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法治社会、国家治理与政府审计

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卷 首 语

不积跬步，无以至千里，不积小流，无以成江海。

——《荀子·劝学》

这是中匈两国学者就法治社会、国家治理与政府审计理论与实务问题的首次会晤与对话，必将有力推进中匈两国学者在管理学、经济学与法学领域的知识交流与合作，它是中匈乃至中国与中东欧国家学者学术交流的平台，更是推进社会现代化发展的重要力量。

——题注

南京审计学院是中国乃至亚洲地区唯一一所以“审计”命名的大学，是中国审计高等教育的发源地与知识资源创新基地之一，基于学校重点科研与理论创新领域在中国社会现代化发展中的基础作用，学校的发展历来受到国家与社会的高度重视。进入21世纪以来，完善与推进法治进程、强化与优化国家治理，成为中国社会现代化发展的两大核心支柱，国家治理的理论与实践，开始受到前所未有的关注与重视，也为学校事业的跨越式发展提供了重大的发展机遇。2011年，南京审计学院被中华人民共和国教育部、财政部、审计署和江苏省人民政府确定为共建大学。

“特色、质量、国际化”是南京审计学院的办学理念，这一理念的创立与不断完善，是学校事业发展的重要准则与保证。办学理念是一个有机联系的体系，其中，“特色”是大学发展之基，由此决定了学校的战略目标选择，必须明确学校的重点与优势发展学科，以之为基础，塑造与优化重点与优势学科，据以打造学校的学术高地与“特色”品牌集群，注重优势学科的示范与辐射效应。“质量”是大学发展之本，由此决定了学校的战略目标选择，必须确立学校在知识创新与文化传承中的基本标准，大学准注重知识创新的能力建设，并不断提升建设水平，方能获得更多的发展机遇。“国际化”是大学发展之翼，由此决定了学校的战略目标选择，要不断扩大国际交流的范围与层次，提升大学的国际化程度与水平，实现知识的国际化、交流与对话的国际化。1975年，被誉为“近世以来最伟大的历史学家”的英国著名

The Hungarian Criminal Procedure System in the Light of Corruption

*Herke Csongor**

The Categories of the Criminal Law

Political and legal sciences in the Hungarian law system have three main groups:

- the first group is the political and legal theory which deals with the state and the law as a whole;
- the second group is the history of politics and law, which analyzes the development of the state and law from a historical approach;
- the third group includes specific legal disciplines which examine particular institutions, forms and specific correlations of the state and the law, as well as considers in detail their practical role and impact.

In this respect, the common distinction shall be made between private law and public law. Public law is a branch of law that governs the relationship between individuals and the state. Criminal law (or penal law) is an area of public law.

Within the area of criminal law there are three main categories:

- Substantive criminal law: Criminal law generally refers to substantive criminal laws (including its general and special parts). It defines crimes and establishes punishments to be imposed for the commission of these crimes.
- Procedural criminal law: Criminal procedure describes the process through which substantive criminal law is enforced (It specifies which authorities, against whom, under what conditions and rules may act and enforce the punitive power of the government.)
- Law of the execution of sentences: This provides the rules of how the punishments imposed in the course of lawful procedure must be enforced.

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Similar to other areas of law, criminal law also has its auxiliary sciences, such as criminology (which deals with delinquency as a social phenomenon), forensic science (often shortened to forensics, the rules of the application of scientific knowledge and methodology to legal problem and the investigation of single crimes), criminalistics (a related term to forensics, but refers more specifically to the analysis of physical evidence in criminal cases), furthermore, the areas of forensic medicine, criminal psychology, criminal statistics, etc. must not be forgotten.

The system of legal sources of Hungary

It shall be noted that Hungary belongs to the civil law legal system, the primary (and almost exclusive) feature of which is that laws are written, whereas the common law system based on the lawmaking of the judges.

According to Act CXXX of 2010 on legislation, there are two main forms of sources of law: statues and means regulating public law institutions. The hierarchy concerning statutes can be described as follows: first Acts of Parliament, secondly decree – laws (ceased to exist), thirdly decrees and at last state secretary orders (ceased to exist).

According to Act CXXX of 2010, the other legal instruments of governance are replaced by *means regulating public law institutions*. As a result, the former decisions shall be called "normative decisions" and the former instructions shall be called "normative instructions", this Act does not concern the statistical communications made before it took effect.

The legal sources of the Hungarian Criminal Procedure

The following slide shows the system of the legal sources of criminal law:

- Substantive criminal law: the Act C of 2012 on the Criminal Code;
- Procedural criminal law: the Act XIX of 1998 on Criminal Proceedings;
- Law of the execution of sentences: the Act CCXL of 2013 on theimplementation of the penalties, sanctions, certain coercive measures and misdemeanor confinement.

The Act XIX of 1998 on Hungarian Criminal Proceedings

The main source for criminal procedure is, therefore, the Act XIX of 1998 on Criminal Proceedings which would have originally entered into force on 1st January, 2000. However, due to numerous modifications, this could take place only on 1st July, 2003.

The CPC consists of 608 sections and it is divided into the following parts:

1. *Static part* (*section* 1 *to* 163)
2. *Main provisions of the investigation* (*section* 164 *to* 233)
3. *Provisions of the court procedure* (*section* 234 *to* 391)
4. *Extraordinary legal remedies* (*section* 408 *to* 445)
5. *Separate procedures* (*section* 446 *to* 554)
6. *Closing provisions* (*section* 555 *to* 607)

The course of the Hungarian criminal procedure

- The first stage is the investigation, which can be divided into two phases. The first is the tracking down of the unknown subject of the investigation (in other words: exploration), hence identifying the unsub. The second is the inquisition when the investigating authorities endeavours to collect sufficient evidence and may even apply coercive measures therefore.
- The second stage of the criminal procedure is the so called intermediate proceeding, including the indictment (when the prosecutors' office decides whether there is sufficient evidence to charge a person) and preparation of a trial (when the trial court decides whether a trial should be held against the defendant, arraignment).
- The third stage is the procedure of the court. Inevitable part of this stage is the procedure of first instance and depending on whether an appeal is lodged procedure of second or third instance may be initiated. After the final judgment on the merits has passed and special conditions are met, upon the request of the entitled persons extraordinary legal remedies may lift the rule of res judicata.

The subjects in the criminal procedure

Subjects of criminal procedure are those authorities and persons who take part in the procedure. These subjects can be divided into two main groups:

- the first includes the proceeding authorities of criminal procedures,
- while the other group consists of individuals participating in the criminal procedure.

The criminal procedure requires the existence of certain institutions with strictly determined rights and obligations, such as

- investigating authorities (tracking down unsubs and collecting sufficient evidence),
- prosecution (investigating, pressing and presenting the charges),
- and the court (sentencing).

Participants of the procedure are characterised as main – and subsidiary persons:

- Main persons are the defendant, the defence counsel, at last the victim (and the representative thereof).
- The subsidiary persons can be divided into four groups based on their connections to the procedure: the relatives of someone in the case, who cooperate in taking evidence, who became participant despite their will and who played a role in the initiation of the procedure.

The specialities in the criminal procedures against corruption crimes

The specialities in the Hungarian criminal procedures against corruption crimes are the following:

- exclusive prosecutor's investigative scope;
- the special rules regarding the defense lawyer;
- the special rules regarding the victim;
- the secret intelligence gathering and the corruption crimes;
- the high priority criminal cases against corruption crimes.

The exclusive prosecutor's investigative scope

Duties of the prosecutor differ during the stages of the criminal procedure as follows:

- on the one hand, the prosecutor investigates himself, or controls it and supervises the legality of investigation of other investigating authorities;
- on the other hand, the prosecutor presses and represents charges and – with the exception of private and substitute private accusation – may decide on postponing or partially omitting the indictment.

In certain cases only the investigating prosecutors are entitled to investigate. Here are the examples regarding the corruption:

1. Passive corruption of high – ranking public official: any high – ranking public official who requests or receives an unlawful advantage in connection with his actions in an official capacity, for himself or for a third party, or accepts a promise of such an advantage, or is in league with the person requesting or accepting the advantage for a third party on his behest.

2. Active corruption of public officials regard to judicial staff: any person who attempts to bribe a public official by giving or promising unlawful advantage to such person or to another person for influencing such official's actions in an official capacity.

3. Misprision of bribery: any public official who has positive knowledge of an act of active or passive corruption yet undetected, and fails to promptly report that to the authorities.

4. Claim influence: any person who gives or promises unlawful advantage to a person who claims to influence a public official, or to a third person on account of a person who claims to influence a public official.

5. Abuse of a function: any person who – purporting to influence a public official – requests or receives an unlawful advantage for himself or for a third party, or accepts a promise of such an advantage, or is in league with the person requesting or accepting the advantage for a third party on his behest.

6. Passive corruption in connection with a person who is working for or on behalf of a foreign economic operator: any person working for or on behalf of a foreign economic operator who requests or receives an unlawful advantage in connection with his actions in an official capacity, for himself or for a third party, or accepts a promise of such an advantage, or is in league with the person requesting or accepting the advantage for a third party on his behest.

7. Passive corruption by a person who is working for or on behalf of a foreign economic operator: any person working for or on behalf of a foreign economic operator who attempts to bribe a public official by giving or promising unlawful advantage to such person or to another person for influencing such official's actions in an official capacity.

8. Claim influence in connection with a foreign public official: any person who gives or promises unlawful advantage to a person who claims to influence a foreign public official, or to a third person on account of a person who claims to influence a foreign public official.

9. Abuse of function in connection with a foreign public official: any person who – purporting to influence a foreign public official – requests or receives an unlawful advantage for himself or for a third party, or accepts a promise of such an advantage, or is in league with the person requesting or accepting the advantage for a third party on his behest.

The special rules regarding the defense lawyer and the victim

The special rules regarding the defense lawyer: it is prohibited to be the defense lawyer of the police officer who commits corruption, while investigates in a fraud case, if the defense lawyer was previously the lawyer one of the victims in that case.

The special rules regarding the victim: In case of abuse of a function, the person who gives unlawful advantage is not victim, therefore the amount of the advantage is not enforceable as a civil claim. And generally: the person who commits active corruption is not the victim of the crime, therefore civil claim is not enforceable.

The secret intelligence gathering in the criminal procedures against corruption crimes

Secret intelligence gathering is allowed in case of:

- active corruption;

- passive corruption;
- corruption of public officials;
- passive corruption of public officials.

This crimes mentioned above at the exclusive prosecutor's investigative scope.

The high priority criminal cases against corruption crimes

Finally we have to talk about the high priority criminal cases. The high priority criminal cases against corruption crimes are the following:

1. Active corruption in connection with a person who is working for or on behalf of a foreign economic operator.

2. Passive corruption by a person who is working for or on behalf of a foreign economic operator.

3. Active corruption in connection with foreign public officials.

4. Passive corruption by foreign public officials.

5. Claim influence in connection with a person who is working for or on behalf of a foreign economic operator.

6. Claim influence in connection with a foreign public official.

7. Abuse of function in connection with a foreign public official.

In these cases the procedure shall be conducted out of turn concerning prominent cases. The fact that the procedure is conducted out of turn shall be ensured by every participant of the procedure by their own means.

Thank You for the Attention!

新中国反腐立法的宏观解读

谢冬慧*

腐败,已成为困扰世界各国的严重社会问题,如何惩治和预防腐败?! 法律可以破解这一难题,成为反腐败的有力武器。并且,运用法律手段反腐败,是世界众多国家所采取的行之有效的共同手段和方式,也是法治道路的必然选择和社会发展的理性需求,而运用法律反腐败的前提和基础是进行反腐败立法。新中国反腐败立法顺应了特定的时代诉求,它经历了几个发展阶段,未来的反腐败立法将朝着科学化、权威化、细密化等趋势向前发展。

一、反腐立法的诉求之源

(一)反腐立法要义:法治道路的选择

"立法是由特定主体,依据一定职权和程序,运用一定技术,制定、认可和变动法这种特定的社会规范的活动。"[1]它是表达国家意志的重要途径,实践证明,立法者利用立法手段协调社会关系,解决社会矛盾,往往是最佳路径,也是依法治国、建设法治国家的基础性活动。就新中国反腐立法而言,是指中共中央或相关机构作为立法主体,通过特定的程序,确认反对腐败的法律规范活动。新中国开国前夕通过的临时宪法文件《共同纲领》明文规定,一切国家机关必须厉行廉洁朴素,严惩贪污浪费。该纲领开启了新中国反腐立法的先河。

反腐立法是制度反腐理论[2]和法治国家的集中体现。法治是治国理政的基本方式,其"核心作用就在于,对随时可能被滥用、异化的权力作出制约,将权力运

* 谢冬慧,中国南京审计学院法学院教授,主要研究领域为法学理论。

[1] 周旺生:《立法学教程》,北京大学出版社2006年版,第60页。

[2] 该理论的基本观点是:腐败发生的原因是腐败动机与腐败机会耦和的结果。从外在客观原因来说,腐败产生的直接的原因在于制度上腐败机会的多少以及腐败成本的高低。因此,最佳的反腐败策略就在于通过科学的制度设计,减少制度漏洞,强化制度的执行力。参见张杰:《科学治理腐败论》,中国检察出版社2012年版,第41~42页。