

## DEVELOPMENT OF THE SYSTEM OF LEGAL REMEDIES IN HUNGARIAN CIVIL PROCEDURE LAW AFTER THE DEMOCRATIC TRANSFORMATION

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Following the democratic transformation in Hungary, the change in the social and economic order made a new legal environment necessary. The aim of the present study is to provide a review of the response given by the Hungarian civil procedural system to this challenge, to examine the influences exerted on the system of remedies that led to its transformation (as a whole and regarding certain details), how it became adjusted to the requirements of the rule of law and how it acquired its present form. However, in order to understand the processes following the democratic transformation, it is necessary to refer briefly to the earlier procedural solutions of the preceding era.

The Hungarian Code of Civil Procedure (HCCP) of 1952 (Act III of 1952) transformed the earlier two instance *appellate system* into a one level system. In its original form, the above-mentioned Act maintained a such kind of second instance proceedings characterising Plósz' Code of Civil Procedure of 1911. Approximately one and a half years later, in 1954, the first comprehensive modification of the HCCP brought about a crucial change concerning the character of second instance proceedings, a version of the socialist appellate system was introduced. In 1957 the appellate system shifted toward the former model again. Afterwards, right up to 1990, there was only one relevant change worth mentioning in the 70s: when the legislator made it possible to adjudge appeals out of sessions.<sup>1</sup> The HCCP of 1952 regulates the reopening of a case as a form of *extraordinary remedy*, unlike the HCCP of 1911,

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<sup>1</sup> KENGYEL, MIKLÓS: *Magyar polgári eljárásjog*. Budapest: Osiris, 2006, 61-62, 362-363.; KISS, DAISY: Fellebbezés. In NÉMETH, JÁNOS (ed.): *A Polgári perrendtartás magyarázata*. Budapest: Közgazdasági és Jogi Könyvkiadó, 1999, 934-935.

which made the reopening of a case possible through submission of a statement of a claim, which meant the starting of new action. The reduction in the number of grounds for the reopening of a case resulted in the fact that this form of remedy could only serve the purpose of remedying factual errors.<sup>2</sup> Besides, the Act of 1952 introduced an extraordinary remedy called “remedy in the interests of legality”, which was present in the HCCP from 1954 – with slightly different content – already as “the protest on legal grounds”. With modern eyes, the most striking feature of this legal institution was that one was allowed to resort to it independently of the parties’ will,<sup>3</sup> which could result in a serious injury to the parties’ right to disposition, as the Chief Public Prosecutor and the President of the Supreme Court was also entitled to lodge a protest on legal grounds against a final decision which was considered unlawful or unfounded. Adjudging such protests fell within the scope of authority of the Supreme Court.

The democratic transformation took place when the remedy system of Hungarian civil procedure was in the state briefly outlined above. After 1990 the first great impetus to the transformation of the Hungarian remedy system was given by a decision of the Constitutional Court, thus the reform really started in 1992 with the introduction of the *review procedure* (second appeal). The comprehensive modifications of the HCCP of 1997 and 1999 “further refined our appellate system”, but as a result of the delay in the setting up of the regional courts of appeal, the reform has been completed only in the 21<sup>st</sup> century.<sup>4</sup> In the past one and a half decades, most modifications have been concerned with the institution of review and they have been generated by the decisions of the Constitutional Court in several cases. These solutions have not proved to be lasting ones, in the 90s and at the millennium, the institution of review was characterised by the exploration of possibilities.

## I. Constitutional problems

Civil procedural law is not independent of the Constitution, the Constitution gives the limits of legislation concerning procedural law. The first decision of the Constitutional Court having a significant effect on the system of remedies was *Decision № 9/1992. (I.30.) AB of the Constitutional Court*, which was declared the institution the protest on legal grounds unconstitutional and “the rules concerning the protest were annulled with effect from 31 December 1992. It was laid down as a fact that the protest on legal grounds was contrary with the requirement of legal certainty which formed the content of the principle of constitutionality [Art. 2(3) of the Constitution], with the institution of legal force and with the parties’ right of

<sup>2</sup> KÓRÓS, ANDRÁS: Perújítás. In PETRIK, FERENC (ed.): *Polgári eljárásjog. Kommentár a gyakorlat számára*. Budapest: HVG-ORAC, 2006, 504/2.

<sup>3</sup> VEZÉR, ÁGNES: Felülvizsgálat. In NÉMETH, JÁNOS (ed.): *A Polgári perrendtartás magyarázata*. Budapest: Közgazdasági és Jogi Könyvkiadó, 1999, 1084.

<sup>4</sup> KENGYEL, MIKLÓS: A polgári eljárásjog jelene és jövője. In BENISNÉ GYÖRFFY, ILONA (ed.): *Ötödik magyar jogászgűlés*. Budapest: Magyar Jogász Egylet, 2000, 243.

disposition in civil cases.” The legal institution of review was introduced with effect from 1 January 1993 instead of the protest on legal grounds annulled by the above-mentioned decision of the Constitutional Court (Act LXVIII of 1992). The first amendment after the democratic transformation did not re-establish the remedy at third instance, which was abolished in 1951.<sup>5</sup>

The reborn institution of review constitutes an extraordinary remedy which may be resorted to against a given circle of final decisions, where the request is founded on the violation of a legal rule influencing judgement on the merits. Review as a remedy is a civil right, it may be exercised, on compliance with the legal requirements, by the party, the intervening party and anybody concerned by the provisions of the judgement. When judging the petition for review, the Supreme Court proceeds. The regulation elaborated following the decision of the Constitutional Court is often referred to, not without just cause, as a “forced solution”<sup>6</sup>, these provisions little stood the test of time. The nature of review has changed since as a result of several comprehensive modifications.

*Decision № 1/1994. (I.7.) AB of the Constitutional Court* meant a new step on the way toward the renewal of the remedy system. This decision sharply defined the right to disposition of the parties and limited the role of the public prosecutor (in order to meet the requirement of the rule of law). The Constitutional Court found that the prosecutor’s general powers to initiate proceedings, to intervene, to file appeals and submit motions for the review of final decisions were unconstitutional. Therefore the Constitutional Court annulled legislative provisions pertaining to the exercise of the above powers.

According to *Decision № 22/1995. (III.31.) AB of the Constitutional Court*, the “Parliament caused a situation of unconstitutionality when, during the regulation of the order of civil procedures, it failed to ensure the exercise of the right to legal remedy against the order of the second instance court to pay a fine or expert fees”. As an answer to this was the institution of exception introduced with effect from 1 January 1997, however, this institution was short-lived, later it was merged into the system of appeals against court orders made during the second instance proceedings. During the second instance proceedings appeal is possible against orders based on the first instance pattern, orders dismissing appeals [HCCP Section 233/A], and orders rejecting petitions aimed at initiating preliminary ruling process [HCCP Section 249/A].

The Constitutional Court took a stand concerning the rules of the review procedure in its *Decision № 42/2004. (IX.9.) AB* as well. By the above decision, it annulled certain provisions restricting the submission of petitions for review and excluding the possibility of legal remedy. This provided an impetus for the repeated

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<sup>5</sup> KENGYEL, MIKLÓS: *Changes in the Model of Hungarian Civil Procedure Law*. Manuscript, (forthcoming): Kluwer (2007); GÁTOS, GYÖRGY: Felülvizsgálatról – felülvizsgálatig. *Magyar Jog*, 1992/11, 673.

<sup>6</sup> Cp. KENGYEL, MIKLÓS: Die Revision im ungarischen Zivilprozeß. *Zeitschrift für Zivilprozess*, 1994/2, 191-192.

and comprehensive re-regulation of the review procedure (Act CXXX. of 2005). After an amendment of 2001, among the conditions for lodging a petition for review, the law included such grounds as well that made review necessary in the interest of legal uniformity. In its above-mentioned decision, the Constitutional Court objected to the fact that “additional grounds apart from the violation of a legal rule affecting the case on the merits restrict the function of remedy significantly or extinguish it”. The other annulled provision was the exclusion of the possibility of remedy connected with the “screening role” of the sole judge. According to the earlier regulation, in the first phase of the proceedings – before the case came before the senate – the sole judge decided, within the framework of a preliminary examination, whether the petition for review met the legal requirements. In case the conditions were not satisfied, he was entitled to reject the petition and there was no possibility of remedy against his decision. The possibility of the screening of petitions for review by the sole judge seemed problematic for several reasons. On the one hand, the judge did not only examine the petition for review from a formal aspect but he could also decide about questions of content, moreover, his decision was final (non-appealable).<sup>7</sup> With regard to questions of content, in a given case it could pose a problem for the sole judge what to consider “an order made on the merits of the case” or it could be problematic for him to decide what one should evaluate as a legal issue of fundamental importance.<sup>8</sup> Despite the fact that, here, the Constitutional Court only found it unconstitutional to exclude legal remedy against the decision of the sole judge and annulled this sentence of the statute only, during the modification in 2005, the legislator’s reaction was to abolish preliminary screening by the sole judge. Thus, in accordance with Section 11 (5) of the HCCP, at present, the Supreme Court sits in a senate of three professional judges during the review proceedings. If the extraordinary complexity of the case justifies it, the Supreme Court may order a senate of five professional judges to proceed in the case.

## II. The Court structure and the rules of legal remedy

The changes in the framework of justice necessarily brought about changes in the field of legal remedies as well. Within the framework of the justice reform, in 1997, the Constitution was amended, which meant the beginning of return to the four level court system abolished after World War II. This was carried out in such a way that regional courts of appeal were set up as forums of appeal between the county court level and the Supreme Court. Three of them (the Metropolitan Court of Appeal and the Regional Courts of Appeal of Pécs and Szeged) started to function on 1 July 2003, while the other two in Debrecen and Győr began their work on 1 January 2005. As a

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<sup>7</sup> TILK, PÉTER: A felülvizsgálat intézményével összefüggő néhány alkotmányossági kérdés. In KENGYEL, MIKLÓS (ed.): *50 éves a polgári perrendtartás*. Pécs: Dialóg Campus, 2003, 166.

<sup>8</sup> SZŐKE, IRÉN: A felülvizsgálati kérelmet vizsgáló egyesbíró magányossága. In KISS, DAISY – VARGA, ISTVÁN (eds.): *Magister artis boni et aequi. Studia in honorem Németh János*. Budapest: ELTE Eötvös Kiadó, 2003, 832-834.

result of the setting up of regional courts of appeal, the Supreme Court, as a forum of appeal, proceeds in a narrow circle, its activity is rather focussed on the conduct of review proceedings and ensuring law unification. Adjudging of appeals forms part of the tasks of the regional courts of appeal when the case has been tried by the county court at first instance, in case of actions starting at the local (or labour) courts, the forums of appeal are the county courts. The justice reform was accompanied by changes in the rules of jurisdiction, the first instance jurisdiction of the county court was significantly expanded, which was intended to counterbalance the disproportionate division of workload at the different court levels.

### III. Expansion of the circle of remedies

The introduction of the newer type of legal remedies was the result of the decisions of the Constitutional Court in several cases, including the regulation of *review* at the beginning of the '90s and the provisions concerning *exception*, which were introduced in 1997 and later abolished (2003). These legal remedies and their function were examined under point 1.

With the creation of the possibility of the *direct appeal* (Sprungrevision), the means of the Hungarian system of legal remedies were further diversified in 2003 by Novel VIII of the HCCP. If the decision has been passed by the county court at first instance, parties proceeding with the help of a legal representative may submit a joint petition attached to the appeal against the decision requesting that the appeal grounded on the violation of a substantive legal rule should be adjudged directly by the Supreme Court. Parties may move for proceedings by the Supreme Court in a property law case, if the amount disputed in the appeal exceeds 500.000 forints (HUF). In the appeal one may not refer to a new fact or new evidence. The adjudication of the appeal shall take place out of session, by the proper application of the governing rules relating to the review procedure, thus, when adjudging the appeal, the Supreme Court makes its decision based on the documents at its disposal. No review is possible against the decision. [HCCP Section 235 (3)–(4)] According to the reasons provided by the statute, the construction of direct appeal endeavours to promote the acceleration of the procedure by enabling the parties to narrow down the function of the ordinary remedy procedure to the issue considered by them to be of crucial importance and to choose the “most authentic decision-making forum” for this role. However, this legal construction may be used in cases when the legal dispute between the parties does not require the decision of a question of fact but the interpretation of law. In such a case it may be the common interest of the parties that the highest judicial forum took a stand within the shortest period of time.

Act XIX of 2006 introduced a new legal institution sharing partly the characteristics of legal remedy: “*the exception against the delaying of court proceedings*” [HCCP Sections 114/A. and 114/B]. By introducing the new legal institution, the obvious aim of the legislator was to promote the ending of court proceedings within a reasonable time limit, to provide means, already in the course of proceedings and not only after their closing, for achieving the delay-free continuation of proceedings and for ensuring adequate protection from ways of conduct causing protraction. The legal

institution of exception against the delaying of court proceedings was set up taking the peculiarities of Hungarian procedure into consideration, during the elaboration of the Hungarian regulation it was the Austrian solution that served as the main model. An exception may be submitted by the party, the intervening party and the public prosecutor involved in the proceedings. It shall be filed in writing with the court proceeding in the case. The exception is addressed to the county court in case of local court proceedings, to the regional court of appeal in case the matter is being tried in the county court and to the Supreme Court in case of the proceedings of the regional court of appeal. In the exception one may request the court to establish the fact of omission and to order, by fixing an appropriate deadline, the court committing the omission to carry out the missed procedural act or to pass the missed decision. An exception may only be submitted if the law set a deadline for the court to carry out specific procedural acts and this deadline has expired without result, or if the court set a deadline for a participant of the proceedings to carry out a procedural act and the deadline has expired without result, and, in spite of this, the court has not taken the necessary and possible measures concerning the party involved, or since the latest substantial court measure a reasonable period of time has passed that would have been enough for the court to carry out the procedural act or to order the act to be carried out but the court has failed to do so. In case the court proceeding in the matter finds the exception reasonable, it may take or order the taking of measures necessary for the termination of the situation described as injurious in the exception. In case it does not consider the exception well-founded, it may refer the documents to the court competent in adjudging the exception. The reasons given to the Act emphasizes that the court adjudging the exception shall not order the court of trial to carry out a specific procedural act as this would already mean the violation of the court's independence. There is no possibility of further remedy against the decision of the court.<sup>9</sup>

#### **IV. Changes concerning the limits of legal remedy**

We may lay it down as a fact of universal validity that one of the main causes of the delay of civil lawsuits is the excessive caseload on courts. One of the means frequently used to solve this problem is the restriction of legal remedy. In Hungary, after the modification of the Constitution in 1989, the entitlement to legal remedy became an absolute right (exercisable without restriction). This principle proved unreasonable in practice as it obstructed the reform endeavours aimed at the realization of less complicated and quicker procedure and less costly justice. Therefore, during the modification of the Constitution in 1997, the text of the fundamental law was supplemented by a section concerning the restriction of the entitlement to legal remedy. According to the amended Section 57 (5) of the

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<sup>9</sup> GÁSPÁRDY, LÁSZLÓ - HARSÁGI, VIKTÓRIA: Alapvető elvek. In PETRIK, FERENC (ed.): *Polgári eljárásjog. Kommentár a gyakorlat számára*. Budapest: HVG-ORAC, 2006, 12.

Constitution, this may be carried out “in the interest of and in proportion to the decision of legal disputes within a reasonable amount of time”. Restricting techniques may vary.<sup>10</sup> In the following section, we will review, firstly, cases where it is the specific type of decision, a limit of amount defined by law or, for example, belonging to a specific group of cases that constitute the limit and exclude the possibility of resorting to legal remedy. Secondly, we will show that the adjudging of particular cases (e.g. depending on the amount disputed in the appeal) results in a different procedural order in the remedy phase of the proceedings. Such different procedural rules typically contain certain restrictive provisions as well. Thirdly, we have to outline the character of evidentiary proceedings as being different from the first instance proceedings, one of the most important restrictive elements of which may be described as the “prohibition of novation”.

### 1. Factors blocking the way to legal remedy

Concerning the regulation found in the Part on General Principles of the HCCP, changes in the circle of conditions completely excluding the possibility of legal remedy took place primarily in relation to extraordinary remedies.

In order to accelerate procedures and achieve the unchangeable and executable judicial decision within the earliest possible time, Amendment of 1995 of the HCCP restricts the initiation of *retrial proceedings* in case of a retrial founded on a “new fact”.<sup>11</sup> It was this amendment that incorporated into Section 260 (2) of the HCCP the condition according to which any of the parties might only initiate a retrial if it was not his own fault that he did not use the fact, evidence or decision mentioned there during the earlier proceedings. As a result of this modification, at present, the HCCP makes the retrial procedure possible on the following grounds:

- a) if the party refers to a fact or evidence or a final decision of a court or other authority, which was not considered during the lawsuit by the court, provided – in case of consideration – it would have resulted in a decision more favourable for the party (novum);
- b) if the party lost the case contrary to the law owing to a criminal act committed by the judge participating in the passing of judgement or by the opposing party or some other person (crimen);
- c) if preceding the judgement passed in the case, an unappealable judgement was made earlier concerning the same law (res iudicata) [HCCP S. 260]

Act XLV of 1999 completed grounds for retrial with a further case, the aim of which was to provide the party with legal remedy in the particular case even when the Constitutional Court allows the constitutional complaint by the retrospective exclusion of the applicability of a legal rule declared unconstitutional. In spite of all this, it may be stated that Hungarian legal regulation restricts the field within which

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<sup>10</sup> Cp. KENGYEL, MIKLÓS: Zivilprozessrecht um die Jahrtausendwende. *Zeitschrift für vergleichende Rechtswissenschaft*, 2002, 270-271.

<sup>11</sup> KÖRÖS (2006) op. cit. 507.

a retrial is admissible too strictly. It is solely aimed at eliminating the factual deficiencies of the contested judgement, – contrary to the earlier Hungarian solution and those of some European states – a retrial may not be founded on the serious violation of a rule of procedural law.

The rules of review have been significantly modified several times in the past one and a half decades. This has happened in several cases as a result of the decisions of the Constitutional Court annulling specific provisions of the law. The regulation of review may seem, owing to the several changes in concept (see also: point 1), as if it cannot find its real place and role in the Hungarian system of legal remedies. An essential change in concept took place in 2001, when the amendment of the HCCP rendered review an extraordinary remedy allowing the rescission of legal force only within a narrow circle defined by law.<sup>12</sup>

The next change in concept came in 2005 following Decision № 42/2004 (XI.9.) AB of the Constitutional Court already referred to above. This latter modification causes significant change both in the process of proceedings (the elimination of the sole judge) and in the restrictions concerning the conditions for submitting a petition. The law considers review an extraordinary remedy that may be resorted to as a civil right by those seeking justice on referring to the violation of a legal rule, and during which the Supreme Court proceeds in a senate. However it does not only express the special nature of remedy in the sense that it may be resorted to only against final decisions but also in the sense that the circle of decisions and cases against and in which a petition for review may be submitted is restricted from various aspects. The restriction of the use of extraordinary remedy corresponds to international practice and to Recommendation R(95)5 of the Council of Ministers of the Council of Europe as well, it is also harmonious with the contents of the Decision of the Constitutional Court.

A petition for review may not only be submitted against the judgement and an unappealable court order made on the merits of the case but also against specific conclusive court orders including an order rejecting the claim without the issue of a summons and against a judgement of non prosecution passed for the same reasons.

The so-called “negative” list enumerating the causes excluding review has been slightly altered. Here, in the majority of cases, restriction is linked with the subject-matter of the case. The provision of the negative list prohibiting the review of only those Supreme Court decisions that were made during the review procedure has been modified as well. From this time on all decisions of the Supreme Court will be excluded from the circle of reviewable decisions. Thus the legislator endeavoured to put an end to the earlier contradictory situation, which was pointed out in legal literature right after the making of these provisions already.<sup>13</sup> Hereafter the Supreme Court will not be allowed to make decisions at two different remedy levels concerning the same case.

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<sup>12</sup> JUHÁSZ, LÁSZLÓ: Bizonyítás a fellebbezési szakban. In KENGYEL, MIKLÓS (ed.): *A polgári perbeli bizonyítás gyakorlati kézikönyve*. Budapest: Közgazdasági és Jogi Könyvkiadó, 2005, 124.

<sup>13</sup> See KENGYEL (1994) op. cit. 191.

According to the amended Act, in property law cases where the amount disputed in the petition for review does not exceed one million forints, review is inadmissible. The Constitutional Court has examined the constitutionality of the setting of a value limit as a condition for review several times and it has not found the earlier value limits of 200.000 and 500.000 forints unconstitutional.

It is a new element in the law that regarding certain groups of cases, review is possible only when the first and second instance courts have taken a different stand concerning the case. Thus, for instance, in lawsuits concerning neighbouring rights or the protection of a possession, in certain enforcement cases and actions relating to the custody and change in the custody of children and the regulation of visitation rights – if the decision of the first instance court has been upheld by the second instance court – review is not possible. According to the reasons given to the Act, these lawsuits are characterised by an outstanding interest in the settlement of the pending legal situation at the earliest possible time and the coinciding positions of two courts provide satisfactory guarantee of the lawfulness of the judgements.

In the Part on Special Proceedings in the HCCP (which contains the system of rules relating to individual lawsuits conducted observing special rules with regard to their subject-matter) we may also come across rules restricting the right to legal remedy. However, these typically concern extraordinary remedies (e.g. in case of matrimonial lawsuits, fraternity suits, press rectification proceedings). We may find one single example for the exclusion of appeal as an ordinary legal remedy within the circle of these special types of lawsuits. As a result of the comprehensive modification of the HCCP in 1997, the judgements of the first instance in administrative actions can be appealed only exceptionally. This solution is not unanimously accepted by Hungarian experts. The essence of the criticism concerning the regulation lies in the following: “This provision is based on the mistaken notion that the administrative action is the continuation of administrative procedure at the court. In an administrative procedure the client is subordinated to the administrative authority, which is replaced by the claimant – respondent equal relation in the administrative action, where the object of procedure is not the administrative matter any more, but the legitimacy of final administrative decision.”<sup>14</sup>

## 2. Appeal in small claims

“The »scenario« of the procedure of first instance may diverge - partly depending on the disputed amount – all over the world”.<sup>15</sup> The notion of “small claims” (called *bagatelle* cases) appeared in Hungarian civil procedural law in 1997 for the first time. However, their field of application was restricted by law to legal remedies. Small claims are actions in property law falling within the competence of local courts in which the amount disputed in the appeal does not exceed 200.000 forints or ten per-

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<sup>14</sup> GÁSPÁRDY, LÁSZLÓ: Quo Vadis Hungarian Civil Procedure Law? In *Studi di diritto processuale civile in onore di Giuseppe Tarzia*. Milano: Giuffrè Editore, 2005, 2674.

<sup>15</sup> *Ibidem* 2673.

cent of the claim stated in the petition. This way, when determining the amount, it is not the claim enforced by the action nor the one awarded or rejected by the first instance court that matter but the amount stated in the appeal.

By introducing rules of appeal relating to small claims, the legislator aimed at ensuring by law both the enforcement of the right to legal remedy and the constitutional requirement of the conclusion of lawsuits within a reasonable time limit (see point 1) while restricting the two constitutional rights or values reciprocally “in favour of each other”.<sup>16</sup> The regulation, on the one hand, restricts the possibility of challenging first instance decisions by appeal, on the other hand, it simplifies the appeal procedure concerning small claims. It restricts appeal as it is possible only on referring to the substantial violation of the rules of first instance procedure or to the mistaken application of the legal rule serving as the basis for conclusive judgement in the case. The substantial violation of a procedural rule means the violation of a legal rule which had influence on adjudging the case on the merits. In the second instance proceedings it is prohibited to claim new facts or submit new evidence. There is no such prohibition if the presentation of facts or the submission of evidence could not take place during the first instance proceedings as a result of the violation of a rule of procedural law or the mistaken application of the law by the court. [HCCP Section 256/C]. In this situation the presentation of new evidence is possible only within the circle and to the extent it was earlier rendered impossible by the mistake of the first instance court.<sup>17</sup>

### 3. Changes in the limits on evidence during the remedy procedure

Rules of appeal hardly changed between 1952 and the nineties, whereas in the second half of the nineties quick transformation of the legal institution started. The most important change was the alteration of the character of appeal. The legislator continuously narrowed down the possibility of the presentation of evidence and new facts during the appeal proceedings. Before the entry into force of Act LX of 1955 it happened regularly that the litigants presented essential evidence during the appeal. The second instance court was obliged to annul the decision of the first instance court for this reason several times. The bad faith conduct of the case by the party could be sanctioned only by imposing a penalty. The said Act narrowed down the unrestricted possibility of the presentation of new evidence significantly. Namely, if the party has failed to present his evidence despite the order of the first instance court, in the appeal procedure such evidence cannot be taken into consideration.<sup>18</sup> The prohibition of new facts or evidence appeared in 1997 for the first time in connection with small claims (see also point 4.2.). The prohibition or, at least, restriction of new facts or evidence became general two years later: in accordance with modified Section 235(1), during appeal it is admissible to refer to a new fact or present new evidence if the appellant

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<sup>16</sup> KÖRÖS (2006) op. cit. 497.

<sup>17</sup> KISS (1999) op. cit. 1015.; JUHÁSZ (2005) op. cit. 115-116.

<sup>18</sup> JUHÁSZ (2005) op. cit. 109-110.

learnt about it after the passing of the first instance decision, provided this fact or evidence, if considered, would have resulted in a decision more favourable for him. A new fact may be referred to, new evidence may be presented or the consideration of evidence disregarded by the first instance court may also be initiated if aimed at proving the unlawfulness of the first instance decision.<sup>19</sup>

At present, concerning means of evidence in the second instance proceedings, there is no restriction of the type appearing in the original text of Section 249(3) of the HCCP, which limited evidence during the appeal procedure before the Supreme Court to documentary evidence. However, this provision applied only for a few years after the entry into force of the HCCP.<sup>20</sup> On the contrary, there are restrictions concerning the scope of evidence during the second instance proceedings. If it becomes necessary to repeat or supplement the evidentiary proceedings which have already been conducted by the first instance court on a large scale, this may lead to the annulment of the decision (order of new trial). Annulment usually takes place in case the first instance court has not investigated the facts of the case or has not clarified the relevant circumstances required for deciding the case. Listening to one or two witnesses cannot generally be considered large-scale evidence. When judging the scope of evidentiary proceedings to be conducted during the second instance procedure, the scope of the evidentiary proceedings conducted by the first instance court should also be considered.<sup>21</sup>

Between 1992 and 1998, in accordance with Section 275(1) of the HCCP, when adjudging petitions for review the Supreme Court made its decision on the basis of the documents at its disposal and the documents submitted to it, and it could order the parties to attach or present further documents. Apart from this, there was no possibility of taking evidence. Act LXXII of 1997 brought about a change in the taking of evidence during review, it rendered it unambiguous that the taking of evidence is not possible since the review procedure is limited to the adjudication of a legal issue.

## V. The effect of the accession to the European Union on Hungarian legal remedies

For reasons of Hungary's accession to the European Union, Section 249 of the HCCP was incorporated into the HCCP by Act XXX of 2003. The Act is aimed at promoting the applicability of the preliminary ruling processes based on Article 234 of the Treaty establishing the European Community. During the second instance

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<sup>19</sup> Cp. NÉMETH, JÁNOS: Die Berufung im ungarischen Zivilprozeßrecht. In PRÜTTING, HANS: *Festschrift für Gottfried Baumgärtel*. Köln: Heymanns, 1990, 424; KENGYEL (2000) op. cit. 244.; JUHÁSZ (2005) op. cit. 111.

<sup>20</sup> HARSÁGI, VIKTÓRIA: *Okirati bizonyítás a modern polgári perben*. Budapest: HVG-ORAC, 2005, 26–27.

<sup>21</sup> BAJORY, PÁL: *Fellebbezés a polgári eljárásban*. Budapest: Közgazdasági és Jogi Könyvkiadó, 1987, 317.; FARKAS, JÓZSEF: *Fellebbezés*. In SZILBEREKY, JENŐ - NÉVAI, LÁSZLÓ (eds.): *A polgári perrendtartás magyarázata*. Budapest: Közgazdasági és Jogi Könyvkiadó, 1976, 1167-1168.

proceedings one may submit a separate appeal against the rejection of the petition initiating preliminary ruling proceedings. This provision has been applicable since 1 May 2004.

According to the explanation given the Act, this rule is necessary because there is no ordinary legal remedy available against the second instance conclusive judgement, within the framework of which the need for the initiation could be questioned. Under Hungarian law – as we have already pointed out – the possibility of review is strongly restricted, the unlawful omission of the initiation of preliminary ruling processes, in itself, does not serve as a ground for review.