

STANDARDIZATION OF JUDICIAL PRACTICE AND HARMONIZATION WITH THE ECtHR JURISPRUDENCE – HUNGARY

Erika RÓTH*

Abstract

This paper is a little bit unusual. Questions were put by the organisers of the conference in order to obtain information about the practice of administration of law and elaboration of legal norms. The central problem touched by the studies prepared for the conference is the uniformity of legal practice. The author tries to describe shortly the Hungarian solution answering most of questions but using a partly modified structure: when information would have been similar concerning different questions she joined them together. Topics of the questionnaire partly cover problems the author has discussed in her lecture last year.¹

Keywords: *criminal justice, court system, Hungarian law, jurisdiction, jurisprudence, legal practice, legal remedies, uniformity of practice*

1) Court system of Hungary and levels of jurisdiction

Local courts mean the first level of the Hungarian judicial system. These courts are located in the major towns (105) of Hungary and in Budapest (6).² The local court shall proceed as single judge or in chamber (one professional judge and two lay judges or – as a new possibility - two professional judges and three lay judges).

The second level of the Hungarian court system consists of 19 county courts and the Metropolitan Court of Budapest (hereinafter jointly referred to as county court). These county courts are competent to hear as first instance courts the cases established by an Act, and review appeals lodged against the decisions of local courts in the second instance.³

In some cases defined by law only the county courts have exclusive jurisdiction, they are competent to hear for example homicides, acts of terrorism, trafficking of human beings. As a first instance court the county court shall hear cases in chamber composed by one professional judge and two lay judges or two professional judges and three lay judges (depending on the complexity and seriousness of the cases). As a second instance court the county court shall review appeals in chamber composed by three professional judges.⁴

Regional courts of appeal are the ‘youngest’ actors of the administration of justice. In Hungary 5 regional courts of appeal are seated in Budapest, Debrecen, Győr, Pécs and Szeged. These courts have competence to render judgment on legal remedy submitted against decisions of

* Associated Professor, Ph.D., Department of Criminal Procedure and Correctional Law, Faculty of Law, University of Miskolc, Hungary (e-mail: jogerika@uni-miskolc.hu)

¹ Published in Lex et Scientia. International Journal. Nr. XVII. Vol.1/2010. pp. 41-51

² http://www.birosag.hu/engine.aspx?page=birosag_english_03_judicial

³ http://www.birosag.hu/engine.aspx?page=birosag_english_03_judicial

⁴ http://www.birosag.hu/engine.aspx?page=birosag_english_03_judicial

local or county courts. The court of appeal re-examines the facts of the case and reaches its own conclusions.⁵

The Supreme Court is the supreme judicial body of the Republic of Hungary. The Supreme Court adjudges legal remedies submitted against decisions of the county courts or the regional courts in cases set forth by an Act; adjudges petitions for review; adopts obligatory uniformity decisions applicable to the courts.⁶

Normally decision of the first instance court may be appealed and in some exceptional cases entitled persons may lodge an appeal against the judgement of the court of second instance. As the Hungarian court system is of four levels cases usually finished at the county or the regional court. If those entitled to lodge an appeal do not do it the judgement of the court of first instance may become final.

The court of second and third instances and courts rendering extraordinary remedies (re-trial, judicial review, appeal on legal grounds and uniformity proceeding) are authorized to repeal the decision of the lower courts.

2) Jurisprudence as a source of law or what is the value of the legal precedence

Generally decisions of upper courts are not binding for lower courts, except the uniformity decisions of the Supreme Court, although in practice the case law is taken into account when courts make decisions. The reason of it is that upper courts adjudge appeals submitted against the decisions of lower courts and in these proceeding they –most likely - do follow their previous practice and principles laid down by them in former cases.

Precedence may be referred by the participants of the criminal procedure – e.g. by the defence lawyer or the prosecutor when they speak for the defence or for the prosecution (closing arguments), and the court may cite previous decisions of other courts but it happens very rare.

In Hungary – as in other countries of the continental law system – there is not any legal rule which compels a judge to follow the decisions of higher courts, but the reality shows that they do it.⁷

The justification of the court decision shall contain reasons of all provisions and applied legal norms in order to inform all actors of the procedure about the facts and the law on which the decision is based. As it was mentioned earlier the court has no legal obligation to consider the practice, the known decisions of the other courts, but they usually shall take into account cases published in compilation (collection) of court decisions or the judgements of the upper courts which concerned their own cases. But jurisprudence is more frequently referred as ‘due to the consequent practice of judiciary’.

Only decision pronounced in the uniformity procedure binds the lower courts. Constitution of Hungary states that “...uniformity resolutions shall be binding on all courts.”⁸

3) Mechanisms providing legal practice coherence or unit

I hardly believe that there is any country in Europe which has an absolutely uniform legal practice. Non-unity means that sometimes different courts understand norms in different ways.

⁵ http://www.birosag.hu/engine.aspx?page=birosag_english_03_judicial

⁶ http://www.birosag.hu/engine.aspx?page=birosag_english_03_judicial

⁷ This and other questions of the recent study were discussed in detail and published in: Erika RÓTH: Ensuring uniform administration of law in criminal matters – the Hungarian way. *Lex et Scientia. International Journal*. Nr. XVII. Vol.1/2010. pp. 41-51

⁸ Article 47 Section (2) of the Constitution of the Republic of Hungary (Act XX of 1949).

May be that the rule is not clear enough and make possible different interpretation. But sometimes not only ambiguous rules are the reason of the non-unit. It happens quite frequently that the punishments imposed for the very similar offence without any specialities in the personal background of the offender diverge in different parts of a country. If this phenomenon is constant and significant it might violate the principle of equality before the law.

Ensuring uniform application of law by the courts is the duty of the Supreme Court. Within the framework of performing its duties, the Supreme Court shall adopt uniformity decisions and publish decisions of theoretical importance.⁹

Uniformity decision is applicable in order to provide unity of judicial practice. This procedure shall be conducted

a) in order to develop legal practice or ensure uniform sentencing policy a harmonisation decision is required in a matter of doctrine,

b) if a panel of the Supreme Court intends to deviate from the decision of another adjudication panel of the Supreme Court with respect to a legal issue.¹⁰

The procedure may be initiated by the President or the head of the criminal division of the Supreme Court, or the Prosecutor General, and in the second case - specified in subsection b) - by the panel of the Supreme Court.

The harmonisation panel of the Supreme Court consists of five professional judges. Seven professional judges shall adjudicate the motion if the question affects different fields of law (e.g. civil and administrative or civil and criminal etc.).

4) Appeal in the law interest

Appeal against the decision of first instance court may touch question of law and question of fact as well, but in the procedure of third instance only the question of law may be discussed. The breach of law is the basis mostly of the judicial review which is a special (extraordinary) legal remedy procedure in Hungary. There is another one special remedy in the Hungarian criminal procedure called appeal on legal grounds. This may be lodged by the Prosecutor General at the Supreme Court against the unlawful and final decision of the court, unless the final decision may be contested by other means of legal remedy.¹¹

Upon establishing the violation of law, the Supreme Court may acquit the defendant or make other decisions concerning the sanctions applied in the procedure favorable for the defendant, but in other cases the decision of the Supreme Court may establish only the fact of unlawfulness.¹²

Decision made in the procedure of 'appeal on legal grounds' - which means appeal in the interest of law - is not compulsory for lower courts so the independency of the judge is not influenced. But the fact is that if a judge or a chamber does not want their decision to be quashed they will follow the principles and interpretation of rules published by the Supreme Court in the procedure of 'appeal on legal grounds'.

5) Preliminary ruling procedure before the Court of Justice

Preliminary ruling procedure was established to ensure the uniform interpretation of the community law.

⁹ Act N° 66 of 1997 on the Organization and Administration of Courts Article 27. The Act is available in English on page http://www.birosag.hu/engine.aspx?page=birosag_english_01_act

¹⁰ Act XIX of 1998 on Criminal Procedure Article 439 Section (1)

¹¹ Act XIX of 1998 on Criminal Procedure Article 431

¹² Act XIX of 1998 on Criminal Procedure Article 437

The court shall suspend the criminal procedure *ex officio* or upon a motion, if the preparatory inquiry of the European Court of Justice is initiated according to the rules set forth in the Treaty establishing the European Union or the Treaty establishing the European Community. In its decision the court specifies the question requiring the preliminary ruling of the European Court of Justice and – to the extent required for answering the question – describes the facts and the Hungarian legal regulations concerned. The decision shall be sent to the European Court of Justice, as well as for the information to the minister responsible of justice.

6) Relationship between the jurisprudence of the Strasbourg and Luxembourg Courts and that of other international courts

Although there is no ‘official’ connection between the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ) to some extent a mutual effect might be observable. EU institutions are bound to respect human rights. The European Court of Justice has jurisdiction over member states, EU institutions, businesses and individuals within the geographic boundaries of the European Union which is a narrower territory than the territory of the Council of Europe. The European Court of Human Rights has jurisdiction over member states of the Council of Europe that have accepted the Court’s jurisdiction. The European Court of Justice ensures that EU and EC treaties are respected and that the laws are being followed. The Court of Justice takes into consideration decisions of the ECtHR as guidance in its decision making on human rights issues.¹³ While all members of the European Union are member states of the Council of Europe and subject to the jurisdiction of the ECtHR the connection – at least in human rights questions – is obvious. Sometimes the ECJ refers the case law of the ECtHR and treats the Convention on Human Rights as though it was part of the EU’s legal system.

7) Competence of the Supreme Court in Hungary

The Supreme Court – as it was mentioned earlier - is the supreme judicial body of the Republic of Hungary. It operates judicial and uniformity chambers, as well as criminal, civil and administrative judicial colleges.

It has competence as court of second and third instances (court of appeal) and deals with extraordinary remedies (judicial review, appeal on legal grounds and harmonisation/uniformity procedure). As it is regulated in the Section 25 of the Act N° 66 of 1997 on the Organization and Administration of Courts

the Supreme Court shall

- a) adjudge the legal remedy submitted against the decision of the county court or the regional court in the cases set forth by an Act,
- b) adjudge petitions for review,
- c) adopt an obligatory uniformity decision applicable to the courts,
- d) proceed in other cases referred to its jurisdiction.¹⁴

8) The role of jurisprudence and legal theory in the legislation process and in development judicial practice

Jurisprudence is continuously developing and may support the work of the legislator and the administration of justice as well. If we speak about the necessary changes of justice and legal

¹³ See http://www.hrea.org/index.php?doc_id=365

¹⁴ http://www.birosag.hu/engine.aspx?page=birosag_english_01_act

practice, I think that it is a current topic in all countries. Good as it is the regulation if the practice is not on the top. Jurisprudence and legal theory may especially be important in a preparation of a draft or when interpretation of a rule is ambiguous.

The judicial practice usually does not rely on the scientific results. However it is not rare that actors in the closing speech cite sentences from text books the court is not very keen on accepting those efforts.

Legislator quite frequently asked opinion of academics in the past and I hope that in the near future the new government will rely on well based, rich knowledge of law teachers and researchers. The cooperation would be fruitful for both partners.

9) Involvement of judges in the law drawing up and adoption process

In Hungary construction of the law has a statutory basis. The law CXXX of 2010 on the construction of law regulates steps of the legislative process. Not only the act on construction of laws contains rules on the process how a norm should be prepared but the Act CXXXI of 2010 on the participation of the society in the preparation of laws as well. Almost all important laws have to be made available on the website of ministries in order to provide opportunity for all citizens and for professional circles to explain their opinion. Depending on the topic of the planned law the draft should be sent to scientists and practicing lawyers in order to get acquainted with their points of view.

Usually an ad hoc committee supports the work of the official law makers. Members of this committee represent the main fields of legal profession: lawyers, judges, prosecutors and academics take part in this activity. They are entitled to make a draft. If the time devoted to the drawing up procedure is limited, only the officials of the ministries are involved into the work but the prepared draft is circulated and all authorities which participate in the administration of justice and professional circles, departments of universities have opportunity to write comments, proposals. These may only help the work of the ministry and have no binding character. The same is the aim of the duty prescribed for authorities responsible for preparation of an act. They have to make available the draft for all citizens on a website.

10) Administrative mechanisms for unifying the jurisprudence

As it was mentioned earlier ensuring uniform application of the law by the courts is the duty of the Supreme Court. Within the framework of performing this duty the Supreme Court shall adopt uniformity decisions and publish decisions of theoretical importance. But not only the Supreme Court but lower courts have role in unifying the administration of justice. As the Act 66 of 1997 on the Organization and Administration of Courts says if a chamber or a single judge of the lower courts has rendered judgment in some theoretical question and that decision has become final, it/he is obliged to introduce the decision of theoretical importance to the president of the court.¹⁵

The president of the court and the head of the judicial college shall continually monitor the administration of justice in the courts. If he is informed of the decision during the examination held in the courts or in any other way that the court has developed a contradictory practice in a theoretical question or final decisions have been adopted on the basis of contradictory theoretical bases, he shall inform the president of the higher level court regarding this fact, together with the submission of the decisions and the other documents as necessary.¹⁶

¹⁵ Act N° 66 of 1997 on the Organization and Administration of Courts Article 28 Section (1)

¹⁶ Act N° 66 of 1997 on the Organization and Administration of Courts Article 28 Section (2)

11) Involvement of the legal council in the jurisprudence unifying process

There is no legal council in Hungary. The Hungarian Constitution created the National Council of Justice as a constitutional organisation to reinforce of the independence of justice. It started its activities in 1997. The National Council of Justice fulfils the central duties of administration of courts with the observation of the constitutional principle of judicial independence and exercises supervision of the administrative activities of the presidents of the courts of appeal and the county courts. This body has no role in the unification process.¹⁷

12) Databases regarding legal decisions

On the website <http://www.birosag.hu/engine.aspx?page=anonim> the collection of court decisions are available in anonym form. It has to be mentioned that this collection does not contain all decisions. The Law XC of 2005 on the freedom of electronic information prescribes the duty of the court in that relation. Due to the regulation publication of decisions of the Supreme Court and regional courts is compulsory but presidents of lower courts may order to publish any other decisions on the website. There is statutory deadline for doing this: within 30 days after the court put down its decision in writing.

Decisions of the Constitutional Court are available on the website of that court – some most important decisions in English as well.

13) Professional training of judges

Although the National Judicial Council (and earlier Ministry of Justice) organised conferences and short term courses for judges – mostly in order to discuss new laws and current questions of administration of law - in Hungary judges have never had an institution of further education to help them in acquiring practical knowledge necessary for this profession till 1 September 2006 when the Hungarian Judicial Academy was opened. This Academy is a unique institution in Hungary's history. It intends to offer high quality, effective education to the members of the Hungarian judiciary (not only to judges but to clerks and the administrative staff as well). Relying on the Academy's institutional potential, the main goal is to support the functioning of courts with a scientific and educational centre of European standards. Its work is helped by the guidance of Educational Scientific Council and on the central training plan adopted by the National Judicial Council.

14) Types of specialisation of judges or law courts

Judges work in criminal, civil, economical, administrative and labour chambers. It means that a judge trying criminal cases does not deal with civil and labour law cases. Special types of chambers within criminal division mean juvenile court and military court. Above it in larger courts there are some kinds of specialisation within the criminal division as well: judges trying transport cases, economical crimes etc. This solution provide basis to become good specialist of a narrower field.

¹⁷ See more about the National Council of Justice on page http://www.birosag.hu/engine.aspx?page=birosag_english_02_national

15) Controlling constitutionality of the laws

The Constitutional Court is the supreme organ for protecting the Constitution. Its tasks are reviewing the constitutionality of laws, protecting the constitutional order and fundamental rights established in the Constitution. The Constitutional Court is not part of the “normal” court system.

Considering the adopted statute unconstitutional, the President of the Republic refers it to the Court instead of signing it (constitutional veto). In such a case, the Court decides on the constitutionality in extraordinary proceedings. (Preliminary - ex ante - review)

The Act XXXII of 1989 on the Constitutional Court assures the possibility of constitutional supervision of international agreements prior to their ratification.

The posterior review is the most general competence of the Court, directly deriving from the Constitution. Anyone, without legal interest can submit a petition asking the constitutional review of a legal norm. If, upon the petition, the challenged law is found to be unconstitutional, the Court annuls it. Generally, in such a case, the annulled law remains in force until the publishing of the Court’s decision and the annulment does not concern the existing legal relationships. In exceptional cases, the Court may order the retroactive or the pro futuro annulment of the unconstitutional law, for the sake of legal certainty.

The Court interprets its competence for posterior review extensively. It stated that the competence covers all normative acts, including laws implementing international treaties and law uniformity resolutions.¹⁸

16) Influence of globalisation on the jurisprudence

It is not easy to speak shortly about the influence of globalisation on the jurisprudence in general. In my opinion the importance of the knowledge of scientists became more important because the practice and experiences of foreign countries now are better and easier acceptable. Theoretical basis of the proper implementation of foreign solutions is important and that fact may enhance the appreciation of scientists.

In practice the cross-border crime is the most significant influence of globalisation. That phenomenon raises the importance and need of judicial cooperation and the role of international organisations.

17) The „quality of laws” in Hungary

The fundamental problem is that there are too many regulations in Hungary. Laws change very frequently and not only an average citizen but even the practicing lawyers and scientists are not able to follow modifications. Sometimes different acts are not harmonised and that controversy does not help the work of administration of justice. Despite this fact I can say that the quality of law – concerning norms of criminal law and criminal procedure - is high in Hungary. The legislator respects human rights and international requirements. When a new law is under construction the harmony with EU law always are examined.

18) The weight of the budget destined to justice in GDP

In 2009 the GDP of Hungary was 26 054.3 billion HUF and the amount of support the judiciary received from the state budget was 67 643 million HUF. It means that 0,2 % of the state budget was spent for the judiciary in 2009.¹⁹

¹⁸ <http://www.mkab.hu/index.php?id=introduction>

¹⁹ The annual budget of the judiciary was 272 938 288 Euro in 2008.
http://www.birosag.hu/engine.aspx?page=birosag_english_03_judicial

19) Responsibility of judges when laws are violated

Criminal proceedings and proceedings for petty offenses may, based on an action related to a professional judge and his participation in justice only be instituted or compelling measures only applied in such proceedings against a lay-judge - with the exception of flagrant cases - with the approval of the appointing party or the party entitled to elect such persons. Professional judges and lay-judges may waive their immunity in relation to proceedings for petty offenses.

Against professional judges and prosecutors, as well as associate judges criminal proceedings for a criminal offence committed in their capacity as such, may only be instituted after the prior consent of an authorized person.

As the employee the responsibility of judges is based on the Act LXVIII of 1997 on the service relations of the court employees. The latter type of responsibility is similar than the responsibility of average employees. The upper limits of the responsibility I exactly defined. If e.g. a suspect suffered damage during or as a consequence of a court process or decision the court is responsible for its judge. It could be the second step to call the judge to account e.g. in a disciplinary procedure.

Conclusion

The Constitution of Hungary says: ‘... the legal system of the Republic of Hungary shall adopt the generally accepted rules of international law, and shall ensure harmony between the assumed international law obligation and domestic law’. Studying the case law of the ECtHR we can realize that Hungary is really ready to accept these requirements and does its best in order to avoid the impeachment in Strasbourg and always examine the harmony with the EU law when a new draft is under preparation.

References

- RÓTH Erika: Ensuring uniform administration of law in criminal matters – the Hungarian way. Lex et Scientia. International Journal. Nr. XVII. Vol.1/2010. pp. 41-51
- Act N° 66 of 1997 on the Organization and Administration of Courts
- Act XIX of 1998 Code on Criminal Procedure
- http://www.birosag.hu/engine.aspx?page=birosag_english_01_act
- http://www.birosag.hu/engine.aspx?page=birosag_english_02_national
- http://www.birosag.hu/engine.aspx?page=birosag_english_03_judicial
- http://www.mkab.hu/index.php?id=home_en
- <http://www.mkab.hu/index.php?id=introduction>
- <http://www.lb.hu/english/index.html>
- http://www.hrea.org/index.php?doc_id=365