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THE ACCUSATORY SYSTEM, THE ACCUSATION PRINCIPLE AND THE PRINCIPLES OF THE CRIMINAL PROCEDURE

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I. The aim and subject of the research, the structure of the dissertation

At first sight the question of criminal procedural principles as the subject of scientific research is either too general to be well grasped, or seems to be evident that it is less worthy of more examination. Nevertheless, in jurisprudence and legal education, the topic of principles is important, usually it is an introduction to a field of law. The role of the principles is also essential in (Hungarian) legislation, Hungarian codes often begin their text by listing and detailing principles. In the field of procedural law the principles seem to be given more emphasis than in other fields of law.

According to my assumption if the principles of a field of law – especially the principles of a code of a procedure – are properly formulated by the legislator, the understanding of the principles is in itself capable of obtaining a comprehensive picture of that field of law or that procedure. It is therefore important that the principles are properly selected and formulated so that they can form a coherent system. Otherwise, the system will be strained by internal inconsistencies, which will also have a detrimental effect on the application of the law.

Nevertheless, in the science of criminal procedure law a comprehensive work on principles has not been written, but rather shorter articles on each principle are typical. The primary aim of my research was therefore a general, comprehensive examination of the criminal procedural principles (and criminal procedural systems). However, the questions immediately arise: which principles can be considered as criminal procedural principles; whether there is a ranking of principles; whether the range of principles is closed, so it is possible to examine each principle individually; and whether there is a principle that has a stronger effect on the criminal procedural system than other ones. I answered these questions at the beginning of the research that the range of principles is not closed, therefore (also for the size limit of the dissertation) it is not possible to examine all the principles individually. In addition, I found that there may be a principle (or principles) that can determine the form of the procedural system more effectively than others. Based on this, I decided that after the general examination, I would focus only on such (a) principle(s). In my opinion in the Hungarian procedural system this determining principle is the principle of accusation (or accusation principle).

The primary and general aim of my examination was therefore to demonstrate that both the topic of principles in general, and the topic of principle of accusation are worthwhile

and useful to research, because declaring or eliminating certain principles can determine the whole character of the procedure.

My dissertation is therefore divided into two separate sections. The general section deals with the criminal procedural principles generally and the criminal procedural systems closely related. The second, special section of my dissertation is exclusively about the principle of accusation and some closely related principles.

The dissertation includes an international comparative study targeting the Anglo-American legal systems, because the Anglo-American legal (and criminal procedural) system is the system, which is so different from the Hungarian regulation that it requires a comparative examination.

In the first chapter of my dissertation I review the definitions of the criminal procedural principles and look for common elements.

In the second chapter I examine the origin and historical development of criminal procedural principles and systems in both Hungarian law and universal legal history.

In the next chapter I review the connections between the principles and the procedural systems. First I examine the Hungarian law, then the Anglo-American legal systems, and after that I compare the models and make an attempt at a new modeling.

In the fourth chapter of my dissertation I review the sources of law of the principles, analyze both the Hungarian legislation and the relevant international conventions, and then try to make the structure of the sources transparent.

In the science of criminal procedure law the subject of the normative nature of the criminal procedural principles is a less studied and it is a controversial issue as well. In the fifth chapter I examine this problem.

The last chapter of the first part of my dissertation deals with the classification of principles. Here I review the Hungarian classification theories, and then I describe my own systematization categories. I examine the acceptability of categorizations developed in other fields of law, as well as the revivability of the so-called leading-principle-concept of Hungarian jurisprudence of the early 20th century.

The special part of my dissertation focuses on the issues of the principle of accusation. In the first chapter (chapter 7) of this part I review Hungarian theories on the principle of accusation. Next, I examine the development of the Hungarian legal regulation of this principle. Then I analyze the Anglo-American regulation and legal theories of the accusation principle, taking the differences from the Hungarian characteristics into account. Finally, I clarify and specify the concept of the accusation principle and its elements.

In the next chapter, I clarify the connections and differences between the principle of accusation and the principle of ex officio.

In the ninth chapter, I examine the necessity of the accusation (whether the charge is well-founded by evidence), i.e. after the investigation what kind of certainty must be required for the prosecutor as precondition to prosecute.

In the tenth chapter of the dissertation, I give a longer analysis of the institutions established in the Hungarian and Anglo-American legal systems for the filtration and control of the charge, and whether these are necessary.

In the next chapter I examine some questions of the subjective aspect of the accusation principle, especially, how the prosecutor depends on the suspicion of the pre-trial investigation, and what the consequences of this can be during the trial.

In the twelfth chapter I review some special questions of withdrawing the charge and the modification of the charge.

Finally, in the last chapter of my dissertation, I examine principles closely related to the principle of accusation, such as the issue of the burden of proof, the presumption of innocence, the principle of in dubio pro reo, and the prohibition of self-incrimination.

II. Methods and sources of the research

The basic method of my research was to review, analyze, evaluate and compare written sources. The two types of written sources I have examined are legal sources and scientific papers. Among the legal sources I examined not only the legislation, but also the written sources of sentencing practice and the relevant court, prosecutor's office and constitutional court decisions.

I reviewed and interpreted the above mentioned written sources not only in relation to the Hungarian legal field, but also in relation to the Anglo-American legal systems. During the examination of the Hungarian sources of law, I basically and primarily focused on the codified criminal procedure law, i.e. on the legal text of the six criminal procedure codes promulgated in Hungary. In doing so, I examined in which code which principles were regulated and with what emphasis. I also reviewed the ministerial explanations of the codes. I also analyzed the Hungarian judicial practice related to my topic, the resolutions of the Supreme Court and the General Prosecutor's Office, as well as the relevant decisions of the Constitutional Court.

It can be stated that scientific papers that comprehensively deals with the principles are rare in both Hungarian and Anglo-American literature. Rather, the individual analysis of a principle is typical. In the Hungarian legal literature the principles are comprehensively detailed primarily in the university textbooks of criminal procedure law. In addition, a number of articles can be found in journals that deal mainly with certain principles, and some monographs also touch on certain principles, less commonly the principles in general. I tried to review these writings as completely as possible on all relevant topics, and then I recorded the most important findings, comparing the ascertainments of each author with the statements of other authors and my own views, to drew conclusions from them.

I did the same for English and American sources. With regard to the English and American legal systems, I examined and analyzed several legal acts (codes), and highlighted the differences in the regulations. Beside this, I compared the Hungarian and Anglo-American legal regulations. I also analyzed the dissertations of several English and American authors and compared them with each other. I specifically examined the differences between Anglo-American and Hungarian law in connection of my research topic, so I also made an international comparison of the regulation and the scientific interpretation of the principles.

III. Summary of the results of the research and its utilization

The primary and general purpose of my dissertation has been to demonstrate that both the principles (and systems) of the criminal procedure and the principle of accusation can raise theoretical and practical problems that may be taken into consideration by either legislation or law enforcement. In connection with these questions, my multiply-proven general assumption has been that the principles of the criminal procedure can characterize the whole structure of criminal justice system. At the same time I have also justified that there may be a central system-defining principle among the principles, which can define the entire order of procedure by itself. In our current criminal justice system this is the principle of accusation.

Following this line of reasoning, my dissertation is divided into two distinct parts: in the general section I have examined the general questions of the principles of criminal procedure, while in the special section I have analyzed the accusation principle itself which I consider to be the central principle.

First of all, I have dealt with the definability of the principles, so I have reviewed several definitions of the Hungarian jurisprudence, and after evaluating these definitions I have uncovered the generally accepted, most justifiable conceptual cores. I have identified four core elements: 1. fundamentality, 2. generality, 3. ability of determining systems and 4. ability of orientation.

After that I have investigated the origins of the principles, focusing on the historical/social facts which underlie the principles of criminal procedure. Regarding the origin of the principles, I found that firstly the various procedural systems developed due to social and political influences, then the jurisprudence later abstracted the principles from them, and later these principles also influenced the legislation. After this analysis I have demonstrated the early presence of a number of important principles, and have reviewed and evaluated the procedural system of some historical eras. In the examination of the historical development of principles and procedural systems, I have reviewed both the universal and the Hungarian legal developments. I have found that from a very early period, typical system-forming principles can be discovered in the criminal proceedings of certain historical periods. Here I have been paying attention to the presentation of each of the well-known historical procedural systems and their principles.

Then I have examined the dogmatic relations between the principles and the procedural systems. While doing so, I have proved the existence of a close and practically inseparable relationship. First, I have evaluated the Hungarian, then the Anglo-American

system theories, and have compared the continental and the Anglo-Saxon theories on many points. After this analysis I have made an attempt to explore the cause of the differences in system theories. I have found that the main reason of the differences is the different use and interpretation of each term. In the Anglo-Saxon legal system the term "adversarial" means that the evidences are presented by the parties, i.e. that the judge has no liability to prove the charge or other facts. The term "accusatorial" in Anglo-American systems has similar meaning as the burden of proof, while in Hungary it means primarily the dependence on accusation (that is, the court can only adjudicate if the prosecutor has charged). I have also found that the tripartite division of the procedural systems of the Hungarian jurisprudence (inquisitorial, accusatorial, mixed) is not necessary from the historical point of view. The double division (inquisitorial-accusatorial) is sufficient, because the system which is called mixed is in fact considered to be accusatorial. And from the aspect of international comparison, the tripartite division is either not justified. We can consider all modern systems in force today mixed, or rather it is more useful to divide the systems on the basis of non-adversarial and adversarial discrimination, thus on the basis of the distribution of the burden of proof. Finally, I have presented a new approach to modelling. The basis of my modelling is the relationship between procedural positions. Based on this, I have distinguished three models: 1. a horizontally bipolar intervention-free model; 2. a vertically bipolar (inquisitorial) model; 3. a three-pole (accusatorial) model.

In the next part of my paper I have reviewed the sources of law of the principles. Following this analysis, I have made a clear breakdown of the complex source system and I have detailed the conclusions that can be drawn from it. In doing so, I recorded which principles appear in each Hungarian sources of law, which can be found in the international declarations only, and which are included in all texts. I have drawn attention to the unjustified duality and inconsistency of the regulations, as well as to the fact that the accusation principle is not included in either the constitutional or the international declarations, although it would be necessary.

I have examined the normative nature of the criminal procedural principles, and the question whether we can attach any binding force to the principles. I have distinguished four meanings of normativity: 1. the question of binding force, 2. the question of (abstract) mandatory applicability, 3. the question of concrete applicability, and finally 4. the question of whether the final decision can be based on a principle. At the end of my examination, I have come to the conclusion that in the case of certain principles the answer can be affirmative.

With regard to the classification of principles, first I have reviewed the most typical grouping theories of the Hungarian law. Then I have examined four questions: 1. the sustainability of the most common classification theories (in my view, most of them cannot be justified); 2. the adoption of new or other forms of classification (one of the classification of the science of civil procedure law can be adopted); 3. the examining or (re-)interpreting the acceptability of the leading-principle conception (I consider the leading-principle conception to be revivable and applicable); and 4. the ranking of principles (based on the former conclusion, there may be a ranking of principles). At the end of this section, I have also tried to justify the central role of the principle of accusation. This is based on the fact that if the accusation principle is taken out from the system, the structure of the whole system will change.

In the special section of my dissertation first I have examined the Hungarian theories of the accusation principle and then the development of the Hungarian legal regulation. I have pointed out that for a long time the principle of accusation suffered a significant setback, especially in the socialist period, but to this day there are rules restricting the accusation principle (but to a much lesser extent). Using the same method, I have made the analysis of the Anglo-American legal systems as well. I have found, as I have already pointed out, that the principle of accusation has different meanings in Anglo-Saxon legal systems, both in legislation and in jurisprudence. In these systems the accusation principle essentially means the burden of proof. As a result, I have established what, in my view, is the meaning of the principle of accusation, what core conceptual elements can be revealed, and how they are interrelated. These elements are: 1. the separation of procedural functions (primarily the judicial and the prosecutorial functions), 2. the court's "dependence" on accusation (the judge can only adjudicate if the prosecutor has charged; and the judge can only make his decision within the framework of the charge); and 3. the right of the accuser to decide on his own charge (the accuser – and only the accuser – can change and drop/withdraw the charge).

From a certain point of view the accusation principle is in competition with the principle of ex officio, while, from another aspect, these principles fit together, so I have also reviewed this context and the several meanings of the principle of ex officio. The principle of ex officio has three meanings in criminal procedure. Only the first, narrowest meaning competes with the accusation principle. According to the principle of accusation, the court can only initiate judicial proceedings on charge. In the narrowest interpretation of the principle of ex officio, the court can decide without any charge. The second meaning concerns the court's ex officio burden of proof. It only seemingly competes with the accusation principle because

it does not violate its elements. Finally, according to the third meaning, the principle of ex officio also means that the court may carry out any other procedural act (eg issuing a summons, setting a new trial date) ex officio.

I have examined the issue of the necessity of the prosecution (whether the charge is well-founded by evidence), i.e. after the investigation what kind of certainty must be required for the prosecutor to prosecute. Three rules of the Hungarian Criminal Procedure Act confirm that the accuser is also bound by the in dubio pro reo principle. So the accuser can only prosecute if he sees that the crime has been proven beyond a reasonable doubt. In addition to these objective legal rules on evidence, there must also be a subjective side: the accuser himself must be convinced that the suspected has committed the crime.

I have analyzed the legal institutional systems of filtration of charges. Not only the former legal solutions (such as charge-council system in Hungary) or the currently operating Anglo-Saxon grand jury model, but also the peculiarities of the Hungarian law that allowed the trial court to check the appropriateness of the charge (for example additional investigation, "lawful" charge, return of documents). I have proved that in most cases these institutions violate the principle of accusation. Briefly, if the judge already takes a position or gives an opinion on the charge during the controlling/filtrating procedure of the charge prior to the trial proving procedure, he loses his impartiality.

I have examined some questions of the subjective aspect of the accusation principle, especially, how the prosecutor depends on the suspicion of the pre-trial investigation, and what the consequences of this can be during the trial. According to the current Hungarian regulations, both the investigation phase and the interrogation of the suspect are necessary before the indictment, however, the absence of these has no legal consequences. However, in my view, this is a conscious legislative decision because there is no reason to make the prosecutor (who is the conductor of the investigation) dependent on the police's decision on suspicioning.

I have gone over some special questions of withdrawing the charge and the modification of the charge. I have proved that some rules of the new Hungarian Criminal Procedure Act limit the accusation principle (its element of withdrawing the charge), because withdrawing the charge is no longer an unlimited power, but can only be applied in certain cases defined by the Act on Criminal Procedure.

Finally, I have evaluated the interrelationship between the principles of accusation and some other related principles, such as the burden of proof, presumption of innocence, in dubio

pro reo, and the prohibition of self-incrimination. Here I have presented some problematic rules of the new Hungarian criminal procedure code.

I believe that the results of my research have contributed to a clearer interpretation of the principles of the criminal procedure and the principle of accusation, which can be useful for both the jurisprudence and the law enforcement.

IV. List of publications related to the dissertation

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