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Confrontation from a Criminal Procedural Approach

Abstract. The author made a research over the past six years, and gathered data regarding confrontation as truth-seeking method in the criminal procedure. He analysed the Hungarian legal rules of confrontation in historical and recent time and claimed that the concept and the types (classification) of confrontation was clear. As an evidentiary procedure, it can be well demarcated and distinguished from other applicable means of seeking the truth in CPA and beyond it in the area of criminal-tactics. Thus, from interrogation, identification parade, attempt to prove, crime scene interrogation, search/body search, parallel hearing of experts, polygraph and cross-examination. Above all you can read a few amendment proposals of the statutory regulation of confrontation.

Keywords: compulsory confrontation, crime-solving tactics, criminal investigation, cross-examination, excluded evidence, face to face, identification parade, interrogation, legal remedy, participatory rights, statutory regulation

1. The concept of confrontation

It has become clear from my research with a historical perspective that it was not confrontation but rather torture that was used as a regulated method of seeking the truth in the ancient times or at the beginning of the feudal Middle Ages. Torture began to get 'loosened' in the late Middle Ages, in the 17th and 18th centuries, when the institution of confrontation came into existence. Torture was officially abolished in the 19th century after a temporary duality i.e. coexistence and was replaced solely by confrontation sometimes together with an oath on the basis of an accusatorial attitude.

Confrontation—with a stress on the trial stage—had a detailed legal regulation as early as the first part of the 20th century in some codes of criminal procedure including the Hungarian one. However, these rules still lack the definition of confrontation leaving this task to scholarly jurists. Thus, the notional definition and the description of the essential features of confrontation are indispensable.

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Before providing the definition, it should be noted that my legal historical research has made it clear that in the beginning, in the 17th and 18th centuries and even in the 19th century confrontation was also called ‘counter-front-statement’, ‘face to face testifying’, and counter positioning. This latter one indicates that the persons confronted stood facing each other. The collation of testimonies was sometimes performed–virtually–by reading, which means statements were not actually said to somebody’s face.

The modern theoretical grounding and the practice based on it is different. Special literature seems to be of a unified standpoint claiming that “the essence of confrontation is a special, ‘combined’ interrogation, an independent investigatory (procedural) act in the framework of which more than one person is interrogated concurrently in order to resolve any marked contradictions between testimonies made earlier by the interrogatees.”¹

The definition I also agree with needs to be made more precise by stating that the term ‘more than one person’ can only mean definitely two persons, not more and not less. If there were only one person, it would fall into the category of general interrogation and there could obviously be no confrontation; if there were more than two, the psychological and criminal-tactical reason for its existence would be called into question.

2. The statutory regulation of confrontation

Pursuant to the effective though fairly brief Section 124 of Act XIX of 1998 (CPA):

“(1) If the testimonies made by the suspects and the witnesses or the suspect and the witness contradict, such contradiction may be clarified by confron-

¹ Tremmel, F.–Fenyvesi, Cs.–Herke, Cs.: *Kriminalisztika Tankönyv és Atlasz* [Textbook and Atlas on Criminalistics]. Budapest–Pécs, 2005. 385.

A similar definition can be found in the German literature. “Confrontation, which serves the purpose of eliminating contradictions, is the simultaneous interrogation of the persons who have already been interrogated and whose statements markedly differ from each other.” Ackermann, R.–Clages, H.–Roll, H.: *Handbuch der Kriminalistik*. Stuttgart–München–Hannover–Berlin–Weimar–Dresden, 1997.

According to the French special dictionary of criminal law, confrontation is “the counter-posing of witnesses, a witness and the victim, or a witness and the suspect. Thus their allegations may be checked, collated and measured in the presence of each other.” *Dictionnaire de droit criminel*. Paris, 1992.

tation if necessary. The persons confronted shall make their testimonies in words to each other; they may put questions to each other.

(2) The confrontation of the witness and the suspect shall be omitted if it is necessitated by the protection of the witness or the suspect.

(3) A person not having attained the age of fourteen may be confronted provided it arouses no fear in the minor."

The statutory regulation may be analysed by the help of the main questions (guidelines) of criminalistics. These are: What? Where? When? How? Who? With Whom? Why?

What is confrontation? It has already been dealt with in the part giving the definition of this concept, here it is only added that it is a method of seeking the truth expressly not specified or defined by law. It is referred to as an 'evidentiary procedure' in CPA, which can be challenged from a terminological point of view, since evidencing is the alpha and omega of the whole criminal procedure, there is hardly such a thing as a procedure within a procedure, it is extremely misplaced, it bears unnecessary duplication.

It is, however, praiseworthy that now it is unfolded from the gown of interrogation (of 1973) and now it is given a separate section emphasizing its special nature and existence on its own.

Where can it be applied? This question should be rephrased as, *Which authority shall apply it under which section of CPA?*

Possible stages and actors are: investigatory-police (other investigatory organs such as customs investigators are not described here), interim-prosecution, and trial-judiciary.

The issue may be examined from several aspects. On the one hand:

- a) What was the intention of the law-maker?
- b) What is the opinion of law enforcement and administration?
- c) What is the real situation?
- d) What is the author's position in this respect?

Ad a) The legislator would have liked to shift the emphasis to the trial-judiciary stage in the framework of the reform of criminal procedure initiated in the early 1990s. It was indicated by the fact that according to the legislator, the main aim of the investigation was to inform the prosecutor and the principles characterising the whole procedure could get unfolded in full in the trial stage in an independent and impartial court. Consequently, confrontation as the application of a truth seeking method was considered appropriate rather in the trial-judicial stage partly returning to the model of the CPA of 1896. This may be the reason for the polished amendments of the wording of the act

such as the inclusion of the word ‘may’ instead of ‘shall’ in the scope of application and the protection of witnesses/suspects and children, which may be implemented more easily before the courts than before the investigatory authorities.

Ad b) The opinion of law enforcement and administration, judges, prosecutors, (defending) counsels and police persons (and suspects) is well reflected in the finding of my empirical study:

On the average, half of law enforcers and administrators are satisfied with the current legal regulation of confrontation with prosecutors standing out of this circle. Four fifths of them regard it appropriate as opposed to the suspects, of whom only one fifth approve it. The rate of satisfaction is similar in the case of the investigatory implementation (48%), while the method of implementing it in the trial-judicial stage is ranked at a higher quality level (67%). In accordance with it, only one third of the informants would place confrontation in the investigatory stage, however, the size of the group preferring the trial stage and the size of the group preferring both stages are approximately the same.

In other words, no marked dominance has been established by law enforcement and administration concerning the question “where shall we apply confrontation?”

Ad c) In reality—as supported by the part of the empirical research processing files and by the author’s own practice—confrontations on the merit are carried out mainly in the investigatory stage, they are performed in the trial-judicial stage in a far smaller number and these tend to be formal and unsuccessful due to the lack of tension described in the theoretical grounding.

Ad d) Fully agreeing with the theoretical shift of emphasis and the increase in the importance of the trial-judicial stage related to the reform of CPA, I suggest that confrontation—considering mainly its psychological and criminal-tactical aspects—cannot be preferred and actually applied in the trial-judicial stage but rather in the investigatory-fact-finding stage. My argumentation is supported not only by the indicators of practical efficiency—which are better in the investigatory stage—but also the psychological factors which may bring about the situation of distress on the side of the person making untrue statements. These psychological factors can hardly be created in huge, impersonal courtrooms where the trial with adversarial features is often held in front of the members of the press and the general public. There are a lot of things missing such as the intimacy of nearby bodies, the effect of surprise as everybody may be familiar with the documents of investigation and the former records of trials, the dawn-raid effect, the harshness of the initial experience and I could keep enumerating. All these negatives make the trial application of confrontation unreasonable and ungrounded; consequently, I prefer its investigatory implementation.

The issue of the interim procedure may arise where the prosecutor with the results of investigation might perform confrontation. In theory. But in theory only, because on the one hand investigation has been completed by then and the same concerns may arise as in the case of timeliness in the trial stage, in other words participants may have become familiar with everything at the accomplishment of the investigation. In theory there is the possibility of a successful confrontation conducted by the prosecutor in the interim procedure where suddenly a new source of evidence for example a new-truthful-witness (the victim or the suspect making changes) appears and it has the power of surprise in the course of confrontation. This is highly unlikely in reality and so is the possibility of a prosecutor noticing the omission of confrontation during investigation and then performing it himself. Although nothing excludes its performance, empirical data show that members of the prosecuting authority rather send the documents back to the investigating authority to perform the act(s) of confrontation.

Preparing the trial is also part of the interim stage but performing a confrontation in that stage is theoretically excluded since proving on the merits or an evidentiary procedure cannot be implemented there, it can only be implemented in the trial stage.

A further argument for performing confrontation in the course of investigation is that interrogation and confrontation have their own methods and descriptions which are taught at a professional level in substantial depth and number of hours only at the Police College in Hungary. Thus officials at the investigating authority may be assumed to have the greatest knowledge and competence in this respect.

When and why is confrontation to be applied?

The question does not refer to the issue of the relevant sections of CPA, now it should be rephrased as follows: *in what cases and/or why must/may confrontation be applied?*

The answer may come partly from procedure law and partly from criminalistics (more precisely from criminal-tactics). This study covers only the legal aspects; its criminal-tactics deserves a separate study.

It is clear from the wording of the act that if there is a 'contradiction' between testimonies, it "may be clarified if necessary." As lawyers say, each word is an 'action-handhold'. Each word has its own importance and each can be examined.²

² Mihály Tóth did so in two of his studies on the regulation laid down in the former Act on Criminal Procedure, Act I. of 1973, the wording of which differs from the now

First, the contradiction has to be interpreted as the following question immediately arises: *Does the legislator's intention concern all conflicts and contradictions?*

I do not think this to be the case either in respect of the legislator's intention or the conduct to follow. It would be more appropriate—in accordance with the opinions of authors dealing with this issue—to insert an adjective into the legal provision, namely the need for confrontation may arise in the case of an 'essential' contradiction. Seeming and trifling contradictions concerning details and minutiae are not worth 'shooting our bolt' at. I use this phrase deliberately as one of the factors in the background of unsuccessful confrontations is the huge amount of unnecessary, schematic, apathetic and characterless confrontations lacking atmosphere and concerning insignificant matters which may be regarded as a set of 'forced confrontations'. Concealed behind it—as the findings of empirical studies show—is the fear of the police for the prosecution regarding the omission of this procedural act as a reason for supplementary investigation ('throwing it back'), on the basis of the prosecutors' requirements. This fear can only be eased by the high-level and professionally well established joint (police-prosecution) interpretation and application of the regulation pertaining to confrontation, and on the basis of the mutual responsibility of the two authorities.

Mihály Tóth has already specified the most frequent theoretical and practical cases of contradictions which I can neither add to nor delete from as there is no such need. In his opinion the most frequent contradictions are as follows:

„a) The contradiction is only a seeming one as the the persons interrogated have stated the same but expressed themselves in a different way.

b) The contradiction is a seeming one because the differing statements do not concern the same fact.

c) The contradiction concerns the same fact but it is not significant from the point of view of the instant case.

d) The elimination of an essential contradiction concerning the same fact is not necessary since evidence on the one side outweighs evidence on the other side.

e) The elimination of an essential contradiction concerning the same fact is a tactical mistake as its being insoluble is the evidence itself.

f) The elimination of an essential contradiction concerning the same fact is necessary but it can be eliminated by some simpler and more certain method than confrontation.

effective act. His findings still apply today. In more detail see: Tóth, M.: A szembesítés béklyójában [In the shackles of confrontation]. *Jogtudományi Közlöny*, 39 (1984) 139. and Feloldható-e a béklyó? [Can shackles be unfastened?] *Jogtudományi Közlöny*, 39 (1984) 282.

g) The contradiction to be eliminated could only be eliminated by confrontation but no success can be expected from the confrontation.”³

There even seems to be some contradiction and uncertainty in the wording of the act as if there is a contradiction, a confrontation should be performed, however, there is an immediate concession stating that all this shall apply only ‘if necessary’.

Some further questions arise: *What does ‘if necessary’ mean? Who defines what necessity is?*

The latter can more easily be answered promptly, it is the master of the case, ‘dominus litis’, the prosecutor in charge of the investigation, however, he is rarely in a position close enough, in other words decision-making is vested in the law enforcement official of the police. In the course of a review by the prosecution, the prosecutor will order the ‘necessary’ confrontation if the feeling of lack arises. If the member of the investigating authority deliberately omitted confrontation, a conflict situation arises, as the police officer met the persons testifying in the course of the procedure and for some psychological or rational reason he deemed confrontation to be unnecessary, inappropriate, undesirable or even detrimental to the whole evidentiary procedure and to its final outcome. The prosecutor implementing the review has not seen anyone, has not perceived any sign of metacommunication or any real personality, only the wording of CPA is imperative to him. The conflict can only be resolved on a professional basis, namely the investigator should inform the prosecutor about the professional reasons and conciliation should be conducted if needed. According to my experience of practice, unfortunately, we can never reach the situation in which the decision on performing a confrontation could be made solely by the investigators operating at the level of the executive since then it might soon turn out that there is no need for any confrontations or at least only a few would be performed. Investigators would immediately move in the line of least resistance since they do not have a high opinion of this institution at present—as has been shown by empirical research. They would try to omit confrontation due to its circumstantiality (it is always difficult to ensure the presence of more than one person at the same time), formality and the lack of faith, and would try to save time and energy, which might quickly lead to the decline and death of the institution. One counterargument is that an investigator is always interested in finding the truth, and is always urged on with what is referred to by the term ‘houndspirit’ in American literature, and deploys all lawful means including confrontation as a possibility. The idea is quite likeable and works in especially important cases, nevertheless, in most of the cases there is no trace of such a spirit and it cannot be perceived according to the rule of big numbers.

³ Tóth, M.: *A szembesítés béklyójában*, *op. cit.* 140.

The discretion of a well established decision is respected by the guiding decision of the Supreme Court declaring, “if in a criminal case initiated for kidnapping the confrontation between the accused and the victim was not performed in the course of the investigation due to the sense of fear of the victim—and at the time of the trial the victim’s presence could not be ensured due to his or her staying at an unknown place—it cannot be regarded as a procedural infringement affecting the well-groundedness of the judgement, for the very reason that besides the victim’s testimony, the court considered and assessed all other evidences and evidentiary tools supporting it.”⁴

In the trial stage it is undoubtedly the independent judge (court) that orders a confrontation. Compared to the investigator, the judge is in an easy position because the contradicting parties concerned are present, ‘ready at hand’ in the courtroom thus the act can be performed quite easily in some moments without any special formal or written requirements.

Revisiting the first question, the ‘necessary’ cases may be interpreted from a positive (permissive) and negative (excluding) aspect. Some important permissive conditions are:

- there are essential contradictions between the testimonies;
- the act of the confrontation is likely to be successful, a result can reasonably be expected.

In my view, the necessity of a confrontation is excluded if:

- a child should be confronted with an adult;
- there is no real chance for the confrontation to be successful, it is reasonably assumed that it will lead to no result and there are data supporting this;
- the protection of the witness or the suspect (e.g. a pentito) requires it (as specified in Section 124 (2) of CPA)
- in the interest of the investigation (its success);
- the suspect makes a (even advance) statement refusing to testify in confrontation.

Further reasons may be found in both categories but these are the most frequent ones both in practice and at a theoretical level about which a decision must be made by the investigator, the prosecutor in charge of the investigation in the first main stage of the criminal proceedings, and the judge (court) in the trial stage.

It may be clear from my enumeration that I cannot agree with the concession prescribed in Section 124 (3) of CPA, pursuant to which a child may also be confronted “provided it arouses no fear in the minor”. Having regard to my studies, experiences, and the psychological factors, I claim it as a principle fact

⁴ Court Decisions 1999/12, case no. 544. (Supreme Court Bf. III. 1284/1998.)

that confrontation arouses fear and tension in a child under 14. The wording of the act questions the psychological principle of confrontation since the core of the act of confrontation is the intensified creation of distress and tension. This applies to the atmosphere and the circumstances of its performance even if it is not the child that is regarded as the person making untrue statements. It is impossible for a child to be in peace and quiet in a situation involving the police-authorities, where even adults would be 'shaky on their legs' even if they have got nothing to do with the crime. This section is welcome to have been included in the effective CPA, but it may be regarded as a first step only and not as ideal. I would consider it ideal and propose it as *de lege ferenda* to expressly exclude the possibility of confronting a child in the act itself. In my opinion subsection (3) should read: *(3) A person not having attained the age of fourteen shall not be confronted.*

In this area my opinion dissents from the standpoint of Hungarian courts, which is in line with the act in force, and which considers the statutory (personal) guarantees sufficient for the protection of children as witnesses in the case of confrontation too. According to a guiding decision published in the Court Decisions: "In the course of interrogating children not having attained the age of 14 as witnesses, the investigating judge shall observe the special rules set forth in the act on procedure. These include that such witnesses need not be warned concerning the consequences of perjury, they may be confronted only if it does not arouse fear in them, and their caretaker or legal representative may be present during the act—and cannot be sent out either—even if later they might be interrogated as witnesses."

The reasoning contains that several provisions of CPA (the presence of a caretaker, a legal representative or perhaps an expert psychologist and interrogation by a closed-circuit telecommunication network) establish the possibility of mitigating the psychological and other harmful effects inherent in the interrogation of a child as a witness to the smallest extent possible and necessary thus preventing the possible damages caused to their personality development.⁵

My argumentation is supported by the relevant legal practice of the European Court of Human Rights, according to which the state of being free from fear cannot be ensured at a trial. It should be added that in an investigatory situation the negative effects would be magnified because client-publicity is limited, the room is much smaller, mysteriousness, etc.

The ECHR declared in its guiding decision that the British authorities violated the right to a fair hearing guaranteed in Article 6 § 1 when in the case of

⁵ *Bírószági Határozatok* (Court Decisions), 53 (2005) 738, case No. 343.

an 11-year-old accused the trial took place over three weeks in public in the Crown Court. In its reasoning the Court noted, “the formality and ritual of the Crown Court must at times have seemed incomprehensible and intimidating for a child of eleven, and there is evidence that certain modifications to the courtroom, in particular the raised dock which was designed to enable the defendants to see what was going on, had the effect of increasing the applicant’s sense of discomfort during the trial, since they felt exposed to the scrutiny of the press and public. Both applicants suffered post-traumatic stress disorder, and had limited ability to instruct their lawyers and consult adequately the details of their acts. They found the trial depressing and frightening and were unable to follow it. In such circumstances the Court did not consider that it was sufficient for the purposes of Article 6 § 1 that the applicants were represented by skilled and experienced lawyers. Here, although the applicants’ legal representatives were seated “within whispering distance”, it was highly unlikely that the applicants would have felt sufficiently uninhibited, in the tense courtroom and under public scrutiny, to have consulted with them during the trial or, indeed, that, given their immaturity and their disturbed emotional state, they would have been capable outside the courtroom of cooperating with their lawyers and giving them information for the purposes of their defence. In conclusion, the Court considered that the applicants were denied a fair hearing in breach of Article 6 § 1.”⁶

Concerning necessity, the following question may be asked, *is there a compulsory confrontation?*

Is there a situation where the confrontation must be performed in any case?

The legal answer may be deduced from the act: no. The wording of the act contains two restrictions, necessity and possibility. In other words, it no longer uses the command ‘shall’ as it used to. I fully agree with it, all the more so as besides the legal arguments, there are the criminal-tactical arguments serving as confirmation which may occasionally be weightier, more marked and more powerful than the legal ones are. The criminal-tactical success cannot be sacrificed to the rigidity of the law, in other words the ammunition the investigating authorities have cannot be exhausted, jeopardized, weakened or ‘bungled’ due to the rigid interpretation and application of confrontation. In several cases it must be saved for the trial stage even if in the course of discovery the

⁶ Eur. Court H. R., Cases T. v. the United Kingdom, and V. v. the United Kingdom judgments of 16 December 1999. Available in Hungarian: *Bírósági Határozatok*, 49 (2001) 497, case No. 314.

‘weapon’ has become known for those against whom the documents contain incriminating data.

In the course of elaborating on the issue of ‘necessity’, the question of who-with whom has already been touched upon,⁷ in other words *who is confrontation carried out between, who are the persons who can participate in a confrontation as persons to be confronted?*

The (three) possible options can be inferred from the text of the act:

- a) suspect-with suspect;
- b) witness-with witness (including the victim-witness);
- c) suspect-with (victim)witness.

Groups a) and b) are homogeneous in respect of form, in the case of group c) confrontation is heterogeneous, since the procedural statuses indicate similarity and difference. In the case of the latter, the order of warnings is different as well.

Heterogeneous confrontation is the most frequent in real life, in which the suspect sits face to face with the witness, quite often the victim-witness. In most of the reported Hungarian crime cases the known suspect is there alone as opposed to an average of five witnesses in a Hungarian criminal case, not all of whom are obviously capable of contradicting the suspect in important matters.

The findings of my empirical survey also show the actual investigatory ratios, out of 541 confrontations:

- a) suspect-witness 247 instances (46%),
- b) suspect-victim 122 instances (23%);
- c) suspect-suspect 88 instances (16%);
- d) victim-witness 18 instances (3%);
- e) witness-witness 66 instances (12%);
- f) victim-victim 0 instance (0%).

Altogether 541 confrontations were carried out in the 186 criminal cases, which means 3 (2.9) confrontations on average. It can also be seen that due to the average number of witnesses there are more (twice as many) confrontations performed between the suspect (and as it is true in the trial stage too, the word accused can also be used) and the witness than between the suspect and the victim. Altogether the two categories (witness/victim facing the suspect), the heterogeneous group makes up nearly 70% (69) of the confrontations. Only every sixth is carried out within the homogeneous group of suspects (16%) and within the homogeneous group of witnesses (the victim) (altogether 15%).

⁷ The question of how is not dealt with here, since the answer is given by criminal-tactics, and it needs a separate study.

It should be noted here that besides the homogeneity and heterogeneity of the participants, Flórián Tremmel differentiates content homo- and heterogeneity depending on whether “the source of the contradiction is a mistake on both sides or a lie on both sides, or these contradictions were created on the one side by a mistake and on the other side by a lie.”⁸

3. Types of confrontation

Besides the dichotomy between homogeneity and heterogeneity, confrontations can be classified into different groups. The following classification may also be applied:

- A) active (narrow)–passive (wide) (within them personal and material);
- B) formal–informal;
- C) replaceable–irreplaceable;
- D) ex officio–upon request.

Ad A) So far I have dealt with the legal aspects of confrontation taken in the narrow sense, the detailed rules of which are laid down by criminalistics, in particular criminal-tactics. This term has another, wider epistemological interpretation as well; as I mentioned in the course of demarcating it from other investigatory-evidentiary acts, interrogations, crime-scene interrogations, identification parades, attempts to prove, crime scene investigation, search and body search, the use of polygraph and hearing experts all have elements of confrontation. Unlike personal confrontation which is active, it may be called ‘passive’, since the person concerned, usually the suspect, sees the scene, the proving objects and events in front of him (material confrontation). He or she is looking at them passively, though not without being touched and impressed as they (may) induce inner tension and further deliberation in the person looking. Sometimes the passive looking and facing induces the confession of the truth, the modification of a testimony and testifying or confessing itself.

A classic literary example of passive confrontation can be read in the short story entitled *Brutes* written by Zsigmond Móricz.⁹

The examining judge felt (knew) that the red faced shepherd and his mate had killed Curly the Shepherd and his son but failed to make the shepherd admit to it. However, when on his way out of the room the shepherd approached the

⁸ Tremmel–Fenyvesi–Herke: *Kriminalisztika tankönyv és atlasz, op. cit.* 386.

⁹ Móricz, Zs.: *Brutes* (Translated by Gulyás, Gy.). In: *44 hungarian short stories*. Budapest, 1979, 68–86.

door, and reached his hand for the doorknob, he staggered back. He could not touch the doorknob. "He could not move. He just stared and stared and a small froth appeared around his mouth." There, hanging on the doorknob, was the brass-ornamented leather belt, with which he and his mate had committed the brutal crime.

The shepherd slowly raised his hand to his head, turned back, and then confessed to his crime, "We killed Curly the Shepherd for his three hundred sheep and two donkeys."

Ad B) The former active and passive confrontations may be referred to as formal and informal confrontations. The formal confrontation is described and circumscribed by the provisions of CPA, while the informal confrontation is described in and by criminal-tactical recommendations. This statement is true even if the formal confrontation is claimed to be an institution with a double formation. It can be examined both in a legal and in a criminalistic sense and rules and recommendations can be found pertaining to it. (It should be added that considering its psychological features, it is rather an institution with a triple formation.)

All acts—occurring in any stage of the criminal proceedings—can be called informal¹⁰ in the course which confessors are faced in some form with the truth, a standpoint, some evidence, a testimony or some data different from what they have conveyed. And it applies to all possible participants of the confrontation such as the suspect, the victim and the witness.

An example of a confession induced by an informal confrontation can be read in the ballad entitled *Call to the Ordeal* by János Arany¹¹, in which there is an informal confrontation with a dead person.

A young man was found in the woods with a dirk in his heart. "...he unto the ordeal calls / All he suspects, to view the test / Which must the guilt make manifest." First the young man's enemies are called to the dead body, then his friends, relatives and finally his beautiful lover and secret bride. When the girl appears, blood begins to flow out of the wound. Then the girl told what had happened. She didn't kill the boy, but she gave him the dirk. The boy urged

¹⁰ Endre Bócz refers to this category by the term 'tactical' confrontation. In more detail see Bócz, E.: *A kihallgatások szervezése [Arranging interrogations]*. *Belügyi Szemle*, 11 (1973) 93.

¹¹ Arany, J.: *Call to the Ordeal* (translated by William N. Loew). In: Arany, J.: *Toldi; Toldi's eve; Ballads; Selected lyrics* (translated by William N. Loew). New York, 1914. 164–166.

her to say ‘yes’ or else he would kill himself. Then the girl gave him the dirk and replied him to do so.

“My heart in the truth, he did possess;
 He should have known it; but, ah, woe!
 He still besought another, ‘Yes,’
 ‘Or,’ said he, ‘to my death I’ll go,’
 Here, take my dirk, and end it so!”

Besides objects, persons may also informally have an effect on persons lying or deceiving.

Kálmán Mikszáth gives a wonderful literary example of it in his novel, *The Noszty Boy’s Affair with Mari Tóth*,¹² in which Ferenc Noszty—who had already committed a bill fraud—and again wanted to get the girl with a big dowry by fraudulent means.

“You haven’t heard the last of this,” roared Feri and tore himself from the hands that were restraining him. “We’ll settle accounts, master-baker! We’ll settle accounts...”

And, his bloodshot eyes rolling ominously in their sockets, he was moving towards Tóth again with raised fists when suddenly the library door opened and a tall, handsome soldier stepped into the room and said to him sharply:

“Did you want something?”

Ferenc Noszty recoiled at the familiar voice and glanced fearfully in the direction from which the question had come.

Colonel Stromm was standing on the threshold, his arms folded, and he repeated:

“What do you want?”

Noszty’s arms fell limply down and a deathly pallor came over his face.

“I want to go home, Colonel,” he groaned in a pathetic, broken voice.

Ad C) The pair of replaceable–irreplaceable confrontation is connected to what has been claimed about ‘necessity’. The confrontation is necessary to be performed if—among others—it cannot be replaced with anything else, if we cannot get close to the evidence in any other way, or if there is no other

¹² Mikszáth, K.: *The Noszty Boy’s Affair with Mari Tóth* (Translated by Bernard Adams). Budapest. 2005. 414.

possibility. Consequently, it may be deduced from the train of thought and the wording of the act as a general rule that it is not an 'ultima ratio', neither is it to be deployed in the first place; it may only be applied if it cannot be substituted with anything else, and it cannot be applied if the elimination of the contradiction would be a tactical mistake. What can replace it? Here we can refer to the thoughts above, the classification into active-passive and formal-informal. Active and formal confrontation acts may be replaced with passive and informal ones. The 'father', the original source and the starting point of confrontation is interrogation, whose gown confrontation itself has slipped out of. Nonetheless, such may be the other special form of interrogation, the crime-scene interrogation or testifying on the spot, further, identification parades, and other open and covered data collection and requests. However, the danger of delay, 'periculum in mora' should be considered; a means which is also expedient in time, which serves the double requirement of swiftness and thoroughness of criminal proceedings and investigations is to be applied.

Ad D) By prescribing confrontation as a possible method applicable if 'necessary' instead of the former imperative of 'shall', which I approve of, the legislator has eliminated the obligation stemming from officiality, the obligation of carrying out confrontation *ex officio*. Consequently, even if there is a contradiction, it is not sure that there will be a confrontation. This has opened up the way in front of the theoretical and practical possibility of a petition to perform a confrontation which may come from both the subjects of the defense (the suspect, the defense counsel or the legal representative of the minor) and the victim or perhaps the non-injured witness. Petition is not the right expression, as I usually say, the defense counsel (the defense) is not a begger, he or she does not have to beg in the course of the proceedings, let alone in connection with evidencing. (The term petition to be released is appropriately replaced with the term motion in the act.) The defense can hand in a motion to perform a confrontation as part of the defense tactics. The victim is also entitled to it but the simple (non-injured) witness—quite properly—not.

The motion does not have to be agreed to, the confrontation does not have to be performed; it is at the discretion of the authorities. In the case of rejection, a resolution has to be made to this effect, against which the initiator is entitled to seek legal remedy.

4. Participatory rights and duties concerning confrontation

4.1. Presence, activity and asking questions

There at least three persons present at an investigatory confrontation (This is the main concern of my analysis), the person conducting the confrontation and the two persons being confronted. Beyond this standard, however, other persons may be present, the official keeper of minutes, the defense counsel of the suspect, the attorney of the (victim)witness, the prosecutor and in the case of an illiterate person's confrontation—upon a motion to this effect—two official witnesses at the disclosure of the minutes, since it is a special form of interrogation. All these persons have a statutory right to be present, moreover, the person conducting the confrontation may allow, if necessary, the presence of a (sign)interpreter, an expert, a psychologist, a probation officer, a legal representative, a caretaker, a teacher if the person to be confronted is a juvenile/child.

It should be noted here that the Constitutional Court has touched upon the issue of confrontation only once and only indirectly. It declared the unconstitutionality of the situation concerning the application of official witnesses by a majority decision. I myself agree with Árpád Erdei, who expressed a concurring opinion claiming that “the mere presence of an official witness at the confrontation entails his/her gaining an insight even into the most intimate details of the person(s), private individual(s) concerned (for example body search and house search)”. It should be added that it applies to confrontations too, for instance one carried out in connection with a sexual crime (committed within the family).

Árpád Erdei added, “The effective act on criminal procedure excludes even client-publicity in the case of most investigatory acts. Thus it does not allow the presence of either the suspect or the defense counsel at the interrogation of witnesses whose interrogation has not been requested by them, excludes them from the confrontations between the witnesses, and even makes confrontation omissible. Taken all this together, it may be suggested that the presence of official witnesses is not required either by the efficiency of the investigation or by any noticeable interest of the authorities. The advantages that used to be entailed by the application of official witnesses are now replaceable by other methods which better serve the prevalence of objectivity, and do not jeopardise the interests of others. The continuously expanding technical possibilities and methods which are also referred to by the act are suitable for eliminating all the disorders and abuses which the application of official witnesses automatically entail even in the case of a guarantee system satisfying higher

level requirements than those at present. It follows, that Section 183 of CPA, allowing for the application of official witnesses, is unconstitutional because it unnecessarily and disproportionately restricts the rights laid down in Article 59. (1) of the Constitution.”¹³

A further issue may be whether only the leading defense counsel or all the defense counsels may be present in the case a suspect has more than one defense counsel. The act does not govern this issue; in my view only the leading defense counsel or an attorney or a legal trainee substituting him or her may be present. The size of rooms available for confrontations, the tactics of confrontation and the psychological requirement according to which the number of the ‘adversary’ should not be too large, it should not weigh on or be a psychological burden and pressure on the victim, on the witness or in rare cases on the other suspect.

The same ‘self-restraint’ is to be voluntarily imposed on the investigating authority, since it may seem to be too much of pressure and forced interrogation if several persons queued up behind the investigator keeping the minutes as if showing off strength, which might induce fear and intimidate any of the persons to be confronted.

In the case of a witness-witness confrontation, the question arises as to whether the defense counsel of the suspect may be present or not. Under the general rule of the effective Hungarian regulation, the defense counsel may only be present at the interrogation of his own witnesses. Considering that confrontation is a combined form of interrogation, this rule is applicable and has to be extended to cover it: the defense counsel may be present at a confrontation (the authority has the duty of notice) where one of the participants is a witness whose interrogation has been requested by the defense counsel. A counterargument may be that in this way the defense counsel might have access to the contents of the testimony of the other side’s witnesses whose interrogation he was not present at and the minutes of which he has no copy of. The authorities have two ways to eliminate this concern: they either omit the confrontation for a tactical reason in the interest of the success of the investigation or postpone the confrontation until right before discovery when there is not too much left to hide from the defense.

The presence of both the witness—provided he or she cannot refuse to testify, there is no obstacle to it, or he is not exempt—and the suspect may be enforced. A witness may be brought in if he fails to attend and may be fined for not testifying. If the witness still does not open up, it brings about the criminal law threat of perjury, though only at a theoretical level. Certainly, a

¹³ Decision No. 43/2004 (17. 11) AB of the Constitutional Court and the concurring opinion attached to it.

kind of a block which the authority has to remove by criminal-tactical means has occurred or the confrontation has to be cancelled due to fear, intimidation, psychological block, etc. which the witness himself may indicate. There is no point in increasing tension to the breaking point and stubbornly insisting on the confrontation of a witness who is blocked, since in such a situation no positive result can be expected. To the contrary, the witness may be expected to become more reserved and frightened, which does not do any good to the whole case or procedure.

The suspect can also be forced to attend the venue of the confrontation, he or she has to appear once summonsed, however, it is pointless if the suspect, fully aware of all legal warnings, stated in advance that he would not make a confession at the confrontation. Forcing a confession would violate the Miranda principle, further, in my view forcing the suspect to make a confession against his own will and intention arouses the suspicion of a forced interrogation. Once it has been stated that confrontation is a special, combined interrogation, the rules of interrogation obviously apply to it as well, according to which in case of refusal, even putting questions is forbidden. A confrontation is, however, started by asking a question and is continued by doing so again.

It may occur, and I have conducted some empirical research into this, that the suspect might be present, he may not have been able to avoid it, nonetheless, he does not look into the other's eyes or horrible dictu even lowers his head, closes his eyes or reads his notes, in other words shows total passivity (frivolousness) or resistance. There is no efficient means for preventing it, the person conducting the confrontation can do only one thing. The confrontation must immediately be terminated, as no success can be expected due to the lack of the psychological basis, further, this can stop the suspect from further 'taking the air' and possibly obtaining information from the other party.

The situation in the courtroom is totally different. One of the persons to be confronted is already there, (just like the defense counsel, the attorney of the witness, the legal representative of the victim, the experts, etc.) he will hear the other contradicting suspects and witnesses, thus, following the passive (informal) confrontation, there can be no power of surprise, the formal confrontation can have no real strength. Besides, –as I have already mentioned–by the end of the investigation he has got to know or may have got to know the standpoints of persons making contradicting testimonies, which also weakens the chances of a successful confrontation.

According to the wording of the act, the persons being confronted may ask each other questions but this seems to be possible only after the authority has put its questions. This is in conflict with criminal-tactical requirements, since real confrontation develops through an argument which, of course, must be

channelled appropriately. I regard it redundant and unnecessary to grant the right to ask questions in a statute, as the content-requirements of confrontation are defined by criminal-tactics (and the person performing it) but these detailed rules must not be listed in the framework of criminal procedure law.

In my view, as it is a special form of interrogation, the defense counsel, the attorney of the witness, and the legal representative of the victim may ask questions but only once the questions between the authority and the persons being confronted have been asked and recorded. The answer to a question asked by a 'quasi investigator' must be given by looking into each other's eyes and not to the person asking the question.

4.2. Taking the minutes and its copy

Under the effective CPA minutes must be taken of the confrontation, while formerly a report could be drafted in misdemeanour procedures. It should be noted here that in my opinion minutes should only be taken if the formal confrontation has some result, namely one or both of the persons confronted have changed their testimonies. My argumentation is supported by the following:

- It would make the procedure simpler and quicker if the investigator could record unsuccessful confrontations in reports. Usually no minutes are taken of negative (unsuccessful) investigatory acts and data collections, for instance of the fact that a person interrogated near the scene does not know about the case or knows only about irrelevant facts.

- Only successful confrontations providing a result or a change deserve attention in the course of the rest of the procedure, but then taking the minutes is important due to the Miranda warnings and the evidentiary force of the testimony.

- In the trial stage it is also recorded in one practical sentence only, "the confrontation has yielded no result".

- My main argument is that during the preliminary proceeding the investigator performing the confrontation could focus on the core of confrontation: the atmosphere, inducing tension, genuine clashing, sharpening the actual counter-front-statement, the personality of the persons being confronted, bridging the gap between them, observing the person (presumably) making an untrue testimony, the tactics of confrontation based on criminal-psychology, and moves in the direction of the result.

- Taking the minutes/dictating, mainly in the case of persons not very good (but also who are good) at typing/dictating engages attention and consumes energy, makes the person conducting the confrontation unfocussed, disorganised

and scatterbrained and by giving substantial time for preparation, provides an escape pursuit for the liar who perceives that the person conducting the confrontation is uncertain and unfocussed. In this atmosphere, in the obscurity of typing, the other person telling the truth also weakens and fades away gradually, then eye-contact disappears, as 'there is nobody to shepherd the flock'.

I fully approve of the fact that the two-coloumn composition of recording advised in books on criminal-tactics and used from the 1960s to the 1980s has disappeared from practice. On the one hand, the computer softwares and forms used by the police do not apply this form. (I can only hope that partly because the editors came to the same conclusion as my aforementioned argumentation proposing simplification.) On the other hand, even law enforcers realised that it made taking the minutes of the confrontation even more complicated, more tiring, and slower. The two-coloumn composition of recording has never made any sense, neither has verbose and babbling minutes.

Confrontations may also be recorded technically, following the tape-recoding¹⁴ which has been used for decades, now (even digital) videorecording can also be applied. All the more so as this can record images not only voices. The whole procedure becomes visible for us afterwards, which may especially be valuable if either of the persons confronted has made a change concerning an essential, relevant, and material fact. It may strengthen the authenticity and the evidentiary force of the confession and it is true for the trial stage and for the scope of discretion applied there too. The recording can certify the fairness of the procedure, and can prevent a result achieved there going into the group of excluded evidence.

A debated question is *whether to record the official remarks about the perceived communication and metacommunication signs in the minutes together with any reference to the successfulness or unsuccessfulness of the confrontation at the end of the minutes.*

With regard to the first question, the findings of my research into the psychological basic features show that no certain conclusions concerning truth coverage or lying can be drawn from non-verbal signs (sweating, crossing legs, scratching, etc.). Consequently, their recording is also unnecessary, neither are they good for guidance, they may even influence and mislead subsequent readers of the minutes. Thus, also prosecutors and judges. It is one-sided because either the defense counsel, the suspect, or any of the persons confronted might request their inclusion into the minutes. The suspect may claim the same with

¹⁴ A detailed study on the then modern taperecording: Bócz, E.: Szembesítés magnetofon alkalmazásával a nyomozás során [Confrontation and the use of a taperecorder in the course of investigation]. *Ügyészeti Értesítő*, 2 (1965) No. 4.

good reason; once the authority records such things about him, why could not his observations be also recorded. Under such circumstances I am rather happy than discontented with the small number of the records of metacommunicative signs I found in the course of my empirical research.

I regard the recording of successfulness/unsuccessfulness—contrary to the recommendations of many investigating instructions—absolutely unnecessary and pointless. It should be enough to simply report an unsuccessful confrontation—as it has already been stated. However, due to the obligation to take minutes, as it is a special form of interrogation (especially if one of the participants is the suspect, since then taking the minutes is obligatory anyway), the outcome is obvious from the content. On the other hand, if there is a positive result, the consecutive (one-person) interrogation of the person making a change is desirable as may be the taking of the minutes of the crime scene interrogation. This will clearly show that the confrontation has been successful. If no interrogation follows, it may not be appropriate from the point of view of criminal-tactics to ‘blab it out’ to him in writing that there has been a sort of shift or change, the authority has obtained some new information during the confrontation. In such a case there is no need for calling attention to it by declaring it. I have not been able to find one single argument in favour of it, only arguments against it. The question must be asked as to why the authority deemed it necessary to put that sentence at the end.

Defense may get a *copy* of it for free (since April 2006), after—upon the initiative of among others, this author¹⁵—the Constitutional Court has adopted its decision, concerning this issue, complying with European standards and the requirement of due process including the equality of arms.

According to the general rule, the copy is not for free in the case of a victim-witness; however, if the official of the authority allows—and he can do so if it does not harm the interest of the investigation—a copy to be issued to him, the witness has to pay for it, actually HUF 100 per page.

I agree with the provisions pertaining to copies, I do not consider their amendment necessary or desirable.

4.3. Legal remedy

As each coin has two sides, a complaint may be lodged by the defense (the suspect or the defense counsel). On the one hand because of performing a

¹⁵ Csorbul-e a védelem alkotmányos elve az iratmásolás illetékeztetésével? [Is the constitutional principle of defense victim by imposing a duty on copying documents?] *Belügyi Szemle*, 47 (1999) 45.

confrontation, on the other hand because of omitting it. If the suspect states it in advance on record (or in a self-testimony) that he does not intend to take part in a confrontation and he does not intend to make a testimony in the course of it, there is an obstacle to the confrontation. Even forcing him to attend against his own will is not useful. Even subsequent to the CPA coming into effect, i.e. even in 2003 (unfortunately quite frequently before it), the authorities conducted 'one-party' confrontations where the suspect refused to make a testimony, and exercised his right to silence, nevertheless a 'one-sided' confrontation was carried out. Mainly due to being afraid of the prosecutor sending the case back for 'supplementation'. Fortunately, this practice, resembling forced interrogation, and going against the Miranda-principle, which was unfortunate even for criminal-tactical reasons (e.g. the suspect could obtain data and information), was abandoned in a few months as the result of the position of prosecution applying the appropriate interpretation.

The defense counsel of the suspect sometimes 'objected to' performing a confrontation in advance, prior to the confrontation. I might say, he submitted a motion for not conducting the confrontation. However, such a form does not exist; defense may only note that according to its position the confrontation is not desirable or even unlawful for some reason. Thus, there is no advance legal remedy in the case of confrontation either, it can only be simultaneous with the implementation of the act or subsequent to it.

Concerning this issue, there is a guiding court decision illuminating for the defense too, in which a defense counsel was found guilty of defamation. The counsel made the following statement before the confrontation of his client, "I am objecting to the hearing of this woman and to her confrontation with my client because she is the person who reported to the police and she is banned from the territory of the district anyway." The court held that only the statements of defense made in the framework required for deciding the case are privileged and this statement was not in this category. Confrontation is a means of evidencing the performance of which does not depend on the previous record of the parties, neither on their possible objectionable conduct.¹⁶

If defense submits a motion for the performance of a confrontation, the authority must handle it in line with the rules of evidentiary motions. It must either be approved of and then performed, or not approved of and rejected by a resolution in writing against which a complaint may be lodged which will be decided on by the prosecutor in charge of the investigation (or the super-ordinate prosecutor).

¹⁶ Court Decisions 1989, case no. 6. (Municipal Court of Budapest, 20. Bf. 1. 5766/1988.)

Defense may complain about the fact of the investigatory confrontation and the way of its performance too. The complaint, however, has no delaying effect, thus the authority first performs the confrontation and only later decides about the legal remedy. A complaint may be directed against the conduct of the investigator and against the actual implementation too, alleging that it was biased, humiliating, suggestive, leading, treating the person concerned as guilty, degrading, violent, rough, etc.

Confrontation is ordered in the form of an order guiding the proceedings against which no legal remedy is available. The defense, the attorney of the witness, or the legal representative of the victim may also note here that there is an obstacle to confrontation, it is not desirable and may request the court to omit it.

5. The probative force of confrontation, excluded evidence

The purpose of the whole criminal procedure including the investigation is to hold a proper mirror, ascertain the real (true) facts of a necessarily past act, a process of acquiring knowledge, in the course of which it can be decided whether a crime has been committed (can be prosecuted), who the offender is, and whether he is punishable.¹⁷ In the course of investigation, the facts establishing criminal responsibility are to be collected, relevant evidences are to be detected and collected on the basis of which the prosecutor can decide whether there is enough evidence for arraignment, for committal for trial or not.

According to László Pusztai László, “Cognition is a progression from not-knowing to knowing, from defective and imperfect knowledge to ever enriching and more and more thorough knowledge”.¹⁸ Regarding the fact that the act to detect is a past and usually a concealed, a hidden, and a covered act, it is often a difficult—even-painful process to grasp reality through senses and experience, and to detect evidence related to reality at the beginning and in the course of the whole process. This process may be facilitated by the mental-assessing activity of the authority trying to infer a past cycle of events from the present. In this framework it sets up hypotheses and versions. It deems something true and tries to confirm or refute it subsequently by evidence collected in the course of investigation. Confrontation as an act of investigation-evidencing in

¹⁷ For more details see: Barna, P.: *A bűnüldözés elvi kérdései* [Theoretical issues of criminal investigation]. Budapest, 1971. 376.

¹⁸ Pusztai, L.: *Szemle a büntetőeljárásban* [Review in criminal procedure]. Budapest, 1977. 422.

which the authority has some sort of version or conjecture if not a pre-conception fits into this train of thought. As the authority often has a bunch of evidence, however modest, and a hypothesis, upon noticing the contradictions between the testimonies, it starts out from the presumption that somebody has told the truth while the other person has told something untrue (a lie). Confrontation is meant to move this uncertainty into a direction, since if everything was certain, clear and unambiguous, the procedure of confrontation would become unnecessary and a kind of over-evidencing. The purpose is to move from uncertainty towards certainty; it is an attempt to check existing versions and conjectures. Certainty may mean the exclusion of a version, and it may also be valuable, because it may show that the route is wrong, investigation might reach a deadlock, there is no point in taking that route so it must be quitted. A positive attempt confirming a version is not a complete success, taking the possibility that a confrontation may induce a suspect who has denied up to that point to change or perhaps make a confession which may not be real, full, and precise.

Is a testimony evidence, what force does it have?

According to one content-pillar of the warnings based on the Miranda-principle—which the suspect to be confronted will get to know –, “anything you say can be used as evidence”. On this ground all his words and sentences uttered during the confrontation can be used as evidence. This thought is strengthened by our definition, according to which confrontation is a special form of interrogation and the minutes of the confrontation as the testimony of the suspect is included in the evidences. However, at the same time this weakens the argumentation, i.e. its independent existence as evidence. It is rather of a supplementary and subsidiary nature, according to Flórián Tremmel¹⁹ the ‘amplified/supplement-evidence’ nature of the testimony made during confrontation is shown. It will become really valuable if following the ‘test of trustworthiness’, the probative force of the words and the testimony is strengthened and made unambiguous in the framework of an individual interrogation or a crime scene interrogation (on-the-spot interrogation). In the quoted case of the suspect, he makes a detailed confession, a confession with a ‘perpetrator’s mind’, which can be checked.

In the case of confrontations assessed to be successful, the party being confronted sometimes simply says, “so it happened”, which indicates a wish to

¹⁹ See: Tremmel, F.: *Bizonyítékok a büntetőeljárásban* [Evidences in criminal procedure]. Budapest–Pécs, 2006. 178.

get released from the situation of the confrontation rather than self-incrimination based on a genuine intent to change or confess which can be regarded as evidence.

I do not deny the right of the authority in the final instance that of the court to have discretion in regarding what has been uttered during confrontation as evidence but I deem it appropriate only with the above restrictions and additions.

Finally, when evaluating evidence, it must also be examined *whether it has been obtained lawfully in compliance with the requirements of a constitutional state founded on the rule of law and (European) human rights*. The forms of negative conduct on the side of investigating-authority mentioned in the section on legal remedy may reach a level at which the possible result cannot be admissible, cannot be included among the lawfully obtained evidences and must be excluded. Such can be evidence obtained in a manner contravening the provisions of CPA, in other words, evidence obtained unlawfully, including—but not limited to—the following cases:

- the person conducting the confrontation uses violence against either of the parties being confronted;
- the person conducting the confrontation threatens either of the parties being confronted;
- the person conducting the confrontation fails to give the warnings (concerning the rights and duties) appropriate to the status of the parties to be confronted;
- the official conducting the confrontation records falsities in the minutes and/or falsify the contents of the minutes;
- the official violates the rules of criminal-tactics to such an extent which injures the fairness of the investigating act (e.g. sits/stands more than one person facing the other, continuously puts pressure on the persons being confronted, puts leading-influencing-suggesting and/or deceiving questions with an untrue basis).

Infringements of the law concerning confrontation may occur during the trial stage too, the consequence of which is necessarily a procedural non-compliance.

The court has declared such non-compliances in its guiding decision when stating:

“An unconditional procedural non-compliance occurs when the court of first instance conducts a trial and takes evidence in the absence of the suspect, contrary to the statutory provision prescribing the presence of the suspect.”

The accused of the first order failed to appear at the trial of the first instance on 21st of March 2003, though duly summonsed. In spite of it, the

court examined K. Gy. as a witness, who gave evidence concerning the act committed jointly by the accused of the second and third order, thus the court conducted evidencing. According to the record, the necessity of the confrontation was replaced by allowing K. Gy. to give evidence in writing. This act of evidence was not repeated in the presence of the accused of the second order during a subsequent procedure.²⁰

It declared in another case: “During the interrogation of a child or a juvenile, the presence of his caretaker and teacher is not compulsory; it is a procedural non-compliance if the court excludes the testimonies of such witnesses made in the course of the investigation from the evidences.”

The court of first instance excluded the testimonies made by J. B., juvenile and G. B., child in the course of the investigation, and also excluded the confrontations. The court based its decision on the fact that these witnesses were interrogated late in the evening and late at night without the presence of their legal representatives.²¹

6. Summary

In conclusion to the study it may be claimed that the concept and the types (classification) of confrontation is clear. As an evidentiary procedure, it can be well demarcated and distinguished from other applicable means of seeking the truth in CPA and beyond it in the area of criminal-tactics. Thus, from interrogation, identification parade, attempt to prove, crime scene interrogation, search/body search, parallel hearing of experts, polygraph and cross-examination.

Contrary to jurisprudence and the intention of the legislator, the emphasis of confrontation is still on the investigatory and not on the trial stage, which I myself support mainly on the basis of criminal-tactical arguments.

I propose the amendment of the statutory regulation in force to the effect that the application of confrontation should be excluded in the case of children,

²⁰ Court Decisions 2005, case no. 100. (Legf. Bír. Bfv. [Supreme Court criminal appeal cases] III. 613/2004.) This interpretation coincides with Court Decisions BH 1987. case no. 187. “Evidence taken by a court of first instance during a trial in the absence of the accused does not constitute an unconditional annulment, provided evidencing is repeated subsequently in the presence of the accused.” (Eln. Tan. B. törv. [Supreme Court Presidential Department criminal cases] 1426/1986.)

²¹ Court Decisions 1996, case no. 520. (Supreme Court, Legf. Bír. Bf. 1. 245/0996.)

further, the persons conducting confrontation should be provided with the possibility to record in a report—instead of the minutes.

Finally, I claim that there is no such a thing as a compulsory confrontation and there are methods of confrontation which lead to the exclusion of evidence.

In my view—based on research optimism—the consideration and application of these ideas in legislation and law enforcement may result in a higher level of efficiency and success, which is in the interest of all law-abiding citizens.