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Evaluation of unlawfully obtained evidence in light of the codification of the new Code of Criminal Procedure

I. Introduction

The concept of the new Code of Criminal Procedure enacted 11 February, 2015[1] is built around the hexagon of the following major *codification principles*: efficiency, speed, simplicity, modernity, coherence and purposiveness.[2] More specifically, the Concept also specifies 14 *centres of gravity (regulatory principles)* for the new legislation. However, the Concept emphasizes that "the preparation of the new Code of Criminal Procedure shall involve full review of the Code of Criminal Procedure with each and every provision checked for possible need for alteration or amendment".[3]

In light of the foregoing, this study focuses on one of the most sensitive areas related to evidences in criminal proceedings, namely the evaluation and admissibility of unlawfully obtained means of evidence and the resulting evidence matters. Even though the regulatory principles of the Concept imply that *the legislator does not put the focus of the new codification on the re-definition of* (the general and/or special clauses of) *unlawfully obtained evidence*, I still state that it would be reasonable to review this legal facility.

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* adjunktus, Szegedi Tudományegyetem, Állam- és Jogtudományi Kar, Büntetőjogi és Büntető Eljárásjogi Tanszék

1 Regulation principles of the new Code of Criminal Procedure – The proposal that was accepted at the Government's assembly on 11 February, 2015 (Regulatory Principles 2015). Source: http://www.kormany.hu/download/d/12/40000/20150224%20IM%20el%C5%91terjeszt%C3%A9s%20az%20%C3%BAj%20b%C3%BCntet%C5%91elj%C3%A1r%C3%A1si%20t%C3%B6rv%C3%A9ny%20szab%C3%A1lyoz%C3%A1si%20elveir%C5%911.pdf (download: 27 February, 2016.)

2 The new legislation "forms a step of the criminal law reform initiated by the enactment of Act C of 2012 (the new Criminal Code). The objective is to establish criminal proceedings that are suitable to effectively address practical issues in accordance with rule of law requirements and to supersede Act XIX of 1998, the unity of which has broken due to several linguistic amendments throughout the years." MISKOLCZI BARNA: *Az új büntetőeljárási törvény kodifikációs irányelvei*, in: ELEK BALÁZS – MISKOLCZI BARNA (ed.): Úton a bírói meggyőződés felé. A készülő új büntetőeljárási törvény kodifikációja. Printart-Press, Debrecen, 2015. p. 30.

3 Regulatory Principles 2015. p. 32.

The legal facility in question is the requirement of ensuring fair proceedings[4] which has been defined in the Concept as a core principle[5]. Unlawfully obtained evidence makes two interests conflict with each other: the requirement of holding the defendant liable under criminal law on the one side and the legal conformity of the proceedings and the rights of the defendant on the other. The previous interest requires that no evidence suitable for establishing liability under criminal law (including conclusive proof where applicable) shall be excluded on the sole ground of having been obtained in breach of a legal regulation.[6] According to the latter interest, we must not forget about the importance of ensuring compliance with the legality of criminal procedures and with the rights of participants in the criminal procedure including in particular the defendant.[7]

This study consists of two major units. As a first step (refer to Section II), I laid the foundation by presenting the general clause of the current and valid Code of Criminal Procedure concerning unlawfully obtained evidence and the legal practices built on this general clause.

The second unit (refer to Section III) focuses on the description and evaluation of conceptual suggestions which relate to this topic and have appeared mainly in criminal proceeding law publications.

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[4] The right to fair proceeding is a guarantee adopted from anglo-saxon law schemes. The essential aspects of this right were first declared at international levels in Section 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (dated 4th November, 1950 in Rome, Italy). BÉNÉDICT, JÉRÔME: *Le sort des preuves illégales dans le procès pénal.* Pro Schola, Lausanne, 1994. p. 301.; This Convention was adopted into Hungarian law by means of Act XXXI of 1993. HOLLÁN MIKLÓS – OSZTOVITS ANDRÁS: *A tisztességes eljáráshoz való jog – az (1) bekezdés magyarázata*, in: JAKAB ANDRÁS (ed.): Az Alkotmány kommentárja. Századvég Kiadó, Budapest, 2009. p. 2059. The right to fair proceeding (trial) is also addressed in Section XXVIII of the Fundamental Law which section also covers other fundamental norms of the more broadly construed constitutional criminal law. LÉVAY MIKLÓS: *Büntetőhatalom és Alkotmány, különös tekintettel a bűncselekménnyé nyilvánításra és a büntetésekre*, in: DRINÓCZI TÍMEA – JAKAB ANDRÁS (ed): Alkotmányozás Magyarországon. Pázmány Press, Budapest–Pécs, 2013. p. 213.

[5] The scheme of distinction of "core principles" or "super principles" from standard principles was established by *Tremmel Flórián*. HERKE CSONGOR – FENYVESI CSABA – TREMMEL FLÓRIÁN: *A büntető eljárásjog elmélete.* Dialóg-Campus, Budapest–Pécs, 2012. pp. 50–52.

[6] KIS LÁSZLÓ: *A jogellenesen beszerzett bizonyítási eszközök sorsa néhány külföldi állam és hazánk büntetőeljárásában*, in: SZABÓ KRISZTIÁN (ed.): Az új büntetőeljárási törvény első éve. Debreceni Konferenciák IV., Debrecen, 2005. p. 57.

[7] An interesting note is that *Bencze Mátyás* also mentioned double conflict of interests when he studied the presumption of innocence. (These interests, namely the effectiveness of criminal justice services and the protection of the defendant's rights, appear not only in the assessment of the presumption of innocence but also in the conduction of any and all criminal proceeding actions and thus in the evaluation of unlawfully obtained evidence.) He states that making criminal proceedings effective and efficient requires rules "which help reveal justice, while the restrictions imposed on criminal justice services shall ensure that potential errors and issues are minimized and individuals subjected to proceedings get the chance to defend themselves. The real issue to be solved by the legislator is assigning the proper weight and significance to each of these interests. The interest of the community (as a whole unit of the society) lies in the most effective possible operation of justice services (i.e. without formal barriers). However, when the community is perceived as the entirety of individuals, it obviously becomes important to ensure that defendants are granted proper guarantees and the right to fair proceedings". BENCZE MÁTYÁS: *Az ártatlanság vélelmének érvényesülése a magyar büntetőbíróságok gyakorlatában.* http://jog.unideb.hu/documents/tanszekek/jogbolcseleti/publikcik/artatlansag_veleme_a_gyakorlatban.pdf (download: 1 July, 2013.)

II. General clause concerning the exclusion of unlawfully obtained evidence

Even though this study is not aimed at historical researches, I have to take note of the fact that the first time the general clause of exclusion of unlawfully obtained evidence was mentioned in the codified Hungarian criminal proceeding law was *Act I of 1973* (Code of Criminal Procedure – *A büntetőeljárásról szóló törvény*; hereinafter referred to as the Old Be.): "The results of evidence procedures conducted in breach of the provisions of this Act must not be considered as evidence."[8] The former written criminal proceeding codes (i.e. Act XXXIII of 1896 – *Criminal Procedure*;[9] Act III of 1951– *Criminal Procedure*;[10] and "Act" 8 of 1962 – *Code of Criminal Procedure*) only defined the sanctions linked to each mean of evidence (i.e. voidness or non-observance) when the evidence was obtained in breach of the procedural rules.

After the Old Be. had been criticized for its inaccurate general clause definition,[11] the *current and valid criminal proceedings act* (Act XIX of 1998 on Code of Criminal Procedure, *A büntetőeljárásról szóló törvény*; hereinafter referred to as the Be.) has brought more exact and precise provision concerning the general clause of unlawfully obtained evidence. "Facts derived from means of evidence that were obtained by the court, the prosecutor or the investigating authority by way of committing a criminal offence, by other illicit methods or by the substantial restriction of the procedural rights of the participants may not be admitted as evidence."[12] This provision implies that the legislator has dual purpose. First, it shall try to exclude from Hungarian criminal proceedings (or sanction it, if it has already happened) the concept of "obtaining evidence at all costs". On the other hand, this exclusion (or sanctioning) is "only" permitted in three cases: when the evidence is obtained by way of committing a criminal offence [Aspect I], by other illicit method [Aspect II] or by substantial restriction of the procedural rights of the participants [Aspect III]. In my opinion, the indicated ruling gives a more accurate (but not entirely accurate) provisions concerning the admissibility of unlawfully obtained evidence. It leaves several questions open which shall be answered by jurisprudence and case law.

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[8] Article 60 (3) of Old Be.

[9] See: Article 135, 204, 205–206, 229, 304, 310, 331, 353, 363, 382 (2) sentence; Article 384 5. and 8. point; Article 404.

[10] See: Article 4, 55–57, 59 (2), 94 (4) 2. sentence; Article 160 (2).

[11] The general wording of the referenced provision has caused practical interpretation issues. In terms of grammar, the provision can be understood in a way to think that any kind of technical offence will result in the exclusion of the proof. However, it also implies that proofs obtained in other (i.e. non-criminal) proceedings even by material breach of the law may be appreciated (i.e. utilized) in the criminal proceeding. The weight of this issue is indicated by the fact that even the superior judicial forum, the Supreme Court *(Legfelsőbb Bíróság)* has not been able to establish unified legal practices in this matter. CSÉKA ERVIN – VIDA MIHÁLY: *A büntető eljárási jog vázlata I.* JATEPress, Szeged, 1999. p. 195.; CSÉKA ERVIN: *„Örökzöld" kérdések a büntető bizonyításban*, in.: FARKAS ÁKOS – GÖRGÉNYI ILONA – LÉVAI MIKLÓS (ed.): Ünnepi Tanulmányok Horváth Tibor 70. születésnapjára. Miskolc, 1997. p. 175.; BÁRD KÁROLY: *Emberi jogok és büntető igazságszolgáltatás Európában. A tisztességes eljárás büntetőügyekben – emberijog-dogmatikai értekezés.* Magyar Hivatalos Közlönykiadó, Budapest, 2007. 232–233. pp.; LŐRINCZY GYÖRGY: *Gondolatok a bizonyítási eljárás törvényességéről a büntető eljárásban.* Acta Jur. et Pol. (Tom. LIII, Fasc. 15.) Szeged, 1998. p. 211.; GÁCSI ANETT ERZSÉBET: *Unlawfully Obtained Evidence in the Hungarian Criminal Procedure*, in: KARSAI KRISZTINA – SZOMORA ZSOLT (ed.): Bosphorus Seminar. Papers of a Bilingual Seminar on Comparative Criminal Law. Beiträge eines zweisprachigen Seminars über. Strafrechtsvergleichung. Szegedi Tudományegyetem Állam- és Jogtudományi Kar, Szeged, 2015. p. 32.

[12] Article 78 (4) of Be.

This study does not go into the details of each aspect but rather summarizes them just as much as necessary to elaborate on the topic (refer to Section II.1). This study focuses (refer to Section II.2) on my hypotheses concerning the evaluation of unlawfully obtained evidence and on justifying such hypotheses.

II. 1. The aspects of the general clause

II. 1.1. Exclusion of evidence obtained "by way of committing a criminal offence"

By way of committing a criminal offence (Aspect 1 of general clause) needs the least explanation. Criminal offence shall be construed as a fact or circumstance specifically defined in the special part of Act C of 2012 on the Criminal Code (a *Büntető Törvénykönyvről*, hereinafter referred to as the Btk.). The scope of relevant criminal offences is certainly restricted as the criminal offence mentioned herein must have been committed by an official such as a member of the court, the prosecution service or the investigating authority.

It includes, in particular, enforcing of statement (Article 303 of Btk.) which is directly aimed at the unlawful obtaining of statements (in particular the defendant's statement) as means of evidence. Other types of criminal offence committed by officials, including abuse of office (Article 305 of Btk.), mistreatment in official proceedings (Article 301 of Btk.), covert investigation and covert information gathering without authorization (Article 307 of Btk.), and unlawful detention (Article 304 of Btk.), may be included in this scope only if it is ascertainable that the authority has directly obtained any means of evidence relevant to the particular proceeding by way of committing this criminal offence. Furthermore, abetting after the fact [Article 282 (3) (d) of Btk.], falsifications of different documents by a public official (Article 343 of Btk.) and passive corruption of public officials (Article 294 of Btk.), may also be relevant to Aspect 1 in Article 78 (4) of Be.[13]

II. 1.2. Exclusion of evidence obtained "by other illicit methods"

By way other illicit methods (Aspect 2 of general clause): The difficulty of application of this aspect lies in the failure of the legislator to precisely define what is meant under "by other illicit methods". The science of criminal proceedings and legal practices have joined their forces to fix this issue. In doing so, the scientific approach suggests that "other illicit method" shall be construed as such a procedural offence or breach of an instruction or regulation which makes the evidence's legality ambiguous but cannot, by itself, give rise to the conclusion of a criminal offence.[14]

In my opinion, there are two categories within evidence unlawfully obtained by other illicit method. The first category includes violation of special prohibitions associated with certain means of evidence (i.e. special clauses for unlawfully obtained evidence). The second

[13] GÁCSI 2015, P. 32.

[14] Vö.: BÁNÁTI JÁNOS ET AL.: *Büntető eljárásjog*. HVG-ORAC, Budapest, 2009. p. 110.

category includes prohibitions of evidence involving the influencing of the interrogated person's state of mind.[15]

II. 1.3. Exclusion of evidence obtained "by the substantial restriction of the procedural rights of the participants"

Obtaining evidence by the substantial restriction of the procedural rights of the participants (Aspect III of the general clause) shall mean a legal offense that essentially affects any of the participant's procedural rights and leaves the court uncertain about the authenticity of the evidence. With regards to this aspect, my de lege ferenda suggestion applies to the subjective side of the aspect.

My opinion is that the use of plural form is confusing in this case (even if it indicates that protection is available not only for the defendant but also for all other participants in the procedure). For Aspect 3 to be grammatically appropriate and applicable, at least two participants' procedural rights need to be violated or restricted.[16] (The "new" wording of the legislation is presented in Section II.2.2.)

II. 2. Hypotheses concerning the evaluation of unlawfully obtained evidence[17]

II.2.1. Necessity of the general clause

The first hypothesis I addressed in this topic is that evidence prohibition, as defined in the proceedings act in the form of general clause, is necessary (also in the new Code) as the risk of so-called "guarantee inflation" does not allow for the assignment of evidence prohibition to each procedural rule in the form of special clauses.[18] This hypothesis seems to be justified as the legal cases reviewed indicate that, if the sanctioning for unlawfully obtained evidence was not stipulated by law in the form of a general clause, the authorities (and the judges) could potentially gain absolute power. In other words, I disagree with the standpoint according to which "the use of generally defined evidence prohibitions (i.e. general clauses) is adverse as they are difficult to interpret and even more difficult to enforce [...]"[19]

In my opinion, the general clause for unlawfully obtained evidence may be the very asset to ensure that evidence and means of evidence unlawfully obtained in criminal proceedings are (or may be) excluded by legal ground. However, I do not doubt that special clauses are required for the efficient application of the general clause. However, for special clauses, it has to be noted that it is impossible to link guarantee to each and

[15] GÁCSI ANETT ERZSÉBET: *Bizonyítási tilalmak a magyar büntetőeljárásban: a törvénysértő (jogellenes) bizonyítékok kizárása*, in: JUHÁSZ ZSUZSANNA – NAGY FERENC – FANTOLY ZSANETT (ed.): Ünnepi Kötet Dr. Cséka Ervin Professzor 90. születésnapjára. Acta Jur. et Pol. Szeged, 2012. 175–180. pp.

[16] GÁCSI 2015, 38–39. pp.

[17] The hypotheses described below were established based on cases from Hungarian judicial practice between 2006 and 2015. For more information on methodology, please refer to: GÁCSI ANETT ERZSÉBET: *A jogellenesen megszerzett bizonyítékok értékelése a büntetőeljárásban.* PhD Dissertation. Szeged, 2015. 15–16. pp.

[18] At this point, my hypothesis crosses path with Regulatory Principle 2 in the Concept. Regulatory Principles 2015, 9–10. pp.

[19] HERKE – FENYVESI – TREMMEL 2012, 145–146. pp.

every procedural institution (such guarantees include, for example, the requirement of recording the Miranda warning given to the defendant into the minutes and that failure to satisfy this requirement shall cause the so obtained defendant confession to be excluded from the scope of evidence) as this would lead to guarantee inflation (i.e. real and reliable guarantees would lose their significance).

The rule of "repeated warning" is a great example in the Code of Criminal Procedure (more precisely, the hearing of witnesses) why a general clause is needed:[20] according to this rule, when and if it is ascertainable that a witness puts a criminal charge on himself or herself or one if his or her relatives, the witness shall be warned again in both the investigatory and judicial stages of the proceedings (in addition to the general warning) that he or she is not under the obligation to provide testimony.[21] As far as repeated warnings are concerned, the Code of Criminal Procedure orders that both the warning and the response of the witness thereto be recorded in the minutes. However, failure to provide the repeated warning does not render the evidence inadmissible (as it does with the failure to provide the general warning). The question arises whether the testimony can be excluded from the scope of admissible evidence when the relative to be heard as witness is not given the repeated warning with regards to his or her relative right to exemption. According to the legal practice, it cannot be excluded (refer to Edition 97, Volume 2014 of ÍH) as the rule is not backed by a special clause for the exclusion of evidence. In my opinion, however, the legislator introduced the rule of repeated warning into the Be. as an additional, real guarantee for the right of exemption [refer to Article 82 (1) (b) of Be.] which provides true meaning to the prohibition of self-incrimination. Therefore, it is the very general clause of unlawfully obtained evidence (i.e. the aspect of substantial restriction of the procedural rights of the participants) which renders or may render the testimony obtained without the repeated warning excludable from the scope of admissible evidence. The reason why I called Aspect III of the general clause in this case is that the failure of providing repeated warning should only serve as a legal ground for exclusion of the testimony from the scope of admissible evidence if all three conditions for the repeated warning are satisfied. The reason being is that, from all of the grounds for exclusion, the only warning that may be repeated is the warning pertaining to Article 82 (1) (b) of Be. (Condition 1), provided that the cases specified in Article 82 (4) of Be., do not exist (Condition 2) and only if it is ascertained that the witness puts a criminal charge on himself or herself or his or her relative (Condition 3). Whether or not all of the conditions are met is a matter of decision by the acting judge.

II.2.2. Clarification of the general clause's definition

My second hypothesis concerned the wording of the general clause. My thesis is: From a procedural-dogmatic point of view, the general clause of the current Be. concerning unlawfully obtained evidence needs re-wording (but not re-definition).[22]

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[20] GÁCSI ANETT ERZSÉBET: *A tanú mentességi jogára való ismételt figyelmeztetés mint (új?) szabály a magyar büntetőeljárásban.* Magyar Jog 2013/6. 348-356. pp.

[21] Article 181 (2); 293 (3) of Be.

[22] At this point, my hypothesis may cross path with Regulatory Principle 4 in the Concept. Regulatory Principles 2015, 12–14. pp.

With regards to that, my de lege ferenda suggestion implies that Article 78 (4) of the Code of Criminal Procedure should read as follows: "Factual information derived from means of evidence obtained by the court, the prosecutor or the investigating authority by way of committing a criminal offence; by other illicit methods; or by the substantial restriction of the procedural rights of any participant may not be admitted as evidence."

II. 2.3. Segregation of the aspects

The third hypothesis concerned the analysis of the individual aspects of Article 78 (4) of Be. My thesis is: the general clause (more specifically, Aspects 2 and 3 of the general clause) in the Be. [Article 78 (4)] cannot be unambiguously and distinctively interpreted as their segregation is not certain enough. To ensure more consistent application of law, criminal jurisprudence shall provide for a more specific and detailed interpretation background. The lack of consistent and unified application of law could deteriorate the rights of participants in criminal proceedings (including in particular the defendants) as stipulated in the Fundamental Law and the Code of Criminal Procedure due to the uncertain borderline between cogent and discretionary evidence prohibitions.[23]

My researches have indicated that the application and segregation of the aspects "by other illicit method" and "by the substantial restriction of the procedural rights of the participants" in legal practice are indeed uncertain. For the majority of the reviewed judicial decisions reasons supporting the decision indicated that the evidence was obtained in breach of the law and therefore excluded from the proceeding under Article 78 (4) of Be., but the court did not make specific reference to either of the aspects. On the other hand the decisions were wrong. It all comes down to the observation that obtaining any means of evidence "by illicit method" virtually always involves "the substantial restriction of the procedural rights of the participants". For the latter one to be applicable on its own (i.e. without overlapping Aspect 2), the evidence obtained must not itself be in violation of the law but the participant of the proceeding must have been restricted in exercising their rights.

Nevertheless, it does not mean that Aspect 2 and 3 in Article 78 (4) of Be. could not or should not be distinguished from each other. Another reason why this kind of distinction is important is that evidences obtained pursuant to Aspect 2 (and similarly Aspect 1 as well) must not be utilized in the proceeding in line with the statutory prohibition and thus must be excluded even if it is impartial and truthful.[24] Consequently, such evidence shall be considered absolute excluded from the evaluation.[25] On the other hand, Aspect 3 leads to evidence relative excluded from the evaluation where the authority evaluating the evidence shall have the liability to decide whether or not the restriction of the procedural rights of the participants is substantial.

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[23] At this point, my hypothesis may cross path with the Regulatory Principles, as defined in Section 13 of the Concept, and the detailed rules thereof. Regulatory Principles 2015, 28–30. pp.

[24] VARGA ZOLTÁN: *A bizonyítékok értékelése*, in: JAKUCS TAMÁS (ed.): A büntetőeljárási törvény magyarázata. 1. kötet. KJK-KERSZÖV, Budapest, 2003. p. 155.

[25] CSÉKA ERVIN ET AL.: *A büntetőeljárási jog alapvonalai. I.* Bába Kiadó, Szeged, 2006. pp. 226–227.

III. Conceptual suggestions that have appeared in professional publications

As I have mentioned in the "Introduction" section, the legislator did not put the focus of the codification on the evaluation of unlawfully obtained evidence. This leads to some sort of shortage as for the available conceptual suggestions relating to prohibitions for evidence.

III. 1. Substantive justice vs. proceeding law justice (in light of unlawfully obtained evidence)

The matter of assessment of exclusion of unlawfully obtained evidence, as a legal facility, arose general wise at the beginning of the codification works, upon assessment of the codification pillar, when it came to answer the question "*What is the objective of criminal proceedings?*". This legal facility is a necessary restriction on substantive justice (*Elek Balázs,*[26] *Márki Zoltán*[27]).

Elek Balázs stated that justice cannot be the ultimate goal to be achieved by all means and at any price when it comes to the regulation of criminal proceedings since it is the very requirements for fair proceedings that require such guarantee for the protection of the rights and interests of the parties to the proceedings which might eventually and occasionally narrow the possibilities for bringing justice to the perpetrator and the circumstances of the crime. Such requirements include the prohibition of admission of evidence obtained by way of committing a criminal offence, by other illicit methods (e.g. violation of the defendant's right to remain silent, or bypassing the absolute and relative obstacles for testimonies) or by the substantial restriction of the procedural rights of the participants.[28]

Márki Zoltán thinks that the matter of admissibility or exclusion of evidence brings a great deal of uncertainty to criminal proceedings nowadays and thus requires intervention.[29] Therefore, the matter of timeliness as defined in the Concept is not a standalone issue but rather an interdependent factor of all of the foregoing.[30]

In my opinion, putting restrictions on the process of revealing objective justice is an essential and necessary part of mixed criminal proceeding schemes. One of the greatest examples comes from a provision from the current and valid Code of Criminal Procedure. According to this provision, "one should try to reveal the facts extensively, completely and truthfully [...]".[31] The reason I am saying this is that even though the referenced legal provision establishes the goal for the continental schemes (i.e. revealing the substantive justice), the use of the word "try" implies that the path to revealing justice cannot be unrestricted and infinite. The principle of free evaluation of evidence (also declared in the Be.) is closely related to the foregoing: the reason why I state this is that, in my opinion, the legal facility of unlawfully obtained evidence (i.e. evidence prohibitions) serves as a control measure for this principle. The principle of free evaluation of evidence should not be mistaken for libertinage in the evidence process.

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[26] ELEK BALÁZS: *A jogerő a büntetőeljárásban.* Debreceni Egyetem Állam- és Jogtudományi Kar Büntető Eljárásjogi Tanszéke, Debrecen, 2012. p. 38.

[27] MÁRKI ZOLTÁN: *A büntetőeljárás megújulásának lehetőségei.* Ügyvédek Lapja, 2014/4. sz. pp. 2–8.

[28] ELEK 2012, p. 38.

[29] MÁRKI 2014, p. 3.

[30] MÁRKI 2014, p. 4.

[31] Article 75 (1) 2. sentence of Be.

III. 2. Adoption of German and/or Austrian regulation(?)

As far as the static part of criminal proceedings, more specifically the evidence process, is concerned, *Herke Csongor* addressed the issue of evidence prohibitions. *Herke* thinks that, in the codification of the new Code of Criminal Procedure, the legislator should reconsider the prohibited interrogation methods regulated in the German Code of Criminal Procedure (nStPO) and the interrogation prohibitions declared in the Austrian Code of Criminal Procedure (aStPO).[32] According to the *nStPO*, the following constitute *prohibited interrogation methods* that render the evidence obtained this way inadmissible: making someone tired or exhausted, administration of medication; torturing, deception, coercion, offering benefits not permitted by law, or other illicit interrogation methods.[33] The Austrian *aStPO* defines *interrogation prohibitions* with similar level of details. For example, interrogation prohibitions include non-permitted promises, non-permitted deceit, threatening, coercion, or asking ambiguous or unclear questions.[34]

In my opinion, the aforementioned provisions of nStPO and aStPO are present in Hungarian criminal proceeding law even if they are not regulated in the Be. but rather established by legal practices. The reason why I state this is that these provisions can all be derived from Aspect I (obtaining evidence by way of committing a criminal offence) and Aspect II (obtaining evidence by other illicit methods) in Article 78 (4) of Be. The latter aspect can be linked not only to the means of evidence but also to the scope of evidence prohibitions involving influencing the interrogated person's state of consciousness.

The question here is whether the codification of the new Code of Criminal Procedure has to go this deep into regulation. If it does, should this regulation be introduced into the general clause of unlawfully obtained evidence or into the individual special clauses?

In my opinion, if it was introduced into the general clause, it would break the boundaries of the general clause. A question that could arise, for example, is that if Aspect II (other illicit methods) has such detailed rules attached to it, then why could Aspect III (substantial restriction of the procedural rights of the participants) be not clarified similarly within the boundaries of the general clause? The latter question also has its reasonable meaning in another context which I covered in my researches, namely that these two aspects are often mixed in legal practice in terms of their interpretation. Conclusively, we can now state that such detailed rules cannot be introduced into the general clause as it would cause the general clause to lose its general regulatory nature.

Another question is whether it is reasonable to create so-called special clauses for these detailed rules. I state that it is not because no exhaustive list can be made of the aforementioned illicit interrogation methods and/or interrogation prohibitions. Nevertheless, the Hungarian criminal proceeding law does not stick to exhaustive rules by any means; the Be., for example, contains numerous exemplary lists. In my opinion, the Code of Criminal Procedure cannot be broadened to a point where it would include a separate rule for each and every scenario. However, these foreign regulation patterns (and

[32] HERKE CSONGOR: *Az új büntetőeljárás kodifikációja jog-összehasonlító megközelítésben*, in: ELEK BALÁZS – MISKOLCZI BARNA (ed.): Úton a bírói meggyőződés felé. A készülő büntetőeljárási törvény kodifikációja. Printart-Press, Debrecen, 2015. pp. 52–54.

[33] Article 136a. I. és III. of nStPO.

[34] Article 164 (4) of aStPO.

the awareness of it) may bring benefits to the Hungarian legal practice as they could make it easier to subsume individual cases under the appropriate aspect of Article 78 (4) of Be.

III.3. Distinction between cases considered to be simpler and more complex

In order for the new Code of Criminal Procedure to meet the European standards and ensure that proceedings are completed in a timely manner, it is essential that the subject matter of admissibility and exclusion of evidence needs reconsideration (and not necessarily re-definition). For the proceedings to be completed in a timely manner, it has to be ensured, in as early as the investigation phase, that the obtaining of means of evidence required (and just enough to underpin the major decisions affecting the investigation) is regulated through an effective framework. It helps to avoid unnecessary formalities and excessive evidence or "over-evidence".[35] Therefore, the Concept says that the set of means and rules shall reflect the distinction between proceedings considered to be simpler and proceedings that are more complex and have significant subject matter.

As far as investigations involving *cases considered simpler* are concerned, a more flexible process of obtaining and recording means of evidence could provide better efficiency in continuing into or diverting from court proceeding at short notice. If continuing into court proceeding, the centre of gravity for the evaluation of means of evidence may shift to the pre-court stage of the proceeding without major prejudice to the conclusive force of evidence (including in particular testimonies) due to lapse of time. Depending on the cooperation of the defendant or the limitation of applicable sanctions, the set of rules established for expedited and simplified investigations does not exclude the possibility of diverging the case into mediation and/or prosecution measures or into a separate simplified proceeding that affects the court proceeding.[36]

On the other hand, *proceedings which are considered more complex and have more significant subject matter* may use more formal rules for obtaining means of evidence. However, the enforcement of such rules must not result in "double evidence" proceedings (which are broadly criticised across practicing professionals) that would unreasonably extend the duration of the proceeding.[37] According to the Concept, the new Code of Criminal Procedure shall define such procedural rules for obtaining evidence which organize the method and results of obtaining means of evidence in a way so that the exact substance and authenticity of the evidence leave no doubt. (However, it is still unclear what that would mean exactly.) This regulation in combination with the facility to exercise the right to defence in a more active and practical manner may be suitable together to ensure that the investigation results are easier to use across subsequent stages of the proceeding. Therefore, the guarantee rules applicable to obtaining means of evidence may eliminate the risks associated with the loss of evidence due to potentially prolonged duration of the investigation.[38] The question arises, most certainly, whether criminal offences could be distinguished from one another on this ground. (This regulatory principle

[35] Regulatory Principles 2015, pp. 29–30.
[36] Regulatory Principles 2015, p. 29.
[37] Regulatory Principles 2015, p. 29.
[38] Regulatory Principles 2015, p. 30.

of the new Code of Criminal Procedure is closely related to the efforts on simplifying, expediting and making criminal proceedings more efficient and to the review of the scheme of simplified criminal proceedings aimed at rendering proceedings fast and efficient.)[39]

IV. Epilogue

Finally, it is to be stressed out that, in light of the codification principles, the legislator should be reasonably expected to ensure, across the codification process of the new Code of Criminal Procedure, that the rules to be implemented and enforced are clear and transparent even if it "only" comes down to the interpretation of the norm's wording (i.e. grammatical understanding of the script).[40] This is the only way to ensure that guarantee provisions are fully satisfied and fair procedures are not only called fair but are truly fair.[41]

ANETT ERZSÉBET GÁCSI

A JOGELLENESEN MEGSZERZETT BIZONYÍTÉKOK ÉRTÉKELÉSE AZ ÚJ BE. KODIFIKÁCIÓ SZELLEMÉBEN

(Összefoglaló)

A 2015. február 11. napján elfogadott új büntetőeljárási törvény koncepciójában[42] főbb *kodifikációs irányelvként*: a hatékonyság, gyorsaság, egyszerűség, korszerűség, koherencia és célszerűség hexagonja került kiemelésre. A Koncepció ezen belül az új törvény szabályozásának 14 *súlypontját (szabályozási elvét)* határozza meg, hangsúlyozza azonban, hogy „az új büntetőeljárási törvény előkészítése során a Be. teljes körű felülvizsgálatát el kell végezni, minden egyes rendelkezésnél meg kell vizsgálni, hogy azzal kapcsolatban nem merül-e fel módosítási igény".

Ennek fényében tanulmányomban a büntető eljárásjogi bizonyítás egyik legérzékenyebb területét: a jogellenesen megszerzett bizonyítási eszközök és az azokból származó bizonyítékok értékelésének / felhasználhatóságának a kérdését vizsgáltam meg. A

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[39] Regulatory Principles 2015, p. 30.

[40] SZABÓ KRISZTIÁN: *A nyelvtani értelmezés jelentősége a büntetőeljárási kodifikáció során*, in: ELEK BALÁZS – MISKOLCZI BARNA (ed.): Úton a bírói meggyőződés felé. A készülő büntetőeljárási törvény kodifikációja. Printart-Press, Debrecen, 2015. pp. 117–126..; ELEK BALÁZS: *A büntető eljárásjog tudomány hatása a bírói gyakorlatra*, in: BÁRD PETRA – HACK PÉTER – HOLÉ KATALIN (ed.): Pusztai László emlékére. Országos Kriminológiai Intézet, ELTE Állam- és Jogtudományi Kar, Budapest, 2014. pp. 45–56.

[41] SZABÓ 2015, p. 126.

[42] Az új büntetőeljárási törvény szabályozási elvei – A Kormány 2015. február 11. napján megtartott ülésén elfogadott előterjesztés (Szabályozási Elvek 2015.). Forrás: http://www.kormany.hu/download/d/12/40000/20150224%20IM%20el%C5%91terjeszt%C3%A9s%20az%20%C3%BAj%20b%C3%BCntet%C5%91elj%C3%A1r%C3%A1si%20tC3%B6rv%C3%A9ny%20szab%C3%A1lyoz%C3%A1si%20elveir%C5%911.pdf (letöltés ideje: 2016. február 27.)

Koncepció szabályozási elveiből ugyan az olvasható ki, hogy *a jogalkotó a kodifikáció során elsősorban nem a jogellenesen megszerzett bizonyítékok* (generál-, és/vagy speciálklauzuláinak) *újrafogalmazására koncentrál*, azonban álláspontom az, hogy indokolt a jogintézmény felülvizsgálata.

Maga a jogintézmény a – Koncepcióban vezérelvként megfogalmazott – tisztességes eljárás érvényesülésének követelménye. A jogellenesen megszerzett bizonyítékok esetén ugyanis kettős érdek ütközik egymással. Amíg a mérleg egyik serpenyőjében a terhelt büntetőjogi felelősségre vonásának követelménye áll – amely érdek azt diktálja, hogy a büntetőjogi felelősség megállapítására alkalmas (adott esetben perdöntő jelentőségű) bizonyítékok, ne kerüljenek kizárásra csupán azért, mert valamely előírás megszegésével szerezték meg azokat, – addig a mérleg másik oldalán álló érdek a büntetőeljárásbeli törvényesség betartásához, a büntetőeljárásban résztvevők jogainak a biztosításához kapcsolódik.

Tanulmányomat két nagyobb egységből építettem fel. Első lépésként (lásd: II. pont) a hatályos büntetőeljárási törvény jogellenesen megszerzett bizonyítékok generálklauzulájából és az erre épülő joggyakorlatból indultam ki.

Második egységként (lásd: III. pont) a témát érintő – elsősorban a büntető eljárásjogi szakirodalomban megjelent – koncepcionális javaslatokat ismertettem és értékeltem.