OVERVIEW OF THE PROHIBITION OF REFORMATIO IN PEIUS IN THE HUNGARIAN CRIMINAL PROCEDURE

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Abstract

The prohibition of reformation in peius has two meanings in the Hungarian legal terminology, such as the prohibition of increasing punishment and the so called reformation in peius. In the effective Hungarian legal system it is regulated, within the rules of the criminal procedure, regarding the ordinary and extraordinary legal remedies, separate procedures and, in addition to the criminal procedure, it is regulated even regarding the law of minor offences. Furthermore, the reformation in peius is not an inevitable consequence of the rule of law, but only a legal favour, and many questions and problems emerge in the light of fundamental principles and constitutionality concerning this prohibition. The prohibition of reformation in peius may be regarded as a legal guarantee for the defence to be able to file an appeal without the risk that the judgment might be altered to detriment of the accused. Therefore, it is a case of favour defensionis and as such it plays a huge role in sentencing, especially when the judgment was appealed in order to increase the severity of sentences.

This paper examines the connection between the prohibition of reformation in peius and the principle of constitutionality, as well as the its relation to the aggravating and mitigating factors of sentencing taken into account by the court of appeal.

Keywords: *Reformatio in Peius; Criminal Procedure; Constitutionality; Waving the Prohibition of Reformatio in Peius, Sentencing, Criminal-Policy*

Introduction

The expression „reformatio in peius" was mentioned for the first time in a roman legal case connected to procedural law, however it was unknown to the criminal procedure law in the 18th century (KLEINSCHROD). At the beginning of the 19th century, GONNER pointed out that the alteration of the judgment to the detriment of the accused through ordinary legal remedy (reformatio in peius) should not be required. These two sources led to ineffectual debates regarding the origin of the expression.

The prohibition of reformation in peius describes, in a wider sense, the right of state bodies entitled to permit the alteration of a decision to the detriment of the receiver (KOPP). In procedural law, reformatio in peius is mentioned in case an organ of higher degree passes a decision to the detriment of the accused, while a more favourable decision was expected to be passed thereby (SARTORIUS). In the course of time, more differentiated opinions were born regarding the expression, and the prohibition of reformation in peius was determined as the alteration of every

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single decision passed by the new court, and concerned the main question of the case to the detriment of the person against whom it was taken, however in favour of the person by whom the appeal was filed (RICCI). The restriction of reformation in peius focused only on the main questions of the decision.

In Hungary the prohibition of reformation in peius has two meanings which derived from the German influence where it is defined with the same differences: prohibition of increasing punishment and the prohibition of reformation in peius.

Although the first Hungarian Criminal Procedure Code (henceforth CPC) of 1896 included provisions regarding the prohibition of reformation in peius, these rules had been abolished by the following CPC on the grounds that the purpose of the legal remedy is the enforcement of substantial justice and not the safeguarding of the position of the accused ("the substantial justice prevails over all" as stated by CSÉKA). The situation changed when in 1954 the Modification of the CPC introduced the relative prohibition of reformation in peius which was improved by the following CPCs (of 1958, 1962). After the historical improvements, the effective CPC of 1998 (Act XIX of 1998) still did not succeed to have the perfect rules regarding this legal institution which may arise out of ordinary and extraordinary legal remedies, separate procedures and, in addition to the criminal procedure, it is regulated even regarding the law of minor offences. Even the Civil Procedure Code (Act III of 1952) specified in its section 253 (3) that the court of second instance shall alter the decision of the court of first instance only within the limits of motion for appeal (joint appeal) and the counter-motion for appeal (section 247). According to this rule the court of second instance may pass a decision on matters concerning rights enforced in the course of the law suit, as well as matters set up as a defence in contradiction of such rights and has not been heard by the court of first instance or no decision has been passed thereon.

The prohibition of reformation in peius as a basic requirement can be traced back to several fundamental principles of the criminal procedure. The most important one is favour defensionis which includes several favours granted for the defence, therefore it is closely linked to the principle of defence. In addition, it is also connected to the principles of legality, opportunity, right to legal remedy. The other very important principle is the principle of prosecution, given that the aggravation of the punishment is only allowed in cases where the prosecutor filed an appeal for this reason. It can be stated, that this prohibition is a "procedural protection-right", as GRETHLEIN said, which shall balance the factors hindering the submission for legal remedy, furthermore, L. MOLNÁR calls the prohibition of reformatio in peius the "principle of appeal without fear" with good reason. Some other quite popular principles should be mentioned as well, such as the requirement for fair trial, and the principle of constitutionality.

1. The prohibition of reformatio in peius and the principle of constitutionality

According to KORINEK, as for the constitutional procedure, this key-definition came into the limelight basically in the German legal literature. The prohibition of double jeopardy and the command of equity are the basis for the prohibition of reformatio in peius. However, the prohibition of reformatio in peius is not an inevitable consequence of the rule of law, ~~but~~ only a legal favour.

The mostly proclaimed counter-argument against the prohibition of reformatio in peius is that in certain countries (some provinces of Switzerland, Great-Britain) this institution is unknown, but still there is no doubt about the constitutionality of these countries. Though, this cannot be a conclusive argument against the definition deriving from the principle of constitutionality. The reference to the legal order of other countries solely does not give grounds to refuse the constitutional basis for the prohibition of reformatio in peius, as a criminal procedural institution. The required persuasive power of this argument is shown by HAUSER, when he says, that on such

grounds the CPC of Luzem province is not constitutional, because it has a provision saying that the accused does not have the freedom of confession during interrogation. It cannot be stated that the criminal procedure law is not constitutional for the lack of one detailed provision, although the right to remain silence (nemo tenetur se ipsum accusare) belongs to the basic principles of the criminal procedure, and expresses the human dignity as well. The admission of the right to remain silence is a necessary element of the fair process. However, not only Luzem province, but most of the provinces of Switzerland have no regulation on advising the accused of such rights, but still, Switzerland is a state founded on the rule of law. This reasoning justifies that the definition of constitutional principles cannot be determined by the mere comparison of legal institutions.

The principle of constitutionality is found in the development of specific law and order, which is not constant and is not laid down in writing for ever. MEYER-GROßNER indicates many clauses which support the 'general fundamental principle'-character regarding the meaning of prohibition of reformatio in peius. First of all, the prohibition of reformatio in peius is restricted by several provisions which allow the aggravation de lege lata, notwithstanding that the judgment was appealed only in favour of the accused. In German law such restriction is the order of hospitalizing in a psychiatric institution or in an institution suitable for detoxication cure, which can be ordered if the judgment of first instance did not stipulate such measure, and no appeal was filed to the detriment of the accused against the judgment of first instance. Both measures can be taken posterior in the procedure of legal remedy or beside other punishments or measures. The prohibition of reformatio in peius does not restrict this in Germany either. This regulation is therefore an exception to prohibition of reformatio in peius. In Hungary the law gives even more possibilities to increase the severity of setences despite the prohibition of reformatio in peius, since in the procedure of the second instance several detrimental decisions can be taken for the lack of appeal filed to the detriment of the accused (but e.g. in the course of extraordinary remedies, all kinds of increase is forbidden by law if the extraordinary remedy was initiated in favour of the accused).

2. The right to wave the prohibition of reformatio in peius

The question arose in the scientific literature that can the accused wave the defence provided by the prohibition of reformatio in peius, well, in some cases he may live to see like the prohibition of reformatio in peius hinders the possibility to pass a subjectively favourable decision for him (e.g. if the suspended imprisonment means smaller harm to him than the fine to be executed). Two groups have been formed regarding the question of the permissibility of waiver: who agree with it and who don't. The second group allows some exception when defining the disadvantage from a general objective point of view, such as the factual surveillance (FRISCH, SCHLÜCHTER); the wish of the accused (GRETHLEIN), the attitude oriented to the case (PAULUS). Usually who refuse the right to waiver, stipulate the possibility to replace measures. We think that there is no need for the possibility of right to waiver because the actual request of the concerned party has been considered at the first level of adjudication of increase. FRISCH regards the structure of waiver as a solution that one is forced to adopt. GRETHLEIN reject the possibility of waiver due to loss of rights, which considered to be a dogmatic ground, because the criminal claim of the state is independent of the influence of the accused, therefore the state cannot enter into an agreement with the accused on the extent of punishment permissible by law.

The group of objectivity thinkers, on the contrary, explicitly suggests the possibility of waiver, because they take the general objective judgment of prohibition of reformatio in peius as its starting-point, which either does not render at all or renders only possible to replace measures in a restricted manner. Thus, e.g. the right to waiver is emphasized as a protective order of the

criminal procedural instructions of prohibition of reformatio in peius by GERHARDT, i.e. it allows the accused to waive the rights protecting him.

From our point of view, the accused is not allowed to waive the prohibition of reformatio in peius in a state founded on the rule of law. The prohibition of reformatio in peius provides certain boundaries for the state regarding the extent of punishment. These boundaries cannot be shifted, and it shall be not permitted on the basis of the subjective choice of the accused. The requirement of legal security and predictability of procedure of the second instance shall always prevail. If the waiver of the effects of prohibition of reformatio in peius was permissible, then its boundaries should also be determined.

3. The prohibition of reformatio in peius and the factors related to imposition of punishments

The general preamble of the opinion No. 56/2007 of the Penal Council, entered into force on November 14 2007, on appreciable factors in the course of imposition of punishment, lays down that the Penal Council of the Supreme Court took the Recommendation No. R (92) 17 of the Committee of Ministers of Council of Europe concerning consistency in sentencing and several decade-old judicial practise, as a starting-point. The Appendix of this Recommendation specify in 11 points the viewpoint of the Committee of Ministers of Council of Europe related to the imposition of punishment, from among these points only two concerns the question of increasing and mitigating circumstances. Point 3 of Part B deals with the penalty structures and records that the "sentencing orientations" shall indicate ranges of sentence for different variations of an offence (according to the presence or absence of various aggravating or mitigating factors), but leave the courts with the discretion to depart from the orientations. The so called "starting points" indicate a basic sentence for different variations of an offence, from which the court may move upwards or downwards so as to reflect the aggravating and mitigating factors.

Part C of the Appendix of the Recommendation deals with the aggravating and mitigating factors. According to this, the factors taken into account in aggravation or in mitigation of sentence should be compatible with the declared rationales for sentencing. The Recommendation does not render obligatory to clarify the major aggravating and mitigating factors only in law, but makes explicitly possible to determine these in legal practice. Where a court wishes to take account, as an aggravating factor, of some matter not forming part of the definition of the offence, it should be satisfied that the aggravating factor is provided beyond reasonable doubt. In the same manner, the principle of favour defensionis prevails regarding the provision of the Recommendation which says that before a court declines to take account of a factor advanced in mitigation, it should be satisfied that the relevant factor does not exists.

The imposition of sentence is always the task of the court, which requires complex evaluative work. Pursuant to the Commentary, the personality of the judges obviously gains importance in the course of this evaluative work, but the consistency and uniformity of the sentencing practise are both important requirements and social interests. This job demands remarkable thoroughness and responsibility from the court, since the imposition of sentence cannot constitute a reason for review itself, just like the fact that the provisions of section 37 and 83 of the Criminal Code (CC), the aggravating and mitigating factors and Opinion taken into account either.

The section 83 of the CC determines the principles of imposition of punishment. On the score of this, the following should be taken into account when sentencing:

- the purpose of the sentence: such as the protection of society, the special and general prevention factors (BALOGH-KŐHALMI);
- restrictions set forth by law: besides the upper and lower limit of the sentence available, it includes all the provisions of the General Part of the CC which made it possible for

the courts to impose a sentence above the upper limit or under the lower limit (Commentary);

- the danger posed to society by the offence: cf. "sentence proportionate to the act" (M. TÓTH);
- the level of the danger posed to society by the offender: the offender poses a potential danger to society not in general, but because of committing a specific crime (F. NAGY);
- the level of guilt: intention or negligence (KIS), and the levels of these, which, according to F. NAGY, is a competition to the danger posed to society by the offender. Though the danger posed to society by the offender is similar to guilt, because – according to GYÖRGYI – it means the psychic relation to the specific crime, therefore it is necessary and reasonable to separate these by law;
- other aggravating and mitigating factors.

The application of the word "other" before the aggravating and mitigating factors means that the legislator constitutes the danger posed to society by the offence and by the offender, furthermore, the level of guilt as aggravating and mitigating factors. However, it highlights these factors due to their importance from among the normative factors of imposition of punishment.

The aggravating and mitigating factors – with the exception of the above mentioned highlighted factors – were not mentioned by the former Criminal Codes on substantive criminal law, and so it is in the effective CC. The list of examples was drafted partly by the scientific literature and partly by the Supreme Court. In the following table the attempts at classifying the aggravating and mitigating factors are summarized:

SCHULTEISZ	MOLNÁR	KÁDÁR	ANGYAL- RÁCZ	FÖLDVÁRI	Opinion of the Supreme Court
1. factors affecting (increasing or mitigating) the danger posed to society by the offence 2. factors affecting the danger posed to society by the offender 3. factors affecting guilt 4. factors affecting the materialization of the aim of punishment	1. factors related to the subjective side of the crime 2. factors related to the objective side of the crime 3. indifferent factors related to imposition of punishment 4. factors effective regarding certain crimes	1. factors increasing the danger deriving from the crime to the society 2. factors increasing the danger deriving from the personality of perpetrator to the society 3. factors increasing guilt 4. factors not provided by the legal definition of other crimes	1. level of guilt 2. the objective importance of the crime 3. the accused person 4. exogenous factors of crime 5. objective and subjective factors arose after the commitment of crime 6. aggravating and mitigating factors typically effective regarding special crimes	1. the danger posed to society by the the offence and the offender 2. perpetrator's crime 3. aggravating and mitigating factors of objective nature 4. aggravating and mitigating factors of sub-jective nature	1. subjective factors affecting the sentence 2. objective factors affecting the sentence

As it's evident according to the table, the Opinion, which is normative for the present legal practise, contains much easier classification than the legal literature when it examines only from two points of view (objective or subjective circumstances) the aggravating and mitigating factors which are normative for the imposition of punishment. On the other hand, the factors highlighted by the legislator (danger posed to society by the offence and the offender, level of guilt) is not regarded to be emphasized by the Opinion, but it discusses them within the scope of the two main groups. Besides, the estimation of several circumstances accepted in the legal literature (HONIG, SCHOTT). Such circumstances e.g.:

- collective evaluation of the attacked social conditions;
- examination of collective evaluation;
- the termination of the demand directed to the defence of society (FÖLDVÁRI);
- the heavier injury fails to come off;
- perpetration under the influence of force and threat;
- repeated perpetration (even is it does not constitute legal unity);
- different forms of perpetration attained simultaneously;
- perpetration encumbering the discovery;
- circumstances related to the place of the commitment of crime;
- circumstances related to the time of the commitment of crime (at a definite hour; circumstances existing at certain moment; other dates and intervals) etc.

The evaluation of these circumstances made in the course of the imposition of punishment is not excluded by the Opinion, since the enumerated factors give only basis for the judge when he passes his judgment in a special case. Furthermore, the same circumstances shall also be evaluated by the court of appeal, when it decides on whether the court of first instance had judged the normative factors for the imposition of punishment properly, or the mitigation – if the prohibition of reformatio in peius did not take effect - or increase of severity of sentences shall take place besides the accurate evaluation.

4. The prohibition of reformatio in peius within the restrictions of criminal-political ideas

From among the three levels, distinguished by FINSZTER regarding criminal-politics (1. respondent criminal-politics: the answers of the investigating and the judiciary bodies to the committed violence of law; 2. structural criminal-politics: legislative plans, ideas of system-development and financing the operation of the legislator and government based on the prediction of delinquency; 3. strategy on public safety: political sphere, institutions and actions of the civil society and economy), the first level has special significance in terms of the prohibition of reformatio in peius. According to FINSZTER, the guarantee of legality belongs here among others, like the differentiation of enforcement of the criminal claim of the state, the speed of the procedures and the trial-parsimony. Nevertheless, these factors crucially specify the scope of prohibition of reformatio in peius.

BÁRD laid down three criminal-political basic models in the Criminal-political Conception published in 1993:

- The first is a restrictive-intervening model which protects the collective interest in the first place, and concentrates on the change or isolation of the convict (so-called strict right-wing approach).
- The second model (liberal approach) is the assisting-supporting alternative, which places the personal interest at the first place, and the public interest just behind this (not the

treatment-segregation of a certain convict, but the prevention of opportunity of crimes, general prevention). When interpreting the definition "public interest", ADAM's conclusion shall be taken into account, whereas the constitutional interest contains requirements and limits for the state and citizens, and attention shall be payed at all times to not to let these values to "sink into unworthy, formal category". SAJÓ came to the conclusion that the "public interest" definition serves as suppressing or ruining the private interest and privacy, and it is applied only in order to let certain private interest get advantage in comparison to others.

• The third one is the state founded on the rule of law or constitutional alternative, which selects the behaviours to be criminally punished originated from the primacy of law. In terms of prohibition of reformatio in peius, it is obvious that only the second and the third model has significance, since the conception, which regards the convict crazy from the beginning and applies forceful retribution, cannot be made consistent with the restriction of the judicature of second instance.

In the last two decades of the 20th century and in the first decade of the 21st century, five main events took an unexpected turn regarding criminal legislation:

• In the 1980-1988 period, MÁRKI thought that the criminal-politics drifted away from reality, because the ideal of "strong state" of the party-state could not keep a tight hand on crime. Anyway, the requirement of re-socialization is attached to this period as well.

• In the 1989-1992 period the constitutional criminal law appeared, however, MÁRKI said this was, regarding the criminal-politics, the "age when the rein was thrown among horses": the prisons became somewhat empty, but this could be attributed to general pardon and de-criminalization (GÖNCZÖL).

• The main point of the change in 1993 (Act XVII of 1993) was liberalization, but to some extent this period can be described both by increase of severity and additional criminalization. Though the requirement of change in conception can be placed to this period regarding criminal procedure law. The requirements for the new CPC were determined by the Ministry Decision 2002/1994. (I. 17.). BÓCZ mentions the stronger expression of right of disposal as a requirement as well, which supports the existence (and incidental amplification of its scope) of prohibition of reformatio in peius anyway.

• The Act LXXXVII of 1998 broke radically away from liberalization (though it kept some part of it), which was based on the requirement of proportionality composed by the Constitutional Court: if it is necessary and expected by proportionality (for the constitutional examination, see SZABÓ), the aggravation of the amount and conditions of penalty shall be demanded from punitive-politics.

• A newer change in 2003 (Act II of 2003) turned to liberalization without the termination (setting aside) of every strict criminal-political provisions.

The provisions of prohibition of reformatio in peius were not concerned specifically by any of the criminal-political changes, its modifications were exhausted by enacting the principles of former authorative ruling of the Supreme Court, but these did not constitute essential change. One cause thereof is hidden in a critique composed rightly by FINSZTER of criminal procedure legislation, whereas, the legislation urged the new act to become early effective without cause instead of having a thorough impact-research and condition-analysis completed.

None of the reasons laid down by legality and opportunity, in their debate, can be supported exclusively insomuch that one of them could be excluded completely when passing a judgment regarding a precisely stated situation. The development between legality and opportunity requires the legal-political evaluation of multitude counter-arguments, especially if it concerns the constitutional balance between legal security and legality of a certain case. This statement is effective, in the first place, regarding in what manner the aims of criminal-politics can be fulfilled

the best. The interests of trial-efficiency are favourable to loosen the principle of legality as possible, but then a problem arose that how can the law-enforcement display subjective, individual approach in the course of judging a case, since the requirement of uniform criminal investigation can be curtailed easily. This can be offended even in the case of prohibition of reformatio in peius, whereas the omission of an appeal, which should have been filed by the prosecutor acting alongside the court of first instance (to the detriment of the accused), can cause that the court of the second instance shall impose such sentence to the accused which would be significantly aggravating in other case.

It shall be officially admitted that a certain limitation of the principle of legality is inevitable. This requires from the legislator to provide alternative solutions (better personnel and financial possibilities, de-criminalization measures) in order to hinder this development whenever it is possible. This is even more effective if the principle of opportunity becomes primary in comparison to the principle of legality (due to necessary diminishing of the principle of legality because of economical reasons).

No exact boundaries can be determined where does the territory of "enemy of the rule of law" starts, but the solution (aside from obvious cases) shall be left to the legal-political decision of the legislator and the law-enforcement bodies. This circumstance does not constitute a speciality of the difference between the principles of legality and opportunity, but it is a rare phenomenon which describes a general weak point of the constitutional argument. The possibility to develop the adequate relation between the principle of legality and opportunity cannot be given up. Therefore, the clause of the prohibition of reformatio in peius is necessary on the condition, that it should better fit the constitutional considerations, while accepting the critical observations, in order to not to let the prohibition of reformatio in peius to become – by using ERDEI's comparison related to another legal institution - only a birdlime, which has mighty little honey.

Conclusions

Theoretical and practical problems arise in case a detrimental alteration of the judgment is initiated, not like in case of reformation in melius which means exactly the opposite, hence, the alteration in favour of the accused no matter that the appeal was filed in favour or to the detriment of the accused. The topic of reformation in peius and the prohibition thereof have not been discussed thoroughly, and as it was shown above, some countries do not even either know or have regulation concerning it. This fact was brought up as one of the most proclaimed counter-argument against the prohibition of reformation in peius stating that these countries are still constitutional regardless to having or not any regulation about this prohibition. However, the criminal procedure law cannot be deemed to be unconstitutional for the lack of only one legal institution, if some other instructions of the law may cover it, even if it is not detailed. Furthermore, even in Hungary, despite the prohibition of reformation in peius exists; there are several possibilities to increase the severity of sentences.

Concerning the question whether the accused can or cannot waive his right to prohibition of reformation in peius it shall be taken into consideration that in case it was allowed the state would have gain even more power and the aim of the CPC trying to balance the position of the prosecution and defence would lose its significance.

Since the imposition of a heavy or light sentence lay in the hands of the judge, the factors playing a role in the evaluation process thereof shall be determined both by the legislator and – more detailed - by judicial practice, as it is in Hungary; the examples were drafted mostly by legal literature and the Supreme Court. The mitigating and aggravating factors shall be considered wholly and complexly, especially because the imposition of a sentence does not create a cause for

review itself. These circumstances shall be considered by the court of first instance and also by the court of appeal when it examines whether these normative factors were properly adjudicated concerning the imposition of punishment.

The requirement of prohibition of reformation in peius was not concerned expressly by the criminal-political changes. The different criminal-political ideas vary according to the range of interest of the state (public) or of the person. The debate between the principle of legality and opportunity calls for a legal-political evaluation of several counter-arguments, but it shall be high lightened that certain limitation on the principle of legality is necessary, such as even the prohibition of reformation in peius.

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