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A legal historical survey of the development of hungarian public prosecution with special emphasis on ius puniendi becoming a state monopoly

Abstract

The legal historical study of the development of Hungarian public prosecution and the legal legitimacy of the accuser is necessary when examining the charges resulting in the relativisation of ius puniendi as a state monopoly. This study meets this requirement when it discusses the history of this process from private to public prosecution until the codification of the 1896: XXXIII statute, the Code of Criminal Procedure. The study describes the history of the creation of the Hungarian public prosecution system until ius puniendi becoming a state monopoly in relation with the criminal authority of the state and the principle of legality.

Key words: private prosecution, public prosecution, public prosecutor, ius puniendi, mixed system

Introduction

"The early history of criminal law was dominated by civil law: the institution of exclusive private prosecution."[1] In case of private prosecution the relative, the tribe, the clan of the injured party is the "dominus litis", the exclusive lord of the prosecution, only he could initiate a procedure. The accidental relations to public law are of secondary importance, the enforcement of the punishment was the task of the injured party. It was based on the idea that the interest and the order of the state were not violated by the criminal offence. In purely accusatorial systems the penal claim of the state was realised in case of serious crimes only if the injured party presented indictment. Ex officio procedures were non existent just like the institute of public prosecution. During the course of history the public nature of certain criminal offences was realised, and the private prosecution was not in accordance any longer with the requirements and the structural level of the society thus ex officio procedures were initiated and private prosecution was limited. As a special form of public prosecution the general charge law, the "actio popularis" was born. During this development the rules of the inquisitorial process became dominant in the administration of justice. Criminal law became more and more influenced by public law in the late Middle Ages, and since the beginning of the Modern Age the right of punishment against criminals has been exercised by the state, based on the idea that it is the task of the state to enforce punishment against activities violating and breeching the legal order. As a result a permanent department of public prosecutor was created excluding private prosecution by the indictment monopoly of the state prosecutor's office.

The History of the Development of Relations between Hungarian Private and Public Prosecution until the End of the 19th Century

The First Period (1000–1514)

During the early centuries the Hungarian criminal procedure was mainly accusatorial. Prosecution and punishment of criminal activities against individuals depended on the charge of the injured party. According to the law of St Stephen the perpetrator

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[1] Judit Kovács: A magánvád szabályozásának hazai története az 1973. évi I. törvény megjelenéséig. Acta Juridica et Politica. Tomus LXII. Fasc. 13. Szeged, 2002. p1.

could be exempted from the punishment during the process if he came to an agreement with the injured party or paid a certain fee, as punishment was considered as private recompensation. In case of repeated theft ransom was excluded. The ransom was an accepted institution during the reign of Louis the Great and Matthias Corvinus. Criminal activities against the king or the state, as well as robbery, murder and robbery, theft, witchcraft, arson, money and document forgery were ex officio persecuted and high treason, robbery, theft and other public offences were obligatory to be reported under penalty and was investigated by the envoy of the king. The formalities of the process were simple and not different from civil suits.

From the time of Béla III charges must be submitted in written form, which was followed by a writ of summon with the seal of the judge without any preliminary proceedings. The accused person could defend himself free and could clear himself of the accusation by taking an oath or accepting the challenge to a duel. The trial was conducted directly and orally according to the principles of publicity.[2] The Golden Charta of Andreas II (1222: II statute) contained the special rights of the nobility by stating "We wish that the nobles (servientes) can not be captured and hurt by us or by our descendants in order to please any authority unless they were previously summoned and sentenced according to the law."[3]

Tripartitum by Werbőczy also includes the right of the nobles to defend themselves free, their personal freedom, and unlike accused of common origin their exemption from torture in case of certain common felony.[4] A noble could be sued only on the basis of the resolution of the general assembly of the county.[5] (Later it was substituted with the court of law suing the accused, which prevailed in written lawsuits until the middle of the 19th century.)

This special right of the Hungarian nobles hindered the European investigative methods to gain grounds in Hungary and influenced the criminal actions until 1848.[6]

Until the end of the 15th century the injured party filed the charges as the accuser in case of crimes against person. In case of common crimes the deputy-lieutenant of the county – who was the president of the court of law as well – and the judge of the city – as the official investigating authority and the public prosecutor who initiated the process – took part in the process.[7] According to Tripartitum by Werbőczy the judge and the accuser (plaintiff) are separated,[8] thus the deputy-lieutenant of the county from time to time commissioned a procurator[9] to commence a lawsuit and represent the charges.

The Second Period (1514–1853)

From the 16th century in cases in connection with infidelity "the prosecutor of the Holy Crown and the director of royal affairs"[10] was the public prosecutor, who accomplished the tasks of the investigator and the accuser, and who was the plaintiff in the criminal cases. He was subordinated to the palatine, who acted as a judge.

In the 17th century the process of indictment varied according to the freedom of defense, the hierarchical status of the accused and the seriousness of the committed crime, but due to the privileges of the nobles the system of investigation could not be established. A noble man could be arrested only in case of being caught red-handed or after being pursued and high treason. He could apply for a written lawsuit similar to civil cases, which was accusatorial against him. If a serf was accused he was arrested and only in case of high treason and infidelity was the lawsuit conducted according to the rules of a written lawsuit, otherwise in case of a common crime – e.g. murder, theft, arson – he took part in a fast oral lawsuit, a "criminalis procedure" and he could be investigated, which meant torture usually. The written lawsuit allowed not only the personal defense but also a defense by a lawyer, and the trial was oral, which was later substituted in more serious cases with a written form. The elements of the investigative methods began to gain grounds, thus the preliminary proceeding became longer, the ordinary investigation became a norm, torture, written forms and fixed evidentiary procedure became widespread.

The institute of the public prosecutor accepted generally in the process of accusation started to develop in this period in Hungary, but it could not be considered a uniform public prosecution institute. The prosecuting officer of the county in the 18th century can be seen as the predecessor of the public prosecuting authority in as much as he compiled a letter of indictment in criminal cases tried similarly to civil cases, thus functioning as an accuser.[11] But besides this activity he also acted as an examining magistrate and as an appointed public defender.[12]

Until the middle of the 19th century criminal cases had two types. One of them was the written lawsuit conducted as a civil lawsuit according to the rules of

[2] Magyar Törvénytár (annotated by Dezső Márkus), 1896. évi Törvénycikkek, Franklin-társulat Magyar Irod. Intézet és Könyvnyomda, Budapest, 1897. p(p)122–126.
[3] Dezső Márkus: (1897): op. cit. p.124.
[4] Ferenc Finkey: A magyar büntető eljárás tankönyve, Politzer Zsigmond és fia kiadása. Budapest, 1903. p25.
[5] Dezső Márkus: (1897): op. cit. p126.
[6] Jenő Balogh – Károly Edvi Illés – Ferencz Vargha: (1898): op. cit. I. p9.
[7] Ferenc Finkey: (1903): op. cit. p26–27.
[8] István Werbőczy: Hármaskönyv, Előbeszéd 13. cím, 4–5 §.
[9] Imre Hajnik: A m. bírósági szervezet és perjog az Árpád- és vegyes házbeli királyok alatt, Athenaeum r.t. Könyvnyomdája, Budapest, 1899. p182.
[10] Imre Hajnik: (1899): op. cit. p183.
[11] Ferenc Finkey: (1903): op. cit. p117.
[12] Jenő Balogh – Károly Edvi Illés – Ferencz Vargha: (1898): op. cit. I. p409.

the accusation, which was the normal case with noblemen. The other type was the summary jurisdiction – which can be used with a nobleman only with his consent – and was similar to an investigative process. In case of common crimes the process was initiated ex officio both against noblemen and commons. Following the investigation on the authentication trial a decision was made whether to continue the trial in a written form or in a summary way. Simultaneously with the litigation the public prosecutor was asked to present a letter of indictment. The written lawsuit was started on the basis of the plaint note of the injured party or the public prosecutor – in cases which were liable to prosecution ex officio that of the municipal prosecuting officer and in cases in the Royal Court of Appeal that of the director of the royal cases – after changing the written pleadings. The accused and the plaintiff were summoned to appearance, where the plaintiff, in his absence the defendant opened the appearance protocol. If every party appeared the defendant presented his formal objections the discussion of which were presented in three pleadings in the appearance protocol. It was followed by the ruling of the jury concerning the objections. If these were dismissed the actual oral part of the trial started during which the pleadings of the parties were recorded in the protocol. Then the jury gave the case to judgement by an interrupting decree. After the genuine trial the case was presented in front of the court, which was followed by the evidentiary procedure and the ruling.

In a summary lawsuit the initiation of the process was normally the ex officio investigation, which was conducted by the deputy-lieutenant of the county with the district administrators and 12 chosen noblemen. Later it was conducted by the prosecuting officer. The process could also be initiated on the basis of charges or accusation. The investigation was followed by a more and more lengthy preliminary procedure, which was conducted at county, city and landlord courts by the same person who ruled in the case. The summary trial was oral, in the presence of the accused and the defence was allowed. The prosecuting officer – whose contribution was not always essential – presented his indictment, the accused could defend himself, if he had a defendant he could also pleaded and the sentencing took place last. The rules of fixed evidentiary procedures prevailed.[13]

The Third Period (1853–1896)

The legal regulations of the previous era were in force until 1853. In 1854 the Austrian code of criminal procedure of 1853 was enacted, which found only the investigation procedure consistent with the interest of the state and the state prosecutor's office created to conduct public prosecution. Following the highly secret investigation the final trial did not realised a system of indictment in spite of the contribution of the state prosecutor and the speech of the prosecutor and the defence argument. The court was obliged to initiate a process when it came to know of a criminal offense even without the petition of the public prosecutor. The public prosecutor was not the lord of the indictment since the verdict of the court was not influenced by either his withdrawal or his petition. Oral trials were held at courts below, while at tribunals the verdict was based on written documents. Publicity was limited at main hearings, and fixed evidentiary procedure prevailed.[14]

The Conference of the Judge Royal in 1861 reinstated the old Hungarian feudal criminal procedure since it introduced the summary process[15] to be conducted against everybody as the oral form became a universal requirement. It abolished the differences resulting from being part of the nobility as it ordered the universal use of the privileges earlier applied to noblemen only. The task of the public prosecutor was carried out by the prosecuting officer again.[16]

During the years after 1867 a royal prosecutor's institution independent from the courts with functions adjusted to the requirements of the indictment were established by laws concerning state jurisdiction and the statute of 1871: XXXIII. According to him "it is absolutely necessary to set up bodies representing public prosecution" and "to separate the distinct activities of judges, prosecutors and public defenders and consign them to independent bodies."[17]

Private prosecution was not regulated, only the practice of the Curia naturalised the right for private prosecution of the injured party.[18]

Code of Criminal Procedure

The provisions of the statute 1896: XXXIII (henceforth Bp.) concerning the code of criminal procedure left the institute of royal prosecution unchanged and only complemented it with the institute of the prosecutor's agents. The royal prosecutor's office representing the common interest of the state consisted of the chief prosecutor and his deputy (Curia), royal senior prosecutors and senior deputy prosecutors (royal tribunals) royal prosecutors and junior prosecutors (royal criminal tribunal) and agents of prosecutors (royal district court).[19]

Bp. never accepted the exclusivity of the principles of either the right of the citizens to prosecute or the

[13] Pál Angyal: Magyar büntetetőeljárásjog tankönyve, Athenaeum irodalmi és nyomdai R.-T., Budapest, 1915. I. p(p)28–29., Ferenc Finkey: (1903): op. cit. p27.

[14] Dezső Márkus: (1897): op. cit. p131.
[15] Pál Angyal: (1915): op. cit. p29.
[16] Dezső Márkus: (1897): op. cit. p(p)131–132.
[17] László Nánási: A magyar királyi ügyészség megszervezése és működésének kezdetei (1871–1872) Ügyészségi értesítő, 1992/2–3. p(p)6–20.
[18] Dezső Márkus: (1897): op. cit. p132.
[19] Jenő Balogh – Károly Edvi Illés – Ferencz Vargha: (1898): op. cit. I. p409.

monopoly of prosecution. It reconciled the right elements of these two opposing systems instead. The process was bound to prosecution with the royal prosecutor's office representing the charges but it also accepted the right for substitute civil action of the injured party and in case of some minor offences it was the injured party that was considered the primary representator of the charges the main plaintiff.[20] Rulings of Bp. regarding the investigation: the prosecution was usually preceded by investigation ordered by the royal prosecutor's office as a judicial authority ex officio; the investigation and the inquiry were secret, publicity was limited; the entry level court and the appellate court could order the procurement of evidences. Rules typical of the system of charges: actual process can be initiated only on the basis of a charge; charges are represented by the prosecutor's office, which is independent from the court, in exceptional cases the injured party is the main prosecutor or the substitute civil suitor; the accused has the legal right for defence, he can employ a public defender, and are considered a client; investigation can be ordered only in connection with actions and persons stated in the proposal of the accuser; the charge must be connected to the legal matter; the court is not bound by the classification of the charge and the proposed sentencing, the accuser can not propose the extent of punishment; if the charge is dropped the process expires if no other party takes over.

Conclusion

During the history of Hungarian jurisdiction the priority of private prosecution gave way to the slow development of public prosecution thus receding to the background.

It can be stated that until the 19th century "the thousand-year-old Hungarian criminal procedure went through generally the same evolutionary phases as the criminal jurisdiction in Western Europe." Although "[...] the investigative system could not take deep roots in Hungary."[21] According to Ferenc Finkey "[...] especially in the last few centuries the Hungarian criminal processes can not be considered as a simple copy of foreign ones."[22]

The obligation of the enforcement of the punishment by the state is based on the principle of legality, which inducts obligations for law enforcement authorities, primarily for public prosecutors to enforce the claim for punishment.[23] Ius puniendi became a state monopoly in the 19th century in Europe and in Hungary as well. It resulted in the development of public prosecution in Hungary in the 19th century, which meant that the state had to create a permanent public prosecuting authority to perform the duties of public prosecution, which it duly fulfilled according to the requirements of that age. Public prosecution did not become the monopoly of the Hungarian public prosecutor, and private prosecution was not eliminated. Bp. incorporated the elements of the prosecution and investigation systems – influenced by French and German codexes – that it considered right with special emphasis on the principles of charges and by alloying them in an up-to-date form created the mixed system. ■

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[20] Ferenc Finkey: (1903): op. cit. p118.
[21] Ferenc Finkey: 1903): op. cit. p30.
[22] Ferenc Finkey: (1903): op. cit. p24.
[23] Ervin Belovics – Balázs Gellért – Ferenc Nagy – Mihály Tóth: Büntetőjog I. Általános rész, HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2012. p(p)26–27.