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Thoughts on the codification of criminal proceedings

Introduction

While codifying the Act on criminal proceedings it is a fundamental task to define the conceptual structure of the Act. With respect to that it has to be decided whether the codification should be characterized by the traditional principles, values, as well as the sphere of priorities should be set around which the legislation is organized. The Hungarian criminal justice system should represent an effective and modern procedural system, which is built on guarantees and principles. This study, by presenting a few basic legal institutions, demonstrates the possible necessity of their introduction and highlights that the client-style trial prevailing in the Anglo-Saxon-type criminal justice system is not the sole alternative for the further development of our law of criminal proceedings.

I. Suspect – defendant

The current Act on Criminal Proceedings (Act XIX of 1998) states that the condition for declaring someone defendant is the substantiated suspicion.¹ The defendant reaches the legal status of defendant in the proceeding by the statement of the substantiated suspicion, and this is the date from which the procedural rights (to inspect documents and to further the case) and procedural obligations originate. That is also the date after which coercive measures against the defendant can be applied.

However, in legal practice, the substantiated suspicion is not readily available for the investigating authorities specifically (*in personam*) with respect to the defendant. Rather the situation in reality is that when the investigating authorities gain knowledge of the commission of the crime, they only have a basic, not substantiated suspicion (e.g. originating from the complaint) against the supposed perpetrator. The procedural status of such a person is not clear from the law, although several sections touch upon it (e.g. Sections 73 (6), 170 (4), 178/A (1) of the current Act on Criminal Proceedings). In relation to the person without independent legal status the legislator leaves a further question without answer: Is it lawful to interrogate as witness a person, about whom it can be probable that later, after the interrogation as a witness, when the suspicion becomes substantiated owing to the collection of further means of evidence, he or she will be the subject of the proceeding as defendant?

The question is not a recent one. Already Legislative Decree No. 8 of 1962, (hereinafter: Code No. I), introduced in Section 108 “The rules of procedure against the suspect before

¹ Section 6 (2) of the Act on Criminal Proceedings: Criminal proceedings may only be initiated upon the suspicion of a criminal offence and only against the person reasonably suspected of having committed a criminal offence.

becoming defendant”, and in accordance with it re-regulated the legal institution of accountability of the defendant. To start with the beginning: in the historical evolution of this legal institution, Act III of 1951 on Criminal Procedure (hereinafter: ACP No. II) contained only the following in Section 2 (1): “Criminal proceedings shall only be initiated in accordance with the law and only against such a person who is reasonably suspected of committing a crime.” Based on that, the persons who could be suspected of perpetrating a crime often entered into the undesirable status of defendant without the necessary grounding and had to endure coercive measures applied against them. The introduction of the legal institution of declaration of becoming defendant aimed at changing that situation. Its antecedent was Act V of 1954, which introduced into Section 91/B (1) of ACP No. II the prerequisite for the taking of responsibility as defendant, which claimed the establishment of the identity of the person who committed the crime by the authorities. This occurred via a – justified – decision declaring to become defendant, which necessarily meant that according to the investigating authority issuing the decision, the defendant is *not simply reasonably suspected* of committing the crime, but *certainly* that person is the perpetrator.²

Thus ACP No. II required the almost full certainty as the prerequisite for the taking of responsibility as defendant, while Code No. I (Legislative Decree No. 8 of 1962) only set the existence of founded suspicion. Nevertheless, in practice, before the declaration of becoming defendant, which required founded suspicion specifically against the person, such cases occurred which made it necessary to ensure the possibility of proceedings against the suspect, exceptionally, before the declaration of becoming a defendant. This required less than a founded suspicion, mainly: the person suspected of committing the crime (suspect) could be summoned and interrogated by the investigating authority before declaring the person defendant. The prerequisite for the application of the investigative actions was only that the elucidation of the case rendered the measures necessary. If that existed, the suspect could be taken into custody, home detention or search of residence could be ordered against the suspect, warrant of arrest could be issued, furthermore inspection, search, body search and seizure could be executed, and the suspect could be obliged to undergo expert examination.³ This meant that apart from taking into custody almost all such procedural action could be ordered against the concerned person which could be applied against the defendant. However, in order to protect the procedural legal status of the suspected person, he or she could be taken into custody only in case if the crime was punishable by imprisonment and for a maximum period of 72 hours, within which time limit the suspect had to be declared defendant or had to be released.⁴

In practice the legal institution of “suspect not declared defendant” was exceptionally applied. If the identity of the perpetrator of the crime serving as the basis of the investigation was not doubtful, the person was interrogated as a defendant, and not “suspect not declared defendant”, if proving the facts upon which the unlawfulness of the action was based remained doubtful. Owing to the change of law, namely the termination of the legal institution of “suspect not declared defendant”, even its rare application disappeared from practice.⁵

The domestic literature on criminal procedure is relatively united in the issue, that the differentiated handling of the suspicion and thus the declaration to become defendant means the necessary acceptance of the two-phase investigation (investigation – examination).⁶ In Hungary,

² Section 91/B (1) of ACP No. II: When the investigating authority has enough data to define the perpetrator of the crime, it delivers a justified decision about the concerned person’s taking of responsibility as defendant.

³ Gödöny József: *Gyanúsított – terhelt*. In: Kriminálisztikai Tanulmányok II. Közgazdasági és Jogi Könyvkiadó. Budapest, 1963. p. 38. [Suspect – defendant]

⁴ Legislative Decree No. 8 of 1962, Section 109.

⁵ Bócz Endre: *Büntetőeljárás jogunk kalandjai. Sikerek, zátanyok és vargabetűk*. Magyar Hivatalos Közlönykiadó. Budapest, 2006. p. 201. [Adventures of our criminal procedural law. Successes, rocks and roundabouts.]

⁶ About the two-phase investigation and the institution of the investigating judge see: Erdei Árpád: *Tanok és tévtanok a büntető eljárásjog tudományában*. ELTE Eötvös Kiadó. Budapest, 2011. p. 262-263. [Doctrines and false doctrines in the science of criminal procedural law]

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owing to the termination of the institution of the investigating judge, the investigation has theoretically become one phase, but in practice, the investigation, as a preparatory proceeding, can still be divided into two phases: the investigation, characterized by the collection of data and questioning, and the examination, where unique, preliminary evidence-obtaining occurs.⁷ (As a result, a further question to be clarified during the codification is whether the role of the investigation as “evidence-collector” should be strengthened, or the institution of the investigating authorities, and whether this can be seen as a real alternative when taking into account the existing traditions of criminal proceedings.)

Thus the problem still exists: if the investigating authority becomes aware of the perpetration of a crime, and in relation to it a certain person can be suspected (just simply, not in a substantiated way) of its perpetration, then the procedural legal status of that person needs to be clarified.

In legal practice the simply suspected person is either summoned and interrogated as a suspect (thus qualifies as a defendant without its conditions) or interrogated as a witness, under the obligation to tell the truth. Neither of these solutions is correct. In case of the interrogation of a suspect, if later the suspicion does not become substantiated, this means that such a person was interrogated who cannot be the subject of a proceeding as defendant. In case of interrogation as witness, the acting member of the investigating authorities circumvents the law, because requests a witness testimony under the obligation to tell the truth from a person whose legal status rather resembles the defendant's.⁸ This is not altered by the fact, that our current Act on Criminal Proceedings ensures the possibility that an attorney can represent the witness and who informs the witness about his or her procedural rights and obligations.

Naturally, it can accidentally happen with the investigator that during the interrogation of the witness, in relation to a certain question, it turns out later, that by answering it the witness would charge him- or herself with the commission of a crime. This is not identical with the formerly mentioned case, when the investigating authorities have incriminating evidence against someone, nevertheless they summon the person as a witness. It is a question, how this applied, bad practice should be altered, as well as, if the investigator intends to misuse it, how can this be stopped by the modification of the law.

A lawful solution to the situation might be, if our new code on criminal proceedings grants independent legal status to the person who is suspected, but not declared defendant yet, as long as the simple suspicion concretized to the person of the perpetrator does not become substantiated. The suspected person can be represented by an attorney and is entitled to the right to silence. The purpose of ensuring this special legal status is that until the suspicion possibly becomes substantiated the suspected person should not suffer disadvantages stemming from his or her involvement in the proceeding as a witness, despite that the authority has already realized

⁷ Tremmel Flórián: *Magyar büntetőeljárás*. Dialóg Campus Kiadó. Budapest – Pécs, 2001. p. 349. [Hungarian criminal proceedings]

⁸ It is an unlawful investigatory practice also according to *Árpád Erdei*, that “the authorities, before declaring the suspected person defendant, interrogate him or her as witness, owing to tactical reasons, and they inform him or her about the suspicion only later. The authorities expect from this that the suspected ‘witness’, owing to the notice on the obligation to tell the truth, shares such facts with them, which promote the success of the investigation. Since it can occur in any case that the person interrogated as a witness comes under suspicion subsequently, the law cannot exclude interrogation in both of these different status. However, the tactical use of that possibility cannot be supported.” Erdei Árpád: *Tanok és tévtanok a büntető eljárásjog tudományában*. ELTE Eötvös Kiadó Kft. Budapest, 2011. p. 293. [Doctrines and false doctrines in the science of criminal procedural law]

The situation can further be tinged, if the investigating authority intends to check the authenticity of the testimony through the use of polygraph. About this see: Budaházi Árpád: *Poligráf*. NKE Szolgáltató Kft. Budapest, 2014. p. 103-107. [Polygraph] and Sléder Judit: *A büntetőeljárás megindítása. Doktori értekezés*. www.ajk.pte.hu/files/file/doktori.../sleder-judit/sleder-judit-vedes-ertekezes.pdf Downloaded: November 24, 2014. [Initiation of the criminal procedure]

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that the person him- or herself can be among the assumed perpetrators.⁹ With respect to the application of this legal institution only an exceptional and possibly short-term ordering of it can be accepted.

II. Sharing of the procedural tasks and as a consequence the role and significance of (incriminating) evidence not motioned by the prosecutor

According to Section 1 of the current Act on Criminal Proceedings, prosecution, defence and sentencing are distinguished from each other. Section 4 (1) provides that the charge shall be proven by the accuser, while paragraph 2 adds that facts not proven beyond reasonable doubt may not be contemplated to the detriment of the defendant. If the prosecutor does not motion it, the court is not obliged to procure and examine means of evidence proving the charge. The prosecutor has the possibility to motion for the production of evidence until the end of the evidentiary procedure. The prosecutor, as the authority having the monopoly of charge, has the task to prove the charge, and the failure to do so also burdens the prosecutor, the declaration of which is included in the judgement of the court. Furthermore, the prosecutor independently decides about the necessity of motioning for the production of evidence, the court cannot even draw its possible necessity into the attention of the prosecutor. As a consequence the risk of the level of proving the charge burdens the prosecutor.¹⁰

Several decisions of the Constitutional Court of Hungary dealt with the issue of evidence not motioned by the prosecutor, as well as with the court's legal motivation to find material justice.¹¹ However, the current text of the law leaves the question unanswered and to the "wise wit" of the court to decide how far they can go with the supplement of the evidence, if they experience passivity from the prosecutor. In theory, we can agree with the position that owing to the consequent division of functions the court is neither obliged, nor entitled to perform evidentiary procedure for incriminating the accused; thus the last sentence of Section 75 (1) of the current Act on Criminal Proceedings shall be accordingly modified.¹² However, relinquishing material justice necessarily comes as a consequence from this: the price we should pay for the consequent application of the principle of division of functions is too high.

Problem arises in practice when the (*subjectum* of the) judge and the prosecutor evaluates the evidence differently. According to the prosecutor the evidence gained in the court hearing is enough to prove culpability, while in the opinion of the judge it is not. Both of them are aware of the documents of the investigation and know that there's further incriminating evidence, but the prosecutor – to evade over-proving – does not motion for them (e.g. for the interrogation of further incriminating witness). In accordance with our legislation in effect the judge can decide whether to *ex officio* summon them, because he or she is interested in material justice, or to dispense with the further interrogation of witnesses. According to the consequent application of the concept, in the future, the judge has to dispense with evidentiary procedure not motioned by the prosecutor, and thus the case can occur when the judge delivers acquitting judgement even

⁹ Budaházi Árpád: *A vallomás őszinteségének műszeres ellenőrzése, különös tekintettel a poligráfus vizsgálatra.* www.ajk.pte.hu/.../doktori/budahazi-arpad/budahazi-arpad-muhelyvita-ertekezes.pdf Downloaded: November 21, 2014. [Instrumental control of the honesty of testimony, with special regard to the polygraph examination.]

¹⁰ See in detail the judgement of the Court of Appeal of Szeged (Szegedi Ítéltábla): ÍH 2013/94.

¹¹ The most significant ones: 14/2002 (III. 20.) Constitutional Court decision; III/2045-6/2012 Constitutional Court decision, about the latter one see in detail: Fantoly Zsanett: *Egy alkotmánybírósi határozat (III/2045-6/2012.) margójára, avagy a bírői szerepekör aktív vagy passzív voltáról.* In: Maráz Vilmosné Emlékezésről készült konferenciakiadvány. Szegedi Ítéltábla, Szeged, 2013. [On the margin of a Constitutional Court decision (III/2045-6/2012.), or about the activeness or passiveness of the role of the judge]

¹² Hegedűs István: *Javaslat a Büntetőeljárás törvény kodifikációjához. Kézirat.* [Proposal for the codification of the Act on Criminal Proceedings]

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though he or she knows that there would have been enough evidence in the case to convict the accused. From the other side: if the defence omits to introduce the extenuating evidence, the judge shall not take it into account. If possibility is provided for the court to *ex officio* acquire evidence extenuating criminal responsibility, then the equality of arms is lost. Or maybe it can be justified by the principle of *favor defensionis*?

It is also the consequence of the consistent application of the dogmatic concept that it is the obligation of the judge to order evidentiary procedure offered by the parties. The prosecutor, driven by the fear that the evidence might not be enough, insists on the review of all the incriminating evidence acquired during the investigation at the court hearing. But for the defence the protraction of the trial is a good opportunity to create the extenuating circumstance of effluxion of time.

The danger also exists, that in such a system the prosecutor would only keep in mind the enforcement of the criminal law claim of the state and presents the court only with incriminating evidence, and omits the extenuating ones. From this point the case depends on the activity of the defence counsel, how much he or she is willing to examine the documents which can even reach 10-thousand pages sometimes.

This legal problem also affects the appeals' proceedings. If the court of first instance delivers an acquitting judgement, but the prosecutor appeals it and motions for the use of further evidence existing in the documents of the investigation, which was omitted in the proceeding of first instance – owing to the lack of motion to do so. The viewpoint is known from the legal literature that in such cases the judgement of first instance is not unsubstantiated and thus evidence cannot be acquired in the second instance.¹³ An opposing position is that evidence can be acquired, since new evidence can be presented in the appeals. (For example, the innocently convicted defendant presents in the appeal that at the time of the crime he was in Paris with his mistress, and can prove this with digital photographs (furthermore even a surveillance camera recorded him) and the reason why he did not present this in the first instance is that he was afraid of his wife and did not want his marriage to end with divorce.) In this system the court of second instance has to change into a court of facts, and has to conduct the evidentiary procedure not performed in the first instance, whether motioned by the defence counsel or by the prosecutor.

A further consequence is that the culpability of the accused acquitted in the first instance, owing to the charge being unsubstantiated, can be declared in the second instance, because the conviction can be rendered after substantiating the charge. This is not a bad solution from the point of view that a proceeding of third instance follows and not a proceeding re-instituted due to repealing the original decision.

Thus a summarizing question is whether it can be accepted as the consequence of the principle of division of functions that in the future not criminal justice would be served, but criminal legality. The judge only supervises, as a “wise *kadi*”, the arguing prosecutor and defence counsel from above; and his or her task is not the delivery of the just decision, but the rendering of a legally correct one.

III. The announced absence of the accused

Since March 1, 2011 the current Act on Criminal Proceedings provides the opportunity for the court of first instance to hold the hearing *in absentia* of the duly summoned accused, if the

¹³ For this topic see in detail: Fázsi László: *A bizonyítási teher értelmezésének gyakorlati kérdései bírói aspektusból*. Magyar Jog 56. évf. 2009/1. szám p. 22–23. [Practical questions of the interpretation of the burden of proof from the aspect of the judge]; Hoós Tibor: *Az igazság szolgáltatása a bíró szemével*. Magyar Jog 60. évf. 2013/4. szám p. 228 – 230. [Serving justice from the viewpoint of the judge]; Cséffai Attila: *Iustitia elveszett szemkendője*. 61. évf. Magyar Jog 2014/3. szám p. 173–182. [The lost blindfold of Iustitia]

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accused expresses his or her claim not to take part in the hearing.¹⁴ In this regular proceeding the accused resides at a place known for the authorities, in contrast with the special proceeding against the absent defendant, who is either at an unknown place or abroad, and thus a warrant of arrest is issued against him or her. Previously the evidentiary procedure could only be finished *in absentia* of the accused residing in a known place, if the accuser's acquittal or the termination of the proceeding was ordered (Section 281 (9) of the current Act on Criminal Proceedings).

With respect to its practical application, in 2013 only in the 0.57% of the cases was the special proceeding against the *in absentia* defendant motioned by the prosecutor.¹⁵ No concrete statistical data is available on the number of evidentiary procedures initiated *in absentia* of the accused in the frame of the regular proceeding. Legal literature contains a reference only to that about half (49.81% – 56.86%) of the postponed cases between 2004 and 2008 occurred owing to the non-appearance of the accused. However, no data is available within this percentage rate about the percentage of that non-appearance which had previously been announced or subsequently justified by the accused.¹⁶

With the codification of the announced absence of the accused the legislator unequivocally clarified the question that the accuser's right to trial can only be understood as a right¹⁷ and it cannot be placed among the procedural obligations of the accused.¹⁸ The Constitutional Court in its Decision No. 14/2004. (V.7.) also took this standpoint when it stated that “the right to attend the trial can be waived. Nevertheless, in order to comply with the provisions of the Convention,¹⁹ it has to be accompanied by unequivocal, definite guarantees which suit its seriousness.”²⁰ The improved version of this argument can be found in Opinion No. BKv 92, according to which the accused can waive his right to be personally present at the court hearing, but this does not mean that he can enforce the holding of the trial in his absence. In accordance with the above-mentioned, the court does not have the obligation to inform the accused about the possibility of the announced absence, presumably the presiding judge informs the accused about it if his or her

¹⁴ Section 279 (3) of the current Act on Criminal Proceedings: Parallel to the summons the court might notify the accused that the court hearing can be held in his absence, and the proceeding can be finished against him, if he previously announces that he does not intend to participate in the court hearing.

¹⁵ This rate had not even reached half percent in previous years: 2012: 0,45 %; 2011: 0,31 %; 2010: 0,47%; 2009: 0,42 %. Source: *A büntetőbíróóság előtti ügyész tevékenység főbb adatai I.* 2013. Kiadja: Legfőbb Ügyészség Informatikai Főosztály [Major data on the prosecutor's activity at criminal courts]

¹⁶ Hegedűs István: *A büntető ítékezés gyorsítása, különös tekintettel a vádlott jelenlétére – az alkotmányosság tükrében.* In (szerk.: Balogh Elemér): *Az Alkotmánybíróság és a rendes bíróságok – 20 év tapasztalatai.* Szeged, 2011. p. 28. [Acceleration of criminal adjudication, with special regard to the presence of the accused – in the mirror of constitutionality]

¹⁷ In this respect *Károly Bárd* unequivocally expresses his position when analysing the right to fair trial: “The right to fair trial requires that the possibility of personal participation be provided for the accused. (...) Thus the court hearing *in absentia* of the accused – if allowed at all – is restricted to those cases, when the absence of the accused can be regarded as waiver of the right to participate.” In: *Bárd Károly: Emberi jogok és büntető igazságszolgáltatás Európában. A tisztességes eljárás büntetőügyekben – emberijog – dogmatikai értelkezés.* Magyar Hivatalos Közlönykiadó. Budapest, 2007. p. 185–186. [Human rights and criminal justice in Europe. The right to fair trial in criminal law cases – human right – theoretical discussion]

¹⁸ *Árpád Erdei* expresses his opinion in a more tinged way: “Even beside full respect to the rights of the defendant it can be accepted that the presence at the trial of the accused, who is at least under the substantiated suspicion of the commission of a crime, is a procedural obligation in the spirit of the law.” In: *Erdei Árpád: Tanok és tévtanok a büntető eljárásjog tudományában.* ELTE Eötvös Kiadó Kft. Budapest, 2011. p. 296. [Doctrines and false doctrines in the science of criminal procedural law]

¹⁹ The Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950. For the official Hungarian-language text of the Convention sees: Act XXXI. of 1993.

²⁰ The same interpretation of the law can be read in the *Poitrinol v. France* judgement of the European Court of Human Rights: “ (...) when the accused has waived his right to appear and to defend himself, but at all events such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards.” <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57858> (Downloaded: December 1, 2014)

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presence is not necessary during the evidentiary procedure in order to establish the exact, complete and real facts of the case.²¹

To conduct the evidentiary procedure in the absence of the accused is alien to the traditions of Hungarian criminal procedural law, which is trial-centric and grounds the trial upon the principle of directness.²² The need to uncover material justice is served if the accused participates in the evidentiary procedures – and even if he practices the right to silence – owing to his personal presence he gains knowledge of the result of the evidence. He can decide any time to practice his procedural rights, thus influencing the outcome of the evidence. With the new legal institution of the announced absence of the accused these procedural rights of the accused are diminished and instead of them a new right enters: the right to be absent from the trial. Its condition is that the accused is aware of the court proceeding against him, thus he deliberately waives his right to personal presence and with this to the right to personal defence.²³

Nevertheless, it is questionable whether the right of the accused to a fair trial is not violated if he waives to be personally present, because personal presence at the court hearing is an essential condition to becoming the subject of other parts of rights of the accused. Some authors also express their concern for the violation of the principle of directness in these proceedings.²⁴

Nevertheless, parallel to the opinions expressing doubt such positions exist in the legal literature according to which – especially being aware of foreign legislation and legal practice – the possibility of the announced absence of the accused could be applied more courageously, especially in proceedings conducted owing to crimes of minor seriousness.²⁵ In Germany, for example, in relation to proceedings initiated owing to crimes of minor seriousness it is possible to conduct the court hearing in the absence of the accused, if the residence of the accused is known, had participated in the earlier phases of the proceeding (thus he is aware of the criminal

²¹ Újvári Ákos: *A vádlott tárgyaláson való jelenléte a Be. 279. § (3) bekezdésének tükrében, avagy a Be. új jogintézménye: a vádlott bejelentett távolléte*. In (szerk.: Gál István): *Tanulmányok Tóth Mihály professzor 60. születésnapja tiszteletére*. Pécs, 2011. p. 531. [The presence of the accused at the court hearing in relation to Section 279 (3) of the Act on Criminal Proceedings, or the new legal institution : the announced absence of the accused]

²² Even though it cannot be doubted that the legal institution of the court hearing in the deliberate absence of the accused had already been known by Act XXXIII of 1896 on criminal proceedings. According to the essence of this “proceeding of stubbornness” (or “proceeding of rebelliousness”), it could be applied if the missing defendant was summoned owing to a misdemeanour or a minor crime punishable only by fine and the facts could be established without the interrogation of the accused. The judge could hold the court hearing and could deliver the judgement based on the evidence. Against the judgement the accused could submit a justification. If the court accepted the justification, the court hearing had to be held again. The actual text of the provision is available here: Újvári Ákos: *A vádlott tárgyaláson való jelenléte a Be. 279. § (3) bekezdésének tükrében, avagy a Be. új jogintézménye: a vádlott bejelentett távolléte*. In (szerk.: Gál István): *Tanulmányok Tóth Mihály professzor 60. születésnapja tiszteletére*. Pécs, 2011. 533. p. [The presence of the accused at the court hearing in relation to Section 279 (3) of the Act on Criminal Proceedings, or the new legal institution: the announced absence of the accused]

²³ Gácsi Anett Erzsébet: *Megjegyzések a távollévő terhelttel szemben lefolytatott külön eljárásról*. In (szerk.: Schiffner Imola – Varga Norbert): *Sale and community – adásvétel és közösség*. Szegedi doktorandusz Konferenciák IV. Generál Nyomda Kft. Szeged, 2014. p. 55. [Remarks on the special procedure conducted against the absent defendant]

²⁴ Újvári Ákos: *A vádlott tárgyaláson való jelenléte a Be. 279. § (3) bekezdésének tükrében, avagy a Be. új jogintézménye: a vádlott bejelentett távolléte*. In (szerk.: Gál István): *Tanulmányok Tóth Mihály professzor 60. születésnapja tiszteletére*. Pécs, 2011. p. 534 - 535. [The presence of the accused at the court hearing in relation to Section 279 (3) of the Act on Criminal Proceedings, or the new legal institution : the announced absence of the accused]; Gácsi Anett Erzsébet: *Megjegyzések a távollévő terhelttel szemben lefolytatott külön eljárásról*. In (szerk.: Schiffner Imola – Varga Norbert): *Sale and community – adásvétel és közösség*. Szegedi doktorandusz Konferenciák IV. Generál Nyomda Kft. Szeged, 2014. p. 52. [Remarks on the special procedure conducted against the absent defendant]

²⁵ Hegedűs István: *A büntető ítékezés gyorsítása, különös tekintettel a vádlott jelenlétére – az alkotmányosság tükrében*. In (szerk.: Balogh Elemér): *Az Alkotmánybíróság és a rendes bíróságok – 20 év tapasztalatai*. Szeged, 2011. p. 35–36. [Acceleration of criminal adjudication, with special regard to the presence of the accused – in the mirror of constitutionality]

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proceedings against him), and has not appeared at the court hearing in spite of being properly summoned).²⁶

A position could be represented during the national codification according to which in the event of “small cases” (crimes punished by not more than five or eight years of imprisonment), the presence of the accused is not necessary, if proper summons had been served to him.²⁷ Nevertheless, the presence of the defence counsel would be compulsory, but the proceeding could be conducted without any restriction in the absence of the accused and without any further declaration of the accused. The rendered decision should be delivered to the accused with ensuring the right to appeal, and thus the right to remedy would not be violated. Such modification of the regulation would make it possible in relation to a vast number of cases to render the decision of first instance much quicker, thus significantly speeding up the finishing of the criminal proceeding.²⁸ It is undoubted, that the price of that would be the violation of the principle of directness.

A more radical idea would be that the presence of the accused is not obligatory anywhere.²⁹ If the proper information about that is provided to the accused, then he can decide, whether he intends to be present at the procedural action or not; and the absence of the accused in spite of the proper summons would not hinder the holding of the court hearing. According to *István Hegedűs*, it would not be compulsory to *ex officio* order a defence counsel in the case of absence: the accused can decide whether he gives powers-of-attorney to someone or requests the court to order a defence counsel.³⁰

IV. Restricted revision in the proceeding of second instance

The principle of revision present in the current Act on Criminal Proceedings, – that is the widespread possibility for second-instance revision, with few exceptions, based on law – has already been enacted into Section 197 of Act III of 1951 on criminal proceedings, introduced to it by Act V of 1954.³¹

According to our proposal based on the essence of restricted revision the aim set in the appeal would define the scale of the revision, so if the appeal attacks only the sanction, then the revision would also pertain only to that, as a general rule. Under the restricted revision exceptions to the general rule would be the procedural causes resulting in absolute repeal (causes of quasi nullity) and the false qualification influencing the sanction: these should be examined by the court of second instance *ex officio*. Such modification would obviously work toward acceleration, but at

²⁶ Bárd Károly: *Emberi Jogok és büntető igazságszolgáltatás Európában. A tisztességes eljárás büntetőügyekben – emberjog – dogmatikai értelkezés.* Magyar Hivatalos Közlönykiadó. Budapest, 2007. p. 184. [Human rights and criminal justice in Europe. The right to fair trial in criminal law cases – human right – theoretical discussion]

²⁷ In our modern world it can occur that for a defendant who works abroad it costs more to travel home than to pay the fine ordered by the court.

²⁸ Hegedűs István: *A büntető ítékezés gyorsítása, különös tekintettel a vádlott jelenlétére – az alkotmányosság tükrében.* In (szerk.: Balogh Elemér): *Az Alkotmánybíróság és a rendes bíróságok – 20 év tapasztalatai.* Szeged, 2011. p. 36. [Acceleration of criminal adjudication, with special regard to the presence of the accused – in the mirror of constitutionality]

²⁹ Hegedűs István: *Javaslat a Büntetőeljárás törvény kodifikációjához.* Kézirat. [Proposal for the codification of the Act on Criminal Proceedings]

³⁰ Hegedűs István: *Javaslat a Büntetőeljárás törvény kodifikációjához.* Kézirat. [Proposal for the codification of the Act on Criminal Proceedings]

³¹ Section 208 (1) of Act III of 1951 about the revision independent from the cause of the appeal, but only in that part of the judgement which was appealed; Section 197 (1) of Act III of 1951, introduced into it by Act V of 1954, about revision pertaining to the whole of the appealed judgement, independently from the cause of the appeal. Legislative Decree No. 8 of 1962, in Section 241, continued this regulation, but with some exceptions. Cséka Ervin: *A büntető jogorvoslatok adatai.* Közgazdasági és Jogi Könyvkiadó. Budapest, 1985. p. 217.

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the same time it would not fully solve the either material, or procedural legal errors occurring in the work of the courts of lower level.

Also at second instance it would be possible to establish a different finding of facts, even in the case of an accused acquitted at the first instance. In such cases, the proceeding of third instance would serve as a control to establishing the culpability of the accused in the second instance proceeding. With this rule it would be possible to evade the repeal of acquitting judgements of first instance, when the court of second instance finds the findings of facts of the acquitting judgement unsubstantiated, but under the existing regulations it cannot establish different findings.³²

Summary

The modernization of criminal procedure neither needs a fundamentally differently structured criminal procedural system nor a differently structured law on criminal proceedings. Nevertheless, significant changes are necessary in the formerly mentioned areas. With the introduction of further but not significant measures criminal proceedings could also be moved into the direction of increasing efficiency, e.g. the maintenance of exclusive competence can be disputed, but all crimes resulting in death and crimes causing particularly considerable damage or pecuniary injury should be rendered into the power of the higher courts (*törvényszék*). It would be justified to introduce a limit to judicial review, in order to strain the frequent unfounded submissions (e.g. reference to *novum* should only be accepted if the submitter became aware of it subsequent to the entering into force). In order to promote the more frequent application of the special procedure called waiving of the right to trial it would also be necessary to rethink its current regulation; and at the same time it would also be advisable to regulate the proceeding of substitute private accusation in a separate procedural form. Furthermore, it would be justified to “eliminate” from the Act on Criminal Proceedings the administrative-style provisions, which rather belong to other laws on the administration of court matters, penal execution etc.³³ And at last, modification proposals concerning prosecutors: the prosecutor should not submit the motion for sanction at the time of issuing the charge, since a fair motion can only be submitted after the court hearing and not exclusively based on the documents. In this case the prosecutor can indicate the level of punishment in his or her pleading (this system operates e.g. in France), thus the judge does not have to guess what punishment would be acceptable for the prosecutor, and later it would not serve as the basis of appeal. To widen the circle of opportunities, a further means of evading the judicial route could be if the prosecutor had the right to impose fine in cases of omission of trial, against which decision the concerned could turn to the court (this solution exists in the Netherlands).

³² Hegedűs István: *Javaslat a Büntetőeljárás törvény kodifikációjához*; Kézirat. [Proposal for the codification of the Act on Criminal Proceedings]

³³ Hegedűs István: *Javaslat a Büntetőeljárás törvény kodifikációjához*; Kézirat. [Proposal for the codification of the Act on Criminal Proceedings]

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