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Sanctions against recidivists in the Hungarian Criminal Code – the “three strikes law”

The three strikes law was introduced in the Hungarian sanctioning system in 2010, as one of the first legislative actions of the government elected in the same year. The declared goal of the new legislation was the exclusion from the society of those who commit violent crimes again and again.¹ My lecture gives a short overview of the history of the legislation. After that, I examine the conformity of the three strikes law to the Hungarian Fundamental Law (which is the constitution of Hungary) and to various international treaties.

The Hungarian three strikes law – contrarily to the legislation in the USA and in Slovakia, where three strikes must only be applied in case of recidivism – has two branches. The severe sanctions shall not only be applied in case of multiple violent recidivism but also in some cases of concurrence of offenses.

Three strikes in case of multiple violent recidivism

The category of multiple violent recidivist was introduced in the Hungarian sanctioning system in 2009.² According to the modification, *multiple violent* recidivist is a multiple recidivist who committed a criminal offence involving violence against person at least three times. The relevant crimes (such as homicide, causing bodily harm, rape, robbery, etc.) were also exclusively listed in the Criminal Code (Btk)³. In case of multiple violent recidivism, the lower limit of the range of imprisonment applicable to the relevant crimes was increased. This modification was the precursor of the three strike laws as it defined the notion of multiple violent recidivist and listed the criminal offences including violence against person. The Hungarian Supreme Court declared that multiple violent recidivism is a special case of multiple recidivism, as such it necessarily includes all the relevant elements of its concept and, in addition, it requires that all the three offences involve violence against person.⁴

Megjegyzés [s1]: majd a további törvényi hivatkozásokat is ilyenre kellene átírni

Three strikes law in the narrower sense was introduced in 2010, as one of the most emphasized topic in the election campaign of the government elected in the same year:

Btk of 1978 Art. 97/A (2) In case of multiple violent recidivists, the upper limit of imprisonment applicable to the criminal offence that serves as the ground for multiple violent recidivism shall be doubled. In case this increased upper limit of imprisonment exceeds twenty years or the criminal offence concerned is punishable also with life imprisonment, the multiple recidivist shall be sentenced to life imprisonment.

On 1st July 2013, the new Criminal Code entered into force in Hungary. A very significant modification was made to the three strikes law. In case of multiple violent recidivism, the possibility of conditional release from life imprisonment must be excluded, which means that in these cases the application of whole life sentence is mandatory.⁵

Three strikes in case of concurrence of offenses

According to the above-mentioned Btk-modification of 2010, in case the concurrence of offences contains at least three criminal offences involving violence against persons, the upper limit of the most serious offence shall be doubled. If this increased limit exceeds twenty years or one of the offences constituting concurrence is punishable with life imprisonment, the perpetrator shall be sentenced to life imprisonment.⁶

The new Criminal Code has made significant corrections in the legislation of the concurrence. Now it is declared that these extremely severe sanctions are only applicable in case of real concurrence, the offences were committed by more acts in different times and each relevant violent offence has been completed.⁷

¹ Justification T/25 modification of Act Nr. IV of 1978, (the former Criminal Code)

² Act Nr. LXXX of 2009 2009/LXXX law

³ Act Nr. IV of 1978. Art. 137. 17.

⁴ BKv. 83/2010 (Opinion of the Criminal Board of Supreme Court)

⁵ Btk. Art. 44

⁶ Act Nr. IV of 1978 Art 85 (4)

⁷ Btk Art. 81 (4)

The criticism of the legislation

The sanctioning system of the Hungarian penal law is relatively determined. The legislature determines the type and the range of penalty applicable to a concrete criminal offence and the judge has the possibility to choose the penalty and impose the concrete duration within the legal frameworks.⁸ However, in the three strikes cases, it is obligatory to impose life sentence, the discretion of the judge is excluded or in case of concurrence of offences limited to determine the earliest possibility of conditional release⁹.

The real life sentence in general

The real life sentence was introduced in the Hungarian sanctioning system in 1998¹⁰. Until now, no decision has been made on this sanction by the Constitutional Court. Moreover, the new Fundamental Law of Hungary declares that real life sentence may be imposed in case of an intentional criminal offence including violence.¹¹ Legal scholars agree that this provision has either limitative or legitimating function: the penal power of the state is restricted regarding to most serious penalty on one hand, and providing a constitutional defence to this sanction avoiding the examination of the constitutional court on the other hand.¹² If we take a look at the latest case law of the European Court of Human Rights, it said in its latest decision that real life sentence without any possibility of revision and conditional release violates Article 3 of the European Convention of Human Rights and considered as inhuman or degrading punishment.¹³ With regard to these decisions the whole concept of the real life sentence must be supervised, including the mandatory case of multiple violent recidivism.

Mandatory life sentence in the three strikes cases

Life sentence with the possibility of conditional release does not violate Article 3 of ECHR because it has the possibility of revision.¹⁴ The most serious constitutional condemnation is the exclusion of the discretion of the judge. The judge does not have the right to take into consideration the social dangerousness of the committed act and the perpetrator, or the mitigating and aggravating circumstances. Many scholars say that the legislature should not intervene in the competence of the jurisdiction in such a severe manner. István Kónya, former Head of the Criminal Board of the Hungarian Curia (Supreme Court) said in 2010, just after the introduction of the three strikes law, that mandatory life sentence should be applied only if the criminal offence is punishable with life sentence on its own.¹⁵ In other cases, the imposition of life sentence should be optional, not obligatory. Mihály Tóth, professor of the University of Pécs says that the mandatory life sentence exceeds legislative power and it is a serious intervention in the jurisdiction.¹⁶ Notwithstanding the serious anxieties, the Constitutional Court has not made any decision on the three strike rules. The Hungarian Helsinki Committee, a human rights organization, applied to the ombudsman saying that three strikes law excludes the discretion of the judge and violates the principle of separation of powers, proportionality and non-discrimination.¹⁷ The report of the ombudsman was published in February 2014 concluding that the three strikes law excludes the discretionary power of the judge, does not provide possibility for individualization, that is, it violates the principle of separation of powers. The ombudsman also declared that if the imposition of life sentence in three strikes cases was a possibility not an obligation, the principle of separation of powers would not be violated.¹⁸ The ombudsman called the Ministry of Public Administration and Justice to make the requested changes in the legislation providing the conformity to the Fundamental Law and international treaties.

Three strikes rule: when the upper limit shall be doubled

The other form of the three strikes law is when the upper limit of the imprisonment shall be doubled. In this case we cannot speak about an absolutely determined sanction. In these cases we must examine two decisions of the Constitutional Court. In 1995 the Constitutional Court said that "the Constitutional Court does not have the right to judge the demands, necessities and aims drafted by the criminal policy, especially to judge if they are efficient or subservient."¹⁹ With regards to this statement, the three strikes law cannot be considered unconstitutional just

Megjegyzés [s2]: tényleg ezt mondja? Kár, mert ez nem jó. A téz-re vonatkozó alaptörvényi szabály pont a kínzás tilalma alól jelent alkotmányi kivételt. A többi rendelkezés alól azonban nem mentesít: pl. határozott tv. követelménye vagy az abszolúte határozott szankcióval kapcsolatos problematika; és nem kivétel az EJEK kínzás tilalma alól sem; de az alaptörvényi tilalom alól igen.

Megjegyzés [s3]: ennek mi a forrása? milyen kiadvány?

Megjegyzés [s4]: így mondta? vagy should?

Megjegyzés [s5]: since no constitutional complaint has yet been filed?

Megjegyzés [s6]: ezt büntetőjogi szövegekben a Criminal Code-ra szoktuk használni. Vagy egyértelművé tenném az előtte lévő mondatban (hereinafter referred to as CC), vagy még inkább kerülném.

⁸ Karsai/Szomora: Criminal Law in Hungary (Wolters Kluwer: Alphen an den Rijn 2010) p. 123-124.

⁹ Zalaegerszegi Törvényszék 3.B.27/2011/24. és Pécsi Ítéltábla Bf. I. 249/2012/7.

¹⁰ Act Nr. LXXXVII of 1998

¹¹ Fundamental Law, Szabadság és Felelősség (Freedom and Responsibility), Art. IV (2)

¹² Prof. Dr. Nagy Ferenc: Gondolatok az életfogytig tartó szabadságvesztésről in Magyar Jog 2013/5. p. 265-271

¹³ Vinter and Others v. The United Kingdom [GC], nos. 66069/09, 130/10 and 3896/10 and Magyar v. Hungary 73593/10

¹⁴ Vinter and Others v. The United Kingdom [GC], nos. 66069/09, 130/10 and 3896/10 p. 28

¹⁵ Dr. Kónya István: A három csapás bírói szemmel in: Magyar Jog, 2011/3. 132.

¹⁶ Tóth Mihály: Az új Btk. bölcsőjénél in: Magyar Jog 2013/9. 525-534. o.

¹⁷ http://helsinki.hu/wp-content/uploads/MHB_ombudsmani_inditvany_harom_csapas_201307.pdf downloaded: 2014.01.26.

¹⁸ AJB-5138/2013. (Report of the ombudsman)

¹⁹ 1214/B/1990.(VI.13) AB (Decision of the Constitutional Court)

because of their severity. Within the increased limits, the so-called mid-range rule²⁰ must be taken into consideration. In 1998, the Constitutional Court pronounced the mid-range rule constitutional saying that this is only a guideline for judges in case of applying fix-term imprisonment.²¹ Despite the existence of the mid-range rule, the judge has the opportunity and the obligation to consider the social dangerousness of the perpetrator and the offence, as well as the aggravating and mitigating circumstances. With regards to the aforementioned judgements, I suppose that this form of the three strikes law cannot be considered unconstitutional.

Three strikes in case of concurrence of offences

There are many controversial points in the legislation of the three strikes law applicable to the concurrence of offences. First of all, it should be noted that such laws do not exist in the US or Slovakian legislation which, however, are often referred to by the judicial government as examples of the three strikes law. The first version of this legal institution made the application of life sentence mandatory in case of any type of concurrence, so the judge may have had to sentence a first-time perpetrator to life imprisonment. The new Btk. made some corrections declaring that the violent offences creating the concurrence must be committed by three different acts in different times and each of the offences has to be completed. However, the constitutional concerns have not disappeared with these modifications. With regards to the concept of concurrence²², it has determinative importance that the different offences be adjudged in the same criminal procedure. If some of the offences are not detected on time or the court separates the proceedings due to practical reasons, the perpetrator may get a much more moderate sentence (in form of a so called subsequently aggregated penalty), while if the offences are adjudged in the same proceeding, mandatory life imprisonment must be imposed. Another problem is that this provision does not perfectly fit into the dogmatic system of Hungarian criminal law. Let me give you two examples: if a perpetrator kills two or more people, his offence does not create a concurrence because it is a delictum complexum and, as such, a qualified case of homicide. In this case, the imposition of life sentence is not mandatory.²³ But if the perpetrator commits two less serious violent crimes and, in addition, an armed robbery, life sentence shall be imposed without discretion. Second, this is the only provision of the Btk. which orders more serious punishment to a completed act than to the attempt. Regarding the previous example, if a perpetrator tried to kill more people but only one of them died, the three strikes rule is not applicable because this case embodies the attempt of the qualified homicide and, since only one person died, it is not completed.

Megjegyzés [s7]: ezt kivenném, mert a konkrét esetek statisztikai összehasonlításáról van szó, hanem az elméleti lehetőségek diszkriminatív voltáról (mert hogy ez tkp. az).

The ombudsman claims in his aforementioned report, that “the three strikes law in case of concurrence violates the constitutional principle of fair trial because it allows imposing different sanctions, different length of imprisonment even though the crimes committed and the other circumstances are the same just because the offences were not adjudged in the same criminal procession.”²⁴

Conclusion

The declared aim of the three strikes law could be supported. However, providing its constitutionality, a careful revision is inevitable. According to the ECtHR’s decision, the whole legislation of the real life imprisonment must be revised. In my view, the mandatory case should be deleted from the Btk. The first step was made on 3 April 2014 when the High Court of Appeal of Szeged suspended a criminal procedure requesting the opinion of the Constitutional Court about the constitutionality of the real life sentence.²⁵

I share the views of the cited scholars and the Hungarian Ombudsman regarding the three strikes law for concurrence. With regard to the eventuality of the adjudgement in the same criminal procedure, this provision is undoubtedly discriminative, violates the right for fair trial and as such it is unconstitutional. In a constitutional state it is not acceptable to impose much severe sanctions in very similar cases and on very similar perpetrators. Due to the constitutional and dogmatic concerns detailed above, I suppose that the three strikes in case of concurrence should be abolished.

Megjegyzés [s8]: ezt mindig átírtam: az egy eljárás valódi jelentése ugyanaz az eljárás, a külföldi nem fogja érteni, hogy miért a one-t használod, szerintem jobb a tartalmi fordítás itt, mint a szó szerinti.

Megjegyzés [s9]: szerintem csacsaságot ír az ombudsman: ez nem eljárási kérdés, a fair trial pedig tisztán eljárási alapelv, arra vonatkozik, hogy a büntetőeljárást hogyan folytatják le, s nem arra, hogy ott milyen anyagi jogi szankciókat kell alkalmazni. Itt anyagi jogi kérdéssről van szó, és ez szabály, ami az elkövetők között ésszerűtlenül, önkényesen különböztet, valójában a diszkrimináció tilalmát sérti, nem pedig a tisztességes eljárást.

Megjegyzés [s10]: pontosan, mert diszkriminatív (lásd az előző megjegyzésem)

²⁰ Btk. Art. 80 (3)

²¹ 13/2002. (III. 20.) AB (Decision of the Constitutional Court)

²² Btk. Art.6 (1)

²³ Tóth Mihály: Az új Btk. bölcsőjénél in: Magyar Jog 2013/9. 525-534. o.

²⁴ AJB-5138/2013. (Report of the ombudsman)

²⁵ http://index.hu/belfold/2014/04/03/nem_alkalmazhato_a_tenyleges_eletfogytiglan/ downloaded: 04/042014

that the application of the most severe sanction is an automatism based on the legislation. It is essential to take into consideration all the circumstances of the concrete case, the social dangerousness of the perpetrator and the act, and all in all, to provide a reasonable range of discretionary power for the jurisdiction.

The three strikes law can only achieve its declared goals after the necessary corrections have been made.

Megjegyzés [s11]: nem tudom, nem kell a legtágabb szerintem, inkább ezt írnám: reasonable range

Recidivism in different countries

	Germany	Turkey	Hungary
Legal background	Not in the Criminal Code Only in legal literature	Justification of the Criminal Code contains the general concept Differentiation only in legal literature	General concept and differentiation in the Criminal Code
Exceptions	-	Certain military offences Offences committed as a minor Certain offences committed abroad	Only intentional offences are relevant
Sanctions	Imprisonment + possibility of preventive detention if the perpetrator is still dangerous	Imprisonment + supervised release Imprisonment shall not be replaced by alternative sanctions	Increased upper limit of imprisonment Exclusion of certain benefits (e.g. conditional release) depended on the type of recidivism Mandatory whole life sentence (three strikes cases)
Discretionary power of the jurisdiction	Full + prognosis on the preventive detention by psychiatric experts	Full	Guidelines, increased ranges of imprisonment Exclusion (three strikes cases)
Summary	Individualization + treatment	Individualization	Repression