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The Interpretation of Legal Force in the New Hungarian Code of Criminal Procedure

I Introduction

Birthdays are normally happy events, celebrated in an atmosphere of festivity. This conference is one of the series of conferences organised to commemorate the 350th anniversary of the foundation of the Law School of the University. One could think it a wonderful coincidence that the participants in today's conference can celebrate the foundation of our Faculty and the birth of the new Code of Criminal Procedure (CCP) adopted on June 13, 2017 (Act XC of 2017) at the same time.

When a baby is just born, the first information given to family and friends about him or her is normally their size. Our newborn CCP is rather large, having 879 sections. It could not have been easy for the codifiers to help such a lengthy code to come into this world. Doubtlessly, it would not be an easy task for anyone to undertake the general introduction of any of its institutions, since it involves unravelling an intricate web of provisions.

In this presentation, dedicated to the examination of the ancient institution of legal force as it appears in the CCP, the first fact to note is that, in the European mixed systems of criminal procedure, it is of fundamental importance. Despite this fact, in the more than 120 years of codified Hungarian criminal procedural law history, the CCP is the first to define its concept. Naturally, scholarly writings on it, its contents, and doctrines concerning their characteristics, are abundant. Even so, it is a fact that the lack of a legal definition has been a fertile ground for producing conflicting interpretations of legal force, although it would be a fallacy to believe that to define something in a code is a value in itself – the secret of creating value is that when someone is doing the right thing, they should do it well. It is a question whether the codifiers have been privy to this secret.

To see how the CCP approaches legal force, it is the CCP's provisions directly concerning it that one first has to examine and compare with the earlier forms of regulation. The study must also extend to other institutions that have more remote connections with legal force but exert a significant, although indirect, influence on the new doctrines and theories to be formed by necessity.

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As the Ministerial Motivations for the Bill (MM) declares, the codifiers did not intend to effect a paradigm shift concerning legal force. It was, however, their declared intention to eliminate the difficulties of interpretation related to legal force. For this reason, the discussion in the following parts will touch upon the actual extent of the changes and the question of whether the responses to the practical challenges are adequate.

II The Role of Legal Force

The first issue to examine is whether the CCP introduces changes to the role of legal force. To answer the question, one first has to see if the aim set for criminal proceedings – which so far has been (at least *in principle*) the establishment of the material truth – would change. The answer to the question is (again in principle) in the negative. In the lofty formulation of the MM, 'Hungarians are a truth-loving nation, and establishing criminal responsibility on the basis of the material truth is a fundamental value of the Code in force'. The CCP is intended to preserve such values, the MM claims. In fact, however, more than one factor seems to contradict the claim. In the following discussion, three of them will form the subject matter.

1 The Principle of the Division of Procedural Functions

The principle of the division of procedural functions included in Section 5 of the CCP ('In the criminal process, the functions of prosecution, defence and rendering judgment shall be separated.') is stronger, even if not implemented with absolute consistency, than in the previous Code in force. One may realise that when examining the provisions on the objects to prove by evidence and on the consequences of passing judgment based on insufficient grounds together.

Among those belonging to the first group, Section 163 (1) provides that, in criminal proceedings, the court, the prosecutor's office and the investigating authority 'shall base their decision on facts corresponding with reality.'

It is interesting to compare this command with the provision of Section 75 (1) of the Code in force. According to that, in the evidentiary process, 'endeavours shall be taken for the sound and complete clarification of the facts corresponding to reality'. As Balázs Elek points out, with this formulation, the code previously in force 'admits that it is not always possible'.[1] In turn, based on its language, one may say, the CCP seems to give a categorical declaration of the principle of seeking the material truth.

In fact, the material truth principle cannot be absolute. The Hungarian codes of the mixed system have accepted countless exceptions to its validity. It is easy to see if one thinks

[1] Elek Balázs, *Jogerő a büntetőeljárásban (Legal Force in Criminal Procedure)* (Debreceni Egyetem Állam- és Jogtudományi Kar, Büntető Eljárásjogi Tanszék 2012, Debrecen) 42.

of the fair trial principle or the rules of evidence. As far as the latter are concerned, Section 163 (3) of the CCP prescribes that the court shall clarify the facts 'within the framework of the accusation'. It follows from this that, similarly to the previous situation, under the CCP, only the segment of the material truth (in the classic sense of the term) that appears within the framework of the accusation may be part of the facts of the case that the court is allowed to establish. It is from Section 164 that one may learn what the mentioned 'clarification' means and what the court is empowered, and obliged, to do in the course of it.

Section 164 (1) regulates an aspect of the burden of proof. According to it, the obligation of exploring the facts necessary to prove the accusation, making available the means of evidence necessary to prove them, and/or making motions to the court to obtain them, rests with the prosecutor. This provision is supplemented by par. (2), which prescribes that, in the course of clarifying the facts, the court shall procure evidence only upon motions. The language used clearly shows that both paragraphs are mandatory. As a conclusion, one could say that, in the absence of the appropriate motion, the court may not obtain evidence at all.

At this point, one could assert that the CCP has left behind the uncertainties of the previous Code and stands for the unambiguous acceptance and implementation of the division of procedural functions. The formulation of par. (3), however, instead of excluding all possible doubts, recreates the earlier confusion. It declares that without a motion to that effect, the court *is not obliged* to obtain and examine evidence. Thus, it steps back to the level of the Code in force: it does not prohibit the court from obtaining and using evidence without a motion to that effect from the prosecution or the defence, it merely declares that the court does not have such obligation. The formula again produces legal uncertainty as a legislatively unintended result: it supports judges who prefer judicial passivity and the parties' activity in evidence, but it does not exclude that their more active, more inquisitorial fellow judge could engage in the exploration of facts on his own initiative.

That despite all these facts the CCP seems to have reinforced the principle of the division of functions may be attributable to the provisions regulating the consequences attached to unfounded judgements. Section 593 (4) prohibits applying the consequences of groundlessness when it is caused by the prosecutor's omission of performing his obligations determined in Section 164 (1), as described above. It seems that the legislation complied with the advice formulated by the group selected in the Curia in 2012 for the analysis of judicial practice, which studied how the appellate courts exercised their right to remand cases. The group proposed that different consequences should be attached to the groundlessness of judgments according to whether the cause was attributable to the fault of the prosecutor resulting in a failure to obtain some relevant piece of evidence, or to that of the court.[2] In this way, the prosecutor bears a higher-level responsibility for avoiding situations where, due to prosecutorial inactivity, unfounded judgements gain legal force.

[2] A bíróságok hatályon kívül helyezési gyakorlatának elemzése – Büntető ügyek 2012. Összefoglaló vélemény. (Analysis of the Judicial Practice of Remanding Cases – Criminal Cases 2012. Final Report.) 43. <http://www.kuria-birosag.hu/sites/default/files/joggyak/osszefoglalo_velemeny_2012iimod2_2.pdf> accessed 7 April 2021.

2 Possible Procedural Agreements

In addition to the reinforcement of the division of functions, the expansion of the areas of agreements concluded within the procedure also have an impact on the nature of the truth sought for in the proceedings. The prosecutor's office and the defendant may enter into an agreement concerning the confession to the offence committed and its consequences even before the accusation is preferred (see Chapter LXV). Although according to the Code, the facts of the case and their legal classification may not be negotiated, it is allowed to enter into agreement as to what offences the defendant wishes to confess and, in exchange for the confession(s), for what offences he will not be called to account [cf. Section 411 (1) c), and (3)]. In such situations, according to Section 424, the prosecutor's office prefers the accusation based on the facts and offence agreed upon and, in the written act of accusation, shall make a motion that the court approves the agreement, imposes the sanction agreed upon, and passes other decisions.

In court proceedings carried out as agreed, after interrogating the defendant and examining the file on the case, the court decides at the preparatory hearing on the issue of the approval of the agreement, and if the decision is positive, an extensive and direct evidentiary process does not have to be carried out at the trial. In this way, the Code goes further on the path followed by the CCP in force, which is different from the traditional one, leading to the establishment of the material truth through taking evidence directly by the court at the trial.

3 Needlessness of Evidence

In regulating the issue of what requires proof by evidence, the CCP introduces a provision aimed at speeding up proceedings. According to Section 163 (4) c), it is needless to prove the facts, the correctness of which is accepted jointly by the prosecutor, the defendant, and the defence counsel. In such cases, the court accepts the facts if undisputed by the parties without requiring evidence. As far as the facts of the case are concerned, when they are established by relying on such rules, they may just as easily correspond with reality (material truth) as not. Consequently, it is only the illusion of the truth one may speak of in such a situation.

Thus, contrary to every declaration to the contrary, what one can see when reviewing the provisions of the CCP is that the shift from material toward formal truth, which is present in the CCP in force, is manifested in the CCP as well but, in my opinion, in a significantly stronger form. It is in order to speed up proceedings and to increase the efficiency of the process of calling perpetrators to account that all this happens – provided that speedier proceedings are more efficient proceedings as well. This phenomenon exerts a profound impact on the interpretation of legal force if it is considered to be the factor setting the balance between the requirement of truth (justness, legality), and of legal certainty.

Giving up the principles of seeking the material truth raises the value of legal force. One may say of legal force that it renders the truth attainable in criminal proceedings through

taking and evaluating evidence to be a *legal fact,* as it is legal force that attaches legal effects to it. In turn, if the truth is attained in criminal proceedings with setting the evidentiary process aside and using the admission of the defendant, the lack of dispute, or agreements, there is a very serious need for legal force as a presumptive fact to firm all those facts into legal truth. One can agree with Tibor Király, who claims that the term 'legal truth' is an abuse of the term 'truth' since it may hide a falsehood.[3] However, it is worthwhile to take into account Árpád Erdei's position as a quasi-supplement to the previous view. He interprets the 'legal' epithet attached to truth in the term as the indication that everything included in the court's judgment is validated by, and the recognition of what is expressed in them to be the truth is connected to, legal force. Consequently, the indication of the epithet is that legal truth 'is the quality of something, showing that it is accepted 'as truth' by the law'.[4]

III Legal Force Versus Finality

The CCP in force does not have a Chapter on legal force. It is only on the implementation of judgments that the Code regulates exhaustively in Sections 588 and 589. It provides that judgments may be implemented only after having gained legal force, while court orders, rulings and similar, in general may be implemented even if they do not have legal force yet. The Code precisely determines for every type of court decision when legal force sets in. In this situation, it is not from the Code but from the doctrines of criminal procedure that one may learn what legal force is, what its contents are, what effects it produces.

According to the prevailing view, legal force is a characteristic feature of judicial decisions attached to them by law, which results in the termination of proceedings in matters the decision settles. A decision having legal force may not be challenged anymore with *any ordinary legal remedy,* it may not be changed, and it may, and should, be implemented. What is included in it is binding, not only *inter partes,* but for everyone *(erga omnes),* authoritative, has probative force and must be taken as the truth.

The customary categorisation of legal force distinguishes absolute and relative; full and partial; formal and material legal force. Most of the problems of these categories are related to the pair mentioned last.

The MM claims that the CCP 'is striving for filling a gap of 25 years […] by the consistent use of the legal force concept, defining it as material legal force'. The MM refers to the Constitutional Court's decision 9/1992. (I. 30.) AB, which declares 'the institution of legal force, precisely defined as material and formal legal force is a constitutional requirement, an element of the rule of law'.

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[3] Király Tibor, *Büntetőítélet a jog határán (Criminal Judgement on the Edge of Law)* (Közgazdasági és Jogi Könyvkiadó 1972, Budapest) 222.

[4] Erdei Árpád, *Tanok és tévtanok a büntető eljárásjog tudományában (Doctrines and False Doctrines in the Science of Criminal Procedural Law)* (ELTE Eötvös Kiadó 2011, Budapest) 51.

The codifiers of the CCP found the solution to the problems in including only *material legal force* (and the effects originating from it) in the concept of legal force, which they declared attributable only to definitive judgments, i.e. those deciding the outcome of the case. With this solution, the CCP joins the interpretation of the concept given (in my opinion erroneously, as I expounded in a paper published earlier[5]) by the supreme judicial organ in the 1/2007. BK opinion and 2/2015. BJE decision. According to it, material legal force may be attained by judgments deciding issues of substantive criminal law *on the merits.* The basis for the view is the idea that *formal* legal force should be understood as excluding the possibility of using ordinary remedies to challenge the judgement having legal force. In turn, material legal force built on the formal one is the collective name for the *extra effects* of deciding the main substantive law issue that exert their impact in the area of *substantive law.*

The textbook by Mihály Móra, published about 60 years ago, points out that the use of the *formal* and *material* epithets as legal terms is misleading: it makes the false impression that the term formal legal force means the effects of procedural law, while material legal force refers to the effects of substantive law. The basis of the use of material legal force name is an idea originating from the doctrines of civil law. According to those, it is the judgment having attained legal force that creates the situation of substantive law in which a person's conduct is punishable: for the punitive claim of the state, a conviction is a creative, an acquittal is a destructive, force. Móra also points out that formal legal force in fact is a precondition for both processual and substantive law effects, whereas material legal force equally carries substantive law and procedural law effects.[6] Mihály Móra is right: the application of the 'formal' and 'material' epithets to distinguish the two classes of legal force has confounded even the supreme judicial organ.

The erroneous conclusions, drawn after lengthy theoretical disputes in the literature of criminal procedural law, and, in the wake of those in the practice making use of them, could have been avoided with relative ease. In order to achieve that in the future at least, the theoretical categories of formal and material legal force should be revised because the present classification causes more confusion than it eliminates. It would be worthwhile to distinguish the *formal* and the *material effects* of legal force.

The formal effects are independent of the contents of the decision having legal force. What they express is that ordinary remedies may not be used to challenge them. In turn, the material effects of legal force concern elements or parts of the decision. The substance, in other words the elements making up the contents of the decision, become *res iudicata/ iudicatae* when the legal force sets in, and it is those elements that the material effects concern. Therefore, the term material legal force does not in fact refer to material (substantive)

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[5] Király Eszter, 'A törvényes vád hiánya miatti megszüntető végzés „jogerőtlenedésének" tanulságos története' (The Edifying Story of the Lost Legal Force of the Decision to Terminate Criminal Proceedings for the Lack of Lawful Accusation) in Fazekas Marianna (ed), *Jogi Tanulmányok (Studies on Law)* (ELTE 2014, Budapest) 167–179.

[6] Móra Mihály, Kocsis Mihály, *A magyar büntető eljárási jog (Hungarian Criminal Procedural Law)* (Tankönyvkiadó 1961, Budapest) 394.

criminal law, but to the material effects created by legal force, which may equally be of the nature of substantive law or procedural law.

The codifiers, however, thought something else and set aside the century-old doctrinal traditions. As mentioned above, under the new Code, material legal force is only attributable to definitive decisions.

The contents of (material) legal force, i.e. the effects of it, are determined by the Code. Section 456 (1) defines *finality* ('The definitive decision of legal force of the court is final.'); the *binding force* ('it includes a decision on the accusation and/or on the criminal liability of the defendant, on the consequences under substantive criminal law or the absence of those, binding for everyone'); the *exclusion of the possibility of further ordinary legal remedy* ('After attaining legal force, the definitive decision may be changed only by an extraordinary remedy or as a result of special proceedings.'); the *ne bis in idem* rule and the *prohibition of double jeopardy* [Section 4 p (3): 'Criminal proceedings shall not be initiated or the opened proceedings shall be terminated if the conduct of the perpetrator was judged earlier, except for the cases of proceedings of extraordinary remedy and specified cases of special proceedings.' Section 456 (2): 'If the definitive judgment attains legal force, for conduct adjudicated in it, new criminal proceedings against the defendant shall not be carried out.']; and the *rules of the implementation of the sentence* [Section 456 par. (3): 'The implementation of the imposed punishment or applied penal measure shall be started after the definitive judgement attains legal force and the legal consequences attached to the conviction, to the acquittal or to the termination of proceedings shall set in after the attainment of legal force.']

Considering the fact that the MM stresses the importance of the precise definition of the concept of legal force, it is justified to note that perhaps the probative force of a judgment having legal force should have been mentioned in the Code. The same applies to that the attainment of legal force sets up the presumption of the truth of facts determined in *(res judicata pro veritate habetur),* and that of the legality and justness of, the judgement.

It is a different question whether it is right to include theoretical concepts and definitions in a code. Laws, including codes, are composed from norms having special structures, and scholarly definitions are not always reconcilable with them. For this reason, it may happen that writing legal provisions in that manner causes more trouble than it has advantages (see the story of the enactment of the scholarly concept of legal accusation in the previous Code). The fiasco of the attempt and its causes are well known in legal circles. The CCP itself is evidence of the fact that the codifiers share the opinion of the critics of the definition taken up by previous Code: it is left out of the CCP.

The CCP has some provisions in Section 457 on the partial legal force of definitive decisions: identically with Section 346 (4) of the previous CCP, it provides that the appeal shall suspend the onset of the legal force of the definitive judgment in the part that the appellate court is to review. The CCP adds that if the decision has parts not reviewed by the appellate court, those parts attain legal force. This provision in fact promotes the fulfilment of the requirement of clarity of norms, but scholars and practicing jurists proved equally able to see this element in the earlier code.

A significant change of attitude is clear in the CCP's provisions that make it clear that non-definitive decisions of the court are able to attain only formal legal force. In connection with them, the CCP, presumably in order to avoid misunderstanding, does not even use the term legal force, but introduces the category of *'finality'* instead. The meaning of the new term is that, as a rule, these final decisions may not be overturned by ordinary remedies and may not be changed,[7] but the CCP may determine exceptions to the general rule [Section 460 (1)]. The implementation of these decisions (also as a general rule) is separated from their finality. They are to be implemented directly after have been passed, except when the Code attributes suspensive force to the appeal or the court passing the decision or reviewing it on appeal orders the suspension.

The CCP eliminates a shortcoming of the previous Code, which was criticised by practicing jurists and led, in fact, to differences in judicial practice. In addition to the existing clause of legal force (Section 459), the introduction of the finality clause makes it possible that, under the CCP, the time when legal force actually set, and its extent, as well as the same data of any final decision, may be easily established.

IV Legal-Forceless Judicial Decisions

At this point, it is reasonable to make a short detour and look at how the CCP classifies judicial decisions (sections 449–451).

The Code sets up three categories for them. There are

a) definitive decisions;

b) non-definitive decisions; and

c) measures taken by the court, without passing a formal decision.

Definitive decisions are judgments (which either determine the guilt of or acquit the defendant), and the definitive orders (some of the orders terminating proceedings and the so-called *penal order*).

Under the CCP, non-definitive orders are of two kinds.

The first kind is composed consists of orders, neither issued to determine the way of proceeding with the case nor to decide its outcome but to settle some interlocutory matter (such as disqualifying the judge, appointing a defence counsel or deciding on the exclusion of the public from the trial). There are two types of these orders; those that may be appealed (it is the general rule), and those that may not (these are the exceptions).

The orders issued for conducting the trial are, as declared by Section 449 (4), 'non-definitive decisions, made after the case is registered at the court, in order to determine the way of proceeding or to prepare procedural acts or to ensure their performance' (such as sending the case to trial; setting the trial date; postponing the trial; and issuing summonses). According to Section 580 (1*) d)*, no appeal is possible against these orders: it is possible,

[7] So, final decisions are forever (at least in principle).

however, to claim exception because of them in the appeal against the definitive decision [Section 580 (3)]. The same applies in the case of measures taken by court, which do not require a formal decision [Section 580 (1*) e)*, and (3)].

In connection with the issue of legal force, a change deserves special attention. The Code divides the decisions of terminating proceedings into two groups. Such decisions are definitive, therefore capable of having (material) legal force, in the cases enumerated in Section 567 (1), as follows:

a) when the punishability of the defendant is terminated by his death, statutory limitation, pardon, or other circumstances;

b) the conduct was earlier adjudged with legal force;

c) the prosecutor's office dropped the case and private prosecution or private accessory prosecution is excluded or does not take place;

d) [repealed]

e) [repealed]

f) proceedings are carried out for an offence of a significance, as compared to another offence to be judged in the same case, is negligible from the point of view of criminal liability,

g) the lack of the required private complaint with no possibility of obtaining it.

In the cases enumerated in Section 567 (2), the legislators selected (using unknown criteria) some causes for terminating proceedings in situations where the order is demoted from a definitive decision (capable of having legal force) to a non-definitive one (capable of being merely final). These are as follows:

a) the lack of the required special complaint or the Prosecutor General's order substituting for it;

b) [repealed]

c) the accusation was made by an unentitled person;

d) the written act of accusation does not have all the elements required by Section 422 (1) and, owing to that, the accusation is not fit to be judged *on the merits*;

e) proceedings are taken over by another state;

f) Hungary does not have criminal jurisdiction for the case.

The consequence of this manner of regulation is that the termination of proceedings by a non-definitive decision does not have *res judicata* and *ne bis in idem* effects. Section 4 (3) prohibits initiating, and carrying out, criminal proceedings for the perpetrator's offence when earlier proceedings for the same conduct was concluded with a decision having legal force, unless it is a case of extraordinary remedy or that of certain special proceedings. If the decision closing down the original case is only a *final* one, there is no procedural bar to exclude the initiation of new proceedings.

I find the problem is in the inconsistencies in the differentiation between the causes for the termination of proceedings. It is inexplicable why the legislators think that orders of termination are definitive decisions adjudicating the accusation *on the merits,* thus deserving legal force, when the *cause* is either that the prosecutor drops the case, or it is considerations

of expediency. In turn, it is just as difficult to explain why it is that when the proceedings are terminated because the written act of accusation does not have the necessary legal elements, the lack of legal force provides a new opportunity for the prosecutor's office to pursue the accusation after the appropriate corrections. To make them, one should just follow the court's instructions (included in the court's opinion as criticism of the original one). This makes one suspect a violation of the division of functions and some other principles. As Justice Miklós Lévay pointed out in his dissenting opinion attached to decision 33/2013. (XI. 22.) AB of the Constitutional Court, just because the law declares that the lack of legal elements does not lead to the termination of proceedings with legal force is why the principles of fair trial, the division of functions and the impartiality of the court remain in danger.[8]

V Concluding Remarks

In this presentation, I have focused on the provisions of the CCP that predict a change in the role of legal force caused by the changing nature of the truth sought for in criminal proceedings. Together with that, I intended to show how the transformation of the concept of legal force in the Code had become the cause of its 'transfiguration'.

Legal force is a basic institution of criminal procedure, having many ramifications and connections. In order to have a complete picture of the interpretation of legal force expressed in a code, one could say with some exaggeration that most of its provisions must be examined, because they may have elements influencing the picture. Let us take, for example, the regulation of extraordinary remedies. It does not only indicate how important the respect for legal force is for the legislators, but also shows how the requirements of seeking the truth, striving for justness, and ensuring legality and legal certainty are ranked on the list of values to be defended.

There are many questions concerning legal force in the new Code that require answers. This conference may contribute directly or indirectly to finding some. Let us hope it will.

[8] The Constitutional Court did not find it unconstitutional that under the previous CCP, the court decision to terminate proceedings due to the lack of some element of the definition of 'legal accusation' would not exclude presenting the accusation again after the corrections of the mistakes. The CCP abandoned the definition but the introduction of the distinction of the 'legal' and other elements of the written act of accusation raises the same issues as the previous regulation. Thus, Justice Lévay's words remain valid for the new Code.