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10 years in the history of pre-trial detention in Hungary (2010–2019)

Introduction[2]

One of the most difficult parts of criminal procedure law is to regulate pre-trial detention. The most serious form of coercive measures is to break through the guarantees of personal liberty in order to ensure the success of the proceedings.[3] In Hungary, the regulation on pre-trial detention has been significantly amended on several occasions in the past ten years. This study will determine the content and directions for the development of these amendments.

The necessity of detention prior to criminal conviction has always been evident. Consequently, the Constitutional Court in the Decision no. 26/1999. (IX. 8.) ruled that pre-trial detention as a coercive measure does not preclude the rule of law and constitutional rights such as the presumption of innocence.[4]

In this lecture I would like to analyse the relevant procedural rule changes regarding pre-trial detention between the years 2010-2019. Over the past decade, there have been several significant changes in the legal framework for pre-trial detention, with statistically well-demonstrated results. In the year 2010 investigating judge ordered the most serious coercive measure in 5885 cases on prosecutor's motions ordering for pre-trial detention, this number was more than 6000 in 2013, and 3085 in 2018. 2019, the first full year of the new Criminal Procedure Act shows is around 3300. I believe this is a significant reduce:[5]

Year	Pre-trial detention ordered on prosecutor's motion
2010.	5885
2011.	5712
2012.	5334
2013.	6098
2014.	4836
2015.	4453
2016.	4199
2017.	3997
2018.	3085
2019.	3330

Important footsteps of the regulation on pre-trial detention in the last decade were the following:

1. Ensuring the Impartiality of the Court

In 2011 the decision 166/2011 (XII. 20.) of the Constitutional Court declared it unconstitutional for the investigating judge to take into account investigative tactical purposes when making decisions on pre-trial detention. It stated that introducing the institution of the investigating judge domestically, the legislator followed the continental solution, the main function of which was to enforce the procedural guarantees and the protection of the fundamental rights in particular. The responsibilities that fall within the jurisdiction of the investigating judge

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[3] Irk Albert: *A magyar büntető perjog vezérfonala.* Dunántúl Pécsi Egyetemi Könyvkiadó és Nyomda R.-t., Pécs, 1931, 96. o.

[4] Decision no. 26/1999. (IX. 8.) of the Constitutional Court, II.1.

[5] Official statistics by the Prosecution Service of Hungary: *Ügyészségi Statisztikai Tájékoztató – Büntetőjogi Szakág.* Legfőbb Ügyészség, Budapest, 2020, 57. p.

are mainly there to ensure fair criminal proceedings and this is guaranteed by the impartiality and independence of the judge. It must be made clear that the investigating judge is not obliged to take into account tactical factors of the investigative authority and the public prosecutor that can only be enforced during the investigation phase, therefore avoiding any suggestion of bias. Not only an actual partiality but also the mere appearance of partiality makes it impossible for the investigative judge to make decisions around the legality of the defendant's detention, in line with Article 5.3 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Other decisions of the Constitutional Court based on the objective test to exclude all judges involved in decision-making on pre-trial detention from later proceedings. These were Decision no. 34/2013. (XI. 22.) and Decision no. 21/2016 (XI. 30.). According to the Constitutional Court, Article 6.1. of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article XXVIII./1. of the Constitution ensures that every person has the right to have any charge against him or her, or any right and duty in litigation, adjudicated by a legally established independent and impartial court in a fair public trial within a reasonable period of time.[6] "*The independence and impartiality of the judiciary established by law is a general principle of law inherent in all major universal and regional international conventions for the protection of human rights.*"[7] The mere fact that the presiding judge took part in proceedings prior to indictment does not in itself place their impartiality in jeopardy, the European Court of Human Rights has confirmed in several of its decisions. Rather, it has to be examined whether the presiding judge needed to evaluate evidence, take a position on the defendant's involvement or the degree of involvement in the alleged crime during-making.

When considering pre-trial detention, the presiding judge has to consider whether there is reasonable suspicion that the accused has committed the alleged crime. The judge's position taken over the matter of reasonable suspicion indicates a belief that it is "highly likely" that the alleged crime was in fact committed by the accused or such evidence is available that supports the existence of a crime.

As with ascertaining guilt, examining the matter of reasonable, however, is not possible without evaluating the evidence available. The Constitutional Court therefore ruled that it is a constitutional requirement that a judge taking part in proceedings with regard to the arrest in the investigative phase shall be excluded from further judicial proceedings. This rule applies to both trial and appeal courts.

[6] The Fundamental Law of Hungary

[7] Decision no. 34/2013. (XI. 22.) of the Constitutional Court, IV.1.1.

Accordingly, as of 19th April 2017. the imposition of pre-trial detention or the extension of it is decided by the investigating judge prior to filing for indictment. Both the investigating judge and a judge presiding over a potential appeal is subsequently excluded from the proceedings of a trial court.

2. File access regarding pre-trial detention

The Criminal Procedure Act has provided file access for the defence to question the basis of pre-trial detention since 1st January 2014. This means, that the defence should learn about all evidence that supports the special reasons for the detention, according to the prosecutor. Before this, the Constitutional Court of Hungary explained in the Decision no. 166/2011 (XII. 20.), that if "*the investigating judge does not allow the counsel to access certain documents that could offend the Convention requirements in other ways in the habeas corpus proceedings*" according to the Nikolova-judgement from 1999 by the European Court of Human Rights. The violation of this rule was observed in cases against Hungary by the European Court of Human Rights, almost identically, word by word[8]. In the cases of XY versus Hungary[9], Hagyó versus Hungary[10], A.B. versus Hungary[11], and Baksza versus Hungary[12] the European Court of Human Rights condemned Hungary for the violation of art 5 of the Convention, with similar arguments.

In accordance with par (1) art 7 of the Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings (hereinafter referred to as the Directive), "*Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to* challenging *effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers*." After implementing the Directive, and 16 years subsequently the Nikolova-judgement, we have finally reached what we could have a decade and a half ago: the possibility to effective defence is ensured for the defendant and his counsel regarding decisions on detention.

[8] *'Equality of arms is not ensured if counsel is denied access to the investigation file in so far as it is essential in order effectively to challenge the lawfulness of his client's detention.'* [*XY versus Hungary*, resolution of 19 March 2013, point 50; *Hagyó versus Hungary*, resolution of 23 April 2013, point 68; *A.B. versus Hungary*, resolution of 16 April 2013, point 36; *Baksza versus Hungary*, resolution of 23 April 2013, point 47]

[9] *XY versus Hungary*, resolution of 19 March 2013 (case no.: 43888/08)

[10] *Hagyó versus Hungary*, resolution of 23 April 2013 (case no.: 52624/10)

[11] *A.B. versus Hungary*, resolution of 16 April 2013 (case no.: 33292/09)

[12] *Baksza versus Hungary*, resolution of 23 April 2013 (case no.: 59196/08)

3. New Act on Criminal Procedure – a new approach

The Act XC of 2017 on Criminal Procedure (hereinafter referred to as the Criminal Procedure Code), entered into force on 1st July 2018, introduced a significant change in the system of coercive measures affecting personal liberty. Under our previous criminal procedure law, the (pre-) arrest-centric approach required the court to justify why it is applying a less coercive measure instead of arrest. The new act on criminal procedure breaks through this regulation. The court now has to justify why the aims of the coercive measure can only be achieved by the most serious one. Why it is not enough to "merely" order house arrest or injunction to stay away. The imposition of the requirements of necessity, proportionality and graduality implies that the court, when assessing coercive measures affecting personal liberty, must justify in its decision how the general and special conditions for ordering coercive measures are met or why they are missing.

"The principle of gradation means that coercive measure requiring higher restrictions can be applied by the authorities only when the objective of the proceedings could not be attained by other action requiring less restrictions."[13]

The aims of pre-trial detention are inserted by the legislator under the Sec. 277. Par. (4) of the new Code:

The detention shall be made to ensure the presence of the defendant, to prevent the imposition

or refusal of evidence, or to prevent crime-repetition, if, in particular

a) the nature of the offense,

b) the status and interests of the investigation,

c) the personal and family circumstances of the defendant,

d) the relationship between the defendant and the person involved in the criminal proceedings or another person,

e) the behaviour of the defendant presented before and during the criminal procedure regarding the personal liberty with an affecting judicial licenced compulsory provision desired aim restraining and criminal supervision cannot be ensured.

However, in my view, Section 277 para (4) point (b) of the Criminal Procedure Code conflicts with the 166/2011. (XII. 20.) decision of the Constitutional Court, as it prescribes that the investigating judge must take into account the circumstances and interests of the investigation when ordering pre-trial detention, which is clearly unconstitutional and contrary to an international treaty.

The detention of the defendant may take place under the under-mentioned conditions under the Sec. 276. Par. (2):

a) to ensure to presence of the defendant, if

aa) the defendant has escaped, or has attempted to escape, or absconded from the court, the prosecutor, or the investigating authority, or

ab) there is reasonable cause to believe that the defendant will be inaccessible during the criminal procedure, especially the defendant would escape or abscond;

b) to prevent the obstructing and jeopardising the evidentiary procedure, if

ba) for the reason of frustrating the evidentiary procedure, person involved in the criminal proceedings or another person was intimidated or influenced, or evidences and documents and electronic data was destructed, falsified or secreted by the defendant, or

bb) there is reasonable cause to believe that the defendant would endanger the evidentiary procedure, especially the defendant would intimidate or influence person involved in the criminal procedure or another person, or would destruct, falsify or secrete evidences, documents and electronic data;

c) to prevent the crime-repetition, if

ca) the defendant continued to commit the criminal offence made the subject of the investigation after the defendant was suspected, or the defendant was suspected of another criminal offence punishable by imprisonment, or

cb) there is reasonable cause to believe that the defendant would accomplish the attempted or planned criminal offence, or would continue to commit the criminal offence made the subject of the investigation, or would commit another criminal offence punishable by imprisonment.[14]

Summary

In conclusion, it might be said that the much-criticized practice has been significantly affected by several decisions of the Hungarian Constitutional Court, the adoption of an EU directive and a new Criminal Procedure Code with EU compliant legislation. The General Explanations on the new Act on Criminal Procedure states that "*Meeting the requirements of the Fundamental Law of Hungary and the obligations of international law and EU law obviously mean a safeguarding minimum.*" In Hungary the case law of the European Court of Human Rights is reflected more and more both in the judgements of Hungarian courts and in the guidelines of higher courts but the difficulties of establishing interpretations in harmony with the case law of the European Court of Human Rights are common.

[13] Robert Bartko – András Payrich: *Comparative Study on the Pre-trial Detention with Reference to the New Hungarian Code on Criminal Procedure.* International and Comparative Law Review, 2017, vol. 17, no. 2, p.171.

[14] *Id.* p.173.