Dr. Livia Gergi-Horgos*

Thoughts on the accused party's box in connection with ius puniendi

Summary

The essay examines the issue of the relativization of ius puniendi during the court process when the immediate enforcement of the right of punishment of the state is delayed by the absence of the accused aiming to prolong the litigation in a corrupt way. The essay examines the problem of the right for hearing including the right of attendance of the accused as a critical element of a lawful process. The essay gives an international overview of the ban on processes in absentia and certain regulations permitting it. The essay makes proposals to enlarge the legal basis of a court procedure considering the absent accused.

Key words: ius puniendi, fair procedure, right for the hearing, in absentia, absent accused

1. The importance and influence of ius puniendi

During the evolution of the power of punishment of the state, sentencing and carrying out the sentence became the task of the state as a result of a long historical process accompanied by breaks and relapses.[1] According to *Mihály Szibenliszt* the state power – in order to maintain internal security – manifests itself not only as a civil court but also as a criminal court, which is called (ius puniendi) or the right for punishment.[2] From the high Middle Ages criminal jurisdiction became more and more integral part of public law and the exclusiveness of the enforcement of the right of punishment of the state became a norm. From the beginning of the Modern Age the right to punish perpetrators was exercised by the state.[3] It was based on the concept that it became the task of the state to punish acts violating and endangering law and order, which resulted in the state monopoly of punishment, which meant responsibility as well. The legal base of criminal authority is criminal law, and the legal frame of the enforcement of the power of punishment is the law of criminal procedure, which manifests itself in criminal justice (suprema criminalis jurisdictio) in judicature.

In its resolution the Constitutional Court stated that, in a democratic constitutional state the power of punishment is a constitutionally limited executional authority of the state to punish perpetrators. In this criminal system criminal acts are considered as violations of law and order and the state exercises its power to punish them. Criminal acts can cause personal injuries, but their evaluation as violation of public law and order resulted in the monopoly of the state to punish. The exclusive right of law enforcement means the obligation to enforce the claim of punishment.[4] Another resolution of the Constitutional Court includes that the responsibility of the state towards the community is to enforce without delay the claim for punishment, which is based on the constitution and the right for fair procedure. The delay of the enforcement of the claim for punishment damages the prestige and operation of judicature.[5]

2. The right for fair procedure and procedure in absentia

The accused is the central figure of the criminal procedure, the case is pending against him, the court must decide on his criminal liability. While regulating his rights and obligations besides his multiple

* *Assistant lecturer, Department of Law of Criminal Procedure, Institute of Law Enforcement Studies, Faculty of Law Enforcement, Nacional University of Public Service, Budapest, Hungary*

[1] Blaskó, Magyar Büntetőjog, Általános rész, (tankönyv, Rejtjel Kiadó, Budapest–Debrecen, 2013) 24. o.

[2] „Imperium civile, ut securitas interna perfecte obtineri valeat, non solum ceu civilis, sed etiam ceu criminalis judiciaria potestas (ius puniendi generatim) semet exerat," Szibenliszt Mihály, Institutiones juris naturalis II. köt. Jus naturae sociale complectens. Eger. 1821. II. rész. VIII. 96. §, fejezet. 96. §) 115.

[3] Belovics Ervin – Gellért Balázs – Nagy Ferenc – Tóth Mihály, Büntetőjog I. Általános rész, (HVG-ORAC Lap- és Könyvkiadó Kft. Budapest, 2012) 27. o.

[4] 40/1993. (VI. 30.) AB határozat

[5] 14/2004. (V. 7.) AB határozat

detrimental situation a special duality must be considered, that is he is the subject of both the defence and the evidence. Every statement of the accused is regarded as means of defence (moyen de défense) and evidence (moyen d'instruction) that is source of evidence at the same time.[6]

The fair procedure contains elements with different functions in the wider sense, namely: 1. courts established by the law, the independence and impartiality of judges, 2 public trial, 3. court rulings during reasonable time, 4 the fair procedure in the narrow sense (the notion of fairness, authorizations specified in the European Convention on Human Rights Article 6 Paragraph 3).[7] According to Károly Bárd 'the presence of the accused is the prerequisite to make the best of several partial authorizations of the fair procedure.'[8] The accused has the right to defend himself personally and to question the incriminating evidences, to put up questions to the witnesses, experts, to make remarks, and to receive defence and interpreter. The right of presence at the trial can be either active or passive, but it is a right, which he can relinquish and this right also should be ensured. The inappropriate interpretation of the right of presence of the accused during the course of Hungarian legal history led to the fact that his presence at the hearing became obligatory. His right is now an obligation,[9] and it is strengthened by the view in jurisprudence, according to which it is an obligation.[10] There is also a contrary view which I can fully agree with. According to this view 'the presence of the accused at the trial (the so called personal presence) must be interpreted as a right and not as an obligation during the criminal process. It follows from this that he can relinquish this right.[11]

As the accused is not present at the trial, he is not a participant of the process, where his criminal liability is decided on, and the court can not use the possibility of direct cognition and recognition guaranteed by the principle of directness. Furthermore it can negatively influence the evaluation of evidences and substantive justice. It can be stated that the presence of the accused at the trial is in accordance with the general interest of judicature, which supports this argument. Although the Constitutional Court stated that the right of presence at the trial can be relinquished, but it must be unambiguous, resolute and ensured by guarantees.[12] According to Károly Bárd the accused can do it and the judicature can acknowledge it but he can not be obliged. According to operative legal regulation the accused can be obliged contrary to his wish to be present at the trial.[13]

It is a constitutional obligation and an international principle to enforce the criminal claim of the state. The Committee of Ministers of the European Council also declares that any delay in the judgement of a criminal case damages the trust in judicature and corrupts its operation.[14] While it is not always in the accused party's interest as his conduct resulting in a longer process might influence the verdict, since he can hope for a more lenient sentence due to the lapse of time.

According to *Tibor Király* 'the procedure against the accused in absentia causes a problem in connection with the court procedure, the trial and the verdict. When the accused is not present he can not use his procedural rights, and if he is sentenced it can not be enforced – making the whole process useless. In this case the personal contact between the judge, the parties and the accused is non existent, thus the principle of verbosity and directness is damaged.[15]

In its resolution the Constitutional Court agreed with *Tibor Király* and stated referring to the argument of the Court in Strasbourg that, the criminal court directly observing the interactions between the accused and the other parties can have a fuller picture to judge the reality of the facts and the personality of the accused.[16]

According to *Károly Bárd,* the right for a fair procedure is not damaged if the process is conducted without the accused party if he explicitly requested it, agreed to it, or his relinquishing his right can be concluded in all probability.[17]

The Constitutional Court stated in its resolution that, the accused relinquishes his rights and defence due to his own decision in order to prevent finishing the case and his impeachment. Due to this behaviour of the accused an important partial right of the right for fair procedure, namely the obligation to finish a case within a reasonable period of time is damaged. It can negatively influence the interests and rights of the accused party during the trial and makes the evidentiary procedure in a criminal case more difficult. Furthermore the fact that a long period of time elapses between the time of the crime and the verdict delivered by the court the aimed influence of the sentence also diminishes. Considering all these facts the legis-

[6] Herke Csongor – Fenyvesi Csaba – Tremmel Flórián: A büntető eljárásjog elmélete. Dialóg Campus Kiadó. Budapest–Pécs, 2012. 99–100. o.

[7] Bárd Károly: Tárgyalás a vádlott távollétében, – emberijog-dogmatikai analízis – , In: Wiener A. Imre Ünnepi Kötet, Wiener A. Imre születésnapjára (szerk.: Ligeti Katalin, Kiadja: KJK-KERSZÖV Jogi és Üzleti Kiadó Kft., Budapest, 2005) 216. o.

[8] Bárd Károly: Emberi jogok és a büntető igazságszolgáltatás Európában. A tisztességes eljárás büntetőügyekben – emberijog-dogmatikai értekezés. Magyar Hivatalos Közlönykiadó, Budapest, 2007. 179. o.

[9] Előterjesztés az új büntetőeljárási törvény koncepciójáról szóló Kormányhatározat tervezetéhez (30237-32/2013. OBH) 5. o.

[10] Erdei Árpád: Tanok és tévtanok a büntető eljárásjog tudományában. ELTE Eötvös Kiadó, Budapest, 2011. 296. o.

[11] Gácsi Anett Erzsébet: Megjegyzések a távollévő terhelttel szemben lefolytatott külön eljáráshoz. Salle And Community – Szegedi Jogász Doktorandusz Konferenciák IV. Szerk.: Schiffner Imola, Varga Norbert. Generál Nyomda Kft., Szeged, 2014. 58. o.

[12] 14/2004. (V. 7.) AB határozat

[13] Bárd Károly: (2007): i. m. 200. o.

[14] Európa Tanács Miniszteri Bizottságának a büntetőeljárás egyszerűsítéséről szóló R (87) 18 számú Ajánlása

[15] Király T.: Büntetőeljárási jog. Osiris Kiadó, Budapest, 2003. 541. o.

[16] 14/2004. (V. 7.) AB határozat (a Strasbourgi Bíróság érvelését idézi)

[17] Bárd Károly: (2007): i. m. 196. o.

lator – resulting from the enforcement of the claim for punishment of the state – is entitled to create a regulation according to which the criminal procedure can be started in the above mentioned circumstances or continued. The only limiting factor is that the regulation must ensure with proper guarantees that the procedure is conform to the requirements of the right for a fair procedure.[18]

3. International Practice in Regulating Procedures In Absentia

The right of the accused party for personal presence 20 is mentioned only in the International Covenant on Civil and Political Rights[19] accepted by the UNO among the international documents containing the basic guarantees of criminal justice.[20]

The declaration of the right to be present of the accused party in the charters of international courts of law and the resolutions of the Statute of the permanent International Criminal Court exclude the process in absentia.[21] It goes back to the fact that circumstances of procedures at the international courts prohibit in absentia but not at national courts. The Security Council of the UNO is free to decide when to set up an ad hoc international court thus weakening its legitimacy. Special literature also questions the international legal ground of setting up such courts. The accused party also questions the right of ad hoc courts to exercise penal law. They are also exposed to the critic concerning their impartiality as there is a widespread view that 'the mighty ones are not impartial'. Due to these facts the International Criminal Court was established in 1998.[22]

'The European Court of Human Rights accepts the procedure in absentia of the accused party only in very limited circumstances. Some might trace the influence of the Anglo-Saxon ideology of the procedure as they think the procedure in absentia of the accused party contradicts the principle of a pure client model.[23] According to Cassese, the essence of a pure client model is that the accuser and the accused argue with each other, they have to collect, present and examine the evidences. If the accused is not present there is no-one to act on his behalf.[24] Although it is true that in an accusatorial trial consisting of arguments of two opposing parties the accused party is usually a passive one as in most cases he does not speak and the other parties do not try to make him speak either, and his defender argues instead for him. (The accused may make a confession if he wishes, as a witness of the defence, but the accused party's confession as such is unknown in an Anglo-Saxon procedure.) His presence is necessary as his defender acts as a representative therefore the accused must instruct him continuously. Thus processes in absentia – if it is allowed at all – are limited to those cases when the accused relinquished his right to be present. According to the federal regulations of criminal procedure in the USA the hearing can be held without the presence of the summoned accused party if he already declared on the accusation and was already present at an earlier part of the hearing and is aware that he must be available in the future. (...) But there are serious consequences of relinquishing the right of being present. The convicted can not force the renegotiation of his case, as it is presumed that he definitively relinquished his right.[25]

Most national procedural laws allow the conduct of a trial or part of a trial in absentia of the accused party. Its leniency towards in absentia trials is compensated in continental law with openness to lift validity. In Europe French and Italian law grant wide authorization in connection with procedures in absentia of the accused party.[26]

French law allows the representative presence of the accused at the trial, the accused party does not have to be present (CPP Article 544).[27] After the hearing (contradictoire) the court can deliver a judgement if the accused was aware of being summoned and did not justify his absence on substantiated reason or explicitly requested the trial to be held without his presence (CPP Articles 410 and 411). A judgement can be delivered without a contradictorial hearing only if the accused party was not summoned and it is not evident that he was aware of being summoned – with the legal consequence that the accused party can protest (CPP Articles 412 and 487). When somebody is sentenced without a trial he can protest against it and the same court can rehear the case. (CPP Article 489).[28]

According to Italian law the accused party has the right to be present at the trial. If he does not appear in spite of a proper summons and does not excuse his absence (CPP Article 486) the court declares his negligence (contumacia). In this case the trial can be held without his presence. This negligence is annulled if

[18] 3231/2013 (XII. 21.) AB határozat

[19] Bassiouni, M. C.: Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions. Duke Journal of Comparative and International Law, 1993. 292. o. In: Bárd károly: Emberi jogok és a büntető igazságszolgáltatás Európában. A tisztességes eljárás büntetőügyekben – emberijog-dogmatikai értekezés. Magyar Hivatalos Közlönykiadó, Budapest, 2007. 179. o.

[20] 14. cikk. 3. d) pont.

[21] Bárd Károly: (2007): i. m. 181. o.

[22] Bárd Károly: (2007): i. m. 182. o.

[23] Cassese, A.: International Criminal Law. Oxford University Press, New York, 2003. 371. o. In: Bárd Károly: Emberi jogok és a büntető igazságszolgáltatás Európában. A tisztességes eljárás büntetőügyekben – emberijog-dogmatikai értekezés. Magyar Hivatalos Közlönykiadó, Budapest, 2007. 185. o.

[24] Cassese, A.: (2007): i. m. 186. o.

[25] Bárd Károly: (2007): i. m. 186. o.

[26] Bárd Károly: (2007): i. m. 182. o.

[27] Herke Csongor: A francia és olasz büntetőeljárás alapintézményei, (Egyetemi Jegyzet, PTE ÁJK, Pécs, 2013) 80. o.

[28] Herke Csongor: (2013): i. m. 82. o.

the accused party appears before the verdict is delivered (CPP Article 487 Paragraph 3.) If the verdict is delivered without the presence of the accused party the verdict is deposited and the accused is informed about it by delivering an abridgement. (CPP Article 548 Paragraph 3.).[29]

German law contains stricter regulations and a trial can be held only in the presence of the accused party. If he is a fugitive after the investigation is finished the court can secure the evidences but can not decide on his culpability (StPO Article 285.). But an insubordination process can be held in the case of criminal offences of a lesser degree if his abode is unknown, appeared at the trial at an earlier phase and does not appear in spite of a proper summons. In this case the process is not in absentia but in absence.[30]

Austrian law also contains insubordination process, which can be held only in case of misdemeanors if the court heard the accused and he was summoned personally to the main trial (Bp Article 427.(1)).[31]

4. A Legal Historical Overview of Processes against Accused Party In Absentia in Hungary

A trial in absentia of the accused party was allowed only in very restricted circumstances by earlier regulations.

The statute XXXIII in 1896 on criminal rules of the court' (henceforth I.Bp.) accepted the rule of modern rules of the court namely that nobody can be sentenced without being heard.[32] I. Bp excluded the process in cases at courts of law or jury in absentia of the accused party: indictment, main hearing, and sentencing are excluded in case of an in absentia accused party.[33] and if the accused was a fugitive, or absent only investigation and examination could be carried out. The so called obstinacy procedure[34] could take place at trials at district courts according to Bp. As the accused was summoned without obligatory presence[35] – the conclusion of facts was clear – in connection with petty offence or misdemeanor with pecuniary penalty and the accused did not appear or was absent the court could have the trial and deliver a verdict.[36]

The Law III of 1951 (henceforth II. Bp) allowed the procedure to take place in absentia only during investigation and as a main rule the trial could not be held without the presence of the accused. As an exception it allowed the trial to take place in absentia in case of petty offences and misdemeanors with pecuniary penalties if the accused party was properly summoned but unjustifiedly did not appear.[37] The trial can take place in case of any criminal offence if it can be concluded beyond any doubt that the accused stays abroad due to breach of law.[38] The delivery of the verdict was carried out by announcement,[39] and by reopening a case the final verdict could be appealed since the accused could not use the rights of defence.[40]

Law V of 1954 (henceforth II: Bpn.) and subsequently the Law-decree 8. of 1962 (henceforth I. Be) were unanimous regarding in absentia trials, containing the main rule as the process could not take place in absentia. As an exemption they allowed the court process in absentis in case of offences with pecuniary penalties.

Law I. of 1973 (henceforth: old Be.) regulated in absentia processes not as a separate procedure but as part of the general provisions of procedure of the first instance' in chapter 9. As a main rule in criminal procedures the trial could not be held in absentia only if the accused stays abroad illegally and is non-extraditionable, or his extradition was refused, or the trial is about involuntary treatment in a mental institution and due to his condition the accused can not appear at the trial or is unable to act on his behalf.[41] But in case of petty offences with proper summons trials can be held in absentia if the case was misdemeanor with pecuniary penalty.[42]

The Hungarian law of criminal procedure allows the possibility to hold a trial in absentia on the basis of the provision effective since March 1, 2002 enacted by the Article 112 of the Law CX of 1999. Since this time the Hungarian criminal procedure contains this institution. Law CX of 1999 modified the old Be,[43] in a way that it disposed in absentia trial in a separate chapter – ChapterXVII/A. – ensuring the process and the verdict in case of such accused party.

The currently effective Law XIX of 1998 (henceforth Be) regulates in absentia process in Chapter XXV. As a separate process it defines the conditions which allow the court procedure to take place in case

[29] Herke Csongor: (2013): i. m. 85. o.
[30] Bárd Károly: (2005): i. m. 212–213. o.
[31] Bárd Károly: (2005): i. m. 226. o.
[32] Finkey Ferencz: A magyar büntető eljárás tankönyve, (Politzer Zsigmond és fia kiadása, Budapest 1903) 495. o.
[33] I. Bp. 472. § 1. bek.
[34] (also known in Roman law) the accused who did not appeat at the court in spite of being summoned or could not be arrested was condemned in obstinacy (in contumacian), as he was considered obstinate since he deliberately abdicated himself from the process, and he was sentenced in absentia without being permitted to use his rights. He was considered to relinquish his rights to defend himself.
[35] The 2nd Paragraph of Article 530 of I. Bp differentiates the summons if it is a petty offence or a misdemeanor to be sentenced with imprisonment. If he is summoned for a petty offence or mindemeanor with pecuniary penalty the accused can sent a defender instead of himself and the trial can be held in absentia. If he is summoned for misdemeanor to be sentenced with imprisonment or some further misdemeanor and he does not appear without a serious reason he will be detained.
[36] I. Bp. 540. §
[37] II. Bp. 154. § (3) bek.
[38] II. Bp. 154. § (4) bek.
[39] II. Bp. 172. § (3) bek.
[40] II. Bp. 213. § (3) bek.
[41] Régi Be. 192. § (1) és (2) bek.
[42] Régi Be. 225. § (3) bek.
[43] The Law XIX. of 1998 was framed but was not effective.

of any criminal offence if the accused stays either abroad or a fugitive. The aim of this separate procedure is to ensure that the accused can not avoid the trial thus not being able to be sentenced due to term of limitation.[44] Furthermore it has a critical role in connection with fulfilling the expectations of the society of the proper operation of judicature and strengthening trust.

The court acts in case of an in absentia accused according to the proposal of the public prosecutor.[45] If the abode of the accused becomes known before the trial starts, the court informs the prosecutor and orders incarcerative or deprivative coercive measures against the accused.[46] At in absentia trials the presence of the defence is compulsory.[47] If measures to find the accused were successful before the definitive decision of the entry-level court, the court continues the trial with the presentation of the materials of earlier hearings and opens the evidentiary procedure if necessary.[48] If measures to find the accused were successful after the definitive decision of the entry-level court, the accused within the period of appeal can propose a retrial at the entry-level court instead of appealing. After opening the trial the court declares his ruling passed in absentia of the accused and the proposal of the accused for retrial. At the retrial instead of hearing the witnesses and the experts the minutes of the earlier testimonies and expert's opinions can be read. Provisions of Chapter XIII must be applied at the trial. The court according to the result of the retrial can sustain or annul its earlier verdict delivered in absentia of the accused or can deliver a new verdict.[49] If measures to find the accused were successful during the appellate court proceeding, the appellate court schedules a hearing, interrogates the accused and – if necessary – records further evidence proposed by the accused. The appellate court can sustain, alter or annul the verdict of the entry-level court and orders it to rehear the case according to the result of the proceeding.[50] If measures to find the accused were successful during the third degree court proceeding, the third degree court annul the verdict of the entry-level court and the appellate court and orders the entry-level court to rehear the case. If the adobe of the accused becomes known after the final verdict a retrial proposal can be submitted on behalf of the accused party.[51]

According to Zsanett Fantoly, due to these legal provisions the criminal procedure doubles in practice, which does not result in rapid procedure at all.[52] Although this legal possibility has importance since it makes possible to prevent proceedings from being dismissed due to statute of limitation, which might mean the failure of judicature. It must be added that in these cases the accused rarely apply for a new trial.[53]

5. The absence of the accused from the trial and the passive presence of the accused at the trial

A distinction must be made between a trial in absentia of the accused and a trial without an accused party. Regulations effective from 1st March, 2011 ensure the possibility for the accused staying at a known abode to stay away from the trial if the accused notified the court in advance that he does not wish to be present at the trial.

According to general rules if the accused does not appear at the court in spite of a proper summons the court must order his immediate judicial warrant if he did not notify the court in advance that he did not wish to take part in the process. The hearing can be held in absentia if the legal matter of the trial is an involuntary treatment in a mental institution and due to his condition the accused is unable to be present or unable to exercise his rights. If the proceeding is against more accused parties the part of the trial the accused is not involved can be held. If issuing a writ of summons is not possible or is unsuccessful the trial can be held in absentia of the accused at large in spite of a proper summons but the evidentiary procedure can not be finished only if the court acquits the accused or terminates the criminal procedure against him. If the accused can not be arrested until the new date of the trial because he is a fugitive or in spite of an arrest warrant he can not be arrested until the new day in court the court establishes that the accused is a fugitive and proceeds according to Chapter XXV.[54]

If the accused staying at a known abode notifies the court in advance that he does not wish to take part in the process with the consent of the judge and proper surety, the court can finish the trial and pass a decision on the merits. According to Paragraph (3) Article 279 Be. the court notifies the accused by sending a writ of summons that the trial can be held and finished in absentia if the accused notifies the court in advance that he does not wish to take part in the trial. This provision decrees not as an obligation but as a possibility for the court to notify the accused about his right of being absent. The absence of the accused

[44] Fantoly Zsanett – Gácsi Anett Erzsébet: Eljárási büntetőjog. Dinamikus rész, (Iurisperitus Bt., Szeged, 2014.) 265. o.
[45] Be. 528. § (1) bek.
[46] Be. 528. § (2) bek.
[47] Be. 530. § (1) bek.
[48] Be. 531. § (1) bek.
[49] Be. 531. § (2)–(4) bek.
[50] Be. 531. § (5) bek.
[51] Be. 531. § (6)–(7) bek.
[52] Fantoly Zsanett: A büntető tárgyalási rendszerek sajátosságai és a büntetőeljárás hatékonysága, (HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2012) 271. o.
[53] Fantoly Zsanett – Gácsi Anett Erzsébet: (2014.): i. m. 266. o.
[54] Be. 281. § (1)–(9) bek.

from the trial can be permitted and the evidentiary procedure can be held if the conclusion of facts can be established without questioning the accused.[55] It is not a subjective right of the accused, if the procedure can not be conducted insouciantly in absentia of the accused the court summons the accused with the obligation of personal appearance.

If during certain phases of the trial the personal appearance of the accused is necessary he has to appear at the court following a proper summons. If he fails to appear his absence is regarded as absenteeism. In this case the accused box remains empty because the accused abuses his rights for being present at the trial and hinders the enforcement of the criminal claim of the state and violates the consequences of finishing the case during a reasonable period of time.

According to *Ákos Újvári* the legislator wrongly made possible for the accused to notify the court about his absence in any case indifferentially. It is not defined in the Be. in what form and by what proceeding the accused can do it. In case of a written notification the court can not check if it was done personally, voluntarily and under no influence thus violating the principle of directness. According to his view, by trying to solve this problem new problems were created in the legal standard, and the constitutional and human rights requirements of the procedure are violated by applying it.

It implies a greater risk as the European Court of Human Rights may establish the violation of the Convention due to this procedure, which constitutes a reason for review.[56]

In my opinion the written form of notification must be excluded because it violates the principle of directness. The accused can be entitled to it if he appears at the first hearing following a proper summons and that he notifies the court about his intentions.

The aim of creating these provisions were to prevent the accused from prolonging the litigation deliberatedly and hindering the termination of the case during a reasonable period of time by being absent. But these provisions failed to exclude the possibility of hindering the enforcement of the claim for punishment of the state by the intention of the accused.

It could also be possible to hold the evidentiary procedure at the court in the absence of the accused, and the trial could be finished by the court as well but the legal regulations must be created. If the accused notifies the court about his absence or if he denies to make a testimony results in the same situation regarding establishing the facts: the accused does not take part in the evidentiary procedure with his testimony and does not contribute to establishing the conclusion of facts substantially and completely and in accordance with the truth, he can not be questioned and does not take part in confrontation. The accused present at the trial can not be forced to make a testimony and contribute in the evidentiary procedure, the only consequence of his passive presence or absence is that he deprives himself of the right of defence of this kind – which he has a right to. The effective regulations ignore it and does not set a high value on it.[57]

6. Conclusion

It needs careful consideration whether to widen the possibility for the accused when he chooses to keep silent at the trial and does not wish to take part actively. It is questionable whether to diminish the function of the accused box during the trial and leave it empty or force the accused to be present passively by enforcing relevant sanctions.

According to my view if the accused chooses to keep silent at the trial, i.e. he denies to make a testimony and does not answer the questions – but has already made a statement regarding the charge and was present at the first hearing – and notifies the court that he relinquishes his right to be present or does not appear at the consecutive – second – trial in spite of proper summons than his presumption to relinquish his right of presence can be rendered possible. Judicature should ensure the subjective right of being absent for the accused exercising his right to keep silent with ensuring the obligatory defence by framing an unambiguous provision that the procedure can be continued and a verdict can be delivered.

On the first hearing when the court warns the accused of the consequences of his decision it must be emphasized and the accused must be advised that if he relinquishes the right to defend himself personally he can not challenge the incriminating evidences, can not ask questions from the witnesses, the expert and make comments. Furthermore he must acknowledge that his decision carries the serious consequences that he can not force the revision of his case. The court also draws the attention of the accused that during any phase of the procedure he can decide to take part in the process either actively or passively. During the procedure the court continuously notifies the accused about the hearings, the procedural acts and sends him the minutes of the hearings.

But a distinction must be made according to the degree of the criminal offence and the expected punishment when to grant the accused the right to stay away, i.e. accept the decision of the accused. It does not violate the general interest of judicature, as in the

[55] ÍH 2011. 143.

[56] Újvári Ákos: A vádlott tárgyaláson való jelenléte a Be. 279. § (3) bekezdése tükrében, avagy a Be. új jogintézménye: a vádlott bejelentett távolléte. In: Gál István László (szerk.): Tanulmányok Tóth Mihály professzor 60. születésnapja tiszteletére. Pécs: Pécsi Tudományegyetem Állam- és Jogtudományi Kara 2011. 535–536. o.

[57] Előterjesztés az új büntetőeljárási törvény koncepciójáról szóló Kormányhatározat tervezetéhez (30237-32/2013. OBH) 5. o.

case of an accused exercising his right to keep silent at the trial the court's direct perception and the evaluation of evidences are not hindered and improves the enforcement the claim for punishment of the state without delay. In its resolution the Constitutional Court stated that legislation – arising exactly from the obligation of the enforcement of the claim for punishment – is free to pass a resolution according to which the procedure aiming to impeach can be continued.[58]

In my opinion the above mentioned regulation would meet the requirements according to which if the lack of personal defence is based on the personal decision of the accused, than it would not violate an important partial right – namely the right to terminate a procedure during a reasonable period of time – of the right for fair procedure. All these would not violate the rights of the accused he would like to exercise during the procedure and would not make the evidentiary procedure more difficult. The aimed effect of the punishment would be stronger if the span of time between the time of the criminal offence and that of the verdict were shortened, furthermore this regulation would properly guarantee that the procedure is accordance with the requirements of the right for fair procedure thus no restrictive facts can hinder it from being framed. ■

List of special literature:

1. Blaskó Béla: Magyar Büntetőjog, Általános rész, tankönyv, Rejtjel Kiadó, Budapest–Debrecen, 2013.
2. Bárd Károly: Tárgyalás a vádlott távollétében, – emberijog-dogmatikai analízis –, In: Wiener A. Imre Ünnepi Kötet, Wiener A. Imre születésnapjára (szerk.: Ligeti Katalin, Kiadja: KJK-KERSZÖV Jogi és Üzleti Kiadó Kft., Budapest, 2005)
3. Bárd Károly: Emberi jogok és a büntető igazságszolgáltatás Európában. A tisztességes eljárás büntetőügyekben – emberijog-dogmatikai értekezés. Magyar Hivatalos Közlönykiadó, Budapest, 2007.
4. Belovics Ervin – Gellért Balázs – Nagy Ferenc – Tóth Mihály, Büntetőjog I. Általános rész, HVG-ORAC Lap- és Könyvkiadó Kft. Budapest, 2012.
5. Erdei Árpád: Tanok és tévtanok a büntető eljárásjog tudományában. ELTE Eötvös Kiadó, Budapest, 2011.
6. Gácsi Anett Erzsébet: Megjegyzések a távollévő terhelttel szemben lefolytatott külön eljáráshoz. Salle And Community – Szegedi Jogász Doktorandusz Konferenciák IV. Szerk.: Schiffner Imola, Varga Norbert. Generál Nyomda Kft., Szeged, 2014.
7. Fantoly Zsanett – Gácsi Anett Erzsébet: Eljárási büntetőjog. Dinamikus rész, Iurisperitus Bt., Szeged, 2014.
8. Fantoly Zsanett: A büntető tárgyalási rendszerek sajátosságai és a büntetőeljárás hatékonysága, HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2012.
9. Finkey Ferencz: A magyar büntető eljárás tankönyve, Politzer Zsigmond és fia kiadása, Budapest 1903.
10. Herke Csongor – Fenyvesi Csaba – Tremmel Flórián: A büntető eljárásjog elmélete. Dialóg Campus Kiadó. Budapest–Pécs, 2012.
11. Herke Csongor: A francia és olasz büntetőeljárás alapintézményei, Egyetemi Jegyzet, PTE ÁJK, Pécs, 2013.
12. Király Tibor: Büntetőeljárási jog. Osiris Kiadó, Budapest, 2003.
13. Szibenliszt Mihály, Institutiones juris naturalis II. köt. Jus naturae sociale complectens. Eger. 1821.
14. Újvári Ákos: A vádlott tárgyaláson való jelenléte a Be. 279. § (3) bekezdése tükrében, avagy a Be. új jogintézménye: a vádlott bejelentett távolléte. In: Gál István László (szerk.): Tanulmányok Tóth Mihály professzor 60. születésnapja tiszteletére. Pécs: Pécsi Tudományegyetem Állam- és Jogtudományi Kara 2011.

[58] 3231/2013 (XII. 21.) AB határozat