

## Károly Bárd

THE DEVELOPMENT OF HUNGARIAN CRIMINAL  
PROCEDURE BETWEEN 1985 AND 20051. THE EVOLUTION OF HUNGARIAN CRIMINAL  
PROCEDURE LAW FROM THE 1980s UNTIL  
THE TRANSITION

Fifteen years after the political transition the transformation of the Hungarian law of criminal procedure might come to an end. Since January 2003, Act XIX of 1998 (hereinafter, the '1998 Act or Code') – replacing the previous Code on Criminal Procedure<sup>80</sup> – has been applicable although, according to the original plan of the legislature, it should have already entered into force in 1999. However, the adoption of the Act was followed by the parliamentary elections, and the new Parliament postponed the date of entry into force, while it amended several of its key provisions.<sup>81</sup> After the elections in 2002 the text of the Act was again subject to major changes, and the government introduced another bill. Should this be adopted, the Act on the Code of Criminal Procedure may again approximate to the original 1998 version.

The rugged fate of the 1998 Act anyway indicates that the consensus on the direction of the reform of the criminal procedure, set out on the door-step of the transition, broke down after a few years. The consecutive amendments show the close linkage of the system of criminal procedure to political ideologies, and also proved that theoretical considerations can be successfully played down by the practitioners' short-term interests and the reflexes inherited from the past.

In the present study I outline the development of Hungarian criminal procedural law mainly in the period following the transition. For the very reason of constraints of length, I was compelled to choose some aspects along which the evolution can be illustrated. I assess the development of Hungarian criminal procedural law in the light of those objectives and principles that were set forth by the then government in 1994.<sup>82</sup> Beside the review of the legislative procedure, I endeavour to reveal the reasons triggering the changes. Among these, I will demonstrate the impact of the case-law of the European Court of Human Rights (hereinafter, ECtHR), and I try to answer the question to what extent our procedural law in its present form is in accordance with Strasbourg jurisprudence. Besides showing the influence of the European Convention on Human Rights (hereinafter, ECHR) on Hungarian legislation, I elaborate on some important decisions of the Constitutional Court relating to the criminal process. Before turning to the

80. Act I of 1973.

81. Act I of 2002.

82. Government Resolution 2002/1994 (II.14) on the Concept of the Criminal Procedure.

analysis of the legislation after 1990, I shortly look at the situation preceding the transition.

The almost incredible speed of the political changes can be clearly tracked on the modifications of our criminal procedural law from the mid 1980s. On the 1987 amendment of the 1973 criminal procedure code, which from a technical point of view was quite correct at the time of its adoption (1973), there was no trace of any rule-of-law spirit; the changes aimed at increasing the efficiency of the criminal justice system and not at strengthening the guarantees. The primary goal of the legislature was to accelerate the process: the number of cases coming under the simplified procedure was increased, by the Act the investigation time limits were repealed and prosecutors were encouraged to use the possibility of bringing the accused directly before the court without a formal indictment. In addition the amendment extended the sanctions that could be imposed without trial through penal order.

In 1989, contrary to this, the amendment to the code not only attempted to bring the Hungarian regulation in line with the assumed international human rights obligations, namely with the UN International Covenant of Civil and Political Rights (hereinafter, ICCPR), but in many ways it guaranteed rights for the accused and defence counsel above the European average.

The amendment prescribed that the decision on pre-trial detention and the provisional committal of defendants of unsound mind was to be ordered exclusively by a judge and that the justification of these coercive measures had to be reviewed periodically *ex officio* at shorter intervals. It also ordered that judgment had to be pronounced publicly in every case; it ordained that the defendant<sup>83</sup> was to be informed of his/her right to remain silent, and that the violation of the right to silence as well as the functional provisions ensuring its observance<sup>84</sup> resulted in the fact that the defendant's statement could not be taken into consideration as evidence. The rights of the defence in the phase of investigation were broadened: defence counsel acquired the right to be present at the examination of all witnesses and to put questions directly to his/her client interrogated as a suspect by the investigating authority and to witnesses when examined. Since the 1989 amendment, it has also been prohibited to monitor the written and oral communication between the defence counsel and the defendant. The amendment significantly narrowed the jurisdiction of military courts and laid down the prohibition to use evidence obtained in violation of the law.

Thus, the 1989 amendment on several points went beyond the requirements set forth in the ICCPR or in the ECHR: none of the documents prescribes, for example, that the presence of the defence counsel shall be ensured when witnesses are examined during investigation, or that unlawfully obtained evidence should be excluded and neither the UN Human Rights Committee's nor the ECtHR's case-law sets such requirements. It could be expected that the new political

83. I use the term 'defendant' to cover both the suspect and the accused.

84. Both the information on the right to silence and the suspect's answer had to be included in the file and had to be signed by the suspect. The 1998 Code contains an identical provision.

leadership with reference to the increase in criminality experienced after the change in the political regime and the need to fight it more effectively, would try to revoke the provisions restricting the powers of the law enforcement agencies or to narrow their scope.

This is how it happened but law enforcement and the courts, even before the legislative intervention, successfully softened the 'radicalism' of the provisions introduced in 1989. The police, for example, by late notification often kept defence counsel away from the witness examinations; the rule on the exclusion of unlawfully-obtained evidence was deprived of its practical significance by the Supreme Court. The Supreme Court in numerous decisions argued that the provision adopted in 1989 should not be interpreted as a general exclusionary rule but merely prohibited statements acquired through coercion from being considered – as it was also forbidden by the original text of the 1973 code.<sup>85</sup> The reservations against the above-mentioned provisions led to the result that the new 1998 Code did not adopt them. It provides instead that, during the investigation, defence counsel can participate in the examination of witnesses only exceptionally and the provision on the unconditional exclusion of illegally-obtained evidence was replaced by a provision, which gives a broad discretion to courts.<sup>86</sup>

The Hungarian Supreme Court – shortly after the entry into force of the 1989 amendment – also made sure that the courts, when ruling on pre-trial detention, exercised sufficient self-restraint and did not complicate the work of the investigatory authorities. Interpretive Statement (*BK Állásfoglalás*) No. 122 of the Supreme Court's Criminal Division emphasized that, even though the judge could not avoid considering the strength of evidence supporting the reasonable suspicion – when deciding whether the motion to order the suspect's pre-trial detention was well founded – he could not take a stand on the conclusive force of the evidence submitted by the prosecutor. Thus, 'the existence of the reasonable

85. The Supreme Court in Judgement 1996 BH 246 – citing the ministerial Explanatory Notes to the 1989 amendment – argued: Art. 60(2) of the Criminal Procedure Code states that 'no one shall be forced to testify through coercion, threat or similar methods'. The original text of Act I of 1973 did not specify whether the statement or testimony obtained through coercion could be used. This gap was filled when the 1989 amendment to the 1973 Code added a third paragraph to Art. 60 declaring that evidence obtained through violation of the provisions of the Code might not be considered. According to the Supreme Court, 'the amended text of the Code does not leave any doubt that Art. 60(3) contains the cogent sanction for the breach of the procedural behaviour defined in Art. 60(2)'. See also Supreme Court Judgement 1997 BH 342: 'According to Art. 60(3) of the Code on Criminal Procedure the evidence taken in violation of the provisions – meaning Art. 60(2) – of the Code on Criminal Procedure cannot be considered'. For the sake of completeness, I note that in that in some court decisions the scope of Art. 60(3) is interpreted broader. For an analysis of the courts' jurisprudence, see K. Bárd, '*Demokrácia – tisztességes eljárás – megismerés a büntető perben*' (Democracy – Fair Trial – Recognition in the Criminal Trial), in Á. Farkas (ed.), *Emlékkönyv Kratochwill Ferenc tiszteletére* (Memorial Book Published in Honour of Ferenc Kratochwill), (Bíbor Kiadó, Miskolc, 2003), pp. 90–98.
86. According to Art. 78(4) of the 1998 Code: Facts that result from evidence obtained by the court, the prosecution, or the investigatory authority through a criminal offence, other prohibited methods, or through substantial impairment of the participants' procedural rights, cannot be taken into consideration.

suspicion as the so-called general precondition of pre-trial detention shall be clarified without assessing the strength of evidence presented by the prosecutor in support of the suspicion'.<sup>87</sup>

After radically narrowing down the scope of the military criminal procedure in 1989, the range of offences that fell under this special procedure was extended again. The 1989 amendment restricted the scope of this special procedure to military offences committed by soldiers but, as a result of the amendments issued in the first half of the 1990s, the jurisdiction of military courts was broadened again. The scope of the military criminal procedure was further widened by the 1998 Code so that today, beside military offences, 'civil' offences committed by members of the armed forces and crimes committed by the prison staff during or in relation to duty also fall under the military criminal procedure, just as before the 1989 amendment.

## 2. RECONCILING THE HUNGARIAN CRIMINAL PROCEDURE WITH THE STRASBOURG CASE-LAW

At the same time, the provisions that were adopted in 1989 in order to harmonize Hungarian criminal procedure with the assumed international obligations have not been changed. The 1989 amendments aimed at creating conformity with the provisions of the ICCPR; the ECHR and the case-law of the European Commission and the ECtHR was rather unknown even among experts at that time. Making Hungarian law compatible with Strasbourg case-law was put on the agenda after the country's accession to the Council of Europe. For the systematic screening of the Hungarian legal system on its compatibility with the ECHR, an interdepartmental committee was set up and the result of the analysis was already made accessible for the general public in 1992.<sup>88</sup>

Before summarizing the result of this analysis and the provisions meant to harmonize Hungarian criminal procedure with Strasbourg case-law, I shortly elaborate on the difficulties that legislators faced when they 'transplant' ECHR case-law. The ECtHR always decides on individual applications and is authorized only to deliver a judgment on the violation of the ECHR in the particular case. In its decision, the ECtHR does not make an evaluation of the respondent state's law, so it does not assess whether the law is in accordance with the ECHR. It is for the national legislature to answer the question whether national laws guarantee that the measures and decisions of the authorities and courts are in accordance with the ECHR.<sup>89</sup> Afterwards the legislature must decide how detailed the 'transplantation'

87. 1992/4 BH 234.

88. T. Bán and K. Bárd, *'Az Európai Emberi Jogok Egyezménye és a magyar jog'* (The European Convention on Human Rights and Hungarian Law), (1992) 6/7 *Acta Humana* 1.

89. Of course, before the ratification of the ECHR only the judgments delivered against other states were available for the experts working on creating compatibility. When the lawyers in the Ministry of Justice before the ratification examined the Hungarian legal system and prepared the bills necessary for ensuring compatibility, they went through the ECtHR's judgments

of the Strasbourg case-law should be, what has to be regulated on the level of the general norm, and in which cases judges and other decision-makers (for the sake of brevity I will further on refer to judges only) can be trusted to guarantee conformity with the ECHR. This dilemma arises primarily in cases where a domestic rule does not compel judges to violate the ECHR, i.e., the rule can be applied both in accordance with and in violation of the ECHR.

If a provision in national law can be applied only in violation of the ECHR, the legislature usually has to intervene. The legislature in such cases may remain passive only if judges are entitled to give priority to international law – including the case-law of the international control organs – over domestic law, to apply the former and disregard the latter; however, it is merely the self-executing (directly applicable) rules of international law which offer this possibility. The legislature may also remain passive – at least temporarily – if judges have the opportunity to call upon, e.g., the constitutional court to decide whether the relevant domestic provision, which they should apply in the case pending before them, is in violation of the assumed international obligations of the country, provided that the constitutional court has the power to annul the problematic domestic rule; and further that the consequences of the decision, based on the law that has been declared unconstitutional, may be removed and the affected person is entitled to adequate compensation. In both instances, the legislature may remain passive on the condition that the judges are sufficiently familiar with Strasbourg case-law to recognize the suspicion of the discrepancy between international and national law.

Returning to what I was describing above, the ‘case-oriented’ approach of the ECtHR primarily confronts the legislature with a dilemma when the domestic norm is not in obvious violation of the ECHR. If the rule of national law can be applied both in line with and in violation of the ECHR, the legislature can take the risk: it might leave the law untouched in the expectation that judges will follow the ECHR-conform interpretation. This strategy can be chosen only in cases when judges know the Strasbourg case-law sufficiently well and are capable of offering an ECHR-conform interpretation to the domestic law.

If these conditions are absent, the legislature has no other option than to exclude the possibility of an interpretation contrary to the ECHR by amending the questionable provisions. This, of course, may require frequent amendments of legislation, will make the regulation casuistic and rigid, and will often have burdensome cost effects as well. Considering that the Hungarian judiciary only started to familiarize itself with Strasbourg case-law in the early 1990s, and it was not used to depart from established domestic jurisprudence, even if the ECHR-conform

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rendered against the ‘old’ members of the Council of Europe. They assessed whether the situation on which the complaint was based could have been resolved in an ECHR-conform way under Hungarian law or it would have resulted in an obvious violation. Similarly, the Constitutional Court refers to judgments that concern other states when it examines the ECHR-conformity and, through this, the constitutionality of laws. On the influence of the case-law of the ECtHR on the decisions of the Constitutional Court, see L. Sólyom, *Az Alkotmánybírászkodás kezdetei Magyarországon* (The Beginning of Constitutional Adjudication in Hungary), (Osiris Kiadó, Budapest, 2001), pp. 201–222.

interpretation would have called for departure, the legislature had to make significant amendments.

The new provisions adopted in 1994 that aimed at making the 1973 Code compatible with Strasbourg case-law brought about substantial changes in three areas.<sup>90</sup> In order to guarantee *the right to liberty and security* it prescribed that suspects might be kept in custody without a judicial decision only for 72 hours: if the judge were not to order pre-trial detention, the suspect was to be released.<sup>91</sup> Moreover, the 1994 Act ensured that at the hearing held in the matter of the pre-trial detention, the suspect and the defence counsel were to be presented with the prosecution's evidence and given an opportunity to reflect on it.<sup>92</sup> Similarly, the provision according to which the provisional committal of defendants of unsound mind was to be reviewed every six months, not only in the phase of the investigation – as required under the previous regulation – but also after the submission of the indictment, provided for a higher level protection of personal liberty.<sup>93</sup>

The amendment fulfilled the requirement flowing from the *presumption of innocence* and the *right to a public trial* by guaranteeing the right of suspects to contest the reprimand given by the prosecutor in the pre-trial stage. If the suspect were to complain against the discontinuation of the investigation coupled with the reprimand, the prosecutor must continue the investigation. In this case the prosecution may either terminate the investigation on a different ground (e.g., by finding that no criminal offence could be established) or bring the case before the court by indicting the defendant. Thus the prosecutor cannot apply a reprimand again, which by its very nature is identical with declaring the existence of the suspect's guilt without a judicial decision.<sup>94</sup>

The rules on compensation for pre-trial detention were also amended in line with the Strasbourg case-law on the presumption of innocence. According to the principle on which the change was based, compensation is payable in all cases when the defendant's guilt has not been established, thus not only when the criminal process has ended with the acquittal of the accused, but also in cases where the prosecutor has terminated the investigation or the court has discontinued the process based, for example, on the statute of limitation, the absence of a private motion (*Privatantrag*) or in the case of *res iudicata*. Only those cases constitute exceptions to this rule, where the court finds all elements of the defendant's criminal liability established but refrains from formally declaring him guilty, or where the defendant has the opportunity to 'enforce' a decision declaring his/her innocence but waives this possibility. This is the situation, for instance, when he/she accepts the discontinuation of the procedure based on an amnesty law or when he/she accepts the reprimand given in the pre-trial stages of the process.

90. Act XCII of 1994: hereinafter, the '1994 Act'.

91. 1994 Act, s. 6.

92. 1994 Act, s. 17.

93. 1994 Act, s. 7.

94. 1994 Act, s. 12.

Partly with regard to the presumption of innocence, partly to eliminate the inconsistency of the former regulation, the 1994 Act significantly broadened the number of cases of compensation for all kinds of deprivation of liberty served on the basis of a final judgment: since then compensation is due for imprisonment, for detention in juveniles' reformatory institutions and for forced medical treatment if the convict, on an extraordinary remedy, has been acquitted, sentenced to a less severe penalty or to probation or if the procedure against him/her has been terminated.<sup>95</sup>

At this point I also note that the Constitutional Court compelled the Hungarian Parliament to amend the rules on compensation, although conformity with the ECHR would not have so required. The Constitutional Court ruled that there had to be no difference between the amount of compensation for lawful but unfounded detention<sup>96</sup> on the one hand and for unlawful detention on the other.<sup>97</sup> In 2003 the Constitutional Court found that the provision of the Code of Criminal Procedure, which excluded compensation if 'the defendant tried to deceive the authority for the purpose of preventing the success of the investigation, or has otherwise attributably given ground to the suspicion of having committed the criminal offence', was in violation of the right to defence. Moreover, the Court claimed that the right to self-determination, derived from human dignity, was violated by the provision of the Code which excluded compensation for the deprivation of liberty, served on the basis of a final judgment, if the defendant failed to appeal against the first instance judgment.<sup>98</sup>

Finally, the 1994 Act aimed at creating compatibility with the ECHR and contained several provisions that were meant to guarantee the *equality of arms*. It provided that if the police or the prosecutor appointed an expert during the investigation, then – upon the request of the accused or defence counsel – the court was under the duty to appoint another expert for the same fact.<sup>99</sup> The Act also guaranteed that the accused and the defence counsel were to be informed of the fact that the prosecutor had filed an appeal and of the content of the prosecutor's motion submitted on the appeal of the defence.<sup>100</sup>

95. 1994 Act, s. 21.

96. This is the case, for instance, when pre-trial detention was lawful, the defendant, however, is acquitted.

97. *Dec. 66/1991 (XII.21) AB*. This judgement remitted the decision to the courts to rule on the grounds and amount of compensation. Previously courts examined these questions, but the final decision was taken by the minister of justice.

98. *Dec. 41/2003 (VII.2) AB*.

99. 1994 Act, s. 4. This rule does not apply in cases where the court itself also appointed an expert, or where the request was submitted in the appeal procedure.

100. 1994 Act, ss. 14 and 15. The Constitutional Court also contributed significantly to bringing Hungarian law into line with ECHR, Art. 6: several decisions provided for the respect for the equality of arms principle: see e.g., *Dec. 6/1998 (III.11) AB*, in which the Court annulled the provision that did not allow issuing copies of documents containing state or official secrets to the private individuals participating in the procedure, as it unconstitutionally restricted the rights of the defence and the 'equality of arms'; and also *Dec. 33/2001 (VII.11) AB*, in which the Court annulled the provision that required the acquisition of the prosecutor's motion on the

Since the systematic screening of the Hungarian legal system carried out in the 1990s, no similar analysis has taken place. However, the legislature has tried to draw the lessons that might be drawn from Strasbourg case-law in the course of preparing the comprehensive reform of criminal procedure. Mainly with regard to ECHR jurisprudence were powers – previously exercised by the prosecutor – assigned to courts in the pre-trial stage of the process in the 1998 Code. The new Code tried to reduce the frequency of the use of coercive measures curtailing the right to liberty and introduced provisions aimed at shortening the length of pre-trial detention. The later amendments of the 1998 Code were also partly triggered by ECHR case-law: the legislature attempted to draw the conclusions from the cases decided upon applications submitted against Hungary.<sup>101</sup> Despite this, the Code up to this day contains provisions the application of which might result in finding a violation against Hungary.

### 3. WORKS AIMED AT DRAFTING THE NEW CODE

Due to the amendments starting from 1989 by the mid-1990, the Hungarian criminal process was considerably transformed; however, it retained several features of the socialist-type procedural laws. First of all, in respect of the allocation of competencies, Hungarian criminal procedural law differed from the Western European model, as it assigned substantially a limited role to judges in the pre-trial process, while it guaranteed such powers to the police that were reserved for prosecutors in the Western-type continental mixed system. Other characteristics of the socialist model were also maintained: the Code of the mid 1990s did not attach too much importance to the formalities of procedure, underestimated lawyers' expertise, and only partly acknowledged the parties' right of disposing of the case.

It is typical of 'socialist' procedural laws that, with reference to the principle of substantive justice and by underestimating the requirement of legal certainty which forms part of the rule of law, they widely allowed lifting the binding force of final court judgments. That is why the Constitutional Court's decision in 1992 had

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disqualification of the Court, and in case of disqualification before appointing the competent Court.

101. On the basis of the case *Dallos v. Hungary* (ECtHR, Judgement of 1 March 2001, Reports of Judgements and Decisions 2001-II), Act I of 2002, s. 321(4) introduced – with regard to the rights set forth in ECHR Art. 6(3)(a) and (b) (everyone charged with a criminal offence has the right to be informed promptly of the nature and cause of the accusation against him, and to have adequate time and facilities for the preparation of his defence) – the rule: 'if the court, before delivering the final decision, finds that the legal qualification of the defendant's conduct may be different from that indicated in the prosecutor's indictment, the trial may be adjourned in order to guarantee the preparation for the defence'. The antecedent of the Act's amendment was the report of the European Commission on Human Rights finding a violation of the right to a fair trial. For a review and analysis of the *Dallos* case, see M. Tóth, *A Magyar büntető eljárás az Alkotmánybíróság és az európai emberi jogi ítékezés tükrében* (The Hungarian Criminal Procedure in the Light of the Constitutional Court's and the European Human Rights Court's Jurisprudence), (KJK-Kerszöv, Budapest, 2001), pp. 70–71.



such a great importance:<sup>102</sup> in this the Court found the so-called protest in the interest of legality,<sup>103</sup> as a kind of extraordinary remedy, to be in violation with the Constitution. The Court reasoned:

The requirement of the rule of law as to substantive justice may be attained within the institutions and through the guarantees ensuring legal certainty. The Constitution does not confer a right for 'substantive justice'; in the same way it does not guarantee that no judicial decision shall be unlawful. These are the goals and duties of the state under the rule of law. In order to accomplish these objectives the state must establish the appropriate institutions – primarily those providing procedural safeguards – and guarantee the implicated rights. The Constitution therefore confers the right to procedures necessary and, in the majority of cases, appropriate for the realization of substantive justice . . . The requirement of substantive justice and legal certainty are brought into harmony by the finality of judgments . . . on the basis of the priority of legal certainty. The finality of judgments, in its formal and substantive sense, is a constitutional requirement being part of the rule of law.

As a result of the Court's decision the reform of the appellate system became compelling.

Thus, starting to work on the new Code was unavoidable. The outline and the principles of the would-be Act were laid down by the government's resolution on the concept of the criminal procedure (hereinafter, 'Concept') in 1994.<sup>104</sup> As sources of the reform, the Concept identified the Hungarian procedural traditions, international trends (among them the jurisprudence of international human rights control organs), and the expectations formulated by the public towards the operation of the criminal justice system.

Among the Hungarian procedural traditions, the Concept stressed that the medieval Hungarian law never accepted the inquisitorial type of procedure to the extent as was the case in German or French law, and that the 1896 Code of Criminal Procedure, which was in force until the years following the Second World War, was significantly closer to the accusatorial model than the Act of 1973, which was in force at the time the Concept was drafted.

Among the international trends, the Concept referred to the differentiation of procedural forms, the spread of special procedures aiming at acceleration and respecting the parties' right of disposal, further to the European standard as reflected in the judgments of the ECtHR.

According to the Concept the social context, in which the new Code was being prepared and is going to operate, could not be ignored. It referred to the fact that as

102. *Dec. 9/1992 (I.30) AB.*

103. The 'protest' could be submitted by the Chief Public Prosecutor and the President of the Supreme Court if they were of the view that a final court judgment was legally incorrect or based on erroneous facts. Upon the protest, the Supreme Court could amend the judgment or quash it and refer the case back to the competent court for reconsideration.

104. Government Resolution 2002/1994 (II.14) on the Concept of the Criminal Procedure.

a legacy of the past the justice system had undergone a legitimacy crisis and the effects could not be eliminated in a short time. The community expected the criminal justice system to be not only efficient but also transparent and accountable.

The Government Resolution assigned the task of drafting the new Code on Criminal Procedure to the minister of justice along the following principles:<sup>105</sup>

- (1) In the criminal procedure the division of tasks and particularly the principle of separation of procedural functions shall be more prevalent than at present. The tasks of the police, the prosecution service and courts shall be clearly demarcated.
- (2) The standard type procedure shall be construed upon the doctrine that the question of criminal liability is to be decided in an adversary trial respecting the principle of immediacy (*Unmittelbarkeit*) and the parties' right of disposal.
- (3) The principle of collective decision-making shall be maintained, but the number of cases decided by single judges has to be increased.
- (4) For the protection of fundamental rights the judges' involvement has also to be guaranteed in the pre-trial phase.
- (5) The appeal system has to be worked out so that appeal is provided from both first instance and second instance court decisions.
- (6) In the criminal process the possibilities of the aggrieved party (victim) to enforce his/her claims, and his/her procedural rights shall be widened. Under appropriate conditions the victim shall be allowed to act as private accessory prosecutor.
- (7) In addition to the procedure that is deemed as the standard type – where the trial dominates – other simplified procedures shall be worked out, the adequate use of which allows for the differentiated settlement of cases.

With the involvement of scholars and practitioners a codification committee was set up, which handed over a draft text in June 1997 to the minister of justice. This draft served as the basis of the bill submitted by the government to Parliament. The new Code was adopted by Parliament in March 1998, and – as I have already indicated above – has been substantially amended since then.<sup>106</sup> Hereafter I examine how the principles set forth in the Concept addressing the reform of the relationship between the preparatory and the judicial phase of the process and envisaging the change in the structure of the trial have been realized in the provisions of the Act.

105. The Concept finally proclaimed that for the success of the procedural law reform organizational deficiencies (such as the problems of the selection and participation of lay assessors or the deficiencies in the operation of *ex officio* appointed defence counsel) had to be solved.

106. Act XIX of 1998 on the Code of Criminal Procedure: hereinafter, 'the 1998 Code'.

#### 4. THE RELATIONSHIP BETWEEN THE INVESTIGATION AND THE TRIAL

The Concept emphasized the fact that, considering the amendments after 1989, the new Code could be constructed pursuant to two different models. One option was that the legislature further increased the role of the judiciary and the rights of suspects and defence counsel in the preparatory phase, thus creating a procedure close to the so-called 'neo-inquisitorial model'. This model necessarily entailed reintroducing the institution of the investigating magistrate; moreover it required the broadening of the traditional powers of the magistrate: as a consequence, it would result in reducing the importance of the trial stage.

The other option was a model based on the 'primacy of the trial', which would strengthen the adversarial elements in the judicial phase of the process. The Concept, with reference to Hungarian traditions, international trends and public expectations towards the criminal justice system, opted for this latter solution. I repeat point 2 of the Government Resolution: 'The standard type procedure shall be construed upon the doctrine that the question of criminal liability is to be decided in an adversary trial respecting the principle of immediacy (*Unmittelbarkeit*) and the parties' right of disposal'.

No doubt, several provisions of the Act strengthen the importance of the trial conducted, according to the immediacy principle compared to the preceding procedural phases. Thus, for example, breaking with the 'socialist' doctrine that emphasized the equal importance of the investigatory and the judicial stages of the process and demanded from the investigation that it establish all the relevant facts in accordance with reality, the 1998 Code provides:<sup>107</sup> 'the facts shall be established during the investigation to the extent that the prosecutor can decide whether charges are to be brought'. The Code also restricted the number of decisions that might be rendered on the merits prior to the trial: the court, without holding a trial, in the so-called preparatory stage (*Vorbereitung der Hauptverhandlung*) can only terminate the procedure for reasons that can easily be elucidated on the basis of the investigation files, but – contrary to the previous regulation – the court is not entitled to discontinue the procedure on such grounds that (by their nature) can only be clarified through the direct perception and evaluation of evidence presented in the trial. (Thus, the court, contrary to the earlier rules, may not discontinue procedure in the preparatory phase with reference, e.g., to the insufficiency of incriminating evidence, to self-defence or necessity.) It is also undoubted that, compared to the prior regulation, the 1998 Code contains more detailed rules for those cases where the court wishes to make use in the trial of and rely in its judgment on the defendant's or the witness' statement made at an earlier stage of the procedure.<sup>108</sup>

107. 1998 Code, Art. 164(2).

108. 1998 Code, Arts 291–296. Actually, the 1998 Code did not bring anything new in this regard; it rather lifted the existing jurisprudence to the level of law.

The provision, which makes a distinction between *reading-out* and *making reference* to statements made as a defendant or witness, serves the aim laid down at the beginning of the codification that the new Code was to put an end to the automatic reading-out of the files of the investigation, including the minutes recording statements, so the trial would not be confined to simply verifying the information gathered during the investigation. The statements made as a suspect during the investigation are to be *read out* in full only if the accused does not intend to testify at the trial or if, on a proper summons, he/she fails to appear at the trial or if his whereabouts cannot be determined and the procedure can be conducted in his absence.<sup>109</sup> In contrast, parts of the statement may be *referred to* when there is a contradiction between the statements made at and those prior to the trial.<sup>110</sup>

The distinction between the *reading-out* of statements and *making reference* to them makes sense only if different consequences attach to them. The legislature's concept was indeed that those statements, which can be read out may directly serve as the basis for the court's judgment, whereas in the case when the court makes reference to the earlier statement only the statement given by the accused trying to explain the difference between the earlier statement and the one given at the trial or perhaps his/her silence is to be used and referred to in the court's judgment on the merits. Judicial practice, however, does not follow this distinction and only sees a quantitative difference between reading-out and making reference to statements: in the interpretation of most Hungarian courts the former refers to the whole statement, while in the case of the latter only certain parts of the earlier statement are read out and relied upon.<sup>111</sup> But there are judges who do

109. 1998 Code, Art. 291(1).

110. 1998 Code, Art. 291(4).

111. This interpretation seems to be supported by the minister's Explanatory Notes given to clauses 289–292 of the bill: 'If the defendant makes a statement at the trial, the bill permits that the previous statement is referred to – which does not mean reading out the entire statement – in cases'. If the legislature had seen the only difference between reading out and reporting in this, then obviously it would have kept the wording of the 1973 and 1896 Criminal Procedure Codes. Both these Codes dealt with the *reading-out* of the statement in whole or in parts. (See Act I of 1973, Art. 203(4) or Act XXXIII of 1896, Art. 305.) The 1998 Code itself mentions the reading-out of the previous statement and parts of the statement in Art. 296(3): 'If the person to be heard as witness at the trial was heard as a suspect or an accused in an earlier phase of the procedure, his previously made statement or parts of it may be read out without his/her consent that are not covered by the exemption guaranteed in Art. 82(1)'. Accordingly, *making reference to* cannot be the same as *reading out parts* of the statement. I note that the German Code of Criminal Procedure (StPO) speaks about reading-out (*Verlesung*): if a witness or an expert states that he/she can no longer remember a fact, then the pertinent parts of the written record of his/her previous interrogation may be read out to refresh his/her memory (stop, Art. 253). Thus, one can accept the prevailing academic view that *Verlesung* is a special, additional form of examining documentary evidence, since according to the general rule, the contradiction or the facts the witness or expert cannot recall should be clarified through the examination of the person who has carried out the interrogation. According to the minority view, StPO, Art. 253 merely prescribes the conditions under which the attention of witnesses and experts can be drawn to their earlier statements: see G. Pfeiffer (ed.),

not even follow this distinction: several courts habitually read out the whole statement made during the investigation, though the 1998 Code clearly provides that 'parts of the earlier statement may be referred to only if the accused is addressed questions on facts and circumstances included in the file, or if the accused has made a statement on these facts and circumstances at the trial'. It is the duty of the presiding judge 'to ensure that reference to earlier statements does not go beyond what is necessary for establishing the facts'.<sup>112</sup>

The text of the 1998 Code – following the 2002 amendment – practically allows the courts to use the accused's statement made as a witness at an earlier stage of the procedure without restraint and, with this, it further limits the importance of the immediacy principle, albeit the wording suggests that there are constraints. According to the 1998 Code, Art. 291(2), if the accused was examined as a witness during the investigation, then the witness statement may be read out not only if the accused himself/herself so requests, as was envisaged in the original version of the Code. In the absence of such request, the testimony made as a witness can be read out if the court is satisfied that during the investigating authority rightly came to the conclusion, that in the absence of any witness privilege, there was no obstacle to interrogation and if the witness was warned of the duty to tell the truth and was advised of the legal consequences of perjury. This condition, however, is not a real restraint since, if the investigation authority fails to inform the witness of the privileges, his/her rights and duties, the statement cannot be considered anyway.<sup>113</sup> In summary, the 1998 Code declares that the statement made as a witness can only be read out if it can be used according to the general rules. Thus the new regulation does not give due consideration to the fact that the accused was interrogated in the phase preceding the trial in a different position, notably as a witness, who is under an obligation to testify and to tell the truth whereas an individual interrogated as a suspect may refuse to give a statement and even has the 'right to lie'.

Similarly, the Act does not set any special limitation on the use of the defendant's testimony given either as an accused or as a suspect in another criminal process, which thereby significantly weakens the immediacy principle: the only condition of using the statement made in another process is that the rules of the Code have been observed, so the statement could have also been considered in the other procedure.<sup>114</sup>

The Code's provisions on the protection of witnesses and victims also infringe upon the immediacy principle. The so-called particularly protected witness, whose

*Karlsruher Kommentar zur Strafprozessordnung und zum Gerichtsverfassungsgesetz mit Einführungsgesetz* (2nd ed., C. H. Beck, München, 1987), p. 102.

112. 1998 Code, Art. 291(5).

113. See 1998 Code, Arts. 82(2) and 78(4).

114. 1998 Code, Art. 291(3). But this provision sets a genuine limit: if the person to be examined as a witness at the trial was interrogated as a suspect or an accused at an earlier stage of the procedure, without his consent, his/her previously made statement or only those parts of it may be read out that do not fall under the scope of his right to refuse testimony.

identity cannot be revealed to the defence counsel and the defendant, naturally cannot be heard at the trial.<sup>115</sup> A witness, who has not turned 14 at the time of the hearing, cannot be examined either.<sup>116</sup> The investigating authority and the prosecutor may allow a witness to make his/her statement in writing and not orally and, in such cases, the court may read out the written statement instead of examining the witness. The court may also permit a witness, who previously testified at the trial, not to appear again but instead to provide a written statement.<sup>117</sup>

To sum up we can conclude that the Code allows the use of statements made at an earlier stage of the procedure at the trial within broader limits than the previous regulation, and it does not alter those provisions that almost unconditionally make it possible to read out documents prepared during the investigation or in other criminal proceedings.<sup>118</sup> Thus, the principle of immediacy prevails to a lesser extent than previously and since – contrary to the wording of the Act I of 1973 – the defence counsel, as a general rule, cannot be present at the witness' examination during the investigation,<sup>119</sup> the Code on the whole weakens the position of the defence. Several such situations might occur, where the court can base its judgments on the statement of witnesses, whose reliability could not have been questioned by the defendant and the defence counsel through direct confrontation in any phase of the procedure, although their right to do it is guaranteed by ECHR, Article 6.<sup>120</sup> In theory, it cannot be excluded that the judgment finding the defendant guilty is based exclusively or predominantly on such statements<sup>121</sup> – so the potential violation of ECHR, Article 6 is inherent in the new regulation.

115. 1998 Code, Art. 294.

116. 1998 Code, Art. 294. If the witness who did not turn 14 when he was examined during the investigation, but he did at the time of the trial, he may be examined only if it is particularly necessary. It is a guarantee rule that if the prosecutor considers that the examination of the witness less than 14 years of age at the trial may influence his development detrimentally, he requests his examination by the investigation judge (1998 Code, Art. 207(4)). The Code does not however exclude the use of minutes taken of the statement of the witness under 14, if the examination was not conducted by the investigation judge.

117. 1998 Code, Arts. 281(8) and 296(1)(e).

118. 1998 Code, Art. 301.

119. The defence counsel may be present at the interrogation of the suspect, at the examination of the witness only if he or the suspect requested the examination (1998 Code, Art. 184(1) and (2)).

120. According to ECHR, Art. 6(3) everyone charged with a criminal offence has the right – at least – to examine or have examined witnesses against him. The Code lays down rules only in relation to the especially protected witnesses – similarly to the Dutch regulation – that at least guarantee for the defence counsel and the defendant to ask questions in writing from the witness, with whom they will not have a chance to confront personally (1998 Code, Art. 263(3)).

121. The Code, contrary to the Dutch regulation, e.g., does not contain the rule that the judgement shall not be based exclusively or predominantly on the statement of witnesses, whom the defence counsel and the defendant could not question directly at any stage of the procedure.

## 5. THE DIVISION OF PROCEDURAL FUNCTIONS

As demonstrated, several provisions of the Code weaken the immediacy principle and therefore the adversarial nature of the process as well, even though the Concept envisaged a procedure which 'gives more weight to the adversarial principle'. Of course, the condition for the adversarial system, which is construed as a kind of battle between opposing parties, is that the participants contending against each other are present at the trial. However, there are still cases where the prosecutor does not take part in the trial: as a general rule, his/her participation in the first instance court procedure is mandatory only if the crime the defendant is accused of carries a prison sentence of at least five years.<sup>122</sup> Obviously, in the trial held without the prosecutor the principle of separating the procedural functions cannot be observed, although the Concept committed itself to strengthening this principle.<sup>123</sup> In such hearings the tasks that should be undertaken by the prosecuting party are inevitably incumbent on the judge and this can reasonably raise doubts as to his/her impartiality and objectivity. This is supported by the decision of the Constitutional Court delivered in 2002: the Court, with reference to the right to a fair trial and particularly to the requirement of judicial impartiality, annulled the provision of the Code which provided for the judge to call upon the public prosecutor, absent from the trial, should the possibility of extending the charges arise.<sup>124</sup>

Strengthening the principle of separation of procedural functions and judicial impartiality, and its appearance, relieving the judge of the tasks of the investigator were the reasons for the provision that replaced the system of judicial interrogation with interrogation by the parties at the trial. Already during the preparatory works, the practitioners' repugnance at the interrogation by the parties was perceptible although it had supporters among Hungarian scholars and in spite of the fact that interrogation through the prosecutor and defence counsel had been envisaged in the 1896 Criminal Procedure Code – though only as an optional form of interrogating witnesses.<sup>125</sup> The main reason for the practitioners' aversion was primarily their ignorance: most of them identified interrogation by the parties with the Anglo-American system of cross-examination, albeit in the former the accused does not take the stand as a witness and accordingly is not under the duty to tell the truth. Further in the system of party interrogation, there are no distinct rules for the 'examination-in-chief' on the one hand and for 'cross-examination' on the other. And finally the judge in the system of party interrogation retains his/her right to put questions to the witnesses and the accused following the examination by the parties, without any restraint.<sup>126</sup>

122. 1998 Code, Art. 241(1). About the history of the provisions allowing for trials without the prosecutor and the critique of the current regulation, see E. Bócz, 'A Be. újabb novellája elé' (On the Latest Amendment to the Criminal Procedure Code), (2005) 12 *Magyar Jog* 712.

123. See point 1 of the Concept.

124. Dec. 14/2002 (III.20) AB.

125. Act XXXIII of 1896, Art. 308.

126. For the differences between the Anglo-Saxon and continental rules of procedure see Á. Erdei, 'Az inkvizíciós és kontradiktórius vonások a büntető eljárási rendszerekben' (The Inquisitorial and Adversarial Features in the Criminal Procedural Systems) (1998) 4 *Jogtudományi Közlöny*

Act I of 2002 afterwards returned to the system of interrogation by the judge on the plea that in the course of the drafting process the reservations of experts 'as to the practical applicability of institutions alien to Hungarian traditions were not sufficiently taken into consideration'. 'In order to guarantee that the law is implemented and is accepted by practitioners' – according to the Explanatory Notes – 'the provisions of Act I of 1973 must be reintroduced, according to which persons to be heard at the trial shall be examined by the judge'. In the light of this reasoning, it is surprising that the amendment did not completely eliminate the interrogation by the parties but, after all, restricted it to the examination of witnesses and thus kept it as an option.<sup>127</sup>

It is partly the preservation of judicial interrogation that can be blamed for the prosecutors' continued practice to try to shift the responsibility of proving the charge to the judge. The bill submitted at the end of 2005 aimed to eliminate this practice and strengthen the accusatorial principle when it tried to define the requirements towards the indictment submitted by the prosecution. According to this, the indictment must be lawful and this not only means formal legitimacy, i.e., is it is not sufficient that the indictment is submitted by the competent public prosecutor. The lawfulness of the indictment also means that it has to meet the minimal substantial requirements. Following the guidance given by the Constitutional Court,<sup>128</sup> the bill considered the indictment to be lawful if 'the person entitled to bring charges in his/her submission to the court initiates a court procedure against an identifiable individual on the basis of precisely described facts, which constitute an act prohibited by the Criminal Code'. If the indictment fails to meet these requirements, the court (instead of setting a date for trial) will dismiss the case.<sup>129</sup> The court follows the same procedure if the indictment does not contain those elements that are prescribed by the Code, and the prosecutor does not rectify the omission despite the court's order.<sup>130</sup>

127.; K. Bárd, 'A büntető eljárási törvény tervezete az európai jogfejlődésben' (The Bill on Criminal Procedure within the European Legal Development) (1998) 4 *Jogtudományi Közlöny* 121. For the differences between interrogation by the parties and cross-examination, see T. Király, 'A magyar büntetőeljárásjog fél évszázados történetének vázlata' (The Outline of the Half-Century Development of the Hungarian Criminal Procedure Law), in T. Király, *Szemelvények ötven év büntetőjogi és más tárgyú tanulmányaiból, ahogy magukon viselik a korszak bélyegét* (Excerpts of Studies on Criminal Law and Other Subjects in the Last 50 Years as They Bear the Marks of the Era), (ELTE-ÁJK, Budapest, 2005), p. 25.

127. According to the 1998 Code, Art. 295(1): 'On the request of the prosecutor, the defendant and the defence counsel, the presiding judge may permit the witness to be examined first by the prosecutor and the defence counsel'. The original text of the Code provided that the defendant also had to be interrogated first by the parties, with the condition that he/she was examined first by the prosecutor.
128. *Dec. 14/2002 (III.20) AB*.
129. If the court finds out later that the charge is not lawful, it may dismiss the case at the trial as well: see clause 137 of the bill.
130. According to clause 120 of the bill: 'The letter of request addressed to the prosecutor may aim at rectifying the omissions of the bill of indictment, seeking, securing and examining evidence, and making sure that the evidence is available at the trial.'



The 1998 version of the Code intended to strengthen the adversarial character of the procedure by offering a possibility to the defendant at the beginning of the trial, before taking evidence, to make a declaration whether he/she sees any legal obstacle to holding the trial, whether he/she considers the charge to be well founded and whether he/she pleads guilty. The declaration is distinct from the defendant's statement as one of the means of evidence. With this the legislature wished to stress that the defendant was not only a source of evidence, but also a party to the process.<sup>131</sup> This provision did not last long even on paper: it was repealed in 2002 and the 2003 amendment did not reintroduce it.

## 6. THE PARTIES' RIGHT OF DISPOSAL – CONSENSUAL PROCEDURES

For the above-mentioned reasons, the parties' right of disposing of the case at the trial has not been strengthened. At the same time, the new law, compared to the earlier regulation, gives more power to the parties (the prosecution, the defendant and the defence counsel) to determine the form of procedure in the particular case. In all cases where the Code allows deviation from the principle of mandatory prosecution (legality), it is for the prosecutor to take the initiative: he is the one who can apply a reprimand or can decide not to indict the defendant conditionally for a probationary period.<sup>132</sup> But the prosecutor's decision in such cases becomes final only with the defendant's 'consent'. The presumption of innocence does not allow that a body other than the court declares someone guilty and in both cases, i.e., when the defendant is given a reprimand and when the prosecutor opts for suspending the indictment conditionally, the decision in fact reflects that the defendant is guilty of a criminal offence. Nevertheless, nothing prevents the defendant from waiving the judicial procedure, accordingly the reprimand and the suspension of indictment become 'valid' if the defendant takes cognizance of them and does not exercise his/her right to enforce the court procedure.<sup>133</sup>

The situation is similar with the penal order (*Strafbefehl*) that was also previously known in Hungarian law: the prosecutor – in case of an offence punishable with less than three years' imprisonment – may request the court to impose a

131. In Act XXXIII of 1896 on the Code of Criminal Procedure, the examination of the accused was regulated separately to the 'evidence-taking procedure'. For the reasons, see *Az 1892. évi február hó 18-ára hirdetett Országgyűlés képviselőházának irományai* (The Documents of the House of Commons of the Parliament Convened for 18 February 1892), Volume XXVIII (Pesti Könyvnyomda Rt., Budapest, 1895), p. 101.
132. According to the 1998 Code, Art. 222(1): 'The prosecutor in case of offences punishable with less than three years' imprisonment instead of bringing charges – with regard to the gravity of the crime and the extraordinary mitigating circumstances – may suspend the indictment for a period of one to two years, if it can be assumed that it will have a positive effect on the suspect's future behaviour.'
133. If the defendant submits a complaint and there is no room for terminating the investigation or, in case of applying reprimand for terminating the investigation on a different ground, the prosecutor brings charges (1998 Code, Arts. 197(2) and 227(1)(a)).

sentence without holding a trial. The court – if it agrees with the request – may impose among others a sentence of conditional imprisonment of a maximum of one year, a fine or a sentence of probation.<sup>134</sup> However, since everyone is entitled to a public trial if accused of having committed a criminal offence, the penal order becomes ‘legally binding’, if the accused waives his right to a public hearing. If the accused ‘submits an objection’ to the penal order, the court is under the obligation to hold a trial.

In case of the above-mentioned institutions, the defendant’s freedom to decide is limited: either he accepts the prosecutor’s offer or rejects it, and then the procedure is conducted according to the general rules. In contrast the so-called ‘waiver procedure’, which was unknown in Hungarian law before, is a truly consensual procedure, as it is not applied on a unilateral decision of the prosecutor (and the defendant can only take cognizance of it), but as a result of negotiations and agreement between the accuser on the one hand and the defendant and his counsel on the other. In this regard, this special procedure is similar to the institution of plea bargaining and guilty plea known in American law: the accused pleads guilty and waives his right to a hearing, and in return he can expect a significantly lower sentence than that which is imposed in the standard procedure.<sup>135</sup>

However, the rules of this consensual procedure are tailored to the principles of the continental procedural model. First, this special procedure is available only in cases where the crime carries a maximum sentence of no more than eight years’ imprisonment; in the case of the most serious crimes the right to trial may not be waived.<sup>136</sup> Furthermore, the waiver of the trial does not absolve the court of the obligation to explore and establish the true facts of the case. The court, in addition to verifying that the accused pleads guilty and waives his right to a trial, will also interrogate him. As a result of the interrogation, the court has to refer the case to trial not only if it has doubts as to the voluntariness of the plea, but also when it has concerns as to the trustworthiness of the confession, or when the statement given by the accused differs considerably from the statement made during the investigation.<sup>137</sup> Even if the defendant confesses and waives the trial, the court is bound to examine whether the prosecutor’s legal specification of the crime is correct; furthermore, the court has to switch to the standard procedure if it finds that the

134. The court may also impose so-called ancillary penalties, such as the withdrawal of a driving licence. The court may also administer a reprimand.

135. According to Criminal Code, Art. 87/C, in case of waiver the right to a trial, the term of imprisonment may not exceed:

a) three years in respect of crimes punishable by more than five years’ but less than eight years’ imprisonment;

b) two years in respect of crimes punishable by more than three years’ but less than five years’ imprisonment;

c) six months in respect of crimes punishable by imprisonment of up to three years.

136. Since the 2002 amendment of the 1998 Code, an exception to this rule is the case where the accused committed the offence in a criminal conspiracy and co-operated with the investigatory authority in the evidence of crimes committed by the criminal conspiracy or of other crimes, but his co-operation was not ‘rewarded’ with terminating the investigation against him.

137. 1998 Code, Art. 538.

conduct of the accused may qualify as a more serious offence than that which is indicated in the prosecutor's indictment.<sup>138</sup>

The experience gained so far with the 'waiver' procedure shows that practitioners still have reservations about this institution. The justice minister's Explanatory Notes to the 2002 amendment of the Act lists the waiver of the trial among 'those elements of the Code that are alien to Hungarian traditions'. This is partly true so far (and this may be a reason for the limited use of this special procedure) that those characteristics, which put pressure on all those involved in the negotiation, i.e., prosecutor, counsel and the accused to avoid the trial, such as the uncertain outcome of the trial due to the complicated rules of evidence, the incredibly broad discretion of the judge in sentencing or the pressure put on prosecutors who in order to be re-elected, have to prove their suitability through relatively high conviction rates, are absent in the Hungarian criminal justice system.

## 7. CONCLUSION

What has been materialized out of the Concept after more than a decade? Undoubtedly, those ideas have become reality that aimed at increasing the efficiency of the process: the competence of the single judge was broadened, the principle of expediency gained more importance than previously, the number of special procedures was increased and most of these special procedures are meant to ensure the speedy consideration of cases.<sup>139</sup> The position of the victim was strengthened: the institution of the private accessory prosecution was reintroduced.<sup>140</sup> The procedural rights of the victim are to be further widened by the mediation procedure proposed by the bill submitted at the end of 2005.<sup>141</sup> As I already referred to it, judicial competencies in the preparatory procedure were significantly broadened:<sup>142</sup> in line with the Concept the most serious coercive measures may be ordered exclusively by judges;<sup>143</sup> the secret gathering of data

138. 1998 Code, Art. 539(2).

139. Of the newly-introduced special procedures, besides the already-mentioned 'waiver procedure', the procedure against the absent accused also serves the speeding up of the procedure. Of the special procedures already known before, the penal order and bringing the defendant directly before a judge without a formal indictment also make it possible to have simpler and faster consideration.

140. Act XXXIII of 1896 on the Code of Criminal Procedure recognized the institution of the private accessory prosecution; it was repealed in 1954. The arguments and counter-arguments for the private accessory prosecution are reviewed by T. Király, *A Büntetőeljárás jog (Criminal Procedural Law)*, (Osiris Kiadó, Budapest, 2003), pp. 183–184.

141. T/18090.

142. For the tasks of the judge in the pre-trial stage, see the 1998 Code, Art. 207(2) – (5).

143. The judge takes the decision on pre-trial detention, prohibition on leaving the residence, provisional committal, searches in notary's and lawyer's offices or in medical institutions and the seizure of documents found there, withdrawing travel documents and acceptance of bail.

is similarly bound to a judicial decision; the terminated investigation may be continued on a judicial order; in cases where the evidence cannot be examined at the trial<sup>144</sup> or when this can be assumed, it is the judge who will examine the evidence in the phase of investigation in order to ensure that the evidence can be considered by the trial court. However, those aspirations – which proposed structural changes in the procedure and which would have inevitably resulted in the devaluation of the knowledge and skills acquired by practitioners during the time of the previous Code and which were likely to render the traditional roles of the professional actors of the administration of justice obsolete – have not been realized. Converting these ideas into reality was against the short-term interests of the legal profession, and the drafters of the Code evaded the confrontation because, over the last ten years, they lost the strength and perhaps the determination to push through the ideas they had believed in a decade before.

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144. This is the situation with the especially protected witness. The judge decides on declaring a witness especially protected, and he/she examines the witness outside the trial.