

Initiation of criminal court procedure in the Hungarian Jurisdiction

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Abstract: *The system of the Hungarian criminal procedure is governed by the principle of legality and the relevant rules are contained in the Act XIX of 1998 on Criminal Procedure Code (in what follows: C.P.C.) which rules must be executed compulsory during the everyday activities of investigative authority, prosecutor and court. In the present essay the author endeavored to introduce the basic rules and specific features of filing indictment of the Hungarian Criminal Code. I reckon that it can be stated unambiguously prosecutor plays definite role in relation with establishing criminal liability, since criminal court procedure and thus establishing criminal liability may not occur without filing indictment. Consequently, the prosecutor designates the circle of persons will be fall under court procedure and determines which acts have to be judged by the court with filing indictment.*

Key terms: *criminal procedure, principle of legality, prosecutor, investigation, criminal trial.*

Rezumat: *Sistemul de procedură penală maghiar este guvernat de principiul legalității iar regulile sale relevante sunt cuprinse în Legea XIX din 1998 privind Codul de procedură penală maghiar, (numit în cuprinsul studiului CPC). Aceste reguli trebuie să fie respectate obligatoriu în timpul activităților de zi cu zi ale autorităților de investigație, procurorul și instanțele de judecată. În prezentul studiu autorul încearcă să prezinte regulile de bază și caracteristicile specifice ale rechizitoriului prevăzute de Codul de procedură penală maghiar. Se poate afirma fără echivoc că procurorul joacă un rol definitoriu în raport cu stabilirea răspunderii penale, deoarece declanșarea procesului penal în fața instanței nu poate avea loc fără punerea sub acuzare. Prin urmare, procurorul desemnează cercul de persoane vor fi examinate în cadrul procedurii în fața instanței și judecate în calitate de învinuiți sau inculpați.*

Termeni cheie: *procedură penală, principiul legalității, procuror, investigație, proces penal.*

The prosecutor is that participant of the criminal procedure “who plays role from the initiation of procedure to the end of execution of sentence exercising his official rights or acting in a client position, follows the criminal procedure to the end.”¹

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¹ Erika Roth, *The Discretion Power of the Prosecutor* , n. 82, DELA, 2005.

Specific feature of the Hungarian criminal procedure that it consists of two basic stages. The first is the investigation stage (pre-trial stage), whose main task to clear up the historical matters of fact as much as to be able to make a decision on question of bringing case to the court. The investigation is carried out by the investigation authority, namely by the police. If, according to the data of investigation, existing the probability of commitment of a crime by certain person, the indictment will be filed to the court and so the case reach the second stage which is the court stage.

Consequently the filing of charge is “the general condition of court procedure so court procedure may not start and continued without filed indictment”.²

The tasks of prosecutors after investigation stage are ruled by independent chapter of the C.P.C. so the investigative and the court stages are separated in the Hungarian criminal procedure.

In aspect of the indictment it has determinatively significant who has the right to bring the case to the court, when the indictment fully meets the requirements of law namely when can it be considered lawful and what are the functions and conditions of the filing indictment.

1. The first question has to be examined is that who has the right to file indictment, namely who has the right to bring the case to the court. The indictment is a proposal of a person who has the right to file indictment to the court to establish criminal liability of the accused person, in other words, formal stipulation of the legal charge is to initiate court procedure by a person who has the right to prosecute.

The prosecutor is the public accuser, in other words the prosecution exert the public power of accusation; and this results that the prosecutor represents the charge before the court and claims his dues on remedies ensured by C.P.C. In the waste majority of crimes the prosecutor has the right to make decision on question of filing indictment, especially in respect of serious crimes where he has exclusive right. Besides of the public prosecutor private accuser and substitute private accuser also have the right to file indictment. In the Hungarian jurisdiction the public prosecutor has not have monopoly on bringing case to court as it seen from this specification.

According to the entitlement for the filing indictment crimes can be rated two groups. We can distinguish crimes based on public accusation and crimes based on private accusation. The feature of crimes based on public accusation is the prosecutorial entitlement for filing indictment whereas crimes based on private accusation victims are entitled for this right. In connection with private accusation we may state “the fact that the State identified the violation of public interest (...) does not mean that in some cases where individual rights are violated the State would not let the victim to file charge.”³

Waste majority of crimes are based on public accusation but in few petty crimes the law allows victims to make a decision on submitting indictment (minor bodily harm, violation of privacy, violation of the privacy of correspondence, defamation, libel, desecration). If the victim, in connection with above mentioned crimes makes denunciation (complaint) he entitled for representation of charge as he is the private accuser (§ 52 (1) C.P.C.). However, there are special rules for libel and defamation which can be fall under public accusation, namely the public prosecutor is filing and representing the charge if it committed against an official person in

² Jozsef Belegi et al., *Criminal Procedure. Commentary for Practice*, n.17, HVG ORAC, 2010.

³ Mihaly Toth at al., *Criminal Procedure*, n. 89, HVG ORAC, 2009.

the course of his official proceedings and against an authority in connection with its official operations (§ 52 (4) C.P.C.).

The Hungarian jurisdiction also knows the system of substitute private accusation. In the Hungarian jurisprudence formulated that expectation in the beginning of 1990 that “the feature of prosecutor’s monopoly of charge where the rights of citizens violated (...) must offset.”⁴ If the prosecutor refuses to commence an investigation or to submit a charge against the person whom the victim reported in his denunciation, the victim entitled to take over the prosecution. In other words, the substitute private accusation is “serves as the correction of prosecutor’s discretionary power”⁵ in that case when the person entitled for filing substitute private accusation is dissatisfied with the prosecutor’s activity. The law allows this right only for the victim of a crime, which results that if the specific crime has not have a victim (such a crime for example in the Hungarian Criminal Code is the driving under the influence of alcohol where the criminal code rules to punish the condition under influence of alcohol and there is no requirement for causing accident by the person who drunk alcohol and thereby somebody get injured) to act as a subsidiary private prosecutor is impossible. Further this, according to a decision of the Constitutional Court, if somebody commits a crime causing damage for the State to act as a subsidiary private prosecutor also impossible because in these cases the prosecutor entitled to enforce criminal demand of the State by filing indictment. The rules are the same in those cases where a dispute occurs on that if a penal offence was realized or not, between a public authority which has caused damage and the prosecution. Therefore, there is no possibility for the state authority exerting public power to act as a subsidiary private prosecutor not even in the specific crime where caused damage in its asset or breached its interest. The Constitutional Court in his justification also stated that to let involving public authority in to the subsidiary private prosecution might cause a danger of State’s preponderance because in these cases would be able to file indictment and charge without burdening the constitutional professional responsibility of prosecution.

Therefore, until in the cases based on private accusation the victim’s entitlement for bringing the charge to court independently prevails, to act as a subsidiary private prosecutor possible in strictly listed cases by Criminal Procedural Code and only if the prosecutor or the investigating authority rejected the report, or terminated the investigation, the prosecutor filed indictment only in respect of a part of the accusation or dropped the charge and also if regarding to the point of view of prosecutor the committed act belongs to private accusation. All this arise that the subsidiary private accuser supplant that public prosecutor who does not want to exercise his rights as a public accuser thus the victim forces the court procedure.

Derives from the above introduced rules also that the charge is illegal because of the missing competency of filing indictment

- if the indictment filed by private person in crime falling under public accusatory,
- if the victim acts in those cases where the law not allows.

2. Legality of charge is an essential requirement in the Hungarian jurisdiction. “The legal charge is that kind of fundamental principle which is the center of the criminal procedure, the aim of investigation stage and the cradle of the court procedure.”⁶ The concept of lawful charge is

⁴ Arpad Erdei, *Renovation and renewing*, in n. 8 Hungarian Law 456, 1993.

⁵ Jozsef Balazs Geller, *Certain Problems of EeffectiveRruling of the Substitute Private Accusation*, in n. 12 Hungarian Law, 742, 2001.

⁶ Jozsef Geller Balazs et al., *Certain aspects of the legality of charge. Studies in memoriam of prof. Imre Bekes* n.48, PKKE JAK, 2011.

ruled in the § 2 (2) C.P.C. According to this definition the charge is legal if entitled person filing a proposal to the court in which initiates to state criminal liability of certain person because of his strictly described act. Therefore the legal charge has formal and essential requirements as well. The charge is not suitable for essential requirements if the criminal act not strictly described therefore the specified act can not be determined as a criminal act. The court procedure can not be initiated or continued if these requirements are missing, since the court has to discontinue the case if the charge is not legal. In the legal practice as well as in jurisprudence has been a dispute on legality of investigation for a long time. Can the charge be legal if in the first stage of the procedure the investigation authority, namely the police breaches of the rules of criminal procedure? Therefore, for example during the hearing of the accused person the investigative authority fail to warn him his privilege of refusing testimony or the investigative authority omits to warn the witness his obligation of the true testimony. According to the dominant legal practice these kinds of breaches of law are not concerning the legality of charge but impress the evidences gathered during the investigation, namely theirs application as evidences.

Regarding to the legality of charge therefore prominently significant - as I mentioned earlier – the question of entitlement, the suitability of essential requirements and also what is the function of the charge.

3. The main feature of the function of charge is that the criminal court procedure can not be initiated without charge, i.e. fundamental precondition of the court's justice activity the filing charge by the competent person. The C.P.C. rules this as a principle when states that the court proceeds based upon an accusation. (§ 2 (1) C.P.C.)

The fact of accusation is not only the precondition of the court procedure but also evokes it and assigns its framework as well. The charge actually “serves also as the direct preparing of court procedure since the court may fulfill certain procedural acts after than.”⁷ These are derives from the principle of charge. Basically the principle of charge consist of three elements: separated functions in criminal proceedings, prosecutor's right of disposition over the charge, attachment of court to charge during the initiation and proceed of court procedure and during the sentencing as well.

a) Regarding to that the exercising the tasks derived from the function of charge inseparable attaches to the accuser, the court has not and must not have that kind of instrument with which could force the accusation. Those instruments ensured by law would cause union of functions which seriously would breach the right of impartial court. According to the Hungarian rules judge is obliged to lodge a complaint – also identifying the offender, if the person is known – concerning a criminal offence coming to his cognizance within his scope of competence.

b) The law allows for the accuser to dispose over the charge. According to the result of evidentiary action made before the court – with regard to the charge contained in the indictment or facts related thereto – may modify the charge. The modification has two forms, namely amendment and expansion.

If the prosecutor deems that the accused is guilty of having committed different criminal offence than the subject of the indictment he amends the charge by the correction of matter of fact or/and the legal qualification. The amendment of indictment's basic facts of a case is possible only if it needs minor corrections. However the prosecutor may correct the legal qualification without any restriction regardless of modification of matter of fact. The modification is not exercise influence for the legality of charge because the court is not attached to the legal qualification of the

⁷ Ervin Cseka & Jozsef Szilagyi, *The Indictment* n.13, OPG, 1960.

criminal offence but attached to the matter of fact explained by the indictment which he has to exhaust but he must not go beyond it.

Contrary to amendment, the expansion of the charge means that the prosecutor deems that the charge is correct but the accused person is guilty of having committed another criminal offence related thereto than the subject of indictment therefore he puts this other criminal offence into the charge which results also wider matter of facts. To expand the charge can be made together with the standing by the original charge and only when a new criminal offence can be stated according to the result of evidentiary action made before the court which is in its facts related to the criminal offence contained by the original indictment. It is irrelevant how this fact which connects to the original charge and the expansion is made, came to prosecutor's cognizance and so also irrelevant if the establishment of fact based on the decision of judge on proof.

Finally, the prosecutor's right to dispose over the charge also covers the right of dropping the case, apart from few exceptions. In this context it is very important that the prosecutor may decide exclusively "keep the principle of procedure ex officio (legality and opportunity) in view to drop the charge."⁸ As the C.P.C. rules, if according to the result of evidentiary action made before the court prosecutor deems that the accused is innocent, namely the criminal act was committed by other person or other that kind of reason can be stated which results that the accused is not punishable, the prosecutor has two possibilities. Namely, he may propose the acquittal of the accused of the charges which means that the judge has the right to make the decision or drop the case. In such a case the prosecutor actually makes decision which prevents the continuation of the case by him. Since the prosecutor drops the charge the court is obliged to terminate the procedure even if the court not agrees the standpoint of prosecutor. If the prosecutor took over the representation of the prosecution from the substitute private accuser or private accuser, he may not drop the charge but may withdraw from the prosecution.

Substitute private prosecutor's right to dispose over the charge is limited considering that he may not extend the charge (§ 343 (6) C.P.C.). Contrary to rules on prosecutor who has to give reason for drop the charge, the law is not burden of such an obligation the substitute private accuser and the private accuser.

The law states time limit for disposing over the charge since he is able to exercise this right until the first instance court withdraw panel meeting to adopt the essential decision.

c) The attachment to charge on the one hand means that the court may only ascertain the criminal liability of the person against whom the accusatory instrument was filed and regardless of the result of evidentiary action made before the court may not state criminal liability of other person than the filed accusation explained. The restriction to charge on the other hand places limits for the court since the court may only contemplate acts contained in accusatory instruments, namely the court may not go beyond the filed accusation not even new criminal acts become its cognizance during the court procedure. We would like to emphasize that the attachment to the charge is relating to matter of fact contained in filed accusation because the court is not restricted by standpoint of prosecutor on qualification of criminal. Consequently, the court is restricted by accusation in the meaning of objective and subjective, the court may proceed only against the person indicated in the accusation and may adopt resolution based on those facts which charge contain as happened occurrence.

⁸ Jozsef Belegi et al., *Criminal Procedure. Commentary for Practice* n.22, HVG ORAC, 2010.

Accordingly we may consider affirmable the ascertainment of “the charge is indispensable for the initiation of court procedure and also necessary for court proceedings and that is the measure during sentencing.”⁹

Derives from the principle of attachment to charge the necessity of act-sameness, namely the sentence must contain the facts which are in connection with written in accusation, naturally it does not mean word for word correspondence of accusation and matter of facts of verdict. The court may state that kind of facts in his justification verdict which are not contained the accusation and may state different facts as well. I would like to take a note that “the court is not attached to place, time, instrument, manner, etc. of commitment of crime strictly since these can be corrected during the criminal proceeding.”¹⁰ The importance is on that the verdict must contain those facts (guiltiness, qualification) which are relevant to judge the specific criminal act explained in the accusation and if the court condemning corresponding to the accusation those facts which are impressing and influencing criminal liability have to be same in the accusation and verdict. Regarding to this explanation, consequently the court in connection with historical matter of facts may state those kinds of particulars which are not explained in accusation and does not breach of principle of charge if the matters of facts are not corresponding to the facts of accusation but those facts which are the substantial elements of the crime are same. Obviously, matter of facts of verdict may not correspond to accusation if the court acquits the accused or the qualification is lighter. The immanent objective feature of principle of charge and act-sameness as being close connection with it, is that the court must not go beyond accusation, and establish his decision on facts not contained in accusation must not make more disadvantageous decision.

The charge shift a responsibility onto court at the same time since court has to make decision on charge, has to exhaust it fully. The burden of exhausting the charge means that the court has to take up its position in all relevant facts which are important in terms of criminal liability, it has to judge all relevant acts which are important in connection with criminal law.

4. Further question may be brought up, what conditions of accusation are burdening the prosecutor. The public prosecutor considering the facts of investigation, has to make a decision on further steps has to be taken in the criminal procedure. Stipulations of accusation - separately, gathered in one section of law - are not specified by law. But it can not be the subject of a debate that the accusation filed by prosecutor has strict legal requirements. Since, according to the C.P.C. the criminal proceedings in progress has to be terminated if

- the action does not constitute a criminal offence, or was not committed by the defendant (the person against whom the complaint was filed),
- it cannot be ascertained either that the criminal offence has been committed or that it has been committed by the defendant (the person against whom the complaint was filed),
- with the exceptions set forth in C.P.C., grounds for the preclusion or termination of punishability exist,
- a final court verdict has already been delivered on the action of the defendant (§ 6 (3) C.P.C.).

Essentials of these can be summarized as: “the general requirements of charge are its legality and substantiating.”¹¹

⁹ Endre Bocz, *The Legality of Charge was Really Uncleared*, in n. 5 Hungarian Law 261, 2008.

¹⁰ Csongor Herke, Zoltan Hautzinger, *The basic features of the Hungarian Criminal Procedure* n. 90, EDU-LEX Bt., 2007.

¹¹ Tibor Kiraly, *Criminal Procedure* n. 390, Osiris Kiado, 2008.

Therefore, with the filing indictment the prosecutor expresses his point of view that according to the evidences gathered the crime is carried out, it committed by the accused, there is no ground for termination of punishability or procedural obstacle, and also have not been possibility for the procedure of mediation, postponement or partial omission of the indictment. It follows from the foregoing also that the prosecutor may file accusation only at that case when no more further investigative action has to be taken and when there is no reason for the termination of investigation.

In that respect if the stipulations of filing indictment are exits or not, the prosecutor has to keep the professional requirements in view.

In the Hungarian jurisprudence those authors who are searching this matter, are separately dealing with the problem of certainty necessary to file indictment as the subjective condition of the accusation. It is known that kind of point of view in the jurisprudence that high stage of probability is enough to file indictment since according to documents of investigation “the prosecutor is not in a situation to make decision with that kind of certainty as indispensable requirement for adjudging of court”¹², but according to others the stipulation of it is the certainty. In my point of view, those authors have the right who think that the filing indictment has to be based on objective facts and on that conviction of prosecutor that the object of procedure is a crime and it committed by the accused person.

I would like to take a note that regarding to the question of filing indictment also known that kinds of opinions which are express that having burdening evidences against the accused – regardless of opposite evidences – forced to file the indictment because the court has the right, exercising its discretionary power on valuation of evidences, to judge the criminal liability otherwise, if the indictment is missing, there is no possibility for that. But this argumentation is contrary to strict rules of Hungarian law because according to the § 78 (3) C.P.C. the court and the prosecutor freely weigh each piece of evidence separately and collectively and establish the conclusion of evidence based on their belief thus formed. The law prescribes obligation of valuation of evidences also for prosecutor and if the prosecutor on the ground of evaluation will be convinced that the action does not constitute a criminal offence, the commission of a criminal offence cannot be established, the criminal offence was not committed by the suspect, or it cannot be established whether the criminal offence was committed by the suspect, a ground for the preclusion of punishability exists - unless it appears necessary to order involuntary treatment in a mental institution - the investigation has to be terminated.

To establish the conditions for accusation also task of prosecutor, in the interest of it the prosecutor orders or performs an investigation (§ 28 (3) C.P.C.).

Public prosecutor may file indictment only when the objective and subjective stipulations exists. But if this situation occurs, unequivocally derives from the principle of legality, the prosecutor has to file the indictment because his entitlements of exercising discretionary power authorized only by C.P.C. (postponement or partial omission of the indictment).

¹² Florian Tremmel, *Hungarian Criminal Procedure*, n. 399, Dialog Campus, 2001.