Hungary's Shambolic Anticorruption Proposals

A Practicioner's View

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The Article *Useless and Maybe Unconstitutional: Hungary's Proposed Judicial Review of the Prosecutorial Decisions* by Kim Lane Scheppele, Petra Bárd and Gábor Mészáros gives a detailed account of the proposed legislation on amending the Hungarian Criminal Procedure Code. The conclusions of the article are correct and most of the criticism is accurate. Yet the article misses some real weaknesses of the Hungarian government's proposal. This article aims to point out these weaknesses from the viewpoint of a practicing Hungarian criminal lawyer.

Informal influence

It is a widely held belief that the Supreme Prosecutor's Office has been instrumental in the complete state capture Mr Orbán's Fidesz party achieved in Hungary. But anytime Mr Péter Polt, the Chief Prosecutor, is asked about rampant corruption or state capture, he can point to the Prosecution Service's statistics which show that neither he, nor his subordinates ever gave orders to stop a major anti-corruption investigation. These statistics don't lie. They just don't show us the truth. Most of Mr Polt's influence is informal. It can be best described as a general chilling effect.

Any prosecutor knows the cases which are best to be left alone or investigated in the slowest possible way. They know who are the witnesses who are better not called in. Even if the investigation of a case *is* actively stopped by superior prosecutors, it always only happens informally by "advice". Of course, there is only anecdotal evidence for these claims. At the same time, there is overwhelming evidence that the Prosecution Service does a poor job at tackling corruption in Hungary.

As this is a prominent issue in the rule of law proceedings against Hungary by the European Commission, the government tries to introduce mock legal solutions that leave the status quo unchanged. For example, Article 379 of the Hungarian Criminal Code (receipt of stolen property, 'orgazdaság' in Hungarian) was abolished in 2021. Receipt of stolen property is of course still a criminal offense under Hungarian law, but it was integrated in Articles 399-400 of the Hungarian Criminal Code on money laundering. While arguably the two offenses are similar in nature, the change is useful for statistical purposes. From 2021 on, every local receiver found with a stolen bag, wallet or phone can be reported as a successfully solved anti-corruption case.

The proposed amendment of the Hungarian Criminal Procedure Act is of a similar nature. Its main objective is to keep the European Public Prosecutor's Office away from Hungary, while also avoiding effective remedies for prosecutorial inaction.

Frankenstein

One of the most typical tactics for achieving these aims isthe importation of foreign legal solutions. Austrian and German lawyers will instantly find this new legislation familiar. It is a hastily sewn together Frankenstein's monster of the Austrian *Subsidiaranklage* (öStPO §72) and the German *Klageerzwingungsverfahren* (StPO §§ 172-177).

Predictably, the rebuttal of any criticism of the new Hungarian legislation will sound something like this: 'Scheppele et al. are biased, as always, because they criticize us for implementing a tried and tested, fully and impeccably democratic German solution. Go and criticize the Germans first.'

The true essence of the problem is this: the original German and Austrian legal solutions are designed

to correct faulty prosecutorial *decisions*, while the actual problem in Hungary is prosecutorial *inaction*.

The legislative assumption behind the Austrian and German solutions is that the case was properly investigated to begin with. The prosecutor then decided not to press charges. It is this decision that can be either challenged in court (in Germany), or the victim is given the right to bring the case to the court without the prosecutor's involvement (in Austria).

The legislative assumption behind the proposed Hungarian legislation is that there might bea problem with the investigation itself (and there almost certainly will). Neither the Austrian nor the German court has the right to order the prosecutor to restart the investigation or to guide them how the case would be better handled. The Hungarian court, on the other hand, must give a summary of the considerations that might facilitate the investigation (§ 817/F (6) (d)).

If anything, this could render the new legislation unconstitutional as this might break through the barrier between judicial power and executive power as exercised by the Prosecution Service. But does it? The answer, in my opinion, is no. The reason is that this is *lex imperfecta*. § 817/G (3) stipulates that the prosecutor "strives to" follow the reasoning of the part of the court decision where the court gave directions to the prosecutor. The language of the Act is therefore discretionary, not mandatory. One can only guess how the prosecutors will react to the court's suggestions. They have no formal obligation to follow them.

This can save the new law from being unconstitutional but renders it useless. If the case, after the court decision, is closed again, no one, not even the court, has the right to further "instruct" the prosecutor. In other words: if the prosecutor fails to follow the court's instructions, nothing can be done.

When these cases hit the courts, the results will be disastrous for two reasons. Firstly, the Hungarian courts' are generally unwilling to hear cases where a private party acts as prosecutor. Secondly, the Hungarian courts' are strongly (and very much understandably) unwilling to do the prosecutors' work.

The Austrian "*Subsidiaranklage*" (subsidiary indictment, Hungarian: *pótmagánvád*) was already part of the Hungarian criminal procedure, since 2003. It has failed miserably. Public prosecutors have a 98% success rate in Hungarian courts. *Pótmagánvád* has a success rate of less than 50%. Part of the reason for the difference is of course that a lot of subsidiary indictment cases are pressed on by people out of spite or desperation. But there is also a general resistance on the courts' side to accept that even if the prosecutor did not think it reasonable to carry on with the case, a private party could still do it successfully. Etatism is in the DNA of Hungarian courts.

But even without considering this etatism, if the prosecutor does not do their job properly, despite the court's 'instructions' (which are suggestions, really), the private partywill have to do the investigative work after the investigation has been closed. This causes two problems: it seriously limits the number of people who can really do so; and it draws out the cases.

Slow-walking

Corruption cases can be very complicated. It takes staff, expertise and money to do this in the two months this new legislation gives. Probably NGOs and political parties will have the financial background to do this. Lone amateurs surely won't. This means exquisite material for the Orbán propaganda machine. NGOs will be public enemies again.

If a private party with serious professional backing brings the case to the court on time and reasonably well prepared, they have 'every right the prosecutor has' (§ 817/Q (1)). In this phase of the procedure, that means that they can file all kinds of motions upon which the court will decide to obtain documents, hear witnesses and basically do the work that should have been done in the investigation. This means that the shortcomings of the investigation might be corrected by court orders. This is possible but it will make the proceedings very long. Maybe many years long.

But there are other hidden tricks here. If the public prosecutors have drawn out the investigation long enough, much data (most notably cell phone locations, call lists) can be lost because providers have statutory obligations to delete them.

Scheppele et al. also noticed the possibility of slow-walking the case. Slow-walking is even easier if the case is under review by the court for an additional 2-3 months. After that, the time until the subjects are under suspicion again (interrogated as suspect, an important milestone in the Hungarian criminal procedure) does not count in the final deadline of the investigation. (§817/G (2)) A fine opportunity to further draw out the investigation by months.

This new legislation does not solve the problems of prosecutorial reluctance in anti-corruption investigations. It does not free the Hungarian public prosecutors from the chilling effect. It will not lead to a better criminal response to corruption. Its only purpose is to serve as a bargaining chip towards the European Commission in rule of law proceedings.

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