



THEORETICAL AND PRACTICAL ISSUES OF THE PROHIBITION OF *REFORMATIO IN PEIUS* IN HUNGARY

Csongor HERKE¹, Csenge D. TÓTH²

¹ Associate Professor, Habil. Dr., Head of Department
Department of Criminal Procedure Law and Forensic Science
Faculty of Political and Legal Sciences
University of Pécs
48-as tér 1, 7622 PÉCS, Hungary
E-mail: herke@ajk.pte.hu; Tel.: +36 20 987 5647

² PhD student
Department of Criminal Procedure Law and Forensic Science
Faculty of Political and Legal Sciences
University of Pécs
48-as tér 1, 7622 PÉCS, Hungary
E-mail: csenge@ajk.pte.hu; Tel.: +36 30 405 2562

Received 12 December 2010; accepted 28 April 2011

Abstract. *The requirement of the prohibition of reformatio in peius may arise taking into consideration several basic principles of the criminal procedure. In the Hungarian legal system, it is regulated under the procedure of the second instance, the procedure of the third instance, retrial, extraordinary legal remedies and even under some of the separate procedures. In addition to the criminal procedure, the reformatio in peius is regulated according to the law of infractions.*

However, the most important element of the prohibition of reformatio in peius is that it is a legal guarantee for the defence to be able to file an appeal without the risk that a judgment might be altered to the detriment of the accused. Therefore, the accused will have confidence that the appeal will not do wrong to his interest. At the same time, many counterarguments have been discussed regarding the prohibition of reformatio in peius, such as the violation of substantial justice and legality. This paper examines the reasons for the existence of the prohibition of reformatio in peius in the course of the criminal procedure.

Keywords: *reformatio in peius*, criminal procedure, fundamental principles, appeal, prosecution, defence, sentencing.

Introduction

The expression *reformatio in peius* was mentioned for the first time in a Roman law case related to the procedural law. This thesis refers to the passage of L 1 pr. Cod. de appellationibus et relationibus, 49, 1 Digest, which reads as follows: ‘Appellandi usus quam sit frequens quamque necessarius, nemo est qui nesciat, quippe cum iniquitatem iudicantium vel imperitiam recorrigat: licet nonnumquam bene latas sententias in peius reformet, neque enim utique melius pronuntiat qui novissimus sententiam laturus est.’

The expression was unknown to the criminal procedure law in the 18th century. Gönner (1804) mentioned it for the first time at the beginning of the 19th century and was of the opinion that alteration of a judgment to the detriment of the accused through ordinary legal remedy (*reformatio in peius*) should not be required.

These two sources led to ineffective debates regarding the origin of the expression. The ‘*in peius reformare*’ as mentioned by the passage of the Digest was understood as a satiric

observation that the judges who decide on legal remedies are not necessarily the best judges. In the quoted passage, there is no reference to whether the judges are entitled to revise judgments of courts of a lower instance in the course of the appeal procedure, or if they have the right to do so, to what extent and in which direction they can exercise it. The debates over the origin of the expression only reveal that the term was overrated. Linde (1850) has already objected to the fact that the expression has neither theoretical nor practical consequences, only the designation of the expression is of great significance to the procedural law. According to Kapsa (1976), the influence of being overrated nowadays can still be seen in the understanding of *reformatio in peius*. Every legal institution has homogeneous dogmatic grounds based on which every problematic case could be solved in the same way when the law does not include an explicit provision, and this is also applicable to the *reformatio in peius* (to its prohibition). Frequently mentioned theoretical grounds are the right of disposal and the nature of legal remedy. Connection to motions (the principle of disposition) can also refer to *reformatio in peius*, and it can justify the application of *reformatio in peius* in the course of the appeal procedure, therefore the application of *reformatio in peius* can only be considered as permissible for the reason of the lack of adequate definition.

Legally, it seems to be easy to explain the prohibition of *reformatio in peius* by means of the nature of legal remedies. If the prohibition of *reformatio in peius* is part of the nature of legal remedies then it will prevail in the cases which are not regulated by the legislator. If this reasoning was correct, there would not be any exception to the prohibition of *reformatio in peius*.

Most of the dogmatic grounds which were used in order to define the concept of *reformatio in peius* are inclined towards the procedural law, or seem to be too general when referring to the nature of legal remedy. This is the reason, according to Kapsa (1976), for all of the difficulties arising in the (criminal, civil, administrative) procedural law and related to the prohibition of *reformatio in peius*. The procedure of appeal has no aliud connection to the basic procedure according to the above mentioned opinion, but apparently it differs from the basic procedure by means of the institutional assurance of the deciding body.

The designation of *reformatio in peius* is not a normative, but a descriptive expression, and its content is determined differently. In a wider sense, it describes the right of state organs which permits the alteration of a decision to the detriment of the receiver. In the procedural law, *reformatio in peius* is mentioned in the case when a higher-level body passes a decision to the detriment of the accused, while a more favourable decision was expected to be passed by it. In the course of time, more and more subsequent restrictions needed to be drafted regarding the content of this definition. These different opinions were summarized, and the *reformatio in peius* was determined (from the point of view of the prohibition) as follows: the alteration of every single decision which was passed by a new court ex officio and related to the main question of the case to the detriment of the person in favour of whom the appeal had been filed. The detrimental alteration of questions of secondary importance, such as the injurious disposition of expenses, was not even regarded by these authors to pertain to the question of *reformatio in peius*. Therefore, the restriction of *reformatio in peius* focused only on the main questions. However, not even Kapsa (1976) thought that it was necessary to make the main question one part of the definition of the permissibility of *reformatio in peius*. According to him, only questions, such as to what extent the existing decision of a public authority can be altered to the detriment of the accused and who is entitled to do so, should be examined.

In the course of the appeal procedure, the usage of the *reformatio in peius* doctrine can be hazardous on account of being overrated. According to Hess (1990), a person convinces himself easily to adopt a definition of the content of the procedural law, and to search for a solution for the procedural law in a similar manner, albeit the first thing which should be examined is where the *reformatio in peius* legally belongs to in the course of the appeal procedure.

As it is evident from the above, the prohibition of *reformatio in peius* has two meanings in the Hungarian legal professional terminology: the prohibition of the increasing punishment, and the prohibition of *reformatio in peius*. This is because of the German influence, since the German legal professional terminology uses the same expressions ('Das Verschlechterungsverbot'; 'Das Verbot der *reformatio in peius*'). The English legal professional terminology uses an expression derived from the Latin language ('prohibition of the *reformatio in peius*', 'ban of the *reformatio in peius*'), and this is typical of the terms used by other countries (in Italian, obviously, an expression of the Latin origin is applicable: 'Il divieto della *reformatio in peius*').

1. Prohibition of *reformatio in peius* in the Hungarian legal system

In Hungary, the first Criminal Procedure Code (hereinafter – CPC) of 1896 (Act XXXIII of 1896) already introduced the prohibition of *reformatio in peius*, which was in effect until 1949. Act XI of 1949 on Criminal Proceedings then abolished this institution, because the main aim of legal remedy was, according to the reasoning, the enforcement of substantial justice and not the safeguarding of the position of the accused ('substantial justice prevails over all', Cséka, 1984). Király criticised this system stating that a system where increasing the punishment is permissible in the course of appeal procedure poses a great danger that a more detrimental decision can only be passed on the grounds of a motion of the counsel for the defence.

The Criminal Procedure Code of 1950 (Act III of 1951) again did not mention the prohibition of *reformatio in peius*, i.e. it granted the (unrestricted) right to *reformatio in peius*, but the germs of the institution arose again regarding extraordinary legal remedies. The Modification of the Criminal Procedure Code of 1954 (Act V of 1954) altered this case by introducing the relative prohibition of *reformatio in peius* through introduction of a system of cassation and revision, hence a decision could be detrimentally altered only in the course of retrial even in the case when an appeal is filed to the detriment of the accused. According to Cséka (1984) and Nagy (1960), this was rather the absolute prohibition of *reformatio in peius* combined with the exclusive cassation authority. Since this system interfered with prompt conducting of proceedings, the Amendment of the Criminal Procedure Code of 1958 (Decree law No. 16 of 1958) opened the door for a court of the second instance to alter the judgment of a court of the first instance to the detriment of the accused on the grounds of an appeal filed to the detriment of the accused. Cséka (1984) refers to this as 'regulation subjected to condition', and it means actually relative prohibition of *reformatio in peius* without cassation liability.

The later Criminal Procedure Codes, the CPC of 1962 (Decree law No. 8 of 1962) basically adopted this system with the difference that the detailed provisions of the prohibition of *reformatio in peius* were continuously given finishing touches by these acts and their amendments. However, it still cannot be stated that after such historical improvement, the provisions of the effective Criminal Procedure Code (Act XIX of 1998) will be fully adopted.

In the effective law of criminal procedure, the prohibition of *reformatio in peius* is regulated concerning the procedure of the second and third instance, retrial, extraordinary legal remedies, and even concerning certain special procedures. In addition to the criminal procedure, the *reformatio in peius* is regulated related to the law of infractions. According to Section 92 (4) of Act LXIX of 1999 on Infractions, a court may apply, to the detriment of the person subject to the procedure, more disadvantageous provisions than stipulated in a decision of the authority dealing with infractions only if the following conditions are met: new evidence appears in the course of the trial and on the basis of this evidence the court establishes a new fact which provides grounds for a graver classification or for imposing a significantly heavier punishment. As Kengyel (2008) points out, the principle of 'ne ultra petitem' is also effective in the law of civil procedure. According to the first sentence of Section 253 (3) of Act III of 1952 (Civil

Procedure Code), a court of the second instance shall alter a decision of a court of the first instance only within the limits of a motion for appeal (joint appeal) and a counter-motion for appeal (Section 247). Within such limits, the court of the second instance may pass a decision on matters concerning the rights enforced in the course of a lawsuit, as well as on matters contradictory of such rights but has not been heard or decided by the court of the first instance.

The prohibition of *reformatio in peius* benefits the accused in the appeal procedure and the procedure of extraordinary legal remedies (the so-called ‘matter of favor defensionis’), regardless of who has filed a motion for legal remedy. This can be the accused himself, or the prosecutor, who can file an appeal in favour of the accused according to Section 324 (2) of the CPC, and can also file a motion for extraordinary legal remedy not only to the detriment, but in favour of the accused (Section 409, Section 417, Section 432, Section 440 of the CPC). Moreover, the counsel for the defence has the absolute right for appeal, and he even has the right to file for extraordinary legal remedy unless the defendant has explicitly forbade him to do so. Furthermore, other persons can exercise their right to legal remedy in favour or to the detriment of the accused (a legal representative of the accused, a relative of full age, other parties concerned, etc.). While the prosecutor can file a motion for legal remedy both in favour and to the detriment of the accused, the other authorised parties can exercise their rights only in one direction (either in favour or to the detriment of the accused).

The prohibition of *reformatio in peius* is of no importance in the cases when a legal remedy is filed to the detriment of the accused, but, according to Seuffert (1961), the ‘presumption of justness’ (‘Präsumption der Richtigkeit’) prevails as regards the judgment passed by a court of the first instance. The prosecutor representing the public interest can act in both ways, while the private prosecutor and the substitute private prosecutor can file an appeal only to the detriment of the accused. The prohibition of *reformatio in peius* intends to make it possible for the accused to exercise his right to obtain certain legal remedies if he considers the judgment too severe and wrongful without being at risk that it will be replaced by an even more detrimental one, without quashing the judgment due to the lack of grounds. The court entitled to pass a judgment on the matter in question is basically always bound by the prohibition of *reformatio in peius* if a new decision on the same act is taken because the accused or the prosecutor (or another authorised person) has applied for a legal remedy against the judgment in favour of the accused. The objective of the prohibition of *reformatio in peius* is to preserve the freedom of decision: a judgment can be both accepted and appealed against without the risk of detrimental alteration. The new judgment will not be the same as the judgment appealed against in respect of guilt and legal consequences.

The freedom of the accused to decide is significant with regard to the scope of application and to the extent of the prohibition of *reformatio in peius*. From this perspective, the prohibition of *reformatio in peius* is a ‘procedural protection right’, according to Grethlein (1963), which should balance the factors hindering the submission of a motion for legal remedy. The accused would be in the situation of psychological stress in the absence of the prohibition of *reformatio in peius*, and in such a situation he would have to decide whether to agree to a judgment (including the sentence imposed by it), or to file an appeal, but in this case he should fear the resulting disadvantage. The prohibition of *reformatio in peius* can show a way out of this dilemma of the accused, whereby he will put trust, with a good reason, in not having a disadvantageous position when he files a motion for legal remedy. Molnár (1956) rightly calls the prohibition of *reformatio in peius* the ‘principle of appeal without fear’.

2. Fundamental issues of the prohibition of *reformatio in peius*

The aspects of the prohibition of *reformatio in peius* raise countless important questions. However, in Hungarian research literature this issue has been touched upon by just a few. In the

20th century, as few as nine works were published which clearly questioned the prohibition of *reformatio in peius*, and among them there is none which was published after the democratic transformation (Barbarics, 1968; Cséka, 1984; Jeszenszky, 1956; Molnár, 1980; Molnár, 1956; Neményi, 1956; Radó, 1956; É. Tóth, 1987; Wiener, 1980). University textbooks and lecture notes could not care less about this problem, only a couple of pages have so far been devoted to the subject-matter.

The fact is that foreign, primarily German, research literature is different with regard to this issue. Not only numerous essays have dealt with the issue of the prohibition of *reformatio in peius*, but also many monographs have been published about the prohibition of *reformatio in peius* or its specific elements (e.g. as regards measures). It is for this reason that we believe that a detailed analysis of this subject-matter, which has not been adequately considered, is absolutely necessary in Hungary. Numerous borderlines had to be discussed (criminal substantive law, criminology, forensic science, law of execution of punishment, criminal politics). At the same time, the prohibition of *reformatio in peius* is examined mainly from the perspective of the criminal procedure. Sometimes it was hard to determine how deeply other disciplines should be examined, then we took into consideration what was absolutely indispensable and what was needed to be referred to.

When conducting the research, the following questions had to be answered:

- What cases are for and against the legal institution of prohibition of *reformatio in peius*?
- How to classify the prohibition of *reformatio in peius*?
- What conclusions can be drawn from the Hungarian and foreign history of this legal institution?
- What basic theoretical problems have arisen in the Hungarian and foreign research literature?
- Can any conclusions which are worthy of being considered be drawn for Hungarian legislation from the regulations of other countries?
- Does the prohibition of *reformatio in peius* serve the individual interest of the accused or the public interest?
- Which appeal will be considered to be filed to the detriment of the accused?
- What kind of alteration is prohibited by the prohibition of *reformatio in peius*, and what provision is considered to be detrimental to the accused?
- How much can secondary punishments and measures be compared and can they be mutually replaced when the prohibition of *reformatio in peius* is effective?
- How is the degree of severity of certain punishments determined?
- Should the prohibition of *reformatio in peius* prevail in the course of retrial conducted on the grounds of the most serious procedural contraventions?
- How should the term 'new evidence' be interpreted in the course of retrial?
- Are there particular problems in the course of the procedure of the third instance, the procedure of extraordinary legal remedies and in separate procedures?
- Can the question of the prohibition of *reformatio in peius* arise in the course of investigation?
- Can a decision on the prohibition of *reformatio in peius* be drawn under the authority of deliberation?
- What kind of relation does the prohibition of *reformatio in peius* have to the fundamental principles?
- What kind of relation does the prohibition of *reformatio in peius* have to the principles of legality and opportunity?
- What kind of practice of courts has been developed regarding the prohibition of

reformatio in peius?

- What is the connection between the general principles of punishment imposition and the prohibition of *reformatio in peius*?
 - Are there any characteristic criminal and political considerations regarding the prohibition of *reformatio in peius*?
- etc.

3. Prohibition of *reformatio in peius* and the fundamental principles

The prohibition of *reformatio in peius* is a requirement derived from several fundamental principles of the criminal procedure. From among these principles, 'favor defensionis' has gained a special function since it is a generic term: it covers several favours granted to the defence and effective in the course of proceedings. The legislators did not explicitly accept the term 'parties' when speaking about the prosecution and the defence enjoying equal rights regarding. Indeed, according to Gerber (1913), it is particularly risky to talk about 'parties' in criminal proceedings. The practice also shows that the accused has an 'accumulated disadvantaged position' in the proceedings. Therefore, the CPC intends to compensate this disadvantage to some extent by many detailed provisions. The prohibition of *reformatio in peius* is also a matter of 'favor defensionis', that is why it is closely linked to the principle of defence.

The connection between the prohibition of *reformatio in peius* and the principle of defence is also shown by Nagy (1960) explaining that an appeal filed in favour of the accused presents an opportunity for the court to protect the violated rights of the defence, but it is not acceptable that the fear of increasing the punishment might narrow down the predominance of this right of the defence.

The prohibition of *reformatio in peius* can be attributable to the principles of legality and opportunity (in relation to substantial justice), the principle of prosecution (principle of contradiction) and the principle of the right to legal remedy (not to mention other principles which are nowadays in vogue, such as principle of constitutionality, the requirement of fair trial, etc.). Besides, it refers to other basic procedural requirements, such as partial validity, as an exception to the principle of complete review, which means that if an appeal is filed to the detriment of the accused regarding only one crime out of the crimes being in substantial agglomeration, an order of acquittal (or termination of proceedings) will become (partially) effective, and hence, the prohibition of increasing the punishment will enter into force in respect of this criminal offence. In relation to partial validity, Cséka (1984) points out that the prohibition of *reformatio in peius* and the principle of *ne bis in idem* are related with one another.

The principle of prosecution plays (and played) a huge role in the development of this legal institution, which is proven even by the fact that increasing the punishment is permissible only if the prosecutor files an appeal on this ground. Before the appearance of the principle of prosecution, the prohibition of *reformatio in peius* cannot be examined. According to Nagy (1960), the principle of prosecution means, on the one hand, that the court may decide on the criminal liability of a person and on a criminal offence, who or what is the subject of the indictment, but on the other, it means that the court of the second instance will not reverse the judgment of the court of the first instance to the detriment of the accused against the prosecutor's will expressed in the decision of the first instance.

4. Types of the prohibition of *reformatio in peius*

The roots of the prohibition of *reformatio in peius* can be traced back to the end of the 18th century by Angyal (1917), who believed that continental countries had adopted it from the British law. The prohibition has two main types: the absolute and the relative prohibition of *reformatio in peius* (in addition to these types, the third case is possible when the prohibition of *reformatio in peius* does not prove to be effective). In case of the absolute prohibition of *reformatio in peius*, the court of the second instance will never alter the judgment of the court of the first instance to the detriment of the accused (even if it is entitled to pass a decision in all detail). That is, if it concludes that the judgment of the court of the first instance is not heavy enough, it cannot reverse the judgment of the court of the first instance to the detriment of the accused even if an appeal has been filed to the detriment of the accused. In the case of the relative prohibition of *reformatio in peius*, the judgment can be altered to the detriment of the accused in the course of the procedure of the second instance if an appeal has been filed to the detriment of the accused against the judgment of the court of the first instance. Therefore, the absolute prohibition of *reformatio in peius* means ‘cassation’, the relative prohibition of *reformatio in peius* means ‘reformation’, while the lack of prohibition of *reformatio in peius* is mainly the characteristic of the mixed system of appeal. The terms of absolute, relative and non-effective prohibition of *reformatio in peius* are used by Farkas *et al.* (2004).

In addition to the basic classification (absolute/relative prohibition of *reformatio in peius*), the following distinction might be made: complete or partial, cogent or exceptional prohibition of *reformatio in peius*. The complete prohibition of *reformatio in peius* occurs when the law prohibits every provision detrimental to the accused. On the contrary, when only the partial prohibition of *reformatio in peius* is effective, the law stipulates precisely the provisions which are linked with the prohibition of *reformatio in peius*. For instance, the first type prevails in the case of extraordinary legal remedies, while the second type occurs in the course of the procedure of the second instance, since only three basic alterations are prohibited (finding the acquitted accused guilty, finding the accused guilty after termination of proceedings, increasing the punishment). However, in the course of the procedure of the second instance many provisions, otherwise detrimental to the accused, can be applied even if the prohibition of *reformatio in peius* became effective (e.g., a heavier degree of punishment can be determined; a preliminary judicial exemption can be withdrawn, etc.).

The prohibition of *reformatio in peius* is compulsory if there is no exception to it by the time the prohibition of *reformatio in peius* becomes effective, and the prohibition of *reformatio in peius* is exceptional if the law permits exceptions from the main rule of this prohibition. In this respect, in the course of the procedure of the second instance the compulsory prohibition of *reformatio in peius* is effective, while e.g. in the course of retrial the prohibition of *reformatio in peius* is exceptional, since the law determines several exceptions from the main rule (triple novelty, most serious procedural contraventions, etc.).

5. Prohibition of *reformatio in peius*: arguments pro and con

The most common reason for regulation of the prohibition of *reformatio in peius* has always been to prevent the omission, on part of the defence, to file an appeal against a decision considered to be harmful. Such omission may occur for the fear that the court of the second instance may alter the decision of the court of the first instance to the detriment of the accused even if the appeal has been filed only in his favour, since the case would have never reached the procedure of the second instance (for the lack of an appeal on part of the defence), and the former (lighter) judgment would have never become effective (see ‘the principle of fearless appeal’).

Meanwhile, Molnár (1956) lists several arguments against the prohibition of *reformatio in peius*:

- over-pursuit of the principle of prosecution;
- violation of lawfulness;
- violation of material justice;
- costliness of the procedure;
- the procedure becomes too bureaucratic;
- the guidelines written in the form of cassation violates the independence of the judge;
- expression of extreme liberalism;
- increase in the number of frivolous appeals;
- increasing formality of the procedure, etc.

Under the influence of counterarguments and after examining legal grounds and conducting a historical overview, Delitalia (1927) comes to the final conclusion that the prohibition of *reformatio in peius* should be rejected by the modern criminal procedure.

In spite of these counterarguments, in most countries the prohibition of *reformatio in peius* is well-known and accepted (with a lesser and greater deviance).

6. Prohibition of *reformatio in peius* and the reformation relating to substantive law

The prohibition of *reformatio in peius* is essentially nothing else but a restriction of reformation (modification). The reformation relating to substantive law is often connected to the factual reformation (e.g. it is established that the accused not only took the object not belonging to him, but also used violence while doing so, hence the classification of the criminal offence is not larceny, but robbery). However, the reformation relating to substantive law may follow a factually-based judgment of the court of the first instance. According to Molnár (1980), such reformation relating to substantive law has three conditions:

- a legally effective appeal has been filed;
- the court of the first instance has violated the rules of substantive law;
- the judgment does not need to be quashed (e.g., on the basis of a procedural contravention or the lack of grounds).

The reformation of substantive law has two significant restrictions. The first is partial validity, the second is the prohibition of *reformatio in peius* itself, so the extent of *reformatio in jure* is determined by both limitations. Similar restrictions can be found in the former CPC, e.g. the prohibition of insignificant alteration and the effectiveness of the power of disposal regarding civil claims. The suspension of proceedings imposes a temporary restriction on the alteration relating to substantive law, which may become a permanent restriction if the case becomes forfeited in the meanwhile. Cassation will not take place as a result of error in substantive law, only reformation (if the court of the second instance eliminates the error) or approval can occur (if the error does not need to be – e.g. because of the prohibition of *reformatio in peius* – or cannot be eliminated).

According to the former regulations summed up above, the prohibition of *reformatio in peius* rendered forbidden basically two types of reformation relating to substantive law: finding guilty the accused acquitted by the court of the first instance (whose proceedings have been terminated) and increasing the punishment of the accused found guilty by the court of the first instance. The first type consists of three elements (the act is a criminal offence; it was committed by the accused; the accused is guilty and punishable). Therefore, an appeal filed in order to find the accused guilty will not mean only a motion for finding the accused guilty, but any kind of appeal referring to one or more elements of the guilt of the accused. According to Molnár, if the prosecutor files an appeal, because he thinks that no complete defence to

prosecution for the crime at issue has been established by the court of the first instance (e.g. justifiable defence), then this appeal will be regarded as an appeal for the establishment of guilt itself (since it includes a motion for the guilt of the acquitted accused to be established if there is no complete defence to prosecution for the specified crime). However, the establishment of guilt has no great significance itself if there is no criminal punishment attached to it.

In respect of the development of law, the prohibition of *reformatio in peius* has become a very important legal principle of guarantee. According to RÁCZ (1968), the violation of this prohibition used to be excluded even in the case of an obvious violation of substantive law, e.g. when the court of the first instance would sentence the accused to imprisonment of a shorter duration than the legal minimum. Such infractions of the law occurring due to the prohibition of *reformatio in peius* could be redressed only by extraordinary legal remedies and mostly only within a short time limit. Although this was contrary to the principle of material justice, it was the only alternative suitable for other procedural and constitutional principles. However, the question may arise, should the prohibition of *reformatio in peius* prevail not only in the procedure of legal remedy, but also in the course of the complete criminal procedure. This conclusion has so far never been expressed either in the foreign or the Hungarian legislation.

7. Appeal filed to the detriment of the accused

According to the system of conditions which has evolved as a result of the development of law, the question of whether the prohibition of *reformatio in peius* is effective or not (relative prohibition of *reformatio in peius*) depends on the sole condition for a legally effective appeal to have been filed to the detriment of the accused. According to Cséka (1984), the following should be regarded as a legally effective appeal filed to the detriment of the accused:

- a) an appeal filed in order to establish the guilt of the acquitted accused,
 - b) an appeal filed in order to establish a more severe classification of the case of the convicted accused or
 - c) an appeal filed in order to impose a heavier punishment.
- ad a) An appeal is filed in order to establish guilt if
- it appeals against the acquittal (an order of termination of proceedings, a decision containing independently applied measures), and makes a motion for establishment of guilt and for sentencing the accused;
 - it is filed in order to impose punishment instead of independently applied measures;
 - it appeals against the grounds of the acquittal (the order of termination of proceedings, the decision containing independently applied measures), and makes a motion for elimination of the lack of grounds and for sentencing the accused;
 - it was filed against a procedural infraction which resulted in acquittal (the order of termination, the decision containing independently applied measures).
- ad b) An appeal is filed in order to establish a more severe classification of a criminal offence if
- it makes a motion for establishment of a criminal offence falling under a heavier punishment;
 - it makes a motion for establishment of accessory role or perpetration of crime instead of aiding the perpetrator, as well as for establishment of an accomplished crime instead of an attempted crime; and for establishment of plurality (accumulation) instead of a single criminal offence (Judicial Decision 1979/12).
- ad c) The question of a heavier punishment needs to be settled by the explanations of the Penal Council of the Supreme Court.

Taking into account the abovementioned statements, an appeal is not filed to the detriment of the accused if

- it makes a motion for termination of proceedings or for application of independent measures instead of the acquittal (or conversely);
- it makes motion for establishment of a different legal ground for the acquittal or for termination of proceedings;
- it makes a motion for changes in certain secondary matters – even to the detriment of the accused. Such secondary matter can be, according to Cséka (1984), the stage of execution of punishment, probation, a petty offence judged in the course of criminal procedure, pardon, exemption, commutative rate of fine as secondary punishment, costs of the criminal procedure, the sum total of punishments, other errors than errors of content which falls under the correction of judgment etc.

8. Prohibition of *reformatio in peius* in the Hungarian jurisprudence

Upon examination of the practice of courts regarding effective regulation, it may be stated that the ad hoc decisions refer mostly to the following subjects:

a) What is regarded as an appeal filed to the detriment of the accused?

- the legal classification of a criminal offence does not mean only the designation of the crime as it is set forth in the Special Part of the Criminal Code (including the basic case, the qualified case and the privileged case), but also the different formation of perpetration and the determination of the degree of completion of a committed crime etc. Therefore, an appeal filed to the detriment of the accused should be any appeal filed on the grounds of the above written;
- the appeal filed by the prosecutor in order to take measures (e.g. confiscation of property or supervision by a probation officer) does not lift the prohibition of *reformatio in peius*;
- the fact that the prosecutor has made a motion (within the scope of the appeal directed to the sustained increase of a sentence) to set the judgment aside for lack of grounds (except if he explicitly withdraws the appeal filed to the detriment of the accused) will not alter the possibility of increasing the punishment;
- the prohibition of *reformatio in peius* will not become effective if the prosecutor files an appeal on account of partial acquittal and the court of appeal finds the accused guilty of the criminal offence in question;
- if the prosecutor who was not present at the trial and was served only by the purview of the decision declares that he has the intention to 'file an appeal' regarding the purview of the decision and declares to write the reasoning of his appeal after he has been served by the reasoning of the judgment as well, this declaration cannot be regarded as an appeal filed to the detriment of the accused and lifting the prohibition of *reformatio in peius*, not even in spite of the fact that in his reasoning, which arrived after the expiration of the deadline for appeal to the court, he sustains the appeal to the detriment of the accused;
- the prohibition of *reformatio in peius* becomes effective despite the fact that the appeal has been filed to the detriment of the accused by the prosecutor, if the Attorney General acting in the procedure of the second instance sustains the appeal in his transcript (the reasoning of the appeal) only having regard to the motions which do not lift the prohibition of *reformatio in peius* (e.g. changing the stage of the execution of imprisonment to a heavier one);

- the prosecutor's appeal for general prohibition of driving (every kind or several kind of) public vehicle instead of prohibition of driving one (or not all from among several) type of public vehicle should be regarded as an appeal filed to the detriment of the accused. However, in the case of an appeal filed (sustained) for the prohibition of driving an engine bicycle only instead of prohibition of driving a public vehicle of category A, the increase of the severity of punishment cannot take place in the course of the procedure of the second instance (categories do not differ by the level of severity);
- the appeals falling out of the scope of passing a sentence or increasing the severity of the sentence, but still related to it can never be regarded as appeals filed to the detriment of the accused (preliminary exemption, appeal filed for the omission of inclusion of a fine for petty offence etc.);
- the defensive appeal can never lift the prohibition of *reformatio in peius*, even if the appeal seems, at first, to be filed to the detriment of the accused.

b) When may the accused be declared guilty again despite the prohibition of *reformatio in peius*?

- the acts established by the court of the first instance can be classified as other criminal offence as well, and this falls under the modification of classification and not under the establishment of guilt, therefore it is not excluded by the prohibition of *reformatio in peius*;
- however, if the court of the first instance does establish the guilt of the accused taking into consideration the facts listed in the statement of facts of the indictment for crimes other than the accused was found guilty of (i.e. it does not adequately cover the indictment), the court of the second instance cannot find the accused guilty of these acts on the ground of the absence of appeal filed to the detriment of the accused;
- if combining of cases is omitted by the court of the first instance, the court of the second instance may link up the cases, but if the prohibition of *reformatio in peius* becomes effective then a decision of cassation will be passed (and in the case of retrial there is no impediment to increase the punishment).

c) When can a rather disadvantageous provision be applied against the accused despite the fact that the prohibition of *reformatio in peius* is effective?

- the secondary punishment must always be regarded as a lighter sentence in comparison to principal punishment, even if it means a more detrimental position for the accused;
- in the case of the prohibition of *reformatio in peius*, the court of the second instance will not impose any secondary punishment omitted by the court of the first instance even if it mitigates the punishment or even if it omits another secondary punishment imposed by the court of the first instance;
- the prohibition of the *reformatio in peius* does not exclude the possibility of the court of the second instance omitting the preliminary exemption on the grounds of the absence of an appeal filed to the detriment of the accused;
- the prohibition of the *reformatio in peius* does not exclude the possibility of applying measures besides the punishment if not applied in the procedure of the first instance;
- the prohibition of the *reformatio in peius* does not exclude the possibility of altering the rules of probation to the detriment of the accused;
- the prohibition of the *reformatio in peius* does not exclude the possibility of modifying the degree of execution of imprisonment to the detriment of the accused;
- a civil claim can be judged despite the effectiveness of the prohibition of the

reformatio in peius even if the court of the first instance has referred it for enforcement by other legal means and this provision has not been appealed against.

d) The practice of the law related to the prohibition of *reformatio in peius* which is effective in the course of retrial:

- several decisions record only the fact that the prohibition of *reformatio in peius* is effective in retrial if none of the exceptions occur (e.g. triple novelty);
- the prohibition of *reformatio in peius* is lifted in retrial if a new fact is established due to new evidence in the course of proceedings of the second instance in respect of the basic case;
- the fact that the accused has not complied with his obligation of support since passing of the judgment of the first instance will be regarded as new evidence in case of the crime of omission of support, hence in such case the prohibition of *reformatio in peius* is not effective in retrial.

e) The decisions related to separate procedures, extraordinary legal remedies and special procedures primarily perform the function of clarification of the specific wording of the law:

- the prohibition of *reformatio in peius* is not violated when a court imposes a more severe punishment on the basis of the trial due to establishment of new facts which are the reason to impose a significantly harsher punishment, instead of the punishment imposed on the basis of omission of the trial;
- the increase of the severity of the sentence will not take place if the accused requests to be heard at trial regarding an order passed by virtue of omission of the trial, and no new evidence appears in the course of the trial on the basis of new facts could be established which would serve as a ground for imposition of a significantly harsher punishment;
- the sentence can be augmented in the course of proceedings of the second instance conducted on the basis of a motion for hearing a case at trial, regardless of who has filed the motion if an appeal is filed against the judgment of the first instance;
- the prohibition of *reformatio in peius* does not exclude the possibility of reduction to a lower rank instead of the prohibition of taking part in public affairs, because this does not imply the imposition of a new (secondary) punishment, but means that the court of the second instance applies one of the disadvantages included in the prohibition of taking part in public affairs, hence this is a reduction of punishment;
- the prohibition of *reformatio in peius* is effective during the repeated procedure in case the judgment was repealed due to a motion for review lodged against absolute procedural contraventions;
- the prohibition of *reformatio in peius* which was effective in the basic case is not effective in the course of special procedures (e.g. posterior conversion into the sum total of sentences) in several cases;
- the exceptions of the prohibition of *reformatio in peius* which are effective in retrial are not effective in special procedures.

Before Act XIX of 1998 took effect, many disputes had taken place about the consequences of violation of the prohibition of *reformatio in peius*, since Act I of 1973 did not consider such a violation as a ground for review. The practice of the law – accurately – dealt with such a violation as a relative procedural contravention (cf. e.g. Article II of Conceptual Judicial Decision No. 189 of 2000). Since the effective CPC came into force on July 1, 2003, the prohibition of *reformatio in peius* is regulated as an absolute procedural contravention.

Conclusions

The issue of *reformatio in peius* can be traced back even to the Roman law, however in the past centuries neither the *reformatio in peius* nor its prohibition was examined in detail, and even some countries still are unaware of this legal institution. In the course of the appeal procedure, a court may alter the judgment appealed again in favour of the accused (*reformatio in melius*), which will not raise any theoretical problem; it will be permitted in the case of an appeal filed either in favour or to the detriment of the accused. However, several problems may arise if a detrimental alteration of the judgment (*reformatio in peius*) needs to be done. The legal remedies, at the time of their appearance, served only the purpose of correcting the mistakes of authorities, and on the grounds of a legal remedy, a judgment could only be altered in favour of the accused. Later, the prosecutor could earn more possibilities to appeal the judgment to the detriment of the accused, and a court of the second instance altered the judgment in this way. Thus, the requirement to set a limit for such actions was raised, otherwise the defence would not dare to file an appeal if the court of the second instance passed a disadvantageous decision regarding the accused on the basis of an appeal filed only in favour of the accused.

The prohibition of *reformatio in peius* is of two main types: the absolute and the relative prohibition of *reformatio in peius*. In the case of the absolute prohibition of *reformatio in peius*, a court of the second instance will never pass a decision which is more disadvantageous for the accused, even if an appeal had been filed to his detriment: if the court believes that a more severe punishment needs to be imposed than the one in the judgment of the court of the first instance, the court of the second instance will repeal the judgment of the first instance and order the court of the first instance to examine the case in new proceedings. In the case of the relative prohibition of *reformatio in peius*, the power of decision of a court of the second instance depends on the appeal: if an appeal was also filed to the detriment of the accused, then a more severe judgment may be imposed, but if the appeal was filed only in favour of the accused, then a more severe judgment cannot be imposed. In Hungary, usually the relative prohibition of *reformatio in peius* prevails.

Furthermore, the prohibition of *reformatio in peius* can be distinguished according to the provisions at issue, so complete prohibition and partial prohibition exist. The complete prohibition of *reformatio in peius* means that every decision which is detrimental to the accused is forbidden. The partial prohibition means the effective criminal procedure code determines exactly the provisions which are concerned by the prohibition.

Last but not least, the prohibition of *reformatio in peius* can be divided into cogent prohibition and exceptional prohibition. In case of cogent prohibition of *reformatio in peius*, no exception exists when the prohibition is effective. On the contrary, in case of exceptional prohibition the law may give permission not to act according to the main rule of the prohibition of *reformatio in peius* in certain cases.

The Hungarian criminal procedure law is characterised by a different regulation of provisions of the prohibition of *reformatio in peius* according to the stage of proceedings when the question of the prohibition of *reformatio in peius* may arise. Therefore the Criminal Procedure Code has provisions regarding the procedure of the second (third) instance, the retrial, omission of the trial, military criminal proceedings, waiver of the trial and the extraordinary legal remedies.

The main principle of *reformatio in peius*, that the court of a higher instance can alter a decision of the court of a lower instance to the detriment of the receiver of the decision, should be limited in order to let the law somehow balance the disadvantaged position of the accused. It can be called the prohibition of increasing punishment or simply the prohibition of *reformatio in peius*, either way it will refer to several advantages of the defence prevailing in the criminal

procedure, especially since about 75% of the appeals filed by the prosecutor happened to be capable of aggravating the sentence.

References

- Angyal, P. (1927). *Anyagi és alaki büntetőjog. Az érvényben lévő törvényekben foglalt büntetőjogi szabályok összeállítása a iudikatura feltüntetésével* [Substantial and technical Criminal Law. Compilation of the effective criminal legislation with the indication of judicial practice]. Pécs: Danubia. (In Hungarian)
- Barbarics, F. (1968). A súlyosítási tilalom [The prohibition of *reformatio in peius*]. *Magyar Jog*, 7, 420-425. (In Hungarian)
- Conceptual Judicial Decision No. 189 of 2000. *Official Journal of the Supreme Court*, No. 189 of 2000 Vol.2. (In Hungarian)
- Cséka, E. (1984). A súlyosítási tilalom tartalmának újabb elemei [Reforms of the content of prohibition of *reformatio in peius*]. *Jogtudományi Közlöny*, 3, 128-134. (In Hungarian)
- Delitalia, G. (1927). *Il divieto della reformatio in peius nel processo penale* [The prohibition of *reformatio in peius* in criminal proceedings]. Milano: Giuffrè (In Italian)
- Farkas, Á.; Róth, E. (2004). *A Büntetőeljárás* [The criminal procedure]. Budapest: KJK KERSZÖV. (In Hungarian)
- Gerber, H. (1913). *Das Verbot der reformatio in peius im Reichsstrafprozeß* [The prohibition of *reformatio in peius* in criminal procedure]. Breslau: Schletter (In German)
- Gönnér, N. (1804). *Handbuch des deutschen gemeinen Prozesses, in einer ausführlichen Erörterung seiner wichtigsten Gegenstände* [Manual of the German general procedures, a detailed discussion of its most important subjects]. Berlin: Bd. III. Erlangen. (In German)
- Grethlein, G. (1963). *Problematik des Verschlechterungsverbot es im Hinblick auf die Besonderen Maßnahmen des Jugendrechts* [The problems of prohibition of *reformatio in peius* with regard to certain actions of juvenile justice]. Luchterhand: Neuwied am Rhein. (In German)
- Hess, W. (1990). *Reformatio in peius. Die Verschlechterung im Widerspruchsverfahren* [Reformatio in peius. Increasing the sentence in appeal procedure]. Baden-Baden: Duncker& Humblot GmbH. (In German)
- Jeszenszky, F. (1956). A súlyosítási tilalom a fellebbezési eljárásban [The prohibition of *reformatio in peius* in appeal procedure]. *Magyar Jog*, 1, 5-8. (In Hungarian)
- Kapsa, B. M. (1976). *Das Verbot der reformatio in peius im Zivilprozeß* [The prohibition of *reformatio in peius* in civil proceedings]. Berlin: Duncker&Humblot. (In German)
- Kengyel, M. (2008). *Magyar polgári eljárásjog* [Hungarian Civil Procedure Law]. Budapest: Osiris. (In Hungarian)
- Linde, V. (1850). *Zur Lehre von der sogenannten Reformatio in peius* [About the doctrine of *reformatio in peius*]. Tübingen: Archiv für civilistische Praxis. (In German)
- Molnár, I. (1980). A súlyosítási tilalom főbb kérdései a hatályos jogunkban [Main questions regarding the prohibition of *reformatio in peius* in the effective Hungarian legislation]. *Magyar Jog*, 5, 426. (In Hungarian)
- Molnár, L. (1956). A *reformatio in peius* tilalmának érvényesülése a Bp. 202. § a)-c) pontjára alapított hatályon kívül helyezést követő új eljárásban [Predominance of the prohibition of *reformatio in peius* in the new procedure conducted due to a repeal based on section 202 a)-c) of the Criminal Procedure Code]. *Magyar Jog*, 4, 108-109. (In Hungarian)
- Nagy, L. (1960). *Fellebbezés a büntetőperben* [Appeal in criminal proceedings]. Budapest: Közgazdasági és Jogi Könyvkiadó. (In Hungarian)
- Neményi, B. (1956). A súlyosítási tilalom érvényesülésének vitás kérdései (ún. „*iudicium nullum*”) [Problematic questions regarding effectiveness of prohibition of *reformatio in peius* (a.k.a. ‘*iudicium nullum*’)]. *Magyar Jog*, 6, 170-173. (In Hungarian)
- Radó, Z. (1956). Érvényesül-e a súlyosítási tilalom a hatáskör hiánya miatt elrendelt új eljárásban? [Is the prohibition of *reformatio in peius* effective in the procedure ordered on the grounds of due to lack of jurisdiction]. *Magyar Jog*, 2, 39-40. (In Hungarian)
- Rácz, G. (1968). Fellebbezés, perújítás, törvényességi óvás [Appeal, retrial, veto on the grounds of violating legality]. *Magyar Jog*, 8, 457-462. (In Hungarian)
- Seuffert, K. (1861). *Die reformatio in peius im neueren, insb. bayr. Strafprozeß* [The *reformatio in peius* in the newer criminal process, in particular the Bavarian criminal proceedings]. München: Oldenbourg. (In German)
- The Act I on Criminal Procedure Code. *Magyar Közlöny*, 1973, No. 24. (In Hungarian)
- The Act III on the Criminal Procedure Code. *Magyar Közlöny*, 1951 (no effect since July 1st 1962.). (In Hungarian)
- The Act IV on the Criminal Code. *Magyar Közlöny*, 1978, No. 92. (In Hungarian)

The Act V on the Criminal Procedure Code. *Magyar Közlöny*, 1954 (no effect since 1st July, 1962.). (In Hungarian)

The Act XI on the Criminal Procedure Code. *Magyar Közlöny*, 1949 (no effect since January 1st 1952). (In Hungarian)

The Act XIX on the Criminal Procedure Code. *Magyar Közlöny*, 1998, No. 23. (In Hungarian)

The Act XXXIII on the Criminal Procedure Code. *Országos Törvénytár*, 1896, December 22nd (In Hungarian).

The Act LXIX on Infractions. *Magyar Közlöny*, 1999, No. 57. (In Hungarian)

The Decree law No. 16 on the Criminal Procedure Code. *Magyar Közlöny*, 1958 (no effect since January 1st 1988). (In Hungarian)

The Decree law No. 8 on Criminal Procedure Code. *Magyar Közlöny*, 1962 (no effect since January 1st 1974.). (In Hungarian)

Tóth, É. (1987). Adalék a súlyosítási tilalom kérdéséhez [Contribution to the problems of the prohibition of *reformatio in peius*]. *Magyar Jog*, 6, 525-526. (In Hungarian)

Wiener, A. I. (1980). A főbüntetés helyett alkalmazott mellékbüntetés és a súlyosítási tilalom [Secondary punishment applied instead of principal penalty]. *Magyar Jog*, 6, 492-497. (In Hungarian)

Short biographical notes

Csongor Herke is an associate professor and the head of the Department of Criminal Procedure Law and Forensic Science at the University of Pécs (Hungary), where he lectures on Hungarian and comparative criminal procedure law, as well as forensic science. He defended his PhD thesis on the theoretical and practical issues of preliminary arrest in 2001. In 2008, Csongor Herke received his Dr. Habilitus degree by giving a lecture for students dealing with consensual matters in the criminal procedure in light of constitutional principles and by making a research presentation on agreement in the criminal procedure. Csongor is the author of over 90 publications, 25 editions about criminal law, criminal procedure law and forensic science, including a number of monographs.

Csenge D. Tóth graduated from the Faculty of Political and Legal Sciences of the University of Pécs (Hungary) in 2009; by then she had also studied law for one and half years at the National and Kapodistrian University of Athens (Greece). In the same year, Csenge entered a doctoral program under the guidance of Csongor HERKE concerning criminal offences against health and the rules of medical research in the light of the criminal procedure and forensic science.