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Coercive Conduct in Criminal Procedures

(The Subjects of Secondary Victimisation)

Abstract. This interdisciplinary study shall explore the implications of coercive conduct in the course of criminal procedures, both in the legal theoretical and the practical sense of the term. We shall make a distinction between legal-necessary and illegal-unnecessary coercive conduct and the forms of its implementation. These issues will be analysed in the respective stages of the procedure (investigation—detention—court trial—law enforcement). The study will explore the issue both from the viewpoint of the victim and the parties concerned in the procedure, who are subjected to coercive conduct, furthermore will highlight the major features of the offences affecting them. It shall discuss victimisation catalysts and their functions and finally, assess the ways of reducing the potential of related secondary victimisation.

Keywords: necessary-legal coercive conduct, unnecessary-illegal coercive conduct, necessity, proportionality, the right to command the use of force, secondary victimisation, victimisation catalysts, "velvety" prosecution.

1. The place and role of coercive conduct in criminal procedures

In constitutional democracies, rules of prosecution are set down in writing, both accessible and applicable to all citizens and are implemented in the process of prosecution. These are designated to ensure the lawfulness and fairness of legal procedures, by which crimes are investigated and the penal code is brought to bear against the perpetrators of criminal activities. Procedural rules by their mere existence as directives imply, or at any rate are supposed to imply, a symbolic threat and their role equals that of "the cane on the primary school wall" of old days.[1] In the classroom, the cane occasionally had to be put to actual use, which might also be necessary in the process of prosecution. We cannot claim that coercive conduct is a fundamental prerequisite to all prosecution, but it nevertheless looms in the background and thereby ensures voluntary compliance and peaceful behaviour on the part of the parties

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[1] See, Farkas, Á.: *A falra helyezett nádpálca* (Cane Hanged on the Wall), Budapest, 2002.

concerned against, which, as a potential threat averts the need of taking the cane off the wall in the first place.

Both theoretical and practical research have shown that those, who have committed a crime, either as a consequence of the drive of human nature or in response to their own instincts, will try to avoid the potential of being held accountable for their actions as well as to obstruct the authorities in their attempts to ascertain the facts of the case through comprehensive investigation, to precisely reconstruct preceding events, furnish either damning and aggravating, or, occasionally, exonerating or extenuating evidence and reveal the circumstances linked directly to the act of crime. Such behaviour in a way substantiates the employment of coercion on the part of the authorities. It is no exaggeration to assert that if the threat of coercion and other means of force were eliminated, the implementation of rules of prosecution and law enforcement would not be effective and it would be impossible to guarantee law and order in society.

A further fundamental pillar that substantiates the employment of coercion is the predominance of a high-level interest, namely a criminal-political interest, by which all members of society can demand that efficient law enforcement and enforcement of criminal law be categorically upheld. The force of that belief is so strong that it sufficiently substantiates the employment of otherwise undesirable state–implemented coercion, which can also prevail in constitutional democracies, insofar as it is enforced in full compliance with constitutionally guaranteed rights and within specified limitations.[2]

[2] As Ákos Farkas clearly states, "an efficient judicial system must have effective instruments so as to facilitate criminal investigation and punishment as well as the elimination of obstacles in its path, even without the involvement of the defendant, in order to administer punishment as stipulated by the state. However, the authorities involved in the above system are each led by different objectives, i.e., the police aims to improve crime-fighting statistics, the prosecution aims to win as many cases as possible, the courts aim to conclude as many cases as possible with a minimum level of successful appeals, whereas the penitentiary system aims to guarantee that the period of penal servitude expires with as few problems as possible.

These objectives often clash not only with one another, but also with law. In the interest of achieving their own objectives, the authorities find several ways to interfere with the rights of the individual.

On the other hand, the defendant demands a fair trial and besides the observation of the rules of prosecution, also protection of his rights and a constitutionally valid investigation. Finding the right balance is extremely difficult, a challenge in itself for a court of constitution." Farkas, Á.: Alkotmányosság és büntetőeljárás (Constitutionalism and Criminal Procedure). In: *Kriminológiai és kriminalisztikai tanulmányok* (Essays on Criminology), Vol. 30, 1993. 45.

2. Differentiation between necessary—legal and unnecessary—illegal coercive conduct

In the followings, we will differentiate between legal and illegal (lawful and unlawful or legitimate and forbidden) coercive conduct within the criminal procedure. Legitimate coercive conduct is specified and permitted primarily under the Constitution, furthermore under Act I. of 1973 on Criminal Procedure and other related regulations, such as those governing the police, the border guards, the domestic revenue and customs prosecution authorities as pursuant to Act V. of 1972 on Prosecution, etc. The legal basis of coercion does not in itself justify employment in each case, since that would constitute a serious violation of human rights. Law–enforcement authorities may resort to coercive conduct exclusively with respect to the strictly specified standards of necessity and proportionality.[3] *Necessity* occurs in the event of inevitability and absolute necessity in a situation, which is otherwise unworkable. Whereas *proportionality* requires that the principle of a minimum level be followed, that is to say, the lightest coercive conduct or form of coercion shall be applied in the given situation. The violation of either of the criteria under necessity and proportionality is a serious breach of both the norms specified by the rules of prosecution and the rights of the individual guaranteed by the constitution.

The Act on Prosecution (hereinafter: AP) in Hungary provides that "in a criminal procedure the right of privacy and other rights of the citizen shall be respected, and these can only be limited in cases and in ways as specified herein. In the course of the prosecution the authorities shall ensure that any recourse to force shall not impinge on the rights of the citizen."(Paras. 1–2 of Art. 4.)

Which, in negative terms, implies that any form of coercive conduct, which does not correspond with the criteria above, shall be forbidden. In positive terms, however, it is in compliance with the definition of unlawful coercion as set forth under Para. 8 of Art. 76 of the Police and Criminal Evidence Act of 1984 in the UK. Accordingly, oppression includes torture, inhuman or degrading treatment, as well as the threat of torture or coercion without torture.

[3] These criteria, in view of the fact that coercion features in both, share similarities with the requirements of justified defence, where both the theoretical literature and law enforcement specify necessity, proportionality, directness, direct attack and inevitability as requirements.

3. Features of coercion in the four main stages of the criminal procedure —investigation, confinement under remand, hearing, penalty enforcement

The Act on Prosecution stipulates the task of investigative authorities as follows: "The investigative authorities shall conduct a fast and thorough investigation of crimes and take the necessary steps to call those responsible for crimes to account for their actions." (Para. 1 of Art. 16. of AP) The elements of speed and thoroughness as requirements are also included in the sections of the Act on Criminal Procedure, which deal with the criminological aspects of investigation strategies in practical terms. The so-called *erster Angriff* "first strike"[4] is an extremely important element with respect to the efficiency of the entire criminal procedure. Let us consider, for example, what happens when someone is caught in the act of a crime. Then, the perpetrator is apprehended and brought forth, which is followed by the primary collection of facts and immediate investigative activity such as search of the surroundings, house and body search, arrest and taking into custody. Practically, each phase contains a violation of human rights, and, in cases where resistance occurs, coercion on the part of the authorities and limitation of rights shall be incurred. In the phases mentioned above, the process of apprehension is of special significance, so far as the public and individuals are guaranteed the right to use force in order to apprehend the perpetrator of a crime. In this respect the criteria of necessity and proportionality shall be respected and the right to resort to legitimate coercion shall not be abused, whereas the authorities shall be informed immediately, so that the apprehended perpetrator can be handed over. In practice, that results in numerous conflicts. People, confronted with someone who is emotionally overloaded, generally offended and behaving threateningly towards them, their family, or other people or assets, very often take the law into their own hands and act like judge, jury and prosecutor, and thereby abuse the perpetrator unnecessarily and employ excessive coercion without sufficient cause.

The law-enforcement authorities themselves have also been noted to occasionally resort to excessive coercive conduct. Despite the two–century–old principle that an individual is innocent until proven guilty, some are subjected to unjustified and illegitimate coercive conduct on the grounds of "presumed

[4] Tremmel, F.–Fenyvesi, Cs.: *Kriminalisztika tankönyv és atlasz* (Manual and Atlas of Criminology). Budapest–Pécs, 1998. 242.

concealment of guilt",[5] because of a "passion for the hunt", even in order to create a distorted statistical profile of efficiency. Coercive conduct can take physical or psychological form, or a combination of the two. It appears in its most varied forms at the beginning of the procedure, i.e., threatening with arrest, threats with respect to the children, the family or the workplace of the individual concerned, physical assault, to list just a few examples.

In view of the fact that the investigation is confidential by nature, and therefore secluded from the public domain, the instruments of coercion and instances of multiple limitations on rights may all substantiate serious cases of human rights violations, i.e. conditions of detention,[6] custody,[7] temporary enforced displacement, which demonstrate both the extent to which law enforcers are able and willing to abuse the law and that they are in a position to do so. In a survey of the Hungarian files on ill–treatment during official procedures, we see that in nearly every case such an ill–treatment occurred either in the phase immediately preceding the criminal procedure or during the initial investigative phase, frequently during investigations by the police. In

[5] See Farkas, Á. –Pap, G.: Alkotmányosság és büntetőeljárás (Constitutionalism and Criminal Procedure). In: *Kriminológiai és kriminalisztikai Évkönyv* (Yearbook of Criminology). Budapest, 1993, 45.; Skolnick, J.: *Justice Without Trial*, New York, 1994. 112; Szikinger, I.: Az ártatlanság vélelme — alkotmányos alapelv (The Presumption of Innocence—A Constitutional Principle), *Belügyi Szemle*, 1989/3. 8.

[6] The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment implemented inspections in Hungary in 1992 and 1994. According to the report of November 1994, the danger of abuse in custody shall be reduced if it is stipulated under a provision that those taken into custody may notify relatives and request a doctor or lawyer immediately after taken into custody… The Report of the Committee stressed that individuals shall be entitled to the above rights from the very moment of the outset of custody at a police station, and that, in any case, where a limitation of these rights occurs, the authorities shall justify the necessity of such limitation in writing. It is also deemed necessary that such measure shall be authorised by a lawyer or judge, who would also be responsible for the stipulation of the precise duration of the limitation." For further details, see the report, *Összefoglaló tájékoztatás az Európa Tanács Kínzás Ellenes Bizottsága (CPT)* [Information on the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of the Council of Europe (CPT)], *Kriminológiai Közlemények*, 1996/53. 50.

[7] For further details on the anomalies, see, Herke, Csongor, A letartóztatás (Arrest), Budapest–Pécs, 2002. 1–366, and, Róth, E.: Emberi Jogok kontra fogvatartás a büntető eljárásban (Human Rights versus Detention in the Legal Procedure), *Acta Humana*, 1995/20. 3–87.

other words, the authorities employ illegitimate coercion[8] in the expectation of greater criminological and procedural efficiency and attempt to reveal facts of the case at a time when no counsel for the defence is present.

Instances of unlawful coercive conduct against the perpetrator are uncommon in the second phase of the criminal procedure, i.e. during confinement under remand, when it is the public prosecutor, who decides what direction the process will take and in the preliminary phase of the trial, when documents are examined by the court. In that phase, contact both with the parties concerned in the trial and the defendant occurs only in exceptional cases.[9]

In the third phase of the criminal procedure, that of the court trial of the first and second instance and the remedial phase, both the judiciary and the principal judge have the right to command the use of force, take a person into custody, have a person expelled in the time of hearings or removed from the building, etc. Instances of illegitimate coercive conduct might include cases when the trial judge hears the witnesses in an excessively authoritarian style reminiscent of the mode of interrogation. Which, as a conduct, is expressly coercive, excessively constraining, we could say, violent behaviour on the part of the judge, who, faced with a situation where the defendant refuses to offer evidence, launches an interrogation about the underlying reasons for this stance and bombards the defendant with questions concerning the merits of the case. Defendants, who refuse to offer evidence, must not be asked questions, since that equals coercion to offer evidence. Any intent on the part of the judge to do so, either implicitly or explicitly, constitutes illegitimate coercion, which further exacerbates the case of the already "enormously disadvantaged defendant".[10]

The fourth phase of the criminal procedure, separately regulated, is that of punishment. The defendant now has the legal status of a convict, and as such,

[8] On the subject of coercive conduct against the perpetrator under remand in the investigative phase, we note that in the United States "the Miranda verdict established a practically unshakeable presumption, when it deemed the interrogation of the person in custody to be *ab ovo* coercive conduct, against which the defendant is entitled to protection by law." Grano, J. D.: Miranda's Constitutional Difficulties: A Reply to Professor Schulhofe. *The University of Law Review*, 1988/Jan. 174–178, quoted in: Szikinger, I.: Miranda-ügy (Case Miranda), *Belügyi Szemle*, 1990/3. 111–119.

[9] During the phase of the confinement under remand, the public prosecutor is liable to interrogate the accused held in custody, therefore contact can only occur on that occasion, but in that respect, I haven't encountered instances of illegitimate coercive conduct either in legal literature or my survey.

[10] Tremmel, F., *Magyar büntetőeljárás* (Hungarian Criminal Procedure), Budapest–Pécs, 2001. 95.

is even more unprotected and vulnerable. In the confined and strictly ordered prison environment, the convict can only maintain sporadic contact with a lawyer, provided that he/she has one, whence the assumption of innocence until proven guilty is no longer valid, since a verdict has been brought under full force of the law. The potential for reversal on appeal is slight and the trial judge does not allow for the principle of *contradictorium*. The "guardian" of the rights of the convict is the public prosecutor, who has afflicted the status of the convict by seeking a verdict of guilty, now acts as a guardian of justice. An institution, in which external regulation practically hardly ever interferes, the defendant can suffer legitimate and illegitimate coercion in countless ways.[11]

4. The recipients of secondary victimisation 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 coercion. As the terms themselves suggest, both the victim of the crime and the witness can appear on the receiving end of coercive conduct within an investigation. Special attention needs to be given to the situation of the victim, who has to undergo voluntarily the tribulations of the whole procedure, besides having suffered unlawful violent attacks against his or her person, rights or property. Coercion can inflict injuries in several ways and cause different forms of damage, be it emotional, physical, financial, enduring, etc. Therefore, different forms of coercion have sweeping effects and combined with the indiscretion, insensitivity and the humiliation involved in the serial interrogations by the incompetent and rough police officers (or other authorities), who are often biased and prone to treat victims and witnesses, as if they were suspects themselves, their situation is merely exacerbated.[12] The severity of occasional medical examinations, the tension caused by the ever-present procedural bureaucracy and the depressing impact of force only adds to the above. In that respect, young people and children as those with vulnerable or damaged emotional development, who are particularly exposed to victimisation at the hands of the seeming

[11] The prevalence of human rights violations in the punishment phase is demonstrated by the fact that the European Court of Human Rights received 40% of the complaints from those held in custody. Vókó, Gy.: Az elítéltek jogi helyzetéről, mint reszocializálásuk kiinduló pontjáról (The Legal Status of Convicts as a Starting—Point of their Reintegration into Society), *Jogtudományi Közlöny*, 1989/12. 626.

[12] This observation is supported by the fact that police interrogation rooms are frequently papered with photographs of naked women, often pictured in bizarre poses or with men, and female victims of sexual assaults may also be interviewed in such a room.

omnipotence of the grown-up authority deserve special consideration. In such cases, in view of the age of those concerned, the authorities shall ensure that it is not the standard interrogation procedure that shall be applied.[13]

Usually five to seven witnesses are called in the course of a trial, and they, too, can become victims of both kinds of coercive conduct. They can be forced to attend the trial, be subject to various investigations and confined to a particular place, etc.[14] Simultaneously, they can become the victims of illegitimate threats and coercive conduct, in view of the fact that effective law does not allow them to engage a counsel.[15]

Others who may also endure coercive conduct are victims of confiscation, who themselves are neither defendants nor witnesses to an act of crime. Here, we could refer to the shocked owner of a second–hand car, who discovers that it is just being forcibly confiscated by the authorities due to its former involvement in an act of crime (theft, smuggling, etc.).

5. Victimisation catalysts and their functions

The harmful effects of coercive conduct, be it legitimate or illegitimate, employed by the authorities can be mitigated both by authorities within the institution of the Hungarian Prosecution Service and by independent individuals and organisations. These, in my view, include the agents of law enforcement (the head of the investigation, the prosecuting attorney, the judge), the defence counsel, and individuals and organisations, such as the Constitutional Court, the ombudsman, and various organisations for the protection of the rights of individuals, such as the Helsinki Convention. All these parties, especially the prosecuting attorney, who is designated to a special status, are obligated to safeguard against coercive conduct and secondary victimisation by the authorities. In the former case, they are in a position to influence the way of proceedings, however, in the latter case they cannot be of

[13] Such a case is both distressing and, from a criminal–strategic point of view, abhorrent as a model, when a child or a juvenile is forced to furnish evidence as a witness against a close relation, for example, the father, who sexually abused them, but denies that.

[14] According to Para. 3 of Art. 4. of the Act on Criminal Procedure "the authorities shall be liable to inform the parties involved in the procedure of their rights and remind them of their legal obligations." Witnesses often get the impression that the latter is overemphasised.

[15] This is due to be amended as of July 1st, 2003, when the new Act on Criminal Procedure will guarantee the witness the right to engage a counsel.

assistance, since victimisation usually occurs close to the act of crime in terms of time and place, which implies that the authority is not present. Since the role of the defence counsel in the investigation is restricted, in that respect s/he is insignificant. Furthermore, empirical studies dating back several decades have shown that barely a third of defendants receive the formal protection of an attorney, and that two-thirds of these attorneys are publicly appointed. Thus, a mere ten per cent of all defendants receive a form of "effective" defence as stipulated under the European Convention and Court of Human Rights.[16]

The struggle of independent organisations to safeguard against coercive conduct can become effective only after the respective incident occurred and shall only affect the situation of victims and perpetrators after a series of stages. Therefore, it is less effective than the implementation of internal "catalysts" in the investigation process itself.

6. Potential ways of the reduction of cases of coercive conduct in criminal procedures and of secondary victimisation

Since in my view both the distortion of legitimate coercive conduct and unlawful coercive conduct have the same origins, they can be redressed in the same way, not only by the removal of those who employ coercion, among them detectives and investigators, but also of those in the field of penalty enforcement. It is precisely the preparedness and competence, experience and self-confidence of the officers concerned that needs to be established, built up and relied on.

The requirements above can be met on condition that a particularly competitive admission system is established, in which through the examination of personality traits, candidates and employees with an aggressive disposition and a lack of self-control shall be rejected or dismissed. Successful candidates would also need to demonstrate advanced knowledge of legal texts and an ability to enforce them, as for the management of police documents and

[16] For further details, see Nagy–Szabó, Th.: *A vétségi nyomozás a gyakorlatban* (Investigation of Crimes in Practice), *Belügyi Szemle*, 1983/10. 28.; Tóth, M.: Nyomozás és védelem (Investigation and Defence), *Magyar Jog*, 1989/4. 350; Kiss, A.: A védő szerepe a büntetőeljárásban (The Position of the Attorney in the Criminal Procedure), *Kriminológiai és Kriminalisztikai tanulmányok XXVIII.* Budapest, 1991. 177.; Fenyvesi, Cs.: *A védői jogállás empírikus vizsgálat tükrében* (The Legal Status of the Attorney for Defence in View of Empirical Study), *Belügyi Szemle*, 2001/2. 37. and, A kirendelt védői intézmény problematikája (The Problematic of the Institution of the Appointed Attorney for Defence), *Jogelméleti Szemle*, 2001/4.

criminal procedures, as well as knowledge of criminology, i.e., strategies and techniques as contained by criminal methodology, psychology, i.e., the psychic implications of criminal imprisonment, furthermore, conflict resolution.

Within the scheme of criminal procedure, it is a major imperative that the role, presence and significance of the "catalysts", especially of the authorities in charge, i.e. the defence and prosecution attorneys, be highlighted both from a theoretical and a procedural standpoint.

Summary

Finally, we wish to add a few closing remarks as a conclusion.

The practice of criminal procedure shows that the legislative threat ("cane on the wall") is in itself ineffective in terms of the desirable objectives of law enforcement and crime prevention. Therefore, legitimate coercion and measures of force (the use of the cane) are admissible. The criminal procedure in itself is a repository of force, pressure and constraint, so "velvety" prosecution as such is inconceivable, at best, it is considerate. The truth of this statement is most conspicuous in cases of organised crime, where the parties involved are not reputed for being overly scrupulous in their choice of methods and instruments, yet, the constitutional and legal limitations must not be transgressed. Coercive conduct cannot be high-handed, autocratic, excessive or disproportionate, either in degree or in time, legislators and law–enforcement authorities must maintain a delicate balance between permissible coercive conduct and the due respect of human rights of the defendant and other parties concerned in the case.

As we've pointed out in our study, it is not only the defendant who, as a "main character", is forced to suffer and endure legitimate coercion in the course of the criminal procedure. Other parties also undergo similar treatment, whilst also, unfortunately, may be subjected to contingent illegitimate coercive conduct. Ill–treatment by the authorities can at times have such a great impact that it by far exceeds the disadvantages suffered by the already injured person as a consequence of an act of crime. Which is both highly damaging and constitutes persecution. Secondary victimisation is a real phenomenon in Hungarian prosecution and its prevention should be both a priority and an imperative for all legislators and law enforcement agents, as well as for official and non–official "victimisation catalysts."