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The Principles of the New Code of Criminal Procedure

Just about two weeks ago, on June 9, 2017, in a lecture delivered at the annual Meeting of the Teachers of Criminal Sciences, I still maintained that the debate in the National Assembly might introduce significant, and hopefully positive, changes to the draft of the new Code of Criminal Procedure. After the lecture, an informed person said the final voting over the draft was scheduled for 13 June and, in his opinion, the law would be passed without any modification of importance. Events have proved him well informed; and capable of making predictions that, unfortunately, come true: Act XC of 2017 on criminal procedure (CCP) was enacted on that date. The same events are also evidence that the number 13 truly deserves its ill fame.

Since the topic of today's lecture is the principles of the CCP, the first thing I did when I had the chance to see the full text of the passed law was to look for the modifications concerning the principles. Naturally, there was none to find. Although not a surprise, it still is a disappointment because, in my opinion, some refinements of the draft's provisions on the principles would have been beneficial. To lay the foundations before the discussion of details, some general remarks, or rather reminders, may be appropriate.

1. The principles of criminal procedure are general propositions that singly show one or another characteristic feature of the procedure having them but, in their totality, they can determine the character of a procedural system as a whole and, by that, the most important features of its operation.

Most of the principles would easily fit into both of the two fundamental procedural systems, namely the accusatorial and the inquisitorial ones. To fit those into the continental mixed system is even easier, for it makes use of the 'trick' of recognising principles that are impossible to reconcile as its own. (To do so, the only thing needed is to consider the investigation and the trial as separate phases of the same process, each having a distinct character determined by its own set of principles.)

Only a few principles can singly determine a procedural system. The accusatorial principle (i.e. that the precondition of initiating the criminal process is a valid accusation) – supplemented by necessity with the division of procedural functions – is the distinguishing

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mark of the accusatorial system. In turn, the inquisitorial system is characterised by the *ex officio* initiation of the process in which the functions of prosecution and judgment (and, in a sense, defence even,) are united and borne by the court.

An illustration to the points just made may be as follows:

The acceptance of the principle of public trial or its opposite, i.e. that of secret proceedings; similarly, that the trial is oral or written; even adherence to the presumption of innocence or that of guilt, would not serve as a clear basis for determining to which of the two fundamental systems a procedure regulated in a particular code belongs. It is, however, a well-known fact that some principles are normally present only in the accusatorial procedure, while others in the inquisitorial one. Since it is almost obligatory to mention the former with praise and the latter with contempt, it is, perhaps, not without some malice when one points out that the principle of seeking the material truth – revered by the Ministerial Motivations of the Bill of the CCP (MM) – is the specificity of the inquisitorial and not of the accusatorial system.

2. The second remark is in connection with the first one, as far as it concerns the fact that the theory of principles, in the sense of the present interpretation of their concept, seems to have attracted less attention before the middle of the 20th century than after that time. The laws of the first half of the century, including the first Hungarian CCP, did not declare their principles. It was possible to infer them from the provisions formulated in their spirit. The declaration of their principles became customary in the codes of the 'socialist' period, when the completeness of the list was visibly more important than their consistent application when forming the provisions.

The idea having come up in the MM, namely that the formulation of principles is a task more for the theory (philosophy) of law than for legislation, in all probability would have been considered as 'sacrilege' in those times. Fortunately, for everyone, nobody professed it. Naming the principles of the code in its first provisions was a definite requirement.

The centres of interest of the scholars of procedural law are not always the same, just as legal terminology keeps changing; however, the propositions called principles in present days have been the focus of study for a long time, but perhaps under different names. I, for one, would leave the definition of the principles to the science of criminal procedural law and not as proposed by the MM, to the general 'theory of law', even if the intensity of the interest of procedural theory in the principles is not permanently high. In this context, one should think in terms of devising propositions to serve as bases for designing criminal procedure thought to be rational in the given period. Some of those propositions may have played a role for a long time in determining certain features of the criminal process; without them the procedure of a country, and the country itself, may be liable to attract unfavorable judgement. (It is well known, however, that the interests of international relations may render the mentioning this type of shortcoming impolite. For example, it happened in the case of the Soviet Union and some European socialist countries where it was normally not judges but prosecutors who ordered the preliminary detention of suspects. The Western countries silently accepted the claim that in the socialist systems, during the investigation,

the prosecutor had a status equal to that of the investigating magistrate – leaving disproving it to scholars, if they were interested.)

So whatever is the given name of the propositions we call principles nowadays, they are present in legal thinking and exert an impact. Their list is not a fixed one – some of them may disappear from it; others may lose their importance and rank lower while new ones may be born. The phenomenon is familiar and one can normally find its causes but, as a rule, only after the event. In fact, usually it is also subsequently that one can realise that what the lawmaker calls a principle is no more than an aim set in general terms and in a worse case a requirement of a technical nature. It is easy to find examples of both.

3. The point of departure for the third remark is the fact that the doctrines of criminal procedural law favour the use of principles to describe procedural systems. For example, many authors profess that following certain principles, such as the division of functions or public trial, is essential for the accusatorial system, whereas the inquisitorial one has never used them. (The opposite is also true: the inquisitorial principle of finding out the material truth *ex officio* does not fit the accusatorial system.) Such observations may be correct, but they include anachronistic elements as well. In all probability, the 'creators' of the systems mentioned did not know what they were doing from the point of view of principles, the concept of which was waiting for discovery in the distant future.

The operational principle of the accusatorial system is a simple and natural one indeed. Accordingly, when two people, unable to agree which one of them is right in a dispute, ask a third one to decide the issue, they actually discover it. As far as the inquisitorial system is concerned, it is more than probable that considerations of expediency played a more important role in its formation than principles contrived in advance.

In our times, the process of codification follows a different path. The codifiers pursue their activities, knowing the principles discovered and systematised by legal science, and they include those institutions and solutions in the code that are expedient as well as being in harmony with the principles intended to rule the procedure. Why should they then not include classic principles, recognised worldwide and the repudiation of which is *improper behaviour,* in the code? It is another story (just as with regard to newly discovered or invented principles) how closely the provisions follow them.

At this point, the series of remarks must end and the attempt at surveying the system of principles of the CCP should start.

The new Code, similarly to the one in force, opens the (unprecedentedly, one may say frighteningly, long) series of Section with so-called fundamental provisions. Among them, one finds principles and provisions that do not qualify as such, similarly, again, to the 'old' CCP about going out of force. As far as the latter class is concerned, the use of plural is, perhaps, unjustified, since only the provision concerning jurisdiction [Section 9] belongs to it. All the other fundamental provisions are principles or rules of detail relating to them.

The CCP's tendency to follow patterns adopted by its predecessor is also manifested in the phenomenon that the classic principles and some rules originating directly from them appear far removed from each other, once in the sphere of influence of another, other times

independently as a separate principle. The example of the presumption of innocence may illustrate the consequences of this original method of editorship. It is noteworthy, however, that one could find also positive features of the editorial activity within the Chapter, which deserve a mention first.

Clearly, the CCP – in accordance with its Preamble – goes far in the efforts dedicated to paying due attention to the principle of the division of procedural functions. The Preamble only refers to it, but Section 5 declares that the procedural functions are separate from each other. Section 6 – as if building on the foundations laid by the previous one – regulates the accusatory principle, the acceptance of which follows from the recognition of the division of functions.

When laying down that the burden of proving the accusation should be borne by the prosecutor, Section 7 paragraph (1) follows the same path. Even if the provision does not fit very well into that Section, it is of great importance. By its enactment, the lawmaker intended to establish grounds for the elimination of the infamous anomaly created by Section 75 paragraph (1) of the CCP in force. The basis of its manifestation is the interrelationship between the duty of the prosecutor to represent his case during the trial and the obligation of the court to find out the *material* truth. [The essence of the anomaly is as follows: Section 75 paragraph (1) includes a contradiction. According to it, the court shall strive to determine the real facts of the case. The same paragraph, however, also provides that the court, without a motion by the prosecutor to that effect, is *not obliged* to take steps to obtain and evaluate evidence supporting the accusation. As such, there is a conflict between the requirement of establishing the truth and the principle of the division of procedural functions. As a practical consequence of this situation, if the court takes steps to obtain evidence supporting the accusation without a motion by the prosecutor, it is done clearly in violation of the principle mentioned. If, however, it refrains from doing so, the appellate court, on the appeal by the prosecutor (in default!), may remand the judgment as unfounded.] The CCP, in Section164 paragraphs (1) and (2), has provisions aimed at satisfying the requirements of the principle of the division of procedural functions, which is a highly commendable development. Unfortunately, paragraph (3), as Mihály Tóth has pointed out, recreates all the uncertainties that caused the anomaly described by using imprecise language.

After the detour, let us return to the presumption of innocence, as promised. No one can exaggerate the significance of that presumption for modern criminal procedure: by replacing the presumption of guilt ruling the inquisitorial criminal process, it irrevocably placed the defendant in the position of an actor in, instead of the mere object of, the procedure. The new situation is the consequence of the rules that follow from that presumption, such as the burden of proving the guilt of the defendant being on the prosecutor and the defendant enjoys the benefit of doubt. True, the original formulae of the presumption itself and of the mentioned rules have gone through some modifications in Hungarian legislation. As a result, the CCP does not require the defendant to be considered innocent but prohibits considering him guilty (before the judgment obtains legal force). As far as the benefit of doubt is concerned, the original command to interpret the doubts to favour the defendant

has been replaced by a prohibition from interpreting them to his detriment. All considered, the essence of the matter has remained the same.

The CCP, still in force at the time of this conference and disregarding the close connection between the presumption and the two evidence-related rules, separates them. Whereas one finds the presumption itself in Section 8, the two rules appear in Section 4. The attraction of this indubitably 'original' solution has clearly proved irresistible for the codifiers of the CCP. They declared the principle of the presumption of innocence in Section 1, but they found the proper place for the two evidentiary rules at an even greater distance from it, in Section 7, which, by the way, has the fascinating but ungrammatical title of 'Foundation-layings (*sic!*) to evidence'.

Section 7 is remarkable anyway. The logic of putting the various provisions included in it in the same Section may be difficult to follow but most of them relate, at least, to evidentiary issues.

The MM claims that the Section summarises the evidentiary consequences of the acceptance of the presumption of innocence. The provision in paragraph (1) says that proving the accusation is the prosecutor's duty. Under duress, one might perhaps find a way to tie the provision to the presumption of innocence, particularly with the use of the 'everything is connected to everything else' theorem. However, materially, it is in a much closer connection with the division of procedural functions (Section 5) or with the principle that the court only passes judgement oin issues submitted to it in the accusation (Section 6). Evidently, these remarks only concern the context the legislator placed the provision in paragraph (1), and do not express any criticism of its substance.

In paragraph (5) of Section 7, one may read a more confusing and more problematic issue of the placement of provisions than those mentioned previously. In essence, the paragraph provides that criminal courts, public prosecutors and investigative authorities are not bound by the observations and determinations made in other type of proceedings. The provision clearly goes beyond the realm of evidence, since it expresses the singularity of the administration of criminal justice and its independence of the decisions of other organs judging the same facts from a different perspective. Due to its importance, the regulation deserved to receive a more prominent place, even a full Section, than the last paragraph of Section 7, which is a miscellanea of more or less evidence-related provisions.

The twenty-minute time limit the conference organisers set for this contribution frustrates any attempt at a systematic analysis of the principles of the newly enacted code. Such a short time allows little more than a general evaluation of the provisions of the CCP that are relevant for the topic, and the explanations in the MM. Beyond that, the discussion of some details is only possible in the case of a few principles, if at all. Striving for a judicious use of the time still available thus seems advisable

The first observation concerning the provisions of the nature of principle is that the list of named principles is rather short. It is true, even if one admits that certain provisions, considered traditionally to be principles although not mentioned now among the fundamental provisions, may still be found in other parts of the CCP. For example, one may mention the

provisions declaring the freedom of the use of the means, and the evaluation, of evidence in Section 167. (Interestingly, when the CCP in force first used the same technique, the general opinion was negative. This time nothing like that can be detected. It is possible that the legal community has meanwhile become accustomed to the method.)

The MM tries to explain the relatively low number of listed principles. According to it, the reason for omitting the declaration of the organisational principles is that the Fundamental Law declares them. In addition, they do not have specifically criminal procedural features. Owing partly to their declaration in the Fundamental Law and partly to their not being valid for the whole procedure, or because there are many exceptions to them, it is also unnecessary to name some of the operational principles in the CCP, the MM claims. For these reasons, the Bill did not list a number of generally recognised principles: the right to court proceedings and the right to legal remedies; further on, the right to oral and public hearing and the principle of *directness,*[1] among them.

(A passing remark: It is difficult to see why the MM mentions the directness principle, since the CCP in force has already eliminated it. It is a different story that the reappearance of what the principle originally meant would be a welcome development, but there is no hope of that. According to that classic formula, the judgment has to be based on facts established by evidence taken and examined directly by the court in the presence of the parties. Unfortunately, this version had to be modified and its last element left out because, in the period of the rule of 'socialist' law, the public prosecutor was not obliged to be present at the trial in the majority of cases. Now the prosecutor's presence at the trial is once more mandatory. However, the CCP in force supports a novel trend; so does the new one, but somewhat more forcefully: nowadays defendants have ever-expanding rights to remain away from the trial, which they like to exercise. These facts, and the possibilities of accepting negotiated confessions, justify disposing of the idea of directness. Codes of criminal procedure should not violate their own principles. End of remark.)

The weaknesses of the argumentation of the MM are conspicuous. In the continental mixed systems, it is only natural that, in addition to principles valid for the whole procedure, some characterise either the *preparatory* or the *trial phase* only. For this reason, if principles valid in only one phase of the procedure are not to be named in the CCP, the codifiers should not have mentioned by name the division of functions, the *ex officio* procedure, and the accusatorial principle among the fundamental provisions.

Naturally, it is up to the codifiers to decide whether the code should declare principles directly and, if at all, how many, and what they should be. Nevertheless, it is a welcome idea of theirs that the traditional principle of seeking the material truth remains unmentioned among the fundamental provisions. Although the MM almost genuflects when speaking of the importance of establishing the material truth, it is mostly lip service. The various possibilities for the parties to make agreements and the encouragements by the CCP for their use

[1] Directness in this context is a term expressing that the court must base its decision on evidence taken and examined at the trial.

clearly suggest a limited acceptance of formal truth at least as a basis for judgement. True, the CCP in force also has the same suggestion even if somewhat less clearly.

Another sign of changing attitudes is that the principle of legality (*Legalitätsprinzip*[2]) does not appear among the declared ones either, since the MM promises the strengthening of the institutions based on the principle of expediency (*Opportunitätsprinzip*[3]). It is unfortunate if a code declares a principle but the real legislative intention is to give a prominent role to its opposite. By leaving the legality principle unmentioned, the new CCP prevents critical remarks being made, at least on these grounds. Happily, with this observation, the present discussion can end on a positive note (and almost within the time limit).

[2] According to the principle, criminal procedure must be initiated *ex officio* for every criminal offence.

[3] The principle of expediency represents certain flexibility as compared to the rigid legality. According to its original interpretation, the principle of legality does not apply, when leaving an offense unprosecuted is expedient (for example because the offense is insignificant but the costs of the proceedings would run extremely high), unless this decreases the respect for the law.

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