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THE CRIMINAL DISTINCTIVENESS OF THE VICTIM'S CONSENT IN THE HUNGARIAN LAW PRACTICE

Abstract:

We can conclude that the Hungarian Penal Code does not include statutory regulations for the consent of the aggrieved person. To be able to adopt this instrument the judicial practice made this legal institution applicable by developing its conditions and background. Given that the consent of the aggrieved person restricts the scope of criminal liability I do consider that this institution is agrees with the requirements of the sate constitution. I would also like to point out that several authors¹⁾ are on the opinion that the consent of the injured person should be regularized with a statutory rule to ensure the requirements of legal certainty. However, the new Penal Code, that is currently in the phase of public harmonization, does not include it, either.

Keywords:

According to *volenti non fit iniuri*, the famous thesis of Ulpianus (Digesta 47.10.1.5.), the ground to exclude culpability, today can still impede criminal liability in Hungarian law of order.

1. 1. Antecedents in the history of law

Having reviewed the resources available we can clearly lay down that the cause for exclusion at discussion is such that was already considered in jurisprudence and praxis of the ancient times.

1. 2. Roman law

Roman law distinguished between 'delicta private' and 'crimina publica'. In the case of 'delicta private' the individual was injured, and if the person consented to causing harm, his agreement meant an exception to culpability. In case of 'crimina publica' the public weal was threatened and as a result in this case anybody's permission was indifferent.

1. 2. Italian regulation

'Codice Penole', which came into force on 1st June 1931, already mentioned assign consent. According to §50 of the Code, the person who harms or endangers any right with the permission of the legal entity cannot be punished. The Code did not include any further refinement or supplement and the currently operative Penal Code of Italy does not, either. The latter contains actually

¹⁾ WEINER, A.: *Imre Penal Code, general part, de lege ferenda MTA*. Institute of Jurisprudence. Budapest, 2003. p. 109.

literally the same enactment: “The person who harms or endangers any right with the permission of the entitled/authorized person cannot be punished.” (§50)

1. 3. Solutions of the German law

Leges Barbarorum required the statement of volition by the injured person in any kind of crime to establish the criminal liability. However, considering today’s law dogmatic systems this regulation can actually be associated with the legal institution of private motion or request, that is, the statement of violation by the injured person that initiates the prosecution.

Similarly to the Roman law, *Constitutio Criminalis Carolina* also distinguished between ‘delicta private’ and ‘crimina publica’. In accordance with the conception of Roman law, in case of ‘delicta privata’ the permission of the injured person was an exception to, whereas in the case of ‘crimina publica’ this statement was indifferent to culpability. Because of the different judgment, it was significant which malfeasance pertained to the category of ‘crimina publica’ and which was ‘delicta private’. For example procured abortion was considered as a crime against the public and as a result the permission to this action was not an exception to culpability. According to the Bavarian Penal Code of 1813 the victim’s consent had significance only if the crime was against property. The German Penal Code (1871) did not include a general disposition, the consent of the injured emerged only related to particular regulations. The operative German Penal Code follows the abovementioned law practice as well.

2. Hungarian distinctiveness in judging the consent of the injured

The Hungarian Penal Code (Act IV 1978) does not include any legislative regulation about the consent of the injured person. This formula and its effect on criminal liability was developed by the Hungarian judges. By the law practice of the Hungarian judges in certain cases and under certain conditions the consent excludes criminal liability. So although without having statutory rule to back it up, it is present in the practice of adjudication of Hungarian courts and can provide a ground for excluding culpability.

3. Legal-philosophical background of the victim’s consent.

According to the dominant view in the relevant literature, the victim’s consent must be based on his own free will. It shall only be considered as ground for excluding culpability, if the victim in the lordship of self determination right waives his right to protect his legal value and this way excludes malfeasance.

Thus does the question arise; what is the principled basis for the acknowledgement of victim’s waiver statement (by those who make legislation), furthermore, can the criminal law of a constitutional state be in consideration of the individual’s statutory freedom.

In the case when the victim’s claim of criminal law is enforced by the state,

the individual's opportunities in the hierarchical relation are clearly not unlimited.

The contradicting models distinguish between consent and assent. The consent excludes culpability in some exceptional cases determined by those who make legislation²⁾ and the judicial practice. Assent excludes conscious malfeasance.

In this model the victim's will, originating from the individual's statutory freedom is against the legal expectations representing public interest.

The victim's consent to a conscious malfeasance sets the obligatory force of said dispositions free. The exoneration does not apply to all prohibitions, only to a specific situation. Thus the person is not obliged to his consent statement making the conductor unable to refer to it later saying that the victim gave his consent earlier to commit the conscious malfeasance.

Though, the assent is relevant from the viewpoint of conscious malfeasance. According to the regulation of the breach of domicile³⁾ in the Hungarian Penal Code, another person staying in an apartment will only be a criminal act if he stays there against the will of the owner or the tenant. Squarely it will not be a criminal act if it happens with a pronounced permission. The integration model raises the victim's consent into the circle of the legal subject. Hereby the miss of the legal fact is the excuse to liability.

In conformity with Noll's consideration theory the self-determination of the individual can have conflicts with legal values protected by criminal legal facts. In these situation the conflict can be lifted in consideration of the concrete conditions. The principle of the gradation: the more significant interest overtake the less important interest. Everyone has the right to self-determination in his own sphere of interest. Consent founded in the base of that view are unable to cause criminal law consequence. The situation is pretty much different when the protected legal subject is the public interest because in relation with public interest the consent is not be thought of (szóba sem jöhet) since no one is able to

4. Definition of the victim

§50 (1) of the Criminal Procedure Act (Act XIX 1998) defines victims as a person whose right or legal interest has been harmed or endangered by crime.

However, the injured and the plaintiff are not equivalent concepts in the Hungarian legal system, the two categories mostly coincide in practice, but it

²⁾ Republic Of Austria's Penal code §90 include regulation like this. According to §90 (1) the harm or the endanger of the body is not unlawful if the victim or the endangered person has made a consent and the conduct is not against morality. The §90 (2) is dealing with concrete medical acts. The sterilization did by doctors with the consent of the patient is not unlawful, if the patient is his 25th year and is not against morality.

³⁾ According to the §176 (1) of the Hungarian Penal Code: Someone who enters into someone's house, accommodation or pale belonging to the house or accommodation with force, threat or misrepresentation and stays there commit a crime.

is not necessarily so. The injured is a substantive law category referring to the person against whom the crime was committed. The victim is a procedural category as I have already mentioned.

In the matter of a natural person, the consent is only relevant in criminal law if it comes from a person whose right or legal interest would be harmed or endangered with the crime. In the case of an artificial person the difference is only that the consent can be made by a representative.

5. Submittal of the victim's consent

It is questionable what kind of statements and activities can be considered a consent in the judgment of criminal law, and also whether the delinquent should be aware of this consent. Furthermore, it may be up for a debate in what form the victim should express his will that he does not require the protection of the legal object.

Those in favour of the will-theory say that it is only the mental state of the victim that has significance. Thus the victim's consent does not need to be shown to the outside world in any form and neither is it necessary for the offender to have information about it. As a result, the mental attitude that results in the victim's consent is necessary and sufficient condition of the impunity. According to the less strict version of this theory the will expressing the victim's consent should appear - if not 'expressis verbis' - but at least in a conclusive form about which the conductor does not need to know.

On the other hand the followers of the so-called declaration theory are on the opinion that to exclude criminal liability it is necessary that the conductor knows about the consent which has to be clear and explicit.

In my view the declaration theory is the dominant one in most European countries and also in Hungary. However, if we accept the theorem as a premise that the victim's consent provides ground for excluding malfeasance *v*, then the will-theory may seem more appropriate.

Guaranteeing the right of disposal about his legal right constitutes the basis of the defense and if the legal fact pleases the victim and, then as for the culpability, it is indifferent if the conductor did have a knowledge about the consent or not.

An example could be the case of a person who has wanted to get rid of the stucco on the wall of his house for a long time but before he could do it, a neighbour damages it because of a previous disagreement. In this situation the consent excludes the opportunity to hold the conductor criminally liable, even if the intention of his conduct was not in favour of the house owner, but rather to his loss. Detachedly, in this given situation the conduct was for the good of the victim, and for this reason the criminal law cannot regard it as an unlawful act. It is questionable – though only in procedure - how it can be proved that there was a consent and not a posterior approval, as the latter is a mitigating circumstance at best.

It is also debated if the consent should fit the conditions or certain variance is

allowed when norms outside the criminal law specify modal conditions. The question could also be put whether the victim's consent is criminally valid only if it fits the modality of another legal branch. According to the law practice and relevant literature the dominant standpoint is that even though the consent does not meet formal requirements, it will not invalidate the victim's statement and it can be used as a legal document. That is why a statement that is not valid in civil law can still be of interest in substantive criminal law. Let me point out that there are also opposite views, which, referring to the unity of the legal system, come to the conclusion that an invalid consent in civil law shall not be relevant in criminal law either. With referring to the unity of law and order we can conclude that an extinct statement in the civil law can not be relevant in the criminal either. This view can be approved regarding the content requirements, but not as far as the formal requirements are concerned. In criminal law formal inadequacies can be significant only when it comes to the proving phase.

6. The criteria of timeliness

The victim's consent must give his consent before the conductor starts to perpetrate the act against criminal regulation. In case the injured consents either after the act has been started but by criminal law it is not yet considered an accomplished act, or – as I have mentioned before – if the injured contests the act posterior, after it has been completed, the statement cannot be considered as a defense, the consent given after the conduct does not have significance from the aspect of criminal liability. I find this theorem appropriate even if several authors are on the opinion – supported by life-like examples – that posterior approvals⁴⁾ should be held as a defense as long as the prosecution has no proof beyond doubt that the victim did not consent to the crime posterior. Otherwise, a friend, having a glass of wine in the owner's cellar while waiting for him, would commit a theft, indifferent of the fact that he knows that the owner will consent to it when he arrives. I believe that the abovementioned act is a theft, regarding the price of the wine, and the fact that no prosecution will start in default of reporting is another issue. As for the consent, it can be withdrawn freely any time without any explanation or justification.

7. The circle of the entitled

As not everyone can consent to the harm of his rights or his legal interests, possessing the consenting ability has a determinative significance.

The fact of consent is irrelevant in criminal law if the victim:

- is under the age of 14
- is under guardianship regarding statutory conditions because of legal incapacity,
- he's in a state which prevents him deciding about his own affairs.

⁴⁾ BALAZS, G.: *The Hungarian Criminal Code I.* 'Magyar Közlöny Lap- és Könyvkiadó' Budapest, 2008. p.154.

For this reason, if a 10-year-old child gives his money voluntarily to the request of the perpetrator, the theft is materialized. It is another question that the conductor must be aware of the fact that the person who consented was under guardianship because of legal incapacity. In case the conductor has no knowledge of this condition, it is regarded as factual mistake which will make the basis of the exclude.

The consent of people belonging to the above category is not relevant according to the criminal law because due to their ages and mental disorders they are not able to realize the importance of the abandonment of their rights.

Only those consents of the injured can be accepted which were made free from force, error and threat and provided the injured possesses consenting liability, recognized by law. In this part I agree with the authors who state that the errors of will, for example the mistake should be related to the protected legal object, because if the consent applies to indifferent circumstances, the perpetrator is not culpable. The opposite viewpoint is that of those who give full power to the will of the injured and say that a consciousness, – which is aware of all questions and details – is a necessary condition for the consent to be legally effective.

Thus the consent must be voluntary, serious and also unambiguous.

8. What crimes the victim's consent covers

The enforcement of *volenti non fit iniuria* is not unlimited in the criminal law.

a, The victim can consent to the injury of property and injury of interest and thus taking objects with the consent of the victim and destroying other's assets with the consent of the owner do not realize a theft or damage.

b, In case of crimes that are committed against individuals the situation is not that unambiguous. The former Hungarian Penal Code, the so-called "Csemegi Kódex" regulated desirable homicide as an aggravated crime. However, the currently operating Penal Code states that a person committing a criminal homicide on the victim's request will be charged for malicious manslaughter as well. Here I need to mention the issue of euthanasia. Euthanasia in everyday life means to shorten painlessly the life of those close to death and unable to live an honorable life any more. It can be materialized by the victim's initiation (voluntary euthanasia) or without it (involuntary euthanasia). This everyday life euthanasia is considered as malicious manslaughter. According to criminal law, the term euthanasia can only be used when a doctor helps a patient into death because he is suffering from an incurable disease and has intolerable pain. The act can be regarded as euthanasia only if it happens after the patient's specific will and it is the doctor who takes the intervention that causes death (active euthanasia), or the doctor misses the treatment that would save the patient's life (passive euthanasia). The relevant act in the Hungarian legislation is The Medical Act (Act CLIV 1997). §15 (1) of the statute ensures the patient's right for autonomy. According to this autonomy, the patient can freely decide whether he requires medical service or not and also what kind of medical treatment he

allows. The denial of the treatment is regulated by the Medical Act. §20 (3) says that the life-saving or life-sustaining treatment can be denied in case the disease is lethal, it leads shortly to death even with the help of the advised medical treatment, and with the denial the patient allows the disease to have its natural course. The denial of the life-saving treatment is only valid if it is made in front of a medical commission including three doctors. First the members of the commission examine the patient and concordantly state in writing that the patient was aware of all the consequences when he made his decision. The patient has to renew his declaration in front of two witnesses on the third day of the examination. The declaration must be made in the form of an official document.

We can conclude that if the patient rejects the treatment appropriately according to the legal regulation, the doctor cannot be obligated to carry on the treatment. In this case, however, the doctor cannot be charged for omission manslaughter.

The Hungarian Constitutional Court has also dealt with euthanasia. The Court declared (28.IV 22/2003) that the Medical Act is not anti-constitutional because it does not make the active form of euthanasia possible. The consent in crimes against bodily fear excludes criminal liability only if the victim consented for a commonly recognized public interest. According to the Hungarian judicial practice the consent is not a defense if the maltreatment is based on a bet.

The sentence of the European Court of Human Rights stated in the case of *Brown v. others United Kingdom* (1994) that to call somebody to account for the bodily harm caused by sado-maso act does not violate the 8th article of the European Convention of Human Right that protects the right to privacy.

However, sport activities are socially recognized. In certain sports, considering the nature of the given sport, the danger that participants cause harm to each other is extremely big. Obviously, the boxer entering the ring is fully aware that he can get seriously injured during the match, but by taking part in the activity he takes the risk with implied conduct.

According to the Hungarian practice the consent is a defense only if the harm was caused:

- during a fight of a recognized competitive-sport
- in a match that was played according to the sport regulations
- was not intentional.

These conditions must be present together. It has no significance, however, if the person does the sport for fun or competitively. Thus the same rules can be applied for a school football match and a professional match. Violation of the rules of a sport does not base the criminal liability in itself, even in case it was on purpose, because injuries can happen for example even if the football rules are fully kept. During the game, when a player kicks the other player's leg instead of the ball, he commits a foul, but this foul will not base criminal liability even if the victim breaks a bone as there is a victim's consent. There

is a completely different case when the aim of the penetrator is not only a foul but also to cause assault because then his act is a crime.

To conclude we can lay down that in case the sportsman does not harm the regulation while causing bodily harm, for example if a boxer punches the opponent so strong that he breaks his nose, he will not be charged due to the consent. The same rule applies if the player breaks the rules, but causes assault incautiously. However, if the intent is both the violation of the rules and committing a foul, the person must be called to account for committing a crime.

The practice of the Hungarian legislative power considers the consent as a defense in case it realizes socially recognized purposes. For instance if an alcohol addict consents to being locked into his house so that he does not get any alcohol, the person who locks him cannot be liable for crime against liberty.