European effects on the new basic principles of Hungarian criminal procedure

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The new Act XIX. Of 1998 about Hungarian Criminal Procedure has formulated several new basic principles from July 1st, 2003 and that under a new name „Basic provisions'. It did so to refer to the fact that these provisions are duties and are bound to comply with; thus they became order for those applying the law and those participating in the procedure. I will deal with these provisions in this paper as part (lecture) of Craiova Conference, Roumania.

1. The basis of the court's procedure. The court fulfils its function of jurisdiction, signalled by § 1 and articulated by the separation of competencies, according to § 3. The examined § 2 answers the question of and provides guidance for what the „ condition sine qua non" (indispensable condition) of court jurisdiction is., without which no jurisdiction can take place and no procedural section of court procedure can come to life. The answer is charge. I can add legal charge as the existence and legality of such a charge is examined by the jurisdiction court in advance, during the course of the preparation of the trial.

Thus, the name of the basic provision as binding rule can be formulated and is preferable under didactical considerations as "charge being the basis of legal procedure". Without a charge no jurisdiction exists; without a charge nobody, thus not even the defendant can not be called to account. According to the legal wording *"the court can only decide about the criminal responsibility of a person, if he or she has been officially charged, and only in such an offence that is contained by the charge"*.

This statement contains two requirements apart from its being based on charge: namely a personal and an objective requirement. On the one hand, no natural person can be called responsible without a charge directed to an identified person; on the other hand he or she can only be held responsible in the frame of actions that has been encountered in the charge.

Here I would like to mention that from 2005 on the personal effect will be widened by the Act about the responsibility of legal persons coming into force, although in that case the jurisdiction court can only handle on the basis of a legal charge.

Furthermore, I would like to emphasise on the fact that the objective factual questions of the act contained by the charge (Act XIX. Of 1998 about Criminal Procedure, referred to as Be. 217. § section (3), point b)) are not absolute requirements for the

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courts. They can depart from them after the registration of proof within the actual frameworks via minutiae; the legal evaluation and further propositions are of no binding force at all for the courts. (See further in: Bírósági Határozatok, (Decisions of Court) referred to as BH 1986/9. in future. The fact that the facts of the case contained in the decision of the court do not overlap with the facts contained in the letter of charge totally, but with regard to the facts making up the key elements of the act they correspond to each other is not considered as a violation of the principle of charge. For the absence of legal charge see BH 1982/41. – If the prosecuting attorney fails to accuse the defendant with regard to any act in his letter of charge, the court cannot proceed in this respect due to absence of any legal charge for the act.)

Thirdly, I wish to underline the fact that within the issue of charge public charge will always be undertaken by a public prosecutor; however, there can be a representative of charge in an affair of private charge due to public interest (such as military or underage issues). Furthermore, the plaintiff, the private prosecutor and the substitute private prosecutor can also act as plaintiff in cases defined by law.

Two sections of this basic question are based on the two-century old institution of the principle of charge, namely that the authority of charge submits its reasons and its proposal of calling to responsibility in written- or in exceptional cases during the course of the separate and simplified presentation procedure form in oral, or noticed – form. This will serve as a base to the jurisdiction of the court. By this the content of the charge becomes obvious to the defendant and he or she has the possibility to defend him or herself against it. The defence – with the help of an official defender if required- can happen according to the symbolic meaning and theory of the principle of "equality of the arms" (égalité des armes, Waffengleichheit) of the Agreement about the Protection of Human rights and Basic rights to liberty, signed in Rome in November 4th. 1950. This guarantees the same rights for the attorney proposing the charge and the prosecuting attorney(private prosecutor, substitute private prosecutor) within the range of proof, and also for the subjects of the defence (defendant-defender), as well. It is to be underlined that –also for avoiding the misconceptions of many practising defenders- the equality of the arms only succeeds after the charge in the court section of the procedure, and only in the framework of the process of proof. Thus, the basis of the equality requirement drawn and worked out by jurisprudence is the charge itself, and not only the basis of court procedure, but beyond its being a requirement, it is not a sufficient requirement as it is only complete in the framework of proof. This is true for the further sections of the procedure (legal remedies, extraordinary legal remedies, special and extraordinary procedures), as well.

For the defendant the provisions of the basic principles mean that he or she cannot e judged upon beyond the charge, thus the framework of jurisdiction as well as that of defence on the merits of the case are set. Thus, the court will only decide for sure on such an act that is contained by the charge, and this means that the court remains within the range of the so called "similarity of act". The charge sets the lower

and upper limits of legal procedure; on the basis of duty of exploitation the court has to decide on the issues contained by it, but- as a prohibition of overstretching- on more ore other things, whether they are of personal or objective content, the court cannot rule. (See to this 49/1998 (IX. 27.) AB Alkotmánybírósági Határozatok, (Decisions of Constitutional Court) referred to it as AB in future.)

This basic provision is an important requirement of the constitutional state because with the help of it "justizmord" can be avoided that enables the jurisdiction of the court without charge, overstretching the charge resulting in a "judicial charge".

Among the relating decisions of the European Court of Human Rights (ECHR) the case Serves v France of 1997 can be underlined, in which the court emphasised on the autonomous nature of the expression "criminal charge". It is to be ascertained within the framework of the Agreement and not on the basis of domestic legal provisions. Thus, it has to be understood as an official declaration of the competent authority addressed to an individual about his being charged with having committed a crime, i.e. with such an act that can be of meaningful effect of his or her status. (EJF, 1998/4, p. 20-21.)

See to this: Garyfallou Aebe v Greece, 1997.(Papers on Human Rights, referred to as EJF 1998/4., p.20-21.; Steel and Others v United Kingdom, 1998, EJF 1999/2. p. 57. ; Gea Catalán v Spain , 1995, EJF 1997/3.p. 55-56.; Salvado Torres v. Spain, 1996, BH 1997/6. p. 477-478. ; Pélissier and Sassi v. France, 1999, EJF 2000/1. p. 17-18.; Dallos v. Hungary, 2001, BH 2001/5. p. 392-397. ;. Matioccia v. Italy, 2000, BH 2001/8. p. 639-640).

2. Right to the proceedings of the court. The separated jurisdiction within the framework of the constitutional state, declared in § 1. of the Code of Criminal procedure can only be exercised by the courts. This declaration can be found in § 3: (1) *"Everybody has the right to the trial of the court in order to decide about the charge referred to him or her."*

The origins of this basic provision can be found in several international statutes, among them in section 6. of the European Agreement of Human Rights, according to which *"Everybody has the right to trial by an independent and neutral court erected by the law in order for his or her act to be dealt with in an open way and within reasonable time and to be decided about his or her civil rights and liabilities, as well as about the merits of the criminal charge referred to him or her."*

From our viewpoint the need and right for the "court" is to be underlined. Under everybody we understand the defendant because –as it was mentioned in the previous section- criminal proceedings of the court can only be initiated against a definite individual and on the basis of acts contained by the charge, thus the right to the proceedings of the court has to be guaranteed for the defendant. Section (2) of the facts of the case is in tune with this thought: *"Only courts are entitled to decide upon*

the responsibility of a person and issue a penalty on him or her when committing a crime."

The first section contains a right for the defendant and at the same time a liability for the authorities, as it contains the act of accusation too, which is to be followed by the monopolistic appearance of the court. The same duality lies behind section (2) as well, as the competency off the court is on the one hand a right for the defendant, on the other hand a liability for the authorities and finally for the courts, too.

This is a right for the defendant on the one side; on the other side, however an order-like duty that originates from the principle of legality. Courts have to proceed as a jurisdiction authority, but at the same time alone and exclusively this authority can proceed in such a function. The monopoly of the courts is a desirable guaranteeing component because – in accordance with the legislative- I believe that the basic principles (basic provisions) can only realize their purpose at this forum completely; only under such just and fair surroundings can a just and neutral decision about the criminal responsibility and maybe about the penalty be born. (This monopoly is applied by a constitutional ruling, according to which: *"The courts of the Republic of Hungary protect and ensure the constitutional order, the rights and legal interests of the citizens, they penalise the committers of crimes". (§ 50. section (1)*, and furthermore, § 1 of the Act LXVI of 1997 on the Structure and Administration of Courts that declares, that: *"In the Republic Of Hungary, jurisdiction is exercised by the courts."* We have to add that they do it with the help of such judges who are declared to be independent by law and who decide according to their conceptions on the basis of laws, who cannot be influenced with regard to their jurisdiction activities and cannot be ordered, as well. (§ 50 section (3) of the Constitution and § 3 of the Act on Courts.) (Constitutional Court rulings regarding this issue: 401/1992 and 104/D/1994. AB decision.)

Having listed all this we can agree with the wording by Mihály Tóth who adds an adjective to the name of the basic principle. The requirement of the right to a "fair" trial exists because what would the right to trial be of use for without fair proceedings. The declaration of the court in itself is not sufficient. I can also add by Tibor Király that this is at the same time a right to a lawful court and a lawful judge; a right to such a court that has lawful competencies and authority in the criminal case of the defendant. Nobody an be deprived of his or her lawful judge, thus the principle is a guarantee to the neutral and objective jurisdiction, and to the avoidance of the assignment of a biased court or judge- whether it is for the benefit or the damage of the defendant-, too. This is ensured by the legal provision that states the possibility for the defence (defendant-defender) to initiate the remittal of the case (to another, neutral court) at the opening of the trial, before the start, or the exclusion of the president, a member or the secretary of the council of the court.

As there are breakages through the strict order of legality at other places, too, we can find some of them here, as well; at least it appears to be so. By this I mean the

actions of the prosecuting attorney that apply sanctions or prescriptions of duty without charge. The so called termination with a court admonition and the prescribed behavioral duties in the case of the postponement of accusation belong to this category. However, the collusion with the basic principle is only illusory, due to several reasons.

First of all, the defendant has the right to legal remedy a definite complaint against the decisions of the attorney (termination with a court admonition, termination of investigation due to procedural mercy initiated officially, postponement of accusation, in military criminal procedure attorney decision due to delegation to disciplinary procedure), which is followed by the act of accusation, thus the trial of the court will be opened for him or her, as well. Secondly, these attorney decisions do not contain a penalty – but there is no doubt about their aggrieving nature- , as well, which is a conjunctive condition to the realisation of the basic principle by the wording of the law.

Here I would like to note that the need (right and liability) for a court decision about the charge also means the right to a competent and responsible court, as well, however, it does not mean the ability of the defendant to initiate the attorney as the authority of accusation for accusation.

Looking at the question from a theoretical view, the requirement of legality is in battle with the opportunism, the expediency. There is a real possibility to make a realistic, legal judgement on the merits in the case of minor crimes without necessitating the whole court and its machinery for the decision. As the 8 basic principles serving as a foundation for the Code of Criminal Procedure contain the statement: *"Apart from the general basic procedure- where trial dominates- simplified procedures have to be developed, the proper application of which facilitates the differentiated decision of the cases"*- and in agreement with this provision, I do not find the containment of the acting and decisive range of powers for the attorney in such directions and measures contrary to the constitutional state or to the principles, especially in the case when there is a possibility to make use of the correction by the court.

From the practical side I can ensure that this solution based on differentiation serves the interests of the defendant, as well, as his or her case will be closed more quickly, he or she escapes the possible protraction of the section of court proceeding, or the already existing "accumulated disadvantages" following him or her from the beginning of the proceeding. Thus, the legal prescription of and sticking to the principle to the full and without opportunism would be rather rigidly strict, than lawful and realistic in the 21st century.

The decisions of the ECHR strengthen the international acceptance and application of the basic principle, however, they also show that the authorities cannot be held responsible for the absence of the court trial, if it occurred exclusively due to the behaviour attributable to the individual involved, i.e. if he or she was deprived of the right to court proceedings due to his or her own failure. See for details: Hennings v.

Germany, 1992, BH 1993/5, p. 398-399.). Furthermore: Mauer v. Austria, 1997, EJF 1998/3. p. 5-6.; Kadubec and Lauko v. Slovakia, 1998. EJF 1992/2. p. 40-41.; Hussain and Singh v United Kingdom, 1996, BH 1996/8.p. 637-638.)

3. The prohibition of self-accusation. The principle contained by § 8. of the Code of Criminal Procedure did not play an outstanding role so far, although it is the modern application of the " nemo tenetur se ipse accusare" , known from Roman law. According to the law *"Nobody can be obliged to deliver a damning testimony and deliver any evidence against him or herself."*

The less acceptable the incorrect application of "nobody" in the case of the presumption of innocence is, as only the defendant can be the subject of the wording, the more permissible it is here, as a damning testimony can happen not only with regard to the defendant. Several participants of the criminal procedure can be encountered, for instance the witness, the plaintiff and other parties of interest, too. The content of the principle applies to all: they are not obliged to deliver any damning or aggravating evidence. The duty of the authorities stands parallel to this: they cannot even enforce this. Furthermore, the liability of proof, lies at the authorities in the case of damning evidence, (onus probandi) , or the burden of proof of guiltiness falls on the authorities. (In the respect the principle has strong connections to the presumption of innocence, too. See for details: the explanation of 41/1991. (VII.3.) AB decision).

The liability is, however, not one-sided; it does not only apply to the damning, but as a requirement of material defence to the extenuating and mitigating circumstances, as well. This has not been granted a wording among the basic principles, but lies only in detailed regulations in the section of investigation as a duty of the attorney. I regard this for of regulation as false, both from a theoretical and practical view. We grand such an importance to the material defence as if it ha to be regarded and prescribed for the authorities as "engraved into stone" at the level of the basic principles , as it is regarded as an outstandingly guaranteeing factor of human, and within that defendant's rights. At the same time, it serves as a mean for prevention of the perseverance avoidance of legal misconceptions and incorrect versions. Furthermore, at the practical level it compensates and prevents the evolution and spreading of the "latent presumption of guilt", discussed in the criminal literature by Ákos Farkas following several German authors, as this phenomenon is not rare in authority circles. It is especially important in such a country, where – according to my previous research- only one third of the defendants is known to have a professional defender, and among these only one third, thus one tenth of the entire defendant population defenders appointed by the court collaborate who draw the attention to and collects or makes somebody collect the extenuating evidence.

The forcing of the defendant to delivering a damning testimony against him or herself can be realised not only in silence, failure to testify, (see its compliance with the Miranda-principle), but also in the freedom of non-acting, non-doing. The subject

is not obliged to show coo-operation or activity in any procedural step that can be "of damning nature" to him. Numerous – deniable- motifs of the kind can be found in criminal procedure, for instance the trial of proof, interrogation at the scene (in forensic meaning a local inquiry). All the acts, however, that are legally enforceable, can be executed even if they deliver damning data. They do not collide with the prohibition of self-accusation as without this the interest of the state with regard to realisation of penalty claim would be damaged, thus criminal investigation would be impossible.

Thus, searching of the premises can be executed during the course of which damning documents in the possession of the defendant or of someone of interest and material evidence can be seized.

As a conclusion from the principle, the defendant – as he or she is not obliged to deliver damming evidence at any side- is not obliged to deliver the extenuating evidence, too. This is left to him or her and cannot be enforced. The delivery of extenuating data can be a question of defence tactics from his or her side; he or she decides on the quantity, quality and timing of it.

I cannot "keep a secret" about the process started mostly in the Anglo-Saxon region that, contrary to the principle, there is severe pressure for the literature and precedents on the evaluation of the defendant's right to silence to his or her disadvantage. I still represent the view not questioned on the continent that this approach damages the Miranda –principle, the presumption of innocence, within this the burden of proof, the principle of defence and the prohibition of self-accusation that has an evident and strong connection to the former. On the basis of reasoning contrary to this the constitutionally proved criminal procedural principle would be a disadvantage for the defendant in itself, as he or she would already be in unfair and unjustified disadvantage supported by law at the very start. With respect to this question there is a certain "smoothening" of ECHR decisions to notice, as in the case of certain crimes(e.g. in criminal cases in connection with duties) we can observe the damage of the legal principle. See in details: Condron v United Kingdom, 2000. EJF 2001/2. p. 13-14. ; Averill v United Kingdom 2000, EJF 2001/2. p. 23-24., Bernard v France 1998, BH 1998/3. p. 232.)

The prohibition of self-accusation affects the most frequent participant of the procedure apart form the defendant (there are on average 5-7 participants in a Hungarian criminal case), the witness, too. No interrogated witness is obliged to state anything damning concerning him or herself or his or her relative (Criminal Code § 137. point 6, and § 82 section (1) point b)), or to delivery any damning evidence or data. One important guarantee factor of the realisation of the principle in practice can be the institution of the witness' counsel, introduced in July 1st, 2003. Its introduction was based on the legal and practical reasoning that often witnesses interrogated deliver a damning testimony against themselves, and thus, as a consequence of this their procedural position changes negatively and they become defendants. "From a strong witness they become a weak defendant." At the start of the interrogation, the

authorities have to draw the attention of the parties of interest to the fact of self-accusation; however, the person delivering data is not necessarily aware of the nature of damning data and the facts of the case. In this he or she can be truly assisted – apart form the liability of the authorities- by a participant of friendly relationship, in the case of the witness the counsel, in the case of the defendant his or her defender, whose duties of information of enlightenment expressively contain this, as well.
Here I would like to note that on the basis of the principle the witness is not obliged to inform about data that have been confirmed in a previous criminal procedure initiated against him or her, however, the act has already been effectively decided or he or she was granted a general pardon. At the same time this right is not absolute as one of the court decisions shows: "From the witness' side the disclosure of irregularities providing a base for disciplinary liability cannot be regarded as equal to the concept of self-accusation, thus the freedom from confession does not apply to it." (BH 1983/436.)

Finally, according to my viewpoint self-accusation can not only be realised through criminally relevant data and evidence, but also through minor criminality, however, in the scope of data regarding the facts of the case of and data about petty offences, as well. Thus, prohibition applies to this, too and in the case of absence of notice these data cannot be regarded during the course of the judgement of the case, either as on merits, or as a petty offence.

From the reasoning of the ECHR connected to the topic the following can be noticed. Example: The case of Saunders v United Kingdom in 1996. According to the Court the freedom from self-accusation is a generally accepted international principle that has strong ties to the presumption of innocence. (BH 1998/3. p. 232-234).
Serves v France, in the decision in 1997 the Court emphasised the right of any accused to silence and not to accuse him or herself, it is a generally accepted international principle that has fundamental significance with regard to the fair trial put down in section 6 of the Agreement. Its reason lies among others in defending the accused from the authorities' corrupt coercion. The right of non-obligation to self-accusation assumes that the prosecuting authority intends to substantiate its reasoning by non-appliance of duress or torment in order to acquire evidence, contrary to the will of the defendant.

See also: John Murray v United Kingdom, 1996, BH 1996/6, p. 478-480; Funke v France decision of February 25th, 1993. A series 256/A.; Brigan and others v United Kingdom, decision of November 29, 1988)

4. The independent evaluation of criminal liability. The legislative articulates a new bastion of the primacy and outstanding role of courts in the basic principles. Along with the principles of the division of procedural duties, basis of court proceedings and right to the trial of the court we can metaphorically say that all the four court –based bastion of the strong constitutional- state fortress exist. The fourth

and last bastion is according to the basic provision declared in § 10 is: *"In the question, whether the defendant has committed a crime, and if so, what sort of a crime he or she has committed, the courts, the prosecuting attorney, the investigating authorities are not bound by any decision or the facts of the case stated in it produced in any other procedure, especially in civil or disciplinary procedure or in procedure of petty offence."*

This principle guarantees the independence of the authorities and thus, the judging courts; it emphasises the jurisdiction based on perceptions, notions and conviction of the judges themselves, that is, justice. It is a consequence of the jurisdictional monopoly of the courts from which it follows that only courts are justified to decide about whether crime has been committed and who has committed it. Phrased in an other way, only the court can – following its own procedural regulations- give the final answer to the fundamental questions of forensic science (what, where, when, how, who, with whom, why) that weave through the entire procedure and their role is becoming more and more important. If the prerequisite of taking the decision lies in the decision of a preliminary question by another authority, than the criminal procedure will be terminated in the cases determined by law (Code of Criminal Procedure § 188, section (1) , point d, § 266. section (1)).

Nevertheless, it does not follow from the principle that documents originating from previous civil, administrative, labour litigation or from petty offences, disciplinary, tax administration, other financial administration or arbitration procedures cannot be used by the criminal authority or the court. They have the right and possibility to acquire them and evaluate them as documentary evidence in the scope of proof.

Finally we have to note that there are some exemptions colliding with the prohibition of double evaluation. These are the following:

1) An effect of the legally executed petty offences procedure as a "small criminal procedure" is that in the case of unchanged facts of the case and legal evaluation its decision on the merits is binding and no authority participating in the criminal procedure can initiate another procedure or call the defendant to account another time.
2) The effective decision regarding legal relationships of personal status, taken in civil litigation is of binding force to the authorities in criminal procedure.
3) If the civil claim has already been decided in a civil litigation by a court of civil affairs and it has come into effect, the claim cannot be enforce in criminal procedure any more.

The Constitutional Court has touched upon this issue in the decisions 42/1993. (VI. 30) and 53/1993, (X. 13.); whereas the ECHR has dealt with similar issues in the cases of Oliveira v Switzerland, 1998 (EJF 1999/2 .p. 18.); Gradinger v Austria, October 23rd, 1995, serial A, decision 328-C.

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