NEW TENDENCIES IN HUNGARIAN CRIMINAL JUSTICE

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Abstract

This paper intends to describe what happened in the Hungarian Criminal Procedural Law in the last decade. Following the most significant changes we can have an impression of tendencies which have influenced the recent amendments. We can realise that requirements formulated in documents adopted by international organisations (first of all the European Union, the Council of Europe) are more and more decisive in the field of criminal justice as well.

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It is obvious that it is not possible to deal with all new institutions of criminal procedural law in a study devoted to the introduction of recent developments to the readers.

The first question is what kind of tendencies we can speak about. It is possible to make a distinction between **tendencies of positive or negative effect** – both could be found in the short history of the new Code on Criminal Procedure (hereafter CCP) in Hungary. Positive is the effect if the guarantees are strengthened, especially the rights of defence and/or victims, the right to be tried within reasonable time etc., or when the modification serves the development of the given branch of law.

The other point of view could be the **source of modification**. If we examine the tendencies in criminal justice, it means who the mover was, who lodges the proposal, who 'table the bill'. Mainly this is the task of the Government: the Ministry responsible for the given field prepares the bill and discusses it with other ministries and with representatives of the professional circles interested in the modification. Due to Hungarian legislation the social debate is necessary before the Parliament tries the bill. Professionals are also entitled to make a proposal, usually to the Ministry. If the Ministry agrees with the recommended changes the way is very similar to the former case. The third quite frequent possibility is when the individual representative submits a proposal, sometimes with professional assistance. By the law the President of the Republic, the Government, any parliamentary committee or a Member of Parliament are entitled to lodge a proposal before the Parliament.[1] It might be interesting that only the first President of Republic, Árpád Göncz submitted bills to the Parliament and two Presidents who were originally lawyers by profession (Ferenc Mádl and László Sólyom) sent back the most Acts to the Parliament.

When the Government prepares a proposal most likely it is in harmony with the official criminal policy. With this we arrive at the third type of distinction: tendencies most frequently could be **generated by criminal policy or/and by EU requirements, by other international duties of the state or by practical necessities**. There are some modifications of the CCP in reasoning of which the Ministry mentioned lack or contradiction found by practicing lawyers.

What kind of tendencies do we meet in the Hungarian legislation? Before starting a deeper examination of actual tendencies I have to mention some facts in order to make the audience

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[1] Article 6 paragraph 1 of the Fundamental Law of Hungary (25 April 2011)

familiar with the background of the situation. The new Code on Criminal Procedure the Act XIX of 1998 was adopted by the Hungarian Parliament on 10 March 1998 and entered into force only on 1 July 2003. In the five years which elapsed between its adoption and entering into force several modifications changed the adopted rules of the CCP, and that process continued after 2003 as well. To picture the situation it could be mentioned that in the last decade more than 50 modifications concerned more or less rules of the CCP. Sometimes it is not easy to find any tendencies in proposals, because individual representatives also have the right to initiate a modification.

The original aim of the legislator and especially the so called Committee of Professors, which was called upon to make a proposal in the second half of the 1990's was to approach the Anglo-Saxon system of criminal justice and meet human rights requirements by making the trial more important (a more emphasised part of the criminal proceeding) and weakening the role of the investigation; to authorise the defence lawyer and the public prosecutor to examine witnesses etc.[2] These very significant changes were lost before the Act came into effect: the investigation preserved its earlier strong position and the questioning of the witnesses by parties remained exceptional.

Modifications after 2003 concerned and were in connection particularly with

- domestic violence
- the duration (time limit) of the pre-trial detention
- the restriction of presence of the defence lawyer in investigatory actions
- the presence of the public prosecutor at the court trial
- holding the trial in absence of the accused (if (s)he was duly summoned and fails to attend)
- mediation and
- cases of emphasized significance etc.

Meanwhile, **in 2004 Hungary joined the European Union** and after that time even the EU law had an effect on our Code: the legislator always has to examine whether a bill is in harmony with the EU law.

Before dealing with some important topics in more detailed form I would like to devote some words to our constitutional changes. The old Constitution of Hungary originated in the Act XX of 1949. However, modifications in the elapsed 60 years concerned almost all articles of it. Notwithstanding that fact the pressure upon the actual leading parties and on the Government was very serious in order to prepare an absolutely new Constitution. The preparation took several years and in that period basic ideas changed frequently. Finally in 2011 (25 April) a new constitution – so called "**The Fundamental Law of Hungary**" was adopted by the large majority (more than 2/3) and entered into force on 1 January 2012. It is quite interesting that after a long period when the political and professional debate took place the "final" preparation of the new fundamental law needed less than a year. The Constitution concerned some procedural rules as well, e.g. the name of the courts, but values and fundamental rights guaranteed at the highest level were preserved.

Some changes of the CCP **simplified the procedure and made it quicker**, which is in harmony with requirements of human rights conventions as they, like the European Convention on Human Rights guarantee that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[3] But the question concerning reasonable time or speeding up the administration of justice is: how much and to what extent we have

[2] About the reform ideas and the reality see "A legfontosabb kérdésekben nem értünk el eredményt": Király Tibor akadémikussal és Bárd Károllyal, az ELTE Büntetőjogi Tanszékének vezetőjével Fahidi Gergely és Tordai Csaba beszélget. In: Fundamentum, 2/2002. pp. 41-45 and Hack Péter - Farkas Ákos - Bodor Tibor - Túri András - Láng Lászlo - Bánáti János: A büntetőeljárás reformja. In: Fundamentum, 2/2002. pp. 49-69.

[3] Article 6 paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Rome, 4. XI.1950

to/may accelerate the procedure, which always means the restriction of guarantees. Critical voices emphasized that this is demolition of guarantees and not an absolutely necessary sacrifice or loss but only political intention.

After that theoretical introduction I would like to deal with some selected topics of Hungarian criminal justice as **coercive measures restricting personal freedom of the suspect, victims' role, measures making the procedure quicker and simpler and special rules of procedure in extremely important cases**.

Coercive measures

Changes occurred in the regulation of coercive measures are relatively positive: the choice has been widened when the legislator allowed to order house arrest or accept the bail offered by the defendant or by the defence lawyer when it has probable cause to believe that the presence of the defendant in procedural actions may be ensured by these measures. Unfortunately in the practice of the courts these measures, which – among others - are alternatives to pre-trial detention are very rarely used.

The other modification of the CCP made the **time limits of the pre-trial detention** more detailed deciding the maximum time that an accused may spend in pre-trial detention before the decision of the first instance court. Time limits are in connection with the punishment which could be imposed in a case taking into consideration the prescribed punishment in the Criminal Code: the more serious sanction may be imposed, the longer the maximum period of pre-trial detention (1, 2, 3 or 4 years) is. The reasoning of the bill mentions that the more serious or more complicated the case is, the more time the collection and examination of evidence need and when there is a danger that the suspect might escape or obstruct or jeopardise the evidentiary procedure it might be necessary to extend the pre-trial detention. That solution is more or less accepted in the practice of the European Court of Human Rights, and met requirements of the former Constitution of Hungary and the updated Fundamental Law of Hungary.

Fight against family/domestic violence has not avoided the criminal procedural law, although both theoretical and practical lawyers agree that the criminal law and especially the criminal procedure is not the appropriate field for finding the solution of that problem. Fortunately only one new legal institution '**Keeping distance**'[4] was introduced in the CCP enriching the range of coercive measures. Keeping distance serves two aims: to protect the victim and to ensure the success of the proceeding. Only the court is authorized to order the keeping distance for a period between 10 and 60 days when the objectives otherwise desired to be attained through pre-trial detention, can also be realised this way.

Mediation and strengthened position of victim

While pre-trial detention and other coercive measures restricting right to liberty concern the position of the accused, the next legal institution I would like to speak about influences the outcome of the procedure from the defendant's and the victim's point of view as well. This is **mediation**,

[4] In some systems of law the name of the similar measure is protection order, but the restrictions connected with them are very similar. See e.g. Raymond Teske Jr.: Legal Procedures Available for the Protection of Women from Intimate Partner Violence. In: New tendencies in Crime and Criminal Policy in Central and Eastern Europe. Proceedings of the 65th International Course of the International Society for Criminology 11-14 March 2003, Miskolc-Hungary. Hungarian Society for Criminology. Bíbor Publishing House Miskolc, 2004. pp. 60-64

which, introduced in 2007, is quite a new possibility in the Hungarian criminal justice.[5] It has to be mentioned that **the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA)** played a very significant role in the introduction of mediation in criminal matters in Hungary. Article 10 of the Framework Decision required that each Member State shall seek to promote mediation in criminal cases between the victim and the alleged offender and to take into account the agreement reached in the mediation procedure.[6]

The key person of mediation is the public prosecutor, who may suspend the investigation for six months and send the case to the mediator if the law allows mediation and both the suspect and the victim agree in taking part in that type of solution finding procedure. During this period mediators try to reconcile the offender and the victim and bring about an agreement between them. The mediation process is successful when the offender has paid compensation or has ensured the compensation of the victim in another way. It is important to emphasize that mediation is not part of the criminal procedure: only the start is relevant when the public prosecutor or the court makes a decision and suspends the procedure and the result of the procedure which influences the closing of the case. The impact of the mediation on the case depends not only on the willingness of the accused but on the length of the punishment prescribed for the given case. So the public prosecutor

- may terminate the case if the offence is punishable by a maximum of three years' imprisonment;
- if the offence is punishable by more than three years' but less than five years' imprisonment, the prosecutor files indictment because only the court can evaluate the offender's conduct as active regret.

When the offender began the compensation of the victim but has not yet fulfilled his duty completely the prosecutor may postpone the indictment, but only in the case of criminal offence punishable by a maximum of three years' imprisonment.

Mediation is becoming a more and more accepted and widespread institution in Hungary: it has positive effect from the victim's, suspect's and prosecutor's point of view: victims and suspects have a chance to be satisfied and the public prosecutor may close the case in a relatively early stage and avoid a probably long trial. It has to be mentioned that not only the public prosecutor but the court may order mediation either during preparation of trial or during the trial of the court of first instance. (In the appeal proceeding before the court of the second or third instance there is no possibility to transfer the case to the mediator.)

The position of the victim was strengthened not only by introducing mediation but by other provisions of the CCP. Here I would like to mention only the right to act as the additional private prosecutor as an example.[7]

Some victim's rights are limited during the investigation and almost unlimited in the court proceeding.

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[5] Mediation was introduced by the Act CXXIII of 2006 on mediation applicable in criminal cases which entered into force on 1 January 2007.

[6] Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) *Article 10*

Penal mediation in the course of criminal proceedings

1. Each Member State shall seek to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure.

2. Each Member State shall ensure that any agreement between the victim and the offender reached in the course of such mediation in criminal cases can be taken into account.

[7] See more about the position of victim in Erika Róth: Position of Victims in the Criminal Procedure in the Context with Requirements of the European Union. In: European Integration Studies, Volume 9, Number 1 (2011) pp. 109 - 120

Measures making the procedure quicker and simpler

Not only in Hungary but all over Europe prevailed a very strong tendency to accelerate and simplify the administration of justice. The reason of it was that in the last 20-30 years the number of cases has drastically increased and not only the number but the complexity of cases caused intolerable workload and delay in the criminal proceedings. **In 1987 the Committee of Ministers of the Council of Europe adopted a Recommendation** in which they summarised applicable measures in order to ensure proper working of the criminal justice systems taking into consideration that "the aim of the Council of Europe is to achieve a greater unity between its members."[8] This Recommendation is an actual guideline even nowadays if a legislator considers (and it has to consider because of the pressure on the criminal justice system) simplification of administration of criminal justice. In Hungary the range of institutions of criminal procedural law which provide remedy for unacceptable length of the procedure became wider and wider. Here I would like to mention only a legal remedy called objection to delay in proceeding and some special procedure the aims of which is definitely the acceleration and simplification of the procedure, e.g. waiving the right to trial, omission of the trial and arraignment. There are examples which on the one hand support the simplification of the procedure but on the other hand weaken the significance of the trial, e.g. offenders are not required to appear before the court, written records prepared during the former stage of the procedure are allowed to be read instead of (repeated) hearing of the witnesses, the experts and the defendants in the trial, in absentia procedure etc.

One very effective solution of decreasing the workload of the courts is discretionary prosecution: waiving or discontinuation of proceedings either in conditional form or without prescribing conditions the suspect has to comply.

In Hungarian CCP all forms of mentioned discretionary prosecution exist: termination of investigation, partial omission of the indictment, postponement of an indictment and sending the case for mediation.

Procedure in cases of emphasized significance

Not such a story of success is one of the most recent modifications (Act LXXXIX of 2011) of the Code which has introduced **special rules for procedure in cases of emphasized significance**. I can say that these rules are one of the most criticised steps of the legislator. The curiosity of the legislation was that the committee which lodged the proposal was the Committee of Constitutional Affairs and the other committee which discussed the proposal was the Committee which deals with – among others – questions of human rights. The consequence was that the new set of rules suffered from constitutional and human rights problems. I would like to mention only some examples to describe the situation: e.g. the maximum period while the suspect was allowed to be held in custody without court decision was extended up to 120 hours (in normal cases the upper limit is 72 hours), which is not acceptable in the practice of the European Court of Human Rights. The other problematic solution was the restriction concerning connection between the suspect (more precisely only 'arrested person') and the defence lawyer. As the original version of the new chapter prescribed the public prosecutor had right to order the prohibition of contact in the first 48 hours of remand in custody. There was no remedy allowed against that measure of the prosecutor. Selection of crimes declared as especially significant was criticized as well. These were politically sensitive crimes and other crimes punishable by long term imprisonment. Five motions arrived to the Constitutional Court challenging the rules of the new chapter. One from the President of the Supreme Court, one from two individual representatives of the Parliament, one from the President of the Hungarian Bar

[8] Preamble of the Recommendation No. R (87) 18 of the Committee of Ministers to Member States concerning the Simplification of Criminal Justice.

Association and two from other persons. The Constitutional Court tried the case quite quickly and made a decision saying that some rules (I mentioned earlier) are unconstitutional and mean violation of international treaties.[9]

As it is said that criminal procedural law is applied constitutional law[10] – guarantees of criminal justice have their roots in constitutional law. International (multilateral) treaties and practice of international organisations founded with the aim of protection of human rights have definitive effect on the legislation. The new tendency is that EU law concerns some topics of criminal and criminal procedural law and we can say that the influence of EU legal instruments on national criminal justice will be more significant due to the principle of mutual recognition.

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[9] Decision of the Constitutional Court of Hungary No. 166/2011. (XII.20.)

[10] Ákos Farkas – Gábor Pap: Alkotmányosság és büntetőeljárás. In: Kriminológiai és Kriminalisztikai Évkönyv, Kriminológiai és Kriminalisztikai Tanulmányok. XXX. Kötet, IKVA, Budapest, 1993.p. 65 (by making reference to Kägi.)