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Some Issues Regarding Fraud in the First Hungarian Criminal Code

*Sándor Madai**

Abstract

The first Criminal Code is always of paramount importance in the life of a nation. Not only because written law, especially criminal law, has been in demand by society from the outset, but also because it is crucial for applying the law, the justice system must also adapt to this. The first Hungarian Criminal Code – the Csemegi Code – met this expectation. The following study focuses on one of the fundamental delicts of property crimes: fraud. We present the questions that the codifier had to answer, then the result of this thinking. Finally, we look at the first amendment to the Csemegi Code, which affected the crime in several respects. The study is based primarily on descriptive, historical and comparative methods, and we try to approach the subject of our study from a theoretical and practical point of view at the same time.

Keywords: *Csemegi Code; Hungary; criminal law; codification; history of criminal law.*

1. Introduction

Changes in social relations often pose serious challenges to the legislator of criminal law. The more developed or "civilized" a society is, the more behaviour that violates or threatens the established complex system of relations should be threatened with sanctions, as there are numerous forms of behaviour that attack and the existing crimes in Criminal Codes do not provide adequate protection. The ministerial justification of the Csemegi Code[1] states that Fraud is "*actually even if not a child of the civilization, but at least a pupil*".[2]

The social changes in Hungary – at least in terms of content – made it necessary very early on (even during time of the founder of the state St. Stephen) to create a fraud-like crime category. However, it was only after a long time that the generic type of these behaviours gained its final form, which is considered to be definitive, at least to this day, and which, in its name, only found its place in the term "fraud" in recent times.

2. Historical background

Why can we say regarding the crime of fraud that it is one of the crimes that had a hard time finding its real place in the Criminal Code? It is known that the development of Hungarian terminology was hindered in Hungary by the spread of Latin. For many centuries, the terms *'stellionatus'* and *'falsum'* have been used in the legal consciousness, if not as a synonym. With the spread of Hungarian terminology, those struggling for the independence of the facts of fraud could not escape the magic of the concept of counterfeiting, and they could not make fraud independent, so counterfeiting initially covered fraudulent behaviour also. This could be explained by the fact that for a long time, fraudulent behaviour also emphasized the falsification of truth, the violation of the right to truth[3]; the right that – and we now know for sure – does not exist.

Referring to the positions of the Hungarian literature, the ministerial justification of the Csemegi Code notes that "*the views of our older scientists also differ infinitely on this crime*".[4] It is probable that the mentioned scholars did not reach a consensus due to the influence of several factors, which could be due to the lack of a uniform, statutory definition, as well as the change in the content of the Latin conceptual set and the increase in foreign influences.

The settlement of the fraud already arose during the preparation of the proposal in 1795. The crime is among the rules of substantive law, in Part Two under Section XL. "*crimes against the property and liberty of citizens*". The Latin title of the section is *'De*

* Sándor Madai, PhD, (Dr. habil.), associate professor, Department of Criminal Law and Criminology, Faculty of Law, University of Debrecen, Hungary; Department of Criminal Law, Faculty of Law Enforcement, University of Publice Service, Budapest, Hungary, email: madai.sandor@law.unideb.hu / ORCID 0000-0002-3376-2488.

1 The Csemegi Code was the first Criminal Code of Hungary (Act no. V. of 1878).

2 LŐW, T., *A magyar Büntetőtörvénykönyv a bűntettekről és a vétségekről és teljes anyaggyűjteménye* - II. kötet. (*The Hungarian Criminal Code on Crimes and Misdemeanours and its complete collection of materials - Volume II.*) Budapest, 1880, p. 731.

3 ILLÉS, K., A vagyon elleni bűntettekről. (About crimes against property.) In: *Magyar Igazságügy.* vol. Nr. 4, 1875, p. 304.

4 LŐW, T., *A magyar Büntetőtörvénykönyv a bűntettekről és a vétségekről és teljes anyaggyűjteménye* - II. kötet. (*The Hungarian Criminal Code on Crimes and Misdemeanors and its complete collection of materials - Volume II*), Budapest, 1880, p. 733-735.

Stellionatu, seu Falso', which in the translation of Lajos Hajdu is *„deception and fraud*".[5]

The substantive law proposal of 1843 is considered controversial in terms of fraud. On the one hand, progress had been made regarding the distinction from counterfeiting, although not yet fully clarified, and on the other hand, there was no clear legislative position mirroring the anti-property nature of the act.

The substantive law proposal of 1843 was another step towards a modern Hungarian substantive law regulation that draws from European intellectual currents and surpasses them in some respects. However, known Hungarian historical events have made it impossible for it to serve the construction of the domestic rule of law, either in its original form or in a revised form. After the revolution and the War of Independence of 1848-49 in Hungary, Austrian criminal law became the obligatory compass for Hungarian science and practice, as in 1849 the Austrian Criminal Code of 1803, and later of 1852, came into force in Hungary.[6]

The creation of the Provisional Rules of Jurisdiction again led to difficult years for practice, given that in 1861, as a result of opposition to Austrian law, the application of pre-1848 Hungarian law was ordered. Not only did the spirit of the proposal of 1843 seem to be lost, but in many respects even the principles of the proposal of 1795 seemed to be pushed into the background, and Hungarian criminal law returned to a fragmented, untraceable regulation.

Minister of Justice Boldizsár Horvát wanted to shed light on this darkness when he started intensive codification work. Although with a change of emphasis, this process led to the entry into force of Hungary's first Criminal Code, Act V of 1878 (Károly Csemegi was the codifier of the Act, so we call the Act the Csemegi Code).[7] We believe that it is unnecessary to present the historical significance of the Code. Therefore, we merely point out that in our opinion, it is not only Csemegi's merit that he created a coherent norm, but it is also at least as important that the Code has also entered into force.

Csemegi's approach – and we will see concerning the regulation of fraud also – was put into practice in several areas before embarking on creating the Code. Although he was not an explicitly theoretical expert, his work was also recognized by scholars, and he also gained experience as a codifier, as his name is associated with Act IV. of 1869 on judicial power. He also knew the practice well, as he practised as an advocate for a long time, so he had the opportunity to know the shortcomings and mistakes of the regulation of criminal law. A circumstance related to the latter fact is that – and the appearance of the influence of foreign countries in Hungary in connection with the regulation of fraud is already clear – he had to apply Austrian criminal law in his legal practice, also considering that the Austrian Criminal Code was in force in Hungary from 1849 – until the entry into force of the Provisional Rules of Jurisdiction.[8] Therefore, it is understandable that applying an existing code provided Csemegi with the basis for drafting the Hungarian Code. He knew precisely the flaws and virtues of the applicable rules, which made it difficult for the judge, the prosecutor, and the advocate. Csemegi considered the problems of codification from the point of view of practice, and the legislative atmosphere favoured calm, professional legislation.[9]

The Code had to answer several questions on the crime of fraud. Such was that fraud should solely be regulated as an act detrimental to property interests, or perhaps non-pecuniary rights should also be protected? It was also a question to which the range of offending behaviours should be abstracted or concretized? Furthermore, perhaps one of the most important resolutions, looking at the issue from a historical point of view, was the settlement of the relationship between fraud and counterfeiting? We have repeatedly pointed out that acts of fraud and counterfeiting have long been considered closely related, parallel, and often regulated the crimes in an inseparable way. So Csemegi had to deal with this fundamental problem – in a way that could be handled for practice.

The crime of fraud is set out in the Part Two, Chapter XXXI of the Code, expressing the conspicuous change of attitude of the legislator, *before* the forgery of documents. Given that the structure of the Code differs from the structure used by our Criminal Code today, it is not easy to take a clear position on what kind of acts Csemegi wanted to define as acts against property, just keeping in mind the structure of the Code. The chapter of fraud regulated several aggravated cases also.

3. Regulation of fraud in the Csemegi Code

The basic definition of fraud was regulated in Section 379 of the Csemegi Code:

"A person who, for the purpose of obtaining an unlawful property benefit for ownself or for another, leads someone to error or maintains his/her error under false pretences, thereby causing him/her property damage: commits the fraud."

For many centuries, as we have already mentioned, it has been a matter of debate why a crime regulated under the name of fraud (stellionatus, etc.) is necessary, what value it protects, that is, in modern terms, what is its legal subject?

The Csemegi Code broke with the legislative hesitation that existed even in the substantive law proposal of 1843, which, in our opinion, was, among other things, an obstacle to the creation of a modern definition that could be well applied to practice. The Code clearly emphasizes the anti-property nature of the act, which is confirmed by the ministerial justification of

5 HAJDU, L., *Az első (1795-ös) magyar büntetőkódex-tervezet. (The first (1795) draft of Hungarian Criminal Code)*, Budapest, 1971, p. 285.

6 FINKEY, F. *A magyar büntetőjog tankönyve. (Textbook of Hungarian criminal law)*, Budapest, 1914, p. 83.

7 SZABÓ, A., A Csemegi-kódex és a magyar polgári állam kiépítése. (The Csemegi Code and the establishment of the Hungarian civil state.) In: *Jogtudományi Közlöny*, vol. Nr. 4, 1979, p. 201-203.

8 FINKEY, F., *A magyar büntetőjog tankönyve. (Textbook of Hungarian criminal law)*, Budapest, 1914, p. 83.

9 HORVÁTH, T., Az első magyar büntető kódex száz év távlatából. (The first Hungarian Criminal Code from the perspective of a hundred years.) In: *Jogtudományi Közlöny*, vol. Nr. 4, 1979, p. 200.

the Code: "*among the generally established items, we mentioned in the first place that fraud constitutes a crime against property. There is now a consensus among professionals on this.*"[10] Pál Angyal adds that "*any form of right on property, that is, both property rights that provide for the protection of property and contract law governing the movement of property*."[11] Finkey also joined the position of Angyal.[12]

Therefore, we can see that a consensus has developed among criminal lawyers on the legal subject of fraud, which not only for the period of the Csemegi Code but practically to this day, has influentially defined the field of social values protected by the definition of fraud.

There was no complete agreement among the contemporary authors as to what could be considered criminal conduct in the definition, as there was a position that, in addition to leading to error or maintaining the error, also considered causing damage as criminal conduct. According to Angyal, in the definition of the Csemegi Code, the behaviour of the perpetrator of fraud is "leading to error" or "maintainig the error", while the occurrence of damage can be grasped as a result, similar to the modern dogmatic approach.[13] According to Finkey's dissenting opinion, "causing damage" is also a "criminal activity" of fraud.[14] Schnierer, on the other hand, opposes both positions[15] when he writes that "*in addition to 'leading to error', our law identifies 'maintaining the error' as a mode of committing fraud*."[16] Nor does the ministerial justification of the Code state unequivocally: "*the mode and means of committing fraud, after the previous ones: leading someone to error under false pretences or maintaining someone's error under false pretences*".[17]

Nor was the practice uniform in judging different behaviours. Such an area was, for example, the misuse of different weights when the seller made a false measurement of the weight of the thing. In one case, the accused sold whitewash to the victim but deceived the victim about its weight because he also put a piece of iron on the scales, thus asking for more money for the goods. However, the victim made a control measurement on his hand scales, thus revealing the fraud. The Curia[18], contrary to the conclusions of the previous courts in the case, acquitted the accused, claiming that, based on the victim's objection, he immediately returned the purchase price, took back the whitewash, so the transaction was not completed, and the victim was not damaged. For this reason, according to the Curia, the decision to establish guilt (as completed fraud) is erroneous, and only an attempt of fraud can be established, which, at that time, was not punishable by the Code[19]; in the case of a similar act committed by a cereal trader, since he had discovered the deception before the transfer of the purchase price, Curia also found an attempt at fraud.[20]

In the definition of fraud, the *'leading to error'* and *'maintaining the error'* represented, as it does today, an anti-trust element, further aggravated by commiting *'under false pretences'*. "*Commiting 'under false pretences' does not presuppose hand-operation, mechanical preparation, action. Excuse, intrigue, dazzling, insidious craftsmanship can also be called 'under false pretences'* "[21], the ministerial justification states. However, it could not solve the dilemma. After the explanations of the mode of perpetration, we read: "*we believe that, even if we have not marked the borderline with certainty and precision, we have used a term which, on the one hand, explicitly excludes the dangerous extension of the concept of punishable fraud and, on the other hand, provides the right direction and guidance in practical cases*."[22]

The judgment of *'under false pretences'* may have depended on many factors, and therefore, as mentioned above, the ministerial justification of the Code itself did not take a position on its assessment. In modern terms, the problem was decided based on a careful examination of all the circumstances. However, the criterion of *'under false pretences'* also meant that if, although there was a profit motive and the damage occurred, but it did not occur as a result of *leading to error* or *maintaining the error* with *'under false pretences'*, the perpetrator could not be punished for fraud.

Finkey agrees with the use of *'under false pretences'* because, in his view, it is clear to the judge to include only specifically fraudulent types of conduct in the crime of fraud, thus distinguishing *fraus criminalis* from *fraus civilis*.[23] Illés Edvi's position is similar to that of Finkey.[24] From a modern point of view, this can be considered the contemporary prevalence of the ultima ratio nature of criminal law.

In addition to Illés Edvi, do others, including Fayer, argue that *'under false pretences'* should be considered an absolute or

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[10] LŐW, T., *A magyar Büntetőtörvénykönyv a bűntettekről és a vétségekről és teljes anyaggyűjteménye* - II. kötet. (*The Hungarian Criminal Code on Crimes and Misdemeanors and its complete collection of materials - Volume II*), Budapest, 1880, p. 737.
[11] ANGYAL, P., *A csalás. (The fraud)*, Budapest, 1939, p. 36.
[12] FINKEY, F. *A magyar büntetőjog tankönyve. (Textbook of Hungarian criminal law)*, Budapest, 1905, p. 734.
[13] ANGYAL, P., *A csalás. (The fraud)*, Budapest, 1939, p. 43. and p. 72.
[14] FINKEY, F., *A magyar büntetőjog tankönyve. (Textbook of Hungarian criminal law)*, Budapest, 1914, p. 738.
[15] The explanation for the difference is that the mode of crime differs from criminal conduct in Hungarian criminal dogmatics.
[16] SCHNIERER, A., *A büntettekről és vétségekről szóló magyar büntető-törvény (1878. V. t. cz.) magyarázata (Explanation of the Hungarian Criminal Code on offenses and misdemeanours)*, Budapest, 1893, p. 568.
[17] LŐW, T., *A magyar Büntetőtörvénykönyv a bűntettekről és a vétségekről és teljes anyaggyűjteménye* - II. kötet. (*The Hungarian Criminal Code on Crimes and Misdemeanors and its complete collection of materials - Volume II*), Budapest, 1880, p. 757-758.
[18] The name of the Supreme Court in Hungary at the time.
[19] Büntető Jog Tára (Repertory of Criminal Law), Vol. L., p. 58-59.
[20] Büntető Jog Tára (Repertory of Criminal Law), Vol. XVIII., p. 201-204.
[21] LŐW, T., *A magyar Büntetőtörvénykönyv a bűntettekről és a vétségekről és teljes anyaggyűjteménye* - II. kötet. (*The Hungarian Criminal Code on Crimes and Misdemeanors and its complete collection of materials - Volume II*), Budapest, 1880, p. 756.
[22] Ibid.
[23] FINKEY, F., *A magyar büntetőjog tankönyve. (Textbook of Hungarian criminal law)*, Budapest, 1905, p. 738.
[24] EDVI ILLÉS, K., *A büntetőtörvénykönyv magyarázata. (Explanation of the Criminal Code)*, Vol. III., Budapest, 1894, p. 266.

a relative concept? Illés Edvi distinguishes between absolute and relative concepts. He considers the former as behaviours by which even the most prudent person can be "*lead to error*" or "*maintain the error*". Under the latter, however, he meant only behaviours which, because of the passive subject's lack of knowledge or experience, were suitable only for fraud, so that it would be unsuitable for fraud against those who have knowledge or experience in a given field. In his view, the only relative concept can be considered in the application of fraud, as this is the only way to ensure the criminal protection of simple people. Joining the position, Fausztin Heil states that "*criminal protection can be denied*" to individuals who ignore their life experience, while criminal protection for simple individuals is more justified.[25]

Fayer also sees the notion of *'under false pretences'* as a relativizing moment of the crime of fraud when he states that "*what can be established for people who have moved from the village to the city but not for urban people*."[26]

The authors did not attempt to define *'under false pretences'* but approached the issue from the point of view of judicial practice, and we can get an idea of what types of behaviours the practice considered *'under false pretences'*. However, it must also be noted that, as acknowledged in contemporary literature, the judicial practice has been quite volatile with regard to *'under false pretences'* as a mode of perpetration.[27] Several decisions generated theoretical debate. In one case, lottery ticket sellers deceived several of the "*ignorant peasant inhabitants of some gardening village*" by selling lottery tickets above the real value of tickets saying those were issued by Budapest's "chief president" and could win significant sums. Two of the three judicial forums acquitted the accused persons, while the Curia found them guilty. According to the substance of reasoning, the accused persons committed the crime in a settlement where "*there was no clerk or priest*", precluding the less informed persons from receiving information from a person they considered credible.[28]

The courts decided differently in the case where the accused deceived the victim when she promised to conjure more money out of less money, and then claiming that if she enchanted the hens of the victim, they would lay silver, and finally she asked for garments and utility items, claiming to be able to triple their number. The accused admitted that she had received money from the victim in order for her hens to lay gold and silver; she also admitted that she also took the victim's garments to mesmerize the victim's husband so as not to leave the victim. On the other hand, the accused denied taking the money to make more of it and the garments to make three of each. The court of the first instance acquitted the accused of the fraud, although it found her liable for a breach of public order. The appellate court agreed with the first-instance decision because "*in the supernatural allegations of the accused, 'under false pretences' could not be recognized, because the promise of a hen laying silver to a person being in an accountable state of mind cannot be considered 'under false pretences' at all*." Curia convicted the defendant of fraud. In its view, the accused took advantage of the victim's educational and living conditions by "*imagining the seductive effect of his promises quite 'under false pretences' in the light of the facts set out above*". The Curia found, in the present case, that all the elements of fraud existed.[29]

Therefore, we can see that fraudulent, deceptive-type conduct has always been an immanent element of fraud, at least since the Csemegi Code.

The result of the crime is property damage indicated in the definition. We mentioned above that it did not agree in all respects with Csemegi's proposal for the final text of the Code. This is also true of the result of the crime. Csemegi originally intended to define the result with "*and thereby damage his/her property*", but instead of the proposal, the following was included in the Code: "*and thereby causes property damage to him/her*".[30]

We could speak of pecuniary damage if "*the situation of the property has become more unfavourable so that it has decreased in value after the event in question.*"[31] Depreciation had to be pecuniary, i.e. quantifiable in money, given that it served as a basis for classifying the offence; in the case of damage not exceeding HUF 50, the act was a misdemeanour; and above that amount as an offence.

It is necessary to mention the interpretation of several experts in the literature, according to which the actual damage (*damnum emergens*) and the *lucrum cessans* were to be understood as the property damage.[32] Regarding the issues of damage, we must mention the problem that judicial practice has finally solved. The question was whether, according to the wording of the Code ("*and thereby causes property damage to him/her*"), the physical identity of the deceived and damaged person is necessary or whether legal identity is sufficient. Schnierer notes in 1893 that "*the relevant words of the law, however, must be interpreted extensively, so that personal identity is not considered to exist in a figurative sense, even when the erroneous person acted as a representative*

[25] HEIL, F., A ravasz fondorlat mint a csalás tényeleme. (False pretence as the element of fraud.) In: *Jogtudományi Közlöny*, vol. Nr. 34, 1888, p. 278.

[26] FAYER, L., *A magyar büntetőjog kézikönyve. (Handbook of Hungarian criminal law)*, Vol. II., Budapest, 1905, p. 411.

[27] FINKEY, F., *A magyar büntetőjog tankönyve. (Textbook of Hungarian criminal law)*, Budapest, 1905, p. 738.

[28] BÁTTASZÉKI, L., Relativ-e a csalás?(Is fraud relative?) In: *Jogtudományi Közlöny*, vol. Nr. 27, 1889, p. 214-215. és SERLY, A., Relativ-e a csalás? (Is fraud relative?) In: *Jogtudományi Közlöny*, vol. Nr. 34, 1889, p. 273-274.

[29] Büntető Jog Tára (Repertory of Criminal Law), Vol. XXX., p. 178-180.

[30] LŐW, T., *A magyar Büntetőtörvénykönyv a bűntettekről és a vétségekről és teljes anyaggyűjteménye* - II. kötet. (*The Hungarian Criminal Code on Crimes and Misdemeanors and its complete collection of materials - Volume II*), Budapest, 1880, p. 737.

[31] EDVI ILLÉS, K., *A büntetőtörvénykönyv magyarázata (Explanation of the Criminal Code)*, Vol. III., Budapest, 1894, p. 272.

[32] ANGYAL, P., *A csalás (The fraud)*, Budapest, 1939, p. 72-75., EDVI ILLÉS, K., *A büntetőtörvénykönyv magyarázata (Explanation of the Criminal Code)*, Vol. III., Budapest, 1894, p. 272-273., SCHNIERER, A., *A büntettekről és vétségekről szóló magyar büntető-törvény (1878. V. t. cz.) magyarázata.* (*Explanation of the Hungarian Criminal Code on offenses and misdemeanours*), Budapest, 1893, p. 568-569. However, the current Hungarian Criminal Code does not follow that example when it defines the concept of damage in Section 459 Subsection (5) Point 16 as "any diminution in the value of property caused by the crime". The lucrum cessans also appears in our law in Section 459 Subsection (5) Point 17 of Criminal Code, but it is mentioned in the Code in the context of pecuniary disadvantage: "any damage caused to property and the missed property advantage".

of the victim's property interest."[33] Illés Edvi in 1894, while accepting the latter theory, which is therefore satisfied with a legal identity, mentions that the practice was still volatile to the theoretical consensus (or rather contrary), as he acquitted an accused who realized all the factual elements of fraud, only the deceived and the damaged person were different.[34] In his work, published in 1905, Finkey already clearly states that the practice accepted the second theory, which means the legal identity of the deceived and damaged person is sufficient to establish fraud.[35] Therefore, we can see in what direction the practice approach has changed, perhaps due to the influence of science, or perhaps the necessity recognized by practice, which is satisfied with the existence of legal identity for the detection of fraud to ensure adequate criminal activity protection.

In addition to the basic definition of the crime, we could find several aggravated cases in the Code. If the damage caused by the fraud did not exceed HUF 50, the fraud was considered a misdemeanour by law; if the damage exceeded this amount, it was a criminal offence. It is also important to point out that there were circumstances defined in the law under which the legislator ordered the act to be punished as a criminal offense, regardless of the amount of damage:

"381. § Irrespective of the amount of damage caused, fraud is punishable if:

1. the perpetrator pretends to be a public official or to have an official mandate in order to commit the crime;

2. it has been committed by a public official, advocate, trustee, administrator or private official in the course of his office or assignment;

3. the perpetrator has already been punished in two cases for fraud, and it has not yet been ten years since he served his sentence before committing his last fraud.

§ 382. Irrespective of the amount of damage caused, fraud is a criminal offence: if someone commits it by destroying or damaging one's own insured property. "

The differentiation was also marked in terms of punishment: the misdemeanor was punishable by imprisonment for up to one year and a fine of up to five hundred forints, and the penalty for felony was imprisonment for up to five years and a fine of up to two thousand forints. If the value of the damage caused by fraud exceeded two thousand forints, or in cases of recidivism or the crime classified as insurance fraud, the fraud was punishable by imprisonment for up to five years.

4. The First Amendment of Csemegi Code

The Csemegi Code was a decisive work in the history of Hungarian criminal law. Its dogmatic system and approach are also reflected in today's criminal law.

Earlier, we pointed out that this Code was the first independent, complex Criminal Code in Hungary. As a result of this fact, it is evident that there was not – could not have been – a work that reflects the views of all representatives of science or practice. In recognition of the merits of the Code, several have criticized specific issues regarding the General Part and Special Part also. Here we want to avoid general explanations of the norm, we only want to draw attention to the problems concerning the definition of fraud, and within that, as we have already talked about the importance of the Code on the crime of fraud, we only touch on the points that changed the definition.

The relevant provisions of the Csemegi Code have been challenged by practice and science on the following points:

1) the use of the term *'under false pretences.'*
2) the question of the identity of the deceived person and the damaged person,
3) the impunity of the attempt of fraud misdemeanour.

According to the aspects above, the legislator amended the basic definition and Section 50 of the First Amendment already defined fraud as follows:

"A person who, for the purpose of obtaining an unlawful property benefit for themselves or another, leads someone to error or maintains his/her error by pretence, thereby causing him/her or for another property damage: commits the fraud. Attempts to commit fraud shall be punishable."

4.1 The use of the term *'under false pretences'*

We have already touched upon the problem of *'under false pretences'* in the past, so now we merely refer to the fact that such an expression of the Code generated such a fluctuating, unpredictable judgment. After hearing professionals' views, the legislator wanted to make this inconsistent judicial practice more predictable by omitting the adjective *'under false pretences'*.

Contrary to Finkey's view, Angyal explains that the concept of pretences must be endowed with "*content elements*" which "*on the one hand do not involve unnecessary inhibitions that hinder the normal course of daily life, and on the other hand provide protection for the optimistic weakers."*[36] By presenting this element, we can get an idea about Angyal's conception of criminal law and its role and function when he states that the educational function of criminal law can be observed in the structure of the definition, as the legislator tries to persuade people to certify reliable and correct conduct.

Nevertheless, what can be considered *'pretence'* according to the amendment? How different is this criterion from *'under false pretences'*? Judging this subjective element also kept itself with the entry into force of the First Amendment. Judging when a lie can be considered *'pretence'* should always be "*judged according to the cases and the individuality of the actors*".[37] Although it was clear from the wording of the Code, the Curia nevertheless con-

[33] SCHNIERER, A., *A büntettekről és vétségekről szóló magyar büntető-törvény (1878. V. t. cz.) magyarázata.* (*Explanation of the Hungarian Criminal Code on offenses and misdemeanours*), Budapest, 1893, p. 569.

[34] EDVI ILLÉS, K., *A büntetőtörvénykönyv magyarázata.* (*Explanation of the Criminal Code*), Vol. III., Budapest, 1894, p. 274-275.

[35] FINKEY, F. *A magyar büntetőjog tankönyve. (Textbook of Hungarian criminal law)*, Budapest, 1905, p. 738.

[36] ANGYAL, P., *A csalás. (The fraud)*, Budapest, 1939, p. 53-54.

[37] *Büntető Törvénykönyv a büntettekről és vétségekről (1878. V. t. cz.) (Criminal Code on offenses and misdemeanours*), Jegyzetekkel, utalásokkal és joggyakorlatokkal összeállította ANGYAL Pál és ISAÁK Gyula (Compiled by Pál ANGYAL and Gyula ISAÁK with notes, references and case law), Budapest, 1937, p. 469.

firmed in several decisions that, due to the modifications set out in the First Amendment, no extraordinary finesse was required to commit the fraud.[38]

In one decision, the Curia stated this in principle: "*The definition of 'pretence' is not a generally closed theorem, the elements of which are identical in each case; but according to the changing conditions of life, the level of intellectual maturity and difference of the opposing parties, it can be a 'pretence' that, when practised by one party, it is capable of deceiving the opposing party and persuading to act.*"[39]

We must criticize one point of this statement, because it is not the *'pretence'* itself that misleads the passive subject, as opposed to the Curia finding, but the criminal conduct *leads someone to error or maintains his/her error*; *'pretence'* – as the mode of the crime – is intended to help, as it refers to its implementation, and it merely supports fraud, but does not in itself cause or maintain the error.

In that case, moreover, the accused, "*known as the fortune-teller and quack doctor*", committed the fraud to the detriment of several victims, whose "*rudimentary intelligence and intellectual weakness immediately appeared to the accused*".[40]

Another decision of the Curia contains a similar approach in terms of content. According to the essence of the historical facts, the victim handed over money to the accused, trusting in the favourable assessment of his application for immunity from military practice, but the accused, although he promised to cooperate, did not and could not do so.

In another case, the defendant sold his horses to the victim, which he said were healthy but were, in fact, sick. The Curia found the crime was committed with *'pretence'*, as signs of sickness could not generally be detected on horses, and also because the victim "*could not be persuaded of the accused's allegation in the lack of special expertise*".[41]

Pál Angyal is one of the few authors who defined the concept of *'pretence'*: "*pretence which contributes to or occurs at the same time as 'leading to error' or 'maintaining the error' which, by increasing the effectiveness of the 'leading to error' or 'maintaining the error', weakens or even excludes the ability to doubt in a third party, or which is suitable for that purpose.*"[42]

We must emphasize two elements of the definition: one is *additionality*, and the other is *efficiency*. The former means that, in the presence of elements of fraud, it is a circumstance contributing to *'leading to error' or 'maintaining the error'* which can be taken into account only in connection with it, as is clear from the wording of the definition itself. Angyal here also refers to *'pretence'* as conduct. However, presumably, the designation of the mode of perpetration would be more correct, considering that the *'pretence'* alone – in this relation – cannot be interpreted, because the perpetrator can be punished only if they lead someone to error or maintains their error *by pretence,* in other words, with a fraudulent mode. Thus, the legislator did not want to designate a new criminal conduct, but to record the mode of the conduct which conduct already existed in the Csemegi Code. By the effect-enhancing nature of *'pretence'*, we can mean that by supplementing the perpetrator's behaviour (*'leading to error'; 'maintaining the error'*), it emphasizes its credibility and makes it easier for the passive subject to accepting the lie.

4.2 The identity of the deceived person and the damaged person

Much of the criticism of fraud in the Csemegi Code mentioned the fact that it was a problem for the practice that the text of the Code required the identity of the passive subject and the victim: "*A person who… leads someone to error or maintains his/her error under false pretences, thereby causing him/her property damage…*". It is clear from the law that fraud could have been established only if the person who had erred or was held in error was the same as the victim, i.e., the person with whom the damage occurred. This deficiency showed its effect in practice relatively early on. As early as 1892, Ferenc Vargha put it this way: "*The issue of the identity of the damaged and mistaken person and, consequently, of the punishability of fraud has given rise to most controversy and criticism in the doctrine of fraud.*"[43]

After the initial extreme fluctuations, separating the physical and legal identities, the judicial practice was finally satisfied with the legal identity of the passive subject and the victim.[44]

Schedius, when drafting a plan of amendment, suggested adding a phrase "*or to someone else*" to the text of the definition of fraud. However, the assembly convened on this issue of the amendment suggested a longer modification: "*A person who has mistaken and been damaged shall be deemed to be the same even if the person who has mistaken had the possibility of a legal or factual provision over the thing.*"[45] Based on various considerations, Fayer disagreed with none of the proposals, arguing that the text of "*and thereby cause property damage to* or *someone else*" would have been the most expedient.[46]

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[38] SCHÄFER, I., Néhány szó a »fondorlat« büntetőjogi fogalmához. (A few words on the criminal law concept of "pretence".) In: *Jogtudományi Közlöny*, vol. Nr. 11, 1933-1934, p. 67.

[39] Büntető Jog Tára (Repertory of Criminal Law), Vol. LXX., p. 122.

[40] Ibid.

[41] Büntető Jog Tára (Repertory of Criminal Law), Vol. LXVII., p. 111-112.

[42] ANGYAL, P., *A csalás. (The fraud)*, Budapest, 1939, p. 55.

[43] VARGHA, F., A büntető-törvénykönyvek módosítása tárgyában összehívott enquéte határozatai. (Decisions of the assembly convened to amend the Criminal Codes.) In: *Jogtudományi Közlöny*, vol. Nr. 9, 1892, p. 66.

[44] FINKEY, F. *A magyar büntetőjog tankönyve.* (*Textbook of Hungarian criminal law*), Budapest, 1905, p. 738.

[45] VARGHA, F., A büntető-törvénykönyvek módosítása tárgyában összehívott enquéte határozatai. (Decisions of the assembly convened to amend the Criminal Codes.) In: *Jogtudományi Közlöny*, vol. Nr. 9, 1892, p. 66.

[46] FAYER, L., Észrevételek a Btk. és a Kbtk. novella-javaslatára XI. (Comments on Draft of the Amendment of Criminal Code and Code on Tresspases XI.) In: *Jogtudományi Közlöny*, vol. Nr. 32, 1892, p. 250.

In the end, the First Amendment chose the text of "*for that or someone else*", and thus it was already clear at the level of the norm that the mistaken person and the victim (the damaged person) could be the same but different too.

4.3 The impunity of the attempt of fraud misdemeanour

The Csemegi Code contained different rules for the attempt than the current Hungarian Criminal Code. According to Article 65 of the Csemegi Code:

"*The act by which the commission of the intended offence or misdemeanour is commenced but not completed: it is an attempt at the commencement of the offence or misdemeanour. An attempt to commit an offence is always punishable, but a misdemeanour is punishable only in the cases specified in a special part of the Code.*"

Based on the text, we can state that Csemegi took a clear position during the drafting of the Code: the attempt to commit fraud as an offence – referring to the second sentence of Section 65 of the Code – was punishable in general, while the misdemeanour of fraud was not.

Concerning fraud, the Enquete convened to amend the Criminal Codes already took the view that any attempt to commit fraud as a misdemeanour was also punishable.[47] A legitimate expectation has been formulated in connection with the relevant provisions of First Amendment, because, for example, the chapter of the Csemegi Code regulating theft – and within that Article 339 – ordered the attempt to punish the misdemeanour of theft.

The legislator, agreeing with the position of theory and practice, corrected the shortcomings of the Code in the First Amendment, and ordered the attempt of the misdemeanour of fraud to be punished as well.

5. Closing remarks

It can also be seen from the above that the first Hungarian codification of the definition of fraud, followed by its subsequent amendment, was surrounded by heated debates. However, these were not in vain since based on these – with only minor modifications – It was possible to create a concept that still holds its place in the current Hungarian Criminal Code.

[47] VARGHA, F., A büntető-törvénykönyvek módosítása tárgyában összehívott enquéte határozatai. (Decisions of the assembly convened to amend the Criminal Codes.) In: *Jogtudományi Közlöny*, vol. Nr. 9, 1892, p. 66.