Penal Means of Substantive Law against Acts of Corruption and Organized Crime in the Hungarian Witness Protection

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Abstract:

The phenomena of corruption and organized crime had been considered as relatively unknown for a long time in Hungary. After the political transformation of the country, from the 1990s did official politics acknowledge the more and more powerful presence of organized crime and of the closely connected acts of bribery, which offered one serious challenge after another for criminal investigators. Undoubtedly, the "large-scale influx of capital caused by the political transformation, the internal contradictions of the reformation of the economy, privatization, the conspicuous polarization and moral crisis of society fulfilled the conditions for crime to become organized and to change in quality."[1] As a result of this, the presence of organized crime had become more and more perceptible also in Hungary, and the situation had been worsened further by the fact that the types of crimes that had been previously committed in organized circumstances became different, and turned more severe. The economic system and the structure of wealth distribution in the previous social establishment were not favorable for the formulation of the modern organized crime, although the trading of illegal goods and services (basically certain fashion and luxury articles, and other articles of personal use) proved partially to be organized.[2]

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Although even its existence had been the topic of debates earlier, by the end of the 1990s, the problem of organized crime was considered as a nation-wide issue, and as the source of difficulties caused by crime in general.[3] According to Zoltán Márki: *"The truth is in between. Organized crime exists in Hungary, and causes serious problems, but it only covers a small percentage of crimes, a percentage that can and should be eliminated."*[4] At the same time we must admit however that the conduct of an actual

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[1] Gábor Kemény, *The witness protection-related modifications of our criminal procedure law, in light of the possibilities in them,* Review of Internal Affairs, 2000, Issue 10, p. 85.

[2] More details on this: Endre Bócz, *The confession of a district attorney – Experiences of prosecution in the fight against organized crime in Hungary,* Review of Internal Affairs, 1997, Issues 7-8, pp. 11-12.

[3] In relation to this, Endre Bócz states the following: *„Today, the statement that organized crime is the plague of our age almost sounds as a cliché among people engaged in criminal science or dealing with the problems of criminal jurisdiction."* Bócz, *The confession* […], p. 11.

[4] Zoltán Márki, *The third phase of the anti-mafia regulation: the present state of national codification* In: *Criminal-political answers to the challenges of crime, with special attention to organized crime and the penal law system of sanctions: The records of the 4th National Criminology Congress. Győr, October 13-14th, 2000* [edit: Erika RÓTH], Criminology Proceedings, Special Edition, Bp., 2001, p. 24

quantitative analysis of organized crime is hindered by *"that deep conspiracy, which is a significant trait of both the formulation and the operation of the organization."*[5]

While previously, in the second half of the 1970s and in the 1980s, one could see a certain level of organization in the way burglaries were committed – which phenomenon was defined by András Szabó as "socialist organized crime" in a witty way[6] –, later this already appeared at vehicle thefts, drug crimes, serious crimes against wealth (oil and mafia cases) and human trafficking. Before the political transformation in Hungary, the extremely severe incarcerations imposed in relation to organized crimes against wealth were thought to discourage criminals from formulating similar organizations. But a new situation emerged from 1980 on, as *"the criminal organizations, that were apart from each other before, started a loose, but continuous co-operation, and the distribution of operational areas has begun as well."*[7] It became obvious that the problem cannot be solved only with penal means of substantive law.

From the 1990s, the restructuring of the political and economic life opened new perspectives for organized crime, the extortion of the so-called protection money, the use of usurious loan and money collectors, and later explosion and hand-grenade killings, showdowns, and execution-style murders became wide-spread. Parallel to this, during the criminal procedures the organized crime groups methodically used different forms of intimidation against witnesses and other participants of the procedure. The number of acts of corruption rose, the already high latency of which, together with the phenomena mentioned above, reduced the faith of society in jurisdiction, and the readiness of citizens to bear witness became significantly lower, due to these phenomena. It was more and more necessary to formulate such regulations, that are able to assure the physical and mental protection of very important witnesses. In the second half of 1997 and in 1998, the Penal Code and the Law XIX of 1998 of Criminal Procedure have been modified in the spirit of the intervention against organized crime, the goal of which was to create as effective means as possible. Among others, the notion of criminal organization and the crime of formulating a criminal organization have been introduced, and in case of many crimes, participation in a criminal organization has been ruled as a qualifying condition.

All this was justified because in a democratic state founded on the rule of law, society's expectations in connection with crime are expressed by the penal law, thus we can say that it is *"one of the 'most national' branches of law."*[8] Considering this, it is very important for the legislator to assure the possibility of using means of penal law when it comes to witness protection. In his excellent monograph about witness verification, Lajos NAGY mentions already in 1966 the criminal law protection of the witness in the first place among the rights due to the witness, which *"provides increased safety for witnesses in case of crimes committed against them as a result of their testimony."*[9] One

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[5] Imre Kertész, *The scope of organized crime* In: *Criminal-political answers to the challenges of crime, with special attention to organized crime and the penal law system of sanctions: The records of the 4th National Criminology Congress. Győr, October 13-14th, 2000* [edit: Erika RÓTH], Criminology Proceedings, Special Edition, Bíbor, Bp., 2001, p. 69

[6] Cites: Bócz, *The confession* […], p. 12

[7] András Horváth, *A few practical experience on organized crime,* Police Review, 1994, Issue 10, p. 5.

[8] Péter Csonka, *The perspective of the Council of Europe in the fight against economic and organized crime,* Review of Internal Affairs, 1998, Issue 11, p. 33.

[9] Lajos Nagy, *Witness verification in the criminal trial,* Economic and Law Publishing, Bp., 1966, p. 229.

decade later, during the codification of the Penal Code, it emerged as a possibility that the crimes committed against the witness as a result of their testimony would be regulated separately, as a standalone statement of fact, which may ensure bigger safety and motivational force for every citizen co-operating in a criminal procedure.

It can be considered a fact, that every external effect focusing to influence witness testimony endangers the valid establishment of facts by the proceeding authorities, thus, jurisdiction must be protected from this by all means.[10] The scope of witness protection includes the means protecting against influencing by violence or threat, although the latter has other known ways, for example promising material or personal advantage, acts of corruption, against which there are also penal means of substantive law available.

In connection with the penal means of substantive and procedural law, Flórián Tremmel aptly notes, that *"substantive penal law in our country is in a significant shortfall compared to procedural law."*[11] However, the witness protection means of procedural law are not sufficient to address the problem of witness protection in a satisfactory way.

In spite of the above, the person threatening and intimidating witnesses was, for a very long time in Hungary, only punishable in case of committing the so-called traditional crimes[12], and only the Law CXXXI of 2001 codified a factual situation serving specifically the protection of the witness into the provisions of Penal Code, by criminalizing the obstruction of public authority proceedings. However, many international documents specify the protection of witnesses by penal means of substantive law, and in this regard, one of the most obvious witness protection methods is clearly the penal law prohibition of influencing the witness by threat. As per the third section of the Recommendation No. R (97) 13 of the Committee of Ministers of the Council of Europe on the intimidation of witnesses and the right to protection, the intimidation of witnesses must be considered a punishable act, either as a standalone factual situation, or as part of the factual situation of a prohibited threat.

The Palermo Convention also specifies the criminalization of the obstruction of justice. The penal means of substantive law to protect witnesses are enacted by point a) of article 23, according to which, each State Party shall adopt such legislative and other measures, as may be necessary to establish as criminal offenses among others, when committed intentionally, the use of physical force, threats or intimidation, or the call to induce false testimony, or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to organized crime.

In spite of the above, clearly different viewpoints have been formed between jurists of theory and practice in Hungary regarding whether it is necessary to regulate retaliatory acts against witnesses as *sui generis* crimes at all, or not. As of now, the majority of the opinions think it is not. Imre Kertész analyzes the arguments of law politics and legal dogma, which either support or oppose the treatment of factual situations serving witness protection as *sui generis* crimes.[13] One of the most important argument of law politics supporting standalone factual situations is that they would represent the increased danger these acts impose on society in a better way, and its

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[10] Balázs ELEK, Influencing testimonies. TKK, Debrecen, 2008, p. 62.

[11] Flórián Tremmel, *Approaching witness protection from a systemic aspect* In: *Theoretical and practical problems of witness protection* [edit. Bence MÉSZÁROS], Faculty of Law at the University of Pécs, Pécs, 2009, p. 111.

[12] For example, through the factual situation of murder or battery of a foul motive or aim.

[13] Imre Kertész, *The witness needs protection,* Hungarian Law, 1993, Issue 4, pp. 196-197.

judgment by penal law.[14] Undoubtedly, the qualification of some of the factual situations that incidentally were to be codified in Penal Code would be manageable in the already existing legal framework, but, at the same time, *"in such cases, symbolic legislation does not resolve a loophole, but signifies the political need for the restriction of a phenomenon considered damaging."*[15]

Considerations of law dogma also demand the codification of specific legal factual situations, as the duality of these acts regarding their subjects of law and commission – namely, that they are not only and not primarily against life and health, but also against jurisdiction – justifies their relocation from under the scope of crimes against life and health. Lajos Nagy considers specific regulations justified exactly because of this: *"According to our viewpoint, it would be* de lege ferenda *necessary to punish violent behavior against witnesses because of their testimony as specific crimes against jurisdiction."*[16] Furthermore, Gábor Kemény states, that the codification of provisions on the obstruction of jurisdiction in the Penal Code would function as an important means for protection, since *"by all probability, it would lower the number of those who undertook the punishment for the crime of intimidating the witness, which is the basis of the proceeding."*[17] Edina Gorza, in the middle of the 1990s,[18] went as far as to give a textual suggestion for the formulation of such new legal factual situations for the Special Part of the Penal Code as for example the misuse of personal information of the protected witness, subornation to perjury, forcing someone to suppress extenuating circumstance. In her opinion, based on these factual situations, judges would order those threats to be punished that *precede* witness testimony in case of the realization of a qualified subornation. However, for punishing the retaliations *subsequent* to testimony, she considers the establishment of murder and battery of a foul motive as enough. Anita Cserháti also insists on the introduction of factual situations that regard witness protection especially.[19]

One can mention as a counter-argument for the above opinions, that we could probably not expect too many judgments with this qualification in everyday practice, and thus, in my opinion, it is not justified to raise the number of penal norms any further.

According to István Vavró, it would be one of the possible penal means of substantive law for witness protection, if the legislator allowed the same special protection for a witness, that an official enjoys.[20] An argument against this could be that *"statistical analysis* [...] *has shown that a perpetrator is not intimidated by either the knowledge that they commit a crime against an official, or the fact that their punishment is going to be more severe"*[21], thus an increased penal law protection on the person of the

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[14] This is also why Ákos Borai suggests these factual situations to be regulated as *sui generis* crimes. Ákos BORAI, *Witness protection Part II,* Police Review, 1994, Issue 11, p. 28.

[15] Imre Kertész, *The even more specially protected witness,* Review of Internal Affairs, 2001, Issue 11, p. 44.

[16] Nagy, *op. cit.,* p. 230.

[17] Kemény, *op. cit.,* p. 95.

[18] Edina Gorza, *Witness protection and organized crime*, Review of Internal Affairs, 1997, Issue 7-8, pp. 30-33.

[19] Anita Cserháti, *Means of procedural law in witness protection. Protection Program*, Lawyer's Magazine, 2006, Issue 4, p. 22

[20] More on this: István Vavró, *On the procedural law means of witness protection,* Review of Internal Affairs, 1993, Issue 9, p. 27.

[21] Kemény, *op. cit.,* p. 96.

witness would probably not ensure real and effective protection for the witness. Furthermore, it would imply a disadvantage during verification, that the perpetrator must be made aware of the special status of the witness – namely, that the perpetrator committed the crime against a person who is a witness in a criminal procedure –, the publicizing of which is just the thing that is a threat to witness protection, and not desired.

In my opinion, when it comes to so-called traditional crimes, it is not justified to relocate them from their position in legal taxonomy, but at the same time, it has become necessary to codify new crimes that have not been regulated before, because of the national expansion of organized crime. All these factual situations must be suitable in themselves to deter the organized crime groups from intimidating or threatening witnesses, and this system of penal means of substantive law is complemented by tools of witness protection related to procedural law and security. The factual situations of the old (Law IV of 1978) and the new (Law C of 2012) Hungarian Penal Code related to witness protection in cases concerning organized crime are the following:

- subordination of perjury [old Penal Code, Section 242; new Penal Code, Section 276];
- obstruction of public authority proceeding [old Penal Code, Section 242/A] – constraining in a public authority proceeding [new Penal Code, Section 278];
- bribery (culpability of influencing witnesses with bribe) [old Penal Code, Section 255; new Penal Code, Section 295];[22]

I am going to introduce the specific legal factual situations here only in light of their relation to witness protection, omitting the detailed analysis of the related special literature on penal substantive law and of the specific crimes.

Subornation of perjury

The prohibition of perjury reinforced by penal law and the century-old culpability of subornation of perjury should serve to assure the reliability of witness testimonies, and to motivate the witnesses to tell the truth. The opinion of Endre Bócz in 1996, in connection with prohibiting witness intimidation by penal law, was that in this regard *"the Hungarian penal law has no debt, as subornation of perjury has been punishable here for almost a century, even if the question is emphasized not by threat, but by a promise."*[23] Subornation of perjury is a so-called *sui generis* crime, or a preparatory behavior, which is evaluated as a standalone, complete basis by the legislator. Based on subsection (1) of Section 242 of the old Penal Code, and subsection (1) of Section 276 of the new Penal Code, due to the criminal basis of subornation of perjury, one who strives to persuade someone to give a false testimony should be punished. If someone commits this crime in a civil case, a disciplinary case, in a case of petty offense, in a case processed by an arbitral tribunal or another authority, then it is considered an offense.

The behavior of perpetration for the crime: the strive to subornation, the call for perpetration, and in accordance with that, the act becomes a factual situation, if the

[22] The listing of this factual situation as a penal means of substantive law can only be found in the works of Mihály Tóth in the Hungarian special literature. See: Mihály Tóth, *Additions to the formative years of our new criminal procedure law (Witness protection and arraignment rights in the drift of modifications)* In: *Papers for Mr Erdei* [edit. Katalin Holé, Csaba Kabódi, Barbara Mohácsi], ELTE-ÁJK, Budapest, 2009, p. 418-433, 425

[23] Endre Bócz, *On witness protection,* Criminology Proceedings, 1996, Issue 54, p. 108

perpetrator did everything to make someone give a false testimony, but it did not lead to success. This scope does not include the influencing attempt, the target of which is not a false testimony, thus, when someone is forcing the witness to tell the truth during examination. In this case, neither false testimony, nor the call to make one is realized – since the witness recounts the truth –, thus, no fact of crime can be established. The call's arrival to the addressed person is a condition for the crime to be considered completed.

The crime can already be committed when the case is not being processed yet, but the perpetrator, considering the possibility of a future procedure, strives in advance to persuade the potential witness to give a false testimony. This also shows that as far as witness protection is concerned, it can not only cover people who meet the traditional criteria of a witness in a criminal procedure, but has a larger scope.

Obstruction of public authority proceeding – Constraining in a public authority proceeding

Article 23 of the Palermo Convention (already cited above) orders that each State Party shall adopt such legislative and other measures, as may be necessary to codify the obstruction of jurisdiction as a crime. Based on point a) of article 23, one must establish as criminal offenses among others, when committed intentionally, the use of physical force, threats or intimidation to interfere in the giving of testimony or the production of evidence.

The Law CXXI of 2001 codified the legal factual situation of the obstruction of public authority proceeding as a provision of the old Penal Code, enforced from 1st April, 2002. In case of an obstruction of public authority proceeding, someone uses physical force or threats to persuade another person not to exercise his or her lawful rights, or not to fulfill his or her duties during a court procedure, or another official procedure; thus, this factual situation is basically a peculiar case of constraining. János Bánáti notes in connection with this, that *"it is undoubtedly necessary to make the constraining of a witness punishable."*[24] However, what he did not consider justifiable was the making of the misleading of witnesses – which was mentioned in previous suggestions, but remained not codified – punishable, the point of which would have been to consider the act criminal even when committed for the above aim, not via physical force or threats, but by a simple misleading. According to the regulations of the old Penal Code, one should understand the notion of another person as referring to the witness, a specialist, or the accused. As per the regulation, the obstruction of public authority proceeding is a much more severe threat in a criminal case, than in a civil or other procedure. Section 278 of the new Penal Code includes the related provisions with new naming, along with unchanged elements of factual situations.

Bribery

Assuring the purity of public life is an especially important duty of the state also in criminal procedures, which is, considering the increasing number of crimes of a corrupt nature, not an easy task at all. It also goes without saying that corruption is becoming more and more international, so not only national, but international measures are

[24] János Bánáti, *Some questions on witness protection* In: *Criminal-political answers to the challenges of crime, with special attention to organized crime and the penal law system of sanctions: The records of the 4th National Criminology Congress. Győr, October 13-14th, 2000* [edit: Erika RÓTH], Criminology Proceedings, Special Edition, Bíbor, Bp., 2001, p. 124

needed to force it back. A part of the practice and system of corruption does not necessarily also qualify as a punishable act, which makes it obvious that the notion of bribery is wider than what corruption means in the sense of criminal law.[25]

According to subsection (1) of section 255 of the old Penal Code, the crime of bribery in an official procedure is committed by someone who gives unlawful advantage to another person, or to a third person on account of such person, to induce him to refrain from exercising his lawful rights in a court or other judicial proceeding, or to induce him to neglect his duties. The perpetrator shall be exonerated from punishment if he confesses the act to the authorities first hand and reveals the circumstances of the criminal act. According to subsection (2), any person – in our case, the witness – who accepts unlawful advantage so as to refrain from exercising his lawful rights in a court or other judicial proceeding, or to neglect his duties shall be punished according to subsection (1). However, the bribed person shall be exonerated from punishment if he confesses the act to the authorities first hand, surrenders the obtained unlawful financial advantage in any form to the authorities, and reveals the circumstances of the criminal act.

The subsection (1) of section 295 of the new Penal Code orders any person to be punished for bribery in court or other judicial proceedings who promises or gives unlawful advantage to another person for himself or for a third party for him to refrain from acting in accordance with his duty or in the exercise of his rights in court, arbitration or other judicial proceedings. As per subsection (2), the provisions of subsection (1) shall apply not only in a procedure conducted by Hungarian authorities, but also when the acts defined therein are committed in the course of or in connection with, proceedings of an international criminal court installed under international convention promulgated by an act, or under a statutory resolution adopted by the United Nations Security Council, or by the Court of Justice of the European Union. According to subsection (3), the penalty may be reduced without limitation – or dismissed in cases deserving special consideration – against the perpetrator of a criminal offense defined in subsections (1)-(2) if he confesses the act to the authorities first hand and unveils the circumstances of the criminal act.

References

János Bánáti, *Some questions on witness protection* In: *Criminal-political answers to the challenges of crime, with special attention to organized crime and the penal law system of sanctions: The records of the 4th National Criminology Congress. Győr, October 13-14th, 2000* [edit: Erika Róth], Criminology Proceedings, Special Edition, Bíbor, Bp., 2001, p. 121-127;

Endre Bócz, *On witness protection,* Criminology Proceedings, 1996, Issue 54, p. 105-112;

Endre Bócz, *The confession of a district attorney – Experiences of prosecution in the fight against organized crime in Hungary,* Review of Internal Affairs, 1997, Issues 7-8, p. 11-12;

Ákos Borai, *Witness protection Part II,* Police Review, 1994, Issue 11, p. 16-28;

Anita Cserháti, *Means of procedural law in witness protection. Protection Program*, Lawyer's Magazine, 2006, Issue 4, p. 5-22;

[25] For more details, see: Csonka, *op. cit.,* p. 52.

Péter Csonka, *The perspective of the Council of Europe in the fight against economic and organized crime,* Review of Internal Affairs, 1998, Issue 11, p. 31-56;

Edina Gorza*, Witness protection and organized crime,* Review of Internal Affairs, 1997, Issue 7-8, p. 23-37;

András Horváth, *A few practical experience on organized crime,* Police Review, 1994, Issue 10, p. 3-7;

Gábor Kemény, *The witness protection-related modifications of our criminal procedure law, in light of the possibilities in them,* Review of Internal Affairs, 2000, Issue 10, p. 85-99;

Imre Kertész, *The witness needs protection,* Hungarian Law, 1993, Issue 4, p. 193-199;

Imre Kertész, *The even more specially protected witness,* Review of Internal Affairs, 2001, Issue 11, p. 29-45;

Imre Kertész, *The scope of organized crime* In: *Criminal-political answers to the challenges of crime, with special attention to organized crime and the penal law system of sanctions: The records of the 4th National Criminology Congress. Győr, October 13-14th, 2000* [edit: Erika Róth], Criminology Proceedings, Special Edition, Bíbor, Bp., 2001, p. 69-82;

Zoltán Márki, *The third phase of the anti-mafia regulation: the present state of national codification* In: *Criminal-political answers to the challenges of crime, with special attention to organized crime and the penal law system of sanctions: The records of the 4th National Criminology Congress. Győr, October 13-14th, 2000* [edit: Erika Róth], Criminology Proceedings, Special Edition, Bp., 2001, p. 13-33;

Lajos Nagy, *Witness verification in the criminal trial,* Economic and Law Publishing, Bp., 1966;

Mihály Tóth, *Additions to the formative years of our new criminal procedure law (Witness protection and arraignment rights in the drift of modifications)* In: *Papers for Mr Erdei* [edit. Katalin HOLÉ, Csaba Kabódi, Barbara Mohácsi], ELTE-ÁJK, Budapest, 2009, p. 418-433;

Flórián Tremmel, *Approaching witness protection from a systemic aspect* In: *Theoretical and practical problems of witness protection* [edit. Bence Mészáros], Faculty of Law at the University of Pécs, Pécs, 2009, p. 108-116;

István Vavró, *On the procedural law means of witness protection,* Review of Internal Affairs, 1993, Issue 9, p. 23-27.