Notes and references

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[5] Szlemenics, Pál: *Fenyítő törvényszéki magyar törvény [Hungarian Penal Court Law]*, Buda, 1836. Magyar Királyi Egyetem, 137.
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[7] Some authors have detected acts in the decrees of St. Stephen [Szent István] and St. Ladislaus [Szent László] that may be regarded as the predecessors of fraud. Madai, Sándor: A csalás tényállásának hazai előképei az államalapítástól a felvilágosodás koráig [Hungarian preliminaries to the statutory offence of fraud from the foundation of the state to the Enlightenment]. *Jogtörténeti Szemle [Review of Legal History]*, No. 4, 2009. 17–20.
[8] Béli, Gábor: *Magyar jogtörténet. A tradicionális jog [Hungarian Legal History. Traditional Law].* Budapest–Pécs, 2000. Dialóg Campus Kiadó, 193.
[9] Sándor Madai – in the wake of Tivadar Pauler and Pál Angyal – mentions only two "fraud-like crimes": masquerading and blood denial, although he intentionally disregards wrongs of private law character. Madai 2009. 18.
[10] Werbőczy István Hármaskönyve *[Tripartitum]*. I. 36., I. 37. § 9, I. 38., I. 39., I. 71., I. 86., I. 123., I. 125., II. 14. § 81, II. 15. § 2, II. 16., I. 24. § 7, II. 29–30., II. 70., 80. § 4, II. 83. § 4–5, II. 74. § 8, § 11.
[11] *„suum nomen in hunc finem periculose cummodant, ne verus contrahens sciatur, et sic tertiusdecipiatur, ac damnum patiatur"*
[12] *Praxis Criminalis* Art. 87., 88., 89.
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[20] Bodo 1751. 314.
[21] *„Falsi autem Crimen est dolosa veritatis immutatio, vel suppressio, in alterius damnum et praejudicium facta, Publico Jure poenaliter prohibita. Seu, Falsum est, quod animo corrumpendae veritatis, in alterius fraudem seu perniciem, dolo malo fit."* Ibid. 300.
[22] Articulus XCII. *De falso Judice, Procuratore, Testibus et Delatoribus.* Ibid. 302.
[23] Articulus XCV. *De Falsarum literarum, Sigillorum et c. Confectoribus.* Ibid. 307.
[24] Articulus XCVI. *De Iis, qui Libram, Pondus, Ulnas, Mensuras, Merces, et alias Res falsificant.* Ibid. 310.
[25] Articulus XCVII. *De Larvatis Personis.* Ibid. 311.
[26] Ibid. 314.
[27] *„Larvatae pp.ersonae sunt illae, alterus familiae nomen seu cognomen assumunt, et subhocce ficto et larvato nomine, ac Persona, sive successionem et haereditatem in alterius Familiae bonis, seu praerogativas, ni damnum et praejudicium legtimarum Familiarum, dolose sibi vendicare attentat."* Ibid. 311.
[28] Huszty 1745. 120.
[29] A büntető törvénykönyv indokolása [Explanatory Notes on the Criminal Code]. In *Képviselőházi irományok [Papers of the House of Representatives].* 1875. Vol. 9, No. 372. 300.
[30] *„Falsum, latiori, latiori significatione, dicitur omne id quod non est verum." „* […] *falsum strictiori sensu accipitur, pro Crimine illo, quod de jure poenaliter est."* Bodó 1751. 300.
[31] Kódex a bűntettekről és azok büntetéséről [Code on Crimes and Their Punishment]. Hungarian translation of the Latin draft in the appendix of Hajdu, Lajos: *Az első (1795-ös) magyar büntetőkódex-tervezet [The First (1795) Draft of Hungarian Criminal Code].* Budapest, 1971. Közgazdasági és Jogi Könyvkiadó, 387–512.
[32] Ibid. 489–492.

Máthé, Gábor

Misconduct as Solid Substantive Legal Institution

1. Theoretical underpinning

Due to the French Criminal Code of 1791 and, subsequently, the Code Penal of 1810, the concept of misconduct entered the criminal law system as a distinct group of criminal offences. The trichotomous (felony – misdemeanour – misconduct) and dichotomous (felony – misconduct) criminal codes were based on the classification of criminal offences upon their gravity.

A major issue in the assessment of minor crimes is therefore to clarify their relationship with other offences. It follows that they are the basis for a lighter form of liability according to criminal liability. Minor offences, as they are not homogeneous in nature, give rise to further problem. That is, there is a significant number of acts which are the consequences of breach of the law and are not simply forms of a crime which can no longer be assessed in criminal law.

As the institutions have evolved, these rather complex illegal behaviours have also required "reconciliation" with the principles of criminal law and the separation of powers

doctrine. As to whether administrative bodies can exercise criminal jurisdiction or impose penalties – i.e., violate the postulate of justice by the courts, arose further constitutional question.

Simply put, the "centuries-old dilemma" of the relevant legislation can be expressed in the following pair of opposites:

- misconduct is part of criminal substantive law, which is adjudicated by the courts and through administrative ambit;
- administration is excluded from the exercise of criminal power on the level of postulates.

The origin of this forced choice between the two mutually exclusive options is the administrative criminal law. Substantive legal unity and division by offences during the procedure have meaningfully led to the proliferation of theories that further qualifies the criminal acts.[1]

Theories of criminal law in the civil era gradually built on each other. Essentially, the concept of counter-administration already appears in the first attempts of delimitation of crime and misconduct, i.e., "violation of the law of a transient nature", which can be assessed both as a formal breach of the law and non-criminal breach of the rules or misbehaviour.

As to the natural law conception, the criminal offence is a violation of a man's inherent rights, whereas the misconduct is only a violation of positive law. Hence the distinction in moral content. That is to say, crimes are immoral, *mala in se* acts "prohibited by nature", whereas misconducts are *mala prohibita* acts criminalised by man-made law. At the same time, the abstract danger as another distinguishing characteristic of counter-administration emerged with the concept of endangerment. The divisibility of criminal law was expressed by theories based on the subject matter of the law and on illegality resulted in judicial and administrative criminal law.

Pál Angyal (1873–1949)[2]

The theory of administrative criminal law in Hungarian jurisprudence was founded by Pál Angyal. According to him, misconduct is a misbehaviour against public administration, which is unlawful as felony. The misbehaviour against public administration is also a substantive criterion characterising the acts covered by administrative criminal law. The substantive element of criminal law carries a danger to society, but this is so slight concerning misconducts that it can be resolved by counter-administration. Counter-administration, on one hand, is the synonym of a lesser degree of danger to society and, on the other, is also the expression of the same degree of danger as acts which obstruct the functioning of public administration.

2. Legislation of misconducts in the 19th century

It is known that the 19th century, which established the rule of law and created major legislation, was consistent in its application of constitutional and criminal law principles.

The first stage in the development of the institution was linked to the universal achievements and domestic attempts of codification of criminal law. The *Addendum to the Proposals of 1843* (on police misconducts under public disciplines and their punishment) is a close Annex to the draft Criminal Code on offences and punishments. The Addendum also took over the division of criminal law into general and special part. The provisions of the general part (scope, liability, stage, offenders, and type of punishment) have been extended with minor amendments to misconducts.

Recognising the difficulties of defining minor offences, it was clear before the codification of the time that the full range of offences and their criminal relevance was not limited to acts bordering on criminality, but also included conducts arising from administrative relationships. As to these conducts, however, it was not possible to lay down general rules and in particular to codify them and had to establish rules for smaller communities.

Irregularities of a misconduct nature (e.g., breaches of fire, water, building and health regulations; violating the rules of the law; causing danger by scuttling on streets and bridges) were listed by the *Addendum*, which behaviours could be formulated and punished partly by governmental decrees and partly by statutes of the jurisdiction. We find the forerunner of the present legal solution already in this attempt at codification: misconducts could be defined by statute, governmental decree and by ordinance.

The *Proposals of 1843* created a parallel between criminal procedure and police proceedings, in addition to the unity of offence and misconduct. The bodies that adjudicated misconducts were not acted as single judges but collegiate bodies. The police magistrate, with two members delegated by the magistrate's office, sat in panel. The relevant sections of the Code of Criminal Procedure were to apply to the proceedings. The one-stage appeal was in-

tended to provide for by the system of redress through the courts.[3]

In addition to the above-mentioned criminal law proposals, our first law on misconducts is worth considering, the *Act No. 9 of 1840 on Rural Police*. This legislation was the first attempt to group together and punish endangering acts in a specific category of cases. General characteristic of these acts was that the act or omission resulted in harm. Causing damage gave rise to two forms of liability: tort liability and "enforcement" liability. Beyond the compensation for costs, the perpetrator of an act of culpable negligence was liable to double damages, i.e., to fine, and in case of repeated culpable negligence, to imprisonment. These penalties were determined by the nature and gravity of the offence and the degree of responsibility. The offences were adjudicated in summary proceedings.

The Act No. 9 of 1840 and the proposals for Addendum were regarded as the source of minor endangering acts, offered solutions from which, as we shall see, subsequent codification could not entirely free itself.

3. The jubilee classic Code of Misconducts (Act No. 40 of 1879)

The second stage in the development of the law of misconducts was opened by the codification of 1878/79. Similarly to the majority of foreign criminal law of the time, a remnant of classical criminal law dogmatics, the *Codex Csemegi* is based on the principle of the threefold division of offences. However, it did not place the punishable offences in a single code. The offences (felony – misdemeanour) were separated from the already heterogeneous and differentiated conduct: misconducts were placed in a separate code. The consistency of the threefold division was reflected in the structural unity of the two codes. Both the Criminal Code and the Code of Misconducts were divided into general and special parts. Chapters containing the general part were essentially adequate with the differences stipulated in the Code of Misconducts.

The Codex Csemegi as the Hungarian Criminal Code – Code of Misconducts together formally created the substantive legal unity: misconduct was introduced as a criminal institution. However, the Codex also legalised the inclusion of part of the infringement of an administrative norm within the concept of misconduct. It is true that the right of administrative authorities to punish acts against administration was recognised only within the narrow limits set by law. Administrative criminal law existed latently within misconduct, but only embryonically. Hence the origin of the consequence of the later separation and the desire to create *Verwaltungsstrafrecht* separated from the judicial criminal law: *Justizstrafrecht*.[4]

It is also known that the general part of the Code of Misconducts provides for two sets of rules. One part deals with the statutory sources of law and the other part with the relationship to criminal law. A framework offence is only a violation of an official provision which is designated as to the subject matter and direction by fixing a penalty. The elements of the activity are embodied in other rules. The other alternative is that neither the object nor the relationship is specified and the government or the legal authority enacts a penal rule for them.

Accordingly, this is our first thesis:

> *The unity of the law of misconduct, while unified according to gravity, can only be understood in terms of the consistency of the law and the multi-stage penal regulations.*

The relationship with criminal law is further characterised by the fact that the general part of the Criminal Code provides the unity, while the Code of Misconducts sets out the differences. Asserting the principle of imputability, the Code of Misconducts basically established liability for negligent conduct.

Explanatory memorandum to Act No. 37 of 1880 on the enactment of the Hungarian Criminal Code regulated the jurisdiction for misconducts. The division of jurisdiction was not proportional between administrative criminal authorities and district courts. It granted preponderance to the administrative authorities (80:44 in favour of the administration). However, activities in the five chapters of the special part provided for judicial proceedings only, while the other five chapters allowed parallel jurisdiction.

Our second thesis stems from the above:

> *The comparison of the specific part of the Criminal Code – Code of Misconducts makes it clear that the unification by weight and the corresponding division of powers was Janus-faced. In the former, heterogeneity pulled through the unity, and in the latter inconsistency pulled through the guarantee requirements. To sum up, the codification in the end of the last century has not been able to overcome the contradictory situation. It was, however, consistent in one respect: it sought to resolve differentiation by means of a general regulatory technique.*[5]

4. The final chapter in the institutional history of misconduct

The regulatory practice bound to legal principles of the 19th century transformed by the mid-20th century. Since the objectives of legal policy can be captured in different dogmatic concepts, it is well known that the relationship between the content and form of law is not functional. Thus, the general part of the Code of Misconducts remained in force until 1 January 1951, while the *Criminal Police Rules* remained in force until 15 July 1952. The evolution of criminal justice became a two-way street. With narrowing of the division of offences according to gravity, Act No. 2 of 1950 on the general part of the

Criminal Code revived the dichotomous system (felony – misconduct). A particular character of the assessment of misconducts was that it bore a same danger to society as felonies. The distinction appeared only in the legal consequence.

Act No. 2 of 1950 on the general part of the Criminal Code did not, however, cover the special part of the law relating misconducts. This was laid down with general scope in decree-law No. 35 of 1951 on *Rules of Procedure for Misconducts*. This meant that decisive role in determining misconducts and felonies were the authorities with jurisdiction, rather than the law.

It was inevitable to simplify the forum system by reason of the diversity of the bodies adjudicating misconducts, the duplication of procedures [*Code of Criminal Procedure* (Act No. 33 of 1896); *General Part of the Criminal Code* (Act No. 2 of 1950)] and the merging of procedural functions (the investigative body also adjudicates). This was partly fulfilled by Decree-Law No. 16 of 1953. It abolished the power of the police to adjudicate misconducts and the general power was shared by the local council's executive committee and the court.

The abolition of the division of offences according to gravity and the creation of substantive criminal law based on a uniform concept of punishment was set forth in decree-law No. 17 of 1955 which resulted the end of the so-called "traditional era" of legislation. The decree-law classified some of the offences under the heading of felonies, while the greater part of them were put under the generic term of misdemeanours. It confirmed the thesis in the literature of the time that misdemeanour is not an indispensable criminal category. In short, its main characteristics were the unification of the forum system, the distancing from criminal law and the creation of a construction based on administrative responsibility, which also eliminated the sanction of restriction of liberty.

5. The concepts of the law of misdemeanours in the two Infringement Acts (1968, 1999)

Following the creation of infringements as a new legal institution by the decree-law, the codification body of the Judicial Council established under the Ministry of Justice, examined in a wide-ranging professional debate, subsequently with the assistance of a team of professors, the theoretical variants and the organisational and procedural issues.[6] The recently published study, presenting the history of criminal law by archival sources of crucial value, is a useful "guide" to the professional plans for almost a decade. Such preparations marked the beginning of the "new age" of the infringements by acts violating or endangering state administration, which, in the first Infringement Act (Act No. 1 of 1968 on infringements), were accompanied by acts against the rules of social coexistence, making it clear that the new institution remained "Janus-faced".

Professor Lajos Szatmári, the eminent administrative law expert, in his authoritative monograph on administrative doctrine, expresses this very eloquently:

> "[…] *the unlawful conduct related to activities of the state administration bodies is not opposed by conducts violating the rules of social coexistence, but by the so-called petty criminal law infringements.*"[7]

In his excellent monograph, Professor Tibor Madarász, also a prominent representative on the subject, reinforces this thesis:

> "[…] *offences belonging to petty criminal law, the 'petty offences' (criminal infringements), fall outside the scope of the concept of sanctions in administrative law* […]. *Criminal infringements are ambiguous in their legal classification. These are also administrative sanctions under substantive law and under the 'official' legal classification. On a theoretical level, however, this position cannot be accepted since the legal classification of 'petty offences' is so criminal in nature that the links between the legal regime of these offences and the substantive or procedural criminal law are much stronger than those between them and administrative law. So much so that the literature seems almost united in calling for a change in the present situation.*"[8]

It is to be mentioned briefly that our first Infringement Act, which denied criminal correlation, underwent a specific transformation. One trend was decriminalisation and the other was the significant extension of the classical personal liability by the inclusion of the liability of legal persons. Moreover, a third feature was the gradual development of sectoral professional supervision alongside legal and financial supervision. The alternative option of dual liability has in itself become a conflict-generating factor. The different nature of the professional supervisors' powers of action was even more striking. For certain types of supervision, the related public administrative body also functioned as an authority dealing with infringements, while it had only the right of initiative for others.

The second code, Act No. 69 of 1999, which was adopted by the Constitutional Court in its decision No. 63/1997 (XII. 12.), made the possibility of judicial review compulsory, thus reviving the solution of the Code of Misconducts model, was a further significant change in the codification timeframe.[9]

6. The third Infringement Act (2012) The transformation of infringements into quasi misconducts

According to Professor Norbert Kis, an inescapable theoretician of infringement law and administrative sanctions, along with the failures of the transformations, the attempt to create the institution of infringement started in 1955

and ended in 2012. Pursuant to his expressive value judgment, the third Infringement Act "triggered a landslide in the law of administrative repression". It took several decades for legal policy to draw the conclusions from the theorems formulated as early as the 1980s. In other words, administrative protection was retreated from this time by administrative law into its own taxonomic and theoretical domain.

To put it simply, the concept of unitary administrative protection has failed, since administrative sanctions other than infringement law have increasingly come to dominate.[10]

The repressive instruments of administrative protection were diverted from the codification of infringements and a different system of sanctions for each sector was created by the legislation in the administrative sector. Professor Marianna Nagy also described this process in an analytical and dogmatically thorough manner, in her excellent monograph.[11] Norbert Kis is perhaps the most "profound" in his assessment of the relevant case-law of the past decade in his habilitation monography, Problems of the criminal power of public administration: limits to the effectiveness of law enforcement. He thus identifies two effects of this controversial development. On the one hand, he stresses the seriousness and repression of the infringement law, and condemns, in particular, the expansion of the sectoral administrative sanction system. Noting several, but focusing on just two of the reasons for this, *hic et nunc*. The first is that the theory of small-scale criminal law has not allowed for differentiation of the system of sanctions in the law of infringements in relation to criminal law, while sectoral legislation has gone beyond this and transcended theoretical dilemmas. On the other hand, the author states that "sectoral sanctions prevail in conditionalities which are more effective and dissuasive than those of the infringement law and this is explained by the lack of a constitutional framework".

Furthermore, the new Infringement Act has triggered the criminalisation test of constitutional criminal law, also emphasized in his dogmatic deduction. In other words, when examining whether a conduct has been declared as infringement, the requirements of constitutional criminal law apply. The Constitutional Court correctly requires a material endangerment of the legal object in order a conduct to be declared an infringement. For the first time in its history, extending the principles of criminal legality to penalties outside of infringement law by the Constitutional Court of Hungary, was a real paradigm shift.[12]

The conclusion is a witty one, since it provides a framework for the jurisprudential lessons to be drawn from the 140-year timeframe from misconduct to misconduct:

> *We have reached a constitutional revelation that recognizes that administrative criminal power is separated from criminal law only by legal policy considerations with the transformation of infringements into quasi-misconducts.*[13]

Notes and references

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