The Context of the Confiscation and Recovery of Criminal Assets According to the System Requirements of a Constitutional State

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Abstract

The starting point of our research is twofold. First, the specific case of criminal asset forfeiture. In this case, the prohibition of double confiscation is violated when the civil claim of 'a public body' as the victim, which is not enforced in the criminal proceedings but is defined in criminal procedural law as – is only enforced after the final order of confiscation. On the other hand, we have examined to what extent the system of procedural actions for the recovery of criminal property, as defined in criminal procedural law, helps in practice to solve the problems arising from parallel proceedings.

Our conclusion is that in a constitutional state – regarding the prohibition of double confiscation – the harm to the accused cannot be increased by paying twice for the damage caused by the crime.

That is, partly in the form of confiscation of property and partly as a civil claim by the victim.

The fundamental elements of a constitutional state – especially the due process of law, the right for just procedure – have to be guaranteed by legislation and judicature.

We also examined the possibilities of tracing the proceeds of crime and other crime-related assets from a forensic perspective.

Keywords: *confiscation of assets, civil law claim, constitutional state, prohibition of double confiscation, e-investigation*

Introduction

In the private and blood feuds that developed in the early stages of human coexistence, the public law element of the crime was only secondary and only the victims were liable to pursue a criminal claim. This was based on the assumption that the crimes did not harm or endanger the interests and order of the state.

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The principle of compositio, or redemption, paved the way for the common law in the area of criminal law, which was based on the principle of the material satisfaction given by the offender to the victim or his community for the release of revenge, part of which, and later the whole, was paid to the chieftain, prince or king. The institution of redemption developed in the ancient slave-holding states and was completed in the early feudal conditions[1].

With the strengthening of public power, separate bodies of the state took over the functions of justice. As a result of a long historical process, the imposition and execution of punishment gradually became a state function[2].

From the High Middle Ages onwards, criminal law became increasingly public. And from the beginning of the modern era, the right to punish offenders was exercised by the state. The enforcement of the ius puniendi, the state's duty to punish acts that violate and endanger the legal order, had already become a state monopoly in Europe, including Hungary, by the 19th century.

The elements of the ius puniendi of the constitutional state – in particular the requirement of legal certainty and fair trial – are codified in the criminal justice system during the enforcement of the state's criminal power[3].

The development of the legal institution of confiscation

Property penalties were widely used in the criminal law of slave-owning and feudal societies. As it is known from legal history, throughout the ages, property punishment in the form of various ransoms and compositions was one of the foundations of penal systems.

When 'common law' gained ground in the realm of criminal law, confiscation of property was already widely used. It is worth mentioning, for example, that in Roman law, during the imperial period, this institution was mostly used by the ruler to enrich himself. Or, in early feudal German law, confiscation of property was usually accompanied by the death penalty, especially for crimes of a political nature.

The Hungarian criminal law of the Middle Ages was also characterised by the imposition of confiscation of property as a normal corollary of the death penalty. The property of those sentenced to be beheaded and deprived of their livestock was transferred to the crown. Thus, for example, Werbőczy's 1514 Code of Laws proposed the punishment of infidelity, well known from feudal law, by the forfeiture of head and cattle, while the punishment of usurpation of power was the forfeiture of head or cattle.

In the various periods of the development of Hungarian law, punishments of a pecuniary nature remained widespread.

However, the amendment of the former Hungarian Criminal Code in 2001 marked a paradigm shift in the way confiscation of property was dealt with. This amendment

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[1] Blaskó, B. *A büntetőjog előtörténete, eredete, kialakulása és fejlődéstörténeti vázlata az ókortól a XVIII. század végéig.* [*The prehistory, origin, development, and historical outline of criminal law from ancient times until the end of the 18th century*.] Rendőrtiszti Főiskola. Budapest, 2011. p 47.

[2] Blaskó B. *Magyar Büntetőjog Általános Rész.* [*General Section of Hungarian Criminal Law*.] Rejtjel Kiadó. Budapest, 2020. p. 24.

[3] Horgos L. *Gondolatok a ius puniendi jogállami tartalmáról.* [*Thoughts on the constitutional content of ius puniendi*.] In Bragyova A. (Szerk.) *Ünnepi tanulmányok Farkas Ákos professzor 65. születésnapjára. [Festive studies for the 65th birthday of Professor Ákos Farkas],* Miskolci Jogi Szemle, XIV. évfolyam 2. különszám, 1. kötet, 2019. p. 390.

removed confiscation of property from the category of ancillary penalties and included it among the measures. The legislator has thus clearly stated that confiscation can no longer be used as a repressive legal sanction and having lost its punitive character, cannot be used as a means of depriving lawfully acquired property. The rules of this measure, which provided for in integrum restitutio in accordance with the offender's financial situation before the offence was committed, no longer aimed at a pecuniary disqualification expressed in the form of a penalty.

The legal institution of confiscation of property in existing Hungarian criminal law

Act C of 2012 on the Criminal Code (hereinafter: Btk.)[4] continues to uphold the legal policy consideration that confiscation of property cannot be considered a punishment. A measure which is intended to the deprivation for the benefit of the State of property derived from the commission of a criminal offence and of property lawfully acquired but used or intended to be used for the commission of a criminal offence. Confiscation of property cannot be used as a repressive disqualification t[5], 2 and can be used independently and in addition to a penalty or measure.

As regards the category of property that may be confiscated, the application of criminal law may rely on a well-established category in civil law, as a source of law other than criminal law[6].

The scope of the property subject to confiscation – and the mandatory cases in which the measure must be applied – is defined in a separate subchapter of the law.

These cases include the following:

a) Property resulting from the commission of a criminal offence and acquired by the offender during or in connection with the commission of the offence. [Art. 74 (1) (a) of the Criminal Code, Subsection (1) of Art. 74.]

This property is nothing other than the offender's benefit from the offence. Property acquired by the commission of the offence cannot automatically be identified with property acquired during the commission of the offence. The realization of the property resulting from the commission of the offence – acquired in connection with the commission of the offence – may be postponed until after the date of the commission of the offence. This includes the confiscation of property received by the offender for the commission of the offence, not including the proceeds of the sale of property received for the commission of the offence or property purchased therefrom.

(b) The confiscation of property shall be ordered in respect of property which has replaced property derived from the commission of the offence and acquired during or

[4] Date of entry into force: 1 July 2013.

[5] It is worth pointing out that, according to the criminal law measures applicable to legal persons, the fine applicable to legal persons as a measure is of a retributive nature, and therefore there is no obstacle to the combined use of this legal instrument and confiscation of property. However, confiscation cannot be imposed on property (assets) which must be handed over or returned to the victim or which has already been returned to the victim, nor can it be imposed where the victim has been compensated for his loss by seizure and restitution.

[6] Property, as universitas iuris, is the universality of rights in rem and obligations. It is thus nothing other than the totality of the property, that is to say, the rights and obligations of a legal person in respect of things and of other persons. Civil law excludes non-monetary property, i.e. property that cannot be expressed in money (for example, property linked to personality).

in connection with the commission of the offence. [Article 74 (1) (d) of the Criminal Code, Subsection (1) of Art. 74.]

The unlawfulness of the acquisition of property is not altered by the fact that it has been replaced by other property. The post-acquisition mobilization of property acquired in the course of or in connection with the commission of the offence, and the conversion of the property into other property, for example by means of various business transactions, cannot avoid the confiscation of the property that has replaced it.

(c) Property which has been provided or intended to be provided for the purpose of the commission of the offence in order to secure the conditions necessary or facilitating the commission of the offence shall also be confiscated. Such property shall be confiscated irrespective of who provided or intended it for the purpose of committing the offence. The use of such property in the commission of an offence shall not be a condition for the ordering of confiscation. [Article 74 (1) (e) of the Criminal Code, Subsection (1) of Art. 74.]

(d) Confiscation of property which was the object of the pecuniary advantage given or promised. [Btk. Article 74 (1) (f), Subsection (1) of Art. 74. Btk. and Point f)]

This measure shall also be imposed on property resulting from the commission of the offence, acquired during or in connection with the commission of the offence, and enriched by another. Where such property has been enriched by an economic entity, confiscation shall be ordered against the economic entity. [Art. 74 (2) of Btk. Subsection (2) of Art. 74. Btk.] It follows that the criminal origin of the property acquired in the course of or in connection with the commission of the offence is not altered by the fact that it changes hands. The unlawfulness of the acquisition of property by a third party in the case at hand means the unlawfulness of enrichment (acquisition) in the civil law sense, given that the property can be disposed of by its owner and the offender is not the owner. In this context, it is important to point out that confiscation cannot be ordered in respect of property acquired in good faith for valuable consideration. Ad argumentum a contrario, confiscation must also be ordered against a bona fide gratuitous author (who is unaware of the criminal origin of the property).

(e) Given that the criminal origin of property unlawfully acquired in the course of or in connection with the commission of an offence does not, of course, change even if there is a succession due to the death of the offender or the unlawfully enriched person or, in the case of an economic entity, due to its transformation, that property should also be confiscated. [Art. 74 (3) of the Criminal Code, Subsection (3) of Art. 74. Btk.] It should be stressed that the legislator provides an important guarantee of the rule of law by declaring the prohibition of double confiscation, including, inter alia, the prohibition of confiscation in the case of parallel proceedings. Thus, confiscation may not be ordered in respect of property used as collateral for a civil claim in criminal proceedings or property acquired in good faith for valuable consideration, nor to property in respect of which an obligation to pay has been imposed by a final decision of an administrative authority, a State tax or customs authority or a final decision of a court in an administrative action in respect of the same facts as the offence which is the subject of the criminal proceedings, up to the amount of the obligation to pay. [Criminal Code. Article 74 (5) a) b) c), Subsection (5) of Art. 74. Btk. and Point a), b), c)]

In the latter case, the prohibition is subject to two conditions. One condition is the identity of the facts, which does not imply the complete identity of the historical facts established in parallel proceedings. The other condition is that the prohibition of double

deprivation is only imposed by law in respect of the deprivation of property resulting from the commission of the same act by the same person.

The legislator specifies which property is to be considered subject to confiscation until proven otherwise. This includes property acquired by the offender during his participation in a criminal organization or during the commission of the offence of trafficking or trafficking in narcotic drugs or the commission of the offence of smuggling of human beings, whether on a commercial basis or in conspiracy. [Criminal Code. Article 74/A (1) (a) (b) (c) Subsection (1) of Art. 74/A. Btk. and Point a), b), c)] This legislation is considered to be one of the most effective instruments in the fight against organized crime, because it deprives criminal organizations of their assets.

A further provision of the Criminal Code, which is not detailed here [Art. 74/A. Btk. § 74/A. (2) Subsection (2) of Art. 74/A. Btk.] provides that, until proven otherwise, property shall be deemed to be subject to confiscation and that confiscation shall also be ordered in respect of property acquired by the offender in the five years preceding the commencement of the criminal proceedings, if the property or the offender's lifestyle is particularly disproportionate to his proven income or personal circumstances. The offences in question are not listed.

It should be stressed that under the Hungarian Criminal Code confiscation of property cannot be ordered in respect of property lawfully acquired if the offender proves that the property did not derive from a criminal offence. The possibility that during the period in question the perpetrator acquired the property lawfully (e.g. by inheritance) cannot be ruled out. The contradictory situation which may arise from the foregoing and the possibility of excusing the accused – in a special way, by reversing the burden of proof – is resolved by the legislation in question, in that the legal presumption can be rebutted. The risk of success in proving the rebuttal of the presumption of law is borne by the accused. The confiscation of property must be ordered in monetary terms where the property subject to confiscation can no longer be found or where the property subject to confiscation cannot be separated from other property or where it would be disproportionately difficult to separate the property cannot be separated from other assets or would be disproportionately difficult to separate. [Criminal Code. Article 75 (1) (a) (b) (c) Subsection (1) of Art. 75. Btk. and Point a), b), c)]

Thus, the State's criminal claim is guaranteed even if the property can no longer be found or if the property subject to confiscation cannot be separated from other property or if it would be disproportionately difficult to separate it. This provision protects the bona fide, recidivist acquirer by ensuring that the property is not confiscated from him.

The confiscation of property is compulsory in the so-called "proceedings in rem" if the offender is not punishable for reasons of childhood, pathological mental state or for reasons of non-criminalization as defined by law, or if the offender has been reprimanded or cannot be executed during the period of special protection as defined by the Special Protection of Cultural Property on Loan Act. [Criminal Code. Article 75 (2) (a) b) c), Subsection (2) of Art. 75. Btk. and Point a), b), c)] The facts of the case (and the acquisition of property in connection therewith), which are exhausted by the conduct of the above persons, may objectively have a danger to society that may justify the order of confiscation of property.

The fate of the confiscated property is that, unless otherwise provided by law, it will pass to the State. [Art. 75 (3) of the Criminal Code Subsection (3) of Art. 75. Btk.]

The legislator provides for the possibility of sharing confiscated property between States in the context of international legal assistance.

International outlook

The prerequisite for the application of confiscation under the German Penal Code is the confiscation of property resulting from the commission of any offence against criminal law or the payment of its equivalent. [Strafgesetzbuch, StGB §§ 73-73e] It is applicable even if guilt is not established and not only in respect of the perpetrator but also in respect of another person. However, the deprivation of property belonging to the victim may not be ordered if the victim has a private claim arising from the offence, for the fulfilment of which he would have to deprive the offender of the amount from the proceeds of the offence. This also applies when the victim's satisfaction of his civil claim is jeopardized by the payment of the deprivation in value[7].

Similar solutions have developed in English and Spanish law. However, in English law, for example, the rule applies only to the offender[8].

The development of the legal institution of civil action

The claim for compensation for the damage caused to the victim by a criminal offence can be found at the very beginning of the development of Hungarian legal history. In addition to the prospect of the application of the death penalty, the institution of compensation was also included9. The root of the compensation for the victim's damage related to the crime, the assertion of a civil claim, was compositio[10].

The first Hungarian Code of Criminal Procedure, Article of Law XXXIII of 1896 of criminal code of procedure (henceforth: Bp.), already assumed that certain crimes (e.g. assault, manslaughter) caused such damage to the victim that the victim's private interests were so violated that the crime was not yet resolved by a finding of guilt and the imposition of a penalty. For this reason, partly criminal law and partly private substantive law have given the victim a right of action against the offender. This is what criminal law called the victim's private claim (obligatio ex delicto)[11]. To a limited extent, the B p. accepted the theory of the so-called adhesion system, that the injured private party could assert his claim for damages already in the criminal proceedings. However, this did not change the fact that the main purpose of criminal proceedings was to establish criminal liability.

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[7] M. Hollán, *Vagyonelkobzás. [Confiscation of property.]* HVG-ORAC Lap- és Könyvkiadó, Budapest, 2008. p.170, p. 182.

[8] M. Hollán , cited, p. 160.

[9] e.g. according to the law of St. Stephen, in the case of intentional homicide, the perpetrator was obliged to pay gold coins to the "state" (treasury) and to the victim's relatives for the crime committed. Second Book of the Decretals of King Stephen. Furthermore, the institution of redemption was accepted in the reign of Louis the Great and even during the reign of King Matthias.

[10] The study specifically examines the institution of civil claim in the context of the so-called adversary proceedings in criminal proceedings. Thus, it does not touch upon other forms of compensation for the victim.

[11] F. Finkey , *A magyar büntető eljárás tankönyve. [Course Book of Hungarian Criminal Procedure.]* Politzer Zsigmond és Fia., Budapest, 1903, pp. 156-166.

The legal institution of the civil claim in our domestic criminal procedural law underwent gradual changes and clarifications in the 20th century until its current stage in the 21st century.

In the realization of the state criminal claim, the civil claim arising from the crime committed by the accused on the side of the victim/private party as a direct consequence of the act charged in the specific case is adjudicated by the court in the course of the criminal proceedings.

The regulation of civil claims in current Hungarian criminal procedural law

The preamble of the Law of Criminal Procedure Act XC. of 2017 (henceforth: Be.)[12] 6 places special emphasis on the increased protection of victims of criminal offences and the importance of enforcing their rights. The amendments that have taken place have arguably strengthened the procedural status of victims and the guarantee of their corresponding rights, which has allowed the Be. to systematize these provisions[13]. The above-mentioned provisions also apply to the rules on civil claims by private parties.

The Be. lays down clear, well-defined rules on the possibility of adjudicating civil law claims in criminal proceedings, lists the framework for this and the scope of civil law claims that may be asserted in criminal proceedings. With this system, the Be. has confirmed the legitimacy of the adversarial procedure and made it easier and more effective to use in criminal proceedings.

However, the civil claim is ancillary to the criminal claim. Its function is secondary in the criminal procedure, since its object is to enforce the criminal claim of the state against the civil procedure[14].

The intention to assert a civil claim can be announced by the victim before the indictment. This gives the opportunity to establish the exact content of the civil claim during the investigation, but also to correct it before the indictment, or even to refrain from doing so. [Be. § 355 Art, 355. Be.][15].

The Be. stipulates how long after the indictment the victim can present his civil claim. At the latest at the court of first instance at the procedural act at which he/she could first be present according to the provisions of the Be. If the time limit is missed, no certificate may be issued. [Art. 556 (1) of Be. Subsection (1) of Art. 556. Be.] Therefore, if the victim did not appear at the preparatory hearing, he/she may no longer present his/her civil claim at the trial. The Be. precludes the institution of a certificate in this respect in the event of his failure to appear.

If the private party lodges a civil claim, the criminal and civil consequences of the offence committed against the victim may be determined – jointly – in the criminal

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[12] Date of entry into force: 1 July 2018.

[13] K. Farkas, *A sértett helyzete az eljárás hatékonysága tükrében.* [*The situation of the victim in the light of the effectiveness of the procedure.]* In M. Hollán, K. Mezei (eds.), *A büntetőjog hazai rendszere megújításának koncepcionális céljai és hatásai* [*Conceptual goals and effects of the renewal of the domestic system of criminal law]* Társadalomtudományi Kutatóközpont Jogtudományi Intézet. 2020, p. 64.

[14] A. Kiss, *A sértett szerepe a büntetőeljárásban.* [*The role of the victim in criminal proceedings.]* Országos Kriminológiai Intézet [National Institute of Criminology] 2018, p. 175.

[15] G. Megyeri, *Nyomozás.* [*Investigation*] In P. Polt (ed.) *Kommentár a büntetőeljárási törvényhez. 1. kötet. [Commentary on the Criminal Procedure Code. Volume 1.]* Wolters Kluver, 2018, p. 711.

proceedings. In the adversary proceedings, the private party also assumes the position of plaintiff under the rules of the Code of Civil Procedure against the defendant as a defendant, as if the private party had brought an action before the court.

A civil claim can only be brought before a court, as reflected in the definition of private party. According to it a private party is a victim who brings a civil claim in court proceedings, even if he or she has declared his or her intention to do so before the charge is brought. [Be. § 54 (3) Subsection (3) of Art. 54. Be.]

The Be. adopted the provision of the former Hungarian Be., according to which the civil claim must have a direct causal connection with the act which is the subject of the accusation. This implies, on the one hand, that a civil claim can be enforced before a court – after indictment. On the other hand, it follows that only private law claims closely related to the subject-matter of the case can be brought in criminal proceedings, which are essentially intended to determine criminal liability. Criminal proceedings may be used to seek compensation, restitution of unjust enrichment, cessation of the infringement or the removal of the injurious situation, restoration of the situation prior to the injurious situation or the original situation, or other claims for the delivery of something or the payment of money. Appropriate measures to satisfy these claims can also be found in the Be. (e.g., in the case of harassment, restraining the accused from further infringements by means of a restraining order). The private party has the possibility to lodge, prepare and secure a civil claim during the pre-trial investigation (e.g. by requesting the seizure of the accused's property). Nevertheless, one of the main differences between a civil claim and an asset recovery activity is that the investigating authority does not have an obligation to search for assets in the case of the former[16].

The Be. defines as a new element the scope of application of the Law Code of Civil Procedure Act CXXX of 2016 (hereinafter: Pp.) in the case of the adjudication of a civil claim. [Be. § 555 (1)-(6) Subsection (1)-(6) of Art. 555. Be.]

In order to facilitate the enforcement of a civil claim by the victim, the Be. lays down minimum elements without which the merits of the civil claim would not be adjudicated. [Be. 556 § 556 (2) Subsection (2) of Art. 556. Be.] The Be. also provides for the communication and amendment of a civil claim in this context. [Be. § 558 (1) – (3). Be. § 559 (1) – (2). Subsection (1) – (3) of Art. 558. Be., Subsection (1) – (2) of Art. 559. Be.] In order to ensure that private law claims are judged according to uniform criteria, the Ordinance also applies to civil law claims the provisions of the Civil Code on the types of claim and the cause of action. [Pp. Sections 172-173, Art. 56 (2) of the Be. Pp. 172-173, Subsection (2) of Art. 56. Be.]

In this way, the Be. has raised the professional standards expected of judges in adversarial proceedings, since detailed knowledge of the rules of the Pp. has become necessary in criminal proceedings as well.

The Act states that a claim that cannot be enforced in court cannot be brought in criminal proceedings either. [Subsection (3) of Art. 56. Be.]

The Be. explicitly excludes the assertion of a civil claim in the case of offences against the budget and other offences against the State. In such cases, procedures other than civil court proceedings, in particular administrative, tax and customs procedures, are available. [Be. § 56 (4) Subsection (4) of Art. 56. Be.]

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[16] R. Nagy, V. Vári, *Új irányok a vagyonvisszaszerzésben*. [New Ways in Asset Recovery] Belügyi Szemle. 69(4), 2021, pp. 579-593.

The principle of officiality is impaired in relation to civil claims. The Be. stipulates that the public prosecutor's office may only assert a civil claim on behalf of the victim or join in the assertion of such a claim on the side of the victim, in accordance with the rules of the Pp., in an auxiliary capacity and with limited powers, except in the cases specified in the Be[17].

The Be. maintained the previously known rule that the assertion of a civil claim by other legal means does not preclude the victim from acting as a private party. [Be. § 56 (6) Subsection (6) of Art. 56. Be.]

The court of first instance shall rule on the merits of the civil claim on the legal basis and the amount of the claim. [Be. § 571 (1) – (4) Subsection (1) – (4) of Art. 571. Be.] A further possibility is to order the civil claim to be dealt with by other legal means. [Be. § 560 (1) – (4) Subsection (1) – (4) of Art. 560. Be.] However, the Be. does not provide the court with the possibility to dismiss the civil claim on the merits.

International outlook

The German Code of Criminal Procedure [Strafprozessordnung, (StPO) §§ 403-406c] provides for the possibility of an adhesion procedure for the victim. It can only be used to pursue a civil claim relating to the offence for which no other legal proceedings are pending. The victim's right of petition may relate to any criminal offence. If, on the basis of the outcome of the hearing on the merits, the application for an application for an admissibility order is well founded, the court will grant it in the criminal judgment. The decision may be limited to the legal basis of the asserted claim or to a part of it[18].

The French Code of Criminal Procedure also grants the right to a natural person who is the victim of a criminal offence to claim for direct damage – material and non-material – before a criminal court as a private party (partie civile). [Code de procédure pénale (henceforth: CCP), CCP Article 2, Art. 2 CCP.]. [CPP 4 and 5, Art. 4-5 CCP][19].

The Italian Code of Criminal Procedure [Codice di procedura penale (henceforth: CPP)] regulates the participation of the civil party entitled to compensation in criminal proceedings as a general rule and not as an exception. The rules for joining and the judicial procedure are set out in separate articles. [CCP Articles 74-75, CCP Articles 74-75, CCP Articles 538-539, Art. 538-539 CCP., Herke, 2011, 99.] The victim is obliged to submit the amount of compensation in writing to the criminal court at the end of the trial[20].

In contrast, English law does not give the victim the right to join the criminal proceedings as a private party (partie civile) in the case of a public prosecution. Furthermore, the victim has no formal right to seek compensation. However, courts are bound by ex officio compensation rules[21].

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[17] A. Békés, Sértett. In P. Polt (ed.), *Kommentár a büntetőeljárási törvényhez. 1. kötet* [*Commentary on the Criminal Procedure Code. Volume 1.*] 2018, Wolters Kluver, p.182,

[18] Cs. Herke, *A francia és az olasz büntetőeljárás alapintézményei.* [*Basic institutions of French and Italian criminal procedure.]* PTE ÁJK, Pécs, 2013, pp. 110-111.

[19] Cs. Herke, *A német és az angol büntetőeljárás alapintézményei.* [*Basic institutions of German and English criminal procedure.*] PTE ÁJK, Pécs, 2011, p. 99.

[20] Cs. Herke , 2011, cited, p. 100.

[21] Cs. Herke , 2013, cited, p. 115.

The specific conflict between confiscation of property and the enforcement of a civil claim

It is not in line with the requirements of the rule of law to order confiscation of property (assets) which the offender has acquired through the offence, and which therefore belongs – unlawfully and temporarily – to his property, but which is proven to belong to the victim or to another person.

This follows from settled Hungarian judicial practice. According to this, confiscation of property under the Criminal Code is a measure intended to deprive the State of the property resulting from the commission of an offence and of property lawfully acquired but used or intended for use in the commission of an offence.

Asset forfeiture may not be ordered in respect of property used to cover a civil claim in criminal proceedings. Thus, the prohibition of confiscation of property applies only if the court hearing the criminal proceedings decides on the merits of the civil claim of the victim. However, Paragraph 54(3) of the Be. provides that it does not preclude the enforcement of a civil claim by other legal means if the victim has not been a private party to the criminal proceedings. This may lead to a violation of the prohibition of double deprivation if the victim is a "public body" and the confiscation order in favour of the State governed by criminal law is made after the final disposition of the criminal proceedings, the civil claim is made by the victim "public body" after the conclusion of the criminal proceedings. This is in fact a specific case of a breach of the prohibition of double deprivation. On this basis, if the victim – a "public body" – may be paid twice by the accused person for the property resulting from the commission of the offence. The reason is that the current provisions of the Criminal Code and the Criminal Procedure Code nowadays allow this. In our view, this could have an unintended effect on the rule of law in criminal proceedings, as it is completely contrary to the rule of law and the sentencing of the accused in favour of the State would in particular violate the principle of legal certainty.

If the victim and the victim as a 'public body' do not request that the administration proceedings be conducted and do not assert their civil claim in the criminal proceedings, the imposition and payment of confiscation of assets would risk the accused being liable to pay twice.

This is no longer a quasi conflict of laws, as it is not otherwise a conflict of laws. There is no doubt that the situation created by the legislation under consideration is contrary to the fundamental values of criminal procedure in the rule of law and is unacceptable.

International perspective

For the purposes of our topic, we have reviewed the German Btk. [Strafgesetzbuch, (StGB)]. Section 73(1)(II) of this Act excludes the applicability of confiscation of property if the victim of the offence has a private claim arising from the offence, the fulfilment of which would require the confiscation of the proceeds of the offence from the perpetrator or the participant. In this case, it is irrelevant whether the civil claim is pursued in the adversary proceedings of the criminal proceedings or in civil proceedings, only that there is a civil claim[22].

[22] M. Hollán, 2008, cited, p. 170.

If confiscation has not taken place due to the exclusionary rule of the German Criminal Code, but the criminal proceedings have been completed without the civil claim being asserted, then subsequent confiscation in the criminal proceedings should be allowed for three years. [StPO Art. 111 (4) (i), Subsection (4) of Art. 111. StPO. and Point i).] If the victim has not asserted the civil claim in civil proceedings within three years, the claim shall be vested in the State.

Criminal aspects of the recovery of criminal property

The prosecution and the investigating authority are obliged to take all necessary measures during the proceedings to trace and secure the property or assets that may be confiscated. [Art. 353 (1) of Be. Subsection (1) of Art. 353. Be.] Prior to the indictment, at the request of the prosecution or the investigating authority, the body of the investigating authority responsible for the recovery of property may participate in these tasks.

The body responsible for the recovery of property of the investigating authority shall conduct its proceedings in accordance with the provisions of the requesting prosecution or investigating authority and, in specific cases, a joint investigation team may be established. The member of the investigative body responsible for the recovery of property may carry out procedural acts in order to detect and secure confiscable property or assets, and it shall act in the interests of the investigation and may initiate the procedural act he considers appropriate with the requesting authority. [Subsections (1)-(2) of Art. 354 Be.] Furthermore, the body of the investigating authority responsible for the recovery of property may obtain any information necessary for the purpose of detecting and securing the confiscated property or property. [Be. § 354 (4) Subsection (4) of Art. 354. Be.]

A number of measures are to be carried out in connection with the tasks of securing and recovering property. Pursuant to ORFK Instruction No. 20/2018 (31 May 2018) on the tasks to be performed for the purpose of tracing, identification, and asset recovery of proceeds of crime and other property related to crime:

- during the investigation of a criminal offence generating property, the investigating body must, in order to ensure the enforceability of the confiscation or forfeiture of property, examine the possibility of seizing the property resulting from the offence;
- the victim must in all cases be informed of the civil liability of the victim in order to obtain compensation for the damage caused – in all cases, the victim must be informed of the possibility of pursuing a civil claim in criminal proceedings in order to recover damages,
- in the course of the preparatory proceedings and investigations initiated in connection with a criminal offence generating the proceeds of crime, measures must be taken to obtain information on the assets and income of the perpetrator or of other natural or legal persons or entities without legal personality who have benefited from the proceeds of crime. The mapping of assets must be carried out up to two dates: the date of the commission of the offence or the date of the entry into force of the Criminal Code. 74/A of the Criminal Code.
- if there is a suspicion that the offence was committed by a criminal organization, the search of property must be extended to the entire period of the existence of

the criminal organization or, in the case of a given offender, to the period during which he was a member of the criminal organization. The investigating authority should also identify the suspect's network of contacts and criminal history in order to identify any person who may have been involved in the concealment or management of the property, the way in which they cooperated and the property that was concealed, and to establish the origin of the offender and the fact of concealment.

- in the course of the property search, it is also necessary to obtain physical and personal evidence relating to the acquisition or transfer of each item of property discovered.
- if the legal conditions for confiscation or forfeiture are met, and in order to satisfy a civil claim, urgent measures must be taken to enforce the property measures.
- where an investigation plan is drawn up, it must specifically indicate the measures and procedural steps planned for the recovery of assets. At the end of the investigation, a summary report should state whether any measures have been taken to secure the assets or clearly indicate the reasons for the lack of a search. [ORFK instruction 20/2018 (31.V.) ORFK instruction 20/2018 (31.V.) ORFK instruction] Pursuant to the Instruction, in the investigation of all property-generating crimes, the possibility of deprivation of property resulting from the commission of a punishable act must be examined[23].

However, this also requires monitoring of scientific and technical developments. A major role in this is played by financial profiling and the mapping, understanding and processing of electronic investigation (e-investigation) resources. E-investigation means that the investigating authority requests information from directly or indirectly accessible databases in order to detect and prove criminal activity and to locate criminal assets[24], while applying tactical recommendations to ensure the success of the investigation. E-investigation facilitates the tracing of criminal assets (proof of acquisition of illicit assets) for financial profiling (asset recovery) and the establishment of versions or the verification of established versions for asset seizure and asset recovery[25]. Knowledge of domestic databases and rapid exchange of information and cooperation between Member States are essential for the tracing of the assets of the person concerned[26].

The enforcement of coercive measures is an important element in the recovery of criminal assets. Two categories of coercive measures are distinguished: coercive measures affecting personal liberty and coercive measures affecting property. Coercive measures affecting property include search; search; seizure; seizure under lock and key and temporary unavailability of electronic data. [Be. § 272 (3) Subsection (3) of Art. 272. Be.]

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[23] R. Nagy, V. Vári, *New Ways in Asset Recovery*, In: Jačimovski, S (eds.) *Archibald Reiss Days 2020: thematic conference proceedings of international significance,* Belgrade, 18-19 November 2020, Belgrade, Serbia: University of Criminal Investigation and Police Studies, 2020, p. 247.

[24] G. Gardonyi, *Still Image Face Recognition in Hungary* Belügyi Szemle *68/ 3,* Special Issue Budapest 2020, pp. 22-33, https://doi.org/10.38146/BSZ.SPEC.2020.3.2

[25] E. Nyitrai, *A bűncselekményből eredő vagyon visszaszerzése*, [*Recovering the property resulting from the crime*] Ügyészek Lapja, 2020/2-3.sz., Budapest, 2020, p 51.

[26] E. Nyitrai, *Vagyon-visszaszerzés a szervezett bűnözés felszámolásában*. *[Asset recovery in the eradication of organized crime]* In: L. Frigyer (ed..*): Nemzetközi jellegű szervezett bűnözés nyomozásának kutatása információáramlási szempontból. Tanulmánykötet II.* [*Research on the investigation of international organized crime from the point of view of information flow. Study volume II.]* Nemzeti Közszolgálati Egyetem, [National University of Public Service] Budapest,2018, p.127.

These forms of coercive measures enable confiscation to be effective and the criminal property to be secured. If the offender is deprived of the property acquired through the offence, it is not worthwhile for him to commit the offence and, if it becomes a practice, it is likely to deter economic crime and to protect the interests of the victim[27].

Summary

Constitutional state is the rule of law and is derived from the constitution. The concept of the rule of law cannot be understood without taking into account the existence of the Constitution[28].

The fundamental element of the rule of law is the requirement of legal certainty and the legal, institutional and organizational system which is the guarantee of the rule of law[29].

Legal certainty, which is closely linked to the rule of law, expects the legislator to ensure that the law as a whole, its unified subdivisions and individual rules are clear, unambiguous and foreseeable. It is not only the guarantees of substantive criminal law that derive from the rule of law, but also procedural guarantees[30].

The fundamental elements of the rule of law are, in particular legality, justice, legal certainty, the principle of legality of prosecutorial activity and, last but not least, the requirement of due process[31]. In its preamble, it is stated that the fundamental right to a fair trial must be guaranteed in criminal proceedings for the perpetrators of crimes punishable under the Criminal Code and international law. The principle of equality of arms is an essential element of due process, which has been elevated to an important principle in continental legal systems by the case law of the European Court of Human Rights. A negative requirement in this context is that the prosecuting authorities are prohibited from increasing the disadvantage of the accused. It is also a violation of the principle of due process to require the accused to pay twice the amount of the damage caused by the crime.

In our view, both the German and the Hungarian legislation should clearly and unambiguously state that the prohibition of double deduction cannot be infringed within the constitutional framework of the rule of law. The possibility of the occurrence of quasi-collision permitted by the Hungarian legislation in force – the double deprivation of

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[27] P. Cieleszky , T. Henyecz, C. Horváth, *A vagyonfelderítés lehetőségei.* [Possibilities *of asset detection. Law Enforcement Review,*] Rendészeti Szemle, 2007/1, Budapest, 2007, pp. 32–37.

[28] B. Blaskó, *Jogállamiság – Büntetőjog – Bűnösség.* [*Rule of law – Criminal law – Guilt.*] Kandidátusi disszertáció [Candidate's dissertation], Magyar Tudományos Akadémia, 1994, p.27.

[29] T. Király, *Szemelvények ötven év büntetőjogi és más tárgyú tanulmányaiból. [Extracts from fifty years of criminal law and other subjects.]* ELTE ÁJK Büntető Eljárási jogi és Büntetés-végrehajtási jogi Tanszék. 2005, p. 250.

[30] A. Szabó, *A jogállami forradalom és a büntetőjog alkotmányos legitimitása,* [Constitutional revolution and the constitutional legitimacy of criminal law.] In Németh Zs. (ed.), *Tiszteletkötet Sárkány István 65. születésnapjára [Tribute volume for István Sárkány's 65th Birthday.]*, Rendőrtiszti Főiskola, 2010, p.116

[31] L. Horgos, *A ius puniendi jogállami tartalmának kiteljesedése*. [*The accomplishment of the constitutional content of ius puniendi*]. *Válogatás a DOSz Alumni Osztály tagjainak doktori munkáiból. II. kötet.* [*Selection from the doctoral theses of the members of the DOS Alumni Department. II. volum*e] Doktoranduszok Országos Szövetsége. [National Association of Doctoral Students] 2021, p. 212.

property which has otherwise been unlawfully acquired – must be eliminated, in particular where the victim is a State or budgetary body.

It should also be noted that forensic science and new investigative methods play a significant role in the deprivation and recovery of criminal assets. E-investigation can be considered as a new field of research in criminology, which can contribute to the enforceability of confiscation or forfeiture in the case of a property-generating crime, and to the seizure of the property derived from the crime.

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