrest may work together with those imprisoned [Bvtv. Section 275 (7) b)],
- ❖ During medical treatment, they don't have to be separated from the other prisoners [Bvtv. Section 99 (3) and Section 277. (2)],

- ❖ The occlusion or its remaining part cannot be executed, if following the judgment becomes final the convict after giving birth took care for the child in their own household for an year, or for at least one year child care fee or child care assistance benefits received, or five years or more time spent in pre-trial detention or imprisonment, or two years or more time spent in detention home (Bvtv. Section 278),
- ❖ During the implementation of detention the soldiers, in addition as described in the Section 273. Paragraph 5 the other convict and spending misdemeanour occlusion principal, and further the different stock group soldiers must be separated from each other [Bvtv. Section 279 (2)],
- ❖ Progressive regime rules⁵ of confinement as defined in Section II. are not applicable on the convict. [16/2014. (XII. 19.) IM Decree Section 179. (1)].

The Ministerial Decree 55/2014. (XII. 5.) BM (Minister of Interior) contains the following about the premises on custodial arrest for Hungarian Citizens:

- In case of adults, custodial arrest should be performed in the competent penal institute stipulated in Appendix 4 [Section 10. (1)],
- In case of adults, if the custodial arrest cannot be performed in the competent penal institute due to lack of room, or after including preliminary detention and house arrest, there are more than fifteen days remaining from the custodial arrest, it can be performed in one of the penal institutes stipulated in section 5 of Appendix 5. [Section 10. (2)],
- In case of minors, custodial arrest should be performed in the competent penal institute stipulated in Section 3 of Appendix 5 [Section 11. (1)],
- In case of minors, if after including preliminary detention and house arrest, there are less than fifteen days remaining from the custodial arrest, it can be performed in one of the penal institutes competent according to the address of the minor and stipulated in Appendix 4 [Section 11 (2)],
- Custodial arrest of military personnel shall be performed in a separated section of the Juvenile Prison in Tököl [Section 12],
- The occlusion of non-Hungarian citizens and those who are not residing in Hungary should be carried out, the competent court imposes imprisonment seat of penal institution specified in the enclosure 4 level [Section 13 (1)]. This occlusion can be implemented in any of the Correctional Institute declared in the 5. point of enclosure 5 level. If after a preliminary detention and house arrest of imprisonment counting more than fifteen days left, or if the competent court imposing headquarters of imprisonment in the absence of capacity by the specified Correctional Institute in 4. Enclosure there is no possibility of detention for the implementation of imprisonment [Section 13. (2)].

The Appendix 4 to Decree 55/2014 (XII. 5.) BM (Minister of Interior Affairs) enumerates the penal institutions being appointed based on the address of the culprit sentenced to custodial arrest or incarceration for delinquency:

⁵ The progressive regime rules are determined by 16/2014. (XII. 19.) IM Decree 33-36 §§.

| <i>Location</i> | <i>Penal institute</i> |
|----------------------------------|---|
| Budapest Capital and Pest County | Central Transdanubia National Prison - Baracska |
| Komárom-Esztergom county | (Men) Pálhalma National Prison (Women) |
| Baranya County | Baranya County Remand Prison |
| Bács-Kiskun County | Bács-Kiskun County Remand Prison |
| Békés | Békés County Remand Prison |
| Borsod-Abaúj-Zemplén County | Borsod-Abaúj-Zemplén County Remand Prison |
| Csongrád County | Szeged Strict and Medium Regime Prison |
| Fejér County | Central Transdanubia National Prison |
| Győr-Moson-Sopron County | Győr-Moson-Sopron County Remand Prison |
| Hajdú-Bihar County | Hajdú-Bihar County Remand Prison |
| Heves County | Heves County Remand Prison |
| Jász-Nagykun-Szolnok County | Jász-Nagykun-Szolnok County Remand Prison |
| Nógrád County | Balassagyarmat Strict and Medium Regime Prison |
| Somogy County | Somogy County Remand Prison |
| Szabolcs-Szatmár-Bereg County | Szabolcs-Szatmár-Bereg County Remand Prison |
| Tolna County | Tolna County Remand Prison |
| Vas County | Szombathely National Prison |
| Veszprém County | Veszprém County Remand Prison |
| Zala County | Zala County Remand Prison |

The Appendix 5 to Decree 55/2014 (XII. 5.) BM (Minister of Interior Affairs) enumerates penal institutions being appointed to juveniles sentenced to incarceration for delinquency, and penal institutions being appointed in cases to be stipulated in this decree.

| | |
|--|--|
| Budapest and any county of the country | Juvenile Prison (Tököl) (juvenile men) Regional Juvenile Prison (Kecskemét) as a branch of Bács-Kiskun County Remand Prison (juvenile men and juvenile women) Pálhalma National Prison (juvenile women) |
| Budapest and any county of the country | Budapest Remand Prison (men and women) Állampuszta National Prison (men) Budapest Strict and Medium Regime Prison (men) Szeged Strict and Medium Regime Prison (men) Tiszalök National Prison (men) Pálhalma National Prison (women) |

Assessment

Glancing at the implementation decrees on those sentenced to custodial address and the penal institutions detailed above, it is clearly visible that although those sentenced to

custodial address and those sentenced to imprisonment are not held in the same quarters, yet there is the possibility for them to meet during the day. Furthermore, if we take a look at the website of BVOP (Hungarian Prison Service) and access the website of Sopronkőhida Strict and Medium Regime Prison, we find that

“Sopronkőhida Strict and Medium Regime Prison has a national scope. Its basic task is to perform tasks related to preliminary detention, maximum and medium regime incarceration of adult male culprits and custodial arrest as ordered by Sopron District Court. The Prison houses over 800 prisoners in different groups.”⁶

Sopronkőhida does not appear in the relevant parts of the decree; furthermore, there is no minimum security prison there, something that is stipulated in Section 243 para. (3) as a starting point on a regulatory level by legislation.

In my opinion, those sentenced to custodial arrest are exposed to indeed negative "adverse effects" if meeting with prisoners, possibly spending maximum security time outside their quarters. Speaking to prisoners and prison guards reveals the fact that culprits often suffer physical, and, more often, psychical harm. Triggers thereof usually remain unknown. In such situations, the danger of those sentenced to custodial service being exposed to physical or psychical harm and atrocities due to not being completely separated from those sentenced to imprisonment is real. The danger is even more significant if a juvenile culprit has to spend custodial arrest in accordance with Section 11 (2) of Decree 55/2014 (XII.5.) BM (Minister of Interior) in a penal institution specified by Appendix 4.

There is hard to find the rationale behind military personnel being confined to the separated quarters of the Juvenile Prison (Tököl). Military personnel, with their special knowledge and training, even unwilling, may affect impressionable juveniles adversely. The mere fact of being incarcerated "gives" experiences to those being exposed to it by the legislator so that more and more emphasis is put on revenge instead of special prevention (or society's self-defence, something that is doubtful to take effect during such a short incarceration). One of the main reasons is that certain imprisonment harms take effect even on the short term. Human relationships are restrained, the prisoner, beyond every legal guarantee, becomes vulnerable to the guards, something that can result in a big psychological hurdle to take.

According to the then one-year statistics, until October 2014, only a total of 196 prisoners were under custodial arrest compared to 300-320 inmates incarcerated for delinquencies every year. It is notable, that the number of those sentenced to custodial arrest grew from 2013 up to sevenfold, meaning that the courthouse application of this form of punishment skyrocketed.⁷ It represents the uncertainty of statistics that

⁶ Ld.: <http://bv.gov.hu/sopronkohida>

⁷ See Nagy, Ferenc: A szabadságelvonnással járó szankciókról az új Btk.-ban. [On the New Sanctions of Deprivation of Liberty in the New Criminal Code]. *Börtönügyi Szemle*, 2014. 4.

according to the first Prison Affairs Review of year 2015⁸, in the data of February 2015 altogether 632 prisoners spend their imprisonment.⁹ The author agrees with the criticisms of Tóth concerning the custodial arrest:

- ❖ There are possible special preventive effects, the unwanted and dangerous consequences are more numerous and severe (personality distortion, stigmatisation, the danger of acquiring and accepting crime types during imprisonment);
- ❖ Custodial service is rendered to be short term imprisonment;
- ❖ Relating to short term incarceration, the Council of Europe has been rejecting it for the last 20 years due to its adverse effects;
- ❖ Incarceration should not be a valid sentence for either summary or criminal offenses against juveniles.¹⁰

The paper disagrees Ferenc Nagy's view that the criminal law means the possibility of a kind of humanization in the imprisonment's renaissance (and in the short duration of imprisonment renaissance), however, it is true that Nagy also urges empirical inquiries within this sphere.¹¹

Custodial arrest could have been brought in by the legislator if they were willing to ignore the relevant decisions of the Council of Europe, by simply extending the lower threshold of incarceration, and stipulates in Criminal Proceedings as a general rule that for example Section 104 of Bvtv. stipulates commutation of implementation of proceedings and that these rules shall apply to incarcerations shorter than 3 months as well as the separations concerning these prisoners could have been regulated the same way.

If the legislator means the principles they wanted to establish related to custodial arrest, and willing to achieve special prevention goals via short term incarceration, then the prisoner must be protected from the negative experiences coming from those spending longer incarceration in the institution. However this protection could be quite expensive for the legislator. This could be done in institutions totally separated from other penal institutions, responsible only for custodial arrests. Even if these institutions

(<http://bv.gov.hu/download/8/1a/01000/B%C3%B6rt%C3%B6n%C3%BCgyi%20Szemle%202014-4.pdf> 13.).

⁸ See Bogotyán, Róbert: A zsúfoltság csökkentésének útjai a börtönépítésen túl. [Possible Methods to Reduce Overcrowding – Beyond Building New Prisons]. *Börtönügyi Szemle*, 2015. 1. <http://bv.gov.hu/download/b/3a/01000/B%C3%B6rt%C3%B6n%C3%BCgyi%20Szemle%202015%201.pdf>.

⁹ This data is very unlikely; it would be more believable if the source of the article would manage together the criminal and misdemeanour imprisonment.

¹⁰ See Tóth, Mihály: Egy büntetőjogász gondolatai a „vox populi” oldalvizen [Thoughts of a Criminal Lawyer on the Issue of Vox Populi]. *Élet és Irodalom*, Vol. LVI (2012), No. 35, <http://ujbtk.hu/dr-toth-mihaly-egy-buntetojogasz-gondolatai-a-vox-populi-oldalvizen/>.

¹¹ See Nagy, Ferenc: A büntetőjogi szankciórendszer reformja. Büntetések és intézkedések az új Büntető Törvénykönyvben [Reform of the Sanction System in Criminal Law. Punishments in the New Criminal Code]. *Büntetőjogi Kodifikáció*, 2001. 2. (<http://ujbtk.hu/buntetojogikodifikacio-2001-2/>).

have to be opened for a wider audience due to prison usage issues, only prisoners spending time in a minimum security institution enjoying mitigated punishment could be placed here as they are especially motivated to keep their prestigious status, thus they are less dangerous towards those under custodial arrest. However, prison building is specially expensive and an abrupt change, and in the meantime, it would be an illusion to hope the establishment of special institutions for the punished chargers can solve these issues.

In Switzerland for short-term incarceration various facilities as professional critics have been introduced, such as the so-called “daily enforcement”, “semi-captivity”, a “semi-free implementation” and the “work of public interest”.¹²

The above facilities are theoretical possibilities, about the actual implementation the cantons are up to decide. Most of the Swiss cantons from 26 to 20 were introduced in the daily execution regulated as such, they should be sentenced to imprisonment for at least a week to spend 24 or 48 hours. This facility can be used if the total of a maximum of two weeks imposed a custodial sentence. There are just a few cantons (e.g. St. Gallen), where the convicted person has to submit a daily implementation plan for themselves, which days and how many hours should they spend in prison.¹³

The convicted prisoner under the *semi-captivity* will be able to continue his mid-day of work or studies, but in his free time, rest periods must be spent as well. In order to *semi-free implementation* s/he spends rest and free time in prison and spends time working outside the framework of the employment practices. The convict can search a job for himself, and if s/he does not, s/he may be required to work in designated places.¹⁴

If we combine economy-wide approach into the “mix” of the development of the system of sanctions (of course not forgetting that it is true that the convicted can commit new crimes during the detention later only among the walls of the prison), it is worth to examining that implementation of the special and general preventive aims, and the mediation procedures of the applicability of cases could be extended.

The same is true for the reparation work. We should think about the probation system again expanding the scope of its personnel. Targeted impact studies should be selected on the rules of conduct system, which matching the personality of the accused and assist the court and the probation supervisor in that in the particular case.

¹² See Nagy, Ferenc: Életközelen: rövid tartamú szabadságvesztés Svájcban [Closeness to Life – Short Term Deprivation of Liberty in Switzerland]. *Börtönügyi Szemle*, 1992. 4. (http://epa.oszk.hu/02700/02705/00012/pdf/EPA02705_bortonugyi_szemle_1992_4_84-89.pdf).

¹³ See Nagy: Életközelen, 86-87.

¹⁴ Ibid. 88-89.

Conclusion

The public work system could and should be reformed, which at the same time can be really useful to society (social integration can be achieved more successfully).

In the present form of the closure, the author considers it unnecessary as a penalty, which is expensive for society, expensive for the convict, its effectiveness (that is, the ability to access prevention targets) is highly questionable. The author thinks that it is also worth considering that along the same arguments for the misdemeanour law, other sanctions could be led out by the legislature, replacing such kind of offense imprisonment.