Secondary Victimization During Criminal Procedure

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Abstract

In constitutional democracies, rules set down in writing that are both accessible and applicable to all (criminal procedural law) are used in prosecution, the goal of which is to ensure the lawfulness and fairness of the procedure by which crimes are brought to light and by which the penal code is brought to bear against the perpetrators of criminal activity. By their mere existence as directives to be followed, prosecutional laws carry with them a symbolic threat. We cannot claim that the eventual use of violence is an essential precondition of all prosecution, but it should nevertheless loom in the background, thereby helping to ensure the voluntary compliance and peaceful behaviour of the participants and so preventing the need to take the cane down off the wall in the first place.

Both theoretical and practical research have shown that those who have committed a crime will try to avoid being held accountable for their actions, attempting to obstruct the authorities in their attempts to ascertain, in turn, the facts of the case through comprehensive investigation. Such behaviour goes some way towards providing the authorities with a basis for justifying the necessity of violence. Thus, if the threat represented by violence and other uses of force were taken away, the implementation of prosecutional laws and law enforcement would not be effective and it would be impossible to achieve the standards demanded by society.

The other fundamental pillar supporting the use of violence is the existence of a high-level interest, namely a criminal-political interest, by which all members of society demand that successful law enforcement and the enforcement of criminal law be categorically upheld. The force of the belief is so strong that it provides a solid basis for the implementation of otherwise undesirable state-implemented violence. State-implemented violence can also exist in constitutional democracies, insofar as it is carried out in compliance with constitutional rights and within the specified limitations.

Keywords: *defense counsel, first strike, human rights, illegal and legal violence, investigation, law enforcement, presumption of innocent, secondary victimization*

I. The Place and Role of Violence in Criminal Procedures

In constitutional democracies, rules set down in writing that are both accessible and applicable to all (procedural laws) are used in prosecution, the goal of which is to ensure the lawfulness and fairness of the procedure by which crimes are brought to

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light and by which the penal code is brought to bear against the perpetrators of criminal activity. By their mere existence as directives to be followed, procedural laws carry with them – or at any rate are supposed to carry with them – a symbolic threat, not unlike that in days gone by of "the cane on the primary school wall"[1]. In the classroom the cane occasionally had to be put to actual use, the same is true in the practice of prosecution, to a greater extent, even. We cannot claim that the eventual use of violence is an essential precondition of all prosecution, but it should nevertheless loom in the background, thereby helping to ensure the voluntary compliance and peaceful behavior of the participants and so preventing the need to take the cane down off the wall in the first place.

Both theoretical and practical research have shown that those who have committed a crime – either due to human nature or in response to their own instincts – will try to avoid being held accountable for their actions, attempting to obstruct the authorities in their attempts to ascertain, in turn, the facts of the case through comprehensive investigation, the precise reconstruction of past events, damning and aggravating evidence (or even, occasionally, exonerating or extenuating evidence) as well as circumstances directly linked to the crime being committed. Such behavior goes some way towards providing the authorities with a basis for justifying the necessity of violence. It is no exaggeration to assert that if the threat represented by violence and other uses of force were taken away, the implementation of procedure laws and law enforcement would not be efficient and it would be impossible to achieve the standards demanded by society.

The other fundamental pillar supporting the use of violence is the existence of a high-level interest, namely a criminal-political interest, by which all members of society demand that successful law enforcement and the enforcement of criminal law be categorically upheld. The force of the belief is so strong that it provides a solid basis for the implementation of otherwise undesirable state-implemented violence. State-implemented violence can also exist in constitutional democracies, insofar as it is carried out in compliance with constitutional rights and within the specified limitations[2].

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[1] The expression can be found in Á. Farkas, *A falra helyezett nádpálca [Cane on the wall]*, Osiris, Budapest, 2002, p. 91.

[2] As Ákos Farkas clearly states, "a successful justice system must have effective instruments for making criminal investigation and punishment possible, for providing help in overcoming obstacles that appear in its path – even without the involvement of the defendant – in order to implement the penalties required by the state.

The authorities involved in the above system are each led by a different objective, however:

– for the police, it is to improve crime-fighting statistics,

– for the prosecution, it is to win as many cases as possible,

– for the courts, it is to conclude as many cases as possible with a minimum of successful appeals,

– for the prison system, it is for the time of the sentence to be served with as few problems as possible.

These objectives often clash not only with one another but also with legal objectives. In the interests of achieving their own objectives, the authorities attempt to find more and more ways of interfering with the rights of the individual.

On the other hand, there is the defendant, who demands a fair trial, the observation of procedural rules, the protection of his rights and a constitutional investigation. Finding the right balance is a extremely difficult, a challenge in itself for a court of constitution." Á. Farkas, *Alkotmányosság és büntetőeljárás [Constitutions and criminal procedure]*, Kriminológiai és kriminalisztikai tanulmányok, OKRI, Budapest, Vol. 30, 1993, p. 45.

II. Differentiation Between Necessary-Legal and Unnecessary-Illegal Violence

Now we come to the differentiation between legal and illegal (lawful and unlawful or official and forbidden) violence within criminal procedure. Legal violence is that which is defined and permitted first and foremost by the Constitution, and secondly by the Act of Criminal Procedure (2017/XC, Hungary) and other legal regulations connected to it (e.g. those governing the police, the border guards, the inland revenue and customs as investigating organizations, Act of Prosecution etc). A legal basis for violence does not in itself justify the use of violence in every case, as it is a serious interference with human rights. Law enforcers can resort to violence only under certain specific conditions in accordance with strict criteria; these criteria are necessity and proportionality[3]. *Necessity* stems from that which is unavoidable, otherwise unworkable or unconditionally required, while *proportionality* requires that the principle of the minimum be followed, that is to say, the mildest violence or form of violence applicable to a situation must be applied. The violation of both these requirements (necessity and proportionality) is a serious offence against norms and also a breach of individual constitutional and procedural rights[4].

Seen in negative terms, any form of violent behavior not corresponding to the above requirements is forbidden. Seen in positive terms, I consider the definition of unlawful violence set out in 76.§ (8) of the Police and Criminal Evidence Act (UK, 1984) as acceptable. According to this, oppression includes torture, inhuman or degrading treatment, as well as the threat of torture or violence falling short of torture.

III. The Characteristics of Violence in the Four Main Stages of the Criminal Procedure (Investigation, Interim, Hearing, Penalty Enforcement)

The Act of Prosecution summarizes the task of the investigative (Hungarian) authorities in the following way The task of the investigative authorities is to conduct a fast and thorough investigation of crimes and also to take the necessary steps to call those responsible for committing crimes to account for their actions. The requirement of speed and thoroughness also appears in the sections of the laws of criminal procedure dealing in practical terms with criminalistic requirements (concerning the tactics of investigation). The significance of the so-called *erster Angriff* "first strike"[5] is an extremely important factor in the success of the entire criminal procedure. Let us consider, for example, what happens when someone is caught in the act of committing a crime. The person in question is apprehended and brought forth, then there is the primary collection of facts and immediate detective activity such as search of the

[3] The criteria – given that violence features in them both – share similarities with the requirements of the enforcement of justified defence, where both the theoretical literature and law enforcement require necessity, proportionality, directness (direct attacking) and unavoidability.

[4] See: V. Berces, *A büntetőeljárás reformja és a bizonyítás alapkérdései (Reform of criminal procedure and basic questions of proofing),* ELTE Eötvös Kiadó, Budapest, 2021.

[5] C. Fenyvesi, C. Herke, F. Tremmel, (eds) *Kriminalisztika (Crimnalstics),* Ludovika Egyetemi Kiadó, Budapest, 2022.

surroundings, house and body search, detainment and taking into custody. Practically each phase contains within it an abuse of human rights, and, in cases where resistance is met, violence committed by the authorities and restriction of rights also occur. Of all the phases mentioned above, the process of apprehension is special, in that the public supports the right of individuals to use force in order to help them apprehend the perpetrator of a crime. Here, too, the notions of necessity and proportionality come into effect, the right to use violence legitimately is not to be abused, and the authorities are to be informed immediately so that the apprehended party may be handed over. In practice, this is the cause of numerous conflicts. Confronted with someone who is emotionally overloaded, generally offended and behaving threateningly towards them, their family, or other people or assets, people very often take the law into their own hands, and act like judge, jury and executioner, abusing the perpetrator unnecessarily and without reason and using excessive violence[6].

The law enforcers have also been known on occasion to use violence to excess themselves. Despite the two centuries-old principle that an individual is innocent until proven guilty, some suffer unjustified and illegitimate violence on the basis of "presumed concealment of guilt"[7], because of "the passion for the hunt" or even in order to create a distorted profile of statistical success. The violence can be physical, psychological, or a combination of the two. It can be seen in its most varied forms at the beginning of the procedure (threatening with arrest, threats made in connection with the children, family or workplace of the individual concerned, physical assault and so on, to list just a few by way of example.)

Given that an investigation is by its very nature confidential (not in the public domain), the multitudinous restrictions on rights of protection and instruments of duress – including conditions of containment in serious abuse of human rights, detention (custody)[8], temporary enforced rehabilitation – demonstrate the extent to which law enforcers able and willing to abuse the law are in a position to do so. If we look through the Hungarian files on maltreatment during official procedures, we see that in nearly every case the maltreatment occurred either in the phase immediately prior to the start of the criminal procedure or during the initial investigative phase (most often police investigations). In other words, the authorities use illegitimate violence with an eye to criminalistic and procedural success, attempting to elicit facts about the case at such a time when no counsel for the defense is present.

In the second phase of the criminal procedure, or interim, when it is the public prosecutor who decides on what direction the process will be taking, and in the preparatory phase of the trial, during which the court examines the documents in connection to the trial before its actual commencement, examples of unlawful violence – above and beyond the legitimate violence of measures implemented under duress – are uncommon. In this phase acts of investigation and contact with the participants in the trial, especially the defendant, happen only in exceptional circumstances.

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[6] See more on this theme: A. Bertaldo, *Quo vadis, ungarische Jugendstrafgerichte? (Quo vadis, Hungarian juvenile courts?),* Büntetőjogi Szemle, 2021/1, pp. 11-15.

[7] See Á. Farkas, G. Pap, *Alkotmányosság és büntetőeljárás (Constitutioness and criminal procedure)* Kriminológiai és kriminalisztikai Évkönyv, OKRI, Budapest, 1993, p. 45; J. Skolnick, *Justice Without Trial*, New York, 1994, p. 112.

[8] Further details of its anomalies can be found in C. Herke's monograph *A letartóztatás [The detention],* Dialog-Campus, Budapest-Pécs, 2002, pp. 1-366 and E. Roth, *Emberi Jogok kontra fogvatartás a büntető eljárásban [Human rights contra detention in criminal procedure],* Acta Humana – Emberi jogi közlemények, 1995/20, pp. 3-87.

In the third phase of the criminal procedure, the court trial phase (of the first and second instance, and remedial phase) the court council and the principal judge have the right to order the use of force (taking someone into custody, having them expelled from the hearing or removed from the building, etc.) Instances of illegitimate violence might include the judge overseeing the trial and the witness interviews in an excessively authoritarian style reminiscent of an interrogation. Here we might see the kind of overly coercive, excessively contrived, we could even say violent behavior on the part of the judge who, in a situation where the accused refuses to give evidence, begins an interrogation about the reasons for this stance, bombarding the accused with questions concerning the merits of the case. Defendants refusing to give evidence must not – cannot – be asked questions, as that would be giving evidence. Any intent on the part of the judge to do this, either in a concealed or open way, constitutes illegitimate pressure and is a further burden on the already "enormously disadvantaged defendant"[9].

The fourth phase of the independently regulated criminal procedure is that of sentencing. The defendant now has the legal status of convict, and as such is even more unprotected and exposed. In the confined and strictly ordered prison environment, the convict can only maintain sporadic contact with a lawyer – assuming that he/she has one – and the assumption of innocence until proven guilty is no longer valid, since a verdict has been brought with the full force of law. The opportunities for appeal are slim, and in front of the sentencing judge the principle of contradictoriality is not complied with fully. The "defender" of the rights of the convict is the same public prosecutor who has often affected the status of the convict by seeking a negative verdict, but who can now act in the role of warden of justice. In an institution in which external regulation hardly ever occurs in practice, there are countless ways in which the defendant can suffer from legitimate and illegitimate violence.

IV. The Recipients of Secondary Victimization in the Criminal Procedure

In the four distinct phases of the criminal procedure, the defendant is not the only one who can suffer legal and illegal violence. As their names suggest, both the victim of the crime and the witness to the crime can end up on the receiving end of violence within an investigation. Special consideration needs to be given to the plight of the victim, who has to undergo voluntarily the tribulations of the whole procedure in addition to having suffered unlawful violent attacks against his or her person, rights or property. The violence in question can wound in many ways and cause different types of damage, be it emotional, physical, financial, temporal and so on. These different kinds of violence can happen at the same time with overwhelming effect. When this is combined with incompetent and rough police officers (or other authorities) who are often biased and prone to treat victims and witnesses as if they were themselves under suspicion, and with the indiscrete, insensitive and humiliating nature of the – sometimes multiple – interviews, it all serves to increase the boorishness of the entire situation. Then there is the severity of the occasional medical examinations, the

[9] F. Tremmel, *Magyar büntetőeljárás. [Hungarian criminal procedure],* Dialóg-Campus Budapest-Pécs, 2001, p. 95.

tension caused by the ever-present procedural bureaucracy and the depressing impact of force. Young people and children need to be given special consideration, as those with vulnerable or damaged emotional development are particularly at risk of victimization at the hands of the grown-up authority's seeming omnipotence. In such cases, because of the age of those concerned, the authorities are required to make provisions to ensure that the standard interview procedure cannot be applied.

There are usually between five and seven witnesses called during the course of a trial, and they, too, can become victims of both kind of violence. They can be forced to attend, be subject to various investigations and be made to remain in a particular place, etc. At the same time, it is possible that they could become the victims of illegitimate threats and violent actions, seeing as current legislation does not even allow them to have a lawyer[10].

Others who might suffer forced measures include victims of confiscation, who themselves are neither defendants nor witnesses to a crime. Think here of the shocked owner of a second-hand car who discovers that it is being forcibly confiscated by the authorities due to its involvement in an earlier crime (theft, smuggling, etc.)

V. Victimization Catalysts and Their Functions

The harmful effects of violence (be it legitimate or illegitimate) carried out by the authorities can be reduced by organizations within the institution of Hungarian criminal procedure and also by outside individuals and organizations. These are, in my opinion, the agents of authority (the head of the investigation, the prosecuting lawyer, the judge), the defense counsel, and also external individuals and organizations such as the Constitutional Court, ombudsman, and various organizations for the protection of the legal rights of individuals, such as the Helsinki Convention. All these parties – especially the prosecuting lawyer, who has special status – have a fundamental obligation to guard against violence by the authorities and secondary victimization. They have the chance to make an impact in the first case, however in the latter case they cannot help much, since violent acts usually happen close to the committed crime in terms of place and time, meaning that they can very rarely be present. Since the participation of the defense counsel in the investigation is restricted, his or her role is even smaller. Moreover, empirical studies dating back several decades have shown that barely a third of defendants receive the formal protection of a lawyer, and that two-thirds of those lawyers are publicly appointed. Thus, only ten per cent of all defendants receive the kind of "effective" defense stipulated by the European Convention and Court of Human Rights[11].

The struggle of outside organizations against the use of such violence can take effect only after the event, and only reaches the victims and perpetrators after a series of phases, so is less effective than the implementation of internal "catalysts" during the investigation itself.

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[10] This is due to change as of July 1 2003, when the Act of Criminal Procedure (at that time) gave the witness the right to a lawyer.

[11] For further details, see M. Toth, *Nyomozás és védelem [Investigation and defence],* Magyar Jog, 1989/4, p. 350; C. Fenyvesi, *A védői jogállás empírikus vizsgálat tükrében [The defence councel's right in mirror of empirical research],* Belügyi Szemle, 2001/2, p. 37; C. Fenyvesi, *A kirendelt védői intézmény problematikája [The applied defense counsel's problems],* Jogelméleti Szemle, 2001/4.

VI. Potential Ways to Reduce Violence in Criminal Procedures and Secondary Victimization

I believe that because both the distortion of permitted violence and unlawful violence have the same source and share the same diseased roots, that they can be cured in the same way, by improving the selection not only of those who apply violence, in particular detectives and initial investigators, but also of those employed in the field of penalty enforcement; improvements also need to be made to increase their preparedness and to improve their knowledge, experience and self-confidence.

For the above requirements to be implemented, a particularly competitive system of admissions would also be needed, in which candidates and employees of a violent disposition as revealed through personality traits or lack of self-control would be rejected or dismissed. Successful candidates would also need to demonstrate a high-level awareness of – and ability to implement – the following: theoretical law (the management of police materials and procedures), criminalistics (the tactics and techniques of criminal methodology), psychology (the psychology of criminal imprisonment) and conflict resolution.

Within the penal procedural system, it is imperative that the role, presence and significance of the "catalysts" (especially the authority in charge, defense attorney and lawyer of prosecution) be increased, both from a theoretical and an operational standpoint.

VII. Closing Thoughts and Conclusions

The practice of criminal procedure shows that the legislative threat ("cane on the wall") is in itself ineffective for fulfilling desired law enforcement and crime prevention objectives. The use of legitimate violence and measures of force (the use of the cane) is therefore required. The criminal procedure itself is a repository of force, pressure and obligation; we cannot speak of a "velvety" prosecution, but, at best, of a considerate one. The truth of this statement is most readily seen in the case of those involved in organized crime – they are not known for being overly scrupulous in their choice of methods and instruments, and yet even so the constitutional and legal limits must not be overstepped. The use of violence cannot be high-handed, autocratic, excessive or disproportionate – neither in degree nor in time; legislators and the agents of law enforcement must maintain a delicate balance between the permitted use of violence and the human rights of the defendant (and other participants).

In the course of the criminal procedure, it is not only the defendant who, as "main character", is forced to suffer and bear legitimate violence; other participants also undergo the same treatment whilst also, unfortunately, falling prey to the scourge of illegitimate violence. The overall impact of such treatment can be at times so great that it goes far beyond the disadvantages and offences actually caused by the crime itself. This is highly damaging, both to the individual concerned and to the chances of successful subsequent prosecution. Secondary victimization is a real phenomenon in Hungarian practice, and its prevention should be both a priority and a responsibility for all legislators and law enforcement agents, as well as for those official and unofficial "victimization catalysts."

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