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Possibilities for speeding up the criminal procedure in the French and Hungarian law

PhD Thesis outline

The aim and subject of the research

Many questions and criticism were arisen concerning with the timeliness of the criminal procedure the past decades. As a result of that, the countries established justice reforms in order to increase the timeliness of the criminal procedure, cut down costs or to make the „overloaded" justice system more effective. The timeliness of the criminal procedure is still a current question in spite of the fact that many authors have already dealt with it. The main criminal political objective of many European countries nowadays, is to simplify and speed up the criminal procedure.

The countries should reach a compromise and accept sometimes alternatives opposite from conventional procedure in terms of less serious crimes procedure in order that the justice would be able to roll up the more serious and more complicated crimes in due thoroughness. Simplifying and speeding up of criminal procedure can be reached if the legislator takes any effort to free the justice system from the least serious crimes occurred in large number and leaves wider possibilities for opportunism. More often the cases are settled on consensus base, fact that involves giving up with both, the principle of substantive justice and the principle at contradictorious procedure.

The thesis aim was to make a complex and comparative analysis on the mentioned subject, first by using the rationalization promoting means of the French and Hungarian criminal procedure. In my choice I was inspired not only by the French language or by the fact that the criminal justice is still unrevealed or unknown to the Hungarian criminal lawyers but the comparison of legal systems, therefore has a bigger role that we can't ignore glancing the legal systems at other countries that way, seeking for comparison base in order to discharge the homeland justice.

Although, the French and the Hungarian criminal procedures are resemble in some respects of the continental tradition, of basic principles they are differ. The French criminal procedure follows the principle of opportunism as a main rule, in contrary to the legality followed in Hungary. That way the comparison and the questions arisen on that mentioned subject became more interesting.

The main question investigated in this thesis is what the slowness and ineffective work of the criminal procedure attribute to. Whether the increasing cases are of the same reasons in both countries? Those countries that follow the principle of opportunism, and have to face with the slowness at the criminal procedure are being helped by the same means. Striking questions were the effectiveness of the followed (law institutions) and concerning the simplifying of the procedure, another western European law culture goes ahead. What are the law institutions that can be adopted, improved as the French model? Or does the Hungarian regulation appear to be more rational?

The first and the main part of the thesis are about the simplifying of the criminal procedure in general. In my opinion the speeding up of criminal procedure can be analysed in two dimensions. The technical alternatives that serve to keep the rational time at the procedure without omitting parts of the criminal proceeding – in the wider sense, the speeding up of the procedure. The simplifying of the procedure proper means those alternatives that support omitting part of the procedure or shortening them as to contribute to relieve the criminal apparatus. Those procedures speeding up alternatives in the narrower sense of the word are analyzed in detail.

Following the reason investigating and clearing some basic notes, I exposed the common influences of both countries and their strong impact over Europe. A special emphasise was put on revealing the constitutional questions that goes together with the law institutes of speeding up of the criminal procedure. Those law-institutes that support the speeding up of the criminal procedure, just like, summary procedure, criminal warrant or plea bargain raise some dogmatic questions. How can such a shift of paradigm law be realised in the criminal law? That is the accused is ensured with the right of disposal where as it is a civil law state? Is it possible to recast the roles of the parties it the procedure ignoring the principle of traditional function-role. Can we say that the end justifies the means? Or constitutional human rights can

be scarified on the rational time. Where can the lines be drawn as far as the unconstitutionality? How the legislator attempts to balance between the expectations of rational time and breaching of basic principles.

The second part of the thesis is about the chronological order at the criminal procedure. I analyzed one by one the French and Hungarian summary procedures, those in connection with the prosecution session, of criminal warrant and resemble to flea bargain. I tried to put the attention on the similarity and the distinct differences of the law institutes of both countries.

The research method

The research method was defined by the aim of the thesis as my thesis is of comparative nature; I used comparative and descriptive methods upon lengthy Hungarian and French scientific literature. Exposing the institutes supporting speeding up of criminal procedure, the aspects of history of ideas and institutes got a prevalent role. At the same time I used the descriptive and critical methods when describing the current legislation of both countries. I analyzed some charts in order to stress the similarity and differences. I used document analyses at investigating international documents and proposals that support the simplifying of procedure and case analysis at the French and Hungarian judgments of the European Court of Justice (ECJ).

To expose the law institutes in use and their effectiveness I analyzed statistics knowing that they give information only about the frequency of practice and not about the effectiveness of the mentioned institutes. I used empiric methods to clear the law institutes in use. I studied cases at the (public) prosecutors' office, municipality of Debrecen and I personally consulted the prosecutors over the cases. I had some personal experiences concerning mediation at the Office of Justice of Hajdú-Bihar County. Judicial experiences judgments thanks to my colleagues (judges). During my research in France, I got some ideas and opinions from experts concerning the matter at issue.

The results of the research and its utilization

Decreasing the burden of the criminal procedure, and closing the cases within rational time are very important issues that the criminal justice should face with in the XXI. Century. The countries under comparison are hit unanimously by the problem of the irrational dragging of the criminal procedure that is why the legislation and the dispensation of both countries make effort to work out smooth justice. The aim is not the changing or evasion of the conventional justice system but speeding up of the procedure in certain cases.

1. It should be clear that, in both countries the same reasons caused the irrational dragging of the criminal procedure. Today as a result of the process of the legal history, it is obvious, that the criminal procedures have become complicated artificially. After all the legislation attempts to meet the expectations of the parties under procedure even if sometimes they are different or opposite. That's the reason for increasing of procedural rules that became irrational and complicated. A fact that evoked the necessity of simplifying and speeding up solutions. On the other hand, an accompanying occurrence of our rusting world is the fact that the crimes turn into new dimension that means challenge to the justice services. The complicated cases, the new means of evidence, the unknown fields of law studied by judges and prosecutors contribute to the dragging of cases and stalling of justice. Those occurrences give grounds for the necessity of simplifying the criminal procedure in both countries.

2. It can be established that in one hand there is a pressure on the countries to find solutions for speeding up the justice, notably, the European Court of Justice demands keeping the rational time of cases with the fair procedure. Both countries were condemned of dragging the procedure. The court doesn't expect fast procedure from the countries, as it is risky in some aspect but closing the cases within rational time, or closing the cases as fast as possible regarding the circumstances. There is no general standard or time limit (deadline) obliged the court at investigating the cases. Each case is investigated individually, and also the questions whether the country breached the fair procedure and within it the demand of rational time.

3. We can state that, the procedural basic principles are so called brakes in the effectiveness that is certain restrictions are allowed within the rational time. We have stated before, at the acceleated procedure proper, parts of the conventional procedure is shortened or omitted at the criminal procedure. Comparing with conventional „perfect" procedure, many legal rights of the parties are violated as the essential basic principles of criminal procedure do as well. When speeding up criminal procedure two conflicting interests should meet simultaneously. Once, to close the cases in rational time; second, to keep the procedural basic principles and to ensure the parties rights.

   The legislator should balance these conflicting interests, by compensating the hurt right in the accelerated (fast) procedure. The constitutional Court and Constitutional Council have an important role in finding the delicate balance, in that way, that they assign constitutional and human rights policies to be followed, and don't allow the basic rights of the person under procedure to be hurt.

4. We can state as well, that as an impact of the accelerated procedure we face with a shift of paradigm. New occurrences appear at the criminal procedure such as the consensual element, agreements are marked up and the conventional functions of the procedure are changed. The user of justice should face with those new situations, which is not an easy task. At the same time, we should keep abreast of the rushing / changing world to maintain our justice system we should make changes in our legal institutes and partly, quit traditional principles.

5. We could state that, the simplifying mechanisms of procedure in terms of time are connected by similar logic chains in both countries. First the procedural alternatives that serve as screening of the system and provide discretion right to the public prosecutor, who should shortened the conventional procedure by complete omission of the judicial session. In the procedure of criminal warrant type, the justice has some role, since the procedure is documented. The plea bargain is part of the accelerated procedure in narrow sense, provides peculiar recasted roles of the paries. Finally, the accelerated and summery procedures, in which the sentence is passed few days after the crime has been committed. It's clear that a parallel can be drawn between the legal institutes of both countries. Those legal institutions with the same functions are

traceable, the difference can be found at the regulation, that follows the local characteristic. Therefore, we can estimate that concerning regulation Hungary isn't backward of any advanced West European law culture. From this it follows that there is no need for a new Hungarian legislation but to improve those existing legal institutes that serve to accelerate the procedure (especially, postponement of charge, mediation, waiver of trial) and put those in practice.

6. As for the proceeding alternatives of both countries, they parallel got into the legal systems but there is a major difference when it comes to decision about proceeding alternatives, because the French prosecutor has wider discretion right than the Hungarian one thanks to the principle of opportunism, that support practicability and trust the prosecutor's skills.

   Concerning the rules of conduct in procedural alternatives prescribed by the prosecutors both countries are the same attitude, since the aggrieved (partly) compensation or other amends, treatments against drugs addiction are stressed. It can be stated as well that the French Criminal Code (in the following CPP), suggests more ideas for the prosecutor as we see citizen's practice, parental responsibility course, traffic safety course and keeping distanced arrangements, these arrangements that are missing from the Hungarian procedure. Taking in account, the critics on the institute of postponement of charge state that prosecutors hardly, prescribe rules of conduct or and duty / obligation. It's worth thinking about extending / widening the prosecutor's choice on the legislative level.

   Investigating the frequency of the procedural alternatives in use, we can see that in France, the mentioned alternatives are used frequently. It can be stated that, each case out of three is closed by using these alternatives. We can hardly find such a legal institute, as the procedural alternatives in France that have been developed in short time and dynamically in the criminal procedure – as a result of the practical necessity. The opportunism caused many crimes to stay open, and those alternatives were found out to give the answer to those criminal cases – a kind of middle course between the traditional judicial procedure and the simple termination. The prosecutors themselves discovered the necessity of using these alternatives, so it is obvious why they like practicing it. The French Criminal procedure is a good examples for the goal of the

diversion is not only simplifying the procedure but answering the criminal cases of less and medium degree.

In contrary, in Hungary the legislator initiates the procedural alternative, that is to discharge the courts and leave it at the prosecutor's session, considering that, the Hungarian prosecutor, who follows the principle of legality does not know the conventional indictment lacking the court – approved. In 2007 only 3,6 % of the indictments handed to the prosecutor used postponed indictment, it hasn't changed ever since.
All in all, the procedural alternatives can be adopted only if the breach of the procedural basic principles is adequately compensated. It provides adequate legal answers for the prosecutors more practical individualization ability, more adequate answer for the committed crimes lucking the judicial session.

After all, we can state, that both countries show close attitude on the theoretical level. On the practical level the French prosecutors more often use the procedural alternatives. In Hungary the regulation is fixed concerning the postponement of indictment therefore in my opinion the prosecutors should think over the advantages achieved by postponement of indictment.

7. Avoiding the question of prosecutor's jurisdiction, the criminal warrant type of procedure serve to speed up the procedure by involving the judge in the procedure. At the criminal trials, the simplified procedure breaks through the main rule of directly established facts. The main objection raised against the criminal warrant, is that it leaves out trial, with all the guarantees enforced, that practically becomes documented and completely indirect. The accused is sentenced without being at court at all. Considering that if we stress the importance of integrity or directness and verbosity of the basic principles of the criminal procedure, in those cases that the facts are clear, the judgment is simple – prejudicial session should be left. In contrary if we stress the importance of the accelerated procedure, criminal warrant can provide the aim. The investigation is occurred then simple judgment, the accused made a confession the judge sentences and the advantage, and comparing with the procedural alternatives in the judge who takes part in the procedure (the judge is involved).

In spite of all the critics my opinion is and according with the practice the simple cases offer reasons for using this procedure, it can be used generally when accused is under confession, less degree of sanction can be opposed or the trial can be kept upon the request of the accused.

8. Both countries know plea bargaining procedure – its informal name reminding of resemble characteristics of the American plea bargain. But the American plea bargain proper can't be found in neither country. That's the reason, the French named plea bargain consensual procedure and CRPC and the Hungarian waiver of trial are baseless and deceptive. The plea bargain intents to eliminate the critics of the criminal warrant that is, judgment is achieved without the accused being heard and the trial is not a conventional proper. The speeding up of the procedure with growing consensual elements in explained by the agreement signed by the accused under confession and the prosecutor, then, the accused is heard by the judge, and the judge approves the agreement the case is closed by only a hearing. According with the modification of the Hungarian criminal procedure we can state that – the Hungarian waiver of trial resemble to the French plea bargain, since the main element is the written agreement signed by the accused and the prosecutor.

   Although the French plea bargain got a lot of critics at the beginning, it became a success story in practice. The prosecutor like applying it concerning with the consensual procedure and the CRPC. Consensual procedure: in 2004 210 cases and in 2006 46.901 cases were closed in the form of plea bargain. CRPC procedure: in 2004 2.187 cases, in 2006 50.250 cases were closed in the form of plea bargain. The French justice system proved with the mentioned data that; first, similar legal institutes get on well together; second, how dispensers (of justice) can promote such a legal institute that the French citizens and legislators have refused to consider for a long time.

   As for the Hungarian plea bargain, unfortunately, I cannot account for growing, blast like result. Following the previous regulation the cases did not exceed the 1 % that meant few cases per year. During the research we stated, that there were countries with no one case of waiver of trial. As for me, as I am pessimistic, thinking that together with the modification of act LXXXIII. of 2009 concerning the wavering of trial, it will not be applied. The problem in practice is that the Hungarian criminal code is

imprisonment centered, which means that in many cases the prosecutor would submit a proposal of suspension of imprisonment. In these cases cutting the sentence, considering the Hungarian sentence in practice does not mean preference for the accused. Though, as a result of the modifications in the mentioned act, many changes took place in the Hungarian plea bargain, but there is still the only advantage of speeding up the procedure and I do not think, that, those modifications would cause increasing in frequency of applying.

All in all, the French plea bargain is effective and with further preferences it can be effective in Hungary as well. The courts can spend more time on complicated cases by means of facts and law. The problem is that the sentence argued with the prosecutor in unknown to both French and Hungarian law cultures. The prosecutors are not famous for bargaining but they know the limits according with the law. The defender (public defender) in a peculiar way plays a new role, active role during arguing with the prosecutor. By Hungarian meaning, one should have a live fantasy to imagine the defender knocking on the prosecutor's door, sitting on the table and arguing over the accused sentence. Otherwise the fact, that at the beginning the French plea bargain was unaccepted either by the jurisprudence or legislators the same way as the Hungarian reaction today, is promising. The dispensers discovered that a special aim is hidden in this law institute and nowadays the plea bargain is an essential element in the French criminal procedure.

9. Finally, the accelerated summary procedures – they shorten the investigatory session and the trial is kept in its original form. In my opinion, in France this procedure is too complicated, there are two procedures: one, for the accused at large and another, for the accused held in pre trial detention. Since, the summons by report and the personal attendance are under the same title, the dispensers and the jurisprudence has a serious task of distinguishing the law. The regulation of both law institutes is a good example for the law being complicated artificially by the legislator. In this consideration, the Hungarian Criminal procedure, the prosecution by satisfying the exception of due process of law, suggest more accurate and easy to apply opportunity.

   Mainly summary procedures can guarantee sentence in short time right after committing the crime – the „immediate sentence" fills in the special prevention. At the

same time, the short investigation, the short procedure of the overcharged judges, the accused inadequate personal details have a negative impact. Anyway, the fact that the trial providing most of the guarantees is not left out of the procedure, should be supported. The fast procedure means advantageous and simple way of taking steps in cases of being caught in act or accusing under confession or with foreigners who stay in the country for a short time. In France ¾ of the accused in fast procedure are foreigners.

10. We can state that, there is a need to speed up the procedure in order to maintain the operational ability of justice but, it's impossible to set up priorities as each alternative represents different approach and, is applied in different cases. In that way, contributes to the rational time of procedure. The prosecutor play a key role, the most important one in speeding up the procedure in procedural alternatives and its explained by the fact that, the prosecutor is the only one to sentence and close the case within short time and without involving the judge in the procedure. In most of the accelerated procedures he holds the monopoly of initiating the procedure.

11. The French and Hungarian law institutes show parallel concerning their logic and characteristics, only the regulation is differ: Hungary does not lag behind France in terms of theoretical aspects. Since, both law institutes can be found in both countries. In meeting the requirements of due process of law, the Hungarian alternatives are more suitable, since the requirements defined by the legislator are more accurate. The advantage of the French procedure is the practical attitude that allows more latitude to the dispensers. The fact that the theoretic alternatives should be applied in practice, should be followed because, there is no need for a law institute, codex of written laws if it can't be practiced.

12. Finally, although there are many critics, we can state, supporting those law institutes that speed up the procedure that they significantly contribute to maintain the operational ability of administration of justice. Our procedural system would be inconceivable and less effective without those speed-up alternatives, but it has a cost of quitting the main basic principles that the conventional procedure has been based on for centuries. The question arose: Where is the limit of quitting those basic principles, and in what way does dispenser promote the idea? The legislative attempts in both countries clearly reflect the awareness of the sole solution for the overloaded justice

that is the dispensers should accept and apply such alternatives that have been unknown up to now, and can serve to shorten the conventional procedure in a good way.

13. The French criminal procedure, which contains the speeding up mechanism, is rather neglected by the Hungarian criminal jurists. The reason, the thesis reveals a bit of the French criminal procedure in that concerning. The comparative work contributes to the improvement of the Hungarian law culture. The first, general part of the thesis that contains some constitutional questions and issues of constitutional state, with some aspects of the French and Hungarian criminal procedures draws some approaches for dogmatism. The other statements of the thesis can serve to modify some acts and can be used for a new reform of the criminal procedure. Moreover, beyond the comparative type of the thesis synthesizes comprehensive, scientific approaches and practical experiences and in some places is critical. The French practical approach can be a good example and professional guide to be followed by dispensers. I hopefully believe that the dispensers, who study my work, would apply those alternatives, professionally select the cases and with more appropriate exploitation of the unknown law institute, and the operational ability of justice would be improved on.

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