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THE EFFECTS AND LIMITS OF LEGAL FORCE: THEORETICAL ISSUES RAISED BY ITS CHANGING CONCEPTION IN HUNGARIAN CRIMINAL PROCEDURE

Theses of the Doctoral Dissertation

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I. THE RESEARCH TASK IN THE LIGHT OF THE HISTORICAL EVOLUTION OF THE CONCEPTION OF LEGAL FORCE

Legal force is a long-established institution, known since Roman law, and constitutes a fundamental institution of European mixed-system criminal proceedings. Nevertheless, throughout the first 120 years of the history of codified Hungarian criminal procedure law, beginning in 1896, none of the procedural codes attempted to define the concept. The new Code of Criminal Procedure adopted on 13 June 2017 (Act XC of 2017 on Criminal Procedure; hereinafter: Be. IV[1]) is the first to regard legal force as a concept warranting a statutory definition. This does not, of course, mean that its content had not crystallised in legal theory or that doctrines and views concerning its distinctive features had not developed. It is nevertheless a fact that this absence of codification provided fertile ground for divergent interpretations of legal force. Yet it would be foolish to suppose that codification has value in itself - the secret lies in doing the right thing well. The question remains whether the drafters of the new Code were privy to that secret.

My research focuses primarily on the changing conception of legal force. Having examined and presented the earlier legislation - or its absence - and the associated legal theory, I must first scrutinise the provisions of the law in force that directly govern legal force. My inquiry also extends to institutions whose connection with legal force is more remote but which, although only indirectly, exert a significant influence on the new doctrine and theory that must necessarily be developed in this field.

According to the generally accepted view, legal force is a property conferred by law on a judicial decision and brings the case to a close. A final and binding decision is no longer open to an ordinary remedy; it becomes definitive and may therefore neither be altered nor withheld from enforcement. Its contents are binding and authoritative not only on its addressees but on everyone else as well; they possess evidentiary force and must be regarded as true.

Of the authorities participating in criminal proceedings, only courts can issue decisions capable of acquiring legal force. Although proceedings may be terminated before an indictment is filed, decisions of the investigating authority or the prosecutor do not amount to a determination of the case regarded as final. This does not mean that such decisions produce no legal effects or that their contents are not binding on their addressees. The termination of

[1] The literature still frequently refers to the Code of Criminal Procedure currently in force as the "new Be." Since almost ten years have elapsed since its adoption and it is not inconceivable that a genuinely new code may soon be drafted, I avoid this anachronism by using Roman numerals, rather than the terms old Be. and new Be., to identify the particular code of criminal procedure under discussion.

proceedings by the prosecutor or the investigating authority, however, does not preclude the continuation of criminal proceedings.

Legal force is closely connected with remedies adjudicated by a forum situated at a higher level of the organisational hierarchy than the court that delivered the challenged decision. Consequently, legal force can be understood only within a hierarchically organised, multi-tier court system and in conjunction with a remedy having devolutive effect. This explains why the classical Continental concept of legal force does not arise in common-law legal systems, where criminal cases are decided by a body of lay jurors convened for the particular case (the *jury*), with no superior body to which its verdict may be appealed.

Legal force is an artificial, legally created rule - one that, following H. L. A. Hart, may be described as *secondary*[2] - which attaches to a court judgment an effect additional to those of the acts of the other participants in criminal proceedings. Through this additional effect, the contents of the judgment become final and indisputable, create an adjudicated matter (the *res judicata* effect), and trigger the prohibition of repeated proceedings (*ne bis in idem*).

In the Continental mixed system, the purpose of criminal justice is to ascertain the truth within the framework of legality and to achieve justice. Both society and the law expect a final and binding judicial decision to meet these requirements.

Some philosophical schools deny or relativise the existence or knowability of truth, while others accept it. Without taking a position in these philosophical debates, it is useful to proceed from the proposition that criminal proceedings, and the taking of evidence within them, are capable of establishing the truth; put differently, evidence is one of the preconditions for determining the truth[3]. The facts established by the investigating authority or prosecutor, and the testimony of the accused or a witness, may coincide with the truth. The law, however, confers through legal force the force of truth solely on a judicial judgment or decision and on the findings contained in it - that is, the adjudicated matter must be regarded as true (*res judicata pro veritate habetur*) - together with the further effects of legal force.

Some authors, including Tibor Király[4], consider the qualification of "truth" by the adjective "legal" to be an abuse of the concept that relativises truth. Others, including Árpád Erdei[5], regard the truth established in a criminal judgment as "legal truth", proceeding from the

[2] H. L. A. Hart: *A jog fogalma* [The Concept of Law]. Osiris Kiadó, Budapest, 1995, p. 167.
[3] Erdei Árpád: *Újítások, találmányok, felfedezések a büntetőeljárásban* [Innovations, Inventions and Discoveries in Criminal Procedure]. *Belügyi Szemle*, 2018/3, p. 7.
[4] Király Tibor: *Büntetőítélet a jog határán* [Criminal Judgment at the Boundaries of Law]. Közgazdasági és Jogi Könyvkiadó, Budapest, 1972, p. 222.
[5] Erdei Árpád: *Tanok és tévtanok a büntető eljárásjog tudományában* [Doctrines and False Doctrines in the Scholarship of Criminal Procedure Law]. ELTE Eötvös Kiadó, Budapest, 2011, p. 51.

fact that legal force attaches legal effects to the declarations made in a judicial judgment. It is in any event undeniable that, by virtue of legal force, the truth declared in a judicial decision is transformed from a legal opinion into a legal fact producing legal effects.

As Ferenc Finkey[6] observed, heightened respect for legal force emerged during the French Revolution. Until then, absolute monarchs had personally granted permissions for the reopening of final judgments (*lettres de révision*), naturally for the benefit of their favourites or to the detriment of their opponents, thereby using criminal proceedings as a means of settling scores. This practice provoked such revulsion that the Constituent Assembly of 1791 abolished reopening altogether, on the ground that the immutability of a judicial judgment was a stronger interest than truth itself: "*L'autorité de la chose jugée est plus forte que la vérité même*."

For the time being, the task of adjudication is still performed not by machines but by fallible human beings, who may err despite the greatest knowledge, care, conscientiousness, and professional experience. Remedies provide an opportunity to correct errors in judicial decisions. As Hart pointed out, however, rules cannot provide for the correction of every breach of every rule.[7] The institution of legal force arose from the need for criminal proceedings to come to an end at a certain point, whatever the outcome; for the decision delivered to be capable of being relied upon and to become authoritative; and for those whom it concerns to accept its finality. Legal force has thereby become one of the cornerstones of legal certainty.

The function of legal force is to reconcile the requirements of justice and legal certainty, with priority accorded to the latter. The immutability and authoritative nature of final and binding decisions constitute a fundamental constitutional interest. At the same time, the lawful and just exercise of the State's punitive power is an obligation of the rule-of-law State. This became clear in France as well after the impetuous abolition of reopening in 1791, and the institution found its way back into French law within a few years. In order to correct judicial errors and mistakes and to ensure that an offender is punished in accordance with the law, it must exceptionally be possible to set aside a final and binding decision through effective instruments available under strict conditions, namely extraordinary remedies.

Until that occurs, or where extraordinary remedies are no longer available, the final and binding judgment remains in force and the presumption that it is free from defect continues to

[6] Finkey Ferencz: *A magyar büntetőeljárás tankönyve* [Textbook of Hungarian Criminal Procedure]. Politzer, Budapest, 1908, p. 537.
[7] Hart (1995), p. 167.

apply. As Hans Kelsen put it, "[a]ny other opinion concerning an allegedly existing contradiction is legally irrelevant".[8]

The roots of legal force can be found in Roman law. It originally appeared as a defence (*exceptio rei iudicatae*) which, once judgment had been delivered and the claim had thereby been exhausted, protected the defendant only against the same claim being brought again. Legal scholarship gradually extended its scope: once an issue had been determined by a judicial judgment, it could no longer be litigated in any context. This was expressed by the maxim *res iudicata pro veritate accipitur*, according to which the content of a judgment, even if erroneous, must thereafter be regarded as authoritative.[9]

If we look back to the Middle Ages in the development of Hungarian law, signs of the effects of legal force can be identified even though the institution did not yet exist *expressis verbis*. Article XXVIII of 1222, for example, provided that a person lawfully condemned could not be exempted from execution of the judgment by an exercise of power. Section 1 of Article VI of 1518 (Vienna) already reflected the finality and enforceability of judicial decisions.

The full range of the effects of legal force can be identified in István Werbőczy's *Tripartitum*, the collection of the laws and customary law of contemporary Hungary published in 1514. It contains enforceability and the *res judicata* effect, as well as the *ne bis in idem* rule.

The concept, types, and effects of legal force crystallised in legal scholarship over the centuries. Perhaps owing to the institution's long history, legislative changes did not affect its fundamental doctrinal relationships. Hungarian legal theory also addressed legal force, and the scholarship of procedural law in the late nineteenth and early twentieth centuries devoted attention to it in textbooks and commentaries, albeit not always extensively or comprehensively.

Our first codified code of criminal procedure, Act XXXIII of 1896 (hereinafter: Bp. I), did not yet contain an express statutory regulation of legal force, although certain features of the institution could be inferred implicitly from individual provisions. Enforceability was clearly an effect attached to the judgment becoming final and binding.[10] The *res judicata* effect was demonstrated by the rule that a previous final and binding judgment concerning an offence constituted a procedural bar and resulted in termination by the indictment chamber,[11] or in

[8] Hans Kelsen: *Tiszta jogtan* [Pure Theory of Law]. Rejtjel Kiadó, Budapest, 2001, pp. 48-49.
[9] Földi András - Hamza Gábor: *A római jog története és institúciói* [The History and Institutes of Roman Law]. Based on the textbook by Róbert Brósz and Elemér Pólay. 14th revised and expanded edition. Nemzeti Tankönyvkiadó, Budapest, 2009, p. 186.
[10] Bp. I, section 494.
[11] Bp. I, section 264, point 1.

acquittal by the court at trial.[12] The evidentiary force of a final and binding judgment was reflected in the requirement that the judgment recording the accused's previous conviction be read aloud at the main hearing as documentary evidence. The *ne bis in idem* effect emerged from the rules governing reopening, which permitted the continuation of proceedings terminated without legal force during the investigation or judicial investigation. The existence of partial legal force followed from the rules on partial review: appellate review was confined to the provision of the judgment challenged by the appeal,[13] and lodging an appeal suspended the acquisition of legal force by the challenged part of the judgment.[14] The part unaffected by the appeal was not subject to review and could therefore acquire partial legal force.

Under Bp. I, criminal proceedings could be terminated during the investigative stage, the judicial-investigation stage, or the judicial stage. Termination during the investigation by the Royal Prosecution Service or the head of the police authority did not acquire legal force, which could attach only to case-dispositive decisions delivered by a judge and concluding the case. During the judicial investigation, proceedings could be terminated by the investigating judge following withdrawal of the charge, or by the indictment chamber on other grounds. The accused could be found guilty only by a court in a judgment following the taking of evidence at trial. Criminal proceedings could be concluded by an order of termination upon the accused's death or withdrawal of the charge by the prosecutor, or by a judgment of acquittal where guilt could not be established for another reason. The court could not pronounce guilt without holding a trial, but it could impose a penalty by penal order, which also carried the effect of enforceability.[15] As Ferenc Finkey stated, termination by the court was "equivalent" to acquittal,[16] and the relevant decisions of the investigating judge, the indictment chamber, and the court were therefore capable of acquiring legal force. This meant that both types of case-dispositive decision, irrespective of whether they actually determined the merits, triggered the *ne bis in idem* effect upon becoming final and binding. Reopening was consequently available only within the limitation period, only on the basis of new incriminating evidence, and only upon application by the Royal Prosecution Service or the principal private prosecutor.[17]

The compensation rules then in force nevertheless revealed some difference between the various grounds for termination and acquittal. Following a final acquittal or termination,

[12] Bp. I, section 326, point 1.
[13] Bp. I, section 387.
[14] Bp. I, section 395.
[15] See Bp. I, section 535(4).
[16] Finkey Ferencz: *A magyar büntetőeljárás tankönyve* [Textbook of Hungarian Criminal Procedure]. Published by Politzer Zsigmond és fia, Budapest, 1903, p. 322.
[17] Bp. I, section 444.

the accused was entitled to compensation for pre-trial detention or detention pending judicial investigation suffered during the proceedings only if the offence had not been committed by the accused, had not been committed at all, or did not constitute a criminal offence under the law.[18]

After Bp. I ceased to have effect, it was not primarily the conception of legal force that changed, but the structure of the proceedings and the actors involved: the institution of the investigating judge was abolished, and preparation for trial by the indictment chamber was replaced by preparation by the trial court. Consequently, only the trial court could thereafter deliver case-dispositive decisions capable of acquiring legal force. During preparation for trial, a case could be concluded only by an order terminating the proceedings. Following trial, most of the former grounds for termination became grounds for a judgment of acquittal.

Act III of 1951, which enacted Bp. II, was the first to state the prohibition of repeated proceedings as a fundamental principle: "Except in the event of reopening or a remedy in the interests of legality, no further criminal proceedings may be brought against the same person for an offence already finally adjudicated."[19]

Act I of 1973 (Be. II) added acquittal for lack of evidence to the circumstances giving rise to compensation, alongside the existing grounds that the act did not constitute a criminal offence or had not been committed by the accused. The remaining grounds for acquittal or termination, since they did not qualify as grounds for compensation, resulted in case-dispositive decisions that were "weaker" in their effects. Withdrawal of the charge was added to the grounds for compensation in 1985, and equivalence among the grounds for acquittal, for compensation purposes, was achieved by 1988. Until 1995, the minor degree of danger posed to society and the absence of a private motion as grounds for termination were still treated as exceptions to the grounds giving rise to compensation. A legislative amendment, subsequently supported by a decision of the Constitutional Court, ultimately brought them within the grounds for compensation as circumstances excluding punishability. The regulation of compensation then remained unchanged for a considerable period.

Although the theory of legal force in the second half of the twentieth century was not free from uncertainties or divergent approaches and opinions among legal scholars, it was essentially characterised by continuity. The subject did not stand at the centre of scholarly interest, as demonstrated by the fact that the first monograph in Hungarian criminal procedure

[18] Bp. I, section 576.
[19] Bp. II, section 6.

scholarship to address questions of legal force comprehensively, written by Balázs Elek, did not appear until 2012.[20]

Until recently, the generally accepted view, also reflected in statutory texts, was that substantive legal force was essentially a characteristic of case-dispositive decisions determining the merits, whereas non-case-dispositive, so-called interlocutory orders were regarded as capable only of acquiring formal legal force. For some authors, the distinction between formal and substantive legal force was linked to the civil-law-derived conception that substantive legal force belongs to decisions determining the substantive criminal-law issue on the merits, while decisions containing no determination on the merits in this sense can possess legal force only in a formal sense.

Up to and including Be. III, enacted by Act XIX of 1998 and amended repeatedly even before its entry into force, the statutory provisions underlying the doctrines of legal force underwent no fundamental change. Divergent theoretical perspectives therefore developed at most on matters of detail. Since statutory regulation was absent, theoretical conceptions differed somewhat in their definition of the formal and substantive effects of legal force, but this caused no difficulty in practice. Nor was there agreement in legal theory on the distinction between case-dispositive and non-case-dispositive decisions, or between decisions on and outside the merits. This situation could likewise arise because the categories had not been clearly regulated by statute.

In my view, the turning point that initiated the change in practice and legal theory to which the legislature later responded can be traced to the 2006 amendment of Be. III. At that time, the lawful charge was introduced into the Code as the basis of judicial proceedings, with a statutory definition corresponding to the constituent elements of a charge now listed in section 422(1) of the Code in force. The absence of a lawful charge became a ground for termination irrespective of the stage at which the court identified it, from judicial preparation for trial through extraordinary-review proceedings, and termination on that ground could also give rise to compensation.

Practice, however, “looked unfavourably” upon the prosecutor's error producing such consequences and sought to reduce prosecutorial responsibility by “reinterpreting” the centuries-old doctrine of legal force. Criminal Law Department Opinion No. 1/2007 - later reinforced by Constitutional Court Decision 33/2013 (XI. 22.) - took the position that an order terminating proceedings for lack of a lawful charge had no substantive legal force because it

[20] Elek Balázs: *Jogerő a büntetőeljárásban* [Legal Force in Criminal Proceedings]. University of Debrecen, Faculty of Law, Department of Criminal Procedure Law, Debrecen, 2012.

did not adjudicate the charge on the merits. Its contents therefore did not constitute an adjudicated matter and did not prevent the prosecutor, within the limitation period, from bringing another charge against the accused in respect of the same act previously charged. In my view, the interpretation adopted in these decisions, lacking a statutory basis, not only ran counter to the requirements of legal certainty and normative clarity but also endangered the principle of separation of procedural functions and judicial impartiality. It permitted the prosecutor to bring a renewed charge after the court itself had explained, in the reasoning of the terminating order based on the absence of a lawful charge, how the defect could be remedied.

The absence of statutory regulation also caused interpretative difficulties in practice regarding an order quashing a decision and remitting the case for new proceedings. Panels of the Curia differed in their interpretation of whether such an order could be challenged and, consequently, whether it possessed legal force. This gave rise to Uniformity Decision No. 2/2015, which held that an order by a second-instance court quashing a first-instance decision and directing the first-instance court to conduct new proceedings possesses formal legal force and may therefore be challenged by the Prosecutor General by means of a remedy in the interests of legality.

II. Summary of the Research Objectives and Structure of the Dissertation

Against this background, it is perhaps unsurprising that the Code of Criminal Procedure in force, enacted by Act XC of 2017, apparently transformed the conception of legal force to a significant extent. It restructured the system of judicial decisions, introduced the concept of finality in place of legal force for non-case-dispositive decisions, and reserved legal force exclusively for case-dispositive decisions. One strand of my research examines how the conception of legal force changed under the 2017 Code and what the individual effects of legal force entail. These questions are addressed in Chapters One and Two of the dissertation.

What certainly changed was the range of decisions capable of acquiring legal force, although the restructuring lacked a solid doctrinal foundation. Chapter Three of the dissertation maps the system of judicial decisions, clarifies the concepts of case-dispositive and non-case-dispositive decisions and of decisions on and outside the merits, and provides a detailed doctrinal analysis of the new category of finality.

Chapter Four examines the effects of legal force from a perspective based on the recognition that, although they are commonly attributed to the judicial decision as a whole, they are in fact "heterogeneous". I demonstrate their heterogeneous nature by showing that some effects attach to the declaratory, *sein*-type elements of the decision, others to its constitutive, *sollen*-type provisions, while still others can be understood only in relation to the decision as a whole.

Chapter Five concerns the truth-presuming *res judicata* effect of legal force, but approaches it from a different perspective. A further change is associated with the 2017 Code, although it forms part of a trend that began earlier: the principle of substantive truth has receded as an objective of criminal proceedings, while institutions content with formal truth or the "truth of the legal dispute" have emerged and gained ground in practice. These institutions and the conception of truth in criminal proceedings, together with the court's role in "seeking the truth", influence - albeit indirectly - the theory of legal force, the content of its effects, and the possibilities of circumventing or setting aside a final and binding decision. This is particularly so as regards remedies for factual errors and the limits of legal force, with special regard to regulatory-offence law. Examination of the associated doctrinal and theoretical questions constitutes the third research objective.

In Decision 9/1992 (I. 30.), the Constitutional Court emphasised the direct constitutional significance of legal force by reference to legal certainty as a requirement of the rule of law. It explained that it would be mistaken to suppose that the Constitution guarantees an individual right to the achievement of substantive truth, just as it cannot guarantee that no judicial judgment will ever be unlawful. The State nevertheless fulfils its institutional duty of protection by establishing institutions that provide appropriate procedural safeguards and thereby secure the individual rights concerned. Respect for legal force serves the security of the legal order as a whole and, according to the position then adopted by the Constitutional Court, legal certainty takes precedence when reconciling substantive justice with legal certainty. Against this background, Chapter Six examines certain questions concerning the limits of legal force: the possibility of setting aside final and binding decisions by extraordinary remedies, viewed in terms of the types of error that the post-finality mechanisms available under the law in force are capable of correcting and the approach they adopt. The chapter also addresses the "circumvention" of legal force through special proceedings and, as a borderline area, the interaction between the legal force of decisions in regulatory-offence and criminal proceedings.

III. RESEARCH METHODOLOGY

My dissertation focuses primarily on questions of legal theory. It was not intended to undertake empirical research or an analysis of judicial practice; nor, for reasons of scope, does it include comparative-law research or an examination of international dimensions. My research focuses on changes in the domestic regulation of legal force and the institutions that affect it, with particular regard to the Codes of Criminal Procedure of 1998 and 2017.

A defining element of my research methodology was therefore the use of the legal-doctrinal method, including statutory analysis, conceptual analysis, and legal interpretation: identifying the meaning of the former and current regulation by grammatical, logical, systemic, and historical-teleological means.

According to Tamás Győrfi, legal doctrine "illuminates the rational system of relationships within law through the elaboration of legal concepts and their conceptual system".[21] Doctrinal analysis is often accused of being detached from life, insensitive to social reality, and ill-suited to contemporary challenges. Legal-doctrinal scholarship is "by its very nature detached from life", but in reality this means only that a particular social ideal may hover behind the arguments and yet "cannot be used as a direct argument". As Miklós Szabó and András Jakab have pointed out, however, "the elaboration of a conceptual system [...] is not some self-serving worship of systems" and is indeed relevant to the application of law. In fact, it is "a requirement arising from legal certainty, since a detailed and systematically elaborated system of legal concepts makes the application of law more predictable".[22]

To identify and elaborate the theoretical questions concerning legal force, I reviewed the relevant literature. In presenting the changes, historical legal analysis was also necessary at certain points.

For reasons of scope, the dissertation deals with extraordinary remedies only within defined limits. It should nevertheless be noted that, following the examination of the theoretical questions within this field, a future study could undertake empirical research into practical experience concerning the setting aside of final and binding decisions.

IV. BRIEF SUMMARY OF THE SCIENTIFIC RESULTS

[21] Győrfi Tamás: *A jogdogmatika mibenlétéről és szerepéről* [On the Nature and Role of Legal Doctrine]. In: Jakab András - Menyhárd Attila (eds.): *A jog tudománya: Tudománytörténeti és tudományelméleti írások, gyakorlati tanácsokkal*. HVG-ORAC, Budapest, 2015, p. 142.

[22] Szabó Miklós - Jakab András: *A jogdogmatikai kutatás* [Legal-Doctrinal Research]. In: Jakab András - Menyhárd Attila (eds.): *A jog tudománya: Tudománytörténeti és tudományelméleti írások, gyakorlati tanácsokkal*. HVG-ORAC, Budapest, 2015, pp. 52-54.

1. Formal and Substantive Effects of Legal Force Instead of Formal and Substantive Legal Force

Constitutional Court Decision 9/1992 (I. 30.) held that "[t]he institution of legal force, precisely defined in terms of formal and substantive legal force, is a constitutional requirement forming part of the rule of law". Yet a review of the prevailing positions and definitions in the legal literature - some of them decidedly obscure or mutually contradictory - and of the earlier statutes, which remained silent on legal force, raises the question of the extent to which the constitutional requirement laid down by the Constitutional Court was ever fulfilled.

It is not easy to define legal force concisely, since it can essentially be defined only through its effects. A dissertation on legal force must nevertheless make at least an attempt: *In criminal proceedings, legal force is the totality of the effects attached by law to the court's case-dispositive decisions, enabling the case to be finally concluded and the associated consequences to take effect.*

The theoretical disputes hitherto conducted in criminal procedure scholarship over the nature of substantive and formal legal force, and the sometimes misleading conclusions drawn from them in practice, appear capable of being avoided by reconsidering those theoretical categories. Instead, a distinction should be drawn between the formal and substantive effects of legal force.

Formal effects are independent of the content of the decision. They merely indicate that the decision is final within the proceedings, cannot be challenged by an ordinary remedy, and cannot be altered in ordinary-remedy proceedings. Substantive effects, by contrast, belong to the particular elements and parts of the decision. What the decision contains becomes an adjudicated matter, to which the following effects attach: binding force, enforceability, evidentiary force, and the *res judicata* and *ne bis in idem* effects. The expression substantive legal force did not necessarily refer to substantive law; rather, it referred to substantive effects arising from legal force, which may be procedural or substantive in nature.

The individual elements of a decision may be divided into two groups. The first comprises the so-called declaratory elements containing statements and findings of a *sein* character. In the operative part, these include the declaration of guilt and the legal classification of the offence; in the reasoning, they include the findings of fact. The second group comprises the *sollen*-type

provisions of the decision, the so-called constitutive elements. These include a provision acquitting the accused or terminating the proceedings, as well as provisions imposing other obligations, such as liability for criminal costs. Some substantive effects of legal force apply only to declaratory elements, others only to constitutive elements, while still others concern the decision as a whole.

2. Changes Introduced by Act XC of 2017 and the Resulting Problems

As a result of my historical, theoretical, and doctrinal inquiry, I identify three significant changes brought about by Act XC of 2017 (Be. IV).

2.1. The First Change: Substantial Restructuring of the System of Judicial Decisions and the Resulting "Lack of System"

Be. IV disrupted the previously established traditional system - although that system was not free from legislative and theoretical uncertainty - and, with it, the conception of legal force. Under the current scheme, only case-dispositive decisions can acquire legal force and produce its effects. Non-case-dispositive decisions instead become final.

The fundamental problem I identify is that legal theory, both previous and current legislation, and practice all conflate the categories of case-dispositive and non-case-dispositive decisions with those of decisions on and outside the merits. In distinguishing case-dispositive from non-case-dispositive decisions, traditional doctrine focused on the substantive effect produced. A case-dispositive decision determined the criminal case positively, negatively, or without either qualification; it brought the case to an end and placed a full stop at the conclusion of the proceedings. It was, in essence, the procedural manifestation of the conclusion of the process for determining criminal liability. Under this doctrine, a non-case-dispositive decision resolved some "interlocutory" or "incidental" issue arising in the course of the criminal trial. Such decisions were more formal in nature and intended to ensure the regular progress of the criminal proceedings; through them, in accordance with statutory requirements, "the sequence and uninterrupted performance of procedural acts was determined and ensured".[23]

The amendment of the Code in force by Act XLIII of 2020 introduced a further concept into the system of decisions: within case-dispositive decisions, it demarcated the narrower category

[23] Angyal (1915), p. 309.

of case-dispositive decisions “ruling on the charge”. My analysis leads me to conclude that, by using the phrase “ruling on the charge”, the legislature was in fact replacing the term “on the merits”. The need to do so indicates that a coherent system of case-dispositive and non-case-dispositive grounds for termination had not been established, even though Act XLIII of 2020 also restructured the grounds on which orders terminating proceedings are classified as case-dispositive or non-case-dispositive.

It would have been of considerable assistance - once the legislature had developed a desire to resolve the contradictions in practice - if the amending Act had expressly identified which decisions it considered case-dispositive decisions ruling on the charge. It is, at least in principle, indisputable that a judgment convicting or acquitting the accused, as a case-dispositive decision, clearly determines the merits and rules on the charge. The same can be said of a penal order.

Even if we consider only the revised case-dispositive grounds, however, it is not easy to determine which grounds for terminating proceedings should be regarded as determining the merits, that is, as ruling on the charge. In my view, the death of the accused, expiry of the limitation period, active repentance, other statutory grounds extinguishing punishability, and prosecutorial discretion - where the significance of the act is negligible for the purposes of prosecution beside the more serious act charged - may be identified as grounds for termination that determine the merits, so that the case-dispositive terminating order also rules on the charge. Yet if scholars or practitioners were asked to state their views, it is highly unlikely that any two positions would coincide completely. This is due to the numerous theoretical uncertainties surrounding the issue. I therefore consider it important to emphasise that the legislature could most readily eliminate these interpretative uncertainties through accurate and professional codification. In the absence of the theoretical and doctrinal clarity indicated above, the requirement of normative clarity is impaired because the content of the concept is uncertain. Doctrinal clarity on the part of the legislature is particularly desirable where the capacity of a decision to acquire legal force and to be challenged by an extraordinary remedy depends on whether it is case-dispositive - and, within that category, whether it rules on the charge - or non-case-dispositive.

Finally, I firmly maintain that it is inappropriate to treat non-case-dispositive decisions as a single category, since they do not form a homogeneous group. The law nevertheless treats them

as such in terms of their effects, namely finality. They include non-case-dispositive orders terminating proceedings, an entirely new "invention" of Be. IV; non-case-dispositive interlocutory orders, which are appealable as a general rule; and non-case-dispositive case-management orders, against which no direct appeal lies.

A further distinction must be drawn for highly specific non-case-dispositive orders, such as an order approving a confession or an agreement at the preparatory hearing. Its content subsequently becomes part of the judgment; even before that judgment becomes final and binding, it is no longer open to challenge and may be altered only exceptionally in relation to the findings of fact, guilt, and legal classification, yet it does not possess simple binding force.

As its name indicates, a judgment imposing an aggregate sentence takes the form of a judgment. In my view, it is a case-dispositive decision and, under the law, capable of acquiring legal force. Nevertheless, the Curia, the Constitutional Court, and most commentaries and textbooks do not regard it as case-dispositive. I demonstrate in the dissertation that an aggregate-sentence judgment is a "truncated" judgment: it does not rule on the charge, but only on the criminal-law consequences. If, following the interpretation discernible from the statutory system, we recognise its case-dispositive character and capacity to acquire legal force, subsequent aggregate-sentence proceedings become what they in fact are: a special post-finality procedure that circumvents legal force in order to remedy an issue that does not affect the merits of the judgment.

2.2. The Second Major Change and the Questions and Problems Arising from It Concern the "Loss of Legal Force" by Non-Case-Dispositive Decisions and the Emergence of the Category of Finality

The significance of legal force is not merely procedural, nor is it manifested only in its effects under substantive law; it entails consequences for the entire legal system and society. Thus, for example, case-dispositive judicial decisions becoming final and binding marks the final conclusion of the case and thereby serves legal certainty. Legal force may therefore be regarded as a cornerstone of the rule-of-law State: if it is weakened, the edifice begins to buckle. Such a process of "erosion of legal force" could already be observed under Act XIX of 1998 (Be. III) in relation to orders terminating proceedings for lack of a lawful charge. The first blow to the legal force of these decisions was dealt by the former Supreme Court in Criminal Law Department Opinion No. 1/2007; the coup de grâce was delivered by the Constitutional Court

in Decision 33/2013 (XI. 22.). The legislature codified and endorsed that result when it broke apart the unified category of decisions terminating proceedings, “demoted” some of them to non-case-dispositive orders, and associated them with finality instead of legal force.

This did not, however, eliminate the problem highlighted among legal scholars by Árpád Erdei and Erzsébet Kadlót and by Miklós Lévay in his dissenting opinion appended to Constitutional Court Decision 33/2013 (XI. 22.): as Constitutional Court Decision 5/1999 (III. 31.) also states, the risk of unsuccessful prosecution is - or ought to be - borne by the State, and failure to observe this principle infringes the requirement of a fair trial.

During the codification of Be. IV, the original bill proposed a promising change concerning the lawfulness of the charge, but this solution did not appear in the Act as promulgated and brought into force. Building on the bill, however, I outline a possible approach to resolving the problem of the “lawful charge” that would be more satisfactory in the light of the relevant principles and constitutional rights:

- It is not necessarily appropriate for the Code of Criminal Procedure to define the lawful charge, and the Code in force has indeed declined this “opportunity”.
- The conceptual elements - the identity of the accused, precisely specified conduct contrary to criminal law, and an application by the prosecutor addressed to the court - must be distinguished from the legality requirements. The absence of a conceptual element results in a non-existent, void charge. Only if the conceptual elements are present can the applicable legality criteria be considered.
- Where the charge lacks a required element, the defect may be remedied, including at the court's direction, without infringing the principle of separation of procedural functions.
- The absence of formal authority to prosecute should result in rejection of the indictment or termination of the proceedings. The person who is in fact entitled to prosecute may thereafter resubmit the charge, and non-case-dispositive termination is therefore acceptable in this situation.
- The legal effect of termination for the absence of conceptual or legality elements should depend on the stage of criminal proceedings at which the defect is detected. If it is identified during preparation for trial, it is tolerable for the terminating order not to possess substantive legal force. The filtering function of this procedural stage is precisely to ensure that, despite the existence of a procedural bar, or on the basis of a charge lacking essential conceptual or legality elements, no person's case proceeds to a trial involving greater publicity and subjecting the

accused to a more serious ordeal. If, however, the trial has already commenced and the defect comes to light as a result of that trial or later, in second-instance, third-instance, repeated, or extraordinary-remedy proceedings, the risk inherent in enforcing the State's claim to punish should be borne by the Prosecution Service acting in the name of the State and by the court that proceeds on the charge and is required to examine its minimum substantive and legality requirements. In the absence of substantive legal force attaching to the terminating order, the legislature shifts that risk to the accused, which is intolerable.

- If, during preparation for trial, the court finds that formal authority to prosecute, the necessary formal requirements, and the minimum substantive conceptual elements are present, it must thereafter adjudicate the charge on the merits. The proceedings may no longer be terminated for the absence of lawful or other such elements. The adjudication on the merits may instead result either in acquittal or in case-dispositive termination - both of which can be justified in theoretical and doctrinal terms - and that decision must in either event possess substantive legal force, excluding renewed proceedings in the case in the absence of an extraordinary remedy.

Analysis of the changing conception of legal force reflected in the 2017 Code and of the specific effects of finality leads to the following conclusion: finality is nothing other than what was previously known as formal legal force. The substance is the same; only the garment is new. What the Act calls legal force in fact combines the formal and substantive effects of legal force.

Several effects of finality deserve emphasis because they differ from the effects of legal force. The first is enforceability, which I examine in detail among the effects of legal force. For final decisions, enforceability is separated from the acquisition of finality: as a general rule, such decisions are enforceable irrespective of whether they have become final, and thus essentially immediately after they are delivered. By way of exception, however, the Act may provide that an appeal against a non-case-dispositive decision has suspensive effect. Consequently, some final decisions, like decisions possessing legal force, become enforceable only after they acquire finality.

The second point concerns the *res judicata* and *ne bis in idem* effects. These are clearly absent from the attributes of final decisions. There would be little point in criticising interlocutory or case-management orders for that absence. The situation differs, however, for terminating orders demoted to the status of non-case-dispositive decisions. A review of the grounds for termination

shows that withdrawal of the charge or the application of prosecutorial discretion may in principle provide a basis for the *res judicata* and *ne bis in idem* effects of the terminating order, whereas the absence of a lawful charge, which provides the basis for a non-case-dispositive terminating order, cannot do so. If these grounds are assessed by reference to exhaustion of the charge and adjudication of the principal question of criminal liability on the merits, it is difficult to identify a criterion that distinguishes the two groups.

2.3. The Third Change Did Not Begin with the Code in Force but Had Started Earlier; Act XC of 2017 Nevertheless Reinforced It: Hungarian Criminal Procedure Allows an Increasing Number of Exceptions to the Still-Proclaimed Principle of Substantive Truth as the Objective to Be Attained in the Proceedings

The conception of truth in criminal proceedings is closely connected with legal force. In relation to the *res judicata* effect of legal force, it is generally accepted in legal theory that legal force creates an adjudicated matter and that the contents of a final and binding judgment must be regarded as true, just, and lawful. The essence of legal force is that it transforms the reality established by the court into legal truth and endows it with legal effects. The findings of fact contained in the judgment must be regarded as corresponding to reality, and the substantive-law conclusion drawn from them as correct; taken together, the two must therefore be regarded as the truth.

Tibor Király rejected this conception of legal force because, in his view, legal truth "abuses the term truth" and "not even legal force can create truth in an erroneous judicial judgment". According to Király, a final and binding judgment by which the court convicts the accused of an offence that he or she did not commit "remains void after becoming final and binding, although this nullity is latent". He considered that what can be said of an erroneous finding of guilt and the latent nullity of such a judgment also applies where a court acquits a guilty person on the ground that no criminal offence was committed. "Latent nullity may be a characteristic not only of an erroneous conviction but also of a judgment of acquittal."[24]

Árpád Erdei, by contrast, regarded the use of the expression legal truth as expressly desirable. "Criminal procedure law treats truth in a distinctive manner. Guilt can be established only by a judicial decision, which becomes valid by virtue of legal force; that is, legal force entails

[24] Király (1972), pp. 219-220.

recognition of the decision's truth. It is a fact that legal force does not transform falsity into truth. If, however, the law does not qualify ‘final and binding’ findings of fact as truth, it expresses, first, that truth cannot even in principle be attained in the proceedings because the procedure is unsuited to that purpose, and second, that knowledge of the truth is not a condition for determining the legal consequence. The adjective ‘legal’ indicates precisely that the quality in question is accepted as ‘truth’ by the law. This is indeed a rebuttable presumption, but what is rebutted is not truth; it is the qualification of ‘falsity’ as truth.”[25]

Following Árpád Erdei's position, I consider it evident that legal force does not in fact transform falsity into truth. It is equally true, however, that until latent nullity is established and declared within the appropriate framework, it presents itself as effectiveness and validity. The presumptive effect of legal force is necessary in the interests of legal certainty. The law must regulate precisely and in detail the possibility of setting aside a final and binding decision, thereby rebutting the presumption, through extraordinary remedies and possibly special proceedings, within a narrower scope than that available for ordinary remedies.

In connection with the changing conception of truth in criminal proceedings, my inquiry also extends to several legal institutions and statutory provisions that, although only indirectly, exert a significant influence on the new doctrine and theory that must necessarily be developed in relation to legal force. The common link between the institutions examined is that each embodies some concession in relation to the traditional requirement of establishing the truth, and constitutes an exception to the principle of substantive truth that continues to be proclaimed at the declaratory level.

In some cases, the legislature is content with the “truth of the legal dispute”: abandoning the principle of immediacy, it accepts a truth attainable in the proceedings without the taking of evidence. Examples include institutions with a longer history in Hungarian criminal procedure law, such as the special form of proceedings designed to expedite the process that developed from the penal-order procedure and is now termed the procedure for issuing a penal order under the Code in force. Another example is the special procedure introduced by Be. III under the name “waiver of trial”, which proved unsuccessful in practice and was recodified by Be. IV as the “procedure in the event of an agreement”. Finally, certain institutions were presented by

[25] Erdei (2011), p. 51.

Be. IV as entirely novel, including the possibility of delivering a judgment of conviction at the preparatory hearing, without holding a trial, on the basis of the accused's confession, and the simplifying rule of evidence under which proof at trial may be dispensed with in respect of facts not disputed and jointly accepted by the parties.

Nor should provisions in which the growing prominence of formal truth is less evident be overlooked. In some instances, stronger enforcement of the principle of separation of procedural functions and the changing role of the court in establishing accurate findings of fact may result in a relaxation of the requirement of substantive truth. In the regulation of ordinary and extraordinary remedies, considerations of procedural economy and timeliness often override the ideal of substantive truth.

Analysis of the questions connecting the system of remedies with legal force shows that, compared with the previous law, the 2017 Code allows factually unfounded judgments - judgments containing factual errors or omissions and therefore in no sense based on substantive truth - to become final and binding in a wider range of circumstances.[26]

Taken together, these institutions and provisions have a similar effect on legal force: they cause its substantive effects (*pro veritate habetur*) to shift from presumption towards fiction. The objectives capable of legitimising this process and its outcome require examination.

In my view, more consistent enforcement of the principle of separation of procedural functions may constitute a legitimate objective for which the expectation that only factually correct judgments should become final and binding might perhaps be sacrificed. For my part, however, I do not consider it acceptable to shift the substantive effects of legal force (*pro veritate habetur*) from presumption towards fiction merely in order to expedite the resolution of cases.

The importance of the truth sought in criminal proceedings and the changing conception of that truth are closely connected with the system of extraordinary remedies. Although a case-

[26] In this context, mention must be made of the exceptions to full review in which the Act establishes an absolute binding effect of the findings of fact. In the event of a limited appeal, or where the judgment rules on several offences, the factual foundation of the part of the judgment or offences unaffected by the appeal cannot be reviewed; see Be. IV, section 590(5). No appeal may be brought before the third-instance court on factual grounds, and the extraordinary-remedy system still does not permit a deficiency in the factual foundation to be remedied in the absence of a *novum*.

dispositive decision becoming final and binding marks the final conclusion of the case, the interests of the administration of justice and of those affected may be prejudiced where the final and binding decision contains factual mistakes or errors of law, or was delivered in unlawfully conducted proceedings. Authors frequently ask which is more important: the decision being free from defect or the legal certainty created by legal force.

As an indispensable element of the rule of law, legal certainty is an important value, but it is not the sole or exclusive attribute of the rule of law. By the twentieth century, it had become generally accepted that the need to ascertain the truth and impose a just punishment, together with the interest in the lawfulness of proceedings, takes precedence over the interests secured by legal force and based primarily on legal certainty. The view emerged that the finality and immutability of a seriously defective decision serves legal uncertainty rather than legal certainty.

Contrary to appearances, therefore, legal certainty and the possibility of setting aside final and binding decisions are not irreconcilably opposed. In some cases, setting aside such a decision is necessary precisely in the interests of legal certainty. It is scarcely possible to speak of legal certainty where truth and justice are manifestly absent, or where legal force renders judicial mistakes and errors made in establishing the truth irreparable and untouchable.
Among the questions concerning the limits of legal force, the dissertation emphasises how changes in the system of extraordinary remedies - considered together with the possibilities afforded by ordinary remedies - have affected the prospects for the post-finality vindication of substantive truth, justice, and legality.

One cannot fail to notice the tension between the respective natures of ordinary and extraordinary remedies, as indicated by their very names, and the relative frequency with which the two types are used. Ideally, if the system of ordinary remedies fulfils its purpose, extraordinary remedies should be required in only a small number of cases, as Árpád Erdei also observed. The number of extraordinary remedies could be influenced by designing the remedial system rationally. According to Erdei, however, this would require an available route for addressing every type of error - factual and legal, from both *ex tunc* and *ex nunc* perspectives.[27]

[27] Erdei (2003), in Holé-Király (2021), pp. 181-182.

A comprehensive examination of the system of extraordinary remedies reveals that it does not permit the *ex tunc* correction of factual errors after a decision has acquired legal force: where there is no *novum*, or new evidence, a final and binding judgment cannot be corrected even if it lacks a proper factual foundation.

Factually unfounded judgments are not based on truth and therefore cannot be just; the question of their lawfulness also becomes irrelevant. The Constitutional Court has itself held that "the Constitution does not, and cannot, guarantee an individual right to the achievement of substantive truth, just as it cannot guarantee that no judicial judgment will ever be unlawful". It regards the function of the Constitution as guaranteeing a right to "a procedure that is necessary and, in the majority of cases, suitable for giving effect to substantive truth". The Constitutional Court's statement that "[t]he institution of legal force reconciles the requirements of substantive justice [and truth - note by E.K.] with legal certainty [...] on the basis of the primacy of legal certainty" can be regarded as correct only if the ordinary remedial system provides broad opportunities to attain substantive truth, and thus appropriate safeguards ensuring that judgments becoming final and binding are based on truth. In that event, legal certainty is indeed best served if final and binding decisions may be set aside only within the narrowest possible scope. Yet the appellate system also treats factual errors as poor relations. If the second-instance court fails to detect and correct a factually defective first-instance judgment and does not reach a decision contrary to that of the first-instance court on the principal issue of criminal liability, the absence of any further right of appeal means that the defect becomes entrenched when the judgment acquires legal force. The extraordinary-remedy system likewise provides no possibility for correcting factual errors from an *ex tunc* perspective. Our remedial system therefore fails to provide an adequate safeguard for attaining substantive truth. In view, however, of all the provisions and institutions in the Code that proceed on the basis that, where there is no dispute between the parties, the legislature is content with formal truth instead of substantive truth, some may consider this not to be a particularly serious problem.

In my view, when the remedial system is considered as a whole, it becomes apparent that the system of extraordinary remedies contains gaps. In the event of the most serious mistakes, it should permit all three types of error - not merely errors of law - to be corrected from both *ex tunc* and *ex nunc* perspectives, assuming, of course, that substantive truth, without which there can be no justice, still retains some value in Hungarian criminal procedure law. Substantive

truth as an objective of criminal proceedings and the "compromise" represented by formal truth or the "truth of the legal dispute" are not mutually exclusive alternatives. Even if we acknowledge the legitimacy of the truth of the legal dispute and allow exceptions to substantive truth in special procedures designed to expedite proceedings, or even within the general procedural rules, it would still be appropriate to permit post-finality correction of factual errors and deficiencies in the factual foundation of a judgment where there is a serious "legal dispute" between the parties concerning the truth underlying a final and binding judgment. This should be possible even in the absence of a *novum*, through an *ex tunc* approach, or by reinterpreting the concept of *novum* and extending it beyond new evidence to include a new means of evidence.

V. PUBLICATIONS RELATING TO THE SUBJECT OF THE DISSERTATION

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2. Király Eszter: *A jogerőhatások heterogén természete* [The Heterogeneous Nature of the Effects of Legal Force]. In: *Jogi Tanulmányok*, 2012/1. ELTE Állam- és Jogtudományi Doktori Iskola (2012), pp. 227-237.

3. Király Eszter: *Új szabálysértési törvény - hangnem nélküli bagatell, avagy variációk egy témára* [A New Regulatory Offences Act - A Bagatelle without a Key, or Variations on a Theme]. In: Fantoly, Zsanett; Gácsi, Anett Erzsébet (eds.): *Állam és jog: kodifikációs kihívások napjainkban.* Szeged (2013), pp. 95-105.

4. Király Eszter: *Szabálysértési jog (kézikönyv)* [Regulatory Offences Law (Handbook)]. Novissima Kiadó, Budapest (2013), 320 pp.

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6. Király Eszter: *Szabálysértési jog* [Regulatory Offences Law]. In: Király, Eszter; Koósné Mohácsi, Barbara: *Büntetés-végrehajtási és szabálysértési jog: kidolgozott jogi szakvizsga tételek*. Novissima Kiadó, Budapest (2014), pp. 215-316.

7. Király Eszter: *Egy jogerőhatás mind felett?* [One Effect of Legal Force to Rule Them All?]. In: Hack, Péter; Koósné Mohácsi, Barbara (eds.): *Emberek őrzője: Tanulmányok Lőrincz József tiszteletére*, Vol. 1. ELTE Eötvös Kiadó, Budapest (2014), pp. 53-60.

8. Király Eszter: *A törvényes vád hiánya miatti megszüntető végzés „jogerőtlenedésének" tanulságos története* [The Instructive History of the "Erosion of Legal Force" of an Order Terminating Proceedings for Lack of a Lawful Charge]. In: Fazekas, Marianna (ed.): *Jogi Tanulmányok*. ELTE ÁJK Állam- és Jogtudományi Doktori Iskola, Budapest (2014), pp. 167-180.

9. Király Eszter: *A jogerő* [Legal Force]. In: Hack, Péter (ed.): *Büntetőeljárási jog II.* ELTE Eötvös Kiadó, Budapest (2015), pp. 113-127.

10. Király Eszter: *Érdemi vizsgálódások az ügydöntő határozatok körében* [Inquiry into the Merits of Case-Dispositive Decisions]. In: Hack, Péter; Király, Eszter; Korinek, László; Patyi, András (eds.): *Gályapadból laboratóriumot: Tanulmányok Finszter Géza professzor tiszteletére*. ELTE Eötvös Kiadó, Budapest (2015), pp. 281-296.

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Koósné Mohácsi, Barbara: *Büntetőeljárási jog II*. ELTE Eötvös Kiadó, Budapest (2024), pp. 193-217.