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dr. Livia Gergi-Horgos
Assistant lecturer
National University of Public Service
Faculty of Law Enforcement (Hungary)

EXAMINATION OF THE LEGAL HISTORY OF THE DEVELOPMENT OF PUBLIC PROSECUTION IN THE PROCESS OF IUS PUNIENDI BECOMING A STATE MONOPOLY

Introduction

The legal historical background in different ages and culture of the development of charges and its forms as the basis for criminal procedures and the legitimacy of the accuser's law are indispensable requirements regarding the analysis and examination of legitimate public prosecution ensuring the relativisation of ius puniendi as a state monopoly.

1. The pre-history of criminal justice and the birth of private prosecution

The criminal justice of the state (suprema criminalis jurisdictio) the modern criminal law and the law of criminal procedure evolved during the course of history.

«During the early years of human civilization criminal justice was non existent due to the primitive nature of social institutions and the lack of judicial

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authorities. The violation of the law was retaliated by private revenge or blood feud.»[1] Anyone who was offended could take revenge, which was unlimited, and was defined by the temperament of the injured party and his vengefulness. A higher stage of development is the blood feud or vendetta, when not the injured party but his or her relatives, tribe or clan took revenge. «… If the violation of the law took place between parties belonging to different tribes or clans the vendetta prevailed for a long time – due to the lack of adequate ways of revenge – thus the first form of justice appeared among people from the same tribe or clan.»[2] Realizing the harmful consequences of revenge and vendetta led to the limtitation of these forms of retaliation, thus when the community, the clan started to regulate and limit blood feud the private criminal justice took shape. The injured party due to his weakness, respect or trust «turns to the common leader instead of taking revenge and prompting this leader to investigate the case and deliver justice. It is doubtless that lodging a complaint preceded the organization of the courts.»[3] According to Faustin Hélie «This claim created the judge.»[4]

In primitive communities after the dissolution of clan system the institution of the talio (ius taliones) slowly takes shape and becomes common in slave states. It means the right to the retaliation of the same excess «eye for an eye» and a jurisdiction based on this principle. The constitutionalization of the penal law was based on the principle of compositio, the principle of redemption, which means the financial compensation of the injured party in exchange for its renunciation from retaliation. The injured party does not take revenge in exchange for a certain compensation or blood money, some part of which, or later the whole amount is the legal due to the leader or the king. The institution of retaliation took shape in the slave states in ancient times and developed during the early Middle Ages. «The redemption gradually developed from blood

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feud, the talio, and existed parallel with it, later became less dominant and due to the strengthening of the penal law of the state – when both the offender and the injured party had to accept the offered peaceful measures, as the court helped and was able to help the injured – it changed in most countries, became exceptional, or was limited to the area of private law.»[5]

In Greek law or in the early phases of Roman law – as well as in ancient German and Frankish public law – the pure accusatorial law prevailed. The sine qua non of the judicial procedure was that the injured party had to make an accusation and ask for a judgement from the court, the prosecutor, the «dominus litis» was the sole person in charge of the case. If a criminal act had any connection to public law it was only second to the violation of private interests. The judge could not interfere in the argument between the accuser and the accused. He could decide at his discretion unbiased and impartially on the result of the pleading as the procedure was not regulated. The process was oral, direct and open. The process of evidence took place in the court. The accused could defend himself free amd was an equal party to the accuser, thus constituting the equality of the clients.

Jenő Balogh expert of modern criminal justice emphasized that «notice that the early forms of criminal justice included all basic elements of the system of accusation. The judge delivered a verdict in case the injured party presented an indictment. The accuser is the sole master of the charge without any restrictions similar to any private law charges».[6]

It was always the individual that presented the case, the institution of the public prosecutor was unknown. There was no professional accuser. The injured party only wanted to be compensated for, and if he came to an agreement with the perpetrator, or he failed to present an indictment the just need for punishment could not be realised. In the case of pure accusatorial system the

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procedure ex officio did not exist as it was private prosecution basically. In case of more serious crimes the claim of the accuser contained private and public injuries and he had to enforce the penal claim of the private party and the state as well when presenting an indictment. It can be concluded that criminal procedure was defined by the pure accusatorial principle until criminal offences were regarded not to infringe and endanger the interests of the state and the enforcement of the punishment was up to the injured party.

2. The most common forms of public prosecution until the birth of the mixed system in the 19th century

During the course of history when certain criminal offences were regarded to violate public law, the system of private prosecution could not fulfill the legal requirements of the state and the society a certain form of public prosecution took shape. In classical Greek and Roman law the citizens' general right of indictment the «actio popularis» evolved. In this case the enforcement of the punishmnet against perpetrators was the right and duty of the citizens.

In Athens «Any citizen could present an indictment, the accused could defend himself either personally or by a defender»[7]. In criminal cases public meetings or tribunals elected by them acted as a jury.

According to Roman law it was the right and duty of any citizen that in case of «delicta publica»[8] – if he learned about it – to contribute to the enforcement of the right of punishment of the state either as an accuser or the representative of the accusation as every citizen was part of the state power and was thus obliged to act against criminal offences against the state. It was the legal right of citizens older than 17 with impeccable conduct of life, but in front of public meetings only citizens with senior position could act as accusers. The private prosecution «delicta privata» also prevailed. In case of private criminal

offences the accuser could be the injured party, or the parent, or the guardian, and if the injured party was a slave his master, who could decide on the charges and came to an agreement with the accused.

During the era of the kingdom and the republic no criminal procedure took place without an accuser. The Roman citizen had to collect the evidence. In case of «delicta publica» he took an oath to represent the charge until the verdict was delivered, thus he could not withdraw from the prosecution without the consent of the court otherwise he was punished [9].

Due to extremely serious and more widespread criminal offences the Roman senate delegated officers as prosecutors during the era of the kingdom and the republic. It constituted ex officio procedures, which limited the general right of indictment of the citizens. «The questores parricidii» [10] and «the duumviri perduellionis» [11] investigate and present indictment ex officio in all cases relegated to them. The procedure in front of the questio is according to the charges and similar to modern procedures in front of a jury»[12]. According to Ferenc Finkey the main principles of the procedure are the following ones: 1. actio popularis (every citizen can act as a prosecutor) 2. principle of disposition (the accuser can withdraw the case and the accuser can discontinue the case by voluntary exile) 3. the freedom of defence (also by a defender) 4. the free evaluation of evidences [13]. Although the right of punishment of the state could not be realised since due to the growing burden of indictment and representation on the citizens, and their personal interests as well the charges were not brought in cases of public interest.

During the era of empire the principle of investigation became more and more decisive. The publicity was limited, the written form and torture were introduced. According to Jenő Balogh «the noble acts on behalf of the common good became dangerous weapons of selfish interests and aims in most cases due

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to the abundant corruption in the last few centuries of the empire. Especially during elections the right of indictment was abused, the greed resulted in actions, which aim was to obtain the wealth of well to do citizens by unsubstantiated charges. It was the sad epilogue of the degeneration of actio popularis!».[14]

The institute of actio popularis in England must be emphasized. It is based on the principle that the English constitutional law when regulating laws always took into consideration the principle that English citizens should take part actively in public affairs. As retaliating offences was considered to be the task of the state it meant that in case of public indictment and representation every citizen had the right to indict. It is the right and duty of the citizens to act in case of any criminal offences, and the same is valid for certain companies and associations [15]. The charges were brought in the name of the monarch, thus in English criminal procedures private indictment is unknown. «In England public indictment is actio popularis» [16]. The English actio popularis was not based on a pure system of indictment, during its history it contained parts of a system of investigation. Real investigative system and public prosecution did not exist until the end of the 19th century.

Based on the accusation of the private prosecutor the magistrate heard the «private prosecutor» and could order him to appear in front of the grand jury and draft the bill of indictment and present it. The role of the private prosecutor finished at the start of the hearing before the grand jury since he was only present at the hearing or could be questioned as the first crown witness but he could not make an argument [17]. The grand jury – consisted of 12-23 members – heard only the witnesses of the accuser and not those of the accused, furthermore the accused was not present at the hearing and a defender was not provided either. From the 13th century investigation and indictment was done by

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the indictment jury, but the petty jury decided on the acceptance or the refusal of the bill of indictment with the help of a judge [18].

At the hearing in front of the petty jury – which was held following the decision of the indictment jury – the attorney was the representative of the charge, who was not the agent of the private accuser but a public appointee. Thus the English actio popularis was equal to the right of accusation and the obligation of testimony [19]. In many cases the English police authority acted and investigated ex officio for inxample in cases not causing death when the police investigator represented the charge. The magistrate (in case of mutiny, and false testimony), the coroner (suspicious or not ordinary death) or public officer (malfeasance) could also act ex officio. The indictment jury acted and presented indictment when it was informed about a criminal offence but there were no private accusers and no one else presented a bill of indictment [20].

«From the 17th century it has been the duty of any individual acting on behalf of the charge to present a bill of indictment to the grand jury against the accused. This duty was eased during the reign of George V and Queen Victoria when according to a law of five counts the prosecutor was helped by civil servants and the authorities in representing a charge, and compiling a bill of indictment, furthermore the costs of the indictment was covered partly by the Treasury and partly by the county [21]. But it can be stated that the accuser was not the master of the charge, if he withdrew the charge a new accuser took over following the ruling of the court.

In England as early as in the 15th century there were efforts to create a permanent public prosecution authority, namely the «Attorney General» [22].

He could act without the decision of the indictment jury in cases of crimes against the state. « In 1824 the total lack of a responsible public prosecutor was considered as an anomaly of the system and after many failed attempts the office

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of the «Director of Public Prosecutions»[23] (DPP) and a department employing about 80 lawyers were created in 1879. The DPP – who acted under the superintendence of the Attorney General according to the law – was appointed by the Minister of Home Affairs. The officers of the courts were obliged by the law to inform the DPP if a case was too slow, the charge was handled unprofessionally ar withdrawn. In these cases the DPP had to intervene, he could take over the charge, make adequate proposals or give counsel and information to senior police officers, officers of the court or others considered relevant in the case». [24]

According to contemporary special literature the office of DPP could not be generally accepted because it was not responsible to the Parliament, and he was not obliged to continue the charge and his withdrawal of the charge meant the power of pardon, which was solely exercised by the crown or the responsible minister out of public interest in very few cases. [25]

His office was cancelled in 1884 and his competence was transferred to the Solicitor of the Treasury, the legal representative of the ministries.

As Jenő Balogh stated in connection with English actio popularis «the duty of public prosecution was not carried out solely by the citizens in England. In public affairs state authorities acted, and although there was no organized prosecutor's office the representation of public charges was taken care of considering the special English conditions» [26].

During the course of legal history private prosecution became less dominant as the importance of public prosecution got more prevalent. It led to the development of the office of public prosecution in Europe, except in England. Until the end of the 19th century it was France where the classical institute of public prosecution developed with the monopoly of indictment. It was always a problem whether the permanent state authority of public

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prosecution could have exclusive right to represent public indictment or in some special cases the injured party could also represent charges. Should a restricted form of private indictment remain? It developed differently in the European countries, buti t did not cease to exist as an institution legitimizing private prosecution. In French law however «the legitimacy of private prosecution was not recognised»[27].

In Europe the investigative system developed more slowly in secular law than in church law. In France as a result of canonic law and the strenghtening of the royal power the rules of inquisitorial procedure appeared in the judicature in the 13th century during the reign of Luis IX and XI. It was the right of the officers of the king to start a procedure following a plaint (plainte), which functioned as a charge. It became more dominant that offences violated public interests and the punishment had to be deterring. The royal courts acted even if the perpetrator did no take part in the process voluntarily. The oral form was succeeded by the written form, secrecy and the gradual limitation of the defence. The material of the evidentiary procedure was obtained ex officio, torture was employed and the judge ordered the detention of the accused at the beginning of the trial. From the Middle Ages until the 15th century French citizens had the right to accuse. During the era of feudal absolutism this right was pushed into the background and the absolute power of the monarch led to more or less high-handedness in criminal justice. The office of public prosecution was formed from the attorneys of the King [28] and was called «ministére public» and acted prallel with the private party in accusations. During the 15th and 16th centuries the royal power curbed the power of the public prosecutor’s office contrary to the competence of the court. This time the public prosecutor only supervised and not directed the process. The competence of the public prosecutor’s office was enlarged by Luis XIV in 1670 by «Ordonnance criminelle», which strengthened

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the investigative system. The 8th article of the third title of this law stated – […] albeit indirectly, it inspired the codexes of criminal procedures in the continent in the following three and a half centuries» [29] – that lawsuits had to be started following the initiation by the prosecutor of the monarch. The role of the office of the public prosecutor became more important in the 17th century, when it could initiate investigation, collected the evidences, proposed the use of the law and exercised his functions in connection with public prosecution.[30] The judge was allowed to start a procedure following his own decision, he was not bound to the public prosecutor as the judge had the same rights out of public interest as the rights of the public prosecutor, thus he could mend the deficiencies of the charge. For example if the public prosecutor did not icrease the punishment it could be done by one of the judges of the court of the second instance.

«At the beginning of the 18th century the ministére public became the sole representative of the charge, the principle of the monopoly of charges became prevalent, according to which law enforcement is exclusively the task of the state, which is carried out by an authority organised specially for this purpose. The authority of the public prosecutor thus developed as part of the office of the General Prosecutor, which is contained in the Codes of 1791 and 1808, and a public prosecutor organisation was set up to prepare legal processes and even control judicature.»[31]

Torture was abolished in the 18th century and ministére public was dissolved by the law of 1791 by dividing its competence between the «commissaire du roi» [32] and the «accusateur public.»[33] The law of 1808 ensured the principle of free defence, oral procedure, directness, publicity and free pleading only at the main hearing contrary to the law of 1791, which ensured these during the whole process. It abolished the indictment jury, which

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was introduced by the law of 1791 after the English fashion. The shortened preliminary proceeding was regulated according to the «Ordonnance criminelle» from 1670. It introduced the secrecy of investigation and indictment and the written form thus ensuring the authoritative function of the public prosecutor and the magistrate during the course of investigation and indictment.

The legislation of the first decades of the 19th century France with its mixed regulation became decisive in the laws of criminal procedure in continental Europe.

3. The relationship of the power of the state to punish and the principle of legality through the institute of public indictment until ius puniendi becoming a state monopoly

The general right of the citizens to indict is contrary to the indictment monopoly of the public prosecutor, when the citizen's right to indict is excluded. It goes back to the theory that the implementation of the punishment of acts violating law and order is the task of the state, thus a separate and permanent authority to represent the charges was inevitable. Criminal law became more and more part of public law since the Middle Ages, and in Modern Age the state has the right to punish the perpetrators. The principle of legality defines the obligation of the punishing power of the state during the criminal procedure. It means obligation for law enforcement authorities, public prosecutors to enforce punishment and apply criminal code.[34]

In fact the right to punish became a state monopoly in the 19th century. Its development defined the expansion of public prosecution in Europe in the 19th century resulting in the creation of the office of the public prosecutor by the state in order to indict and represent charges.

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One of the leading law scholars of the age Jenő Balogh wrote the followings: «As criminal law was more and more decided by public law, and the task and obliogation of the state to ensure law and order and retaliate criminal offences is acknowledged, it is easy to explain why permanent institution of public prosecution was installed in almost every country in Europe parallel with the diminishing of investigative systems and accepting the mixed system resulting in the exclusion of private prosecution int he process.»[35]

Closing remarks

This short investigation in legal history demonstrates the role and importance of public prosecution in the the relativisation of ius puniendi as a state monopoly. As ius puniendi is a decisive factor of public prosecution evolved from private prosecution, which ensures the creation of conditions required in order to punish criminal offences, the legal public prosecution also influences the legal implementation of the state's right to punish. Ius puniendi, the right to punish is a state monopoly in our time restricted by constitutional limitations. Its essence was formulated by the Constitutional Court: «in a democratic, constitutional state ius puniendi is a constitutionally restricted right of the state to punish perpetrators. In this system of criminal law criminal offences are regarded as violations of the law and order of the society and the right of punishment is exercised by the state. Crimonal offences can cause private injuries, but their evaluation as violating the society and its order led to the punishing right of the state, the state's monopoly to punish. The exclusive right of the law enforcement is the obligation to enforce the right of punishment. It is reflected in the principle of criminal procedure enacted ex officio»[36].

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9. Balogh Jenő – Edvi Illés Károly – Vargha Ferencz: (1898): i.m. I. p. 37.

10. Homicide

11. Treason

12. Finkey Ferencz: (1903): i.m. p. 13.

13. Finkey Ferencz: (1903): i.m. p. 13.

14. Balogh Jenő – Edvi Illés Károly – Vargha Ferencz: (1898): i.m. I. p. 38-39.

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15. They were associations, but their members acted as private persons.

16. Balogh Jenő – Edvi Illés Károly – Vargha Ferencz: (1898): i.m. I. p.43.

17. Finkey Ferencz: (1903): i.m. p.116.

18. Angyal Pál: Magyar büntetetőeljárásjog tankönyve, Athenaeum irodalmi és nyomdai R.-T kiadása Budapest, 1915. I. p. 22.

19. Finkey Ferencz: (1903): i.m. p. 116.

20. Balogh Jenő – Edvi Illés Károly – Vargha Ferencz: (1898): i.m. I. p. 41.

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22. Attorney General

23. Director of Public Prosecutions

24. Bócz Endre: A Magyar Köztársaság Ügyészsége és az Alkotmány, Magyar Jog, 2011/3. p.136-145.

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31. Finkey Ferencz: (1903): i.m. p. 117.

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Гергі-Хоргос Лівія

Огляд історії розвитку прокуратури в процесі становлення ius puniendi державною монополією

У статті розглядається передісторія кримінального правосуддя, розвиток обвинувачення і його форм, найбільш поширених типів підтримання публічного обвинувачення з особливим акцентом на монополію обвинувачення прокурора через авторитет держави у кримінально-правових відносинах і принцип законності.

Ключові слова: державне обвинувачення, державна монополія, прокурор, ius puniendi.

Герги-Хоргос Ливия

Обзор истории развития прокуратуры в процессе становления ius puniendi государственной монополией

В статье рассматривается предыстория уголовного правосудия, развитие обвинения и его форм, наиболее распространенных типов

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поддержания публичного обвинения с особым акцентом на монополию обвинения прокурора через авторитет государства в уголовно-правовых отношениях и принцип законности.

Ключевые слова: государственное обвинение, государственная монополия, прокурор, ius puniendi.

Livia Gergi-Horgos

Examination of the legal history of the development of public prosecution in the process of ius puniendi becoming a state monopoly

This paper deals with the prehistory of criminal justice, the development of charges and their forms, the most common types of the representation of public prosecution with special emphasis on the monopoly of charges of the public prosecutor through the criminal authority of the state and the principle of legality.

Key words: public prosecution, state monopoly, public prosecutor, ius puniendi.

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