

Two Decades of Penal Populism – The Case of Hungary

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Abstract

Hungary Post-2010 has been ruled by Viktor Orbán and his right-wing Fidesz party and is generally regarded as a typical case of populist governance. Reforming the Penal Code was one of the first major policy changes initiated by Fidesz shortly after winning the 2010 elections. It introduced the ‘three-strikes’ principle into Hungarian penal policy which is considered a prime example of penal populism. It could be inferred that in the past decade Hungarian penal policy has been dominated by penal populism and punitive measures. This paper argues that reality is more nuanced and presents the concepts of penal populism and populist policy making, with a special focus on the Hungarian context. The article provides an overview of the most important penal

policy measures in the past two decades and examines whether and how increased strictness of legislative acts influenced the sentencing practice. The paper highlights the related results of an empirical survey on public opinions about criminal law and ends with a case study exploration of the intersections of lowering the age limit of criminal responsibility and penal populism.

Keywords

Hungary – penal populism – policy making – criminal legislation

1 Introduction

Post-2010 Hungary, ruled by Viktor Orbán and his right-wing Fidesz party, is generally regarded as a typical case of populist governance.¹ One of the first major policy reforms initiated by Fidesz shortly after winning the 2010 elections was changing the Penal Code and introducing among other measures the ‘three-strikes’ principle into Hungarian penal policy that is considered a prime example of penal populism.² Ever since, the public discourse concerning Hungarian penal policy has been dominated by penal populism and punitive measures. This paper argues that the reality is much more nuanced and the content of actual policy decisions in terms of penal reforms is more diverse despite the populist features of the Orbán governments and the very public political communications of the punitive approach.

This paper first presents the concepts of penal populism and populist policy making, with a special focus on the Hungarian context. The second section provides an overview of the most important penal policy measures in the past two decades. Section 3 examines whether and how increased strictness of legislative acts influenced the sentencing practice. Section 4 highlights the related results of an empirical survey on public opinions about criminal law. Finally, a case study in Section 5 explores the intersections of lowering the age limit of criminal responsibility and penal populism.

1 Attila Bartha, Zsolt Boda and Dorottya Szikra, “When Populist Leaders Govern: Conceptualising Populism in Policy Making,” 8(3) *Politics and Governance* (2020), 71–81; Agnes Batory, “Populists in Government? Hungary’s “System of National Cooperation,” 23(2) *Democratization* (2016), 283–303; Zsolt Enyedi, “Populist Polarization and Party System Institutionalization,” 63(4) *Problems of Post-Communism* (2016), 1–11.

2 Zsolt Boda, Gabriella Szabó, Attila Bartha, Gergő Medve-Bálint and Zsuzsa Vidra, “Politically Driven. Mapping Political and Media Discourses of Penal Populism – the Hungarian Case,” 29(4) *East European Politics and Societies* (2015), 871–891.

2 Penal Populism: Theoretical Foundations

2.1 *Penal Populism and Populist Policy Making*

Penal populism is a discourse which argues that the modern justice system protects the rights of criminals at the expense of the ‘silent majority’, the law-abiding public which suffers from crime.³ This discourse uses simple but expressive slogans, like ‘zero tolerance’, ‘truth in sentencing’ or ‘life means life’. Penal populism fuels, and is fueled by, the fear of crime as well as anger and frustration about the effectiveness of the justice system. It is rooted in emotions and a feeling of injustice⁴ and these emotions can be easily exploited by the tabloid media, with their exaggerated treatment of crime, or by populist/right-wing politicians who build on moral panic and feelings of threat.⁵ Penal populist policies advocate harsher sentences and punitive measures. These measures are considered by mainstream criminology to be largely ineffective in combatting crime and, at the same time, imposing unfair conditions upon perpetrators. For instance, ‘three strikes’ measures (referring to the baseball rule ‘three strikes and out’) order judges to impose the strictest punishments without consideration in case of multiple recidivists. This runs against the principle of the autonomy of judges and may lead to unfair sentencing.

Penal populism is “a punishment policy developed primarily for its anticipated popularity”,⁶ when “both the interpretation of crime and notions on its regulation take shape in a public opinion energized by fear of crime and the discourse of politicians intent upon pleasing their voters.”⁷ It therefore could be expected to be advocated by populist politicians. However, the question regarding populist politicians having a distinct policy agenda is a contested

3 John Pratt, *Penal Populism* (Routledge, London, 2007).

4 Tom R. Tyler and Robert J. Boeckmann, “Three Strikes and You Are Out, But Why? The Psychology of Public Support for Punishing Rule Breakers,” 31(2) *Law and Society Review* (1997), 237–265.

5 Liz Fekete and Frances Webber, “Foreign Nationals, Enemy Penology and the Criminal Justice System,” 51(4) *Race & Class* (2010), 1–25; David A. Green, “Feeding Wolves: Punitiveness and Culture,” 6(6) *European Journal of Criminology* (2009), 517–536.

6 Julian V. Robert, Loretta J. Stalans, David Indemaur and Mike Hough, *Penal Populism and Public Opinion* (OUP, New York, 2003), 65.

7 Andrea Borbíró, “‘Three Strikes and you’re out’ Magyarországon – kriminálpolitikai racionalitás vagy szimbolikus jogalkotás?,” *Acta Facultatis Politico-iuridicae Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae* (2008), 165–179 at 175. The most comprehensive treatment of the question in domestic literature is Katalin Gönczöl, “A büntető populizmus és a társadalmi kirekesztettség,” *Acta Facultatis Politico-iuridicae Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae* (2013), 155–165; Katalin Gönczöl, “‘Let There be Order!’: Rising Criminal Populism in Hungary,” *Archives of Criminology* (2021), 1–16.

issue in the literature. Mudde argues that populism is a ‘thin ideology’ with malleable policy content and ideological position, characterized by a critique of the elite, the valorization of normalized and homogenized conception of ‘the people’, positing an antagonistic relationship between the corrupt elite and the good people, and a rejection of pluralism.⁸ Populism as a thin ideology can manifest itself in both right-wing and left-wing politics therefore, Mudde argues, there is no typically populist policy agenda.⁹ This is difficult to refute but Bartha *et al.* argue that populist governance may have some recognizable traits in terms of policy making procedures e.g., circumventing institutional venues and limiting the participation of social stakeholders, policy discourses e.g., widespread use of discursive governance as well as discourses with negative valence and even policy content.¹⁰

The idealist type of populist policy making, advocated by Bartha *et al.*, consists of four policy content.¹¹ The first is that populist policies are ideologically multifaceted and diverse, not only in the sense that populism can manifest itself on both right-wing and left-wing politics, but also in terms of the policies of the same government. Populist politicians are often pragmatic and less bound by ideological constraints. The second is that populist policies tend to exhibit a policy heterodoxy considering mainstream expertise and policy paradigms. Populism is critical of the elite, including influential technocratic experts, and this easily leads to policy innovations in terms of the objectives or the means of policies. The third is that the thin ideational embeddedness into mainstream policy paradigms as well as the denial of the pluralist policy making logic implies a higher probability of radical policy reforms, as opposed to incrementalism. The final element is that populism follows a majoritarian logic. Its populist decisions reflect the policy preferences of the electoral majority – sometimes even blatantly discriminating against minority interests.

The penal populism framework advocated by Bartha *et al.* implies that

1. populist governments will follow penal populism if it conforms to the preferences of the majority
2. populist governments will not hesitate to make even radical penal justice reforms
3. pragmatism means that governments do not necessarily follow the recipes and unequivocal logic of punitive reforms.¹²

8 Cas Mudde, “The Populist Zeitgeist,” 39(4) *Government and Opposition* (2004), 541–563.

9 *Ibid.*

10 Bartha, Boda, Szikra, *op.cit.* note 1.

11 *Ibid.*

12 *Ibid.*

2.2 *The Hungarian Context*

Hungary has been a typical case of right-wing populist governance¹³ since 2010 and thus has been a fertile ground for penal populism. Both theoretical papers and empirical studies have found that penal populist discourses are embedded into tabloid-like, highly expressive frames built upon the assumption of neglecting the law-abiding silent majority by the justice system of liberal democracies.¹⁴ The populism scholarship of political sciences and policy studies also suggest that the discursive features of penal populism can exhibit a clear punitive policy stance and the applied penal policy measures are likely to be more heterogeneous and ideationally less consistent. The punitive attitude of the electoral majority is a crucial factor under populist governance for shaping penal policies. Previous studies found that Hungarians have one of the most punitive attitudes and preferences in Europe.¹⁵

The most important contextual factor about penal populism is societal responsiveness: whether general attitudes embrace or reject the punitive approach. In this section, it is emphasized that comparative international surveys also point to the relatively high level of punitivity among Hungarians. The 2008 round of the European Social Survey provides one of the most reliable comparative survey data and includes questions on punitive attitudes and the fear of crime. Figure 1 shows that Hungarians have the second most punitive attitude in Europe, just after Bulgarians. It is also noteworthy that levels of fear of crime are not correlated to the strength of punitive attitudes, suggesting that the punitivity of a society relates more to norms and culture than with actual levels of crime and their perception by people.

The widespread support of the punitive penal policy stance by Hungarians is partially shaped by the ruling political elite. Boda *et al.* demonstrates that penal populism has permeated Hungarian political discourse and this is almost irrespective of the ideological camps. Right-wing parties have routinely

13 Zsolt Enyedi, "Paternalist Populism and Illiberal Elitism in Central Europe," (21)1 *Journal of Political Ideologies* (2016), 9–25; Dimitry Kochenov and Petra Bárd, "The Last Soldier Standing? Courts Versus Politicians and the Rule of Law Crisis in the New Member States of the EU," *European Yearbook of Constitutional Law* 2019. (TMC Asser Press, The Hague, 2020) 243–287; Kim Lane Scheppele, "The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work," 26(4) *Governance* (2013), 559–562.

14 Pratt, *op.cit.* note 3; Robert Stalans, Indemaur, Hough, *op.cit.* note 6; Boda, Szabó, Bartha, Medve-Bálint, Vidra, *op.cit.* note 2; Chris Greer and Eugene McLaughlin, "Breaking Bad News: Penal Populism, Tabloid Adversarialism and Brexit," (89)2 *The Political Quarterly* (2018), 206–216.

15 Boda, Szabó, Bartha, Medve-Bálint, Vidra, *op.cit.* note 2; Laura Faragó, Dávid Ferenczy-Nyúl, Anna Kende, Péter Krekó and Zoltán Gurály, "Criminalization as a Justification for Violence Against the Homeless in Hungary," *The Journal of Social Psychology*, (2021) 1–15.

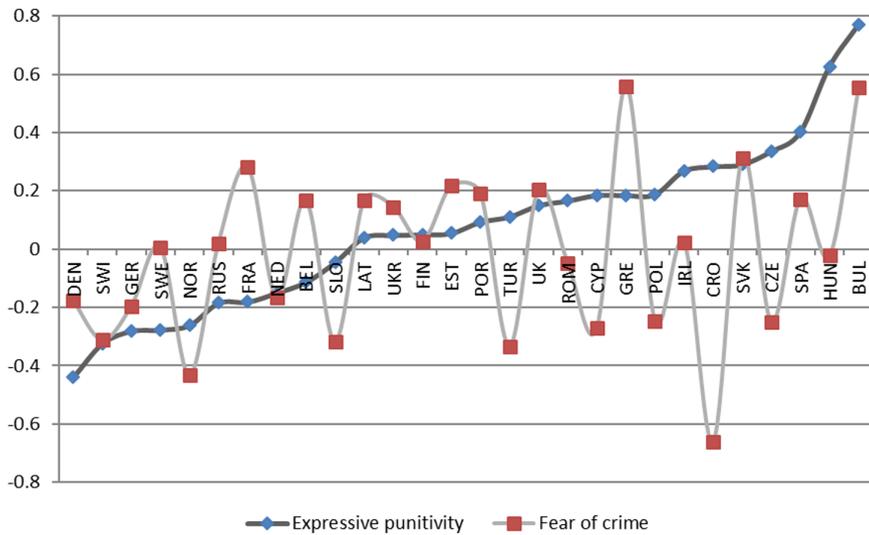


FIGURE 1 Expressive punitivity and fear of crime across Europe in 2008¹⁶

embraced a punitive stance in their penal policy discourses as well as their political agenda whilst the left has not remained unaffected by penal populism. At the beginning of the 2010, only LMP (Politics Can Be Different), the new green party took a consistent non-populist and non-punitive stance in terms of penal policy.

Interestingly, Boda *et al.* could not demonstrate whether the media has taken a clear position on penal policy, which was at the forefront of policy debates in 2009 and 2010.¹⁷ The non-punitive approach appeared occasionally in a limited number of articles and interviews in the left-wing quality press while right-wing outlets supported the government position on the necessity of punitive measures. At the same time, tabloid media sources cautiously avoided endorsing any political initiatives, although their constant and abundant thematization of crime and delinquency has provided an implicit support for penal populism.

16 Source: Boda, Szabó, Bartha, Medve-Bálint, Vidra, *op.cit.* note 2. Authors' own calculations, ESS data (2008), 877. The indicators have been standardized to have a mean of zero and standard deviation of one. Country abbreviations: DEN=Denmark; SWI=Switzerland; GER=Germany; SWE=Sweden; NOR=Norway; RUS=Russia; FRA=France; NED=Netherlands; BEL=Belgium; SLO=Slovenia; LAT = Latvia; UKR=Ukraine; FIN=Finland; EST=Estonia; POR=Portugal; TUR = Turkey; UK=United Kingdom; ROM = Romania; CYP=Cyprus; GRE=Greece; POL=Poland; IRL=Ireland; CRO=Croatia; SVK=Slovakia; CZE=Czech Republic; SPA=Spain; HUN=Hungary; BUL=Bulgaria.

17 *Ibid.*

In summary, the Hungarian societal context is largely supportive of penal populism. The general attitudes of the public are undoubtedly punitive. A politically influential alternative of the punitive penal policy discourse has not emerged and left-wing political actors have been hesitant to confront the majoritarian preferences. The non-punitive stance represented by experts and human rights NGOs has remained marginal in the public discourse while the media agenda has mostly provided implicit support for the punitive approach.

3 Tendencies of Penal Populism and Hungarian Criminal Legislation

This section reviews legislative innovations introduced between 2010 and 2020 which could be perceived to be connected to the phenomenon of penal populism.

In February 2009, Fidesz, as an opposition party declared its belief in the necessity of harsher penal legislation. Bill T/8875, which was later left largely undiscussed, began with the ominous statement “The dramatic increase in grave and violent crime has shown in yet another area the failure of the Government; while they are in power public security cannot be restored in Hungary”.¹⁸ The wording of this document, which was not a party manifesto but the supposedly professional explanation of a bill, was not only highly unusual but also fundamentally flawed. In reality, the volume of the overall known crime rate had essentially remained unchanged, with approximately 400,000 criminal acts recorded by the authorities each year. The number of cases per 100,000 residents was below that of Austria¹⁹ and homicide cases had been in decline for a decade. Incidentally, this decline has been almost uninterrupted, with the exception of 2016, when the number of homicides expectedly increased to 226 from 205.

It must be admitted that at that time, several cases left indelible marks on the public consciousness, due to their brutality, violence, and their apparently unmotivated nature and thus gained greater publicity such as a series of ethnically motivated murders committed against Romas. The previously stated reference to a numerical growth, however, was completely unfounded. Major violent crimes against property, i.e., robberies, were clearly in decline. Those

18 “Bill T/8875,” *Hungarian National Assembly* (17 February 2009), available at <https://www.parliament.hu/irom38/08875/08875.pdf>.

19 “Eurostat Statistics Explained” available at https://ec.europa.eu/eurostat/statistics-explained/images/d/d7/Crimes_recorded_by_the_police%2C_2002%E2%80%9314_YB14.png.

criminal areas that showed a typically steady, but small increase were not the 'grave and violent' ones that the bill targeted e.g., drug abuse.

Shortly after the 2010 elections, Act. No. LVI of 2010 modified the former Hungarian Criminal Code of 1978 and introduced new rules to limit judicial discretion in sentencing, including the adoption of stricter rules for multiple recidivists. The next step was the adoption of the new Criminal Code of Hungary (Act. C of 2012, in force from 1 July 2013). The official explanations attached to the legislative proposals described one of the Code's main tasks to be the abolition of the 'criminals' paradise'. The primary tools to achieve this objective included "the strictness of the law, the extension of punitive measures, and the increased use of the life sentence [...]."²⁰

Many measures of the new Criminal Code were stricter than those of its antecedent,²¹ even if the reality of the change does not altogether meet the rhetoric of the general explanation. Some examples of the changes in the General Part include:

- a selective lowering of the age of criminal responsibility
- stricter rules on limitation periods
- the introduction of the new sanction of detention orders
- the extension of the upper limit of fixed-term imprisonments
- driving bans were made compulsory by default in some scenarios
- the rules on confiscation orders became stricter
- forced medical treatments returned to be unlimited in time
- partially suspended sentences were abolished
- stricter rules were introduced on additional punishments and aggregated sentences
- the consequences of reoffending became graver in special cases

The exaggerated emphasis on increased strictness occasionally led to unconvincing statements in the official explanatory notes. For instance, "following the principle of increased strictness, the lower limit of community service has been raised to 48, the upper limit to 312 hours".²² In comparison, the former Code had "the lower limit of community service is 42, the upper limit 300 hours".²³ Thus, while the new code is somewhat stricter, the 6 to 12 hours of

²⁰ The reasoning of the Criminal Code, 2.3.

²¹ On the general part of the catalogue, see Tamás Háger, "A büntetőtörvény időbeli hatályára vonatkozó rendelkezések mint alapvető alkotmányos, garanciális szabályok," 3 *Büntetőjogi Szemle* (2015), 68–75; Ferenc Nagy, "A szakírórendszer," 1 *Jogtudományi Közlöny* (2015), 1–15, at 1.

²² Sec.47. of the Criminal Code.

²³ Sec.49. (4) of the Criminal Code.

extra community work hardly deserve the emphatic explanation of increased strictness.

The strengthening of the punitive measures was somewhat weakened by some of the measures being rather parts of a 'crime fighting marketing' than concrete, tangible conditions of change that affects multitudes. Some of the measures are arguably instances of window dressing to satisfy those who demand stricter controls. The habit of demanding strict and urgent punitive measures as an answer to any unfavorable event is, sadly, still unchanged.

There are also almost innumerable examples of spur-of-the-moment amendments to criminal statutes which were motivated by unique, never repeated high-profile cases:

- An unfortunate pit-bull attack led to the law (still in the Criminal Law) threatening those who break the law on neutering dangerous dogs with punishments. [Section 359 (2) ba]
- the sending of some harmless powder in mail led to extending the scope of the crime of harassment to anyone who "pretends that an event harming or directly endangering the life, physical integrity or health of another person is about to take place" [Section 222 (2) b]
- supporters running on the pitch at a football championship final led to the inclusion of a reference to "a person who, without authorization, enters or stays in an area of the facility that is not open to spectators or a specified group of spectators, or who throws any item that endangers the sports event" [Section 340 (2)]
- the throwing of eggs led to the broadening of the definition of vandalism in 2008 (and in the new Criminal Code that of all behavior deemed violent) with "offensive behavior... not capable of causing bodily harm" [Section 459. (1) 4.]
- an allegedly fake video recording of an election campaign event led to the enshrinement of the crime of "Making false audio or image recording capable of harming the reputation of another" (Section 226/A.), etc.

These legal norms are typically not applied as other already existing norms are applicable if such events were to occur again. It cannot be argued that such 'precedent-setting acts of law-making' serve preventive purposes, since the original cases are soon forgotten and the legal categories become 'dormant norms', slowly spreading all over the already over-burdened Criminal Code. Describing these legal tools as punitive 'window dressing' is no exaggeration. The new Criminal Code reinforces institutions that show a strong resolve, satisfy certain populist demands and can thus be transformed into political capital and popularity, especially among the uninformed and emotionally determined sections of public opinion. These measures usually do not fulfil their purpose

but remain ineffective and, on occasion, cover the absence of instruments of real value, or at least lessen their authority. This is highly problematic as punitive norms can only be effective, if the criminal law clearly demonstrates its presence and reactivity. These norms, however, merely project the appearance of effectiveness and the protection of the society, and thus they deceive the public. Thus eventually criminal law cannot fulfil its real function and thus loses credibility.²⁴

On the other hand, the relaxation of criminal law rules does not receive comparable attention in the general commentaries, although the new Criminal Code introduced relaxation in many areas. Examples include the decreasing of the lower limit of daily fines,²⁵ the decreasing of the lower limit of driving disqualifications²⁶ and the definition of the earliest date of conditional release in case of fixed-term prison sentences.²⁷ A comprehensive review of the tightening and relaxing of the regulations concluded that “strictness appears only indirectly and besides the numerous cases of increased punishments we can easily find regulations whose relaxing tendency cannot be doubted”.²⁸

4 Increased Strictness in Sentencing Practice?

The focus now shifts to analyzing the claim whether sentencing practice has become any stricter as a result of the new punitive laws with a focus on two of the many potential aspects: the changes in the frequency of imprisonments and their comparative proportion to suspended sentences over time. Table 1 demonstrates the changes introduced over the four years before and the seven years after the entry into force of the new Criminal Code (1 June 2013).

Compared to the 2009 data, the number of sentenced individuals show approximately 10% decrease, while the proportion of imprisonments is essentially the same in 2015–2016. The overall minimal increase, in addition to the decrease in absolute numbers, can be explained by certain structural changes in crime.

Significantly, the proportion of those sentenced to imprisonment had been slowly growing among the complete population of sentenced individuals. The

24 Winfried Hassemer, *Einführung in die Grundlagen des Strafrechts* (Beck, München, 1990), 71–72.

25 Hóger, *op.cit.*, note 21, 71.

26 Nagy, *op.cit.*, note 21, 1.

27 *Ibid.*, Hóger, *op.cit.*, note 21, 71.

28 Tamás Jávorszki, “Az időbeli hatály értelmezése az új Btk. Általános Részének egyes rendelkezései kapcsán,” 14(2) *Jogelméleti Szemle* (2013), 58–65.

TABLE 1²⁹

	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
The number of sentenced individuals	86 120	86 057	88 382	75 533	74 249	83 697	76 394	77 023	72 556	67 113	68 127
The number of individuals sentenced to imprisonment	9 403	9 766	10 504	9 683	9 331	10 221	9 742	9 517	8 342	7 506	7 494
The percentage of convicted criminals incarcerated (%)	10.9	11.3	11.4	12.8	12.6	12.2	12.7	12.3	11.5	11.1	11.0
Imprisonment as a proportion to all sentences (%)	33.6	31.4	32.7	33.7	33.9	34.9	36.8	37.5	36.42	36.76	37.02

²⁹ *A büntetőbíróóság előtti ügyési tevékenység főbb adatai (éves kiadványok)*. Available at <http://ugyesszeg.hu/statisztikai-adatok/buntetobirosag-elotti-ugyesi-tevekenysegi>.

proportion of suspended sentences and imprisonments remained relatively stable. Neither the absolute numbers nor the proportions show any significant change after the new Criminal Code. Comparing the data from before and after the new code's entry into force, leads to two important observations. First, the 30%+ drop in known crime (470.000 to 290.000 criminal offenses) had no real effect on the number of sentenced people, not even when allowing for the years of delay in reaching final judgments. In the pre-2013 period, especially its early part, the rate of convictions was approximately 10% higher. Despite certain expectations, the percentage of incarcerations among all those convicted remained strikingly stable. In the past four years, for instance, the fluctuation within this percentage remained within 0.5%. Given the basically unchanged structures of criminal behavior, this indicates a thoughtful, mature approach to criminal justice.

Second, the proportion of custodial sentences to be served and suspended shows a small, but constant change in favor of the former. This might indicate a certain move towards increased strictness. The option of suspended sentencing has, thus shown a steady decline, which might also be correlated with the extent of the punishments, and is not examined here. Courts have reduced the usage of suspended sentences by 3% in the last 4 years than previous time periods. This would be more significant when compared to prison sentences not in excess of two years, where the opportunity of a suspended sentence is available. However, considering the proportion of measures to sentences or the gradual increase in the proportion of fines (from 22% to 29%), it can be concluded that the overwhelming strictness promised (and, by the legislator, hoped for) has not materialized during the first seven years of the new Criminal Code.

5 Measuring Social Support for Penal Populism

This section of the paper examines the receptivity of the Hungarian society to penal populism. These data were taken from empirical research carried out between 2017 and 2020, to map the legal consciousness of criminal law of the Hungarian population.³⁰ The questionnaire referred to 12 topics in criminal law that were connected to people's daily lives and often covered by the media, ranging from the lower age limit for punishing crimes against property, through torturing animals to accepting informal payments in hospitals.

30 Novelties of Criminal Law in Legal Consciousness Research Project funded by the National Research, Development and Innovation Office. Project number: K 125378. Available at <https://jog.tk.hu/en/novelties-of-criminal-law-in-legal-consciousness>.

In each case, respondents had to answer pairs of questions and decide if the given act was punishable and then if they would designate the act a crime if they were the legislators.³¹

5.1 *The Desired Law*

The research shows that Hungarian public opinion appears to be very punitive: respondents would punish 75% of the cases in question, while current law merely punishes two thirds of them. 10% of the respondents would punish all 31 situations, and one third of the respondents would punish between 27 and 31 of the situations. On average, the respondents would punish 23 situations, the median is 24.

Topics which resulted in above-average punitivity were torturing animals, the age limits of crimes against property, usury and sex with children under 14. The respondents are most lenient when it comes to non-violent disruptive behavior during sporting events (running onto the field) or pop concerts. However, even in such cases more than 40% of respondents recommend punishments, which effectively demonstrates the receptivity to the pseudo-issues discussed above.

5.2 *Acceptance of the Current Law*

Respondents supported the current criminal laws in 59% of the cases. The average respondent's opinion agrees with the current regulations in slightly more than half of the cases, 18 cases on average, this is both the median and the modus. Half of the population (50%) is in agreement with the law in at least 19 cases.

The most significant difference in punitivity is between the public opinion and the legislation in effect. In the case of the currently punishable acts, the rate of agreement is 80% whereas it is merely 30% in those cases that do not currently constitute a crime. People apparently would punish almost every act included in the questionnaire. Opinions meet when current law actually provides for punishments. It would appear, therefore, that agreement is primarily based on punitivity: if the law is punitive, public opinion is favorable.

³¹ For the details, see: Miklós Hollán and Tímea Venczel, "Büntetőjogunk szabályozási újdonságai a jogtudatban – egy empirikus kutatás eredményei," 2020/31 *MTA Law Working Papers* (2020). Available at <https://jog.tk.hu/mtalwp/buntetjogunk-szabalyozasi-ujdonsagai-a-jogtudatban-egy-empirikus-kutatas-eredmenyei>.

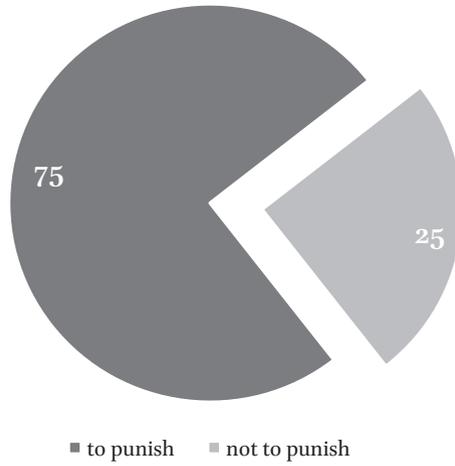


FIGURE 2 The distribution of opinions³²

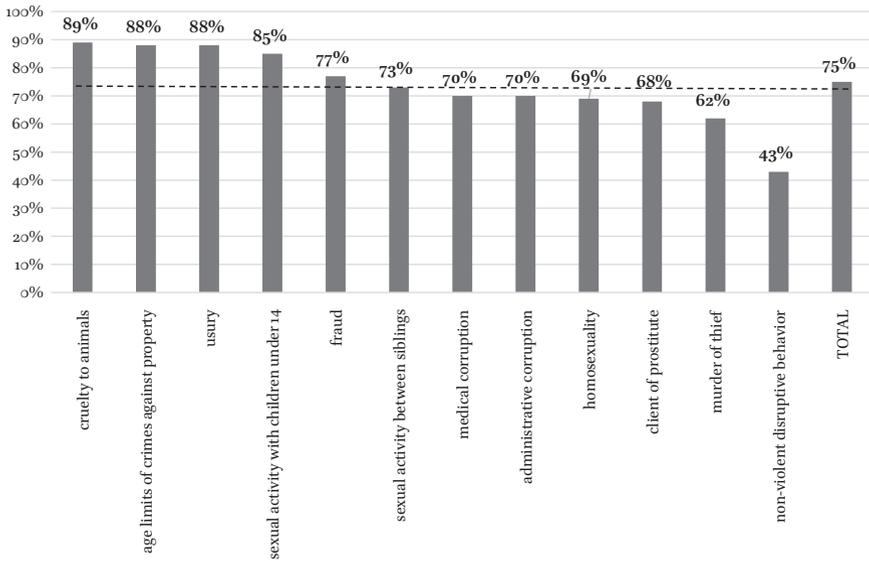


FIGURE 3 Proportion of criminalizing attitudes per topic

³² Source of data of Figure 2–Figure 9: Novelties of Criminal Law in Legal Consciousness Research Project funded by the National Research, Development and Innovation Office. Project number: K 125378. Available at <https://jog.tk.hu/en/novelties-of-criminal-law-in-legal-consciousness>.

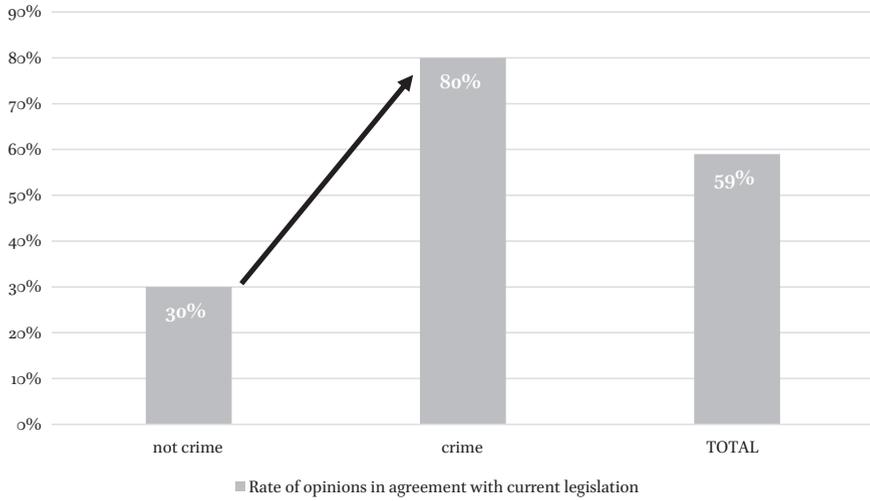


FIGURE 4 Opinions in agreement with current legislation according to regulatory categories

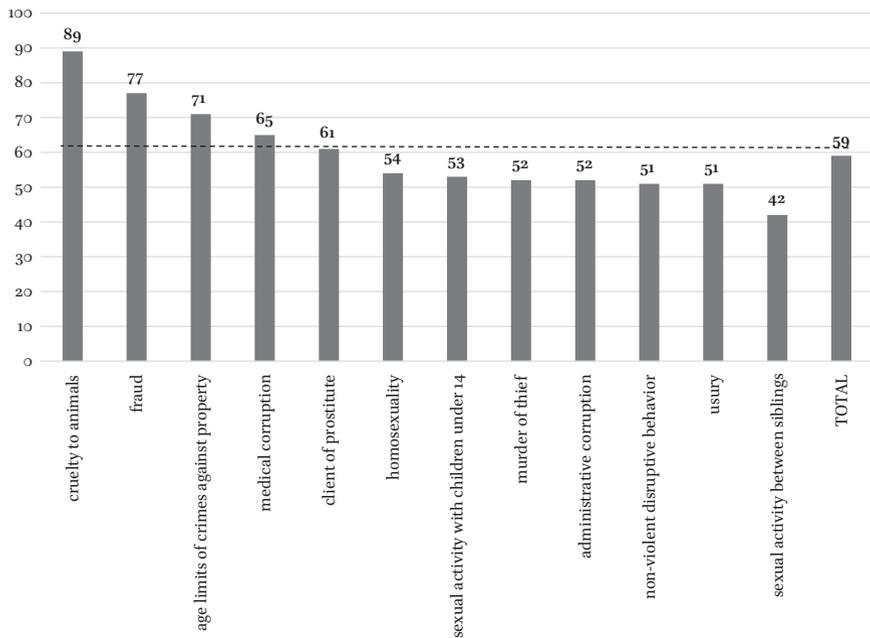


FIGURE 5 Opinions in agreement with current legislation according to topics (%)

5.3 *Acceptance of Presumed Legislation*

Essentially, the interviewees almost exclusively preferred to punish and criminalize. Whether they considered that their opinions coincided with the actual

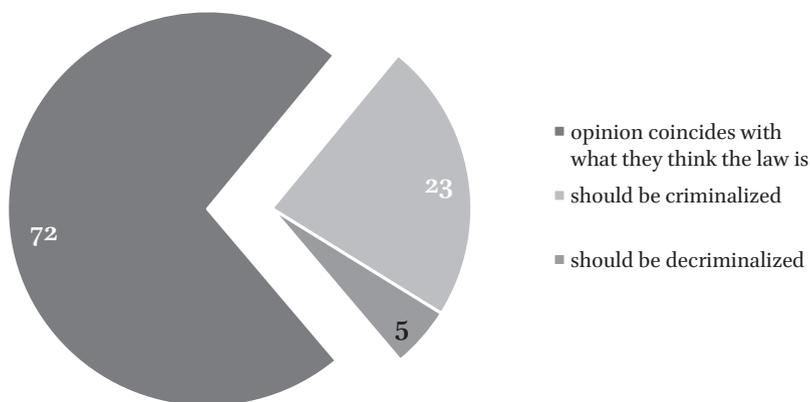


FIGURE 6 Coincidence of opinion and expected regulation (%)

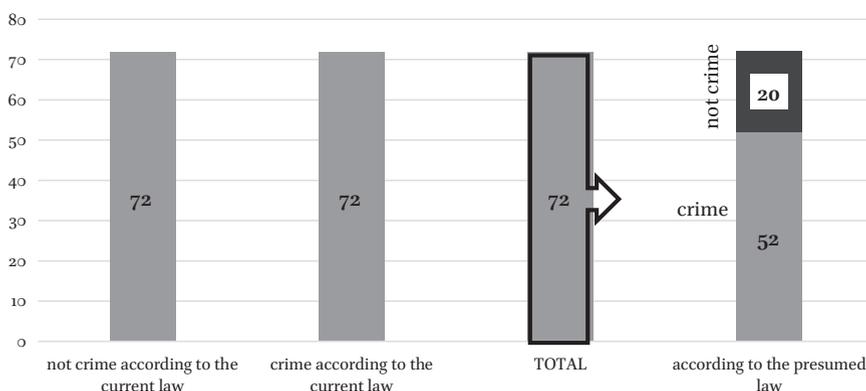


FIGURE 7 Proportion of agreement with the presumed law according to categories

state of the law (72% on average), or when they thought their views differed (23%), they predominantly chose criminalization, meaning that a significant percentage of the population would even punish acts that they, rightly or wrongly, believe not to be currently punishable.

The coincidence of the opinion with the presumed regulation characterizes about three quarters of all the categories, irrespective of whether those are crimes according to the *current* law. The difference is greater if examined when criminality is examined against the *presumed* law. In such cases, the majority of the agreement in opinion (52% out of 72%) refers to cases presumed to be crimes, whereas the minority (20%) refers to acts not thought to be criminal.

There is a difference among topics in terms of the correlation of opinion and the presumed law. There is an above-average coincidence of opinion with

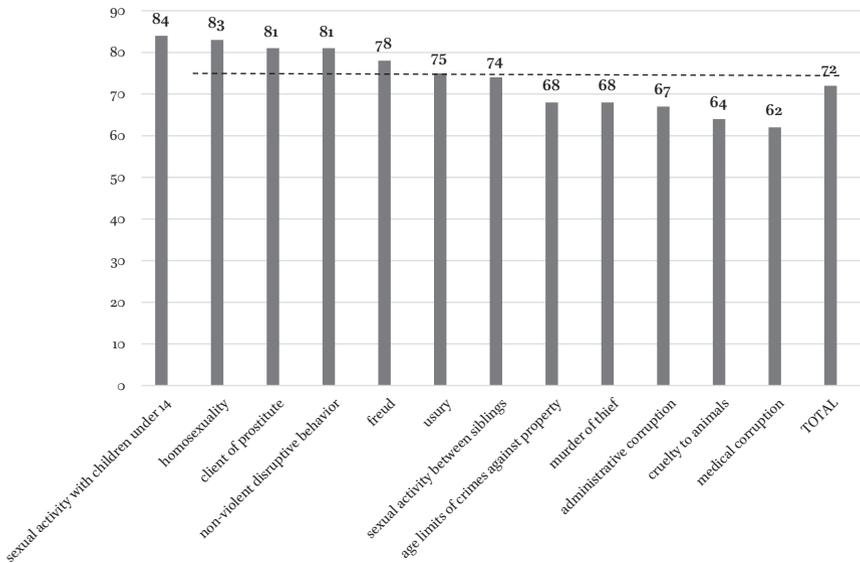


FIGURE 8 Opinions coinciding with legal knowledge according to topics (%)

the presumed law in cases of a sexual nature. In cases involving torturing animals or medical corruption, coincidence is below the average.

There was a study to see if a difference in terms of agreement with the current law exists according to when the legislation came into effect. 55% of respondents agreed with the new regulations and 62% with those that

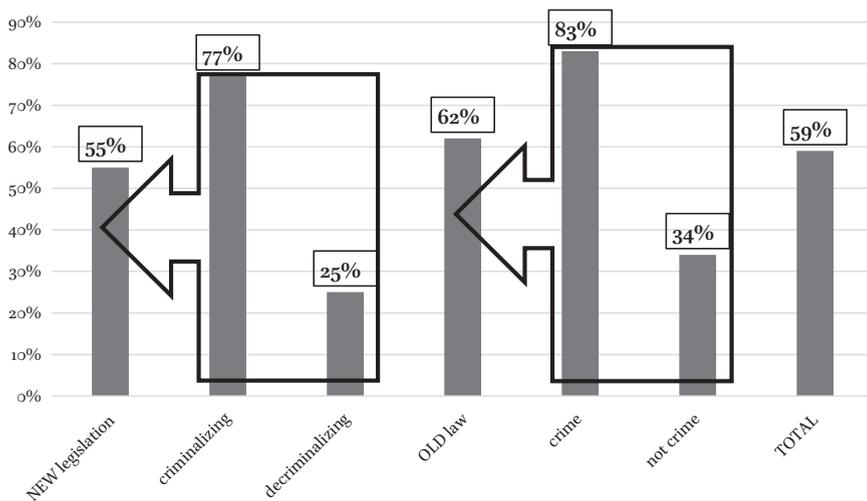


FIGURE 9 Average proportion of opinions in agreement with current legislation: criminalizing/decriminalizing novelty; criminalizing/decriminalizing old law

remained unchanged. It was also analyzed whether the proportion of agreement with the new legislation depending on whether the new law is punitive in nature. Figure 9 shows that the agreement is much greater if it is a punitive measure than in the opposite case.

5.4 *Multivariable Analyses*

A multivariable analysis used binary logistic regression to establish what factors influence public opinion with regard to a given situation.³³ A well-adapted model was developed which explains, on average, 37% of the deviation.³⁴ Regarding opinions, knowledge is always the factor that shows the strongest correlation, with a much higher value than any other. There was no statistical evidence on the direction of that correlation. However, based on the arguments presented in this paper, it is a safe assumption that knowledge is virtually identical to opinion.

A single factor variance analysis was performed to reveal which groups are most likely to show a coincidence in knowledge and opinion. The coincidence of knowledge and opinion was significantly lower in country towns than in Budapest (21.4 and 23.6) or municipalities (23.2). Those with children typically have an opinion more in agreement with their knowledge (23.4) than those with no under-18 child in the household (22). The 30–39 age group shows the most frequent coincidence of opinion and knowledge (23.4) and the same is true for those with only primary school education (23.8). There is a significantly higher coincidence of opinion and knowledge among those with a strong trust in the courts (23.8), the prosecutor's office (23.7) and the police (24.2). On the whole, no significant differences or meaningful tendencies was found in any of these cases.

33 The dependent variable in the binary logistic regression analysis was the bivalent punish/don't punish answer in every situation. The following independent variables were introduced: sex (1 male, 2 female), financial situation compared to other Hungarian families (1 better, 2 about the same, 3 worse); size of settlement (1 fewer than 1000 people, 8 more than 800,000 people, 9 Budapest); church attendance (1: more than once a week, 6: never attends church or any religious communions); job (1: full time; 8: inactive earner); family size; the number of family members above 60; the number of children under 18; per capita income; age; education; watching news on the television (0: never, 1: watches the news on RTL or TV2); involvement in crime (0: no; 1: yes); reader of a daily newspaper (1: yes; 2: no); and according to their knowledge is the act in question currently punishable as a crime (1: punishable; 2 non-punishable).

34 Out of the 31 cases, the highest value of the Nagelkerke R^2 was 0.594 (running on the football pitch), while the lowest was 0.083 (a thief is mortally wounded in the antechamber).

6 Penal Populism and Age Limits of Criminal Responsibility: A Case Study

The 2013 lowering of the age limit of criminal responsibility is worthy of a separate case study as it enables a complex analysis uniting the methods of legal science, political science and the analysis of legal consciousness.

Originally, Hungarian criminal law (Criminal Code of 1878 and the General Part of the Criminal Code of 1950) only allowed the prosecution of persons over the age of 12. In addition, anyone who, at the time the criminal offense was committed, was over the age of 12, but has not attained the age of 16, could only be punished, if they had the necessary mental capacity to establish the criminal nature of their acts.³⁵ The Criminal Code of 1961 raised the age-limit of criminal responsibility for all types of offenses to 14.³⁶ Like its predecessor, the Criminal Code of 1978 did not make persons under the age of 14 punishable, not even by correctional measures.³⁷

After the political transformation of 1990, legal literature offered arguments both for and against the lowering of the age limit.³⁸ The concept behind the criminal legislation for junior delinquents, contained both approaches as variants “A” and “B”. According to the latter version, persons under 12 could have been held responsible for certain crimes against persons, except when they were deemed to be insufficiently developed, either intellectually or morally.³⁹ According to the original recommendation, the lowering of the age limit would have been reserved for cases of homicide, [160. § (1)-(2)], manslaughter (161. §) and bodily harm [164. § (8)]. However, a perpetrator of these offenses under the age of 14 could only have been prosecuted if they “had the insight necessary to recognize the consequences of the offense”.⁴⁰ The correct interpretation of the law thus required the awareness that punishments e.g., imprisonment or fine, were not applicable against these persons, only correctional measures.⁴¹

35 Criminal Code of 1878, Sec.83., General Part of the Criminal Code of 1950, Sec.9.

36 Commentary to Criminal Code of 1961. The commentary explains that the current law only allows corrective measures, that the courts shall not award punishments, and that “neighbouring states all have higher limits in their definition of childhood”.

37 Criminal Code of 1978. Sec.22. a), Sec.23., Sec.107. (1).

38 A survey of legal literature is provided in Réka Király, “A 14. születésnap mint korhatár,” 3(1) *Család és Jog* (2005), 17–25; László Kóhalmi, “A büntethetőségi korhatár kérdése,” 1 *Jogelméleti Szemle* (2013), 82–95; András Vaskuti, “Az életkor és a fiatalkorúakra vonatkozó rendelkezések az új Btk-ban,” 70(4) *Jogtudományi Közlöny* (2015), 173–182.

39 Katalin Ligeti, “A fiatalkorúak büntető igazságszolgáltatási törvényének koncepciója,” 6(2) *Büntetőjogi Kodifikáció* (2006), 21–38.

40 Proposed amendment to the Criminal Code Sec.16.

41 Criminal Code Sec.106. (2) second sentence.

According to the official reasoning of the proposed amendment to the Criminal Code, “nowadays [...] the biological development of children has accelerated, they grow up faster” and “as a result of the information technology revolution, minors reach the various influences of society that they were previously protected from in their fourteenth”. It was also pointed out that

“violent behavior is increasingly prevalent in children between the ages of twelve and fourteen. [...]: Violent methods of imposing one’s will are becoming ever more prevalent, and children committing unusual acts of aggression and life threatening acts of crimes necessitates an amendment to the limitation on criminal responsibility. [...] Such acts by a minor suggest that they will not be able later on to integrate into society and lead a law abiding life without due assistance. Therefore, the tools of criminal law are absolutely vital towards the special prevention necessary.”⁴²

The reasoning, however, does not discuss why ‘due assistance’ requires taking criminal law measures as opposed to applying and improving the existing administrative tools of child protection.⁴³

The current legislation is a result of an amendment that extended the circle of crimes involved to robbery and qualified cases of despoliation. The attached reasoning argued that these crimes “are analogous to the ones in the proposed amendment, in that they also involve violence”.⁴⁴ This latter reasoning is unconvincing, since the crimes involved only resemble homicide in that they involve violence but not in the most salient aspect of the original conception, i.e. they are not life-threatening. The amendment was not even internally consistent, because if it were, it should have been extended to (qualified cases of) blackmail and other acts of violence as well.⁴⁵

Legal literature projected a very limited volume of additional prosecutions following the new code. Criminal statics suggested no more than 60–70 children in whose case the examination of necessary insight will even begin and even if in most cases the result will be positive, criminal measures will be applied in the cases of 40–50 children a year. Mihály Tóth points out that this makes it

42 Reasoning attached to the Sec.16 of the proposal of the Criminal Code.

43 For further analysis, see: Ligeti, *op.cit.* note 39, 28.

44 Balázs József (Fidesz), Csöbör Katalin (Fidesz), Dr. Daher Pierre (Fidesz), Demeter Zoltán (Fidesz), Dr. Hörcsik Richárd (Fidesz), Lipók Sándor (Fidesz), Dr. Mengyi Roland (Fidesz), Dr. Ódor Ferenc (Fidesz), Riz Gábor (Fidesz), Sebestyén László (Fidesz), Szabó Zsolt (Fidesz), Tamás Barnabás (Fidesz), Dr. Tóth József (Fidesz), Dr. Zsiga Marcell (Fidesz), Dr. Papcsák Ferenc (Fidesz): T/6958/169. proposed amendment (30 May 2012.).

45 Criminal Code 367. § (2).

strongly questionable, whether such a number of children required new legislation (or whether the measures were merely meant to pander to those in favor of increased punishments), especially when we consider that the already existing child protection act enables placing children, against whom criminal measures could not be taken, in extreme cases into correctional institutions.⁴⁶

The parliamentary reports of the Prosecutor General for the second half of 2013 (the first 6 months after the coming into force of the new Criminal Code) and then for 2014 show that criminal investigation started in 53 cases against 61 suspects between the ages of 12 and 14. All cases except one instance of despoliation and one of life-threatening violence, were cases of robbery that the children involved typically carried out with older associates. Charges were brought against 17 of those individuals, 3 of whom were eventually found guilty.⁴⁷

Arguably, the aims of the amendment could have been reached by application of the regulations already in existence. The non-criminal measure of protective custody by child services is not materially different from being placed in the correctional facilities that the new criminal legislation enables. Therefore, criminal convictions may provide the same framework and produce the same results as administrative measures. However, it is not established with any certainty that the judicial setting is more conducive to positive change. The investigator, the prosecutor and judge only meet the child once or twice, but the key of the improvement of the child are still in the hands of the educators and the appropriate influence of the social environment.

The legislator, however, found it justified to broaden the regulation even further and to extend it to potential 13-year old terrorists.⁴⁸ The reasoning says that

“in view of the fact that an act of terror exceeds the formerly listed crimes in its dangerousness, and that the recent years have seen ever younger children join terrorist organizations, the amendment is justified. Without it a 12 year old terrorist could not be held accountable for the crimes committed, even if multiple people were injured or killed.”⁴⁹

46 Mihály Tóth, “Az új Btk. bölcsőjénél,” 60(9) *Magyar Jog* (2013), 525–534 at 531.

47 The Prosecution Service of Hungary, “Annual Parliamentary Report 2013” (extract) available at http://ugyeszseg.hu/en/wp-content/uploads/vixpafghz/2020/08/ogy_beszamolo_2013.pdf; in Hungarian available at http://ugyeszseg.hu/wp-content/uploads/vixpafghz/2020/08/ogy_beszamolo_2013.pdf.

48 Act LXIX of 2016, para. 61. In effect since 17 July 2016.

49 Commentary to para. 61 of Act LXIX of 2016. (translated by the authors).

The lowering of the age limit has had a snowball effect and eligible crimes now include attacks against public authorities e.g., police officers or persons fulfilling public responsibilities e.g., teachers.⁵⁰ The reasoning holds that

“the individuals showing disdain for the rules of social coexistence need to be punishable; therefore, the protection of teachers, who fulfil their duties as defined by the law on national public education, the educational assistants and other professionals necessitates an amendment to the Criminal Code’s regulations on the lower limit of criminal responsibility”.⁵¹

According to the specific results of the empirical research, the willingness of Hungarian society to punish is high regarding age-limits of criminal responsibility for crimes against property. Opinions also tend to follow a pattern: 79 percent of respondents say that every case should be punished. Thus, two-thirds of the respondents think that there should be the same regulation for all the case, but they don’t differentiate in their opinion. In this category, the most serious case, a 15-year-old robber, would be punished by 92 percent of the respondents but even the slightest act (theft by a 13-year-old) would be punished by 83 percent. Those who differentiated are more lenient towards 13-year-olds and thieves. However, only 3 percent of the population would regulate according to our criminal law on the age-limit of criminal responsibility in each and every detail examined, namely leave 13-year-old thieves unpunished.

Knowledge may also be significantly influenced by opinions, which may be the most decisive element. In all four situations, opinions and the supposed regulation coincided by half of the respondents (50 percent), while case-independent criminalization is only 16 percent and general decriminalization is negligible (1 percent). Thus, two thirds of the respondents have only schematic knowledge, but also schematic opinion. Differences in opinion and knowledge tend to lead to criminalization, 22–36% depending on the situation. There is a higher percentage of those who want to criminalize when it comes to 13-year-old perpetrators, as they know (wrongly for robbers, rightly for thieves) that they are currently not being punished and they do not agree with the (supposed) law.

⁵⁰ Act LXXIV of 2020. 6. §. In effect since 6 September 2020.

⁵¹ Commentary to § 6 of Act LXXIV of 2020. (translated by the authors).

7 Conclusions

Previous theoretical papers and empirical studies show that post-2010 Hungary can be regarded as a fertile land for penal populism. This research, however, shows that the social reality is more complicated. Official explanations attached to the legislative proposals clearly demonstrated penal populist policy discourses by referring to strictness of the law and extension of punitive measures. In line with this policy background, several provisions of the new Criminal Code are stricter than those of its antecedents. However, some of these measures arguably serve as window dressing, adopted only to satisfy the demand for stricter crime control. The general trend appears to be increased punitivity, in some instances the new code reflects depenalization and provides for more lenient sanctions. Therefore, amendments of Hungarian criminal law between 2010 and 2020 are characterized by heterogeneous tendencies of tightening and relaxing.

It could have been expected that populist penal legislation would result in harsher sentencing practices. Statistical analysis of the data can only partially confirm this assumption. The rate of incarcerations among convicted persons remained strikingly stable while the proportion of fines gradually increased (from 22% to 29%). Only the proportion of custodial sentences to be served showed a small, but constant change in favor of suspended prison sentences. Therefore, it can be concluded that the overwhelming strictness promised and hoped for by the legislator has not materialized in judicial practice during the first seven years of the new Hungarian Criminal Code.

Hungarian society is highly receptive to the legislative products of legal populism. Out of the cases involved in the empirical study, respondents would punish 75%, whereas the law in effect only punishes two thirds of them. Opinions agree with the current criminal law most fully when the law punishes the given act. In cases when public opinion differs from the current law, the difference tends to be in one direction only: people want to punish even in those cases that the current law does not criminalize. However, even in this swell of punitive desires, there are exceptions, where the current law punishes certain acts (such as running on the football pitch during a match), that the majority of the population would not punish.

In post-2010 Hungary, penal policy discourses reinforced strong punitive attitudes of Hungarians. Applied criminal justice policy measures, nevertheless, do not reflect a consistent punitive policy. While the general trend appears to be increased punitivity, in some instances the legal changes reflect

depenalization, even in cases where Hungarian public opinion supports harsher measures. In this regard, the past decade does not differ substantially from the 2000s during which left-wing governments did not follow a consistent policy line either and waves of depenalization were followed by increased punitivity.