PhD Thesis Abstract

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THE ACCOUNTABILTY IN THE SYSTEM OF THE EXEMPTIONS FROM CRIMINAL RESPONSABILTY

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I. A brief summary of the research task, the questions examined in the thesis

My dissertation focuses on the legal concept of accountability; I present its development and its role in the system of the exemptions from criminal liability, then its legislation in force in Hungary and abroad. The aim of the research is to detect possible shortcomings and inaccuracies of the Hungarian legislation in force and to formulate proposals for the legislators.

Accountability is a legal construct that is included in the system of exemptions from criminal responsibility or grounds for restricted criminal responsibility.

Determination of the concept of accountability can be done by two methods. According to one, the legislator gives a definition, setting out in law the conditions which are necessary for the accountability. Another method is the negative definition that is, determining of the reasons that exclude accountability.

It is an interesting phenomenon that although accountability is decisive in establishing criminal liability, as in the event of its complete absence, there is no criminal responsibility and the defendant cannot be punished, in Hungary - similarly to other countries' practice - the legislatures do not define exactly what this concept means. In the absence of legal definition, legal practitioners have tried to define accountability. It must be emphasized that the determination of the accountability depends largely on the development of other sciences too, such as medicine and psychiatry.

According to today's definition, the accountability is the physical-psychic state of a person by which the person is capable to assess their act socially-morally and to act according to this assessment.

The accountability has therefore two elements: the ability to understand what is wrong, the ability to recognise the consequences of the act (ability to discern) and the ability to control the conduct pursuant to this knowledge (ability of conduct control).

Consequently, the person who is unable to recognize the consequences of their act (recognizing component) or behave in a manner consistent with that discernment (will component) is not accountable. However, it is a condition that the brain, where this evaluation

takes place, must be well-developed and must function properly, according to its level of development. For example an abnormal state of mind can exclude criminal responsibility, punishability. As a condition for development, the legislator also defines the minimum age of punishability.

In the case of total lack of accountability, one of the conditions for becoming a perpetrator is missing, so there is no crime at all.

A person is responsible for the crime committed only if the act can be attributed, imputed to the person and due to that the person can be punished. This affects the definition of the perpetrator too, according to which a perpetrator can be a natural person who has the accountability, which is the condition of becoming a perpetrator.

The cause of the total lack or restriction of accountability can be internal, like the underdevelopment of the brain, the personality, which is natural under a certain age and irrespective of the age, if the brain function is impaired by some brain diseases. In these cases, both elements of the accountability can be missing. However, also external cause can produce the lack of accountability, such as coercion, or threats, when the ability to discern is present, only the behaviour according to this is impeded, so the person does not act according to their will due to external reasons.

II. Research Methods; the structure of the dissertation

In my research methodology, I followed the rules of classical legal research and material collection. The objective of my work is to provide a special summary about the legal concept of accountability by synthesizing the historical and scientific views on this topic.

I examined the initial appearance, circumstances and development of the accountability, up to the regulation in force. Through the case law I present its practical significance, highlighting the problems identified and waiting to be solved.

III. Summary of the research results and possibilities for its utilization

III.1. Causes that exclude accountability

III.1.1. Infancy

One of the prerequisites for determining the accountability is the proper development of the brain, enabling the person to anticipate, recognize and morally evaluate the consequences of their acts and act according to this assessment. A person gradually reaches the age when they are presumed to have accountability, but as long as they are considered child, they are exempt from criminal liability.

The 14th and 12th years of age as the upper age of the infancy, i.e. the lower age of the juvenility, which already goes with criminal liability, is determined by Section 16 of the Hungarian Criminal Code[1] (hereinafter CC), depending on the gravity of the offense, as according to the legislature, from this age a degree of physical and mental development may be presumed, that makes the prosecution possible. The text of the legislation:

Persons under the age of fourteen years at the time the criminal offense was committed shall be exempt from criminal responsibility, with the exception of homicide [Subsections (1)-(2) of Section 160], voluntary manslaughter (Section 161), battery [Subsection (8) of Section 164], terrorist offence [Paragraphs (1)-(4) of Section 314], robbery [Subsections (1)-(4) of Section 365] and plundering [Subsections (2)-(3) of Section 366], if being over the age of twelve years at the time of the offense, and if having the capacity to understand the nature and consequences of their acts.

The perpetrator is still considered a child on their 12th and 14th birthday, so the beginning of the juvenile period can be considered from the day following these birthdays.

At the same time, Section 105 of CC did not adjust the lower limit of juvenility, depending on the gravity of the crime, to the ages of 12 and 14, but fixed it uniformly at the age of 12.

[1] Act C of 2012 on the Criminal Code of Hungary

According to the statute referred to, one is considered a juvenile who reached the age of 12 at the time of the offense, but not the age of 18.

As many authors point out, by codifying infancy as an exemption from criminal responsibility, the legislator essentially assumes that a person who has not yet reached the age of 14 (12) hasn't got accountability.[2]

The Hungarian statutory presumption currently in force, according to which a child who hasn't reached the age of 14 has no accountability, can be rebutted in six cases for children over 12 years of age; in three basic and qualified offenses, two more serious cases of violent crime and terrorist act.

So, during the transitional period from infancy to juvenility, which is the beginning of criminal responsibility, in cases of certain very serious offenses, the infancy may no longer automatically serve as an exemption from criminal responsibility, as in the case of these offences one can assume, that the perpetrators may perceive, understand the consequences of their acts, their moral assessment, while for other offenses these are excluded.

Committing crimes in the taxative list, even in case of children over the age of 12, only entails criminal responsibility when the child had the ability to discern concerning the consequences of their act. So, the criminal responsibility can be decided only after examining the ability to discern.

The new provision of the Minister for Justice and Law Enforcement (No. 31/2008. (XII. 31.) in force since 15 March 2014 about the work of forensic experts, identifies and deals separately with the juvenile perpetrator's accountability and their ability to discern.

19/A. § (1) In the course of criminal proceedings, when the question to the expert is the juvenile (between the age of 12 and 14) perpetrator's accountability and their ability to discern, the perpetrator's accountability shall be examined according to Article 17. After the examination of the accountability, in case the perpetrator is accountable, the expert referred to in Paragraph 17 also gives an opinion on the ability to discern by carrying out the perpetrator's expert psychological examination for children and adults in clinical and mental hygiene.

[2] See Ervin Belovics in Belovics Ervin, Gellér Balázs, Nagy Ferenc, Tóth Mihály: Büntetőjog I. Budapest, HVG Orac, 2012.

Paragraph 17 regulates the medical examination of the perpetrator's mental state, which aims to establish whether the perpetrator committed the act in an abnormal state of mind that made them unable or constrained to recognize the consequences of the act or to behave accordingly.

At the same time, the concepts are not defined by law, that is, there is no legal norm saying what the difference between the ability to discern and the accountability is.

III.1.2. Insanity

The basis of both moral and legal responsibility is that we suppose that someone is responsible, as they can control their acts, assess the potential consequences of their acts and choose between the possibilities accordingly. However, free choice may be hindered by either internal or external reasons.

It is clear that those who have lost their relationship with reality will be exempted from both legal and moral responsibility, as they are unable to control, direct their thoughts and behaviour. The questions are what can be considered as mental illness, what excludes or restrains the accountability.

It is not sufficient to establish that the offense was committed by a particular person (imputatio facti), but also to clarify whether the perpetrator had the ability to discern and the ability of conduct control at the time of the act (imputatio iuris).

In international law, the Rome Statute of the International Criminal Court also deals with criminal accountability. Article 31 (1) (a) of the Statute contains the following rules.

"A person shall not be criminally responsible if, at the time of their act, the person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of their conduct, or capacity to control their conduct to conform to the requirements of law."

The international criminal law is the aggregate representation of the criminal law regulation of each state. All states that have ratified the Rome Statute have included sound mind as one of the conditions for criminal liability or insanity as an exemption from liability, as a defence in their legal regulations.

Whether the abnormal state of mind has excluded or limited the offender's accountability shall be investigated by a forensic psychiatrist.

In theory, the legislator can choose from three options when regulating this area.

1) Listing the reasons for excluding the accountability, this is the biological method.

2) Addressing the psychic effects, without mentioning the causes, this is the psychological method.

3) Listing all the causes and also referring to their psychological effects, this is the complex method.[3]

In theory, two types of mental dysfunctions can be distinguished: cognitive and control. Cognitive disorder is when the perpetrator's mental illness or disability distorts their ability to understand their environment, the consequences of their action, the guilty or wrong nature of their act. Control disorder is when the offender's mental illness or disability damages the offender's behavioural control but they know their behaviour is wrong. That is, the two elements of the accountability are also recognizable here: recognition/evaluation and will.

Different legal solutions have been created in each country depending on what mental dysfunctions are taken into account when examining the accountability.

If a person commits a crime in psychosis, the lawmakers of different countries generally agree that the perpetrator cannot be held responsible for their acts.

Psychosis is, therefore, a key element, the presence of which at the time of the offense excludes criminal liability. It means a condition in which the patient’s connection with reality disappears. Their perception, their processing of information and their responsiveness to environmental stimuli are distorted to such an extent that they are unable or hardly able to maintain the simplest adaptive functions. Reality control is lost in psychosis. Persons often have hallucinations, false perceptions and delusions in this state. In the case of psychosis at the time of the offense, accountability is excluded.

[3] Irk Albert, A magyar anyagi büntetőjog, Dunántúl Pécsi Egyetemi Kiadó és Nyomda Rt. Pécs, 1928., 92.

III.1.3. Responsibility for offenses committed in a drunken or intoxicated state and assessment of accountability

Alcohol affects the individual's mood, it reduces anxiety and its short-term effects on the psyche are the feeling of relief and relaxation. At the same time, consumption of alcohol on a regular basis or in large amount leads to extremely damaging health consequences. Its effect on the two elements of the accountability is clearly negative.

There are several factors to be considered when judging crimes committed under the influence of alcohol. The regulation of criminal liability is based on the consequences of alcohol consumption in the person's psyche. Alcohol consumption can lead to limited accountability, or unconsciousness, i.e. lack of accountability.

Section 18 of the CC states that Section 17 cannot be applied to anyone who commits the offense in a drunken or intoxicated state resulting from his own fault. Section 17 is about the limited or excluded accountability due to mental illness. Section 18 excludes the applicability of Section 17 only in the case of confusion of consciousness due to a drunken state. So, it cannot be applied in the case of a mental illness that results from excessive alcohol consumption, so the mental illness caused by alcoholism can also exclude or limit the accountability. Regulations of Section 17 shall precede the ones of Section 18, so the person suffering from mental illness cannot be punished, even if they were in a drunken state at the time of committing the offense.

III.1.4. Connection among coercion, threat and accountability

The accountability, as I have presented, expresses the person's ability to choose between committing the offense and not committing it. The person can be accountable for the offence if their will has not been ruled out either by external objective circumstances or internal factors resulting from their personality, and among the possible acts they chose to commit the offense.

The focus of my research is the accountability, and although this ability is not ruled out or restricted by any internal cause in the case of coercion or threat, the act cannot be attributed to the person, as they are not able to conduct corresponding to their will, due to an external cause namely a coercion or a threat.

Both coercion and threat, as external causes, affect the will-element of the accountability, that is the ability to behave accordingly.

In these cases the actual behaviour is not the result of a free, unbidden will. Since coercion and also threat taxonomically exclude the accountability, this topic cannot be left out of this writing.

According to Section 19 of CC:

(1) Any person who has committed a criminal act under coercion or threat, depriving them of the capacity to act according to their own free will, shall not be prosecuted.

(2) The penalty may be reduced without limitation if the coercion or threat restricts the perpetrator's capacity to act according to their own free will.

Thus, both coercion and threat exclude accountability as external cause. They do not affect the conscious recognition but only affect the ability to act according to their will. The result is that the person does not behave in accordance with their own determination and intention but executes the will of the coercive, threatening person.

III.1.5. The justifiable defence and means of last resort excluding accountability

The justifiable defence as defined in Section 22 (3) of CC and the means of last resort as defined in Section 23 (1) of CC are also among the causes excluding accountability.

For exceeding the justifiable defence [Section 22 (3)of CC][4], the defendant is only liable if the unlawful attack did not provoke shock or aggravation and the defendant deliberately set aside the milder - but effective - means when they chose the one with a more serious outcome.

[4] According to Section 22 (1) No penalty shall be imposed upon a person for any action that is necessary to prevent an unlawful attack against their person or their property, or against the person or property of others, against the public interest, or an unlawful attack posing a direct threat in respect thereof. (3) Any person who exceeds the reasonable force of self-defence due to shock or justifiable aggravation shall not be prosecuted.

The shock or the justifiable aggravation are kinds of consciousness disturbance, which exclude the defendant's ability to assess or ability of conduct control. As a result of the disturbance of consciousness the attacked person improperly judges the actual or imminent attack at the moment of the defence.

Although the shock or justifiable aggravation caused by the unlawful attack creates a disturbance of consciousness, the decision on this issue falls into the competence of the prosecutor or the judge and not of the psychiatrist.

In the case of last resort: "No penalty shall be imposed upon a person who causes harm of the same or greater extent than the one they wanted to prevent, as they were unable to recognize the magnitude of the harm due to shock or justifiable aggravation."[5]

It is clear that the same events occur in the persons' psyches in these situations, both in the case of justifiable defence and the last resort. The shock or the justifiable aggravation creates a state of altered consciousness, where the abilities of sober judgement and assessment are not fully functioning.

That is why individuals in such a situation may not be able to assess the possible consequences of their behaviour, and therefore are not able to carefully assess the weight of the opposing harm, and it can easily happen that they needlessly cause greater harm by their actions, than the threatening damage of the attack, or the damage caused by the attack.

III.2. My propositions for the legislator

De lege ferenda I

In my opinion dealing separately with these two motions: the accountability and the ability to discern is problematic. However the conceptual perplexity, could be eliminated by stating that the ability to discern is an element of the accountability.

Theoretically it is impossible that a person with accountability has no ability to discern. The two concepts have to co-exist. For example, if an offender with a mental illness had no

[5] Btk. 23.§ (2)

accountability at the time of the act because their mind was so disturbed that they were unable to foresee the consequences of their act, it would have been impossible that they had the ability to discern. It is also true that if a person had accountability at the time of committing an act, it means that the act can be attributed to them, they can be held responsible for the act therefore, they must have had accountability. The same is true of a 13-year-old offender, so when it can be established that they had accountability at the time of the act, that is to say, they had the ability to discern and they were able to foresee the consequences of their act. in addition to being able to act according to that understanding. So, it is impossible that they did not have the ability to discern required by the law. Thus, in the case of both infancy and mental illness, the lack of ability to discern (or lack of age adequate or healthy self-control function) causes the lack of accountability, i.e. the act could not be attributed to the person, so they are not criminally responsible for it.

The correctness of my reasoning is also supported by the circular of the Deputy Prosecutor General No 5/2013. (31 March), which reads as follows:

Only by the joint, careful assessment of the expert opinion and all the available data one can decide on the existence or the lack of the ability to recognise the consequences of the act, and then based on this assessment, in the event that other conditions are met, on the prosecution or the termination of the investigation because of reason of exemption from criminal responsibility.

So, according to the Deputy Prosecutor General the definition of the ability to discern is the ability to recognise the consequences of the act.

Let us compare the above definition of the ability to discern with Ervin Belovics's definition of accountability which reads, "There are two components of the accountability, the ability to recognise and the volitional ability. The ability to recognize is to foresee the consequence of the act. The volitional ability means that a person with the ability to recognize can freely form their will and can behave accordingly.

On the basis of the above, the ability to discern is one of the attributes of the accountability, and it is the same as the recognition capability. In my opinion, the definitions of psychic and moral maturity are covered by the recognition component, while self-control belongs to the volitional component.

The question to be decided by the expert is, therefore, whether the person aged 12 but below the age of 14 was able to recognize the consequences of their actions. Were they able to evaluate their actions morally and act accordingly? If so, the act can be attributed to the person. If not, it is necessary to answer the question that this hindered recognition and evaluation ability is on a non-psychological basis and is only a result of delayed development or a consequence of some kind of mental state of mind. Accordingly, in the first case, the ground for the exemption from criminal responsibility is the lack of accountability due to infancy, whereas in the second case the lack of accountability is due to mental illness.

I propose to adjust the lower limit of juvenility to the upper limit of the variable infancy to eliminate contradiction, as follows:

"Juvenile offender" shall mean any person between the age of 14 and 18 at the time of committing a criminal offense, but in the case of committing homicide [Paragraphs (1)-(2) of Section 160], voluntary manslaughter (Section 161), terrorist offence [Paragraphs (1)-(4) of Section 314], battery [Paragraphs (8) of Section 164], robbery [Paragraphs (1)-(4) of Section 365], and plundering [Paragraphs (2)-(3) of Section 366], between the age of 12 and 18 years, if they have the capacity to understand the nature and consequences of their acts.

I propose the modification of the Section 19/A of IRM Decree No 31/2008. (Dec. 31) on the operation of judicial expertise 19/A., by exchanging the word "accountability" to "the ability to discern" The proposed wording:

Examination of a juvenile offender's ability to discern

19/A. § (1) In the course of criminal proceedings, when examining the ability to discern of a juvenile between the age of 12 and 14, the defendant's state of mind shall be examined in accordance with Section 17. Following the examination of the state of mind, the expert in Section 17 also gives an opinion on the age-related ability to discern and for this, it is obligatory to do the clinical and mental hygiene, adult and child psychological expert examinations.

(2) For the purpose of examining the defendant's ability to discern, a specialist in child and youth psychiatry or someone with an equivalent qualification shall be involved, and in terms of this qualification, they must be registered officially as healthcare worker.

Based on the above, there would be the conclusive presumption that under the age of 14, the otherwise punishable act cannot be accountable to the child. In the case of the most serious

criminal offenses a person who has reached the age of 12 may also have the ability to discern regarding these acts, but to establish this, the intellectual development has to be thoroughly examined. As it is not sure that two children at the same age are on the same intellectual and moral level of development and they can judge their actions differently. In connection with the specific situation, the expert should determine how the child's intellectual understanding, and their degree of maturity was, whether they had the ability to recognise the consequences of their act and whether they could assess them morally.

If the expert states that the child was not on the level of development that would have enabled them to recognise the consequences of their act, the offender would not be punished because of infancy due to the lack of accountability.

The thumb rule is that under the age of 14, the offender cannot be punished because of infancy (conclusive presumption). In the case of the enumerated highly serious criminal offenses, the presumption becomes rebuttable, so the child's accountability shall be examined, in particular its part of the ability to discern, namely, whether the child is actually, sufficiently mature, developed and capable to foresee the consequences of their act. In that case, the child would not be punishable because of the lack of accountability (due to infancy).

De lege ferenda II

During my research I have identified another problem as well. Namely that under the current regulations it can easily happen that in the case of certain offences for example, the offence of public nuisance committed by force against another person, the defendant is acquitted, as due to a mental illness they had no accountability at the time of the offence. However their involuntary treatment in a mental institution cannot be ordered either, so there will be no consequence at all of committing an otherwise punishable act.

Point 26 of Section 459 of the interpretative provisions of the CC in force does not indicate the public nuisance in its exhaustive list of “violent crime against another person”, consequently there is no possibility to order the involuntary treatment in the case of such offense.

According to Section 78 of the CC, the order of involuntary treatment may take place if a person commits a violent crime against another person or a punishable criminal offense

endangering the public, and the defendant cannot be prosecuted due to mental condition, and there is reason to believe that the defendant will commit a similar act, and in case of punishability, the penalty of imprisonment would be more than one year.

Pursuant to paragraph (1) of Article 200 of Act CLIV of 1997 on Health Care, the court orders the compulsory medical treatment of a psychiatric patient who displays endangering behaviour but the urgent medical treatment is not justified. Procedure for this compulsory medical treatment may be initiated by the prosecutor following a criminal proceeding if in the case of the perpetrator of the punishable act the other legal conditions of the involuntary treatment are fulfilled, but if the defendant was punishable, the punishment would be imprisonment of maximum one year.

The court does not even have the option to order the compulsory medical treatment if the involuntary treatment could not be ordered because the act cannot be considered as a "violent crime against another person".

If we interpret purely grammatically the meaning of a violent act against another person, it is difficult to argue that if somebody tugs, hits, threatens somebody or grabs someone by their chest, and at the same time hurling menacingly, it is not a violent act or it is not against another person.

According to Point 4. of Paragraph (1) of Section 459 of CC 'violent conduct' means any act of aggression and undue influence exerted on a person by applying physical force, even if it does not result in bodily harm.

In my opinion, the legislator should reconsider this problem and remedy this mistake, as a person suffering from a mental illness or a personality disorder with psychotic episodes can keep others in constant fear. They can bully their neighbours, even attack people, jostle or drag them, they can even cause financial damage to them, and all of this behaviour will be without any consequences if it is not considered at least a physical offense that is a violent act against another person according to the interpretative provisions of the CC as well.

Furthermore let's imagine that a person displays his manhood in a public place, whether around a kindergarten or on the beach, urinates from the side of the swimming pool into the water or repeatedly smashes their neighbour's window or repeatedly commits theft, vandalism, illegal entry into private property, drives under the influence of alcohol and I could go on with the examples.

In my view, the involuntary treatment of the persons exempted from criminal responsibility due to mental illness, displaying such particularly aggressive, violent, behaviour - but even without violence but contrary to the common social norms and significantly detrimental to the interests of others - is justified and indispensable for both the sake of the society and the "offender". Therefore, I think the modification of the CC is essential in this topic.