DOING JUSTICE AFTER REGIME CHANGES, WITH SPECIAL RESPECT TO THE RETROACTIVE JUSTICE

Theses of the PhD-dissertation

I. BRIEF SUMMARY OF THE TASK OF THE RESEARCH

After the regime changes in 1989-90, the problem of doing justice arose in every country of East-Central-Europe and such issues as making the injustices committed in the previous regime public, compensating and rehabilitating victims as well as establishing the responsibility of perpetrators of crimes were put on the agenda. These serious and complex problems came forward not only in post-communist countries but in Western European, Latin-American or African states where dictatorships were replaced by democratic social-political systems.

Doing justice retroactively – which typically follows transitions from dictatorships into democracies – is aimed at redressing injuries caused in the previous regime, and has recourse to different means: financial compensation as well as moral and legal rehabilitation of victims; initiating criminal proceedings against perpetrators of (serious) crimes, or – on the contrary – guaranteeing full or partial amnesty; establishing (parliamentary) truth commissions, revealing the historical facts, making the sins of dictatorships public; withdrawing political and financial rights from representatives of the old regime and ceasing their privileges.

Retroactive justice is a narrower criminal field of the issue which on the one hand is concerned with the moral and financial restitution of the situation of those (or their relatives) who were condemned illegally and on the other hand with establishing the criminal responsibility of those who committed crimes in the previous regime. The most discussed question of retroactive justice is the treatment of those crimes which were committed before the regime change, but at that time – primary because of political reasons – were not prosecuted. It is very difficult to find such a solution which can be accepted by everybody and is compatible with the requirement of both legality and justice.

The question of the dissertation to answer is whether criminal proceedings can be used to handle the crimes and, if so, whether they are suitable for reaching this goal considering the prohibition of applying *ex post facto* criminal law, the problem of statutory limitations and the difficulties of collecting evidence, or whether there are other means through which more satisfying results can be reached.

More than twenty years after the regime change the problem of doing justice has not lost out of its importance and sensibility, therefore I hold it necessary to give a possibly thorough picture about the most significant stages of retroactive justice in Hungary, as well as to present the efforts to do justice after the regime change which cannot be found summarized in the domestic literature.

The dissertation focuses primarily on the practical aspect of retroactive justice, especially on the Hungarian legislative and judicial examples of establishing criminal responsibility, but it describes some foreign solutions too. Through comparing them I tried to answer the question of the dissertation as well as to reveal the legislative deficiencies and other problems which arose in our country in connection with the criminal proceedings.

II. METHODS AND SOURCES OF THE RESEARCH

The dissertation is methodologically based on the conception which makes me able to give an adequate answer for the question put in the introduction and to draw further conclusions on the ground of the material collected and analysed precisely, that stands closer to the inductive method. In the separate chapters of the dissertation I have to use partially different research methods and sources, because there are more fields of jurisprudence and social sciences concerned.

In the first chapter which presents the theoretical and historical background of non-retroactivity of crimes and punishments I relied on the one hand on doctrines of criminal law and legal philosophy, on the other hand – in the field of criminal as well as constitutional law – on the method of historical and comparative analysis. As to the sources, domestic and foreign (English and German) literature, as well as the English and Hungarian text of legal documents (international conventions, national constitutions and domestic criminal regulations) has been used.

In the second chapter – for the purpose of the comprehensive analysis of the retroactive justice in Hungary, in the XX. century – I used (legal) historical works, newspaper-articles, studies from the field of criminal law, international law and political science, documentation of conferences, and of course the relevant criminal legal regulations, decisions of the constitutional court and international treaties as sources. There can be found a brief historical review and a summary international survey in the appendix, in which the method of historical description and the analysis of German legal documents (acts) are applied.

In the third chapter, examining the so called volley cases, I reviewed the original judicial decisions by means of the method of critical analysis of documents, applying the relevant national and international criminal legal rules.

Finally in the fourth chapter, presenting the examples of some foreign countries, I studied essays of English and German language, web-sources and legal texts (acts, decisions of supreme courts and constitutional courts) by means of the comparative method. The description of the development of international criminal justice is based on English and Hungarian literature as well as international documents.

III. RESULTS OF THE RESEARCH AND THE POSSIBILITIES OF MAKING USE OF THEM

1. To reach the purpose of analysing the practical problems of retroactive justice I had to start from the bases of criminal law, legal philosophy and legal history. It can be concluded after reviewing the theories accepting or rejecting the non-retroactivity of crimes and punishments, that the prohibition of applying criminal law retroactively had gradually been grained ground in national laws from the end of the XVIII. century, but it had been pushed into the background because of the world wars, and then after World War II. it became generally accepted by national and international laws too.

As to the Hungarian legal development it can be stated, that in the middle of the XIX. century, during the Hungarian war of independence (1849) the Parliament adopted a retroactive criminal law, but at the end of the century, after the compromise of 1867 the fundamental principles were codified in criminal law. However, the legislature did not insist on following the principle of nulla poena sine praevia lege during the World War I., and after the first and the second world war – despite the effective rules of the Hungarian Criminal Code, for the sake of establishing "the historical (political) responsibility" – even the principle of nullum crimen sine praevia lege was left out of consideration.

2. Following regime changes in the XX. century in Hungary retroactive justice had been used in various forms: During the people's republic in 1919 the question of responsibility arose because of the loss of Word War I., but the retroactive act which was accepted to enable the assigned organs to prepare the legal proceedings aimed at establishing the criminal responsibility of the former ministers and public servants and therefore even introduced a new crime, was not applied in practice because of the fall of the republic.

After the fall of the brief dictatorship of the proletariat, its leaders and supporters were convicted in the course of summary proceedings. As a result of the trial of ten members of the government the court – creatively applying criminal law

and replacing its text by its spirit – sentenced them to death and life imprisonment. Special proceedings for damages were launched against the president of the republic, Mihály Károlyi on the basis of the act on financial responsibility of traitors which resulted in depriving him of all his fortune in Hungary, since the civil court stated, that he committed the crimes of high treason and disloyalty.

Following the terrible events of World War II., from 1945 those who had committed war crimes and crimes against people were convicted by people's courts on the ground of retroactive statutes which created a number of new crimes and a special procedure. People's courts were set up again in 1957 after the fall of the revolution in 1956 which resulted in a widespread retaliation without retroactive justice.

In the course of the peaceful transition of 1989-90 and after the regime change different solutions for doing justice were carried out, which were primarily aimed at ceasing unjust privileges, financially compensating those who suffered injustices, rehabilitating those who were condemned unlawfully and establishing the criminal responsibility of those who committed serious crimes during the dictatorship.

3. For the purpose of the rehabilitation of unlawfully convicted persons and the compensation of the victims of the dictatorship many laws were passed. Beside the four nullification acts referring to the period from 1945 to 1989, statutes ruled the situation of unlawfully convicted persons in the field of labour law and social insurance. Laws on the personal compensation governed by equity realized the partial compensation of those or their relatives who were deprived unlawfully of their life or freedom by means of the decisions of the constitutional court.

It would have definitely been necessary to set up a fact-revealing parliamentary commission with wide range of powers at the beginning of the nineties. Despite the initiative of many – among them the president of Hungary – no such commission was established, unfortunately in this question no political consensus was reached.

The parliamentary majority turned towards the means of criminal law, finding the solution in conducting criminal proceedings and passing symbolic sentences. A law was passed which made it possible to prosecute serious crimes (treason, murder and assault resulting in death) which were not prosecuted out of political reason

between 1944 and 1990. The Constitutional Court however nullified the law before its promulgation, because the retroactive change of the rules of statutory limitations violated the principle of legality and the guarantees of constitutional criminal law.

The Parliament passed later a new law which made way for the prosecution of crimes committed in the course of the revolution and war of independence in 1956. The Constitutional Court declared the law under certain conditions constitutionally and stated, that certain crimes defined in international law (Geneva Conventions) – grave breaches committed in international armed conflicts (war crimes) and some acts prohibited in non-international armed conflicts (crimes against humanity) – cannot fall under statutory limitations, because Hungary undertook an international treaty obligation (in the Convention of New York) to exclude statutory limitations retroactively.

Criminal proceedings (the so called volley-cases) were launched on the basis of the proclaimed act, but the Constitutional Court nullified the act in the end, because the Parliament passed it without considering the court's earlier decision. War crimes and crimes against humanity committed in 1956 became punishable according to the international law, without any national act.

In my judgement it may be discussed, that the acts prohibited in the common article 3 of Geneva Conventions can be qualified as crimes against humanity which cannot fall under statutory limitations on the basis of the Convention of New York. The Constitutional Court should have examined, that the crimes to which statutory limitations were excluded in the Criminal Code according to the Convention of New York in what extent are comparable with the crimes listed in the Convention. It is questionable furthermore, that the regulations of the Geneva Conventions could have been considered as generally accepted, obligatory rules of international law - which must have been applied directly even without proper promulgation - already in 1956.

4. In connection with events happened in October-December of 1956 the prosecution brought charges in altogether nine volley-cases because of crimes against humanity and war crimes (places of commission: Berzence, Eger, Kecskemét, Mosonmagyaróvár, Salgótarján, Tata, Tiszakécske, and Budapest: Nyugati railway

station and Kossuth square).

The advantage of criminal proceedings is, that they mostly revealed the circumstances of the volleys as precisely as possible by means of collecting evidence extensively, and made tragic events happened in the past and buried for a long time live reality. It would be of great importance to ensure the accessibility to these sentences for everybody. The disadvantage of these proceedings is however, that sentences of a different standard, even erroneous judgements were passed in the fairly expensive volley-cases, the qualifying of crimes by the different courts resulted in controversial judicial practice. Volley-cases served in my opinion the purpose of revealing the facts, but did not meet the requirements of legality and justice.

It would be definitely necessary to amend the Chapter XI. of Criminal Code in force (named "crimes against humanity"): among the crimes against peace crimes of not that type can be found (genocide and apartheid), however war crimes and crimes against humanity according to the international law (e.g. acts prohibited in the common article 3 of Geneva Conventions or crimes against humanity in the Charter of the International Military Tribunal) are not included in the criminal code.
The Hungarian translation of the notion of crimes against humanity which were first defined in the Charter is much-debated (emberiség or emberiesség elleni bűncselekmény). Considering the character of these crimes which endanger the whole human race after all and according to the English and French interpretation I hold the definition of "emberiség elleni bűncselekmény" correct for the future codification.
It is also an urgent task for the legislature, to translate officially and proclaim the Statute of the International Criminal Court which was ratified by Hungary in 2001.

A further problem is, that the work of the committee for revealing the historical facts of the volleys is not widely known, its reports are not accessible on the internet, similarly to the documents of the volley-cases. The process of doing justice, its results and materials cannot be found by everybody in practice. Doing justice is inseparable from the Hungarian history of the XX. century, which should be objectively analysed and disseminate as wide as possible.

5. After the fall of communist dictatorships the question of doing justice

certainly not only in Hungary but in every post-communist country was put into the front. In many countries it was aimed at the rehabilitation and compensation of victims and in some the criminal law was used as well in the interest of doing justice. Regarding that dictatorships existed more than forty years, the problem whether these crimes can be still prosecuted or fall under statutory limitations arose, and it was solved differently by the separate countries.

The Germans could above all rely on the legal experiences deriving from coping with the national socialist past, which legal tradition set out from the primacy of justice instead of legality in extreme cases. The legislature declared on the basis of the regulation of the criminal code, that statutory limitations were at a standstill regarding those crimes which were committed in the former regime and not prosecuted according to the will of the leaders of the party. In the so called Mauerschützen-cases courts took a legal regulation which was in force at the time of the commission and ensured impunity for the perpetrators out of consideration referring to the formula of Radbruch and the internationally recognized human rights.

The Polish created a new – not fully precisely defined – type of crime. The constitutional court did not make it possible to prosecute those "Stalinist crimes" which had already fallen under the statutory limitations, it accepted however the annulment of the former amnesties with regard to the exceptional situation.

The Czech legislature also made it possible to punish those crimes which were not prosecuted out of political reasons. The legislature as well as the constitutional court considered the endeavour of the state to prosecute crimes as a primary condition of applying statutory limitations and the lack of it as a legal obstacle regulated in the criminal code. The constitutional court – contrary to the German and Polish bodies – did not even make a difference between the crimes, to which the period of statutory limitation had already expired and to which it was still in process.

The constitutional court rejected the constitutive regulation of the Hungarian legislature which made serious crimes not prosecuted in the former regime out of political reasons punishable. According to its view the formal-objective principle of legality cannot be violated for the sake of redressing the subjectively unjust result of the legal relationships, doing justice after the regime change can exclusively be

realized regarding the guarantees of the rule of law. The constitutional criminal law which includes especially the principle of non-retroactivity ensures such guarantees for perpetrators which cannot be left out of consideration by the legislature.
In my opinion the retroactive change of the regulation about statutory limitations – which was similar to the rule in 1945 – was not acceptable, because limitation is an obstacle of punishment and prosecution in the Hungarian legal system and there is no such regulation in the criminal code about its being at standstill as in Germany or in the Czech Republic. Rule of law can be distinguished from dictatorship so that it does not leave space for the previously followed practice which used the law as a means of politics. In the lack of a supplementary criminal regulation it is even today not a necessary condition of applying statutory limitations that the authorities should work legally.

Asserting the principle of justice when applying criminal law the main political leaders of the previous regimes were condemned only in Germany. In the Czech Republic and Poland the prosecution brought charges against some political leaders unsuccessfully, in Hungary however this was not even attempted.

In other countries doing justice means on the contrary full or partial amnesty in the interest of national reconciliation: In Spain – securing a peaceful transition – criminal law was not used at all, though nowadays the rights of victims and the need for revealing historical facts became important. In the South-African Republic a truth-commission was established for the purpose of revealing justice and carrying out reconciliation between victims and perpetrators, which could grant partial amnesty as well. Reparation and compensation of victims are on the agenda in both countries. In the majority of Latin-American countries practically full amnesty was granted, in some countries truth commissions were set up, but the authority and effectiveness of these was limited.

6. Doing justice after regime changes stirs up emotions everywhere, evokes hot-tempered debates, and such a solution which comforts and satisfies everybody cannot be reached. There is not any generally acceptable, effective method, every country has to find the most proper way and means on its own regarding the requirements of

justice and legality, assessing the realities. Doing justice has to be aimed on the one hand at developing social peace and a healthy society, on the other hand at possible redressing the injuries of real victims through analysing the past objectively. Redressing injuries committed in the previous regimes raises certainly the question of criminal and moral responsibility as well: the conflict of legality and justice appears the most sharply in this field.

The historical examples confirmed that under extraordinary circumstances – especially during or after (civil) war, such as the case of World War II. – retroactive criminal justice, namely adopting and applying retributive criminal law which disregarded the fundamental guarantees, was typical. The decisions of the Nuremberg and Tokyo Court and the people's courts are therefore even today much debated.

In Hungary serious efforts were done to compensate victims and rehabilitate the affected persons or their relatives. There were attempts for applying criminal law as well, even proceedings were conducted, but I argue that it brought a questionable result. In my opinion a parliamentary commission should have been set up in the early nineties to hear politicians and disclosure the main injustices of the previous regime.

It can be finally concluded that in the course of doing justice – regarding the realities of the given historical-political situation, the characteristics of the legal system and the principle of legality – retroactive criminal justice can be used, but the application of criminal law in itself is only able to achieve limited goals. Doing justice must include – beside compensating and rehabilitating the victims of dictatorships – revealing facts thoroughly and making information accessible for the public to assess the past and reach a real social-political transformation.

It is not too late to make the necessary steps for reaching these goals, in the course of which the results of the dissertation can hopefully be used.

IV. LIST OF RELEVANT PUBLICATIONS CONCERNING THE SUBJECT

FOGARASSY Edit: Visszamenőleges igazságtétel Közép-Kelet-Európában, a rendszerváltás után; Jogtudományi Közlöny 2001/9. 381-387. o.

FOGARASSY Edit: A büntető törvények visszaható hatályáról; Tanulmányok Horváth Tibor Professor Emeritus 75. születésnapjára (szerk: Lévay Miklós – Farkas Ákos), Bíbor Kiadó Miskolc, 2002, 25-39. o.

FOGARASSY Edit: Az első kísérlet a háborús bűnösök felelősségre vonására 1919-ben – a nullum crimen sine lege elv áttörése; Publicationes Universitatis Miskolcinensis, Sectio Juridica et Politica, Tomus XVII., Miskolc University Press, 2000, 93-109. o.

FOGARASSY Edit: Sortűzperek Magyarországon; Publicationes Universitatis Miskolcinensis, Sectio Juridica et Politica, Tomus XIX., Miskolc University Press, 2001, 85-99. o.

FOGARASSY Edit: A radbruchi-formula jelentősége; Publicationes Universitatis Miskolcinensis, Sectio Juridica et Politica, Tomus XX/1., Miskolc University Press, 2002, 59-72. o.

FOGARASSY Edit: A visszaható hatály tilalma a rendszerváltás tükrében; Doktoranduszok Fóruma, Miskolc, 1999. november 4-5., Állam- és Jogtudományi Kar szekciókiadványa, 19-24. o.

FOGARASSY Edit: A visszamenőleges igazságszolgáltatás nemzetközi változatai; Doktoranduszok Fóruma, Miskolc, 2000. október 30., Állam- és Jogtudományi Kar szekciókiadványa, 30-35. o.

FOGARASSY Edit: Igazságtételi törekvések Latin-Amerikában; Doktoranduszok Fóruma, Miskolc, 2001. november 6., Állam- és Jogtudományi Kar szekciókiadványa, 60-65. o.

FOGARASSY Edit: A normatív – jogi – felelősség kialakulása és differenciálódása; Miskolci doktoranduszok jogtudományi tanulmányai, Tomus 1/1., Bíbor Kiadó, Miskolc, 2002, 221-242. o.