Ceza Hukuku ve Kriminoloji Dergisi-Journal of Penal Law and Criminology 2018; 6(1):99-115
ISSN: 2148-6646 / E-ISSN: 2602-3911

http://jplc.istanbul.edu.tr

Research Article / Araştırma Makalesi

DOI: 10.26650/JPLC431913

The Right to Appeal and Individual Application in Criminal Proceedings in Hungary, with Special Regard to the Defendant's Participatory Rights

Zsolt SZOMORA[1]

[1]Assoc. Prof., University of Szeged, Szeged, Hungary

ABSTRACT

This paper covers the system of appeal as an ordinary legal remedy in criminal cases under Hungarian criminal procedural law. First, the system of courts as an institutional background will be outlined, then the procedural and substantial conditions of appeal will be described. The framework of any remedial (appellate) system is determined by the following factors: the personal scope of the right to appeal, the grounds of appeal, the rights of the participants in the appellate proceedings, the form of court proceedings, the scope of revision, and the type of decisions the appellate court can deliver. This paper briefly describes all these factors so that the typical features of appeal under Hungarian criminal law can be seen. The paper covers both the institution of first and second appeal, highlighting the cases where a second appeal needs to be made available. Furthermore, the functioning of the constitutional complaint in criminal cases will also be drafted. This kind of constitutional remedy was first put into practice in the Hungarian procedural and constitutional system in 2012. Of the various problem points, the paper focuses on the participatory rights of the defendant in appellate procedures, highlighting the main debate and features of this topic under Hungarian criminal procedural law.

Keywords: Appeal, criminal procedure, Hungary

Date of receipt: 20.02.2018 • **Date of acceptance:** 22.02.2018

Corresponding author: Zsolt Szomora, E-mail: szomora.zs@juris.u-szeged.hu

Citation: Szomora Z, 'The Right to Appeal and Individual Application in Criminal Proceedings in Hungary, with Special Regard to the Defendant's Participatory Rights' (2018) 6(1) Ceza Hukuku ve Kriminoloji Dergisi-Journal of Penal Law and Criminology, 99.

1. Introduction

The framework of any remedial (appellate) system is determined by the following factors: the personal scope of the right to appeal, the grounds of appeal, the participatory rights of the defendant and other parties in the appellate proceedings, the form of court proceedings, the scope of revision, and the type of decisions the appellate court can deliver.[1] The paper briefly describes all these factors so that the typical features of appeal under Hungarian criminal law can be seen. The aim of the paper is to review the relevant provisions of Hungarian criminal procedural law, with reference to legal literature.

2. Institutional Background: The System of Courts, The Basic Right to Legal Remedy and The System of Legal Remedies in Criminal Procedures

The system of trial jurisdictions in Hungary includes Municipal Courts, County Courts, Regional High Courts of Appeal and the Supreme Court (named Curia). That is, we have a four-level courts system and a three-level system of procedure. The jurisdictional system of Hungary is established uniformly, with no special courts for criminal trials, juvenile offenders or military procedures. The *criminal courts of first instance* are the Municipal Courts and the County Courts. Generally, the Municipal Courts are entitled to deal with criminal offences unless the Code of Criminal Procedure refers the trial of first instance to the competence of the County Court in case of certain serious felonies.

The *criminal courts of second instance* are the County Courts and the Regional High Courts of Appeal, depending on where the first-instance proceedings were launched. There are twenty County Courts and five Regional High Courts of Appeal (the latter located in Budapest, Szeged, Pécs, Debrecen and Győr). The *criminal courts of third instance* are the Regional High Courts of Appeal and the Supreme Court.[2]

The general form of legal remedy against the (non-final) decisions of first-instance courts (so-called *ordinary legal remedy*) is called *appeal* under the Code of Criminal

1 On the central questions of legal remedies, see Csongor Herke and others, *A büntetőeljárás elmélete (The theory of criminal procedure)* (Dialog-Campus 2012) 321-337.

2 On the system of courts in Hungary, in detail, see Krisztina Karsai and Zsolt Szomora, *Criminal law in Hungary* (Kluwer Law International 2015) 26-27.

Procedure in Hungary (Act XIX of 1998, hereafter referred to as CCP). The first Code of Criminal Procedure was enacted in 1896, which made appeals against first-instance judgements possible and put into place the possibility of a second appeal as well. The institution of second appeal was abolished in 1951, then re-enacted by the 2006 amendment to the 1998 CCP. Apart from this change of the levels of appeal, the basic principles of the system of first appeal have not changed since 1896.

The *first appeal* can be lodged with no restrictions, while a *second appeal* is available only in a limited scope. A second appeal may only be lodged if the accused was acquitted in first instance and convicted in second instance, or inversely. That is, if the decisions of the first- and second-instance courts differ concerning the guilt of the defendant (see below 6).

If a judgment becomes final, irrespective of the level of the court by which it has been passed, a request for review on points of law may be lodged to the Supreme Court exclusively responsible for reviewing the case on this *extraordinary remedy* (so-called Curia review on the points of law). The admissibility of this extraordinary legal remedy has strict conditions. Furthermore, no review is available if the case was closed in the third-instance. Another extraordinary legal remedy is the re-opening of the case (re-trial, on the points of fact).[3]

3. The First Appeal: Procedural and Substantial Conditions[4]

The CCP divides the so-called conclusive decisions of the first-instance court into two groups (Arts 330-332 CCP):

- judgement on the merits of the case (verdict of conviction and verdict of acquittal);
- ruling on terminating the procedure.

Both types of decision may be subject to appeal.

A conclusive decision means that the first-instance court finishes the first-instance procedure and can no longer take any evidence or make any other or any further decision on the case. However, a first-instance conclusive decision is not necessarily final in the sense of having a legally binding effect.

3 On these extraordinary legal remedies, see Karsai and Szomora (n 2) 213-216.

4 In general, see, Ervin Belovics, 'A másodfokú bírósági eljárás (Second-instance procedures)' in Mihály Tóth (ed) *Büntető eljárásjog* (HVG-ORAC 2013) 422-477; Zsanett Fantoly and Anett Gácsi, *Eljárási Büntetőjog. Dinamikus Rész (Criminal procedural law, Dynamic Part)* (Iurisperitus 2014) 165-189.

An appeal lodged against the fist-instance decision excludes this decision's becoming final. If no appeal is filed, the first-instance decision becomes final. *If a first-instance decision becomes final, its legal character and consequences are exactly the same as that of second- or third-instance final decisions.*

In Art. 324 CCP, the following parties shall be entitled to lodge an appeal against the judgement of the court of first instance, *without any substantial restrictions*:

a) the defendant,

b) the public prosecutor,

c) the substitute private accuser,[5]

d) the defence counsel – even without the consent of the defendant.

As for the public prosecutor, s/he may lodge an appeal both to the detriment and the favour of the defendant. This rule does not apply to the substitute private accuser who may file an appeal only to the detriment of the defendant.

The following participants are entitled to file an appeal *in a limited scope*:

a) the heir of the accused – against orders granting a civil claim,

b) the legal representative and the spouse of the defendant of legal age – even without the consent of the defendant – against an order for compulsory psychiatric treatment,

c) the private party,[6] against a ruling on his/her civil claim in its merit,

d) those against whom a ruling has been made in the judgment, against the ruling affecting him/her.

As for the *procedural conditions* (Art. 325 CCP), after the announcement of the judgment, the entitled persons shall declare whether they exercise the right of appeal. This declaration has either to be made right after the announcement of the judgement (as a last action of the trial), or within three days after the announcement of the judgement. In the latter case, the appeal shall be presented in written form. If the right of appeal has immediately been exercised, i.e. without a three-day delay,

5 In case the public prosecutor terminates the procedure or drops the charge, the victim may act as a substitute private accuser and have the case adjudicated by the court

6 The victim who has suffered financial damages resulting from the criminal offence and enforces a civil claim against the defendant in criminal proceedings

presenting a written appeal is not compulsory. Nevertheless, a written appeal may be presented later.

Should a person entitled to appeal not be present when the judgment is announced, s/he can file a written appeal eight days after s/he was served with the judgment.

The appeal can be based on grounds *both of fact and law*, that is, and appeal may be lodged for legal and factual reasons. The appeal can be filed against any ruling (disposition) given in the first-instance judgment and also against the reasons, explanation given therein (Art. 346 pars 2 and 3 CCP).

Legal reasons can be the question of guilt, the qualification of the criminal offence, the imposing (or applying) of sanctions and other relevant issues, or the violation of the CCP. Factual grounds concern established elements of the criminal offence or defects of the evidence (or evidentiary process). There are only a few cases in which the CCP excludes the appeal; for example, if the public prosecutor drops the charge, or if the court consequently terminates the criminal procedure by a non-appealable decision (without finding the defendant guilty).

As for *substantial conditions and the reasoning of appeal* (Art. 323 CCP): the appellant has to indicate the specific disposition in the judgment against which the appeal is directed and s/he has to indicate the goal of the appeal as well. However, the wrong indication of the appeal's ground or any other mistakes related to the appeal shall not be a reason for rejecting the consideration of the appeal. Furthermore, if the public prosecutor lodges an appeal to the detriment of the defendant, s/he must expressly underline this fact, because only the appeal to the detriment of the accused opens the possibility of the aggravation of the penalty at the second instance (see below 4).

4. The Scope of Revision at Second Instance

The court of second instance disposes of a *broad right of revision* (Arts 348-349 CCP): it reviews the judgment contested by the appeal together with the previous proceedings. The dispositions of the judgment concerning the substantial facts of the case, the establishment of guilt, the qualification of the criminal offence, the imposition of punishment and the application of measures shall be reviewed regardless of the appellant's person and the reason for the appeal. The court of appeal decides *ex officio* on the other issues related to those above (e.g., on the dispositions concerning

the civil claim and the cost of criminal proceedings). Consequently, the Hungarian CCP follows the *principle of full revision*.[7]

However, there are also dispositions that can be revised only upon a particular request due to the principle of *favor defensionis.* For example, if the accused was charged with committing two criminal offences, but the court established his guilt only of one of them and the latter decision was appealed by the defendant, the – partial – acquittal concerning the other criminal offence cannot be revised (it becomes partially legally binding, i.e. final). The same is the case for two or more accused; If all the convicted persons do not appeal, the revision by the court of second instance can affect only the part of the judgment that concerns the appellant. This rule is broken in two special cases, namely the court of second instance can also acquit the non-appellant convict or mitigate his/her unlawfully severe punishment (Art. 349 par. 2 CCP).[8]

As a main rule, the court of appeal makes decisions based on the facts of the case established by the court of first instance (*bound by the facts*). As an exception, the appellate court is entitled to take new evidence if reference to new facts or evidence is made in the appeal. The evidence that was collected at first-instance cannot be presented again unless the first-instance judgment is unsubstantiated (see below 5). However, *the taking of new evidence and establishing new facts is only possible on one condition*, namely *if it results in the acquittal of the defendant or the termination of the procedure (favor defensionis)* (Art. 352 par. 3 CCP).[9]

5. Decisions Made at Second Instance

The possible outcomes of an appeal can be the following: the court of second instance upholds or modifies (*reformation*) or repeals (*cassation*) the judgment of the court of first instance, or it rejects the appeal.

The court of appeal upholds the judgment of the court of first instance if the

7 In detail, Tamás Hága, 'A másodfellebbezés joghatálya, a felülbírálat terjedelme és a tényálláshoz kötöttség a harmadfokú bírósági eljárásban (The scope of second-appeal, the scope of revision and the binding effect of the facts laid down in the revised judgment at third-instance)' (1-2/2013) Büntetőjogi Szemle 19-29.

8 Ibid.

9 István Hegedűs, 'Az eltérő tényállás megállapíthatósága a másodfokú eljárásban (Finding different facts in second-instance procedures)' in *Dr. Maráz Vilmosné Emlékkönyv* (Szegedi Ítélőtábla 2013) 51-53; Lajos Balla, 'Részbizonyítás a másodfokú eljárásban (Taking partial evidence in second-instance procedures)' in Mihály Tóth (ed) *A büntetőítélet igazságtartalma* (Magyar Közlöny Lap-és Könyvkiadó 2010) 106-120.

appeal is not justified. But also in such case, the court of appeal should revise the judgment (because of the fact of the appeal) *ex officio*, and if the revision results in the recognition of the correctness of the judgment, the court of second instance upholds that judgment (Art. 371 CCP).

If the court of first instance misapplied a legal regulation and the judgment does not need to be repealed (e.g., the violation of law by the court of first instance can be redressed at the second instance), the court of appeal modifies the judgment and adopts a decision in compliance with the law (Art. 372 CCP). There is a very important limitation to the appellate court's power of modification: *the prohibition of reformation in peius*. In general, the principle means that as a result of filing an appeal the appellant should not be placed in a worse position than before the appeal. In Art. 354 CCP, 'the acquitted person cannot be convicted at the second instance or the penalty imposed by the court of first instance cannot be increased in lack of an appeal lodged to the detriment of the accused. If an appeal is lodged to the detriment of the accused, the prohibition expires and the revision by the court of second instance can result in conviction or more severe penalty than that imposed by the court of first instance.[10]

Exercising the revision, the most powerful legal means of the superior court is the repeal of the judgment of first instance in order to remedy any severe defects of the procedure at first instance. Art. 373 CCP lists the causes of *mandatory repeal*: in the cases listed, the repeal is absolute and unconditional, and the consideration of the circumstances is not at the discretion of the second-instance court. These causes primarily have a *procedural character*, they are not connected to the wrongful application of substantive law.[11]

In the criminal procedure, there may also be other – not so grave – procedural irregularities having a significant impact on conducting the procedure or the

10 Csongor Herke, *Súlyosítási tilalom a büntetőeljárásban (The prohibition of the reformatio in peius)* (PTE ÁJK 2010).

11 The Court of Appeal repeals the judgment of the Court of First Instance and orders the Court of First Instance to conduct a new procedure if the court was not lawfully formed; the judgment was delivered with the participation of an excluded judge or a judge who was not present at the trial from the outset; the court has overrun its substantive competence; the trial was held in the absence of a person whose presence is mandatory by law; or the publicity was excluded (in camera trial) unlawfully. An important ground of repeal is if the Court of First Instance did not fulfil its obligation to explain the reasons of its decision, and this omission precludes that the Court of Appeal could revise the judgment on merit (inappropriate explanation means the lack of relevant conclusions, the lack of connections between facts and legal consequences or between evidence material and facts etc.) (Art 373 CCP). In detail, Tamás Háger, 'Abszolút eljárási szabálysértések az elsőfokú büntetőperben (Absolute procedural mistakes in the firs-instance procedures)' (2/2014) Büntetőjogi Szemle 49-56.

establishment of guilt, the qualification of the offence or the imposition of the sentence. These irregularities can be, in particular, if the persons participating in the procedure were prevented from or restricted in exercising their lawful rights. In such cases the court of second instance considers the circumstances (the fact whether the procedural error impacts the judgment significantly) and can decide upon the repeal but also upon the redress of the defects (Art. 375 CCP).[12]

The repeal of the judgment of the first instance can be based upon a *factual ground* as well, if the judgment is unsubstantial and this cannot be remedied at the second instance. A further condition here is that this factual imperfection had significant impact on the establishment of guilt, imposition of a penalty or the application of a measure. According to Art. 352 par. 2 CCP, the judgment of *the court of first instance shall be regarded as unsubstantiated* if the facts of the case are not clarified; the court of first instance has failed to establish the facts of the case or established them insufficiently; the established facts of the case are contrary to the contents of the documents; or from the facts established, the court of first instance has drawn erroneous conclusions. As mentioned above, different facts can only be stated if the accused will be acquitted or the procedure terminated based on the evidence taken (*favor defensionis*).[13]

In a limited scope, the judgment made at second instance may be subject to appeal (so-called second appeal) (see below 4). If, for lack of a second appeal, the judgement rendered at second instance becomes final, it can be subject to extraordinary legal remedies, namely Curia review on the points of law or re-opening of the case. The conditions on both extraordinary legal remedies are laid down in detail in the CCP (Arts. 408 and 416), both being available in a narrow scope, that is, simple mistakes in law or facts may no longer eliminate the final character of the judgment.[14]

12 On the cassation in general, István Sódor, 'Kasszáció a magyar büntetőeljárási jogban. Gondolatok a büntetőeljárási törvény újrakodifikálásáról (Cassation in Hungarian criminal procedure – Some thoughts on re-codifying criminal procedural law)' in György Vókó (ed) *Tiszteletkötet Dr. Kovács Tamás 75. születésnapjára* (Országos Kriminológiai Intézet 2015) 255-265.

13 In detail, Tamás Háger, 'A megalapozatlanság kiküszöböléséhez vezető folyamat a másodfokú büntetőperben (Eliminating unsubstantiated decisions at second instance)' (2/2013) Jogelméleti Szemle 29-43.

14 Karsai and Szomora (n 2) 213-216.

6. The Second Appeal and the Procedure of Third Instance[15]

The possibility of 'second' appeal is not available in every case. The 'second' appeal is only admissible if the court of second instance has (allegedly) violated the criminal law and if the adjudications of the main question (the question of guilt) by the two lower courts are completely conflicting. In particular, a second appeal is only possible if the court of second instance, first, acquits an accused who was convicted by the court of first instance, or, second, convicts an accused (or applies compulsory psychiatric treatment against him/her) who was acquitted by the court of first instance, or, third, convicts the accused for an offence which was not adjudicated by the court of first instance (Article 386 CCP).

The availability of a second appeal precludes the second-instance judgment's becoming final. Consequently, decisions of the court of appeal can only become final if no second appeal is available (if neither of the three cases mentioned above exist) or if no second appeal was filed. As for the legal character and consequences, there is no difference between a judgment that becomes finalized at the second or the third instance. However, *there is an important difference considering the possibility of extraordinary legal remedies*: if a judgment becomes final at the third instance, a Curia review on the points of law is no longer available with reference to the serious violation of substantive criminal law (Art. 416 par. 4 CCP), while judgements becoming final at the second instance may be subject to Curia review also in this case.[16]

The *procedural conditions* are the same as those presented in connection with the first appeal (see above 3). The accused, the public prosecutor, the private accuser, the defence counsel and the relative of the accused (if compulsory psychiatric treatment has been applied) are entitled to lodge the appeal; the public prosecutor can appeal both to the detriment and in favour of the accused, the substitute private prosecuting party only to his/her detriment.

15 On the introduction of the thrid-instance procedure in Hungarian criminal procedural law, Ervin Cséka, 'Kétfokú fellebbvitel büntetőügyekben (egykor és ma) (Two-level appeal in criminal procedures today and in the past)' in Katalin Gönczöl and Klára Kerezsi (eds) *Tanulmányok Szabó András 70. születésnapjára* (Magyar Kriminológiai Társaság 1998) 54-64; Ervin Cséka, 'A kétfokú fellebbvitel bevezetése büntető eljárásjogunkba (Introducing the two-level system of appeal in Hungarian criminal procedural law)' in Károly Tóth (ed) *Tanulmányok Dr. Besenyei Lajos egyetemi tanár 70. születésnapjára* (Szegedi Tudományegyetem Állam- és Jogtudományi Kar 2007) 147-158.

16 In general, Belovics (n 4) 484-492; Fantoly and Gácsi (n 4) 190-204; Herke and others (n 1) 345-347.

By way of significant difference to second-instance proceedings, both the public prosecutor and the defence counsel shall present a written explanation to the appeal as well, pointing out the availability of the second appeal. However, the court of third instance is not bound by the reasons given in second appeals.

Independently of the narrow admission of the second appeal, the court of third instance is, however, empowered (and obliged) to *ex officio* revise the judgment challenged by the appeal, together with the previous proceedings of the courts of both first and second instance, the compliance with the procedural rules, and the substantiation of the judgment of the second instance (Art. 387 par. 1 CCP). That is, the principle of *full revision* prevails also at the third instance.[17]

The decisions can be classified the same way as in case of court procedure at the second instance (see 5 above), the same rules apply including the prohibition of reformation in peius as well.[18] As mentioned above, if a judgment becomes final at the third instance, a *Curia review* on the points of law is no longer available with reference to the serious violation of substantive criminal law (Art. 416 par. 4 CCP), while judgements becoming final at the second instance may be subject to Curia review also in this case. *Re-opening* a trial is still possible after a final judgment of third instance if its conditions are met.

7. Participatory Rights in Appellate Procedure

7.1. General Forms of Court Procedure[19]

From the point of view of publicity, four different forms of court procedure can be distinguished: trial (*tárgyalás*), public hearing (*nyilvános ülés*), hearing (*ülés*) and in camera session (panel session) (*tanácsülés*) (Art. 234 Be.). This also represents *a sequence of hierarchy concerning procedural guarantees*. It must be emphasized in advance that court practice has elaborated the limitations of transition from one form of procedure to another: once a second-instance trial or public hearing has commenced, the transition to an in camera session is prohibited (Curia Decision 2003. 934. BH).

The principle of publicity can to the greatest extent be realized in a trial or public

17 Háger (n 7).

18 In detail, Tamás Háger, 'A harmadfokú büntetőbírósági eljárás egyes központi kérdései, különös tekintettel a harmadfokú bíróság ügydöntő határozataira (Some central questions of third-instance procedures, with special regard to the decisions of the appellate court)' (2/2014) Miskolci Jogi Szemle 29.

19 Fantoly and Gácsi (n 4) 75-78.

session. The *trial* is the primary form of court procedure and aims at taking of evidence (Art. 234 par. 1 *Be*). The first-instance court rules on the defendant's criminal liability after taking of evidence in a trial (some exceptions may be made in special procedures; see below). If the court of second-instance carries out evidentiary actions, it also has to open a trial. Holding a trial at third-instance is excluded.

Public hearing is the secondary form of court procedure. It is however the most typical in second- and third-instance proceedings where no evidentiary actions take place. It must be emphasized that the trial and the public hearing *make no difference in terms of personal participation*.

Publicity is limited in case of holding a *hearing*, which embodies a procedural action of preparatory character. As a main rule, no evidentiary actions may take place at a hearing (except the investigating judge in certain cases). The *Be* provides three main types of hearing: hearings held by the investigating judge; preparatory hearing (after the filing of the indictment and before opening the trial) and personal hearing (in proceedings subject to private accusation). *Only the parties can be present at such hearings*: the public prosecutor (private accuser, substitute private accuser), the defendant and the defence counsel, and those subpoenaed or notified can attend (Art. 234. par. 4 *Be*).[20]

Publicity and personal participation is excluded in case of *in camera sessions* (or in other words, panel sessions). Only members of the court and the keeper of the minutes can be present, and taking of evidence is excluded (Art. 234 par. 5 *Be*). Two main types of in camera sessions can be distinguished: first, a panel session held after the trial or public hearing in order to pass the judgment; second, so-called *ex actis* session in simple cases. The latter is now precisely defined in the *Be*, which lists the cases that can be dealt with by in panel sessions. A panel session can embody also a part of the trial, the public hearing or the hearing.

7.2. Presence at Higher Instances

Appeals can be dealt with at an in camera session, public hearing or trial. Appeals can be adjudicated at an *in camera session* if the case does not require a contradictory procedure since it can be adjudged on the basis of the documents.

20 This means that the victim or civil party can only be present if s/he has been subpoenaed or notified of the hearing, which, for example is never the case when hearing on pre-trial detention is held.

Of critical importance in Hungary was the fact that the CCP had not provided for clear rules on when a case *at second instance can be adjudicated at an in camera session*, which did not comply with the maxims following from legal certainty and fair trial. Article 360 paragraph 1 included the following general clause: the presiding judge rules, within 30 days after receiving the files, on whether the case will be dealt with at a trial, a public hearing or in camera session. No further provisions were given in the CCP. Thus it is not surprising that the ECtHR dealt with cases in which the rules on the in camera session were contested.[21]

The Constitutional Court examined the provision of the CCP cited above and declared it unconstitutional in its Decision 20/2005. (V. 26.) AB, also stating that the Hungarian Parliament had omitted to provide precise rules on the forms of court procedures at higher instances, the omission of which leads to an unconstitutional situation. The Constitutional Court found that the rights of all private parties in criminal proceedings had been violated by this general rule because, first, the parties were not to be notified of an in camera session being held, second, no minutes were kept at an in camera session. Since no requirements and limitations to the presiding judge's decision on the form of the court procedure were laid down in the *Be*, the possibility of also approving the first-instance decision, or, furthermore, issuing a reformatory decision was given to the second-instance court, without hearing any of the parties, i.e. at an in camera session. The decision of the Constitutional Court also emphasized that that both the international conventions, the case law of the ECtHR and the CCP regards the whole scope of the court procedure as a consistent and uniform procedure, i.e. the effective participation of the defendant and other private parties cannot be restricted to the first-instance court proceedings. An opposite approach would transform the court procedure at higher instance into an inquisitorial phase again, in which the exclusion of the defendant's and the defence counsel's participation would to a far greater extent be possible than in the investigation phase. This absurd consequence following from Art. 360 CCP infringed the Constitution.[22]

Following from the Constitutional Court Decision 20/2005 (V. 26.) AB, the cases

21 ECtHR, *Csikós v. Hungary*, judgment of 5 December 2006, Appl. No. 37251/04; ECtHR, *Talabér v. Hungary*, judgment of 29 September 2009, Appl. No. 37376/05; ECtHR, *Sándor Lajos Kiss v. Hungary*, judgment of 29 September 2009, Appl. No. 26958/05; ECtHR, *Goldmann and Szénászky v. Hungary,* judgment of 30 November 2010, Appl. No. 17604/05.

22 Reference to the decision of the Constitutional Court also by György Berkes and others, *Büntetőeljárási Jog. Kommentár a gyakorlat számára (Commentary on the Code of Criminal Procedure)* (HVGORAC 2009) 909-911.

in which the appeal can be adjudged in camera are exclusively listed in Art. 360 CCP (declaring the appeal for inadmissible, transferring the case to the competent court, suspending the case etc.). Beyond these administrative actions not affecting the merits of the case and in order to serve the goal of greater speed, the CCP also provides the possibility for an in camera decision if the appeal was lodged only for the favour of the defendant and the facts laid down in the first-instance judgement are well substantiated, i.e. no further evidence needs to be taken.[23] But in such cases, the possibility of requesting a public hearing or a trial must be given to the defendant and his/her counsel so they can participate in person. An *in camera* decision on the merits of the case only being made if such a request is missing.

The general form of court procedure in second instance is a *public hearing*. The court holds a public hearing if the case cannot be dealt with in camera and a trial is not necessary. If the defendant has properly been subpoenaed, the public hearing can be held despite his/her being absent. A judgment on the appeal can also be passed if the outcome of the public hearing does not make the hearing of the defendant necessary (Art. 362 par. 3 CCP). The public prosecutor's attending the public hearing is not compulsory (Art. 362 par. 2 CCP).

The legal conditions for opening a *second-instance trial* are as follows: 1) the case cannot be dealt with in camera; 2) evidence needs to be taken, which is not possible at a public hearing; 3) any other cases where the presiding judge decides to open a trial (Art. 363 par. 2). The defendant must be subpoenaed at least five days before the trial date. Should the defendant notify the court of his/her unwillingness to attend the trial or if no appeal has been lodged to the detriment of the defendant, the trial can be held despite his/her absence (Arts 364-365 *Be*).

The court of third instance generally adjudges the second appeal at a public hearing. The rules on the form of court procedure at second instance apply to the procedure of third instance as well, with the exception that holding a trial and taking evidence in third instance is not allowed.

7.3. The Defendant's Statement at Higher Instances

The defendant has the right to make a statement at any stage of the procedure so s/he has to be provided with the possibility of making a statement if s/he decides so (Art. 117 par. 5 CCP).

23 The fact that an appeal was lodged only in favour of the defendant triggers the *prohibition of reformatio in peius* in higher instances (see above 5).

Invoking this right, the defendant or his/her counsel often files an evidentiary motion *at second instance* so that the defendant who previously remained silent can now make a statement or s/he can modify his/her statement made in first instance. Since it is the first-instance court's duty to take every evidence necessary to find the facts of the case, the appellate court is entitled to review what the first-instant court has done but not to supplement with what the first-instance court has failed to do. Consequently, a motion for the defendant's making a statement can usually not be accepted in the second-instance procedure. Evidentiary actions can be carried out in the second-instance procedure only exceptionally, that is, if the first judgement is unsubstantiated (see above 5). The defendant may make a statement in the appellate court procedure only in such a case.

As already mentioned, evidentiary actions are generally excluded in the court procedure of *third instance*, i.e. the defendant can never make a statement.

8. The Constitutional Complaint - Individual Application to the Constitutional Court[24]

After the 2012 Constitution of Hungary entered into force (called the Fundamental Law of Hungary), the system of constitutional complaints has been available. Constitutional complaints are adjudicated by the Constitutional Court, which is located entirely outside the ordinary justice system. The Constitutional Court has expressed in many of its decisions that it takes the ECtHR case law as a minimum standard when reviewing domestic justice decisions [e.g. Decision of the Const. Court 13/2014 (IV. 18.) AB].

A court decision may be challenged by constitutional complaint if 1) the court decision was rendered on the merits of the case or the decision concludes the ordinary court procedure 2) this court decision violates the applicant's basic right under the Fundamental Law and 3) the legal remedies have already been exhausted or they are not available. If these conditions are met, any person affected by the judgment has the right to file a constitutional complaint (Art. 27 of Act CLI of 2011 on the Constitutional Court). In practice, it is mostly the convicts who file a complaint but there are also some cases where victims filed constitutional complaint [Const. Court Decision 1/2015. (I. 16.) AB is an example on the latter].

24 Cf. Adél Köblös and others, 'Az alkotmányjogi panaszeljárás általános szabályai (General rules of constitutional complaint procedures)' In Botond Bitskey and Bernát Török (eds) *Az alkotmányjogi panasz kézikönyve* (HVG-ORAC 2015) 59-121.

As for the review procedure, it *has no contradictory character*, the applicant will not be heard (procedure in writing), the procedure can be based only on the documents of the criminal procedure. Besides the complaint itself, there is no other formal way of presenting arguments. The court whose decision is contested cannot express its views either.

The criminal court *may suspend* the enforcement of the final judgment in case a constitutional complaint has been filed. If the Constitutional Court requires the criminal court to do so, the enforcement of the final judgment *shall be suspended* (Art. 429/B-C CCP).

As written above, only conclusive or final decisions can be subject to constitutional complaint. In the interpretation of the Constitutional Court, the clause "affecting the merit of the case" excludes the review of any coercive measures ordered in criminal proceedings (such as arrest, pre-trial detention, seizure etc.). Consequently, the ECtHR does not require the exhaustion of constitutional complaint in case of pre-trial detention, and complaints filed to the ECtHR are admissible without the applicant's having turned to the Constitutional Court.[25]

The review carried out by the Constitutional Court is *limited to basic rights issues*. In most of the criminal cases, the relevance and the compliance with Article XXVIII of the Fundamental Law is the subject of the review (right to a fair trial, right to the legal judge, right to defence, presumption of innocence, right to legal remedy, nullum crimen / nulla poena sine lege, prohibition of ne be is in idem). Other typical basic rights affected are the non-discrimination clause (Art. XV), the freedom of expression (Art. IX), the right to human dignity (Art. II).

The Constitutional Court never considers wrongful application of criminal law unless it affects the constitutional content (scope of protection) of the relevant fundamental rights. The Constitutional Court *may not revise the facts of the case,* that is, it is bound by the facts established in the final judgment while performing the constitutional review [see e.g. Const. Court Decisions 1/2015 (I. 16.) AB].

If the Constitutional Court finds that the final judgment rendered by the criminal court violates a basic right guaranteed by the Fundamental Law, it quashes the

25 Numerous ECtHR judgements were made against Hungary regarding pre-trial detention. Cf. *Kutatási jelentés Magyarország – Az előzetes letartóztatás gyakorlata: Az alternatív kényszerintézkedések és a bírói döntéshozatal vizsgálata* (*Research report of the Hungarian Helsinki Comittee on the practice of pre-trial detention in Hungary)* (Magyar Helsinki Bizottság 2015) 13-15.

judgment concerned (it can be a judgment of any instance, including review judgments of the Curia, the Supreme Court of Hungary). If a final judgment has been quashed by the Constitutional Court, the court procedure (or a certain instance of the court procedure) has to be repeated. In the course of the repeated court procedure, the aspects, maxims and explanation laid down in the Constitutional Court decision shall be taken into account by the criminal Court (Art. 43 par. 3 of the Act on the Constitutional Court and Art. 403 par. 3 CCP).

An additional issue of implementation is that the Constitutional Court can lay down so-called "constitutional requirements" in its decisions (Art. 46 par. 3 Const. Court Act), which mostly affect the interpretation and application of the Criminal Code and the CCP, and which requirements must be considered in every future judgment of the criminal courts.[26]

References

Lajos Balla, 'Részbizonyítás a másodfokú eljárásban (Taking partial evidence in second-instance procedures)' in Mihály Tóth (ed) *A büntetőítélet igazságtartalma* (Magyar Közlöny Lap-és Könyvkiadó 2010) 106-120

Ervin Belovics, 'A másodfokú bírósági eljárás. A harmadfokú bírósági eljárás (Second- and third-instance procedures)' in Mihály Tóth (ed) *Büntető eljárásjog* (HVG-ORAC 2013) 422-477, 484-492

György Berkes and others, *Büntetőeljárási Jog. Kommentár a gyakorlat számára (Commentary on the Code of Criminal Procedure)* (HVGORAC 2009)

Ervin Cséka, 'Kétfokú fellebbvitel büntetőügyekben (egykor és ma) (Two-level appeal in criminal procedures today and in the past)' in Katalin Gönczöl and Klára Kerezsi (eds) *Tanulmányok Szabó András 70. születésnapjára* (Magyar Kriminológiai Társaság 1998) 54-64

Ervin Cséka, 'A kétfokú fellebbvitel bevezetése büntető eljárásjogunkba (Introducing the two-level system of appeal in Hungarian criminal procedural law)' in Károly Tóth (ed) *Tanulmányok Dr. Besenyei Lajos egyetemi tanár 70. születésnapjára* (Szegedi Tudományegyetem Állam- és Jogtudományi Kar 2007) 147-158.

Zsanett Fantoly and Anett Gácsi, *Eljárási Büntetőjog. Dinamikus Rész (Criminal procedural law, Dynamic Part)* (Iurisperitus 2014) 165-189, 190-204

Tamás Háger, 'A megalapozatlanság kiküszöböléséhez vezető folyamat a másodfokú büntetőperben (Eliminating unsubstantiated decisions at second instance)' (2/2013) Jogelméleti Szemle 29-43

Tamás Háger, 'A másodfellebbezés joghatálya, a felülbírálat terjedelme és a tényálláshoz kötöttség a harmadfokú bírósági eljárásban (The scope of second-appeal, the scope of revision and the binding effect of the facts laid down in the revised judgment at third-instance)' (1-2/2013) Büntetőjogi Szemle 19-29

Tamás Háger, 'A harmadfokú büntetőbírósági eljárás egyes központi kérdései, különös tekintettel a harmadfokú bíróság ügydöntő határozataira (Some central questions of third-instance procedures, with special regard to the decisions of the appellate court)' (2/2014) Miskolci Jogi Szemle 29

Tamás Háger, 'Abszolút eljárási szabálysértések az elsőfokú büntetőperben (Absolute procedural mistakes in the firs-instance procedures)' (2/2014) Büntetőjogi Szemle 49-56

26 E.g. Decision 8/2013. (III. 1.) AB on the appointment of defense counsel; Decision 21/2016 (XI. 30.) AB on the exclusion of judges.

István Hegedűs, ʻAz eltérő tényállás megállapíthatósága a másodfokú eljárásban (Finding different facts in second-instance procedures)' in *Dr. Maráz Vilmosné Emlékkönyv* (Szegedi Ítélőtábla 2013) 51-53

Csongor Herke, *Súlyosítási tilalom a büntetőeljárásban (The prohibition of the reformatio in peius)* (PTE ÁJK 2010)

Csongor Herke and others, *A büntetőeljárás elmélete (The theory of criminal procedure)* (Dialog-Campus 2012)

Krisztina Karsai and Zsolt Szomora, *Criminal law in Hungary* (Kluwer Law International 2015)

Adél Köblös and others, ʻAz alkotmányjogi panaszeljárás általános szabályai (General rules of constitutional complaint procedures)' In Botond Bitskey and Bernát Török (eds) *Az alkotmányjogi panasz kézikönyve* (HVG-ORAC 2015) 59-121.

Kutatási jelentés Magyarország – Az előzetes letartóztatás gyakorlata: Az alternatív kényszerintézkedések és a bírói döntéshozatal vizsgálata (*Research report of the Hungarian Helsinki Comittee on the practice of pre-trial detention in Hungary).* (Magyar Helsinki Bizottság 2015)

István Sódor, ʻKasszáció a magyar büntetőeljárási jogban. Gondolatok a büntetőeljárási törvény újrakodifikálásáról (Cassation in Hungarian criminal procedure – Some thoughts on re-codifying criminal procedural law)' in György Vókó (ed) *Tiszteletkötet Dr. Kovács Tamás 75. születésnapjára* (Országos Kriminológiai Intézet 2015) 255-265.