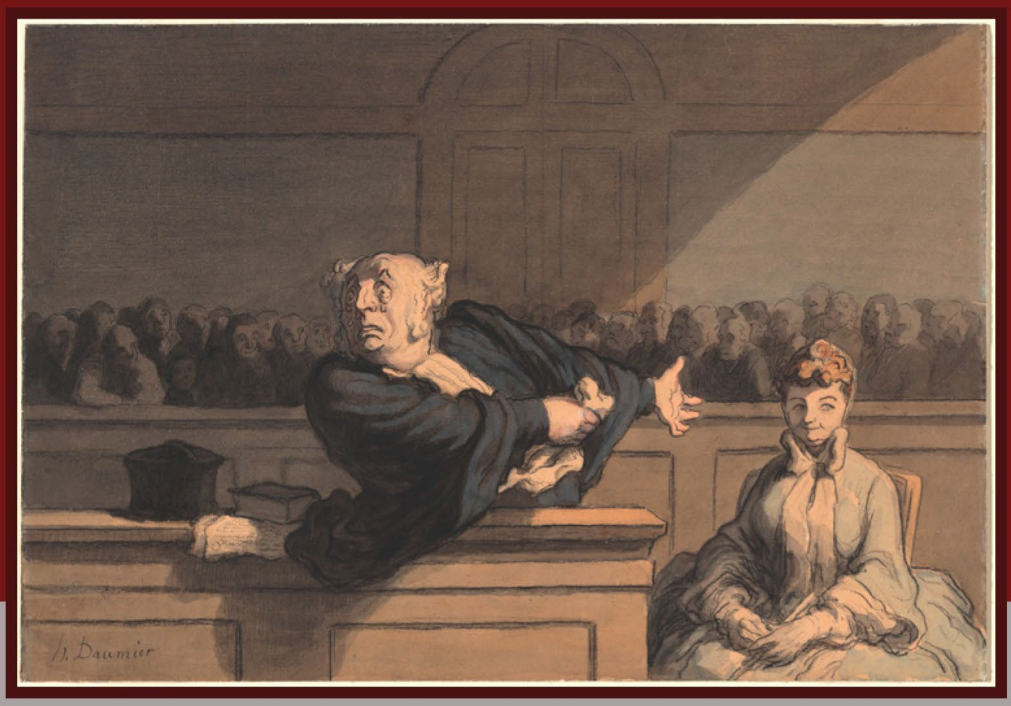

Viktor Bérces

CHAPTERS FROM THE SCOPE OF HUNGARIAN CRIMINAL LAW AND CRIMINAL PROCEDURE LAW

Sapientia Forum Iuris

VIKTOR BÉRCES

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INTRODUCTORY THOUGHTS

The objective of criminal proceedings are to make a decision about the criminal responsibility of a person who committed a crime. In Hungary only a court can establish guilt/criminality and impose a sentence on a person.

Usually, a criminal proceeding shall begin with an investigation, which shall consist of detection and examination. An investigation may be instituted on the basis of a crime report or of data that become known to the prosecution service or the investigating authority in its official competence, or to a prosecutor or a member of an investigating authority in his official capacity. One of the most important parts of this phase is the interrogating of the suspect, which can take place if a specified person can be reasonably suspected of having committed a criminal offence on the basis of available data and means of evidence. Based on the Hungarian Code of Criminal Procedure (hereinafter: CPC), at this stage the rights of the accused are already specifically protected. These persons shall be entitled to (1) receive information on his rights regarding the interrogation as a suspect in the criminal proceeding, (2) authorise a defence counsel, or move for the official appointment of a defence counsel, and (3) consult his defence counsel without supervision before the communication of the suspicion.

One of the important innovations of the CPC is the introduction of various alternative procedural options during investigations. These schemes are mainly based on the Anglo-Saxon model and have in common the possibility of shortening proceedings depending on the confession of the accused. Although these procedures actually reduce the role of evidence in the proceedings, they also significantly reduce the cost of justice.

If there is a court case, the prerequisite is, of course, still an indictment. A peculiarity of the Hungarian system is that it allows for four levels of adjudication, which gives more opportunities to challenge judicial decisions. Although this regulation can delay procedures, it is necessary for the quality of justice. Hence, in Hungary, there is also the possibility of retrial and review. A retrial may be granted regarding a criminal proceeding concluded with a final and binding conclusive court decision on the indictment, provided that new evidence is brought up regarding a fact, either covered or not covered in the underlying case, suggesting the likelihood that (1) the defendant is to be acquitted, a considerably more lenient penalty is to be imposed, or a measure is to be applied in place of a penalty, or the criminal proceeding is to be terminated, or (2) the defendant is to be found guilty, or a considerably more severe penalty is to be imposed, or a penalty is to be imposed in place of a measure, or a measure, that is considerably more severe than the measure applied in place of a penalty, is to be applied. A review shall be granted regarding a final and binding conclusive court decision on the indictment (1) if the rules of substantive criminal law were violated, or (2) if a procedural violation of law was committed.

In this monograph I also analyse certain provisions of the Hungarian Criminal Code (hereinafter: CC), including the relevant decisions of the Hungarian Supreme Court (Curia). I also consider it important to present the case-law of European Court of Human Rights

(hereinafter: ECrHR or Court), as it is important nowadays to ensure consistency between the practice of the Member States and the Court.

I would like to express my special thanks to my parents and my wife for their patience in making this book possible.

Budapest, 2024 April 1.

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associate professor
principal adviser
(Curia, Hungary)

CHAPTER I.

THE ORGANIZATIONAL SYSTEM OF HUNGARIAN CRIMINAL JUSTICE. STRUCTURE OF CRIMINAL PROCEEDINGS

1.1. Introduction: the character of criminal justice

Hungary's legal system has been heavily influenced by Romano-Germanic law (continental law) therefore an important characteristic of criminal law is the comprehensive codification and the dominance of statutes as the sources of law. It can be distinguished from common law systems' judge-made decisional law that gives primacy to prior court decisions: a previous legal case is binding for other courts when deciding different cases with similar facts. In Hungary case law is held to be secondary to statutory law.

a) Based on *The Fundamental Law of Hungary,* human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception. No one shall be subject to torture, inhuman or degrading treatment or punishment, or held in servitude.

Everyone shall have the right to liberty and security of the person. No one shall be deprived of liberty except for reasons specified in an Act and in accordance with the procedure laid down in an Act. Life imprisonment without parole may only be imposed for the commission of intentional and violent criminal offences. Any person suspected of having committed a criminal offence and taken into detention must, as soon as possible, be released or brought before a court. The court shall be obliged to hear the person brought before it and shall without delay make a decision with a written statement of reasons to release or to arrest that person. Everyone whose liberty has been restricted without a well-founded reason or unlawfully shall have the right to compensation.[1]

Everyone shall be equal before the law. Every human being shall have legal capacity. Hungary shall guarantee fundamental rights to everyone without discrimination and in particular without discrimination on the grounds of race, colour, sex, disability, language, religion, political or other opinion, national or social origin, property, birth or any other status.[2]

Everyone shall have the right to have his or her affairs handled impartially, fairly and within a reasonable time by the authorities. Authorities shall be obliged to state the reasons for their decisions, as provided for by an Act. Everyone shall have the right to compensation

1 Article II, III
2 Article XV, (1) – (2)

for any damage unlawfully caused to him or her by the authorities in the performance of their duties, as provided for by an Act.[3]

Everyone shall have the right to have any indictment brought against him or her, or his or her rights and obligations in any court action, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act. No one shall be considered guilty until his or her criminal liability has been established by the final and binding decision of a court. Persons subject to criminal proceedings shall have the right to defence at all stages of the procedure. Defence counsels shall not be held liable for their opinion expressed while providing legal defence. No one shall be held guilty of, or be punished for, an act which, at the time when it was committed, did not constitute a criminal offence under Hungarian law or, within the scope specified in an international treaty and a legal act of the European Union, under the law of another State. With the exception of extraordinary cases of legal remedy laid down in an Act, no one shall be prosecuted or convicted for a criminal offence for which he or she has already been finally acquitted or convicted in Hungary or, within the scope specified in an international treaty and a legal act of the European Union, in another State, as provided for by an Act. Everyone shall have the right to seek legal remedy against any court, authority or other administrative decision which violates his or her rights or legitimate interests.[4]

Courts shall administer justice. The supreme judicial organ shall be the Curia. Courts shall decide on criminal matters, civil disputes, the lawfulness of administrative decisions, the conflict of local government decrees with any other law and their annulment, the establishment of omission by a local government of its obligation based on an Act to legislate, and on other matters specified in an Act. In addition, the Curia shall ensure the uniformity of the application of law by courts, and shall make uniformity decisions which are binding on courts.

The organisation of the judiciary shall have multiple levels. The central responsibilities of the administration of courts shall be performed by the President of the National Office for the Judiciary. The National Judicial Council shall supervise the central administration of courts. The National Judicial Council and other bodies of judicial self-government shall participate in the administration of courts. The President of the National Office for the Judiciary shall be elected from among the judges by the National Assembly for nine years on the proposal of the President of the Republic. The President of the National Office for the Judiciary shall be elected with the votes of two thirds of the Members of the National Assembly. The President of the Curia shall be a member of the National Judicial Council, further members of which shall be elected by judges, as laid down in a cardinal Act.

An Act may provide that other organs may also act in certain legal disputes.

The detailed rules for the organisation and administration of courts and for the legal status of judges, as well as the remuneration of judges, shall be laid down in a cardinal Act.

Judges shall be independent and only subordinated to Acts; they shall not be instructed in relation to their judicial activities. Judges may only be removed from office for the reasons and in a procedure specified in a cardinal Act. Judges may not be members of political parties or engage in political activities. Professional judges shall be appointed by the President of the Republic, as provided for by a cardinal Act. Only persons having

3 Article XXIV (1) – (2)
4 Article XXVIII (1) – (7)

reached the age of thirty years may be appointed judge. Except for the President of the Curia and the President of the National Office for the Judiciary, the service relationship of judges may exist until they reach the general retirement age. The President of the Curia shall be elected by the National Assembly from among the judges for nine years on a proposal from the President of the Republic. The President of the Curia shall be elected with the votes of two thirds of the Members of the National Assembly.

Unless otherwise provided in an Act, courts shall adjudicate in panels. Non-professional judges shall also participate in the administration of justice in the cases and ways specified in an Act. Only professional judges may act as a single judge or panel chair. In cases specified in an Act, junior judges may also act within the powers of a single judge.

In the course of the application of law, courts shall interpret the text of laws primarily in accordance with their purpose and with the Fundamental Law. In the course of ascertaining the purpose of a law, consideration shall be given primarily to the preamble of that law and the justification of the proposal for, or for amending, the law. When interpreting the Fundamental Law or laws, it shall be presumed that they serve moral and economic purposes which are in accordance with common sense and the public good.[5]

The Prosecutor General and the prosecution service shall be independent and shall contribute to the administration of justice by exclusively enforcing the State's demand for punishment as public prosecutor. The prosecution service shall prosecute criminal offences and take action against other unlawful acts and omissions, as well as contribute to the prevention of unlawful acts. The Prosecutor General and the prosecution service:

– shall exercise rights in connection with investigations, as provided for by an Act;

– shall represent the public prosecution in court proceedings;

– shall supervise the lawfulness of penal enforcement;

– shall, as a guardian of public interest, exercise further functions and powers laid down in the Fundamental Law or in an Act.

The organisation of the prosecution service shall be led and directed by the Prosecutor General who shall appoint prosecutors. Except for the Prosecutor General, the service relationship of prosecutors may exist until they reach the general retirement age.

The Prosecutor General shall be elected by the National Assembly from among the prosecutors for nine years on a proposal from the President of the Republic. The Prosecutor General shall be elected with the votes of two thirds of the Members of the National Assembly.

The Prosecutor General shall give an account annually to the National Assembly of his or her activities.

Prosecutors may not be members of political parties or engage in political activities.

The detailed rules for the organisation and operation of the prosecution service and for the legal status of the Prosecutor General and the prosecutors, as well as their remuneration, shall be laid down in a cardinal Act.[6]

b) The rules of substantive criminal law are contained by the *Act C of 2012 on the Criminal Code (hereinafter: CC)*, which is divided into two main sections: General Part and Special Part. The General Part determines the scope of the Code, the essential categories

5 Article 25 - 28
6 Article 29

of criminal responsibility, the conditions and preclusions of culpability as well as the punishments and criminal measures. The Special Part defines those acts that are labeled as crimes.

The most essential concept of criminal law is the definition of crime. Pursuant to our Penal Code, a crime is an act perpetrated intentionally or – if the law also punishes negligent perpetration – by negligence, which is dangerous for society and for which the law orders the infliction of punishment.

Hungarian law makes a distinction between two types of crimes: a crime is either a felony or a misdemeanor. Felony is an act of crime perpetrated intentionally, for which the law orders a punishment graver than imprisonment of two years. Any other act of crime is misdemeanor. This means that a felony is generally considered to be a crime of high seriousness, while a misdemeanor is not, and the law treats them differently.

c) The rulings of criminal procedure law are placed in the *Act XC. of 2017 on the Hungarian Criminal Procedure Code (hereinafter: CPC)*.[7] The Code lays down which organizations and in what framework of procedural authority can judge the crimes described in the Penal Code. Basically, criminal proceeding starts with investigation. The investigating authorities (Police, National Tax and Customs Office) conduct the investigation independently or upon the order of the prosecutor. Their tasks include the exploration of the crime and the perpetrator besides tracing and securing evidence. The prosecutor acts as the public accuser. If the evidence gathered during the investigation confirms the guilt of the defendant without any doubt, the prosecutor files an indictment and represents the charge before the court. The court proceeds can be only based upon an indictment: the court may only ascertain the criminal liability of the person against whom the accusatory instrument was filed, and may only consider acts contained in the instrument.

The prosecutor in a Hungarian court is responsible for presenting all the evidence, both for and against the defendant. Judges are mostly bound by the law as written, not by the decisions of other judges.

Justice is administered in a four-level system by the Curia (the principal judicial organ), the Regional Courts of Appeal, the Regional Courts, and the District Courts. Judges are independent and subordinated only to Acts and shall not be instructed in relation to their judicial activities. Judges may only be removed from office for the reasons and in procedure specified in a cardinal act. Judges shall not be affiliated to any political party or engage in any political activity. The Curia is the principal judicial organ consisting maximum of

7 Construction of the CPC is similar to earlier laws, i.e. the static provisions (of the first eight Parts) are followed by dynamic rules (from the Ninth Part): First Part: General provisions (1-10. §); Second part: The court, the prosecutor and the investigating authorities (11-36. §); Third part: Participants of the criminal procedure (37-73. §); Fourth Part: General provisions regarding the procedural actions (74-162. §); Fifth part: The proof (163-213. §); Sixth part: Covert instruments (214-260. §); Seventh part: Data acquisition (261-270. §); Eighth part: Coercive measures (271-338. §); Ninth part: Preparatory procedure (339-347. §); Tenth part: The investigation (348-424. §); Eleventh part: General rules of court procedure (425-462. §); Twelfth part: Court procedure before charge (463-483. §); Thirteenth part: Pre-trial (484-513. §); Fourteenth part: Court procedure of first instance (514-588. §); Fifteenth part: Court procedure of second instance (589-616. §); Sixteenth part: Court procedure of third instance (617-625. §); Seventeenth part: Evaluation of appeal against the repeal of the court of second and third instance (626-631. §); Eighteenth part: Repeated procedure (632-636. §); Nineteenth part: Extraordinary legal remedies (637-675. §); Twentieth part: Separate procedures (676-836. §); Twenty-first part: Special procedures (837-843. §). Twenty-second part: Other procedures connected to criminal procedure (844-865. §); Twenty-Third part: Closing provisions (866-879. §).

113 judges. The Curia, inter alia, adopts uniformity decisions, which are binding on all courts, judges upon the appeals filed against the decisions of the Regional Courts and of the Regional Courts of Appeal, performs the analysis of the judicial practice in the cases judged upon with final force, publishes guiding resolutions and guiding decisions and judges upon the collision of a local government decree with another statutory provision and it may annul the local government decree.

There are five Regional Courts of Appeal. The Regional Courts of Appeal judge upon the appeals filed against the decisions of the District courts and the Regional Courts, and act in other cases referred to its scope of competence.

There are 20 Regional Courts that hear cases in the first instance – in the cases specified in an Act of Parliament – and judge upon the appeals filed against the decisions of the District courts and the administrative and labour courts.

The District courts proceed as a court of first instance. Labour and administrative courts also proceed as a court of first instance and they are courts on local level from 1 January 2013.[8]

One of the most fundamental principles of criminal process is the right to defense: every defendant may undertake his own defense, or may choose to be defended by a lawyer. In Hungary a lawyer as representative in criminal proceedings can act on behalf of the defendant before the competent authorities in any phases of the procedure: from the investigation period to the court trial(s). It is also important to notice that Hungarian criminal law permits the same counsel to represent more defendants, provided that they do not have adverse conflicts of interest. Normally, under Hungarian law the defendant gives the power of attorney to the lawyer but the trustee or a relative of older age of the accused person can also authorize the lawyer, or, in the case of foreign citizens the consular officer of their native country. The defendant may withdraw the power of attorney at any time, regardless of whether it was given by himself or another person. According to Hungarian law, the lawyer is to submit the power of attorney to the investigating authority, prosecutor or court before the process is begun. The lawyer can only exercise his procedural rights for the defense after submitting his power of attorney.

In particular cases the lawyer's participation is mandatory in criminal procedures, e.g. if the defendant is detained, does not speak the Hungarian language, or is unable to defend himself personally for any other reasons. In such situations when defense is compulsory and the defendant does not have an authorized lawyer the authority officially appoints a counsel for defense. The main duties of the defense lawyer are the following: (1) making contact with the defendant without delay; (2) using all legal means for the defendant in due time; (3) informing the defendant of these legal means and his rights; (4) urging the investigation of facts extenuating for the defendant or diminishing the liability; (5) providing a replacement if unable to attend at a procedural action where attendance is statutory.

In Hungary the lawyer is allowed to visit the penal institution, in which the defendant is detained – of course by showing respect for the internal rules of the institution.

8 https://hunconcourt.hu/about-the-hungarian-legal-system/ (08.03.2024.)

1.2. The investigating authority

During the preparatory procedure and the cleaning up the investigating authority proceeds independently, during the examining phase under governance of the prosecutor's office.[9] The head of the investigating authority is responsible for compliance with the prosecutor's office's instructions.

During investigation, we can differentiate general investigating authorities and special investigating authorities:

a) The general investigating authority is the police. The police proceeds in all cases unless stipulated otherwise by legislative provisions.

b) Special investigating authorities can only proceed in case of particular crimes determined in the law. Such extraordinary investigating authorities are:

– National Tax and Customs Office (e.g. tax fraud, violation of accounting order, bankruptcy fraud) which can also proceed as secondary investigating authority (i.e. crimes committed within its competence such as forgery of official documents, use of fake private documents, money laundering);

– the captain of a vessel (aircraft) on a commercial vessel with Hungarian nationality insignia abroad or on a civilian aircraft can proceed in case of a crime under Hungarian jurisdiction;

– military commander: if the investigation is not carried out by the prosecutor's office, the commanding officer can be the investigating authority[10], by way of the investigating body or the representing investigating officer.

Based on agreement between the heads, and with the approval of the prosecutor's office, more investigating authorities can cooperate in the investigation in a case or in a group of cases.

A separate law determines which of the investigating authorities can proceed (e.g. local (urban or district) police station, district (provincial or metropolitan) police headquarters and National Police Headquarters) in a given case. In case of jurisdiction issues between the police and the National Tax and Customs Office the proceeding prosecutor's office freely appoints the proceeding investigating authority. With the consent of the prosecutor's office, the investigating authorities can also carry out the investigation together.

With regard to the police organisation, Skolnic points out that it „tries to maintain a kind of routine of office, which is in fact a presumption of guilt. When the police arrest someone and suspect him, they believe that the suspect has committed the offence charged. They believe that because they are experts in criminal cases, they can distinguish guilt from innocence. At the heart of their view is that a police officer does not accuse innocent people. In this way, the police see themselves as merciful servants of justice."[11] This is essentially the position of Farkas, who argues that this presumption of guilt is consistently present in the procedure, since within each organisational structure there are conflicting interests at work (e.g. the prosecution is clearly motivated by the need to prosecute).[12]

9 CPC 31. § (2)
10 CPC 701. § (1)
11 Skolnic, J. H.: *Justice Without Trial.* New York, 1994, 112-113.
12 Ákos Farkas: The *Efficiency of Criminal Procedure.* Candidate thesis. Miskolc, 1997. 119.

Impartiality often seems to „break down" in the investigating authority's or prosecutor's style of questioning, manner, possible statements and remarks. At the same time, domestic judicial practice is consistent in the sense that public officials must exercise a high degree of caution in the choice of terms they use in criminal proceedings to indicate the guilt of the accused, especially when the accused has not yet been found guilty by a competent judicial body.[13]

1.3. The prosecutor's office

The prosecutor does not only carry out classic public prosecutor's tasks in the criminal procedure but also the following:

a) it carries out preparatory procedures and investigates;

b) it supervises, directs and instructs;

c) carries out prosecution representation tasks.

Of these functions the first two are connected to the investigation:

ad a) In certain cases the prosecutor carries out the preparatory procedure. The prosecutor also investigates: 1. the prosecutor can take over investigation in any case, 2. in certain cases only the prosecutor can investigate (crimes that fall under the scope of investigative competences of the prosecutor's office such as certain crimes committed by or affecting certain judicial employees; cases in connection with immunity; certain crimes of corruption, etc.).

ad b) In certain investigative phases, the prosecutor's supervision-direction-instruction scope of activities are governed differently in the CPC:

– during cleaning up the prosecutor overviews the legitimacy; within this framework it controls the legitimacy of the proceedings of the investigating authority; it can reverse unlawful decrees; it can call upon the investigating authority to amend the breach of the law and adjudge legal remedy requests, etc;

– during the examining the prosecutor does not only supervise anymore, but directs to: it can carry out all the supervisional measures. In addition it can specifically instruct or forbid the investigating authority to carry out procedural measures; it can change the investigating authority's decision and oblige the investigating authority to come to a decision, or to give report, etc.

– apart from the above mentioned the prosecutor also has the right to instruct, if the prosecutor carries out the investigation himself: in this case the prosecutor can instruct whichever investigating authority to carry out procedural measures within its field of jurisdiction, the crime prevention and counter terrorism units (CTU) can be requested to carry out procedural measures.[14]

The investigative jurisdiction and competence of the prosecutor is determined in separate legislation and highest prosecutor's normative instructions.

ad c) Tasks related to representation of the charge shall be discussed in the chapter relating to evidence of the judicial procedure.

13 RO 2001/12. 955.
14 CPC 349. § (2)

In three separate procedures we can observe specific rules for the prosecutor:

– There is only place for criminal procedure against juveniles by way of public indictment. The prosecutor appointed by the principal prosecutor's office proceeds in the investigation in private prosecution cases;

– There is no place for private prosecution in military criminal procedure. The prosecutor's tasks are carried out by the prosecutor's office appointed by the Supreme Prosecutor (military prosecutor or the public prosecutor appointed by the Supreme Prosecutor for military criminal procedures); in practically all instances, the prosecutor carries out the investigation with the exception of cases against non soldiers. The prosecutor can even proceed in cases concerning non-military criminal procedures.

– In a private prosecution procedure, the prosecutor is entitled to gain knowledge of the content of documents of the case, and if the representation of charges was taken over before the subpoena for personal hearing was issued the prosecutor can order an investigation.

During the preparatory procedure and investigation, next to the investigating authority, the prosecutor and the investigating judge, the following bodies can proceed:

– during preparatory procedure: bodies authorised to apply covert instruments;

– within the management of criminal assets, the body responsible for the handling of corpus delicti and criminal assets;

– before indictment and upon request of the prosecutor's office (investigating authority) the body of the investigating authority responsible for the recovery of assets carries out the procedure for the reconnaissance and insurance of objects seized.

Prosecution, defence and sentencing separate in the criminal procedure. The legal institution of exclusion serves this basic principle and the empowering of the unbiased proceeding of the authorities.

The exclusion rules can be divided into two main groups:

a) The *general conditions for exclusion* are valid for all authorities. These are usually conditions that ensure unbiased proceedings. That is why as a member of the investigating authority, the prosecutor or judge cannot proceed the subject of defence (or relative) on either the side of the defendant or the victim. He/she cannot be a member of the authority that takes or has taken part in the case as a witness or expert. Those of whom no unbiased assessment of the case can be expected for other reasons cannot proceed either (relative exclusion grounds). From the general exclusion grounds it is only the defence counsel that is excluded from the members of the authorities tied to the principle of contradictorium.

b) The *special exclusion grounds* can be linked to certain authorities, e.g.

– the person that proceeded in the case as a judge (and relatives) cannot proceed as a member of the investigating authority or prosecutor and vice versa;

– the member of the investigating authority or prosecutor's office who proceeded in the main proceedings is excluded from investigation for retrial;

– the member of the investigating authority who proceeded in the main proceedings is excluded from investigation in crimes against justice;

– who acted lower level as a judge in the case or is a relative of a judge acting or having acted in the case (also included, with the exception of the relative, the decision on permission for covert data collection).

The exclusion grounds against the head of the investigating authority and the prosecutor's office usually affects all members of the body. The general rule is that in case of exclusion grounds reported by other parties, the member of the authority can proceed in the case until his exclusion is arranged.

The body deciding on the exclusion:

– head of the investigating authority on the exclusion of a member of the investigating authority, the head of the superior investigating authority on the head of the investigating authority, the proceeding prosecutor on the head of investigating authority with national jurisdiction;

– the County Prosecutor General decides concerning the exclusion of prosecutors and head prosecutor of the local prosecutor's office and prosecutors of county prosecutor general's office, in all other cases the Supreme Prosecutor decides;

– in case of judges, the proceeding judge is appointed in administrative jurisdiction (if the judge himself reported the ground for exclusion), or another single judge of the court decides based on the documents (in case he/she is also concerned by the exclusion, the high court decides).[15]

1.4. Basic features of the hungarian judicial system

Pursuant to the Constitution the operation of the Hungarian state is based on the principal of the distribution of powers: the task of the dispensation of justice belongs to the courts. Courts render decisions in criminal and civil law cases, on the legality of public administration decisions, on the collision of local government decrees and other laws that are ranked higher in the legal instrument hierarchy and on their annulment, on the establishment of the failure of local government to pass decrees when they are required by law to do so and in other cases prescribed by law.

The judicial organization is one of the basic pillars of the Hungarian rule of law. Currently there are 158 courts in a four-tier hierarchy: district courts, administrative and labour courts, regional courts, regional courts of appeal and the Curia.

The different court levels are closely interconnected but there is no subordination between the respective levels: the courts situated higher in the hierarchy do not have any right to give instructions. Judges are independent and shall not obey any instructions concerning their adjudication activities and they render their decisions pursuant the applicable laws and their own belief. The main judicial body is the Curia that ensures the consistent dispensation of justice and renders decisions for the sake of consistent dispensation of justice that are binding for the courts.

11,000 people work in 's court system, the number of judges barely falls short of 3,000. This headcount has been basically unchanged since 2011, contrarily to the significantly increased worklo ad that awaits its completion.[16]

15 Csongor Herke: *Criminal Procedure Law.* University of Pécs, Faculty of Law, 2018. 8-12.
16 https://birosag.hu/en/hungarian-judicial-system (08.03.2024.)

1.4.1. Scope of authority of the President of National Office for the Judiciary (NOJ) and the central administrative supervision of the National Judicial Council (NJC)

The justice system created by the reform of 1997, which entrusted the National Council of Justice as a self-governing body with the administration of courts, did not exist then and is still non-existent elsewhere in Europe. As a natural consequence of management performed by a body, the decisions of the NCJ were influenced by particular interests and no operability could be achieved: problems that had to be addressed swiftly could remain unsolved for moths. This is why the new regulations introduced on 1 January 2011 and on 1 March 2011 deprived NCJ of many of its rights and delegated them into the competence of the president of NCJ. 16-20 new rights were added to the original 7-10 rights of the president of NCJ.

The rules coming into effect on January 1st, 2012 divided the powers into two groups. The task of central administration of courts is performed by the President of the NOJ, supported by deputies and the Office. The administrative work of the NOJ's President is supervised by the National Judicial Council (NJC).

The President of National Office for the Judiciary (NOJ) set out the following strategic goals:

– courts shall fulfil their constitutional obligations: independent judges shall adjudicate in a timely manner and at a high professional quality,

– optimal allocation and utilization of human resources,

– provision, optimal allocation and utilization of material conditions,

– integrity of judicial organization, transparency of judiciary and administration, predictability and control of administration,

– simplification of access to courts and

– development of training system, cooperation with other legal professions.

The president of NOJ shall keep the competences of the president of the National Judicial Council, and further rights are also vested on the president in order to secure operability. To mention some of the latter, the right to issue regulations, resolutions and recommendations is a right usually exercised by the heads of the institutions with a national scope of competence.

The president of NOJ shall bear a serious personal responsibility for the central administration and for its effective operation, i.e. to perform the president's duties – as enshrined in the Act of Parliament – with due regard to the constitutional principle of judicial independence.

The president of NOJ shall perform the work under serious control:

a) The president shall provide for the publicity of the administration of the courts and the related decision-making.

b) The president is under an obligation of publication and notification in respect of decisions of the president of NOJ, regulations, recommendations and reports.

c) Between the rules of termination of the mandate also prevails the corporative control. The deprival of office of the president of NOJ may be initiated at the Parliament by NJC with its resolution adopted by two-third majority vote.

d) The customary control over the person responsible for a budgetary heading.

e) The president shall ensure the rights of the advocacy organisations.

f) Obligation of providing information: the president shall

– inform the NJC on her activities on a half year basis;

– inform annually the presidents of the Curia, of the high courts and of the tribunals;

– report to the Parliament annually on the general situation of the courts and on the administrative activities of the courts and once in between annual reports to the Parliamentary Committee of the Judiciary.

g) Appointment of court executives: In the appointment of court executives, the right of the judicial bodies to form an opinion on the appointment remains unchanged. Some of the court executives shall be appointed by the president of NOJ, while a much larger part of executives shall be appointed by the presidents of high courts and of tribunals.

The powers of the bodies forming an opinion remain intact with regard to all executive appointments. Indeed, the rights of the president of NOJ are more limited than the powers of the presidents of high courts and of tribunals. The president of NOJ has to obtain the advance opinion of NJC, if she would like to appoint an executive who had not received the majority of the votes of the body forming an opinion on the appointment. The president of the NOJ shall – at the same time as the appointment – provide a written notification to the NJC and present the reasons of the decision on the next session of NJC, in the case of appointing another person than the one proposed by the body providing an opinion.

The system of applications court executive posts will remain unchanged: The applicants shall refer to his/her long-distance plans and the way of realization concerning the operation of the division in question.

The president of the NOJ may propose to initiate legislation in the interest of legislation affecting the courts.

The NJC has the central administrative supervisory rights regarding to the president of the NOJ as follows:

– Supervising the central administrative activity of the president of NOJ, and making a notification as necessary;

– Making a proposal to the president of NOJ on initiating legislation affecting the courts;

– Forming an opinion on the regulations and recommendations issued by the president of NOJ;

– Approves the rules of procedure of the service court and publish it on the central website;

– Forming an opinion on the proposal on the budget of the heading and on the report on the implementation of the budget;

– Forming an opinion on the detailed conditions and the amount of other benefits;

– Expresses a preliminary opinion on persons nominated as President of the NJO and President of the Curia on the basis of a personal interview;

– Determines the principles to be applied by the President of the NJO and the President of the Curia when adjudicating the applications in the context of using their power to award a position to the applicant in the second or third position in the rankings;

– Have the right of consent in the adjudication of applications where the President of the NJO or the President of the Curia wishes to award a position to the applicant in the second or third position in the rankings;

– Exercises the right of consent regarding the appointment of court leaders who did not receive the approval of the reviewing board;

– Publishing annually its opinion on the relevant practice of the president of NOJ and of the Curia regarding the assessment of the applications for judiciary posts, and court executive positions, may awarding honorary titles etc., on the initiative of the president of NOJ;

– Performing checks related to the property declarations of judges;

– Deciding on the repeated appointment of certain executives, if the office has already been filled by the applicant two times;

– Forming an advance opinion on the application for an executive post, if the president of NOJ or the Curia would like to defer from the majority opinion of the body that has formed an opinion on the appointment;

– Forming an opinion on the rules pertaining to the training system of judges and to the performance of the training obligation;

– The member of NJC may observe the documents related to the operation of NOJ and the president of NOJ, and may request data and information from the president of NOJ;

– The deprival of office of the president of NOJ may be initiated by NJC.[17]

1.4.2. The Appointment of judges

In order to be appointed as judge, the candidate must

– be at least thirty years old,
– have the capacity to act,
– be a Hungarian citizen,
– hold a diploma from a university of law, and
– have passed the bar examination,
– have experiences in the profession of at least one year,
– be willing to make an asset declaration
– have valid aptitude test results, and
– have a valid official certificate of good character.

The first judge appointment will be made for a definite period of 3 years.

The duties of judges typically include: the delivering of judgments in and regarding criminal cases, legal disputes in private law cases, other cases stipulated in legislation, the legitimacy of administrative decisions, the conflicts of municipality rules with other legislation and their annulment and the conclusion of a failure to comply with the statutory obligation of the municipality to pass legislation.

Their status is regulated by the Act CLXII of 2011 on the Legal Status and Remuneration of Judges (the Judges Act).

Applications invited to fill a position at the respective courts must be submitted to the presidents of these courts (i.e. in case of a position at the district court: to the president of the district court, in case of a position at the administrative and labour court: to the president of the administrative and labour court, in case of a position at the general court: to the president of the general court, in case of a position at the court of appeal: to the president of the court of appeal and in case of a position at the Curia: to the president of the Curia).

17 https://birosag.hu/en/national-office-judiciary/scope-authority-president (03.03.2024.)

Within 15 days following the expiry of the deadline for application, the judicial council of the specific court of appeal or general court will interview the applicants. Based on objective and subjective points given to the applicants, the judicial council will rank the applications in line with Section 14 (4) of the Judges Act. Further information on developing ranking is available in KIM Decree 7/2011 (III.4.) on the detailed rules of the assessment of applications for judge positions and the points given in developing the ranking of applications.

The appointment of court leaders is for 6 years, except in the case of appointment as president of a chamber for an indefinite term. Court leader offices can only be held by judges appointed for an indefinite term.

Court leader positions are filled via application procedures. The opinion-giving body (full meeting, general judicial meeting, division, regional division, judiciary or group) gives its opinion on the applicants via secret ballot. The person with appointment power assesses the applications based on the application documents, the personal interviewing of the applicant and the suggestion of the opinion-giving body. Pursuant to 132. § (4) of Act CLXI of 2011 (hereinafter: „Court Organisation Act"), the person with power to appoint is not bound by the suggestion of the opinion-giving body, but he/she must justify in writing if he/she makes a different decision.[18]

1.4.3. The Code of Judicial Conduct

The judicial power in accordance with the Fundamental Law fulfils its constitutional role through a transparent judicial system consisting of independent, impeccable judges.

The judicial profession sets requirements for judges that are based on stricter moral rules than ethical norms generally accepted by society. The aim of creating a Code of Judicial Conduct is to strengthen the public confidence in the judicial system by laying down ethical norms for judges to follow. It defines guidelines for ethical requirements of the judicial professions, provides support in recognising behaviours carrying ethical risk and protects judges who show demeanour worthy of their profession.

The Code of Judicial Conduct applies to all judges appointed in Hungary and it also provides guidelines for lay judges and judicial employees. It defines the expected code of conduct regarding office activities as well as activities outside the office.

a) Independence:

A judge shall exercise the judicial duties free from any influences, as to validate the principle of equal treatment among the parties involved. In the line of work even the appearance of favouring someone should be avoided, not to suggest that the procedure or the decision is based on bias or prejudice. The judge has the freedom to decide within the framework of substantive and procedural requirements, in accordance with their own conscience. A judge shall avoid unnecessary relations to the legislative and executive power in a way that is obvious to outsiders.

b) Impartiality:

A judge shall

18 https://birosag.hu/en/appointment-court-executives

– not be involved in political activity, or take part in political gatherings and shall refrain from political expressions in public;

– not be part of nor have relations to an organisation, a permanent or temporary gathering the aim or activity of which is either in violation of the law, discriminative or is in breach of the public trust regarding the judicial profession;

– not pursue a task or activity, which by nature or origin would affect his or her impartiality, or prevent the fulfilment of judicial duties;

– not support any enterprise, charitable or civil organisation which can be linked to political activity.

c) Dignity:

Public trust and respect is strengthened by showing law-abiding behaviour both in and outside the office. A judge shall

– refrain from extremities in behaviour as well as in appearance, which is suitable to the occasion and worthy of the profession at all times;

– avoid public situations which are undeserving of the judicial profession;

– be patient and courteous with the parties involved in the procedure - besides the necessary firmness – and refrain from remarks that are uncalled for, hurtful labelling and arrogant;

– demand that the parties involved give each other and the court the proper respect;

– shape private relations and leisure time activities in a way that it does not endanger the dignity and impartiality of the judicial profession, not even by appearance (private difficulties shall be handled in a calm, discreet and proper manner);

– use the World Wide Web with due foresight.

Information, sound and video recordings about themselves and their relatives shall only be shared in case it does not impair judicial dignity. Opinions can be shared as long as they do not undermine the dignity of the court or the judicial profession and the regulations in relation to press statements.

d) Diligence:

A judge shall

– perform the delivery of decisions in the cases allocated to him efficiently, in a timely manner; he shall be prepared, diligent and humble;

– pay attention to the proper and economical use of the equipment and sources of the court;

– develop his or her general and professional knowledge through self-education and in organised courses.

e) Propriety:

A judge shall not use the prestige of the judicial office to advance the private interests of the judge. While exercising his or her rights he or she shall obey the rules of exercising law in a proper way. While adjudicating in a case a judge shall avoid the contact with the parties which might give rise to the suspicion or appearance of favouritism or partiality. A judge shall not allow the use of the judge's residence by a member of the legal profession to receive clients or other members of the legal profession. Confidential information

acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge to anyone else; he or she shall not provide or ask for confidential information. A judge shall avoid any communication that may influence the process or the result of a case. A judge shall voluntarily comply with the enforceable or provisionally enforceable obligations settled against him.

f) Respect, cooperation:

A judge shall carry out judicial duties with appropriate consideration for all persons without prejudice or discrimination and requires the same from the parties and their representatives. While carrying out judicial duties a judge shall try to cooperate with his or her colleagues and the members of organisations or authorities; he or she shall express polite and mutually respectful behaviour.

A judge shall

– not criticise the guidelines of a higher level court in front of the parties; he or she shall not express his or her different point of view;

– avoid the humiliation of the lower level court in his decisions; he or she shall not destroy the prestige of the judicial profession;

– not criticise the decisions made by his or her colleagues in any other way (a judge may evaluate or give a constructive opinion on these in scientific, educational or other professional activities);

– refrain from manifesting by words any differentiation among the parties, sympathy or condescension;

– refrain from comments that would suggest failure to fulfil obligation, decisions made to serve political or other interests on his or her colleagues' side.

g) A judge in leading position:

A judge in leading position shall refrain from any behaviour, comments or acts that may offend the human dignity of subordinates. He or she performs tasks as required from his or her colleagues complying with legal and moral obligations, setting an example. Carrying out managerial duties a judge shall be reasonable, fair and consistent with his or her colleagues. In his supervising role he or she shall set the same requirements for all his subordinates.

A judge shall ensure that the behaviour of his or her judge colleagues live up to their judicial profession.

Besides the assertion of the interests and aims of the court, a judge shall aim to establish successful cooperation with the other organisational units and to facilitate fast and precise information exchange.[19]

1.4.4. Procedures for adjudging offences

Act II of 2012 on minor offences, offence procedures and the registration system of offence (hereinafter: the Offences Act) provides for sanctioning criminal action that violates or

19 The Code of Judicial Conduct was adopted on 10 November 2014 in the meeting of the National Judicial Council based on the mandate regulated by law and with an attention to the opinion of the judicial organisation. https://birosag.hu/en/code-judicial-conduct (03.03.2024.)

jeopardises generally accepted rules of cohabitation within society, without however the level or risk or extent of danger that would consitute a crime and which would necessitate sanctions accordingly. The range of action deemed as offence is defined by the Offences Act.

Anyone subjected to investigation for having committed an offence will participate in the procedure as a person subjected to procedure, and will be named as wrongdoer once the court finds him/her culpable for the offence.

Offences are adjudged by the authorities prosecuting offences or courts. as defined by the Offences Act.

Court will adjudge

– offences sanctionable by confinement, and its scope of competence also covers the offence of obstructing fact-finding inspections by the permanent committee of the Hungarian Parliament dealing with national security;

– petitions challenging the resolution of the authority prosecuting offences, and furthermore decides on;

– transforming unpaid fines or on-site fines – or undelivered community work – into confinement.

As a general rule, the court will adjudge the case without holding a hearing. In cases falling within the jurisdiction of district courts, the judge or an appointed court secretary may proceed. Laws also allows court clerks to proceed without holding a hearing, under the control and supervisions of a judge or court secretary.[20]

1.4.5. The competence, the jurisdiction and the composition of the court

In the course of the pre-trial the court with the same competence and jurisdiction shall proceed as the one which later makes a decision on the merits of the case. The court entitled to proceed is defined in three aspects:

– legal authority: the Hungarian courts can proceed in cases falling under Hungarian authority which rules are determined by § 3 of the CC;[21]

20 https://birosag.hu/en/procedures-adjudging-offences (03.03.2024.)

21 The Curia remedied the infringement of the law by imposing a four and a half years' imprisonment instead of a fourteen years' imprisonment. The Kingston Crown Court in the United Kingdom sentenced the accused to fourteen years' imprisonment for violent disorderly conduct, six counts of wounding with intent, assault causing actual bodily harm, carrying sharp or pointed instruments and carrying offensive weapons. Subsequently, the competent Hungarian court held that the conviction of the accused person by a national court of the United Kingdom, being another Member State of the European Union, could be taken into account in Hungary and that the criminal offences determined could be requalified as the crime of public nuisance committed in a gang [section 339, subsection (1) and subsection (2), point a) of the Criminal Code], the crime of attempted battery committed in a gang and as a co-perpetrator in six counts [section 164, subsections (1) and (3) of the Criminal Code] and the crime of battery committed in a gang and as a co-perpetrator [section 164, subsections (1) and (3) of the Criminal Code], and the cumulative sentence for the commission of the aforementioned criminal offences could be a fourteen-year long term of imprisonment. The Prosecutor General submitted a remedy petition in the interest of legality against the order of the competent Hungarian court to the Curia of Hungary with the aim of requesting the supreme judicial forum to establish the unlawfulness of the court order and, on that basis, to impose a shorter sentence of imprisonment than the one imposed by the national court of the United Kingdom in respect of the accused person. Unless an exception is provided by law, the judgment of the national court of another EU Member State delivered in a criminal case shall be equivalent to the judgment of a Hungarian court in such a case, and the competent Hungarian court, prosecution service and investigating authority shall take the judgment of the national court of another EU Member State into account in the course of the criminal proceedings initiated in Hungary after the delivery of such foreign judgment [section 109, subsection (1) of Act number CLXXX of 2012 on Cooperation in Criminal Matters between the Member States of the European

– competence: subsequently to legal authority (that is, if a Hungarian court may proceed in the case), it needs to be clarified what organisationally structured court should proceed (local court, tribunal court, high court of appeal or the Supreme Court);

– jurisdiction (territorial competence): finally, if the question of competence has been clarified, the last question is that out of the courts with the same organisational structure (that is, more than 100 local courts, exactly 20 tribunal courts and 5 high courts of appeal) which should proceed.

The court always examines the competence and the jurisdiction ex officio.[22]

a) The competence:

The task of the court shall be to administer justice. The court shall adjudicate and carry out the tasks relating to the criminal proceeding as specified in CPC. The court of first instance shall be a district court or a regional court. The court of second instance shall be a) a regional court in cases falling within the subject-matter jurisdiction of district courts, b) a regional court of appeal in cases falling within the subject-matter jurisdiction of regional courts, c) the Curia in cases falling within the subject-matter jurisdiction of regional courts of appeal.

The court of third instance shall be a) the regional court of appeal in cases where a district court proceeded as the court of first instance, b) the Curia in cases where a regional court proceeded as the court of first instance.

Union, hereinafter referred to as the EU Criminal Justice Cooperation Act]. The purpose of the process of conversion is to ensure that the provisions of a foreign criminal judgment, delivered by the national court of another EU Member State, the criminal sentence or measure imposed therein and the legal consequences thereof be compatible with Hungarian law [section 111, subsection (1) of the EU Criminal Justice Cooperation Act]. In the course of the process of conversion, the court shall determine the requalification of the criminal offence, established by the foreign judgement, under the provisions of the Criminal Code of Hungary and shall examine whether the provisions of the foreign judgment and the sentence or measure imposed therein are compatible with Hungarian law [section 111/D, subsection (1) of the EU Criminal Justice Cooperation Act]. If the provisions of the judgment of the national court of another EU Member State, the criminal sentence or measure imposed therein or the legal consequences thereof are not compatible with Hungarian law, then the competent Hungarian court shall modify or supplement the provisions of such foreign judgment and the criminal sentence or measure imposed therein in accordance with Hungarian law. The provisions of such foreign judgment that have not been converted shall be taken into account in accordance with the foreign judgment. The competent Hungarian court shall convert the custodial sentence imposed by the judgement of the national court of another EU Member State to reach the maximum length of imprisonment that may be imposed under Hungarian law, if the term of imprisonment imposed by the foreign judgment is longer than the term of imprisonment that could be imposed under Hungarian law [section 111/E, subsection (1) of the EU Criminal Justice Cooperation Act]. In the present case, it has been established that the order of the competent Hungarian court is unlawful with regard to the length of the converted custodial sentence. Given that some of the criminal offences requalified by the competent Hungarian court, namely the crime of public nuisance committed in a gang and the crime of attempted battery committed in a gang are both punishable by imprisonment of up to three years, the lower limit of the applicable criminal sentence for the process of conversion is three months, while the upper limit is four years and six months in accordance with the rules of cumulation. It follows from the foregoing that, in the present case, the fourteen-year long custodial sentence imposed by the judgement of the national court of another EU Member State is not compatible with Hungarian law, therefore, the foreign sentence should have been converted, on the basis of the second phrase of section 111/D, subsection (1) of the EU Criminal Justice Cooperation Act, in accordance with Hungarian law. Thus, the Curia of Hungary, acting upon the Prosecutor General's remedy petition in the interest of legality, held that the sentence of imprisonment imposed on the accused person by the Kingston Crown Court was equivalent to four years' and six months' imprisonment as a cumulative sentence. In: *Communication concerning the decision of the Curia of Hungary in criminal case number Bt.III.1.105/2021.*

22 Herke, ibid. 82 – 83.

The local court disposes of the general competence of first instance.[23] The tribunal court proceeds in the first instance in outstanding cases.The definition of the court of first instance appoints the court proceeding in the second, and contingently, in the third instance, and there is no departure from that (prohibition against secession).

The criminal acts subject to the first instance competence of the tribunal court can be classified into several groups:

– the most serious crimes: crimes punishable by imprisonment for a term up to 15 years or life imprisonment by the law;

– outstanding criminal acts: crimes against humanity, war crimes, crimes against the state etc., (negligence of reporting) kidnapping, trafficking of people, terrorist acts and related crimes, money-laundering;

– crime threatening life or causing death: preparations for murder, negligent homicide, murder committed in the heat of passion, physical injury creating a substantial risk of death or causing death;

– crime related to corruption;

– violent cases of crime against property (e.g., gravely classified case of plundering) or non-violent crime against property classified the most gravely (e.g., theft of especially high value);

– certain crimes with international element: e.g. criminal offence against the administration of justice at an international court, breach of international embargo etc.;

– crime related to public administration: e.g., criminal offences against the order of elections or referenda, crime against the order of European civil initiative, crime against classified data and national data stock;

– criminal offences subjected to military law: in such a case one of the military councils of the 5 appointed tribunal courts (Budapest, Győr, Debrecen, Szeged, Kaposvár) shall proceed (in the second instance the military council of the Metropolitan High Court of Appeal shall proceed);

– other cases: some healthcare crimes, prison riots, infringement of certain rights related to copyright and economic and business related offenses.

If the defendant committed crimes subject to the competent of different courts, the tribunal court shall proceed as court of first instance.[24]

b) The jurisdiction:

Out of the court procedural degrees, the jurisdiction in the second and third instance is simpler, since that court of second or third instance shall proceed, the lower court in the territory of which passed the decision of first or second instance.

23 CPC 19. §

24 A snapshot from the US: „There has been a startling increase in the number of problem-solving courts across the country. As of the spring of 2012, there were throughout New York State alone, 179 drug treatment, 21 mental health, 83 domestic violence and integrated domestic violence courts (which consolidate criminal and family domestic matters), seven sex offense, and three youthful offender domestic violence courts.33 There has been uncertainty and controversy amongst the criminal defense bar regarding these new courts; there seems to be greater acceptance of mental health courts than there is of the drug courts." Nat'l Ass'n of Criminal Def. Lawyers, America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform 51 (2009). In: Richard KLEIN: The Role of Defense Counsel in Ensuring a Fair Justice System. *The Champion,* 2012. 8.

In comparison with the remedial procedures the jurisdiction of the court of first instance shall be established in a more complex manner, which can be a) general, b) exclusive and c) special.

ad a) As indicated by general jurisdiction, the court of jurisdiction shall be the court having exclusive control over the geographical area where the criminal offence was committed.[25] Besides, the CPC stipulates so-called dispositive rules:

– Precedence: if the crime was committed in the territory of several courts or the scene of commission cannot be identified, out of the courts with the same jurisdiction that one shall proceed, which took measures for the first time. An exception to that is, if the scene of commission becomes known before setting the trial and the prosecutor's office (defendant, defense counsel, substitute private prosecutor, private prosecutor) motions for the procedure according to the scene of commission, in that case the court shall proceed where the criminal offence was committed.

– Actual residence: the court may proceed in the territory of which the address or the actual residence of the defendant or victim obtains, if the prosecutor's office raises charge there (this is not applicable in private prosecution procedure, substitute private prosecution procedure or in military criminal procedure).

– Several accused: the court with jurisdiction in re one of the accused may proceed versus the other accused persons, if this does not surpass its competence (if the procedure was initiated before several courts, the principle of precedence applies).

ad b) The so-called seat courts (local courts located in the seat of the tribunal court or in The Central District Court of Pest) in their exclusive jurisdiction shall proceed with jurisdiction pertaining to the county (the capital) in case of the following crimes:

– certain endangering crimes or crimes causing danger (certain cases of public endangerment and interference with works of public concern);

– certain crimes related to the utilisation of nuclear energy (misappropriation of radioactive materials, illegal operation of nuclear installation, crimes in connection with nuclear energy);

– economic crimes (economic fraud, certain cases of information system fraud, economic and business related offenses etc.);

– certain crimes damaging the budget; certain cases of counterfeiting currency and forgery of stamps;

– procedures for crime in connection with the border barrier;[26]

– other crimes (e.g., failure to comply with the reporting obligation related to money laundering, illicit access to data etc.)

If the defendant committed crimes subject to the jurisdiction of different courts, the court with exclusive jurisdiction shall proceed.

ad c) Finally, grounds for special jurisdiction exist in cases of culpable acts subject to Hungarian legal authority, when the crime was committed by the defendant beyond the borders of Hungary. For the adjudication of this crime the court shall have jurisdiction, to the area of which the address or the actual residence of the defendant belongs (in case of a procedure in absentia the last address or actual residence shall ground jurisdiction).

25 CCP 21. §
26 CPC 828. §

In a military criminal procedure the military council of the Metropolitan Tribunal Court shall have jurisdiction in case of a crime committed abroad.[27]

If the jurisdiction cannot be established in a case subject to the competence of a local court, the Central District Court of Pest shall proceed. In a cases subject to the competence of a tribunal court, the Metropolitan Court of Justice shall proceed. The territorial competence of the military council of the court of justice appointed for military criminal procedure is stipulated under a separate law.

If the jurisdiction of a court cannot be established in a procedure for deprival of property, the court shall proceed, in the jurisdiction of which the authority discerned the circumstance substantiating the institution of the procedure for deprival of property.[28]

The court shall examine its competence and jurisdiction: 1. before the commencement of the trial ex officio[29]; 2. after the commencement of the trial only in the case if the adjudication of the case overreaches the competence of the court, or the case is subject to military criminal procedure or exclusive jurisdiction.[30]

c) The composition:

The court adjudicates in the first instance on the merits as a single judge or in council, while in a legal remedy procedure always in council:[31]

In the first instance:

– single judge (generally);

– three professional judges (if the single judge remitted the case to the council of the court);

– special council (economic and business case, criminal procedure against juvenile offenders, military criminal procedure).

In the second and third instance

– small council (3 professional judges);

– large council (5 professional judges).

So, the court of first instance proceeds in a specially composed council in three cases:

– In case of an outstanding crime related to economic and business, one of three professional judges in a council shall be the appointed judge of the council of economic and business (in lieu of that civil) law of the tribunal court;

– In a criminal procedure against juvenile offenders[32] the council consists of one professional judge (appointed by the President of the National Administrative Office of the Courts) and two associate judges (this is possible not only in case the single judge remitted the case to the council, and but this is mandatory in all cases (except for a procedure for crime in connection with the border barrier), if the law stipulates the imposition of a penalty ranging to eight or more years' imprisonment for the crime).

– In the same cases the military council of the tribunal court proceeds in the first instance and in the majority of the cases subject to the first instance competence of the

27 CPC 699. §
28 CPC 823. §
29 CPC 23. §
30 CPC 536. §
31 CPC 13. §
32 CCP 680. §

tribunal court.[33] This council may consist of one military judge and two military associate judges (not only of three professional judges). The military associate judges cannot be of lower rank than the accused (except if the accused is a general).

In the criminal procedure against juvenile offenders exclusively a teacher, psychologist or a person working (formerly) in a position requiring a university or college degree in family protection or guardianship administration etc. may work as associate judge.

The courts of second or third instance may remit the case by reason of outstanding crime related to economic and business to a large council (the council of the court consisting of five professional judges), if that is necessitated by: 1. the complexity of the case, 2. the breadth of the documents of the procedure, 3. the number of the persons participating in the criminal procedure, 4. any other reason.

In cases subject to the competence of the courts of first instance, instead of the single judge (the presiding judge) the court secretary may also proceed in cases stipulated under the CPC (§ 426., e.g. related to the appointment of the defence counsel or the expert, the correction or supplementation of its decision, measure related to cost of criminal proceedings or reduced costs etc.) and in cases determined by statute, out of trial the court administrator may proceed under the direction and the supervision of the judge.

1.4.6. The investigative judge

According to CPC it is the main task of the court to provide justice (i.e. ruling in criminal cases and decisions on the criminal liability). At the same time the court also carries out other tasks determined in the CPC in connection with criminal proceedings. During investigation (before indictment) the investigating judge decides in questions that were referred into the jurisdiction of the court. This is the local court judge that is appointed by the head of the tribunal court.[34] In case of military criminal procedures, this is the military judge of the tribunal court.[35]

The investigating judge's decision can have two forms:[36]

a) Session for priority questions:

– ordainment of coercive measures bound to judicial consent concerning personal freedom (except if a milder measure than the earlier one is motioned);

– prolonging detention (based on new circumstances or following 6 months);

– ordainment of monitoring of mental state;

– ordainment of continuation of procedure due to breach of cooperation (except if theperson breaching cooperation resides in an unknown place or if the prosecutor does not motion for a session);

b) Passes decision based on the documents in the all other questions referred to its jurisdiction:

– excluding the defence counsel;

– special protection of witness;

33 CCP 698. §
34 CPC 463. §
35 CPC 713. §
36 CPC 464. § – 467. §

– obliging the person that denies testimony to disclose the identity of the person providing information;

– issue and recall of European and international arrest warrants;

– judging motions of revision;

– changing a fine into incarceration;

– ordainment of the continuation of a terminated procedure (except if a session is to be held);

– tasks regarding the application of covert instruments which are bound to judicial permissions.

The investigating judge proceeds in prosecutor's procedures under the area of competence of the court of justice (in case more local courts have been appointed, they determine the competence of each and every one of them).

If the court session, the time for the session is determined with consideration for the termination time of the incidental arrest (detention) of the defendant. If the motion is submitted by the prosecutor's office, the prosecutor shall hand over the investigative brief together with the submittance of the motion and the prosecutor shall send its motion to the defendant and the defence counsel. In this case the defence can look over the documents that form the base of the motion (up until at least one hour before the session).

In case the motion was put forward by the prosecutor, it shall ensure the presence of the defendatnt at the sitting and subpoenas or notices the defence counsel (depending whether his presence is mandatory), and ensures the presence of an interpreter or other persons.

The legal representative and of-age guardians of juveniles shall be informed about session concerning procedures for coercive measures with judicial consent which touch upon personal freedom. They have the right to speak and the decision will be communicated to them.[37]

The presence of the following is mandatory at the session:

– prosecutor (junior prosecutor);

– defendant: at the mandatory sessions (except in case of breach of cooperation, if residing at an unknown location);

– defence counsel: monitoring of mental state, when ordering preliminary involuntary treatment in a mental institution, and in case of the absent defendant that breached cooperation;

– the motioner (if he/she does not appear, it shall be considered as a withdrawal of the motion).

At the session the motioner presents the motion verbally and delineates the evidences that form the base for those present. The investigating judge investigates whether

– the legal preconditions of the motion and the session are present,

– there is no obstacles for the criminal procedure, and

– there have been no rational doubts for the grounds of the motion.

In case there are no obstacles for the judging of the motion the court decides by non-conclusive order in which it sustains, partially sustains or rejects the motion. The decree has to be made public by way of announcement (if the investigating judge decided based on the documents, this shall take place within 8 days).[38]

37 CPC 689. §

38 Herke, ibid. 10.

1.4.7. The independence of judges (ECrHR)

a) General principles:
Article 6. of the Convention requires independence from the other branches of power – that is, the executive and the legislature – and also from the parties.[39]

Although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in the Court's case-law, neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction. The question is always whether, in a given case, the requirements of the Convention are met.[40]

b) Criteria for assessing independence:

Compliance with the requirement of independence is assessed, in particular, on the basis of statutory criteria.[41] In determining whether a body can be considered to be "independent" the Court has had regard to the following criteria:[42] (1) the manner of appointment of its members (2) the duration of their term of office; (3) the existence of guarantees against outside pressures; (4) whether the body presents an appearance of independence.[43]

– *Manner of appointment of a body's members:* The mere appointment of judges by Parliament cannot be seen to cast doubt on their independence. Similarly, appointment of judges by the executive is permissible, provided that appointees are free from influence or pressure when carrying out their adjudicatory role.[44] Although the assignment of a case to a particular judge or court falls within the margin of appreciation enjoyed by the domestic authorities in such matters, the Court must be satisfied that this was compatible with Article 6 § 1, and, in particular, with its requirements of independence and impartiality.[45]

– *Duration of appointment of a body's members:* No particular term of office has been specified as a necessary minimum. Irremovability of judges during their term of office must in general be considered a corollary of their independence. However, the absence of formal recognition of this irremovability in the law does not in itself imply lack of independence provided that it is recognised in fact and that other necessary guarantees are present.[46] The presence of seconded international judges for a renewable two year term of office on the bench of a court ruling on war crimes was considered understandable given the provisional nature of the international presence in the country and the mechanics of international secondments.[47]

– *Guarantees against outside pressure:* Judicial independence demands that individual judges be free from undue influences outside the judiciary, and from within. Internal

39 „Ninn-Hansen v. Denmark" (1999)
40 „Henryk Urban and Ryszard Urban v. Poland" (2010)
41 „Mustafa Tunç and Fecire Tunç v. Turkey" (2015)
42 „Findlay v. the United Kingdom" (1997)
43 „Filippini v. San Marino" (2003)
44 „Henryk Urban and Ryszard Urban v. Poland" (2010); „Campbell and Fell v. the United Kingdom" (1984); „Maktouf and Damjanović v. Bosnia and Herzegovina" (2013)
45 „Moiseyev v. Russia" (2008)
46 „Campbell and Fell v. the United Kingdom" (1984)
47 „Maktouf and Damjanović v. Bosnia and Herzegovina" (2013)

judicial independence requires that they be free from directives or pressures from fellow judges or those who have administrative responsibilities in the court, such as the president of the court or the president of a division in the court. The absence of sufficient safeguards securing the independence of judges within the judiciary, in particular vis-à-vis their judicial superiors, may lead the Court to conclude that an applicant's doubts as to the independence and impartiality of a court may be said to have been objectively justified.[48]

– *Appearance of independence:* In order to determine whether a tribunal can be considered to be "independent" as required by Article 6., appearances may also be of importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused.[49] In deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important but not decisive. What is decisive is whether his doubts can be held to be objectively justified.[50] No problem arises as regards independence when the Court is of the view that an „objective observer" would have no cause for concern about this matter in the circumstances of the case at hand.[51] Where a tribunal's members include persons who are in a subordinate position, in terms of their duties and the organisation of their service, vis-à-vis one of the parties, the accused may entertain a legitimate doubt about those persons' independence.[52] In „Thiam v. France" (2018), the Court did not consider that the applicant's fear of a lack of independence and impartiality of a tribunal called upon to examine a criminal charge against him for an offence committed to the detriment of the President of the Republic, who joined the proceedings as a civil party, was justified due to the very fact that the President was involved in the appointment and promotion of judges. The Court noted that the independence of the judges' tenure was constitutionally guaranteed and it protected them from possible attacks on their independence. Moreover, judges were not subordinate to the Ministry of Justice and were not subject to any pressure or instructions in the exercise of their judicial functions, including instructions by the President. Further, the Court had regard to the fact that decisions affecting the appointment of members of the judiciary and their career progress, transfer and promotions were taken following the intervention of the National Legal Service Commission (Conseil supérieur de la magistrature) and after adversarial proceedings. Moreover, the nomination of judges was not a discretionary matter and was subject to control by the Council of State. The Court also noted that the applicant had not submitted any concrete evidence capable of showing that he could objectively have feared that the judges in his case were under the President's influence. In particular, the case bore no connection with the President's political functions and he had neither instituted the proceedings nor provided evidence intended to establish the applicant's guilt; the domestic courts had duly examined all the applicant's arguments; and the subsequent constitutional amendments had excluded the President's involvement in the appointment of judges to their posts.

48 „Parlov-Tkalčić v. Croatia" (2009); „Daktaras v. Lithuania" (2000); „Moiseyev v. Russia (2008)
49 „Şahiner v. Turkey" (2001)
50 „Incal v. Turkey" (1998)
51 „Clarke v. the United Kingdom (2005)
52 „Şahiner v. Turkey" (2001)

1.4.8. The impartiality of judges

The presumption of innocence is necessarily linked to the requirement of impartiality on the part of the judiciary. The objective criterion is the conviction of the subjects of the proceedings that this is necessary, and the subjective criterion is the perception of this conviction, directly or indirectly, towards the outside world. According to a case-law of the ECrHR, it is not enough to do justice; the appearance of doing justice must also be preserved.[53]

In the case of judicial attitudes, impartiality is a particularly sensitive issue. Courts in a democratic society must inspire confidence in society, the primary „marker" of which is the conduct of the accused in criminal proceedings.[54] „The judge must not forget for a moment that the presumption of innocence is not a mere theoretical constraint during the trial, but a practice of conduct which must be enforced minute by minute and which must be expressed in words and gestures."[55] Thus, even indirectly, he may not make expressions that could lead to the presumption of the guilt of the accused, otherwise the defence must make a mandatory motion of bias against the single judge (jury).

Fenyvesi draws attention to the following in relation to this problem: The document, which contains mostly incriminating data generated during the thorough investigation, is given to the impartial examiner (judge) together with the accusation. Above all, an effective defence, including a professional, skilled defence, can weaken the presumption of guilt from the file and strengthen the presumption of not guilty."[56] This does not, of course, exclude the possibility of the person being prosecuted defending himself. The rules of criminal procedure are in conformity with the Constitution if they provide the accused with the means of defence which he may lawfully use and with the right to choose freely the means of defence. The accused may not be restricted in this even by his defence counsel, or, where appropriate, by an ex officio appointed defence counsel.

No dislike, no sympathy, no previous acquaintance with a colleague, nor any judgement on any personal characteristic of the offender should play any part in the judge's work. „This is a difficult test of moral fibre. It is even more so if we add that it is not enough to clarify these matters internally, but the judge must also ensure that those present in the courtroom {...} see and perceive this impartiality {...}."[57]

Judicial impartiality must be fully respected not only in the interpretation of substantive criminal law, but also in the exercise of procedural rights, in particular in the conduct of trials and the maintenance of order. As regards the conduct of the trial (maintenance of order), the court is empowered by the CPC to apply the sanctions provided for therein, including, where appropriate, those imposed on the prosecutor and the defence.[58] This is on the basis of the reasonable grounds that no one's actions

53 „Delcourt v. Belgium" (1970)
54 1993/7. 553; 1995/8. 637.
55 Csaba Kabódi: Justice - a service? In: Mihály Tóth (ed.): *Criminal Procedural Law Reader.* Budapest, Osiris, 2003. 366.
56 Csaba Fenyvesi: The constitutional and principled aspects of defender activity. In Mihály Tóth (ed.): *Criminal Procedural Law Reader,* ibid. 168.
57 Kabódi, ibid. 367.
58 In this area, there are generally two models of regulation in the field of substantive law: if the chairman of the board not only directs or supervises the taking of evidence but also carries it out himself, then this is the continental model; if the interrogations are not within his powers because they are carried out by the

should knowingly obstruct the proceedings or lead to an abuse of rights.[59] GYÜRKY writes: „The proper conduct of a trial is of paramount importance because it promotes a prompt and correct decision on the merits, enhances the authority of the court and strengthens confidence in the administration of justice." [60]

I should note that the prohibition of abuse of rights also applies to the courts. There are also written and unwritten ethical rules for the judiciary, under which forcefulness must not lead to arbitrariness. „The conduct of a vigorous trial should be a listening style that gets to the heart of the matter, humanly inquisitive, which can create an atmosphere of trust that participants to genuinely tell the story of what happened. What is needed is not professionalism, but a high level of people skills, a way of dealing with people and a method of making the necessary contacts."[61]

As regards the examination of judicial impartiality, I would like to draw attention to the following hungarian decisions:

– first of all, the internal convictions of the judges must be examined, followed by all the guarantees which exclude any legitimate doubt as to impartiality;[62]

– it is not only the personal convictions and conduct of the judges as subjects that must be taken into account, but also whether the court in question objectively provides the guarantees that are capable of eliminating all legitimate doubt as to this requirement;[63]

– the accused's point of view is also important, but not decisive, in assessing the appearance of bias; the decisive criterion is whether this fear of incrimination can be considered objectively justified;[64]

– the requirement of impartiality is not in itself violated if the same judge is sitting in different cases of the accused at the same time;[65]

– it is also possible that the investigating judge may become aware of data of which the sentencing judge is not aware, because the data cannot, for whatever reason, be used as evidence in the trial at a later stage; however, there is no concern about this, as prior knowledge of this additional data would potentially put the impartiality of the sentencing judge at risk, and the judgement of the criminal case free from bias. [66]

According to the case-law of the ECrHR, if the independence and impartiality of the court of first instance can be established, these circumstances cannot be remedied ex post facto as procedural irregularities,[67] and the question of judicial impartiality must be assessed primarily from the point of view of the accused[68] (the existence of this circumstance must,

parties, then this is the Anglo-Saxon system of trial. In: Ervin CSÉKA: The criminal trial system. In Mihály TÓTH (ed.): *Criminal Procedural Law Reader,* ibid. 349.

59 FENYVESI: The constitutional and principled aspects of defender activity, ibid. 165.

60 István GYÜRKY:Negotiation conduct through the eyes of the judge. *Hungarian Law,* 1975/3-4. 193.

61 The author adds: „Serious consideration must be given to the fact that many people are first-time visitors to court, do not and cannot know the required forms of behaviour, behave inappropriately in their embarrassment {...}, or are primitive persons whose daily manner of interacting may be disrespectful in court. It is for the judge to choose the correct conduct which will dissolve these inhibitions." In GYÜRKY, ibid. 193.

62 BH 2000/10 No 798.

63 BH 1993/8 No 639.

64 BH 1997/12 No 157.

65 RO 1993/8, p. 637.

66 Decision No 34/2013 (XI.22.) AB.

67 „Smith and Ford v. United Kingdom" (1999)

68 „Remli v. France" (1996)

however, be presumed until the contrary is proved.[69]) It is also a fundamental rule that an application in which the applicant cannot provide concrete evidence to support the possible bias of the national court cannot be successful.[70]

The Court found a breach of the Convention when it

– a member of the jury was not disqualified on the basis of the accused's application for disqualification, despite the fact that the accused had brought a personal lawsuit against him in parallel with the criminal proceedings; the duration of the latter proceedings, which lasted almost 7 months, had given rise to the accused's fear that the judge would regard him as his "personal opponent" in the criminal proceedings; [71]

– members of a Cypriot court confronted the defender by making statements questioning his impartiality and later judged him for alleged contempt of court;[72]

– the judges in the case against the accused's accomplice had made statements in the judgment indicating the accused's guilt in an earlier case, and subsequently the same judges had also ruled in a separate case against the accused and had again given a judgment of conviction for the reasons already explained;[73]

– at the jury trial, the court did not attach any significance to - did not investigate - the racist statements made by one of the jurors at the trial;[74]

– judges who had previously ruled on the same case had to decide whether their own earlier decision was legally correct;[75]

– all three members of the Board of Appeal were involved in the first instance proceedings;[76] it should be noted that even in the case of one member of the Board, a conflict of interest could be established[77] , and in the case of two, this was obvious to the Court;[78]

– at second instance, a judge who has already ruled on the merits of a particular question at a lower instance;[79]

– in both places, the same judge, who was also the "rapporteur" in one of the cases, was the judge who heard the related cases in different courts;[80]

– the presiding judge was a former head of the prosecution service who, in principle, could have dealt with the applicant's case in that capacity;[81]

– the judge presiding over the merits of the case has previously acted as an examining magistrate, drafting the charge or participating extensively in the investigation of the case;[82]

– a significant proportion of the members of the jury belonged to the party involved in the criminal case.[83]

69 „Piersack v. Belgium" (1982)
70 „Debled v. Belgium" (1994)
71 „Chmelir v. Czech Republic" (2005)
72 „Kyprianou v. Cyprus" (2004)
73 „Rojas Morales v. Italy" (2000)
74 „Remli v. France" (1996)
75 „San Leonard Band Club v. Malta" (2004)
76 „Oberschilk v. Austria" (1991)
77 „Pfeifer and Plankl v. Austria" (1992)
78 „Castillo Algar v. Spain" (1998)
79 „Haan v. the Netherlands" (1997)
80 „Ferrantelli and Sanangelo v. Italy" (1996)
81 „Piersack v. Belgium" (1982)
82 „De Cubber v. Belgium" (1984)
83 „Holm v. Sweden" (1993)

The Court held that there was no breach of the Convention when

– during the trial, the judge made statements that could be used to infer his or her preconceptions about the outcome of the case or the defendant's chances at trial;[84]

– in a jury trial of a black defendant, following racist remarks, the presiding judge did not acquit the jury, but merely gave them new instructions;[85]

– the court has previously dealt with the accused's case on other grounds[86] , or the same judges of the same court have heard two different cases of the same accused;[87]

– the accused was tried in absentia for the first time and, after his appearance, sentenced a second time by the same Chamber, as the case was retried in its entirety;[88]

– the Supreme Court also dealt with the case first in the ordinary procedure and then in the annulment procedure (see the latter procedure, which was limited to the determination of points of law);

– the same judge heard the case at first and second instance, but made only minor decisions in the first instance proceedings (see postponement of the trial), but did not hold a hearing on the merits;[89]

– the same judge had previously rejected other applications for release of the accused on the basis of a presumption of his guilt; it was noted, however, that the imposition of these coercive measures was based on the accused's status as a recidivist, and therefore did not constitute a decision on the question of criminal responsibility;[90]

– one of the members of the jury was the head of the public administration body that had previously tried the case (see no evidence that he had actually dealt with it personally);[91]

– the judge hearing the case had previously acted as an examining magistrate, but the case was of minor importance or his role was not significant in terms of the individual decisions;[92]

– the judge who heard the case of the juvenile defendant had previously decided - as investigating judge - to remand the defendant in custody or to investigate the case (see no circumstances that would have called into question the judge's impartiality);[93]

– the trial judge had previously decided whether the case was admissible for trial (see in this case, he did not consider the merits of the suspicion, but the amount of evidence);[94]

– a member of the jury was an employee of a prosecution witness[95]

Based *on Guide on Article 6 of the European Convention on Human Rights*, Article 6. of the Convention requires a tribunal falling within its scope to be „impartial". Impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways.[96]

84 „Buscemi v. Italy" (1999)
85 „Gregory v. United Kingdom" (1997)
86 „Ettl and Others v. Austria" (1987)
87 „Sainte-Marie v. France" (1992)
88 „Thomann v. Switzerland" (1996)
89 „Gillow v. the United Kingdom" (1986)
90 „Jasinski v. Poland" (2005)
91 „Gillow v. the United Kingdom" (1986)
92 „Fey v. Austria" (1993)
93 „Nortier v. the Netherlands" (1993)
94 „Saraiva de Carvalho v. Portugal" (1994)
95 „Pullar v. the United Kingdom" (1996)
96 „Kyprianou v. Cyprus" (2005)

a) Criteria for assessing impartiality:

The Court has distinguished between: (1) a subjective approach, that is, endeavouring to ascertain the personal conviction or interest of a given judge in a particular case; (2) an objective approach, that is, determining whether he or she offered sufficient guarantees to exclude any legitimate doubt in this respect.[97]

However, there is no watertight division between the two notions since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test). Therefore, whether a case falls to be dealt with under one test or the other, or both, will depend on the particular facts of the contested conduct.

Subjective approach: In applying the subjective test, the Court has consistently held that the personal impartiality of a judge must be presumed until there is proof to the contrary.[98]

As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill will or has arranged to have a case assigned to himself for personal reasons.[99] However, the mere fact that the judge might have adopted procedural decisions unfavourable to the defence is not indicative of a lack of impartiality.[100]

Although in some cases it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee. The Court has indeed recognised the difficulty of establishing a breach of Article 6 on account of subjective partiality and has therefore in the vast majority of cases focused on the objective test.

Objective approach: Under the objective test, when applied to a body sitting as a bench, it must be determined whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality.[101]

In deciding whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified.[102]

The objective test mostly concerns hierarchical or other links between the judge and other persons involved in the proceedings which objectively justify misgivings as to the impartiality of the tribunal, and thus fail to meet the Convention standard under the objective test.[103] It must therefore be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal.[104]

In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public, including the accused. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw.[105] Specifically, it is the responsibility of the individual judge to identify any impediments to his or her participation and either to withdraw or, when

97 „Grieves v. the United Kingdom" (2003); „Morice v. France" (2015)
98 „Hauschildt v. Denmark" (1989)
99 „De Cubber v. Belgium" (1984)
100 „Khodorkovskiy and Lebedev v. Russia" (2020)
101 „Castillo Algar v. Spain" (1998)
102 „Padovani v. Italy" (1993)
103 „Micallef v. Malta" (2009)
104 „Pullar v. the United Kingdom" (1996)
105 „Škrlj v. Croatia" (2019)

faced with a situation in which it is arguable that he or she should be disqualified, although not unequivocally excluded by law, to bring the matter to the attention of the parties in order to allow them to challenge the participation of the judge.[106]

Account must also be taken of questions of internal organisation. The existence of national procedures for ensuring impartiality, namely rules regulating the withdrawal of judges, is a relevant factor. Such rules manifest the national legislature's concern to remove all reasonable doubts as to the impartiality of the judge or court concerned and constitute an attempt to ensure impartiality by eliminating the causes of such concerns. In addition to ensuring the absence of actual bias, they are directed at removing any appearance of partiality and so serve to promote the confidence which the courts in a democratic society must inspire in the public.[107]

The Court will take such rules ensuring impartiality into account when making its own assessment as to whether a „tribunal" was impartial and, in particular, whether the applicant's fears can be held to be objectively justified.[108] Thus, applicants are expected to avail themselves of those rules existing in the relevant domestic law.[109]

As regards the procedure to decide upon challenges for bias, the Court examines the nature of the grounds on which the challenge for bias was based. If an applicant based his challenge for bias on general and abstract grounds, without making reference to specific and/or material facts which could have raised reasonable doubts as to the judge's impartiality, his challenge could be classified as abusive. In such circumstances, the fact that the judge who had been challenged on such grounds decided on that applicant's challenge does not raise legitimate doubts as to his impartiality. Moreover, other elements should be taken into account, in particular, whether the grounds for dismissing the applicant's challenge for bias were adequate and whether the procedural defect was remedied by a higher court.[110]

The Court has found, in particular, that the participation of judges in a decision concerning challenges against one of their colleagues can affect the impartiality of each of the challenged members if identical challenges have been directed against them. However, the Court has considered that such a procedure did not affect the impartiality of the judges concerned in the specific circumstances of a case in which the applicant had based his motions for bias on general and abstract, almost identical grounds, without making any reference to specific, material facts that could have revealed personal animosity or hostility towards him. It noted in that context that the exclusion of all challenged judges from the decisions concerning those challenges would have paralysed the whole judicial system at issue.[111]

On the other hand, a failure of the national courts to examine a complaint of a lack of impartiality, which does not immediately appear to be manifestly devoid of merit, may lead to a breach of Article 6. of the Convention, regard being had to the confidence which the courts must inspire in those subject to their jurisdiction.[112] Thus, for instance, in „Danilov v. Russia" (2020), the Court found a violation of Article 6 on the grounds that the domestic

106 „Sigríður Elín Sigfúsdóttir v. Iceland" (2020)
107 „Mežnarić v. Croatia" (2005)
108 „Pfeifer and Plankl v. Austria" (1992); „Oberschlick v. Austria" (1991); „Pescador Valero v. Spain" (2003)
109 „Zahirović v. Croatia" (2013)
110 „Pastörs v. Germany" (2019)
111 „A.K. v. Liechtenstein" (2015); see „Kolesnikova v. Russia" (2021), where there was no risk that the system might be paralysed.
112 „Remli v. France" (1996)

courts failed to take sufficient steps to check that the trial court had been established as an impartial tribunal in relation to the applicant's complaint of a lack of impartiality of jurors with security clearances, which were accorded and controlled by the relevant security service that had instituted the criminal proceedings against the applicant.

Moreover, it is possible that a higher or the highest court might, in some circumstances, make reparation for defects in the first-instance proceedings. However, when the higher court declines to quash the decision of a lower court lacking impartiality and upholds the conviction and sentence, it cannot be said that it cured the failing in question.[113]

Lastly, the Court takes the view that when an issue of impartiality of a tribunal arises with regard to a judge's participation in the proceedings, the fact that he or she was part of an enlarged bench is not in itself decisive for the objective impartiality issue under Article 6. of the Convention. Considering the secrecy of the deliberations, it may be impossible to ascertain a judge's actual influence in the decision-making and the impartiality of the court could be open to genuine doubt.[114]

b) Situations in which the question of a lack of judicial impartiality may arise:

There are two possible situations in which the question of a lack of judicial impartiality arises: (1) the first is functional in nature and concerns, for instance, the exercise of different functions within the judicial process by the same person, or hierarchical or other links with another person involved in the proceedings; (2) the second is of a personal character and derives from the conduct of the judges in a given case.

Moreover, there may be instances of a structural lack of impartiality of a particular court as a whole. This was the case in „Boyan Gospodinov v. Bulgaria" (2018), where the criminal court trying the applicant in criminal proceedings was at the same time defendant in a separate set of civil proceedings for damages instituted by the applicant.

c) The exercise of different judicial functions:

The mere fact that a judge in a criminal court has also made pre-trial decisions in the case, including decisions concerning detention on remand, cannot be taken in itself as justifying fears as to his lack of impartiality; what matters is the extent and nature of these decisions.[115] When decisions extending detention on remand required „a very high degree of clarity" as to the question of guilt, the Court found that the impartiality of the tribunals concerned was capable of appearing open to doubt and that the applicant's fears in this regard could be considered objectively justified.[116] In each case, the relevant question is the extent to which the judge assessed the circumstances of the case and the applicant's responsibility when ordering his or her detention on remand.[117]

When an issue of bias arises with regard to a judge's previous participation in the proceedings, a time-lapse of nearly two years since the earlier involvement in the same proceedings is not in itself a sufficient safeguard against partiality.[118]

113 „Findlay v. the United Kingdom" (1997)
114 „Otegi Mondragon and Others v. Spain" (2018); „Karrar v. Belgium" (2021)
115 „Nortier v. the Netherlands" (1993)
116 „Hauschildt v. Denmark" (1989)
117 „Jasiński v. Poland" (2005)
118 „Dāvidsons and Savins v. Latvia" (2016)

The fact that a judge was once a member of the public prosecutor's department is not a reason for fearing that he lacks impartiality.[119] Nevertheless, if an individual, after holding in that department an office whose nature is such that he may have to deal with a given matter in the course of his duties, subsequently sits in the same case as a judge, the public are entitled to fear that he does not offer sufficient guarantees of impartiality.

The successive exercise of the functions of investigating judge and trial judge by one and the same person in the same case has also led the Court to find that the impartiality of the trial court was capable of appearing to the applicant to be open to doubt.[120]

However, where the trial judge's participation in the investigation had been limited in time and consisted in questioning two witnesses and had not entailed any assessment of the evidence or required him to reach a conclusion, the Court found that the applicant's fear that the competent national court lacked impartiality could not be regarded as objectively justified.[121] Thus, assessment of the individual circumstances of each case is always needed in order to ascertain the extent to which an investigating judge dealt with the case.[122]

The absence of a prosecutor during the criminal trial, which may put the judge in the position of the prosecuting authority while conducting the questioning and adducing evidence against an applicant, raises another issue concerning impartiality. In this regard, the Court has explained that the judge is the ultimate guardian of the proceedings and that it is normally the task of a public authority in case of public prosecution to present and substantiate the criminal charge with a view to adversarial argument with the other parties. Therefore, confusing the two roles in the proceedings is a potential breach of the requirement of impartiality under Article 6. the Convention.[123]

Similarly, the Court has examined the question of compliance with the principle of impartiality in a number of cases concerning alleged contempt by the applicant in court, where the same judge then took the decision to prosecute, tried the issues arising from the applicant's conduct, determined his guilt and imposed the sanction. The Court has emphasised that, in such a situation, the confusion of roles between complainant, witness, prosecutor and judge could self-evidently prompt objectively justified fears as to the conformity of the proceedings with the time-honoured principle that no one should be a judge in his or her own cause and, consequently, as to the impartiality of the bench.[124]

No question of a lack of judicial impartiality arises when a judge has already delivered formal and procedural decisions in other stages of the proceedings.[125] However, problems with impartiality may emerge if, in other phases of the proceedings, a judge has already expressed an opinion on the guilt of the accused.[126]

The mere fact that a judge has already ruled on similar but unrelated criminal charges or that he or she has already tried a co-accused in separate criminal proceedings is not in itself sufficient to cast doubt on that judge's impartiality in a subsequent case.[127]

119 „Paunović v. Serbia" (2019)
120 „De Cubber v. Belgium" (1984)
121 „Bulut v. Austria" (1996)
122 „Borg v. Malta" (2016)
123 „Karelin v. Russia" (2016)
124 „Słomka v. Poland" (2018); „Deli v. the Republic of Moldova" (2019)
125 „George-Laviniu Ghiurău v. Romania" (2020)
126 „Gómez de Liaño y Botella v. Spain" (2008)
127 „Kriegisch v. Germany" (2010)

It is, however, a different matter if the earlier judgments contain findings that actually prejudge the question of the guilt of an accused in such subsequent proceedings.[128]

Moreover, an issue may arise from the perspective of general fairness where the trial court has reached certain findings by relying on evidence that was examined in different proceedings in which the applicant did not participate.

When the presiding judge of a tribunal had been previously declared biased against the applicant in a previous set of criminal proceedings concerning similar charges against him, an objective and justified fear of a lack of impartiality may arise both with regard to the applicant and his co-accused.[129]

The obligation to be impartial cannot be construed so as to impose an obligation on a superior court which sets aside an administrative or judicial decision to send the case back to a different jurisdictional authority or to a differently composed branch of that authority.[130] In other words, the mere fact that the same judge twice exercised the same function in the same set of criminal proceedings is insufficient to show objective lack of impartiality.[131] However, if an obligation on a superior court which sets aside a judicial decision to send the case back to different judges is provided for under the relevant domestic law, the question of whether a tribunal has been established by law arises.

The fact that an applicant was tried by a judge who herself raised doubts about her impartiality in the case may raise an issue from the perspective of the appearance of a fair trial. This, however, will not be sufficient to find a violation of Article 6. of the Convention. In each case, the applicant's misgivings about the impartiality of the judge must be objectively justified.[132]

d) Hierarchical or other links with another participant in the proceedings:

The determination by military service tribunals of criminal charges against military service personnel is not in principle incompatible with the provisions of Article 6.[133] However, where all the members of the court martial were subordinate in rank to the convening officer and fell within his chain of command, the applicant's doubts about the tribunal's independence and impartiality could be objectively justified.[134] Similarly, when a military court has in its composition a military officer in the service of the army and subject to military discipline and who is appointed by his or her hierarchical superior and does not enjoy the same constitutional safeguards provided to judges, it cannot be considered that such a court is independent and impartial within the meaning of Article 6 of the Convention.

The trial of civilians by a court composed in part of members of the armed forces can give rise to a legitimate fear that the court might allow itself to be unduly influenced by partial considerations.[135] Even when a military judge has participated only in an interlocutory decision in proceedings against a civilian that continues to remain in effect,

128 „Poppe v. the Netherlands" (2009); „Schwarzenberger v. Germany" (2006)
129 „Otegi Mondragon and Others v. Spain" (2018); contrast, „Alexandru Marian Iancu v. Romania" (2020)
130 „Marguš v. Croatia" (2014); „Thomann v. Switzerland" (1996); „Stow and Gai v. Portugal" (2005)
131 „Teslya v. Ukraine" (2020)
132 „Dragojević v. Croatia" (2015)
133 „Cooper v. the United Kingdom"
134 „Findlay v. the United Kingdom" (1997)
135 „Incal v. Turkey" (1998)

the whole proceedings are deprived of the appearance of having been conducted by an independent and impartial court.[136]

Situations in which a military court has jurisdiction to try a civilian for acts against the armed forces may give rise to reasonable doubts about such a court's objective impartiality. A judicial system in which a military court is empowered to try a person who is not a member of the armed forces may easily be perceived as reducing to nothing the distance which should exist between the court and the parties to criminal proceedings, even if there are sufficient safeguards to guarantee that court's independence.[137]

The determination of criminal charges against civilians in military courts could be held to be compatible with Article 6 only in very exceptional circumstances.[138]

Objectively justified doubts as to the impartiality of the trial court presiding judge were found to exist when her husband was the head of the team of investigators dealing with the applicants'case.[139] Similarly, an issue of objective impartiality arose where the trial judge's son was a member of the investigative team dealing with the applicant's case.[140]

Family affiliation between judges deciding on a case at different levels of jurisdiction may give rise to doubts as to the lack of impartiality. However, in „Pastörs v. Germany" (2019), where two judges who dealt with the applicant's case at the first and third level of jurisdiction were married, the Court found no violation of Article 6. of the Convention on the grounds that the applicant's complaint of bias had been submitted to a subsequent control of a judicial body with sufficient jurisdiction and offering the guarantees of Article 6 of the Convention. The Court also noted that the applicant had not given any concrete arguments why a professional judge – being married to another professional judge – should be biased when deciding on the same case at a different level of jurisdiction which did not, moreover, entail direct review of the spouse's decision.

Further, family affiliation with one of the parties could give rise to misgivings about the judge's impartiality. The Court has held that such misgivings must nonetheless be objectively justified. Whether they are objectively justified would very much depend on the circumstances of the specific case, and a number of factors are taken into account in this regard. These include, inter alia, whether the judge's relative has been involved in the case in question, the position of the judge's relative in the firm, the size of the firm, its internal organisational structure, the financial importance of the case for the law firm, and any possible financial interest or potential benefit (and the extent thereof) to be conferred on the relative.[141] In small jurisdictions, where an issue of family affiliation may often arise, that situation should be disclosed at the outset of the proceedings and an assessment should be made, taking into account the various factors involved in order to determine whether disqualification is actually necessitated in the case.

The fact that a member of a tribunal has some personal knowledge of one of the witnesses in a case does not necessarily mean that he will be prejudiced in favour of that person's testimony. In each individual case it must be decided whether the familiarity in

136 „Öcalan v. Turkey" (2005)
137 „Ergin v. Turkey" (2006)
138 „Martin v. the United Kingdom" (2006); „Mustafa v. Bulgaria" (2019)
139 „Dorozhko and Pozharskiy v. Estonia" (2008)
140 „Jhangiryan v. Armenia" (2020)
141 „Nicholas v. Cyprus" (2018)

question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal.[142]

A criminal trial against an applicant in a court where the victim's mother worked as a judge was found to be in breach of the requirement of impartiality under Article 6.[143]

e) Situations of a personal nature:

The judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges. That discretion should dissuade them from making use of the press, even when provoked. It is the higher demands of justice and the elevated nature of judicial office which impose that duty.[144]

Thus, where a court president publicly used expressions implying that he had already formed an unfavourable view of the applicant's case before presiding over the court that had to decide it, his statements objectively justified the accused's fears as to his impartiality.

No violation of Article 6. was found in relation to statements made to the press by a number of members of the national legal service and a paper published by the National Association of judges and prosecutors criticising the political climate in which the trial had taken place, the legislative reforms proposed by the Government and the defence strategy, but not making any pronouncement as to the applicant's guilt. Moreover, the court hearing the applicant's case had been made up entirely of professional judges whose experience and training enabled them to rise above external influence.[145]

The Court also did not find lack of impartiality in a case in which a juror had made comments about the case in a newspaper interview after sentencing.[146] Conversely, in „Kristiansen v. Norway" (2015), the presence on the jury of a juror who knew the victim and commented on her character in circumstances which could be perceived as a comment or reaction to her oral evidence led to a breach of the principle of impartiality under Article 6.

Publicly expressed support of a judge who brought the criminal case against the applicant by a judge sitting in a cassation court's panel in the case amounted to a violation of Article 6 § 1 of the Convention.[147]

The fact of having previously belonged to a political party is not enough to cast doubt on the impartiality of a judge, particularly when there is no indication that the judge's membership of the political party had any connection or link with the substance of the case.[148]

1.5. Stages of criminal proceedings (CPC)

a) Preparatory procedure:

– perception by authorities/denunciation/covert information gathering
– order of preparatory procedure

142 „Pullar v. the United Kingdom" (1996), concerning the presence in the jury of an employee of one of the two key prosecution witnesses; „Hanif and Khan v. the United Kingdom" (2011), concerning the presence of a police officer in the jury, and contrast, „Peter Armstrong v. the United Kingdom" (2014)
143 „Mitrov v. the former Yugoslav Republic of Macedonia" (2016)
144 „Lavents v. Latvia" (2002); „Buscemi v. Italy" (1999)
145 „Previti v. Italy" (2009)
146 „Bodet v. Belgium" (2017); „Haarde v. Iceland" (2017)
147 „Morice v. France" (2015)
148 „Otegi Mondragon and Others v. Spain" (2015)

– carrying out of the preparatory procedure (covert instruments and data collecting activity)
– order of investigation/terminate of the preparatory procedure
b) Cleaning up:
– commencing cleaning up
– carrying out cleaning up
– coercive measures/covert instruments/data collecting activity/evidence
– sending the cleaning up's documents
c) Examining:
– commencing examining
– carrying out examining
– coercive measures/specific rules of evidence
– suspension/terminate of procedure
d) Prosecutor's phase:
– mediation procedure/conditional suspension by prosecutor
– suspension of procedure due to cooperation of suspect or rejection of the denunciation
– plea bargain
– indictment
e) Preparation of trial:
– 12 main questions
– emphasised role of preparatory session (pleading guilty/not guilty/arrangement)
– specific rules (penalty order; private prosecution; substitute private prosecution; arraignment)
f) Judicial procedure of first instance:
– opening of the trial
– commencement of the trial
– taking evidence
– pleadings
– adoption of the final decision
– announcement of the final decision
– specific procedures of first instance (criminal procedure against juvenile offenders; military criminal procedure; immunity; private prosecution; substitute private prosecution; arraignment; in absentia procedures; procedure in case of arrangement; repeated procedure; military criminal procedure; trial in the retrial)
g) Judicial procedure of second instance:
– panel session
– public session
– trial of second instance
h) Judicial procedure of third instance:
– panel session
– public session of third instance
i) Extraordinary legal remedies:
– retrial
– judicial review
– constitutional complaint

– appeal on legal grounds
– procedure for the uniformity of the law/simplified review/application for justification)
j) Special and other procedures

1.5.1. The Anglo-Saxon model (USA, Great Britain)

In the anglo-saxon model, criminal prosecution develops in a series of stages, beginning with an arrest and ending at a point before, during or after trial. The majority of criminal cases terminate when a criminal defendant accepts a plea bargain offered by the prosecution. In a plea bargain, the defendant chooses to plead guilty before trial to the charged offenses, or to lesser charges in exchange for a more lenient sentence or the dismissal of related charges.

a) Arrest:

Criminal prosecution typically begins with an arrest by a police officer. A police officer may arrest a person if (1) the officer observes the person committing a crime; (2) the officer has probable cause to believe that a crime has been committed by that person; or (3) the officer makes the arrest under the authority of a valid arrest warrant. After the arrest, the police books the suspect. When the police complete the booking process, they place the suspect in custody. If the suspect commited a minor offense, the policy may issue a citation to the suspect with instructions to appear in court at a later date.

b) Bail:

If a suspect in police custody is granted bail, the suspect may pay the bail amount in exchange for a release. Release on bail is contingent on the suspect's promise to appear at all scheduled court proceedings. Bail may be granted to a suspect immediately after booking or at a later bail review hearing. Alternatively, a suspect may be released on his "own recognizance." A suspect released on his own recognizance need not post bail, but must promise in writing to appear at all scheduled court appearances. Own recognizance release is granted after the court considers the seriousness of the offense, and the suspect's criminal record, threat to the community and ties to family and employment.

c) Arraignment:

The suspect makes his first court appearance at the arraignment. During arraignment, the judge reads the charges filed against the defendant in the complaint and the defendant chooses to plead „guilty", „not guilty" or „no contest" to those charges. The judge will also review the defendant's bail and set dates for future proceedings.

d) Preliminary Hearing or Grand Jury Proceedings:

The government generally brings criminal charges in one of two ways: by a „bill of information" secured by a preliminary hearing or by grand jury indictment. In the federal system, cases must be brought by indictment. States, however, are free to use either process. Both preliminary hearings and grand juries are used to establish the existence of probable cause. If there is no finding of probable cause, a defendant will not be forced to stand trial.

A preliminary hearing, or preliminary examination, is an adversarial proceeding in which counsel questions witnesses and both parties makes arguments. The judge then makes the ultimate finding of probable cause. The grand jury, on the other hand, hears only from the prosecutor. The grand jury may call their own witnesses and request that further investigations be performed. The grand jury then decides whether sufficient evidence has been presented to indict the defendant.

e) Pre-Trial Motions:

Pre-trial motions are brought by both the prosecution and the defense in order to resolve final issues and establish what evidence and testimony will be admissible at trial.

f) Trial:

At trial, the judge or the jury will either find the defendant guilty or not guilty. The prosecution bears the burden of proof in a criminal trial. Thus, the prosecutor must prove beyond a reasonable doubt that the defendant committed the crimes charged. The defendant has a constitutional right to a jury trial in most criminal matters. A jury or judge makes the final determination of guilt or innocence after listening to opening and closing statements, examination and cross-examination of witnesses and jury instructions. If the jury fails to reach a unanimous verdict, the judge may declare a mistrial, and the case will either be dismissed or a new jury will be chosen. If a judge or jury finds the defendant guilty, the court will sentence the defendant.

g) Sentencing:

During the sentencing phase of a criminal case, the court determines the appropriate punishment for the convicted defendant. In determining a suitable sentence, the court will consider a number of factors, including the nature and severity of the crime, the defendant's criminal history, the defendant's personal circumstances and the degree of remorse felt by the defendant.

h) Appeal:

An individual convicted of a crime may ask that his or her case be reviewed by a higher court. If that court finds an error in the case or the sentence imposed, the court may reverse the conviction or find that the case should be re-tried.[149]

149 https://www.justia.com/criminal/docs/stages-of-a-criminal-case/ (08.03.2024.)

CHAPTER II.

PRINCIPLES OF CRIMINAL PROCEDURE

2.1 Concept and classification of procedural principles

The principles of criminal procedures are legislative expectations that help to decide questions of law and fact and set the framework for this decision-making process, and apply to the whole spectrum of official (judicial) proceedings. These principles are regulated by modern procedural codes on the basis of a roughly identical approach.

After 1989, domestic legislation and the application of the law have embraced the essence of the international - criminal procedure-related - documents, and even more, their practical implementation - in the name of the „rule of law" - has been their primary goal. The legal professions have realised that 'the criminal justice system is a mirror in which the whole of society can see the darker side of its face[150] , and the status of the accused is a very good reflection of the quality of the rule of law in a given State.[151]

Through the various international and European conventions, new principles have been established, such as „fair trial", „the rule of law", or „equality of arms", which KIRÁLY calls „universal principles"[152], TREMMEL calls „super principles".[153] Of course, it is not easy to couple these modern terms with the old legal institutions (e.g. the right to defence) and to systematise them dogmatically. However, a unified system is necessary in my view, one principle must be consistently deducible from another. It is no coincidence that such theoretical experiments are almost „commonplace" in academic publications. Thus, for example, FINSZTER, who, quoting VERVAELE, identifies the following as „sub-principles" of the nulla poena sine lege principle, points to the interrelationship of procedural principles:

– nulla culpa sine iudicio (no guilt without a conviction);
– nullum iudicium sine accusatione (no judgment without an accusation);
– nulla accusation sine probatione (no accusation without proof);
– nulla probatio sine defensione (no proof without defence).[154]

The method of systematisation is also complicated by the fact that the individual principles - by virtue of their broad definition and designation - can be derived back and forth from each other. In particular, the concept of „fair trial" is problematic, under the scope of which essentially all procedural principles can be classified. However, I would consider it somewhat „over-generalised" to regard all procedural principles as part of this declaratory legal instrument. Although our method might seem logically correct, the

150 REIMAN, J. H.: *The rich get richer and the poor get prison: ideology, class and criminal justice.* New York, Wiley, 1979, 1.
151 Flórián TREMMEL: Rule of law and criminal procedure. *Law Journal,* 1989/12. 620.
152 Tibor KIRÁLY: *Criminal Procedure Law.* Budapest, Osiris, 2003. 134-136.
153 Flórián TREMMEL: *Hungarian criminal procedure.* Budapest-Pécs, Dialóg-Campus, 2001. 68-71.
154 Géza FINSZTER: Constitutional criminal procedure and investigation. *Fundamentum,* 1997/2. 111.

chronological order in which each procedural principle emerged would make this system look „deceptive".

We must also break with the traditional solutions that limit themselves to an analysis of the „triple classic" (officiality, prohibition of self-incrimination, „in dubio pro reo") in relation to criminal procedures. Almost all principles apply to these procedural acts and I therefore consider it necessary to analyse them all.

2.1.1. System of principles in CPC

In Chapter I. of the CPC, the basic principles regulated under General Provisions serve as a norm for legislation, e.g. the rules for exclusion had to be created so that these fit with the principle of function sharing (contradictorium). In other cases these can be applied in practice (e.g. principle of in dubio pro reo).

The basic principles regulated in the CPC can be divided into two main groups:

a) Basic principles prevailing in the entire criminal procedure:

– presumption of innocence in a narrower sense;
– protection of basic rights
– principle of defence;
– foundation and obstacles of criminal procedure;
– division of procedural duties;
– prohibition of self-incrimination;
– principle of substantive evaluation of criminal liability;
– language of the criminal procedure and the right to use language;

b) Basic principles prevailing only in the judicial phase:

– foundation of adjudication and commitment to indictment;
– burden of proof;
– principle of in dubio pro reo;
– free evaluation of evidence;
– publicity of the trial.

The remaining static rules relate primarily to the subjects of the procedure (authorities and participants) and the procedural actions (evidence, coercive measures). The dynamic provisions regulate the progression of the procedure, from the beginning till the binding conclusion (moreover even further, see extraordinary legal remedies, special and other procedures).[155]

2.1.2. System of principles in European Convention on Human Rights

The European Convention of Human Rights (hereinafter: Convention) sets out the main procedural principles that must be respected in all Member States. The most important of these articles are:

155 Herke, ibid. 4.

a) Article 2. (Right to life):

Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

– in defence of any person from unlawful violence;

– in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

– in action lawfully taken for the purpose of quelling a riot or insurrection.

b) Article 3. (Prohibition of torture):

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

c) Article 5. (Right to liberty and security):

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

– the lawful detention of a person after conviction by a competent court;

– the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

– the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

– the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

– the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

– the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

d) Article 6. (Right to a fair trial):

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

Everyone charged with a criminal offence has the following minimum rights:

– to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

– to have adequate time and facilities for the preparation of his defence;

– to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

– to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

– to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

e) Article 7. (No punishment without law):

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

f) Article 13 (Right to an effective remedy):

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

g) Article 14 (Prohibition of discrimination):

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[156]

156 https://www.echr.coe.int/documents/d/echr/convention_ENG (13.03.2024.)

2.2. General considerations of Article 6 in its criminal aspect

2.2.1. The fundamental principles

Based on *Guide on Article 6 of the European Convention on Human Rights,* the key principle governing the application of Article 6 is fairness.[157] However, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case.[158]

In each case, the Court's primary concern is to evaluate the overall fairness of the criminal proceedings. Compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole, and not on the basis of an isolated consideration of one particular aspect or one particular incident. However, it cannot be excluded that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings. Thus, for instance, in the context of its assessment of the pre-trial judge proceedings confirming the indictment, the Court has stressed that it must have regard to the proceedings as a whole, assessing the handling of the case by the pre-trial judge in light of the subsequent trial, when determining whether the rights of the applicant were prejudiced.

As part of that determination, it needs to be assessed whether any measures taken during the proceedings before the pre-trial judge weakened the applicant's position to such an extent that all subsequent stages of the proceedings were unfair.[159]

Where a procedural defect has been identified, it falls to the domestic courts in the first place to carry out the assessment as to whether that procedural shortcoming has been remedied in the course of the ensuing proceedings, the lack of an assessment to that effect in itself being prima facie incompatible with the requirements of a fair trial according to Article 6 of the Convention.[160] Moreover, the cumulative effect of various procedural defects may lead to a violation of Article 6 even if each defect, taken alone, would not have convinced the Court that the proceedings were unfair.[161]

The general requirements of fairness contained in Article 6 apply to all criminal proceedings, irrespective of the type of offence at issue.[162] Nevertheless, when determining whether the proceedings as a whole have been fair, the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration.

Moreover, Article 6 should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities in taking effective measures to counter terrorism or other serious crimes in discharge of their duty under Articles 2, 3 and 5 § 1 of the Convention to protect the right to life and the right to bodily security of members of the public. However, public interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights.[163]

157 „Gregačević v. Croatia" (2012)
158 „Ibrahim and Others v. the United Kingdom" (2016)
159 „Alexandru-Radu Luca v. Romania" (2022)
160 „Mehmet Zeki Çelebi v. Turkey" (2020)
161 „Mirilashvili v. Russia" (2008)
162 „Negulescu v. Romania" (2021); „Buliga v. Romania" (2021)
163 „Ibrahim and Others v. the United Kingdom" (2016)

Requirements of a fair hearing are stricter in the sphere of criminal law than under the civil limb of Article 6.[164] However, the criminal-head guarantees will not necessarily apply with their full stringency in all cases, in particular those that do not belong to the traditional categories of criminal law such as tax surcharges proceedings,[165] minor road traffic offences proceedings,[166] or proceedings concerning an administrative fine for having provided premises for prostitution.[167]

Article 6 does not guarantee the right not to be criminally prosecuted.[168] Nor does it guarantee an absolute right to obtain a judgment in respect of criminal accusations against an applicant, in particular when there is no fundamental irreversible detrimental effect on the parties.[169]

A person may not claim to be a victim of a violation of his or her right to a fair trial under Article 6 of the Convention which, according to him or her, occurred in the course of proceedings in which he or she was acquitted or which were discontinued.[170] Indeed, the dismissal of charges against an applicant deprives him or her of the victim status for the alleged breaches of the Article 6 rights.[171] Moreover, the Court has held that an applicant cannot complain of a breach of his or her Article 6 rights if the domestic courts only applied a measure suspending the pronouncement of a criminal sanction against him or her.[172]

Lastly, it should be noted that a trial of a dead person runs counter to the Article 6 principles, because by its very nature it is incompatible with the principle of the equality of arms and all the guarantees of a fair trial. Moreover, it is self-evident that it is not possible to punish an individual who has died, and to that extent at least the criminal justice process is stymied. Any punishment imposed on a dead person would violate his or her dignity. Lastly, a trial of a dead person runs counter to the object and purpose of Article 6 of the Convention, as well as to the principle of good faith and the principle of effectiveness inherent in that Article.[173]

On the other hand, Article 6 does not prohibit a fine to be imposed on the surviving company in respect of an infringement committed by its merged subsidiary, where the core business is continued by the parent company.[174]

2.2.2. Waiver

The Court has held that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum

164 „Moreira Ferreira v. Portugal" (2017); „Carmel Saliba v. Malta" (2016)
165 „Jussila v. Finland" (2006)
166 „Marčan v. Croatia" (2014)
167 „Sancaklı v. Turkey" (2018)
168 „International Bank for Commerce and Development AD and Others v. Bulgaria" (2016)
169 „Kart v. Turkey" (2009)
170 „Khlyustov v. Russia" (2013)
171 „Batmaz v. Turkey" (2014)
172 „Kerman v. Turkey" (2016)
173 „Magnitskiy and Others v. Russia" (2019); see also „Grădinar v. Moldova" (2008), concerning proceedings after the death of an accused conducted upon the request of his wife with an intention to obtain confirmation that her husband had not committed the offence, which the Court examined under the civil limb of Article 6.
174 „Carrefour France v. France" (2019)

safeguards commensurate with its importance.[175] In addition, it must not run counter to any important public interest.[176]

Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6 of the Convention, it must be shown that he could reasonably have foreseen the consequences of his conduct.[177] Thus, for instance, the Court has held that the applicants who voluntarily and in full knowledge accepted to be tried in summary proceedings, which entailed certain advantages for the defence, unequivocally waived their right to the guarantees of Article 6 which were excluded in the proceedings in question (questioning of witnesses at the appeal stage of the proceedings).[178]

Similarly, the Court considered that an applicant who, over a period of eleven months until the closing address at the appeal hearing, repeatedly refused to take part in the proceedings via videoconference (which was, in the circumstances, a legitimate form of participation in the proceedings), waived the right to take part in the hearing in his own case.[179]

Some Article 6 guarantees, such as the right to counsel, being a fundamental right among those which constitute the notion of a fair trial and ensuring the effectiveness of the rest of the guarantees set forth in Article 6 of the Convention, require the special protection of the „knowing and intelligent waiver" standard established in the Court's case-law.[180] However, this does not mean that an applicant needs to have a lawyer present in order to validly waive his or her right of access to a lawyer.[181]

Likewise, waiver of the right to examine a witness, a fundamental right among those listed in Article 6 § 3 which constitute the notion of a fair trial, must be strictly compliant with the standards on waiver under the Court's case-law.[182]

2.2.3. Application of the general principles

a) Disciplinary proceedings:
Offences against military discipline, carrying a penalty of committal to a disciplinary unit for a period of several months, fall within the ambit of the criminal head of Article 6 of the Convention.[183] On the contrary, strict arrest for two days has been held to be of too short a duration to belong to the „criminal law" sphere.

With regard to professional disciplinary proceedings, in „Albert and Le Compte v. Belgium", (1983) the Court considered it unnecessary to give a ruling on the matter, having concluded that the proceedings fell within the civil sphere. It stressed, however, that the two aspects, civil and criminal, of Article 6 are not necessarily mutually exclusive. By contrast, as regards disciplinary proceedings before sport federation tribunals, the Court held that the criminal limb of Article 6 did not apply.[184]

175 „Pfeifer and Plankl v. Austria" (1992)
176 „Hermi v. Italy" (2006); „Sejdovic v. Italy" (2006); „Dvorski v. Croatia" (2015)
177 „Hermi v. Italy" (2006)
178 „Di Martino and Molinari v. Italy" (2021)
179 „Dijkhuizen v. the Netherlands" (2021)
180 „Dvorski v. Croatia" (2015); „Pishchalnikov v. Russia" (2009)
181 „Fariz Ahmadov v. Azerbaijan" (2021)
182 „Murtazaliyeva v. Russia" (2018)
183 „Engel and Others v. the Netherlands" (1976)
184 „Ali Rıza and Others v. Turkey" (2020)

In „Müller-Hartburg v. Austria" (2013), which concerned disciplinary proceedings against a lawyer, the Court did not find the criminal limb of Article 6 to be applicable. It took into account the fact that the applicable disciplinary provision did not address the general public but the members of a professional group possessing a special status and that it was intended to ensure that members of the bar comply with the specific rules governing their professional conduct. It thus did not have the elements of a criminal but rather disciplinary nature. Moreover, the deprivation of liberty was never at stake for the applicant and the fine which he risked incurring, although reaching the amount which could be regarded as punitive, was not in itself sufficient to qualify the measure as criminal. The same was true for the sanction of striking the applicant off the register of lawyers, which did not necessarily have a permanent effect and did not render the charges "criminal" in nature.

In the case of disciplinary proceedings resulting in the compulsory retirement or dismissal of a civil servant, the Court has found that such proceedings were not „criminal" within the meaning of Article 6, inasmuch as the domestic authorities managed to keep their decision within a purely administrative or labour sphere.[185] It has also excluded from the criminal head of Article 6 a dispute concerning the discharge of an army officer for breaches of discipline[186] as well as military disciplinary proceedings for the imposition of a promotion ban and a salary cut.[187]

The Court also held that proceedings concerning the dismissal of a bailiff[188] and a judge[189] did not involve the determination of a criminal charge, and thus Article 6 was not applicable under its criminal head. Similarly, disciplinary proceedings against a judge where the imposition of a substantial fine was at stake did not amount to the determination of a criminal charge.[190] Similarly, in the context of the dismissal of a judge resulting from a vetting process, the Court did not consider that the criminal limb of Article 6 applied despite the fact that the dismissal entailed a permanent bar to rejoining the judicial service.[191]

While making „due allowance" for the prison context and for a special prison disciplinary regime, Article 6 may apply to offences against prison discipline, on account of the nature of the charges and the nature and severity of the penalties.[192] However, proceedings concerning the prison system as such do not in principle fall within the ambit of the criminal head of Article 6.[193] Thus, for example, a prisoner's placement in a high-supervision unit does not concern a criminal charge; access to a court to challenge such a measure and the restrictions liable to accompany it should be examined under the civil head of Article 6 § 1.[194]

Measures ordered by a court under rules concerning disorderly conduct in proceedings before it (contempt of court) are normally considered to fall outside the ambit of Article

185 „Moullet v. France" (2007); „Trubić v. Croatia" (2012); „Pişkin v. Turkey" (2020); „Čivinskaitė v. Lithuania" (2020)
186 „Suküt v. Turkey" (2007)
187 „R.S. v. Germany" (2017)
188 „Bayer v. Germany" (2009)
189 „Oleksandr Volkov v. Ukraine" (2013); „Kamenos v. Cyprus" (2017)
190 „Ramos Nunes de Carvalho e Sá v. Portugal" (2018)
191 „Xhoxhaj v. Albania" (2021)
192 forty and seven additional days' custody respectively in „Ezeh and Connors v. the United Kingdom" (2003); conversely, see „Štitić v. Croatia" (2007)
193 „Boulois v. Luxembourg" (2012)
194 „Enea v. Italy" (2009)

6, because they are akin to the exercise of disciplinary powers.[195] However, the nature and severity of the penalty can make Article 6 applicable to a conviction for contempt of court,[196] particularly when classified in domestic law as a criminal offence.[197]

In „Gestur Jónsson and Ragnar Halldór Hall v. Iceland" (2020), the Court found, as regards the first and second Engel criteria, that it had not been demonstrated that the contempt-of-court sanction had been classified as „criminal" under domestic law; nor was it clear, despite the seriousness of the breach of professional duties in question, whether the applicants' offence was to be considered criminal or disciplinary in nature. As regards the third Engel criterion, namely the severity of the sanction, the Court clarified that the absence of an upper statutory limit on the amount of the fine is not of itself dispositive of the question of the applicability of Article 6 under its criminal limb. In this connection, the Court noted, in particular, that the fines at issue could not be converted into a deprivation of liberty in the event of non-payment, unlike in some other relevant cases; the fines had not been entered on the applicants' criminal record; and the size of the fine had not been excessive.

With regard to contempt of Parliament, the Court distinguishes between the powers of a legislature to regulate its own proceedings for breach of privilege applying to its members, on the one hand, and an extended jurisdiction to punish non-members for acts occurring elsewhere, on the other hand. The former might be considered disciplinary in nature, whereas the Court regards the latter as criminal, taking into account the general application and the severity of the potential penalty which could have been imposed.[198]

b) Administrative, tax, customs, financial and competition-law proceedings and other special proceedings:

The following administrative offences may fall within the ambit of the criminal head of Article 6.:

– road-traffic offences punishable by fines or driving restrictions, such as penalty points or disqualifications;[199]

– minor offences of causing a nuisance or a breach of the peace;[200]

– offences against social-security legislation;[201]

– administrative offence of promoting and distributing material promoting ethnic hatred, punishable by an administrative warning and the confiscation of the publication in question;[202]

– administrative offence related to the holding of a public assembly.[203]

195 „Ravnsborg v. Sweden" (1994)
196 „Mariusz Lewandowski v. Poland" (2012), concerning the sentence of solitary confinement against a prisoner
197 „Kyprianou v. Cyprus" (2005), concerning a penalty of five days' imprisonment
198 imprisonment for up to sixty days and a fine in „Demicoli v. Malta" (1991)
199 „Lutz v. Germany" (1987); „Schmautzer v. Austria" (1995); „Malige v. France" (1998); „Marčan v. Croatia" (2014); „Igor Pascari v. the Republic of Moldova" (2016); by contrast, „Matijašić v. Croatia" (2021)
200 „Lauko v. Slovakia" (1998); „Nicoleta Gheorghe v. Romania" (2012); „Şimşek, Andiç and Boğatekin v. Turkey" (2020), which the Court declared inadmissible on the grounds that there had been no significant disadvantage
201 „Hüseyin Turan v. Turkey" (2008), for a failure to declare employment, despite the modest nature of the fine imposed
202 „Balsytė-Lideikienė v. Lithuania" (2008)
203 „Kasparov and Others v. Russia" (2013)

Article 6 does not apply to ordinary tax proceedings, which do not normally have a "criminal connotation".[204] However, Article 6 has been held to apply to tax surcharges proceedings.[205]

When deciding on the applicability of the criminal limb of Article 6 to tax surcharges, the Court in particular took into account the following elements:

– the law setting out the penalties covered all citizens in their capacity as taxpayers;

– the surcharge was not intended as pecuniary compensation for damage but essentially as punishment to deter reoffending;

– the surcharge was imposed under a general rule with both a deterrent and a punitive purpose;

– the surcharge was substantial.[206]

The criminal nature of the offence may suffice to render Article 6 applicable, notwithstanding the low amount of the tax surcharge.[207]

Article 6 under its criminal head has been held to apply to customs law[208] to penalties imposed by a court with jurisdiction in budgetary and financial matters[209] and to certain administrative authorities with powers in the spheres of economic, financial and competition law[210], including market manipulations.[211]

In „Blokhin v. Russia" (2016) the Court found Article 6 to be applicable in the proceedings for placement of a juvenile in a temporary detention centre for juvenile offenders. It took into account the nature, duration and manner of execution of the deprivation of liberty that could have been, and which actually was, imposed on the applicant. The Court stressed that the applicant's deprivation of liberty created a presumption that the proceedings against him were „criminal" within the meaning of Article 6 and that such a presumption was rebuttable only in entirely exceptional circumstances and only if the deprivation of liberty could not be considered "appreciably detrimental" given its nature, duration or manner of execution. In the case at issue, there were no such exceptional circumstances capable of rebutting that presumption.

In some instances, the criminal limb of Article 6 may be applicable to the proceedings for placement of mentally disturbed offenders in a psychiatric hospital. This will depend on the special features of domestic proceedings and the manner of their operation in practice.[212]

Lastly, the criminal limb of Article 6 does not apply to private criminal prosecution. The right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently: it must be indissociable from the victim's exercise of a right to

204 „Ferrazzini v. Italy" (2001)

205 „Jussila v. Finland" (2006); „Steininger v. Austria" (2012); „Chap Ltd v. Armenia" (2017); „Melgarejo Martinez de Abellanosa v. Spain" (2021)

206 „Bendenoun v. France" (1994); conversely, see the interest for late payment in „Mieg de Boofzheim v. France" (2002)

207 10% of the reassessed tax liability in „Jussila v. Finland" (2006)

208 „Salabiaku v. France" (1998)

209 „Guisset v. France" (2000)

210 „Lilly France S.A. v. France" (2002); „Dubus S.A. v. France" (2009); „A. Menarini Diagnostics S.r.l. v. Italy" (2011); „Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia" (2018); „Prina v. Romania" (2020)

211 „Grande Stevens and Others v. Italy" (2014)

212 „Kerr v. the United Kingdom" (2003); „Antoine v. the United Kingdom" (2003), where the criminal limb did not apply; contrast them with „Valeriy Lopata v. Russia" (2012) and „Vasenin v. Russia" (2016), where the criminal limb did apply

bring civil proceedings in domestic law, even if only to secure symbolic reparation or to protect a civil right such as the right to „good reputation".[213]

c) Political issues:

Article 6 has been held not to apply in its criminal aspect to proceedings concerning electoral sanctions;[214] the dissolution of political parties;[215] parliamentary commissions of inquiry;[216] public finding of a conflict of interests in elected office;[217] and to impeachment proceedings against a country's President for a gross violation of the Constitution.[218]

The Court has also found that disqualification from standing for election and removal from elected office on account of criminal convictions for corruption and abuse of power is not equivalent to criminal penalties.[219]

With regard to lustration proceedings, the Court has held that the predominance of aspects with criminal connotations (nature of the offence – untrue lustration declaration – and nature and severity of the penalty – prohibition on practising certain professions for a lengthy period) could bring those proceedings within the ambit of the criminal head of Article 6 of the Convention.[220]

d) Expulsion and extradition

Procedures for the expulsion of aliens do not fall under the criminal head of Article 6, notwithstanding the fact that they may be brought in the context of criminal proceedings.[221] The same exclusionary approach applies to extradition proceedings[222] or proceedings relating to the European arrest warrant.[223]

Conversely, however, the replacement of a prison sentence by deportation and exclusion from national territory for ten years may be treated as a penalty on the same basis as the one imposed at the time of the initial conviction.[224]

e) Different stages of criminal proceedings, ancillary proceedings and subsequent remedies:

Measures adopted for the prevention of disorder or crime are not covered by the guarantees in Article 6.[225]

As regards the pre-trial stage (inquiry, investigation), the Court considers criminal proceedings as a whole, including the pre-trial stage of the proceedings.[226]

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213 „Perez v. France" (2004); „Arlewin v. Sweden" (2016)
214 „Pierre-Bloch v. France" (1997)
215 „Refah Partisi (the Welfare Party) and Others v. Turkey" (2000)
216 „Montera v. Italy" (2002)
217 „Cătăniciu v. Romania" (2018)
218 „Paksas v. Lithuania" (2011); by contrast, „Haarde v. Iceland" (2017), concerning the proceedings against a former Prime Minister in the Court of Impeachment
219 „Galan v. Italy" (2021)
220 „Matyjek v. Poland" (2007); conversely, see „Sidabras and Diautas v. Lithuania" (2003) and „Polyakh and Others v. Ukraine" (2019)
221 „Maaouia v. France" (2000)
222 „Peñafiel Salgado v. Spain" (2002)
223 „Monedero Angora v. Spain" (2008)
224 „Gurguchiani v. Spain" (2009)
225 „Raimondo v. Italy" (1994); „De Tommaso v. Italy" (2017), for special supervision by the police; „R. v. the United Kingdom", for or a warning given by the police to a juvenile who had committed indecent assaults on girls from his school
226 „Dvorski v. Croatia" (2015)

In its early jurisprudence, the Court stressed that some requirements of Article 6, such as the reasonabletime requirement or the right of defence, may also be relevant at this stage of proceedings insofar as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them.[227] Although investigating judges do not determine a "criminal charge", the steps taken by them have a direct influence on the conduct and fairness of the subsequent proceedings, including the actual trial. Accordingly, Article 6 § 1 may be held to be applicable to the investigation procedure conducted by an investigating judge, although some of the procedural safeguards envisaged by Article 6 § 1 might not apply.[228]

Article 6 § 1 is applicable throughout the entirety of proceedings for the determination of any „criminal charge", including the sentencing process.[229] Article 6 may also be applicable under its criminal limb to proceedings resulting in the demolition of a house built without planning permission, as the demolition could be considered a „penalty".[230] However, it is not applicable to proceedings for bringing an initial sentence into conformity with the more favourable provisions of the new Criminal Code,[231] although it may apply to the procedure for rectification of a sentence if that affects the overall length of an applicant's imprisonment.[232]

Proceedings concerning the execution of sentences – such as proceedings for the application of an amnesty,[233] parole proceedings,[234] and transfer proceedings under the Convention on the Transfer of Sentenced Persons[235] do not fall within the ambit of the criminal head of Article 6.

In principle, forfeiture measures adversely affecting the property rights of third parties in the absence of any threat of criminal proceedings against them do not amount to the „determination of a criminal charge".[236] Such measures instead fall under the civil head of Article 6.[237]

The Article 6 guarantees apply in principle to appeals on points of law,[238] and to constitutional proceedings,[239] where such proceedings are a further stage of the relevant criminal proceedings and their results may be decisive for the convicted persons.

Lastly, Article 6 does not normally apply to proceedings concerning extraordinary remedies, such as the reopening of a case. The Court reasoned that a person whose sentence has become final and who applies for his case to be reopened is not „charged with a criminal

227 „Imbrioscia v. Switzerland" (1993)
228 „Vera Fernández-Huidobro v. Spain" (2010)
229 for instance, confiscation proceedings enabling the national courts to assess the amount at which a confiscation order should be set, in „Phillips v. the United Kingdom" (2001); see also Aleksandr Dementyev v. Russia, 2013, §§ 23-26, concerning the determination of the aggregate sentence involving the conversion of the term of community work into the prison term
230 „Hamer v. Belgium" (2007)
231 „Nurmagomedov v. Russia" (2007)
232 „Kereselidze v. Georgia" (2019)
233 „Montcornet de Caumont v. France" (2003)
234 „A. v. Austria" (1990)
235 „Szabó v. Sweden" (2006), but see, for a converse finding, „Buijen v. Germany" (2010) – and exequatur proceedings relating to the enforcement of a forfeiture order made by a foreign court „Saccoccia v. Austria" (2007)
236 seizure of an aircraft in „Air Canada v. the United Kingdom" (1995); forfeiture of gold coins in „AGOSI v. the United Kingdom" (1986)
237 „Silickienė v. Lithuania" (2012)
238 „Meftah and Others v. France" (2002)
239 „Gast and Popp v. Germany" (2000); „Caldas Ramírez de Arrellano v. Spain" (2003); „Üçdağ v. Turkey (2021)

offence" within the meaning of that Article.[240] Only the new proceedings, after the request for reopening has been granted, can be regarded as concerning the determination of a criminal charge.[241] This approach was also followed in cases concerning a request for the reopening of criminal proceedings following the Court's finding of a violation.[242]

However, should an extraordinary remedy lead automatically or in the specific circumstances to a full reconsideration of the case, Article 6 applies in the usual way to the "reconsideration" proceedings. Moreover, the Court has held that Article 6 is applicable in certain instances where the proceedings, although characterised as "extraordinary" or „exceptional" in domestic law, were deemed to be similar in nature and scope to ordinary appeal proceedings, the national characterisation of the proceedings not being regarded as decisive for the issue of applicability. In sum, the nature, scope and specific features of the relevant extraordinary procedure in the legal system concerned may be such as to bring that procedure within the ambit of Article 6 § 1.[243]

Similarly, supervisory review proceedings resulting in the amendment of a final judgment do fall under the criminal head of Article 6.[244]

Lastly, it should be noted that the Court may examine an Article 6 complaint – which had earlier been struck-out from the list of cases on the basis of an unilateral declaration acknowledging a violation of that provision – in the event of its restoration of the case to the list of cases due to the fact that the domestic courts failed to give effect to the unilateral declaration by reopening the relevant domestic proceedings.[245]

2.2.4. Extra-territorial effect of Article 6

The Convention does not require the Contracting Parties to impose its standards on third States or territories.[246] As a rule, the Contracting Parties are not obliged to verify whether a trial to be held in a third State following extradition, for example, would be compatible with all the requirements of Article 6.

a) Flagrant denial of justice:

According to the Court's case-law, however, an issue might exceptionally arise under Article 6 as a result of an extradition or expulsion decision in circumstances where the individual would risk suffering a flagrant denial of a fair trial, i.e. a flagrant denial of justice, in the requesting country. This principle was first set out in Soering v. the United Kingdom (1989) and has subsequently been confirmed by the Court in a number of cases.[247]

The term „flagrant denial of justice" has been considered synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein.[248]

240 „Moreira Ferreira v. Portugal" (2017)
241 „Löffler v. Austria" (2000)
242 „Öcalan v. Turkey" (2010)
243 „Moreira Ferreira v. Portugal" (2017); see further, for instance, „Serrano Contreras v. Spain" (2021)
244 „Vanyan v. Russia" (2005)
245 „Willems and Gorjon v. Belgium" (2021)
246 „Drozd and Janousek v. France and Spain" (1992)
247 „Mamatkulov and Askarov v. Turkey" (2005); „Al-Saadoon and Mufdhi v. the United Kingdom" (2010); „Ahorugeze v. Sweden" (2011); „Othman (Abu Qatada) v. the United Kingdom" (2012)
248 „Sejdovic v. Italy" (2006); „Stoichkov v. Bulgaria" (2005); „Drozd and Janousek v. France and Spain" (1992)

Although it has not yet been required to define the term in more precise terms, the Court has nonetheless indicated that certain forms of unfairness could amount to a flagrant denial of justice. These have included:

– conviction in absentia with no subsequent possibility of a fresh determination of the merits of the charge;[249]

– a trial which is summary in nature and conducted with a total disregard for the rights of the defence;[250]

– detention without any access to an independent and impartial tribunal to have the legality of the detention reviewed;[251]

– deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country;[252]

– use in criminal proceedings of statements obtained as a result of a suspect's or another person's treatment in breach of Article 3;[253]

– trial before a military commission that did not offer guarantees of impartiality of independence of the executive, did not have legitimacy under national and international law where a sufficiently high probability existed of admission of evidence obtained under torture in trials before the commission.[254]

It took over twenty years from „the Soering v. the United Kingdom" (1989) judgment – that is, until the Court's 2012 ruling in the case of „Othman (Abu Qatada) v. the United Kingdom", 2012 – for the Court to find for the first time that an extradition or expulsion would in fact violate Article 6. This indicates, as is also demonstrated by the examples given in the preceding paragraph, that the „flagrant denial of justice" test is a stringent one. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial proceedings such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of a fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.[255]

b) Standard and burden of proof:

When examining whether an extradition or expulsion would amount to a flagrant denial of justice, the Court considers that the same standard and burden of proof should apply as in the examination of extraditions and expulsions under Article 3. Accordingly, it is for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if removed from a Contracting State, he would be exposed to a real risk of being subjected to a flagrant denial of justice. Where such evidence is adduced, it is for the Government to dispel any doubts about it.[256]

In order to determine whether there is a risk of a flagrant denial of justice, the Court must examine the foreseeable consequences of sending the applicant to the receiving

249 „Einhorn v. France" (2001); „Sejdovic v. Italy" (2006); „Stoichkov v. Bulgaria" (2005)
250 „Bader and Kanbor v. Sweden" (2005)
251 „Al-Moayad v. Germany" (2007)
252 „Al-Moayad v. Germany" (2007)
253 „Othman (Abu Qatada) v. the United Kingdom" (2012); „El Haski v. Belgium" (2012)
254 „Al Nashiri v. Poland" (2014); „Husayn (Abu Zubaydah) v. Poland" (2014); „Al Nashiri v. Romania" (2018)
255 „Ahorugeze v. Sweden" (2011); „Othman (Abu Qatada) v. the United Kingdom" (2012)
256 „Saadi v. Italy" (2008); „J.K. and Others v. Sweden" (2016); „Ahorugeze v. Sweden" (2011); „Othman (Abu Qatada) v. the United Kingdom" (2012); „El Haski v. Belgium" (2012)

country, bearing in mind the general situation there and his personal circumstances.[257] The existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion.[258]

Where the expulsion or transfer has already taken place by the date on which it examines the case, however, the Court is not precluded from having regard to information which comes to light subsequently.[259]

Lastly, in the context of a European Arrest Warrant (EAW) between the EU member States, the Court has held that in cases in which the State did not have any margin of manoeuvre in applying the EU law, the principle of "equivalent protection", as developed in the Court's case-law,[260] applied. This is the case where the mutual recognition mechanisms require the court to presume that the observance of fundamental rights by another member State has been sufficient. As envisaged by the EAW framework, the domestic court is thus deprived of discretion in the matter, leading to automatic application of the presumption of equivalence. However, any such presumption can be rebutted in the circumstances of a particular case. Even taking into account, in the spirit of complementarity, the manner in which mutual recognition mechanisms operate and in particular the aim of effectiveness which they pursue, the Court must verify that the principle of mutual recognition is not applied automatically and mechanically to the detriment of fundamental rights.[261]

In this spirit, where the courts of a State which is both a Contracting Party to the Convention and a member State of the European Union are called upon to apply a mutual recognition mechanism established by EU law, such as the EAW, they must give full effect to that mechanism where the protection of Convention rights cannot be considered manifestly deficient. However, if a serious and substantiated complaint is raised before them to the effect that the protection of a Convention right has been manifestly deficient and this situation cannot be remedied by EU law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law. In such instances, they must apply the EU law in conformity with the Convention requirements.

2.3. The presumption of innocence

No one shall be considered guilty until the court finds him guilty by a final and binding conclusive decision.[262] The presumption of innocence is a „conditio sine qua non" of civil legal certainty, writes Angyal.[263] According to Király, this determines the relationship between the parties to the proceedings, which in fact is not a presumption but a „provisional truth": „{...} there is no presumption of innocence (no fact indicating innocence is required for the presumption of innocence to exist)."[264]

257 „Saadi v. Italy" (2008); „Al-Saadoon and Mufdhi v. the United Kingdom" (2010)
258 „Saadi v. Italy" (2008); „Al-Saadoon and Mufdhi v. the United Kingdom" (2010)
259 „Mamatkulov and Askarov v. Turkey" (2005); „J.K. and Others v. Sweden" (2016); „Al-Saadoon and Mufdhi v. the United Kingdom" (2010)
260 „Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland" (2005); „Avotiņš v. Latvia" (2016)
261 „Pirozzi v. Belgium" (2018)
262 Convention, Article 6. point 2.
263 Pál Angyal: The principle of guaranteeing individual rights. In Tóth M. (ed.): *Criminal Procedural Law Reader*, ibid. 44.
264 Király (2003), ibid. 125.

As pointed out by the Hungarian Constitutional Court in its decision,[265] „the risk of failure of law enforcement is borne by the state. The constitutional guarantee of the presumption of innocence {...} expresses this risk-sharing as a specific rule." It should be noted that the presumption of innocence in criminal proceedings should also imply that the accused will be acquitted for lack of a criminal offence as a result of his unrefuted confession. However, judicial practice is different, because acquittals are made in the absence of evidence, thus maintaining the appearance of guilt. [266]

Evidence is the part of the procedure where the presumption of innocence is most „at risk". However, the presumption of innocence is not only binding on the courts, but also on the investigating authorities and the prosecuting authorities. Examples from domestic practice:

a) does not infringe this presumption

– blood tests for suspected drink-driving offenders; [267]

– psychiatric forensic practice, which is based on the assumption that the accused has committed the offence charged.[268]

b) violates this presumption,

– making statements at a press conference about the guilt of a person in custody;[269]

– if the accused is sanctioned for not answering certain questions during the proceedings. [270]

Following the decisions of the ECrHR, this presumption is not infringed by the court's reasoning that the income of persons convicted of drug trafficking offences in the six years preceding their conviction must be considered to be the proceeds of the offence.[271] However, the ECrHR found a violation of the Convention where

– after the acquittal of the accused on the basis of the principle of in dubio pro reo, they made findings that the suspicion against the applicant still existed;[272]

– the Belgian examining magistrate, at the end of the investigative phase of the proceedings, compared the accused to notorious serial killers in response to his provocation, a statement which was essentially intended to create the impression of guilt in the public mind and to anticipate the decision of the court hearing the case;[273]

– in the decision to terminate the proceedings, partly for lack of evidence and partly because of the statute of limitations for negligence, the court used expressions which clearly indicated that the accused was presumed guilty.[274]

In Hungarian jurisprudence, the practice of imposing and maintaining coercive measures restricting personal liberty is particularly problematic in principle, since these procedural acts are carried out without the accused's criminal liability having been

265 9/1992 (I. 30.) AB

266 Krisztina KARSAI - Tibor KATONA: The presumption of innocence and the unrebutted defence of the accused. *Law Gazette,* 2010/4. 179.

267 BH 1996/5 No 394.

268 BH 1993/3 No 233.

269 EFJ 1997/3 No 54.

270 BH 2002/4. no. 317.

271 „Phillips v. United Kingdom" (2001)

272 „Lamanna v. Austria" (2001)

273 „Pándy vs. Belgium" (2006)

274 „Grabschuk v. Ukraine" (2005)

established.[275] The use of arrest seems to be the most worrying of these,[276] but in many cases there is no alternative, particularly in the interests of the investigation. At most, legal limits can be set as to the scope of application, but the possibility of ordering it cannot be excluded for offences (e.g. participation in a criminal organisation) where effective investigation cannot be ensured otherwise.

There is also a view that the burden of proof is in fact reversed in the case of the imposition of various coercive measures, and that the burden of proof is squarely on the defender or defendant to prove that there are no grounds for the imposition. However, I consider this view to be erroneous in the light of current judicial practice in Hungary, since, unfortunately, the courts do not conduct any substantive evidentiary proceedings in the case of decisions on such matters, so that the arguments relating to the 'burden of proof' are also irrelevant.

On the whole, I believe that the existence of coercive measures does not stem from the presumed guilt of the accused, but from the requirement of the success of the proceedings. And if this requires deprivation of liberty or restriction of liberty, this can be done in exceptional cases, as defined by law.[277]

There is also widespread criticism of the application of the law in Hungary, where courts - especially the courts of appeal - are „reluctant" to grant acquittals and necessarily presume the guilt of the accused in their decision-making. Of course, clear and far-reaching conclusions can never be drawn on this issue. However, a number of empirical studies have been carried out recently, which have revealed judicial opinions that the low number of acquittals can be explained by the necessarily more detailed obligation to state reasons. The results of a court study carried out in 2006 confirmed this assertion, finding that courts of appeal overturn acquittals at first instance at a much higher rate than convictions at second instance (presumably this trend is the reason why the prosecution efficiency rate in Hungary is around 95%). However, the prosecution efficiency rate is explained by the prosecution authority as a result of the fact that it only prosecutes cases where the evidence is beyond doubt. [278]

275 It is reasonable to assume that the validity of the principle is questionable in criminal proceedings, since the treatment of suspects, the use of coercive measures against a person „presumed innocent" would hardly be permissible. However, it must be stressed that these measures do not affect the presumption of innocence, do not weaken it and cannot encourage the prosecuting authority to assume guilt at all costs. In fact, the principle would in itself be little more than a mere dictum, and its real content would be given by the additional principles concerning the evidence. In: Karsai - Katona, ibid. 174.

276 See the ECrHR judgment in „Peers vs Greece" (2001), which found that the conditions of the pre-trial detention violated the applicant's human dignity, since they created a sense of hopelessness and inferiority which broke the physical and psychological resistance of the accused and placed him in a humiliating situation. The Court held that the Greek authorities had thus violated Article 3 of the Convention (prohibition of torture). ECrHR, 2002/1 No 26.

277 Recommendation No R (80) 11 of the Committee of Ministers of the Council of Europe, adopted in 1980, draws attention to the requirements of necessity and proportionality: even a person accused of a crime presumed innocent until proven guilty may be detained pending trial only if the circumstances make it absolutely necessary. Pre-conviction detention should therefore be considered an exceptional measure, should never be mandatory and should not be used for punitive purposes.

278 *The right to an effective defence and access to justice in the European Union*. Country Report- Hungary. https://www.helsinki.hu/a-hatekony-vedelemhez-valo-jog-es-a-kirendelt-vedoi-rendszer-reformja-2007-2009/ (09.03.2024.)

2.3.1. Judgments of the ECrHR

Paragraph 2 of Article 6 embodies the principle of the presumption of innocence. It requires, inter alia, that: (1) when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; (2) the burden of proof is on the prosecution, and (3) any doubt should benefit the accused.[279]

Viewed as a procedural guarantee in the context of a criminal trial itself, the presumption of innocence imposes requirements in respect of, amongst others, the burden of proof;[280] legal presumptions of fact and law;[281] the privilege against self-incrimination;[282] pre-trial publicity;[283] and premature expressions, by the trial court or by other public officials, of a defendant's guilt.[284]

Article 6 § 2 governs criminal proceedings in their entirety, irrespective of the outcome of the prosecution, and not solely the examination of the merits of the charge.[285] Consequently, the presumption of innocence applies to the reasons given in a judgment acquitting the accused in its operative provisions, from which the reasoning cannot be dissociated. It may be breached if the reasoning reflects an opinion that the accused is in fact guilty.[286]

However, the presumption of innocence does not normally apply in the absence of a criminal charge against an individual, such as, for instance, concerning the application of measures against an applicant preceding the initiation of a criminal charge against him or her.[287]

Once applicable, the presumption of innocence does not cease to apply solely because the first-instance proceedings resulted in the defendant's conviction when the proceedings are continuing on appeal.[288]

Once an accused has properly been proved guilty, Article 6 § 2 can have no application in relation to allegations made about the accused's character and conduct as part of the sentencing process,[289] unless such accusations are of such a nature and degree as to amount to the bringing of a new "charge" within the autonomous Convention meaning.[290]

Nevertheless, a person's right to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her forms part of the general notion of a fair hearing under Article 6 § 1 of the Convention which applies to a sentencing procedure.[291]

279 „Barberà, Messegué and Jabardov v. Spain" (1988)
280 „Telfner v. Austria" (2001)
281 „Salabiaku v. France" (1988)
282 „Saunders v. the United Kingdom" (1996)
283 „G.C.P. v. Romania" (2011)
284 „Nešťák v. Slovakia" (2007)
285 „Poncelet v. Belgium" (2010)
286 „Cleve v. Germany" (2015)
287 „Gogitidze and Others v. Georgia" (2015); „Larrañaga Arando and Others v. Spain (2019); „Khodorkovskiy and Lebedev v. Russia" (2020); „Batiashvili v. Georgia" (2019), where Article 6 § 2 exceptionally applied to an instance of a purported manipulation of evidence, in order to insinuate the existence of a crime, before charges had been formally brought, which charges were then laid against the applicant very close in time to this noted manipulation.
288 „Konstas v. Greece" (2011)
289 „Bikas v. Germany" (2018)
290 „Böhmer v. Germany" (2002)
291 „Grayson and Barnham v. the United Kingdom" (2008)

The fundamental rule of criminal law, to the effect that criminal liability does not survive the person who committed the criminal acts, is a guarantee of the presumption of innocence enshrined in Article 6 § 2 of the Convention. Accordingly, Article 6 § 2 will be breached if an applicant did not stand trial and was convicted posthumously.[292]

a) Parallel proceedings:

Article 6 § 2 may apply to court decisions rendered in proceedings that were not directed against an applicant as "accused" but nevertheless concerned and had a link with criminal proceedings simultaneously pending against him or her, when they imply a premature assessment of his or her guilt.[293] Thus, for instance, the presumption of innocence may apply with regard to the court decisions in the extradition proceedings against an applicant if there was a close link, in legislation, practice or fact, between the impugned statements made in the context of the extradition proceedings and the criminal proceedings pending against the applicant in the requesting State.[294]

Moreover, the Court has considered Article 6 § 2 to apply with regard to the statements made in parallel criminal proceedings against co-suspects that are not binding with respect to the applicant, insofar as there was a direct link between the proceedings against the applicant with those parallel proceedings. The Court explained that even though statements made in the parallel proceedings were not binding with respect to the applicant, they may nonetheless have a prejudicial effect on the proceedings pending against him or her in the same way as a premature expression of a suspect's guilt made by any other public authority in close connection with pending criminal proceedings.[295]

In all such parallel proceedings, courts are obliged to refrain from any statements that may have a prejudicial effect on the pending proceedings, even if they are not binding. In this connection, the Court has held that if the nature of the charges makes it unavoidable for the involvement of third parties to be established in one set of proceedings, and those findings would be consequential on the assessment of the legal responsibility of the third parties tried separately, this should be considered as a serious obstacle for disjoining the cases. Any decision to examine cases with such strong factual ties in separate criminal proceedings must be based on a careful assessment of all countervailing interests, and the co-accused must be given an opportunity to object to the cases being separated.[296]

The Court has further found Article 6 § 2 to be applicable in the proceedings for revoking a decision on the suspension of prison sentence on probation in which reference was made to the fresh criminal investigation proceedings pending against the applicant.[297]

The Court also considered that Article 6 § 2 applied with regard to the statements made in the parallel disciplinary proceedings against an applicant when both criminal and disciplinary proceedings against him had been initiated on suspicion that he had committed criminal offences and where the disciplinary sanction gave substantial consideration to whether the applicant had in fact committed the offences he was charged with in the criminal proceedings.[298]

292 „Magnitskiy and Others v. Russia" (2019)
293 „Diamantides v. Greece" (2005)
294 „Eshonkulov v. Russia" (2015)
295 „Karaman v. Germany" (2014)
296 „Navalnyy and Ofitserov v. Russia" (2016)
297 „El Kaada v. Germany" (2015)
298 „Kemal Coşkun v. Turkey" (2017)

Similarly, Article 6 § 2 applies where two sets of criminal proceedings are in parallel pending against the applicant. In such cases, the presumption of innocence precludes a finding of guilt for a particular offence outside the criminal proceedings before the competent trial court, irrespective of the procedural safeguards in the parallel proceedings and notwithstanding general considerations of expediency. Thus, considering in one set of proceedings concerning a particular offence that an applicant has committed another offence which is subject to a trial in a parallel set of proceedings, is contrary to the applicant's right to be presumed innocent with respect to that other offence.[299]

Lastly, the Court found Article 6 to apply to the parliamentary inquiry proceedings conducted in parallel to the criminal proceedings against the applicant. In such circumstances, the Court stressed that the authorities responsible for setting up and deciding in the parliamentary inquiry proceedings were bound by the obligation to respect the principle of the presumption of innocence.[300]

b) Subsequent proceedings:

The presumption of innocence also protects individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence with which they have been charged. Without protection to ensure respect for the acquittal or the discontinuation decision in any other proceedings, the guarantees of Article 6 § 2 could risk becoming theoretical and illusory. What is also at stake once the criminal proceedings have concluded is the person's reputation and the way in which that person is perceived by the public.[301]

Whenever the question of the applicability of Article 6 § 2 arises in the context of subsequent proceedings, the applicant must demonstrate the existence of a link between the concluded criminal proceedings and the subsequent proceedings. Such a link is likely to be present, for example, where the subsequent proceedings require an examination of the outcome of the prior criminal proceedings and, in particular, where they oblige the court to analyse the criminal judgment; to engage in a review or evaluation of the evidence in the criminal file; to assess the applicant's participation in some or all of the events leading to the criminal charge; or to comment on the subsisting indications of the applicant's possible guilt.[302]

The Court has considered the applicability of Article 6 § 2 to judicial decisions taken following the conclusion of criminal proceedings concerning, inter alia

– a former accused's obligation to bear court costs and prosecution costs;

– a former accused's request for compensation for detention on remand or other inconvenience caused by the criminal proceedings, it being understood that Article 6 § 2 does not guarantee the right to compensation for pre-trial detention in the case of dismissal of charges or acquittal, and thus the mere refusal of compensation does not in itself raise an issue from the perspective of the presumption of innocence;[303]

299 „Kangers v. Latvia" (2019)
300 „Rywin v. Poland" (2016)
301 „Allen v. the United Kingdom" (2013)
302 „Martínez Agirre and Others v. Spain" (2019), where no link was established between the subsequent compensation proceedings and the earlier criminal investigations.
303 „Cheema v. Belgium" (2016)

– a former accused's request for defence costs;[304]

– a former accused's request for compensation for damage caused by an unlawful or wrongful investigation or prosecution;

– imposition of civil liability to pay compensation to the victim;

– refusal of civil claims lodged by the applicant against insurers;

– maintenance in force of a child care order, after the prosecution decided not to bring charges against the parent for child abuse;

– disciplinary or dismissal issues;[305]

– revocation of the applicant's right to social housing;

– request for conditional release from prison;[306]

– proceedings for reopening of criminal proceedings, following the Court's finding of a violation of the Convention in an earlier case, where the applicants were treated as convicted persons and their criminal record for the initial conviction was kept;[307]

– confiscation of an applicant's land even though the criminal case against him had been dismissed as statute-barred;[308]

– conviction in the subsequent administrative proceedings (qualified as "criminal" within the autonomous meaning of the Convention) following an applicant's acquittal on the same charges in the criminal proceedings;[309]

– dismissal by domestic courts of an applicant's appeal against the prosecutor's decision considering that he was guilty of the offences for which he had been indicted even though the criminal proceedings initiated against him had been discontinued as time-barred.[310]

The Court has also found Article 6 § 2 to be applicable in relation to the doubt casted on the applicants' innocence by the adoption of an Amnesty Act and discontinuation of the criminal proceedings against the applicants under that Act. However, on the facts of the case, the Court found no violation of Article 6 § 2 on the grounds that no wording in the Amnesty Act had linked the applicants themselves by name to the crime described therein and that no other circumstances allowed doubt to be cast on the applicants' innocence.[311]

c) Prejudicial statements:

Article 6 § 2 is not only a procedural guarantee. It is also aimed at preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with those proceedings.[312]

However, where no criminal proceedings are or have been in existence, statements attributing criminal or other reprehensible conduct are more relevant to considerations of protection against defamation and adequate access to court to determine civil rights, raising potential issues under Articles 8 and 6 of the Convention.[313] Moreover, the prejudicial

304 „Lutz v. Germany" (1987), where the Court held that neither Article 6 § 2 nor any other provision of the Convention gives a person charged with a criminal offence a right to reimbursement of his costs where proceedings taken against him are discontinued.
305 „Teodor v. Romania" (2013)
306 „Müller v. Germany" (2014)
307 „Dicle and Sadak v. Turkey" (2015)
308 „G.I.E.M. S.R.L. and Others v. Italy" (2018)
309 „Kapetanios and Others v. Greece" (2015)
310 „Caraian v. Romania" (2015)
311 „Béres and Others v. Hungary" (2017)
312 See: „Kasatkin v. Russia" (2021), concerning an issue of remedies in relation to the prejudicial statements.
313 „Zollmann v. the United Kingdom" (2003); „Ismoilov and Others v. Russia" (2008); „Mikolajová v. Slovakia"

statements must concern the same criminal offence in respect of which the protection of the presumption of innocence in the context of the latter proceedings is claimed.

When the impugned statements are made by private entities (such as newspapers), and do not constitute a verbatim reproduction of (or an otherwise direct quotation from) any part of official information provided by the authorities, an issue does not arise under Article 6 § 2 but may arise under Article 8 of the Convention.[314]

A fundamental distinction must be made between a statement that someone is merely suspected of having committed a crime and a clear declaration, in the absence of a final conviction, that an individual has committed the crime in question.[315] The latter infringes the presumption of innocence, whereas the former has been regarded as unobjectionable in various situations examined by the Court.[316]

Whether a statement by a judge or other public authority is in breach of the principle of the presumption of innocence must be determined in the context of the particular circumstances in which the impugned statement was made.[317]

Statements by judges are subject to stricter scrutiny than those by investigative authorities With regard to such statements made by investigative authorities, it is open to the applicant to raise his or her complaint during the proceedings or appeal against a judgment of the trial court insofar as he or she believes that the statement had a negative impact on the fairness of the trial.[318]

The voicing of suspicions regarding an accused's innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation.[319] However, once an acquittal has become final, the voicing of any suspicions of guilt is incompatible with the presumption of innocence.[320]

Nevertheless, in this context, in cases of unfortunate language the Court has considered it necessary to look at the context of the proceedings as a whole and their special features. These features became decisive factors in the assessment of whether that statement gave rise to a violation of Article 6 § 2 of the Convention. The Court considered that these features were also applicable where the language of a judgment might be misunderstood but can, on the basis of a correct assessment of the domestic law context, not be qualified as a statement of criminal guilt.[321]

d) Statements by public officials:

The presumption of innocence may be infringed not only by a judge or court but also by other public authorities.[322] This applies, for instance,

(2011); „Larrañaga Arando and Others v. Spain" (2019)

314 „Mityanin and Leonov v. Russia" (2019)

315 „Ismoilov and Others v. Russia" (2008)

316 „Garycki v. Poland" (2007)

317 „Daktaras v. Lithuania" (2000); „A.L. v. Germany" (2005)

318 „Czajkowski v. Poland" (2007)

319 „Sekanina v. Austria" (1993)

320 „Rushiti v. Austria" (2000); „O. v. Norway" (2003); „Geerings v. the Netherlands" (2007); „Paraponiaris v. Greece" (2008); „Marinoni v. Italy" (2021)

321 „Fleischner v. Germany" (2019); „Milachikj v. North Macedonia" (2021); by contrast, „Pasquini v. San Marino" (2020), where the impugned statements amounted to an unequivocal imputation of criminal liability that could not be explained by the particular domestic context.

322 „Allenet de Ribemont v. France" (1995)

– to the police officials;[323]
– President of the Republic;[324]
– the Prime Minister or the Minister of the Interior;[325]
– Minister of Justice;[326]
– President of the Parliament;[327]
– prosecutor[328] and
– other prosecution officials, such as an investigator.[329]

On the other hand, statements made by the chairman of a political party which was legally and financially independent from the State in the context of a heated political climate could not be considered as statements of a public official acting in the public interest under Article 6 § 2.[330]

Article 6 § 2 prohibits statements by public officials about pending criminal investigations which encourage the public to believe the suspect guilty and prejudge the assessment of the facts by the competent judicial authority.[331]

However, the principle of presumption of innocence does not prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected.[332]

The Court has emphasised the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of an offence.[333]

For instance, in „Gutsanovi v. Bulgaria" (2013), the Court found that statements of the Minister of the Interior following the applicant's arrest, but before his appearance before a judge, published in a journal in which he stressed that what the applicant had done represented an elaborate system of machination over a number of years, violated the presumption of innocence under Article 6 § 2. On the other hand, spontaneous statements of the Prime Minister in a television show related to the applicant's placement in pre-trial detention did not cast into doubt the applicant's presumption of innocence. Similarly, in „Filat v. the Republic of Moldova" (2021), the Court did not consider that, in the context of the parliamentary proceedings for the waiver of immunity, the statements of the Prosecutor General and of the President of Parliament, referring to the evidence supporting the request for the waiver of the applicant's immunity, breached Article 6 § 2 of the Convention.

Prejudicial comments made by a prosecutor themselves raise an issue under Article 6 § 2 irrespective of other considerations under Article 6 § 1, such as those related to adverse pretrial publicity.[334]

323 „Allenet de Ribemont v. France" (1995)
324 „Peša v. Croatia" (2010)
325 „Gutsanovi v. Bulgaria" (2013)
326 „Konstas v. Greece" (2011)
327 „Butkevičius v. Lithuania" (2002)
328 „Daktaras v. Lithuania" (2000)
329 „Khuzhin and Others v. Russia" (2008)
330 „Mulosmani v. Albania" (2013)
331 „Butkevičius v. Lithuania" (2002)
332 „Fatullayev v. Azerbaijan" (2010)
333 „Khuzhin and Others v. Russia" (2008)
334 „Turyev v. Russia" (2016)

e) Adverse press campaign:

In a democratic society, severe comments by the press are sometimes inevitable in cases concerning public interest.[335] A virulent press campaign can, however, adversely affect the fairness of a trial by influencing public opinion and affect an applicant's presumption of innocence. In this connection, the Court has held that the press must not overstep certain bounds, regarding in particular the protection of the right to privacy of accused persons in criminal proceedings and the presumption of innocence.[336] The fact that everyone charged with a criminal offence has the right under Article 6 § 2 of the Convention to be presumed innocent until proven guilty is of relevance for the balancing of competing interests which the Court must carry out from the perspective of Article 10.[337] In this context, the fact that the accused had confessed to the crime does not in itself remove the protection of the presumption of innocence.

The publication of photographs of suspects does not in itself breach the presumption of innocence[338] nor does the taking of photographs by the police raise an issue in this respect.[339] However, broadcasting of the suspect's images on television may in certain circumstances raise an issue under Article 6 § 2.[340]

f) *Sanctions for failure to provide information*:

The presumption of innocence is closely linked to the right not to incriminate oneself.[341] The requirement for car owners to identify the driver at the time of a suspected traffic offence is not incompatible with Article 6 of the Convention.[342] Obliging drivers to submit to a breathalyser or blood test is not contrary to the principle of presumption of innocence.[343]

2.4. The principle of officiality

The most important aspect of the principle of accusation is that it places the burden of proving guilt entirely on the accuser, so the accused is not required to prove his or her innocence.[344] This principle is not, of course, intended to supersede the function of the defence, but the defence must be an active participant in the evidentiary process - all the more so since it is obliged to do so by the CPC itself. However, the defense counsel and the accused are often in a more difficult position than the prosecutor's office, since they have to prove not the occurrence of an event (positive proof) but its untruthfulness (negative proof). In most cases, this is not even possible with concrete evidence, so the defence is most often limited to challenging the results of the positive evidence, e.g. by questioning the credibility of the testimony.

335 „Viorel Burzo v. Romania" (2009)
336 „Bédat v. Switzerland" (2016)
337 „Axel Springer SE and RTL Television GmbH v. Germany" (2017)
338 „Y.B. and Others v. Turkey" (2004)
339 „Mergen and Others v. Turkey" (2016)
340 „Rupa v. Romania" (2008)
341 „Heaney and McGuinness v. Ireland" (2000)
342 „O'Halloran and Francis v. the United Kingdom" (2007)
343 „Tirado Ortiz and Lozano Martin v. Spain" (1999)
344 Thus, for example, the burden of proving the existence of a ground excluding criminal liability or limiting criminal liability cannot be shifted to the accused (BH 1981.317.).

There are two exceptions to the principle of incrimination, in which cases - according to the rules of the CC - the burden of proof is reversed and falls on the accused. 1. if the accused fails to prove that the property acquired during the period specified in the Act did not result from a criminal offence, confiscation must be ordered in respect of that property,[345] or 2. if the accused does not prove the truth of the facts alleged by him, he shall be criminally liable for the allegation in the case of defamation, making a false statement or false photograph capable of defamation, publishing a false statement or false photograph capable of defamation, libel and slander.[346]

The importance of the enforcement of the principle of officiality has been stressed in a number of domestic case law decisions, for example in the investigation phase, it is always necessary to investigate ex officio whether the prison staff tortured the prisoners.[347]

In relation to the principle of officiality, the ECrHR found a violation of the Convention when the Bulgarian authorities failed to carry out an effective investigation into the death of the applicant's partner, thereby depriving him of an effective remedy.[348] Other Strasbourg rulings:

– in „Kaya v. Turkey" (2001), the Court ruled that when persons acting on behalf of state bodies cause the death of any person in the course of the use of arms, an effective investigation is ex officio mandatory;

– if a person in good health dies in custody, it is the responsibility of the state to investigate the circumstances at the appropriate level.[349]

Based on CPC, the prosecution service or investigating authority shall launch a criminal proceeding ex officio if it becomes aware of a criminal offence subject to public prosecution. Unless otherwise provided in this Act, the court shall proceed on the basis of a motion. A criminal proceeding may not be launched, or a criminal proceeding already launched shall be terminated if the act of the perpetrator has already been adjudicated with final and binding effect, except for extraordinary legal remedy proceedings and certain special procedures. This rule shall also apply where an act of the perpetrator constitutes more than one criminal offence, but the court, pursuant to the qualification offered in the indictment, does not find the defendant guilty in all criminal offences that can be established based on the facts presented in the indictment document.

If the liability of a person was established in an infraction procedure, a criminal proceeding may not be launched against him on the basis of the same facts without issuing a prosecutorial compliance reminder, or conducting a review or retrial procedure, pursuant to the Act on infractions.

All other circumstances preventing the launch of a criminal proceeding, necessitating the termination of any criminal proceeding already launched, or requiring the delivery of a judgment of acquittal shall be specified in an Act.

A criminal proceeding may not be launched or a criminal proceeding already launched shall be terminated, if the act of the perpetrator has already been adjudicated with final and binding effect in a Member State of the European Union (hereinafter: "Member State"); or if a decision was adopted in a Member State regarding the merits of the act which prevents

345 CC 74/A. §
346 CC 229. §
347 BH 2001/11 No 877.
348 „Velikova v. Bulgaria" (2001)
349 EJF 2001/2 No 21.

the launch of a new criminal proceeding regarding the same act, pursuant to the laws of the country where the decision was adopted, or the continuation of the criminal proceeding ex officio or based on any ordinary legal remedy.[350]

2.4.1. The ground for sentencing, the binding nature of the indictment (CPC)

Based on CPC, the court shall (1) deliver its judgment on the basis of the indictment, and (2) decide on, and may not exceed the scope of, the indictment. The court may decide on the criminal liability of the indicted person only, and it may adjudicate only acts that are specified in the indictment.[351]

Legal case 1. (Hungary): Criminal proceedings should be terminated due to the lack of lawful indictment, if the bill of indictment does not contain the precise description of the criminal offences on the basis of which prosecution took place.

The court of first instance found the accused guilty of the criminal offences of continuous embezzlement committed in the pattern of a business operation in respect of particularly substantial value [section 317, subsection (1) and subsection (7), point b) of Act no. IV of 1978 on the Criminal Code (hereinafter referred to as the Criminal Code)] and forgery of private documents [section 276 of the Criminal Code], therefore sentenced the accused to three years and six months' imprisonment, four years' prohibition from public affairs and five years' prohibition from any profession related to the financial sector.

The court of second instance quashed the first instance judgement and terminated the criminal proceedings due to the lack of lawful indictment.

The appellate prosecution service submitted an appeal against the decision of the court of second instance to the Curia.

In its third instance proceedings, the Curia held that the court of second instance had lawfully decided to quash the first instance judgement and to terminate the criminal proceedings against the accused. The Curia agreed with the position of the court of second instance in that the bill of indictment filed by the county prosecution service had not been in conformity with the relevant procedural provisions on lawful indictment contained in section 2, subsections (1) and (2) of Act no. XIX of 1998 on the Code of Criminal Procedure (hereinafter referred to as the Code of Criminal Procedure) with regard to the fact that the bill of indictment had failed to precisely describe the criminal offences for which the accused had been charged with.

The Curia reasoned that, according to the principle of lawful indictment, only a bill of indictment that clearly defines the person against whom charges were pressed and precisely describes the criminal offences for which the person was charged with can serve as a legal basis for a criminal court to proceed to establish one's criminal liability. Consequently, no criminal court proceedings can be launched or continued without a lawful bill of indictment.

The Curia found that the court of second instance had been right in referring to the fact that the bill of indictment had not been specific about the description of the accused person's act of embezzlement (an act of dishonestly withholding assets for the purpose of

350 CPC 4. § (1) – (7)
351 CPC 6. § (1) – (3)

conversion of such assets, by a person to whom the assets were entrusted, either to be held or to be used for specific purposes) in respect of the assets of a financial institution and its clients and the value of the embezzled property. The bill of indictment did not include either whether there had been any change of data in the financial institution's information system or whether there had been any recording of false data, and if so, who had committed it and how it had been carried out. In addition, the bill of indictment did not refer to any fact that would serve as a legal basis for establishing that the criminal offence of embezzlement had been committed in the pattern of a business operation for illegal financial gains.

The bill of indictment was confined to stating that the accused person had opened a bank account by means of using the names and personal data of fictional persons, persons not belonging to the financial institution's clientele and the financial institution's clients without their consent or knowledge, he had conducted financial transactions involving their assets by way of disposing of those assets as of his own property, and he had forged private documents for the above purposes.

The aforementioned formulation does not meet the statutory requirements of lawful indictment as laid down in the Code of Criminal Procedure. With regard to the above, the Curia upheld the decision of the court of second instance.[352]

Legal case 2. (Hungary): By its decision rendered at a panel meeting held on 19 January 2015, the Curia – proceeding upon a petition for judicial review submitted by the defence attorney of the first and second accused – quashed the first and second instance judgements in respect of the first and second accused, and terminated court proceedings in connection with all criminal charges brought against them due to the lack of lawful indictment.

The municipal prosecution service brought charges against the accused persons before the first instance court. The bill of indictment was done on 4 June 2003 and was filed with the court on 1 July 2003. During the proceedings of the first instance court, criminal charges were put forward by the municipal prosecution service. The second instance court noticed that one of the victims had been represented by the sibling of the former head of the county prosecution service in the course of the criminal investigation and during the first instance proceedings, but his representative status ended by the time of the delivery of the second instance decision.

With regard to the above and by virtue of section 373, subsection (1), point II/d) of the Code of Criminal Procedure, the competent regional court of appeal quashed the first instance judgement and – having regard to the changes to the rules on the courts' competence that took place in the meantime – ordered the first instance court to reopen its proceedings.

In their judgements rendered in the reopened proceedings, the lower instance courts found the first and second accused guilty of fraud and other criminal offences, therefore sentenced the first accused to three years' imprisonment, three years' prohibition from public affairs and the payment of an ancillary fine of 500 000,- HUF, while imposed a fine of 250 000,- HUF on the second accused.

In his petition for judicial review, the defence attorney of the first and second accused argued that the date of indictment should be the date on which the bill of indictment was

352 Budapest, the 16th of October 2015. In: *Communication concerning the decision of the Curia of Hungary in criminal case n° Bhar.I.987/2015.*

filed with the court (opinion no. 1/2007. BK of the Criminal Department of the Curia). The requirements for indictment should be met on the date of indictment. Under the provisions of section 32, subsection (4) of the Code of Criminal Procedure and regardless of who puts forward the criminal charges, a prosecutor that has been excluded from proceedings on grounds of a conflict of interests is explicitly prohibited from pressing charges. Such procedural infringement cannot be remedied by a lawful bill of indictment filed belatedly in the reopened proceedings.

The Curia agreed with the arguments explained in the petition for judicial review. The date of indictment shall be the date on which the bill of indictment is filed with the court. In the present case, Act no. XIX of 1998 on the Code of Criminal Procedure entered into force on the date on which the bill of indictment was filed against the accused persons. Section 31, subsection (5) of the Code of Criminal Procedure extends the scope of application of the exclusion criteria regulated in section 31, subsection (1), point b) of the Code of Criminal Procedure and in the previous legal regime to the prosecutors of the municipal prosecution services. It is true that none of the parties to the proceedings has referred to the above exclusion criteria. However, as to the invoked ground of exclusion, due to its nature, the competent judicial authority could have passed only one type of decision, namely it should have excluded the municipal prosecution service from the proceedings. Therefore, a kind of pending situation arose in which the applicable legal provisions explicitly prohibited the competent prosecution service from pressing charges pending the adjudication of the motion for exclusion.

Hence, the municipal prosecution service pressed charges contrary to the legal prohibition, and its unauthorised indictment constituted a serious violation of law (more severe than a procedural infringement such as the violation of the rules on the courts' competence and territorial jurisdiction). Such indictment is formally illegitimate and unlawful. Given that, in their reopened proceedings, the lower instance courts continued to act upon the same unlawful indictment, the reopening of the court proceedings could not remedy this serious irregularity.

For these reasons, the Curia, proceeding upon a petition for judicial review, decided on the merits of the case by quashing the final and conclusive judgement and – with regard to section 373, subsection (1), point I/c) of the Code of Criminal Procedure – terminating court proceedings in connection with all criminal charges brought against the first and second accused, as well as ruling on other legal issues detailed above.[353]

2.5. The principle of „in dubio pro reo"

A fact not proven beyond a reasonable doubt shall not be held against the defendant.[354] This principle sets out the requirement to prove guilt beyond reasonable doubt, which creates obligations - direct and indirect - for the investigating authority, the public prosecutor (private prosecutor) and the court. It should be noted that the assessment of the minimum level of proof is a highly subjective matter. Nevertheless, there are some decision-making

353 Budapest, the 10th of February 2015. In: *Communication concerning the decision of the Curia of Hungary in criminal case n° Bfv.III.1020/2014.*

354 CPC 7. § (4)

principles, mainly developed in judicial practice, which serve as a „lifeline" for the legal practitioner in doubtful situations, such as: 1. „We do not disagree with the expert opinion!"; 2. „Witness testimony is the queen of evidence!", etc.

However, certain criteria are given, which the court will use as a basis for its judgement, such as „common sense", documentary evidence, logic, life experience or the relevance of the facts. It is important, however, that these factors should only play a subsidiary role and should never hinder the development of legal reasoning (adversarial procedure).

Case law:

The court can take a position on the question of the accused's mental state only in favour of the accused, if a scientifically determination of the accused's sanity is not possible on the basis of forensic medical expert opinions.[355]

If there is no direct evidence pointing to guilt in the case, and the available circumstantial incriminating evidence gives no doubt only that the accused could have committed the offence, but the incriminating evidence does not refute the accused's denial and no further evidence can be obtained: the accused must be acquitted of the charges against them for lack of evidence.[356]

If the circumstantial evidence clearly does not provide a basis for a factual conclusion that the accused was the perpetrator of the offence: in the absence of proof, an acquittal order may be made.[357]

The principle of „in dubio pro reo" does not simplify the proof, but only determines its direction. Its flexibility, however, gives the defence a wide field of argument, which lawyers very often use, from their remarks at the first questioning of the suspect, through defence speeches, to appeals on the grounds that the conviction is unfounded.

According to Trstenjak (former member of ECrHR) this principle does not tell the judge when he should have doubts, but only how he should decide when he has doubts. „If in a criminal trial it is not possible to ascertain with the requisite certainty whether the accused has committed a particular offence, his innocence must be presumed in his favour."[358]

According to Tremmel, the principle of in dubio pro reo can only be invoked immediately before the court decision, after the defence has exhausted all its possibilities of proof.[359] In my view, however, the defence counsel must constantly indicate to the competent authority (the court) which facts he considers to be in doubt. The best means of doing so is constant, objective commentary of the case. This practice is particularly justified when the defence has no means of proof at all and the only way to defend itself is for the lawyer to constantly question the credibility of the evidence presented by the prosecution.

355 EBH 2002.793., BH 2003.393.
356 BH2003. 145.
357 BH 1977.484.
358 C-62/06 Fazenda Pública
359 Tremmel (2001), ibid. 87.

2.6. The principle of „fair trial"

The general content of this principle is that public authorities must decide on individual cases concerning citizens' rights in a fair and equitable manner. The essential elements of the guarantee of Anglo-Saxon origin were first set out in Article 6 of the Convention, which was promulgated in Hungary by Act XXXI of 1993 and as a result of which certain of its legal provisions appeared in the domestic constitutional legislation. However, the Hungarian Constitutional Court still does not refer to the concept of „fair trial", despite the fact that numerous petitions are nowadays submitted to the ECrHR by Member States alleging violation of this principle. However, Strasbourg case-law considers the concept of „due process" as a subsidiary clause. This means that if there is any other violation of a fundamental (procedural) right under the Convention, it is no longer necessary to find that this fundamental right has been infringed.[360]

A „fair trial" is a basic requirement not only in the relationship between the accused and the authority (court), but also in the relationship between the defence counsel and the authority (court). This is not primarily a legal but an ethical norm, which creates different obligations and expectations on the part of the authority (court) and the defence counsel.

The ECrHR accepts the right of national criminal courts to impose disciplinary sanctions on participants in proceedings. The classic form of sanction is the disciplinary sanction, which may, however, be imposed only in justified cases. In one case, the judge, in a decision rejecting a request for exclusion, imposed the maximum fine on a defendant who had claimed to have had an intimate relationship with him, on the grounds that he had libeled the court by making false statements, the sole purpose of which was to delay the proceedings. In the present case, therefore, the reason for the sanction was not directly the conduct of the defendant, but the fact of defamation of the court as a legal person.[361]

Moreover, „ethical conduct" relates not only to the conduct of the proceedings but also to the professional approach to the criminal case in question. This means in particular that

– the defence counsel must keep the defendant informed of the current status of the case (evidence) and its expected outcome;

– must be familiar with the most important aspects of the case file.

However, this expectation does not mean that the defence counsel has to play the role of „big brother". Even if the defendant is a close friend of the accused, he must bear in mind that the courtroom is not a world of emotions, there is no room for sentimentality, or impulsiveness. A defence counsel with such a temperament will sooner or later become antipathetic to the court, and such behaviour is therefore more harmful than likely to elicit any sympathy from the judge. From the point of view of general ethics of the defence, I also consider it essential that, when arguing in court, the defence lawyer should refer primarily to the concrete facts that arise, rather than to his personal experience and to the theoretical propositions that come from everyday routine.

The following case law decisions on the Convention have shown an important direction in the interpretation of the principle of „fairness":

a) The fairness or unfairness of a procedure can usually only be judged on the basis of the procedure as a whole:

360 „Pakelli v. Germany" (1983)
361 „Chmelir v. Czech Republic" (2005)

– this does not mean, however, that a particular factor cannot be so decisive for the case as a whole as to give rise to a breach of the Convention in itself; [362]

– it may be the case that only a cumulative assessment of all the circumstances can establish the „unfairness” of the procedure.

b) The ECrHR never examines possible defects in the national legal system or infringements committed by the law enforcers, but whether the authorities of the Member State concerned have infringed the provisions of the Convention.[363]

c) The admissibility of evidence must be governed by national (Member State) law and it is for the national authorities alone to consider the evidence submitted to them; the Court's task, by its own definition, is therefore only to determine whether the proceedings as a whole are fair or unfair.[364] The Court's jurisdiction, by its own definition, does not extend to examining either the defects in the national legal systems or the infringements committed by the Member States' law enforcement authorities,[365] but only to examining whether all these factors taken together are capable of establishing a violation of the Convention.[366]

d) The burden of proving the alleged unfairness of the procedures lies essentially with the applicant.[367]

The ECrHR found a breach of the Convention when

– in the pending case, written evidence was not communicated to the applicant;[368]

– the 24-day detention was carried out without an official decision, no criminal proceedings were initiated before the detention and the suspected offender was not reported;[369]

– the applicant had only a short time-limit to appeal against the judgment, whereas the prosecutor was not bound by any time-limit in this respect; the Court also criticised in the same case the fact that the prosecution, contrary to the defence, had been informed in advance of the composition of the court; [370]

– the lawyer present could not represent the accused because his unlawful absence was sanctioned by national law;[371]

– the court deprived the accused of the opportunity to be represented by a lawyer because he stayed away from the trial (he feared that he would be arrested);[372]

– the accused was deprived of the possibility of lodging an appeal on the grounds that he had previously withdrawn from detention.[373]

362 „Miailhe v. France” (1996)
363 „Perez v. France” (2004)
364 See: „Ferrantelli and Santangelo v. Italy” (1996), where the ECrHR did not find any evidence to that effect.
365 „Perez v. France” (2004)
366 The Court did not find a breach of the Convention where the national court presumed, in an ambiguous situation, that the prosecutor had lodged his appeal within the time limit. This is essentially a matter for the national courts to decide. „Tejedor Garcia judgment” of 16 December 1997, Reports 1997-VIII, p. 2782.
367 „Göktan v. France” (2002)
368 „Koupila v. Finland” (2001)
369 „Bitieva v. Russia” (2007)
370 „Kremzow v. Austria” (1993)
371 „Van Geyseghem v. Belgium” (1999)
372 „Eliazer v. the Netherlands” (2001)
373 „Khalfaoui v. France” (1999)

However, the Court held that there was no breach of the Convention when

– the prosecution had a longer time to appeal than the defence;[374]

– the applicant was acquitted by the courts, but the Supreme Court ordered a retrial, which resulted in the applicant being retried.[375]

The prosecution and the defence must have an equal opportunity to express their views on questions of fact and law. It should be noted that this does not necessarily imply that the prosecution and the defence have the same legal powers, but it does require that the defence has powers of comparable weight to those of the prosecution.

At the level of evidence, this expresses the requirement that the accuser, the accused and his or her defence must be given the same opportunity to prove their case. Therefore, each of these procedural subjects has the right to be present, to ask questions, to comment, to make submissions and to seek redress.

This principle is, of course, far from being fully respected in practice. It can only be applied with restrictions during the investigation phase, in order to ensure the efectiveness of investigation. So, „fair trial" is not „numerical equality", but rather emphasises the right of access to information (documents) and thus the right to meaningful participation in procedural acts and the importance of meaningful preparation of the accused and the defence.

Of course, there have also been other decisions that have emphasised the importance of the principle under discussion. In one such decision, the „bench" ruled that if the public defender is not notified of the place and time of the hearing in a verifiable manner and in a timely manner, so as to enable him to participate in the hearing and exercise his rights under the law, this is not in accordance with the Fundamental Law, and the statement thus taken cannot be evaluated as evidence.

The principle of „fair trial" is applied in a rather deceptive way in the majority of procedural rights, since it can only be literally discussed in the evidentiary part of the trial or in the exercise of the right of appeal. This is also a natural state of affairs, since full equality cannot be expected either in the investigative or in the prosecution phase (after all, the latter is precisely the function of bringing a case to court with the minimisation of the possibilities of defence on the merits). In Hungary, too, the investigative phase is dominated by elements of inquisitorialism, two examples of which are the time limitations on the exercise of the right to be present at procedural acts and the possibility of access to documents.

In relation to the irregularities of certain procedural stages, the ECrHR found a violation of the Convention as fallows:

– the detained suspect was not allowed to have a defence lawyer present during his initial interview and was not warned by the authorities that he was not obliged to charge himself with a crime;[376]

– in a case for damages before the Finnish Supreme Court, the applicant, acting without a lawyer, was not allowed to examine the file; the decision was that the main rules of due process apply not only in criminal proceedings, fundamental human rights are

374 This will only result in a breach of the Convention if an analysis of the procedure as a whole leads to the conclusion that it was unfair. See: „Ben Naceur v. France" (2006)

375 „Nikitin v. Russia" (2004)

376 „Göcmen vs. Turkey" (2006)

„independent of the proceedings”; and that this principle applies before any level of court - whether it be a court of first instance, second instance or third instance;[377]

– denied access to the criminal file, refusing to disclose documents relating to the applicant in the summary proceedings before the police court;[378]

– the prosecution did not provide important evidence to the defence on the grounds of public interest without the knowledge and consent of the trial judge; [379]

– at the hearing before the Constitutional Court, the applicants were not given the opportunity to acquaint themselves with the written evidence on which the decision on the merits was based and to submit their observations on its content, relevance and credibility;[380]

– the proceedings before the court were unexpected, before a new authority and away from the place where the evidence was located;[381]

– the accused or his or her defence counsel were not allowed to inspect certain documents forming part of the prosecution case file or to obtain copies of certain essential documents;[382]

– the prosecutor made a submission to the court in such a way that the defence was not aware of it and therefore had no opportunity to react;[383]

– the report of the prosecutor's rapporteur reached the representative of the prosecution, but the defence was not informed of its contents;[384]

– the accused could not have been aware of the prosecutor's submission and could not react to its findings;[385]

– the determining authorities did not provide the person in pre-trial detention and his lawyer with the possibility to consult the documents for prolonging the detention;[386]

– the court only notified certain material circumstances to the defendants with legal representation.[387]

The ECrHR did not find a breach of the Convention when

– the person concerned was unable to respond to the prosecutor's oral argument;[388]

– certain relevant documents were only made available to the parties concerned during the appeal procedure.[389]

Recommendation No R (95) 13 of the Committee of Ministers of the Council of Europe, adopted on 11 September 1995, states that the rights of the defence must be guaranteed throughout the criminal proceedings, including the use of special means.[390] This legislation

377 „Kerojärvi vs Finland” (1996)
378 „Foucher vs. France” (1997)
379 „Arowe and Da Vis vs. United Kingdom” (2000)
380 „Krcmár and others vs Czech Republic” (2000)
381 „Barberá, Meggegué and Jabardo vs. Spain” (1988)
382 „Öcalan v. Turkey” (2003)
383 „Bulut v. Austria” (1996)
384 „Reinhardt and Slimane-Kaid v. France” (1998)
385 „Meftah and Others v. France” (2002)
386 EFJ 2002/1. 15.
387 „Meftah v. France” (2001)
388 „Stepinska v. France” (2004)
389 „Miailhe v. France” (1996)
390 However, in all cases where the subject of criminal proceedings is a crime committed by an organised criminal group and the life and liberty of the witness may be at risk, a balance must be struck between the rights of the defence, the rights of the witness and the State's duty to provide justice.

also emphasises as a matter of principle the need to strike a balance between the rights of the defence and the interests of the State in the administration of justice.

It should be noted that the requirements of a „fair trial" are not always met in the court proceedings. There are a number of cases where the rights of the defence are restricted, such as (1) the court accepts only the motions of the prosecutor's office; (2) the defendant and the defence counsel are prevented from communicating; (3) unjustified interruption of the plea of defense counsel, etc.

However, it is also noticeable that the inquisitorial features of the investigative phase are inadvertently reflected in the trial phase, as the investigative acts are often carried out without the involvement of the defence, so that the court often receives cases „presented with complete clarity". The consequence of this is that a judge who spends maximum effort studying the case file in detail can easily become a „puppet of the prosecution" and any motion of defence is unlikely to be successful at trial.[391] At the same time, no dislike, no sympathy, no previous acquaintance with a colleague, no judgement on any personal characteristic of the offender, can play any part in the judge's work.

Legal case 1. (Hungary): In its final judgement, the court imposed fines on legal persons as a result of criminal proceedings for tax fraud and other criminal offences. Two legal persons – via their common representative – lodged a petition for judicial review before the Curia by arguing that their representative had not been summoned by the court of second instance to attend the court's public session which had constituted an unconditional procedural infringement.

The Curia esteemed that the petition for judicial review was ill-founded.

1. The Curia primarily examined whether the legal persons and their representative had been entitled to submit a petition for judicial review. Act no. CIV of 2001 on Criminal Sanctions for Legal Persons (hereinafter referred to as the CSLP Act) stipulates that if criminal sanctions were to be imposed on a legal person in a criminal proceeding, the provisions of Act no. XIX of 1998 on the Code of Criminal Procedure (hereinafter referred to as the Code of Criminal Procedure) shall be applied save as otherwise provided for in the present act of law [section 7, subsection (2) of the CSLP Act]. It provides that, in addition to the case referred to in section 416, subsection (1), point c) of the Code of Criminal Procedure, a petition for judicial review may be submitted by a legal person against the relevant parts of the impugned judgement if the imposition or non-imposition of a criminal sanction on the legal person concerned is the result of the violation of substantive criminal law or of the provisions of the present act of law [section 24, subsection (1) of the CSLP Act]. Thus, legal persons are clearly entitled to lodge a petition for judicial review through their representatives.

2. The legal persons' common representative had already been given a mandate in the lower instance court proceedings, therefore there was no need for a renewed mandate for the judicial review proceedings before the Curia. In principle, the rules on defence attorneys shall be applied to the representative of a legal person [section 9, subsection

391 „Statistics show that it takes more time for a trial to end with an acquittal than a conviction. This may be because it is more difficult for the defence to convince the court of the innocence of the accused or the lack of sufficient evidence to support the accusation than it is for the prosecution to convince the court of guilt." In: Ede Theiss (ed.): *Statistics*. Budapest, University note, 1959. 146.

(4) of the CSLP Act]. In the absence of specific provisions, section 47, subsection (1) of the Code of Criminal Procedure – according to which the temporal scope of the official appointment of a legal aid lawyer or the temporal scope of a power of attorney (unless otherwise stipulated by the parties) shall last until the delivery of a final criminal court decision in the case concerned and, moreover, shall extend to retrials, judicial review proceedings and other special court proceedings beyond such delivery – shall also apply to the representative of a legal person.

3. Pursuant to section 416, subsection (1), point c) and section 373, subsection (1), phrase II, point d) of the Code of Criminal Procedure, a petition for judicial review may be submitted against the court's final on-the-merits decision if the court hearing was held in the absence of a person whose presence would have been compulsory by law. For the purposes of the above provisions, court hearings also include public sessions [section 234, subsection (3) of the Code of Criminal Procedure].

Upon proceeding to draft the petition for judicial review, the legal persons' common representative assumed that he had a procedural position quasi identical to that of a defence attorney. On these grounds, since legal persons are obliged to be represented by a natural person, the latter has to be present at the court's hearing or public session.

The Curia agreed with the impeccable arguments put forward by the Office of the Prosecutor General and considered the petition for judicial review to be ill-founded. By virtue of the specific provisions of section 9, subsection (5), point c) of the CSLP Act that deviate from the general rules of the Code of Criminal Procedure, the representative of a legal person "may be present at the court's hearing", which means that his presence is not compulsory by law, however, he should not be excluded from participating in such hearings.

The court of second instance undoubtedly violated the procedural rule according to which the court should have informed the legal persons' legal representative about his right to be present at the court's public session, irrespective of the fact that the legal representative had given a mandate to a substitute representative during the lower instance proceedings. On the other hand, the provisions of section 9, subsection (5), point c) of the CSLP Act had not been violated. The court of second instance duly summoned the substitute representative to attend the court's public session and the summoned person participated in all rounds of the session and rightfully represented both legal persons before the court.

For the sake of exhaustiveness, the Curia noted that the substitute representative had a fundamental duty to inform his principal (the legal representative) about each and every detail of the exercise of his mandate – in particular, about notices and decisions sent to him by the court, as well as about the exercise of his rights as a substitute representative at the court's public session – without any delay. The data examined in the proceedings disclosed nothing capable of proving that the substitute representative had not fulfilled the above duties, and in the petition for judicial review the legal persons' legal representative did not refer to such breach of duty.

Therefore, the fact that the court of second instance had not summoned the duly authorised representative was considered by the Curia to be a so-called relative procedural infringement, which did not breach the requirement of the professional representation of legal persons. The reference of the legal persons' common representative to the rules on lead defence attorneys [section 44, subsection (3) of the Code of Criminal Procedure]

was completely erroneous. These rules arrange the procedural position of several defence attorneys who are all mandated by the same accused, but a legal representative does not qualify as a defence attorney. With regard to the specific provisions of the CSLP Act, the rules on defence attorneys cannot be applied in the present case.

In conclusion, the Curia upheld the impugned court decision in respect of the legal persons concerned.[392]

Legal case 2. (Hungary): In its judgement delivered at a public hearing, the court of first instance found the second accused guilty of the crime of theft [section 316, subsection (1), subsection (2), second phrase, point d) and subsection (4), point b/1) of Act no. IV of 1978 on the Criminal Code] and sentenced him, as a recidivist for the same category of criminal offences, to two years and eight months' imprisonment and to three years' ban on participating in public affairs. In addition, the court declared that the second accused could not be granted conditional release and terminated his previously authorised conditional release as well.

Proceeding upon appeals submitted by the accused persons, the court of second instance upheld the first instance judgement. The second instance decision was delivered at a panel session.

The second accused lodged a petition for judicial review with the Curia against the second instance court decision. The petitioner argued that no summons had been served on him by the court of second instance and he had been imprisoned in a penitentiary facility during the second instance proceedings for a criminal offence committed earlier.

The Curia found the petition for judicial review well-founded. Based on the documents available to it, the court of second instance concluded that the second accused had been released from prison and could be summoned from his place of residence to attend the court's panel session. However, the court of second instance unlawfully sought to summon him from his place of residence, since the penitentiary facility later informed the court that the second accused was imprisoned both at the time of the service of summons and at the date of the panel session.

According to section 360, subsection (4) of the Code of Criminal Procedure, an appeal may be dealt with at a panel session only if the head of panel informs – among others – the accused person of the panel's composition and of the opportunity to request, within eight days, the judicial panel to hold a public session or a public hearing.

Court papers should be served on imprisoned accused persons, however, at their place of detention with acknowledgement of the service of summons. The court of second instance acted unlawfully by failing to duly summon the second accused to attend the court's panel session and by delivering a decision in the absence of a person whose presence would have been compulsory.

The Curia therefore quashed the second instance decision and ordered the court of second instance to reopen its proceedings in respect of the second accused.[393]

392 Budapest, the 11th of April 2017. In: *Communication concerning the decision of the Curia of Hungary in criminal case n° Bfv.II.1278/2016.*

393 Budapest, the 19th of October 2016. In: *Communication concerning the decision of the Curia of Hungary in criminal case n° Bfv.I.178/2016.*

2.6.1. „Equality of arms" (ECrHR)

Equality of arms is an inherent feature of a fair trial. It requires that each party be given a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent. Equality of arms requires that a fair balance be struck between the parties, and applies to criminal and civil cases.

The right to an adversarial hearing means in principle the opportunity for the parties to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision.[394] As a rule, from the perspective of the adversarial trial principle, the Court does not need to determine whether the failure to communicate the relevant document caused the applicant any prejudice: the existence of a violation is conceivable even in the absence of prejudice. Indeed, it is for the applicant to judge whether or not a document calls for a comment on his part.[395] The right to an adversarial trial is closely related to equality of arms and indeed in some cases the Court finds a violation of Article 6. looking at the two concepts together.

There has been a considerable evolution in the Court's case-law, notably in respect of the importance attached to appearances and to the increased sensitivity of the public to the fair administration of justice.[396]

A restriction on the rights of the defence was found in „Borgers v. Belgium" (1991), where the applicant was prevented from replying to submissions made by the avocat général before the Court of Cassation and had not been given a copy of the submissions beforehand. The inequality was exacerbated by the avocat général's participation, in an advisory capacity, in the court's deliberations. Similar circumstances have led to the finding of a violation of Article 6 § 1 concerning the failure to communicate the higher prosecutor's observations on appeal to the defence.[397]

The Court has found a violation of Article 6. in criminal proceedings where a defence lawyer was made to wait for fifteen hours before finally being given a chance to plead his case in the early hours of the morning. Equally, the Court found a violation of the principle of equality of arms in connection with a Supreme Court ruling in a criminal case. The applicant, who had been convicted on appeal and had requested to be present, had been excluded from a preliminary hearing held in camera.[398] The same is true for instances in which an applicant is not allowed to be present at a hearing before the appeal court while the representative of the prosecution is present.[399]

In contrast, a complaint concerning equality of arms was declared inadmissible as being manifestly ill-founded where the applicant complained that the prosecutor had stood on a raised platform in relation to the parties. The accused had not been placed at a disadvantage regarding the defence of his interests.[400]

The failure to lay down rules of criminal procedure in legislation may breach equality of arms, since their purpose is to protect the defendant against any abuse of authority and

394 „Brandstetter v. Austria" (1991)
395 „Bajić v. North Macedonia" (2021)
396 „Borgers v. Belgium" (1991)
397 „Zahirović v. Croatia" (2013)
398 „Zhuk v. Ukraine" (2010)
399 „Eftimov v. the former Yugoslav Republic of Macedonia" (2015)
400 „Diriöz v. Turkey" (2012)

it is therefore the defence which is the most likely to suffer from omissions and lack of clarity in such rules.[401]

Witnesses for the prosecution and the defence must be treated equally; however, whether a violation is found depends on whether the witness in fact enjoyed a privileged role. In „Thiam v. France" (2018), the Court did not consider that the participation of the President of the Republic as a victim and civil party in the proceedings disturbed the principle of equality of arms although he could not be questioned as a witness in the proceedings due to a constitutional prohibition. The Court stressed that such a constitutional prohibition did not in itself contravene Article 6. It also noted, in particular, that in convicting the applicant, the national courts had not referred to any evidence against him adduced by the civil party that required them to test its credibility and reliability by hearing the President. The Court also noted that the nature of the case, the evidence available and the non-conflicting versions of the applicant and the civil party did not in any event require that the latter party be questioned. In addition, the Court had regard to the fact there was no indication in the case file that the President's involvement had encouraged the public prosecutor's office to act in a way that would have unduly influenced the criminal court or prevented the applicant from bringing an effective defence.

Refusal to hear any witnesses or examine evidence for the defence but examining the witnesses and evidence for the prosecution may raise an issue from the perspective of equality of arms. The same is true if the trial court refuses to call defence witnesses to clarify an uncertain situation which constituted the basis of charges.[402]

The principle of equality of arms is also relevant in the matters related to the appointment of experts in the proceedings. The mere fact that the experts in question are employed by one of the parties does not suffice to render the proceedings unfair. The Court has explained that although this fact may give rise to apprehension as to the neutrality of the experts, such apprehension, while having a certain importance, is not decisive. What is decisive, however, is the position occupied by the experts throughout the proceedings, the manner in which they performed their functions and the way the judges assessed the expert opinion. In ascertaining the experts' procedural position and their role in the proceedings, the Court takes into account the fact that the opinion given by any court-appointed expert is likely to carry significant weight in the court's assessment of the issues within that expert's competence.[403]

The Court has found that if a bill of indictment is based on the report of an expert who was appointed in the preliminary investigations by the public prosecutor, the appointment of the same person as expert by the trial court entails the risk of a breach of the principle of equality of arms, which however can be counterbalanced by specific procedural safeguards.[404]

In this regard, the requirement of a fair trial does not impose on a trial court an obligation to order an expert opinion or any other investigative measure merely because a party has requested it. Where the defence insists on the court hearing a witness or taking other evidence (such as an expert report, for instance), it is for the domestic courts to

401 „Coëme and Others v. Belgium" (2000)
402 „Kasparov and Others v. Russia" (2013)
403 „Shulepova v. Russia" (2008)
404 „J.M. and Others v. Austria" (2017)

decide whether it is necessary or advisable to accept that evidence for examination at the trial. The domestic court is free, subject to compliance with the terms of the Convention, to refuse to call witnesses proposed by the defence.[405]

Similarly, under Article 6 it is normally not the Court's role to determine whether a particular expert report available to the domestic judge was reliable or not. The domestic judge normally has wide discretion in choosing amongst conflicting expert opinions and picking one which he or she deems consistent and credible. However, the rules on admissibility of evidence must not deprive the defence of the opportunity to challenge the findings of an expert effectively, in particular by introducing or obtaining alternative opinions and reports. In certain circumstances, the refusal to allow an alternative expert examination of material evidence may be regarded as a breach of Article 6. § as it may be hard to challenge a report by an expert without the assistance of another expert in the relevant field. Moreover, a failure of the prosecution to disclose the technical details on which an expert report is based may impede the possibility for the defence to challenge the expert report and thus raise an issue of equality of arms under Article 6.[406]

Equality of arms may also be breached when the accused has limited access to his case file or other documents on public-interest grounds.[407]

The Court has found that unrestricted access to the case file and unrestricted use of any notes, including, if necessary, the possibility of obtaining copies of relevant documents, are important guarantees of a fair trial. The failure to afford such access has weighed in favour of finding that the principle of equality of arms had been breached. In this context, importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice. Respect for the rights of the defence requires that limitations on access by an accused or his lawyer to the court file must not prevent the evidence from being made available to the accused before the trial and the accused from being given an opportunity to comment on it through his lawyer in oral submissions. In some instances, however, an accused may be expected to give specific reasons for his request to access a particular document in the file.[408]

Non-disclosure of evidence to the defence may breach equality of arms as well as the right to an adversarial hearing, where the defence was not given an opportunity to comment on a supplementary police report).

2.7. Obligation to complete the taking of evidence within a reasonable time

Based on Article 6 § 1 of the Convention „1. In the determination of {...} any criminal charge against him, everyone is entitled to a {...} hearing within a reasonable time." I would note, there are many reasons why procedures may be delayed, for example: non-appearance of the accused, witness, expert or defence counsel; shortcomings of the penitentiary system; reasons related to exclusion of procedural participiants, other

405 „Huseyn and Others v. Azerbaijan" (2011)
406 „Kartoyev and Others v. Russia" (2021)
407 „Matyjek v. Poland" (2007)
408 „Matanović v. Croatia" (2017)

technical difficulties, etc.[409] According to the interpretation of the ECrHR, the interval of reasonable time for the examination runs from the first communication of the suspicion until the date of the final judicial decision. It is clear, however, that the most time-consuming procedural steps in criminal proceedings are those related to the taking of evidence (e.g. witness hearings, confrontations).

The enforcement of this principle is a particularly delicate issue in the case of coercive measures, since these coercive acts are subject to fundamental rights restrictions without the issue of the criminal liability of the accused having been finally decided.[410]

Of course, in the context of determining whether the duration of proceedings is justified or unjustified, the complexity of the case in question and its factual characteristics must always be taken into account and it must be examined in relation to this whether the parties to the proceedings have not deliberately (in bad faith) contributed to delaying the proceedings, for example by means of unnecessary motions to adduce evidence; by means of continually submitted requests for postponement of the hearing; by means of unjustified omissions, etc. [411]

In „Csanádi v. Hungary" (2004), the ECrHR found a violation of Article 6 (1) of the Convention (the right to a fair trial) on the basis that the Hungarian courts had infringed the fundamental right to a fair hearing within a reasonable time. The decision stated in principle that the reasonableness of the length of the proceedings must be assessed in the light of the specific circumstances of the case, i.e. the complexity of the facts of the case and the „procedural conduct" of the accused. In the Court's view, the case in question was not particularly complex in such a way as to give rise to a prolongation of the proceedings. Although the accused exercised his rights under the CPC in force (see submission of a motion, comments, notification of a bias objection), this cannot be held against him and he is not obliged to cooperate with the authorities. Moreover, in this case, the Hungarian court had a period of inactivity of 1 year, during which it did not hold any hearings, even though there would have been no reason not to do so.

There is an interesting study by Ervin Belovics on the specifics of the domestic procedures. The author points out that prior to the 1980s „the court trial was concentrated on one day in the majority of cases and only in cases with multiple defendants or multiple offences were two or possibly more days of trial held. From the early 1980s, however, this changed, with longer criminal trials, which also meant that more and more time elapsed between the suspected offender being brought to trial and the final determination of criminal responsibility. From the early 1990s, the situation became even worse, and sometimes the pre-trial or even trial stage of criminal proceedings alone took several years. The main reasons for this are seen by theorists and practitioners as being the quantitative increase in crime, the growing number of complex cases with difficult legal judgments and the increasing complexity of the rules of criminal procedure, which have led to increasing delays in the application of

409 Anna Kiss - Ádám Mészáros: *Timeliness of investigations, speeding up investigations.* https://www.bm-tt.hu/assets/letolt/rendtudtar/be_gyorsitas_kutjel_meszaros_kiss_2011%20doc.pdf (10.03.2024.)

410 See: Exceptionally prolonged pre-trial detention on the basis of the applicant's arbitrary and violent behaviour does not violate the Convention. „Léger v. France" case

411 „Péissier and Sassi v France" case (no. 25444/94.)

the timeliness requirement by the judicial authorities, sometimes resulting in criminal proceedings taking 8-10 years."[412]

Problems with the application of the principle take different forms in continental and Anglo-Saxon systems. This is because, while the criminal proceedings in continental states seek to establish the material truth, i.e. the historical facts as fully as possible and as close to the truth as possible, in Anglo-Saxon proceedings the courts are content to judge the case on the basis of the evidence presented by the parties and to compare it (formal truth). It is then obvious that, the evidentiary acts are much more detailed and lengthy in processes based on continental traditions.

According to Hungarian case law, the decisive factor for the unreasonableness of the duration of the proceedings is whether there is a period of time during which the authorities are inactive.[413] It is also consistent to hold that the workload of the authorities is not in itself a sufficient explanation for the length of the proceedings, because the States are obliged to organise judicial activity in such a way as to enable them to fulfil all their obligations.[414] The ECrHR has, however, laid down as a rule that the „procedural conduct" of the applicant in the course of the proceedings, the delay in taking procedural steps, cannot be imputed to the public authorities when assessing whether the proceedings comply with the requirement of „a reasonable time".[415]

2.7.1. Determination of the length of proceedings (ECrHR)

In criminal matters, the aim of Article 6 § 1, by which everyone has the right to a hearing within a reasonable time, is to ensure that accused persons do not have to lie under a charge for too long and that the charge is determined.[416]

a) Starting-point of the period to be taken into consideration:

The period to be taken into consideration begins on the day on which a person is charged.[417] The "reasonable time" may begin to run prior to the case coming before the trial court,[418] for example from the time of arrest, the time at which a person is charged, the institution of the preliminary investigation,[419] or the questioning of an applicant as a witness suspected of commission of an offence.[420] However, in any event, the relevant moment is when the applicant became aware of the charge or when he or she was substantially affected by the measures taken in the context of criminal investigation or proceedings.[421] „Charge", in this context, has to be understood within the autonomous meaning of Article 6 § 1.[422]

412 Ervin Belovics: *The timeliness of criminal proceedings.* Szeged, Iurisperitus, 2016. 35.
413 See: BH 1993/1. 77., 1994/1. 78., 1995/5. 399., 1995/7. 556.
414 BH 1995/6. 478.
415 „Ecke v. Germany" (1982)
416 „Wemhoff v. Germany" (1968)
417 „Neumeister v. Austria" (1968)
418 „Deweer v. Belgium" (1980)
419 „Ringeisen v. Austria" (1971)
420 „Kalēja v. Latvia" (2017)
421 „Mamič v. Slovenia" (2006)
422 „McFarlane v. Ireland" (2010)

b) End of the period:

The Court has held that in criminal matters the period to which Article 6 is applicable covers the whole of the proceedings in question,[423] including appeal proceedings.[424] Article 6 § 1, furthermore, indicates as the final point the judgment determining the charge; this may be a decision given by an appeal court when such a court pronounces upon the merits of the charge.

The period to be taken into consideration lasts at least until acquittal or conviction, even if that decision is reached on appeal. There is furthermore no reason why the protection afforded to those concerned against delays in judicial proceedings should end at the first hearing in a trial: unwarranted adjournments or excessive delays on the part of trial courts are also to be feared.[425]

In the event of conviction, there is no „determination {...} of any criminal charge", within the meaning of Article 6 § 1, as long as the sentence is not definitively fixed.[426]

The execution of a judgment given by any court must be regarded as an integral part of the trial for the purposes of Article 6.[427] The guarantees afforded by Article 6 of the Convention would be illusory if a Contracting State's domestic legal or administrative system allowed a final, binding judicial decision to acquit to remain inoperative to the detriment of the person acquitted. Criminal proceedings form an entity and the protection afforded by Article 6 does not cease with the decision to acquit. If the State administrative authorities could refuse or fail to comply with a judgment acquitting a defendant, or even delay in doing so, the Article 6 guarantees previously enjoyed by the defendant during the judicial phase of the proceedings would become partly illusory.

Lastly, decisions to discontinue criminal proceedings, even with the possibility of resuming them at a later stage, mean that the subsequent period is not taken into consideration when calculating the length of the criminal proceedings if a decision to discontinue criminal enquiries is made, the person ceases to be affected and is no longer suffering from the uncertainty which the respective guarantee seeks to limit.[428] The person ceases to be so affected only, however, from the moment that decision is communicated to him or her[429] or the uncertainty as to his or her status is removed by other means.[430]

2.7.2. Assessment of a reasonable time (ECrHR)

a) Principles:

The reasonableness of the length of proceedings is to be determined in the light of the circumstances of the case, which call for an overall assessment.[431] Where certain stages of

423 „König v. Germany" (1978)
424 „Delcourt v. Belgium (1970); „König v. Germany" (1978); „V. v. the United Kingdom" (1999); see, however, „Nechay v. Ukraine" (2021), where an intervening period relating to the procedure for the applicant's psychiatric internment was discounted from the overall period of the criminal proceedings against the applicant.
425 „Wemhoff v. Germany" (1968)
426 „Ringeisen v. Austria" (1971)
427 „Assanidze v. Georgia" (2004)
428 „Nakhmanovich v. Russia" (2006)
429 „Borzhonov v. Russia" (2009)
430 „Gröning v. Germany" (2020)
431 „Boddaert v. Belgium" (1992)

the proceedings are in themselves conducted at an acceptable speed, the total length of the proceedings may nevertheless exceed a „reasonable time".[432]

Article 6 requires judicial proceedings to be expeditious, but it also lays down the more general principle of the proper administration of justice. A fair balance has to be struck between *the various aspects of this fundamental requirement*.[433]

b) Criteria:

When determining whether the duration of criminal proceedings has been reasonable, the Court has had regard to factors such as the complexity of the case, the applicant's conduct and the conduct of the relevant administrative and judicial authorities.[434]

The complexity of a case: it may stem, for example, from the number of charges, the number of people involved in the proceedings, such as defendants and witnesses, or the international dimension of the case.[435] A case may also be extremely complex where the suspicions relate to „white-collar" crime, that is to say, large-scale fraud involving several companies and complex transactions designed to escape the scrutiny of the investigative authorities, and requiring substantial accounting and financial expertise.[436] Similarly, a case concerning the charges of international money laundering, which involved investigations in several countries, was considered to be particularly complex.[437]

Even though a case may be of some complexity, the Court cannot regard lengthy periods of unexplained inactivity as „reasonable".[438] Moreover, although the complexity of the case could justify a certain lapse of time, it may be insufficient, in itself, to justify the entire length of the proceedings.[439]

The applicant's conduct: Article 6 does not require applicants to cooperate actively with the judicial authorities. Nor can they be blamed for making full use of the remedies available to them under domestic law. However, their conduct constitutes an objective fact which cannot be attributed to the respondent State and which must be taken into account in determining whether or not the length of the proceedings exceeds what is reasonable.[440]

One example of conduct that must be taken into account is the applicant's intention to delay the investigation, where this is evident from the case file.[441]

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432 „Dobbertin v. France" (1993)

433 „Boddaert v. Belgium" (1922)

434 „König v. Germany" (1978); „Ringeisen v. Austria" (1971); „Pedersen and Baadsgaard v. Denmark" (2004); „Chiarello v. Germany" (2019); „Liblik and Others v. Estonia" (2019)

435 „Neumeister v. Austria" (1968), where the transactions in issue had ramifications in various countries, requiring the assistance of Interpol and the implementation of treaties on mutual legal assistance, and 22 persons were concerned, some of whom were based abroad.

436 „C.P. and Others v. France" (2000)

437 „Arewa v. Lithuania" (2021)

438 „Adiletta and Others v. Italy" (1991), where there was an overall period of thirteen years and five months, including a delay of five years between the referral of the case to the investigating judge and the questioning of the accused and witnesses, and a delay of one year and nine months between the time at which the case was returned to the investigating judge and the fresh committal of the applicants for trial.

439 „Rutkowski and Others v. Poland" (2015)

440 „Eckle v. Germany" (1982), where the applicants increasingly resorted to actions likely to delay the proceedings, such as systematically challenging judges; some of these actions could even suggest deliberate obstruction; „Sociedade de Construções Martins & Vieira, Lda., and Others v. Portugal" (2014)

441 „I.A. v. France" (1998), where the applicant, among other things, waited to be informed that the transmission of the file to the public prosecutor was imminent before requesting a number of additional investigative measures.

An applicant cannot rely on a period spent as a fugitive, during which he sought to avoid being brought to justice in his own country. When an accused person flees from a State which adheres to the principle of the rule of law, it may be presumed that he is not entitled to complain of the unreasonable duration of proceedings after he has fled, unless he can provide sufficient reasons to rebut this presumption.[442]

The conduct of the relevant authorities: Article 6 § 1 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements.[443] This general principle applies even in the context of the far-reaching justice system reforms and the understandable delay that might stem therefrom.[444]

Although a temporary backlog of business does not involve liability on the part of the Contracting States provided that they take remedial action, with the requisite promptness, to deal with an exceptional situation of this kind,[445] the heavy workload referred to by the authorities and the various measures taken to redress matters are rarely accorded decisive weight by the Court.[446]

Similarly, domestic courts bear responsibility for the non-attendance of the relevant participants (such as witnesses, co-accused, and representatives), as a result of which the proceedings had to be postponed.[447] On the other hand, domestic courts cannot be faulted for a substantial delay in the proceeding caused by an applicant's state of health.[448]

What is at stake for the applicant must be taken into account in assessing the reasonableness of the length of proceedings. For example, where a person is held in pre-trial detention, this is a factor to be considered in assessing whether the charge has been determined within a reasonable time.[449] However, the very fact that the applicant is a public figure and that the case attracted significant media attention does not, in itself, warrant a ruling that the case merited priority treatment.[450]

2.7.3. Several examples

a) Reasonable time exceeded:

– 9 years and 7 months, without any particular complexity other than the number of people involved (35), despite the measures taken by the authorities to deal with the court's exceptional workload following a period of rioting.[451]

– 13 years and 4 months, political troubles in the region and excessive workload for the courts, efforts by the State to improve the courts' working conditions not having begun until years later.[452]

442 „Vayiç v. Turkey" (2006)
443 „Abdoella v. the Netherlands" (1992)
444 „Bara and Kola v. Albania" (2021)
445 „Milasi v. Italy" (1987)
446 „Eckle v. Germany" (1982)
447 „Tychko v. Russia" (2015)
448 „Yaikov v. Russia" (2015)
449 „Abdoella v. the Netherlands" (1992), where, the time required to forward documents to the Supreme Court on two occasions amounted to more than 21 months of the 52 months taken to deal with the case
450 „Liblik and Others v. Estonia" (2019)
451 „Milasi v. Italy" (1987)
452 „Baggetta v. Italy" (1987)

– 5 years, 5 months and 18 days, including 33 months between delivery of the judgment and production of the full written version by the judge responsible, without any adequate disciplinary measures being taken.[453]

– 5 years and 11 months, complexity of case on account of the number of people to be questioned and the technical nature of the documents for examination in a case of aggravated misappropriation, although this could not justify an investigation that had taken five years and two months; also, a number of periods of inactivity attributable to the authorities. Thus, while the length of the trial phase appeared reasonable, the investigation could not be said to have been conducted diligently.[454]

– 12 years, 7 months and 10 days, without any particular complexity or any tactics by the applicant to delay the proceedings, but including a period of two years and more than nine months between the lodging of the application with the administrative court and the receipt of the tax authorities' initial pleadings.[455]

b) Reasonable time not exceeded:

– 5 years and 2 months, complexity of connected cases of fraud and fraudulent bankruptcy, with innumerable requests and appeals by the applicant not merely for his release, but also challenging most of the judges concerned and seeking the transfer of the proceedings to different jurisdictions.[456]

– 7 years and 4 months: the fact that more than seven years had already elapsed since the laying of charges without their having been determined in a judgment convicting or acquitting the accused certainly indicated an exceptionally long period which in most cases should be regarded as in excess of what was reasonable; moreover, for 15 months the judge had not questioned any of the numerous co-accused or any witnesses or carried out any other duties; however, the case had been especially complex (number of charges and persons involved, international dimension entailing particular difficulties in enforcing requests for judicial assistance abroad etc.).[457]

– Little less than four years and ten months at two levels of jurisdiction concerning the constitutional redress proceedings involving complex and novel issues of law with an international element.[458]

2.8. Legality of evidence

The legality of evidence includes the following requirements: (1) The discovery, collection, provision and use of evidence shall not be contrary to the provisions of the law; if it is, the result of the evidence shall not be used in further proceedings. (2) Restrictions on fundamental rights are only possible in exceptional cases and in a way specified by law. (3) The principle of publicity as a general rule should ensure social control of the „purity" of evidence.

453 „B. v. Austria" (1990)
454 „Rouille v. France" (2004)
455 „Clinique Mozart SARL v. France" (2004)
456 „Ringeisen v. Austria" (1971)
457 „Neumeister v. Austria" (1968)
458 „Shorazova v. Malta" (2022)

(4) Based on the indirectness of the evidence, the court's decision may be based on data and information directly disclosed at the trial.

2.8.1. Prohibitions on evidence

Prohibitions of evidence are norms defined by law or judicial practice, according to which a given act of evidence cannot be performed or can only be performed in compliance with certain rules. It is a basic requirement that prohibitions of evidence are defined not only in the interest of the protection of the burden of proof, but also in the interest of the effectiveness of the evidence and the most accurate as possible detection of the facts.

According to BÁRD, „the purpose of prohibitions on evidence is to ensure the reliability of knowledge and, above all, to prevent the conviction of an innocent person."[459] The author adds, however, that these rules are also intended to protect other „substantive values" whose function is primarily to protect the fundamental rights of the person charged. In my opinion, the prohibition of evidence is in fact a specific case of procedural sanctions.

The purpose of procedural sanctions is to enforce the procedural conduct of the persons subject to the proceedings, that is to say, to enforce the conduct of the subjects of the proceedings in accordance with the rules of procedural law. But how far should we go and how far can we go with prohibitions on evidence to protect the rights of the accused but not to make prosecution impossible?

The ECrHR has consistently held that it is for the Member States to define these standards, and this forum has in several cases pointed to its lack of competence to decide on the admissibility of illegally obtained evidence in court. Accordingly, the use of illegally obtained evidence cannot, in principle, be excluded.[460] Possible infringements can only be covered by the Convention if the evidence is also unlawful under national law, and question the fairness of the procedure as a whole. If such evidence has only minimal relevance in this respect, no violation of the Convention may be established.[461]

The prohibitions on obtaining evidence are primarily rules of conduct for investigating authorities and prosecutors (regardless of the nature of the legal system). Most of the issues relate to their admissibility in court. According to some authors, the most important task of procedural law is precisely to develop and establish rules to ensure that the methods of taking evidence are as pure and ethical as possible and that the evidence used to ensure the objectivity and impartiality of the judicial decision is as reliable and free from error as possible. The regulation of these limitations, based in particular on the principle of the rule of law, has thus become a fundamental requirement of all modern procedural codes.

As a general principle, it can be established that facts derived from an instrument of evidence obtained by the proceeding authority (court) by means of a criminal offence, other prohibited means or by substantially limiting the procedural rights of the participants cannot be admissible as evidence.

Question: what criteria should be used to determine these prohibition rules? I consider the primary guiding principle to be that these rules must be precisely defined in

459 Károly BÁRD: *Evidence systems and the establishment of the truth in criminal cases*. Budapest, Hungarian Criminal Law Association, 2011. 31.
460 „KHAN v. United Kingdom" (2000)
461 „Schenk v. Switzerland" (1988)

the relevant procedural code so that the possibility of „judicial arbitrariness" is not even minimally taken into account in the case of decisions on evidentiary acts and motions. The discretionary power of the public (judicial) authorities may at most be limited to preventing the proof of facts which are manifestly impossible, absurd or cannot be proved by empirical-scientific methods.

According to KIRÁLY, the procedural law should define directly and precisely the acts that are prohibited. "It seems better and more appropriate for the procedural code to contain specific prohibitions on some methods of proof (e.g. torture, exhaustion, hypnosis, stunning, illicit coercion), even if the Criminal Code includes such offences as coercive interrogation and others. The CPC should decide on this issue independently. In this context, the norms of the acts of proof and the consequences of their violation should be formulated in the act in a regulated manner.[462]

Some views, however, argue that it would be sufficient to prohibit only those acts of proof which are also criminal offences or contrary to the principles of the CPC. Such considerations, however, carry many dangers, since they only provide a „broad framework" for the prohibition, which could lead to serious abuses and errors of law enforcement.[463]

I would also note here, that „tactical bluffing" cannot be banned. As the ECrHR has pointed out in an earlier decision, it is not necessarily illegal in itself for the police to resort to various tricks to prevent crime more effectively.[464] Of course, the principles established by law and judicial practice also apply to such cases, but the mental exhaustion of witnesses, the „exaggeration" of the professional responsibility of an expert in public by defence counsel, etc., can hardly fall into this category.

As regards the method of detecting procedural irregularities, there are two basic models:

– in jury systems, a professional judge may instruct the jury to disregard evidence obtained illegally;

– in systems following the ordinary (continental) procedural model, the court must „ex officio" disregard such evidence.

Some authors treat the categories of prohibitions on evidence and prohibitions on investigation separately. In TREMMEL's view, the latter circumstances should apply only to cases of proceedings by investigating authorities and should be regulated in the procedural law as separate categories of prohibition.[465]

Based on the CPC illegally obtained evidence cannot be evaluated as such, but the information derived from it can be used in the further part of the proceedings. Following the example of HÁGER, „{...} if a confession is extorted from an accused person by threat, his confession cannot be incriminating, but there is no obstacle to the inclusion of the material evidence obtained from the confession in the scope of evaluation."[466]

462 Tibor KIRÁLY: Evidence in the forthcoming Code of Criminal Procedure. In Mihály TÓTH (ed.): *Criminal Procedural Law Reader,* ibid. 213-214.

463 KIRÁLY (2013), ibid. 213.

464 „Conka v. Belgium" (2002)

465 Flórián TREMMEL: Can the basic concepts of the theory of proof be further developed? In: Mihály TÓTH (ed.): *Criminal Procedural Law Reader,* ibid. 198.

466 Tamás HÁGER: Certain issues of evidence and incriminating testimony. In: Andrea SZILÁGYINÉ KARSAI - Balázs ELEK (eds.): *Studies for the 10th anniversary of the Debrecen Court of Appeal.* Debrecen Court of Appeal, 2016, 163.

Apart from the fact that I consider this domestic practice - from a constitutional point of view - to be a matter of concern, I would like to point out that in Anglo-Saxon legal systems, neither illegal evidence nor other evidence derived from it can be used in subsequent stages of criminal proceedings, according to the „fruit of the poisonous tree principle".

The ECrHR found a violation of the Convention when the criminal liability of a person accused of drug trafficking was established solely on the basis of evidence obtained illegally by the police with the help of secret listening devices. The British courts rejected the defendant's appeal on this point, on the ground that, in the present case, the State's criminal claim was based on an interest greater than respect for the right to privacy. Nevertheless, the ECrHR found a violation of Article 8 of the Convention, since it found that the domestic legislation on the use of secret service agents was inadequate, and, since the right to an effective remedy was also restricted, it also found a violation of Article 13. In the ECrHR's view, the accused would have had several opportunities to object to the evidence in the main case, but his complaints related only to the fact of its use.[467]

The Court did not find a breach of the Convention when it

– evidence found during a search that was not entirely lawful was used in the proceedings, because (1) the accused did not contest the fact in the main proceedings; (2) the evidence was credible and accurate; (3) the search did not concern the applicant's private residence or the place of his business;[468]

– the applicant's secretly recorded statements were not made under duress and were not directly used by the court, but rather relied on the expert opinion based on the audio recording, and the prosecution was supported by other material evidence.[469]

The consequence of a breach of the prohibitions on evidence is, of course, the nullity of the evidence. This means that it is - in principle - not even at the time of its creation suitable for being taken into evidence by the competent authorities (courts). Nevertheless, many decisions by the authorities (courts) can be based on such evidence, but there are nevertheless a number of procedural remedies which can be used to remedy the situation, usually by invoking a procedural irregularity.

2.8.2. The obligation to respect fundamental rights

This principle is intended to protect the rights not only of the accused, but also of all the subjects of the proceedings, and even of persons who are involved in the proceedings but are not subjects. The CPC declares in its introductory part the following: the human dignity of every person shall be respected in criminal proceedings. The right to liberty and security of the person shall be afforded to every person in criminal proceedings. In a criminal proceeding, a fundamental right may be restricted only in a proceeding under this Act, for a reason, in a manner, and to an extent determined in this Act, provided that the purpose to be achieved may not be guaranteed by any other procedural act or measure involving any lesser restriction.[470]

467 „KHAN v. United Kingdom" (2000)
468 „Lee Davies c. Belgique" arret du 28 juillet 2009, no. 18704/05.
469 „Bykov v. Russia" (2009)
470 CPC 2. § (1) - (3)

There are numerous possible cases of violation of this principle,[471] but in practice, problematic situations may arise in relation to the interpretation of the principle of publicity and the imposition or maintenance of coercive measures.

a) The principle of publicity is a basic procedural rule, but in many cases this may affect the personal rights of the accused, in particular his or her human dignity.[472] Nevertheless, there is a tendency for criminal courts to impose fewer restrictions on publicity than civil courts, mainly because of the seriousness of criminal cases and the level of information provided to the public (media). Therefore, it is less common for the court to grant the defendant's requests to exclude the public, merely on the grounds of the defendant's human dignity, personal rights or even on grounds of clemency.

b) In principle, coercive measures may restrict most of the fundamental rights set out in international conventions and the Fundamental Law. The question is, of course, whether it is possible to speak of a violation of rights in cases where the grounds for imposing the coercive measure in question exist and its imposition complies with the procedural rules. In my view, no, since, as I have already pointed out, the interests of proof in many cases necessarily override the fundamental rights of the person subject to the procedure. Without these limitations, criminal proceedings would not be able to fulfil their inherent function. The only problem is that the terminology used in the current CCP does not precisely cover the scope of the fundamental rights that can be restricted by coercive measures, as it only refers to coercive measures affecting 'personal liberty' or 'property'. Thus, for example, it would have been more appropriate to mention separately the category of coercive measures affecting „freedom of movement" in the case of pre-trial detention and „personal integrity" in the case of search. The law could thus have declared the complexity of the legal restrictions imposed by coercive measures and the diversity of the adverse legal consequences they entail.

The ECrHR has explained the proportionality requirements for coercive measures taken in the interest of evidence in almost all fundamental rights. In the context of coercive measures restricting personal liberty, pre-trial detention is an exceptional measure, never mandatory and never applicable for punitive purposes; it may be imposed only if there are reasonable grounds to suspect that the person concerned has committed the offence in question and there are real grounds for believing that one or more of the following grounds apply:

– risk of absconding;
– risk of interference with the course of justice;
– risk of committing a serious crime.

In the case of pre-trial detention, the courts must assess the nature and seriousness of the suspected offence, the probative value of the evidence that the person concerned committed it, the penalty that could be imposed if he or she is found guilty, the personality, criminal record, personal and social circumstances and conduct of the person concerned (in particular as regards the enforcement of any obligations imposed by previous criminal proceedings).[473]

471 For example, in „Z. v. Finland" (1997), the ECrHR found a violation of Article 8 of the Convention because of the publication of the judgment of the court of appeal, which included the identity and medical condition of the applicant. This fundamentally affected the right to human dignity of the accused (ECrHR 1998/3.).

472 In many cases, the full names or photographs of suspects are published in certain reports without a final judgement on criminal liability.

473 ECrHR 1997/2, 60.

Legal case (Hungary): The applicant, Mr Péter Lakatos, is a Hungarian national, who was born in 1986 and lives in Gyál. He is represented before the Court by Mr G.T. Takács, a lawyer practising in Budapest. On 26 February 2011 the Pest Central District Court remanded the applicant in custody under Article 129 § 2 (b) and (c) of the Code of Criminal Procedure on suspicion of aggravated murder within the meaning of Article 166 § 1 of the Criminal Code. It summarized the suspicion against him, referred to the police reports, the autopsy report, the victim's medical documents, examinations of various exhibits and the witness testimonies and concluded that there was a reasonable suspicion that the applicant had poisoned the victim on 8 April 2010. The court found it established that there was a need for the applicant's detention because otherwise he would temper with evidence by exerting pressure on the witnesses, as evidenced by his previous conduct of threatening them. It also held that the applicant's "unclear" financial situation and the severity of the punishment demonstrated the risk of the applicant's absconding. The court gave no consideration to the request of the applicant's lawyer to place the applicant in house arrest.

The appeal against this decision was dismissed on 3 March 2011.

On 21 March 2011 the Buda Central District Court extended the applicant's pre-trial detention until 26 May 2011. It noted again that because of the severity of the punishment and the fact that the applicant had neither a permanent address nor a regular income, there were grounds to believe that the applicant would abscond. The court held that there was a risk of his interfering with the investigation if he were to threaten the witnesses or destroy physical evidence.

The applicant appealed, arguing that the conditions for pre-trial detention had not been fulfilled because there was no risk of his absconding or influencing witnesses. He argued that his settled personal circumstances, that is, the fact that he lived with his common-law wife and two children, his parents, and his brother's family, and the fact that he had no criminal record excluded the risk of his absconding. He further submitted that he had been cooperative with the investigation authorities. Alternatively, the applicant requested his release and that he be placed under house arrest.

The first-instance decision was upheld on appeal by the Budapest Regional Court on 15 April 2011, with the reasoning that the interest of the public in the applicant's detention was more important than his interest in the respect of his right to liberty.

On 23 May 2011 the Buda Central District Court extended the applicant's detention until 26 August 2011. The court maintained its previous reasons justifying the need for his detention. It emphasized that there was a risk of absconding owing the severity of the punishment, the fact that the applicant had no declared employment and had not been reachable at his permanent address. It added that if released the applicant might influence the witnesses or destroy evidence.

On 22 June 2011 the Budapest Regional Court upheld this decision.

On 24 August 2011 the Budapest District Court extended the applicant's detention until 26 November 2011 under Article 129 § 2 (b) (risk of absconding) and (c) (risk of collusion) of the Code of Criminal Procedure. As regards the risk of absconding, the court found that although the applicant had not been reachable at his permanent address and only had temporary jobs, his temporary residence had been known and he had no criminal record. However, given the seriousness of the potential punishment and his "unstable" financial circumstances, his presence at the proceedings could only be ensured through the most

restrictive measure. As regards the risk of collusion, the court dismissed the argument of the applicant's lawyer that the prosecution authorities should have questioned all the witnesses at that stage of the proceedings. It held that although the majority of the witnesses had been heard, their further question could have been still necessary.

On 26 August 2011 the Budapest Regional Court upheld the lower court's decision under Article 129 § 2 (b) and (c) of the Code of Criminal Procedure.

Subsequently, the applicant's pre-trial detention was extended at a number of occasions. In particular, on 24 February 2012 the Budapest High Court held that the unclarified financial situation of the applicant and the seriousness of the crime substantiated the risk of absconding. It also found, without further reasoning, that there were grounds to believe that at that stage of the proceedings the applicant would influence the witnesses.

In his appeal the applicant argued that the investigation authorities carried out no procedural measures, the proceedings were unreasonable lengthy and that he had constantly been reachable at this temporary residence.

On 8 March 2012 the Budapest Court of Appeal dismissed the applicant's appeal.

On 25 April 2012 the applicant's pre-trial detention was extended by the Budapest High Court until 26 June 2012. The court maintained that the detention was still necessary because of the risk of the applicant's absconding pursuant to Article 129 § 2 (b) of the Code of Criminal Procedure. It considered that the applicant had no "financial or existential" bounds, counterbalancing the risk of him escaping an eventual serious punishment. Although he had family ties, an under-aged child and a relative who gave assurances to provide for him if released, given the seriousness of the charges, the gravity of the punishment and his unstable financial circumstances, there was a real risk that he absconded. However, the court did not find that the risk of collusion (Article 129 § 2 (c) of the Code of Criminal Procedure) was substantiated, since there was no way to influence any of the investigative measures the prosecution had relied on. It also considered that although there was likelihood that during the two years following the commitment of the crime the acquaintances and relatives of the applicant had tried to influence witnesses, there was no reliable information that this had actually taken place and a hypothetical risk of further attempts to do so could not substantiate the risk of collusion.

This decision was upheld on appeal on 7 May 2012.

On 22 June 2012 the applicant's pre-trial detention was extended until 26 August 2012. The court agreed with the applicant's contestation that his unsettled personal circumstances could not be relied on after the passing of a lengthy period of time following his arrest to justify his detention.

It nonetheless held that in the absence of any financial bounds, his family ties could not counterbalance the risk of his absconding.

This decision was upheld on appeal by the Budapest Court of Appeal on 28 June 2012.

The Budapest High Court extended the applicant's pre-trial detention on 21 August 2012, reiterating the same arguments as before. The second-instance court upheld the decision on 24 August 2012.

On 4 October 2012 the detention was extended until 26 November 2012.

On 24 October 2012 the applicant's pre-trial detention was extended again for a month under Article 129 § 2 (b) of the Code of Criminal Procedure. However, the Budapest High Court expressed doubts whether there was enough evidence to conclude that there was

a reasonable suspicion that the applicant had committed the crime. It considered that, irrespective of the seriousness of the charges, the risk of his absconding appeared to diminish, since he was raising two under-aged children and had no criminal record. On appeal the Budapest Court of Appeal upheld the first-instance judgment but extended the applicant's detention for two months.

On 21 December 2012, the applicant's detention was extended; the Budapest High Court again referred to the fact that at the time of his arrest, the applicant was unreachable at his permanent address and lived from temporary jobs, which substantiated the risk of absconding. The decision was upheld on appeal on 10 January 2013.

On 22 February 2013 the Budapest High Court released the applicant from pre-trial detention and placed him in house arrest under bail. According to the decision, besides the suspicion against the applicant, the only ground to restrict his liberty was the risk of absconding given the gravity of the offence, and this in itself could not justify his continued pre-trial detention. On appeal, the Budapest Court of Appeal reversed the first-instance decision and placed the applicant in detention on 28 March 2013. It noted that given the seriousness of the offence there was a danger of his absconding, irrespective of his family ties.

On 23 April 2013 the Budapest High Court released the applicant from detention with an undertaking not to leave his place of residence. Relying on the Court's case-law the High Court found that pre-trial detention could only serve as a measure of last resort and the applicant's continued detention would only serve as an anticipated punishment. The decision was overturned by the Budapest Court of Appeal on 26 April 2016, placing the applicant in detention with the same reasons as before.

On 17 June 2013 the Budapest Chief Public Prosecutor's Office preferred a bill of indictment.

On 25 June 2013 the Budapest High Court extended the applicant's detention until the date of the first-instance court's judgment, under Article 129 § 2 (b) of the Code of Criminal Procedure (risk of absconding), for essentially the same reasons as before.

On 28 January and 18 April 2014 the applicant applied for release, which was dismissed on 18 February and 24 April 2014, respectively.

The applicant's detention was reviewed on 16 July 2014 by the Budapest Court of Appeal. It held that the gravity of the offence, the applicant's lack of financial resources and of existential bounds, and the fact that he only notified the authorities of his place of residence once placed in detention substantiated the risk of his absconding.

This decision was upheld on appeal by the Kúria on the 24 September 2014, endorsing the reasons given by the lower-level court. The Kúria also found that the applicant's pre-trial detention was both necessary and proportionate and no less restrictive measure was sufficient to ensure the purpose of the criminal proceedings.

On 29 October 2014 the applicant was found guilty of aggravated murder and sentenced to eighteen years' imprisonment by the Budapest High Court.

Complaint: The applicant complains under Article 5 § 3 of the Convention that his pre-trial detention has been repeatedly extended without the courts taking into account his personal circumstances and applying only formulaic reasoning. Furthermore, his detention extended the reasonable length since the domestic authorities failed to display diligence in the conduct of the proceedings.

Questions to the parties: 1. Have the repeated extensions of the applicant's pre-trial detention been in breach of the "reasonable time" requirement of Article 5 § 3 of the Convention, given the rather formulaic reasoning provided by the courts and the apparent lack of consideration of alternative measures? 2. Does the present case lend itself to the pilot judgment procedure (Article 46 § 1)? 3. In particular, do the facts of the present application reveal the existence of a structural or systemic problem or other similar dysfunction, which has given rise or may give rise to similar applications (see Rule 61 §§ 1 and 2 of the Rules of Court)?[474]

c) In an era of coercive measures that limit personal integrity, the use of searches and physical coercion in particular can raise the possibility of abuse of rights by the authorities. In one case, the ECrHR found a violation of Article 3 of the Convention (prohibition of inhuman and degrading treatment) when the doctor had started to induce vomiting in the hospital after the victim had swallowed a bag of cocaine, since this was not done to protect the victim's physical and mental integrity, but solely to obtain evidence. This method of execution was in itself capable of creating a feeling of fear and vulnerability in the person being examined, and it also carried risks, since it was not preceded by a thorough medical examination.[475]

d) Among coercive measures restricting the right to respect for private and family life

– a violation of rights occurs when masked police officers break into a person's home at dawn without the consent of the person being prosecuted; [476]

– if the investigating authority searches the victim's home without the warrant being produced or without any information being provided about the property to be searched;[477]

Finally, the Court held that this right extends not only to private dwellings, but also to the protection of the registered office, place of business and place of management of companies.[478]

2.9. The principle of publicity

An important criterion for the legitimacy of evidence is its verifiability by the public. This is possible through consistent - but not unlimited - enforcement of the principle of publicity. Today, the legal guarantee of publicity is a fundamental principle of modern legislation and law enforcement. However, the classic principle of the public nature of a trial is not the same today as it was in previous centuries, since it is not only the 'audience' that can physically observe the proceedings, but also the written press and the electronic media. All the conditions for informing the public are therefore met, but this can have a profound impact on the adjudicatory (evidentiary) activity. In my opinion, this should not determine the court's conduct of the case, but it should also be borne in mind that public communication can have a significant impact on society's image of the judiciary and on public confidence in general.

I would note that the publicity of the negotiations is also a fundamental requirement for ancillary matters, according to the case law of the ECrHR. Thus, for example, this forum

474 „Lakatos v. Hungary" (2015)
475 „Jalloh v. Germany" (2006)
476 „Kucera v. Slovakia" (2007)
477 „Imakaieva v. Russia" (2006)
478 BH 2003/10. 796.

found a violation of the Convention when the application was limited to the compensation proceedings brought against the accused for 48 hours of unlawful detention, where no public hearing had been held previously.[479]

The possible ways of limiting the principle are shaped by the different procedural codes and judicial practice. For example, the Court of Justice has consistently recognised the public security interest as a limitation: in such cases, too, appropriate measures must be taken to ensure that the public is adequately informed of the time and place of the hearing and that the procedural steps are accessible to interested parties. Nevertheless, Member States may, with valid reservations, choose to exclude public access to certain types of cases altogether. If, however, the area of law in question is re-regulated, the public trial will once again become the general rule.

The imposition of publicity as a general rule is crucial for the promotion of active evidence in trials, for the control of the legality of the proceedings and for the proper information of society. The historical legal categories of each regulatory model can be distinguished as follows:

– in the case of procedural systems based on the principle of client access, the law only allows the presence of the persons sued;

– for procedural systems based on the principle of public access, the law allows for the presence of anyone.

The International Covenant on Civil and Political Rights states that all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.[480]

On the basis of the above, the case-law of the ECrHR has, as a general rule: (1) requires the negotiations to be open to the public by making the definition of the exclusion rules a national competence; (2) in order to be able to lodge a complaint, applicants must exhaust their domestic remedies; (3) the right to a public hearing may be waived, either expressly or impliedly; in which case there is no violation of the Convention even if this is the only judicial forum in which the proceedings are heard in public;[481] (4) the two degrees of publicity (see first and second degree) are not necessary a) if the higher court no longer examines questions of fact; in this case, it is sufficient to create the conditions for „first degree publicity",[482] and b) if the higher court is entitled in principle to review questions of fact, but in the case in question it actually only deals with questions of law.[483]

479 „Göc v. Turkey" (2002)
480 https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights (12.03.2024.)
481 „Hakansson and Sturesson v. Sweden" (1990)
482 „Sutter v. Switzerland" (1984)
483 „Schlumpf c. Suisse" arret du 8 janvier 2009, No. 29002/06.

In the case of judgments, the full operative part of the judgment or the substance of the grounds of appeal must be published (full grounds are not required), but this is not necessary if the court of appeal decides on the admissibility or dismissal of the appeal or sets aside the decision appealed against and orders the lower court to start a new trial.[484]

The ECrHR, following its case-law, has infringed the Convention by

– the court did hold a public hearing, but 1. it notified the party of this at a time when he was unable to attend[485] 2. the applicant was unable to attend in person because the court held it before the scheduled time[486] 3. it was not really public, as it was limited to the personal hearing of the accused;[487]

– the public delivery of the judgment was not carried out in its entirety;[488]

– the case was brought before the court of appeal alone (see previously before administrative bodies), but its proceedings were not public; it is a general requirement that at least one judicial forum must hold a public hearing in a criminal case;[489]

– the Supreme Court, exercising its full review jurisdiction, did not hold a public hearing, despite the fact that the possibility of substantial harm to the interests of the person concerned had been raised and that it had issued a judgment of acquittal reversing the previous acquittal.[490]

The ECrHR, following its case-law, did not infringe the Convention when it

– the applicant would have had a substantive right to request a public hearing, but he did not do so because it was rarely held in cases such as his;[491]

– the written procedure was also fully capable of clarifying the issues to be decided, and therefore no hearing was held;[492]

– the court of appeal did not hold a public hearing in the case in which it convicted the applicant, who had been acquitted of cigarette smuggling at first instance, because the court merely interpreted differently the law which decriminalised certain conduct, which was not a question of fact;[493]

– only the court of appeal publicly announced its judgment, but the court of first instance failed to do so;[494]

– the review procedure, which was limited to the examination of points of law, was not public; [495]

– the High Court would have held a hearing on request, but no such request was made.[496]

Based on the case law known from Hungarian jurisprudence, taking into account that the trial of a serious offence committed by a minor defendant may be of great public

484 „Pretto v. Italy" (1983)
485 „Yakovleg v. Russia" (2005)
486 „Andrejeva v. Latvia" (2009)
487 „Moser v. Austria" (2006)
488 „Moser v. Austria" (2006)
489 „Fredin v. Sweden" (1994)
490 „Botten v. Norway" (1996)
491 „Rolf Gustavson v. Sweden" (1997)
492 „Vilho Eskeleinen and Others v. Finland" (2007)
493 „Bazo Gonzales c. Espagne" arret du 16 decembre 2008, No. 30643/04.
494 „Lamana v. Austria" (2001)
495 „Pretto and Others v. Italy" (1983)
496 „Zumtobel v. Austria" (1993)

interest may mean that it may be necessary to hold a closed trial in order to reduce as far as possible the intimidation and inhibition of the minor.[497]

I would like to note that the concept of the public has several layers of meaning. On the one hand, it means that anyone can be present in person at a court hearing (subject to some legal restrictions) and demonstrate by their presence "social control" of the functioning of the courts. At the same time, it is the joint responsibility of the court, the prosecutor and the defence to ensure that there are no persons in the audience who, even by their presence, could influence the direction or outcome of the evidence. Therefore, the right to exclude the public from the hearing and the right to make a motion for exclusion should also be a guarantee in the procedural codes.

In cases of greater public interest, it would be a mistake to claim that the high level of publicity does not influence the evidence and the style of statements of the parties. At the same time, I consider it to be of fundamental importance that the procedural acts of the public authorities and the substance of the defence cannot be influenced in any way by the general public perception of the case. Possible media publicity should not, in principle, affect the lawful conduct of the evidentiary procedure or the practice of the authorities.

„High visibility" can cause problems, especially for juvenile offenders. The Court has pointed out in a relevant judgment that it is a violation of the Convention when the presence of members of the press and the sight of a courtroom packed to overflowing with members of the public cause such psychological trauma to the accused that they are unable to give adequate instructions to their defence or are not in a position to make statements of the kind they need.[498]

2.10. The principle of immediacy

The principle of immediacy is a basic requirement for court hearings and expresses the fact that the examination of evidence must be based on the direct and joint perception of the procedural subjects. There are, of course, exceptions to this rule, which often give rise to some concern among legal practitioners and jurists.

The principle of immediacy requires that all evidence is presented in court in its most original form. All witnesses and the accused have to appear before the judge in person to give testimony.

The court should base its findings only on evidential sources which it had actually heard, and not on inquiries or conclusions drawn from another time, place or person. The principle of immediacy is a principle necessitating that the primary sources of evidence be produced in court, so that the judge will base his judgment solely on evidence he was able to examine independently as to its quality and reliability.

NIJBOER provides a more detailed account on the principle of immediacy. In his endeavour to clarify the meaning of the principle in Dutch criminal procedure, Nijboer distinguishes two perspectives on the meaning of this principle in the academic literature. He describes the first one as the formal view: in this view the format of the investigation at trial forms the basis. This formal view requires that there has to be a direct link between

497 BH 2001/4, 315.
498 „T. v. United Kingdom" (1999)

the evidence and the judge, in order that there is an enhanced possibility of verifying information. Thus, the formal principle of immediacy demands that all evidence that could possibly influence the judgment should be subject to challenges during trial. The second view is the substantive view: the principle of immediacy is a principle that pursues the use of the most immediate evidence. The ratio behind this view is that reproduction of evidence bears the risk of distortion.[499]

Enforcing the principle of impartiality in court proceedings makes the court's work much easier when developing a credible, well-founded case. The purpose of enforcing the principle is therefore to ensure that the original sources of evidence are discovered and used in the proceedings, as far as possible without mediation.[500]

The domestic legislation has already created the possibility for the courts to conduct hearings without the presence of the accused and to make a decision on the case in several constructions. A good example of this is the creation of a separate chapter B on absent defendants, or the option to hold the ordinary second instance proceedings even in the absence of the duly summoned defendant (and to hear the appeal) if no appeal has been filed against the defendant, etc. It should be noted that some jurisdictions also recognise the category of so-called "condamner par contumace" (condamner par contumace), which are passed against defendants who are absent through no fault of their own, without the presence of legal representation at the trial. However, the Court has held that this method of sanctioning is contrary to the provisions of the Convention.[501]

According to the consistent practice of the ECrHR, evidence must be presented in open court in the presence of the accused, in accordance with the requirement of an adversarial procedure.[502] The Court's practice is consistent in ensuring the right of the accused to be present, since, although it allows the use of these constructions, it limits their scope to strictly defined cases. On the basis of its case-law:

a) a trial in absentia is not in principle contrary to the Convention, but only if the person concerned subsequently re-examines the factual and legal basis of the charges against him or her before a court which will hear him or her in person;[503]

b) the right to personal appearance may be restricted only if the accused has waived his or her right to personal appearance and to a personal defence;[504]

c) there is no interest in guaranteeing the personal presence of the accused before the courts of appeal, which only adjudicate on points of law; however, in the case of appeal proceedings, it is sufficient for the procedural law in question to provide for the mere presence of the accused and the defence.[505]

499 NIJBOER: Enkele opmerkingen over de betekenis van het onmiddellijkheidsbeginsel in het strafprocesrecht. NJB 1979, 821–823. In: M.S. GROENHUIJSEN – Hatice SELCUK: *The principle of immediacy in Dutch criminal procedure in the perspective of European Human Rights Law.* Tiblurg University, 2014. 249.

500 Csilla HATI: The loss of the principle of immediacy in criminal proceedings. Truth, ideal and reality. In: Balázs ELEK – Tamás Háger – Andrea Noémi TÓTH (eds.): *Studies in honour of the 65th birthday of Sándor Kardos*. Debrecen, 2014. 192.

501 „Krombach v. France" (2001)

502 „Lüdi vs. Switzerland" (1992)

503 „Poitrimol v. France" (1993)

504 „Sejdovic vs. Italy" (2006)

505 „Kamasinski v. Austria" (1989)

The ECrHR found a breach of the Convention when it

– the Court of Appeal took evidence of alleged procedural errors during the appeal proceedings, but neither the accused nor the defence lawyer were informed of this and could not be present;[506]

– the summons was served 2 days before the day of the trial; [507]

– the accused was not informed at all of the date of the appeal hearing before the Supreme Court.[508]

However, the Court did not find a violation of the Convention where the accused had voluntarily stayed away from the trial, or where the accused complained about the restriction of his right to comment in the appeal proceedings, despite not appearing at the trial.[509]

The Strasbourg rulings are mainly related to witness evidence. It is a fundamental principle that the accused must be given the opportunity to challenge incriminating testimony, an essential element of which is the provision of conditions for personal questioning of witnesses. However, according to the Court's case-law, it is not necessarily necessary for such persons to be questioned (directly) at trial, and in certain cases it is permissible to allow only the subsequent presentation of investigative statements. However, the testimony of co-accused persons with the right to remain silent can only be decisive evidence if the other accused persons have been granted the conditions of an adversarial procedure.[510]

The Court found a breach of the Convention when it

– the applicant was convicted by a court in his own country on the basis of a complaint in another country and the testimony of witnesses who were heard in his absence;[511]

– the prosecuting authorities did not make every effort to ensure that the accused could attend the trial in person, despite the fact that other procedures would have made it possible to establish his real whereabouts;[512]

– the court of appeal convicted the applicant, who was acquitted at first instance, of defamation on the basis of a new assessment of the facts, without a personal hearing.[513]

However, the Convention is not violated in interrogations using a closed telecommunications network if there are compelling reasons to do so. The Court has held that a case where a witness was examined by the court using such a device was compatible with Article 6. This was justified by legitimate aims, since the subject of the accusation was linked to participation in a criminal organisation, premeditated murder and misuse of firearms.[514]

The possibility of submitting a written witness statement may also cause problems. Such testimony is usually either 1. handwritten or 2. typed (signed by two witnesses or countersigned by a lawyer) and is therefore considered to be of full probative value. However, in KERTÉSZ's opinion, „in the case of written statements, there is no personal

506 „Komanicky v. Slovakia" (2002)
507 „Ziliberg v. Moldova" (2005)
508 „Maksimov v. Azerbaijan" (2009)
509 „K.A. and A.D. v. Belgium" (2005)
510 EJF 2002/1. 18.
511 „A. M. v. Italy" (1999)
512 „Colozza v. Italy" (1985)
513 „Constantinescu v. Romania" (2000)
514 „Marcello Viola vs. Italy" (2006)

contact between the investigator and the person being questioned, no possibility to clarify vague and difficult to understand parts of the statement during the interview {...} the written statement of the interrogated person cannot replace the interrogation, it can only supplement it {...} the written statement must precede the interrogation, the interrogated person must be given the opportunity to write down the statement in his own hand only after the statement has been made and recorded."[515]

The Court has held that an important element of fair criminal proceedings is also the possibility of the accused to be confronted with the witness in the presence of the judge who ultimately decides the case. Such a principle of immediacy is an important guarantee in criminal proceedings in which the observations made by the court about the demeanour and credibility of a witness may have important consequences for the accused. Therefore, normally a change in the composition of the trial court after the hearing of an important witness should lead to the rehearing of that witness.[516]

However, the principle of immediacy cannot be deemed to constitute a prohibition of any change in the composition of a court during the course of a case. Very clear administrative or procedural factors may arise, rendering a judge's continued participation in a case impossible. The Court has indicated that measures can be taken to ensure that the judges who continue hearing the case have the appropriate understanding of the evidence and arguments, for example, by making transcripts available where the credibility of the witness concerned is not at issue, or by arranging for a rehearing of the relevant arguments or of important witnesses before the newly composed court.[517]

In „P.K. v. Finland" (2002), the Court did not consider that non-compliance with the principle of immediacy could in itself lead to a breach of the right to a fair trial. The Court took into account the fact that, although the presiding judge had changed, the three lay judges remained the same throughout the proceedings. It also noted that the credibility of the witness in question had at no stage been challenged, nor was there any indication in the file justifying doubts about her credibility. Under these circumstances, the fact that the new presiding judge had had at his disposal the minutes of the session at which the witness had been heard to a large extent compensated for the lack of immediacy of the proceedings. The Court further noted that the applicant's conviction had not been based solely on the evidence of the witness in question and that there was nothing suggesting that the presiding judge had changed in order to affect the outcome of the case or for any other improper motive. Similar considerations have led the Court to find no violation of Article 6. in „Graviano v. Italy" (2005) and „Škaro v. Croatia" (2016).

Conversely, in „Cutean v. Romania" (2014), the Court found a violation of Article 6 when none of the judges in the initial panel who had heard the applicant and the witnesses at the first level of jurisdiction had stayed on to continue with the examination of the case. It also noted that the applicant's and the witnesses' statements constituted relevant evidence for his conviction which was not directly heard by the judge. In these circumstances, the Court held that the availability of statement transcripts cannot compensate for the lack of immediacy in the proceedings.

515 Imre Kertész: The *psychological foundations of interrogation tactics.* Budapest, Közgazdasági és Jogi Könyvkiadó, 1965, 286.
516 „P.K. v. Finland" (2002)
517 „Cutean v. Romania" (2014)

In „Cerovšek and Božičnik v. Slovenia" (2017) the Court found a violation of Article 6. because the reasons for the verdicts against the applicants, that is, their conviction and sentence, had not given by the single judge who had pronounced them but by other judges, who had not participated in the trial. Similarly, in Iancu v. Romania (2021) although leaving the question of relevance of the principle of immediacy open, the Court examined under that principle the issue of signing of the judgment by the court's president on behalf of the judge, who had taken part in the examination of the case but then retired before the judgment was delivered. The Court found no violation of Article 6. laying emphasis, in particular, on the following elements: the judgment was adopted by the judicial formation which had examined the case and engaged in direct analysis of the evidence; the judgment was drafted, in accordance with domestic law, by an assistant judge, who had taken part in the hearings and deliberations and who had set out, on behalf of the bench, the grounds for the conviction; the judge who retired had been objectively unable to sign the judgment; the signing of a judgment by all members was not a common standard in all Council of Europe member States; the national legislation limited the admissibility of the signing by the court's president to only those cases where the judge hearing the case was unable to sign the decision; and the president of the court signed the judgment on behalf of the retired judge and not in her (the president's) own name.

An issue related to the principle of immediacy may also arise when the appeal court overturns the decision of a lower court acquitting an applicant of the criminal charges without a fresh examination of the evidence, including the hearing of witnesses.[518] Similarly, the principle of immediacy is relevant in case of a change in the composition of the trial court when the case is remitted for retrial before a different judge. Moreover, in such a situation, the principles of the Court's case-law concerning the right to examine witnesses for the prosecution are of relevance.[519]

Legal case (Hungary): Based on the provisions of Chapter XXV of Act no. XIX of 1998 on the Code of Criminal Procedure (hereinafter referred to as the Code of Criminal Procedure), the accused person was tried in absentia and was sentenced to a non-suspended term of imprisonment by the courts of first and second instance.

The accused person submitted a petition for judicial review to the Curia of Hungary against the final judgement of the court of second instance and argued that he had been unable to be present at the courts' proceedings due to serving his prison sentence in Austria at that time.

The Prosecutor General's Office was of the opinion that the courts had not infringed the special procedural rules on in absentia proceedings in respect of the absent accused person. The requirements for the holding of such proceedings have been fully satisfied, therefore, it could be stated that the courts had held their hearings in the absence of a person whose presence had not been required by law.

In its decision, the Curia pointed out that the accused person's culpability in being absent is stipulated by section 529 of the Code of Criminal Procedure as a condition for the holding of in absentia proceedings. Such culpability can be established in a well-founded

518 „Hanu v. Romania" (2013)
519 „Famulyak v. Ukraine" (2019)

manner only if the courts concerned are unable, despite having taken all possible measures provided under law, to locate the accused person.

Based on Article 20, paragraph (1) and paragraph (2), point a) of the Treaty on the Functioning of the European Union, Article 8, paragraphs (1)-(4) of Directive 2016/343/EU of the European

Parliament and of the Council of 9 March 2016, and section 25, subsections (1)-(2) of Act no. CLXXX of 2012 on Cooperation in Criminal Matters with the Member States of the European

Union, the Curia took the position that, in the case of the absence of an accused person with European Union citizenship, the lower instance courts had failed to take all measures to find him by omitting to issue a European arrest warrant in addition to the national one. Although section 529, subsection (1) of the Code of Criminal Procedure only provides for the issuance of "an arrest warrant", the latter has to be issued at both national and European levels if the absent accused person holds the nationality of a European Union Member State, and even if such person has no known domicile in another Member State. It is only in that case that the legal requirements for the holding of in absentia proceedings can be fully met.

With regard to the above, the lower instance courts failed to comply with the procedural rules on in absentia proceedings and to duly summon the accused person to their hearings, which were therefore held in the absence of a person whose presence was required by law. By virtue of section 608, subsection (1), point d) of the Code of Criminal Procedure, the courts' failure constitutes an absolute procedural infringement which has to lead to the unconditional quashing of their decisions. The Curia did not agree with the prosecution services' viewpoint according to which the absolute procedural infringement had already been remedied as a result of the reopening of the courts' proceedings on the basis of section 408, subsection (1), point e) of the Code of Criminal Procedure. Hence, the Curia – having also regard to the provisions of the new Code of Criminal Procedure that had entered into force in the meantime – quashed the second instance decision and ordered the court of second instance to reopen its proceedings.[520]

520 Budapest, the 12th of October 2018. In: *Communication concerning the decision of the Curia of Hungary in criminal case no Bfv.II.254/2018.*

CHAPTER III.

PERSONS PARTICIPATING IN CRIMINAL PROCEEDINGS

The status of participants in criminal proceedings varies widely in different European procedural laws. My aim in this chapter is to analyse the rules of the Hungarian Criminal Procedure Act, and to refer to the ECrHR decisions, especially in relation to the legal status of the accused.

3.1. The defendant and the person reasonably suspected of having committed a criminal offence (CPC)

The defendant is a person against whom a criminal proceeding is conducted. The defendant is a suspect during the investigation, an accused after the indictment, or a convict after a penalty, reprimand, release on probation, reparation work, or special education in a juvenile correctional institution is imposed by a final and binding conclusive decision or applied.

The person reasonably suspected of having committed a criminal offence is the person, during the investigation, but before the communication of the suspicion, who was apprehended for the commission of a criminal offence or summoned for an interrogation as a defendant or whose compulsory attendance was ordered or against whom a search warrant for the commission of a criminal offence or an arrest warrant was issued.[521]

3.1.1. The rights and obligations of the defendant and the person reasonably suspected of having committed a criminal offence

The defendant shall be entitled to

– get informed of the subject of the suspicion or the indictment, as well as any change thereto,

– be afforded adequate time and circumstances for preparing the defence by the court, the prosecution service, or the investigating authority,

– be informed by the court, the prosecution service, or the investigating authority about his rights and obligations in the criminal proceeding,

– authorise a defence counsel for his defence, or move for the official appointment of a defence counsel,

– consult his defence counsel without supervision,

– give or refuse to give a testimony,

– present pieces of evidence, file motions and observations, and address the court by exercising his right to the last word,

521 CPC 38. § (1) – (3)

– attend the trial and the sessions held relating to coercive measures affecting personal freedom subject to judicial permission, and to ask questions as provided for in this Act,

– seek legal remedy,

– inspect the case documents of the proceeding in their entirety, with the exceptions specified in this Act,

– initiate that a plea agreement be concluded or a measure or decision by a prosecutor be offered.

The defendant in detention shall be entitled to (1) get informed of the reason for his detention and any change thereto, (2) have the court, the prosecution service, or the investigating authority inform one person selected by him about his detention, (3) establish, and keep without control, contact in person, via post or by electronic means with his defence counsel and, in case of a foreign national defendant, the consular representative of his state, (4) keep supervised contact in person or controlled contact via post, or by electronic means with the person selected by him, in accordance with the instructions of the prosecution service before the indictment or the court after the indictment, (5) to keep contact with the person or authority specified in an international treaty promulgated by an Act in accordance with the international treaty.

A defendant shall be obliged to (1) attend procedural acts in accordance with the instructions of the court, the prosecution service, or the investigating authority and as specified in this Act, (2) inform the proceeding court, prosecution office, or investigating authority about his home address, contact address, actual place of residence, and service address, as well as any change thereto within three working days following the change.

The court, the prosecution service, or the investigating authority shall advise the defendant of his rights and obligations at the beginning of his participation in the criminal proceeding. The information shall cover that he may file a request for legal aid, the conditions for such legal aid, and the right to use his mother tongue.

If the defendant is in detention, the proceeding court, prosecution office, or investigating authority shall inform the defendant about his rights also in writing. The information shall cover the period of detention as specified in the decision ordering the detention and the maximum possible period of detention as specified in an Act, the rules of extending, maintaining, and reviewing the detention, and the right to seek legal remedy against these decisions, as well as the right to file a motion for the termination of the detention.

If this Act affords a right for a relative or heir of the defendant to file motions, the provisions pertaining to the rights of defendants shall apply to the rights of the relative or heir.[522]

3.1.2. Effective participation of defendants in the proceedings (ECrHR)

Article 6., read as a whole, guarantees the right of an accused to participate effectively in a criminal trial.[523] In general, this includes, inter alia, not only his or her right to be present, but also to hear and follow the proceedings. Accordingly, poor acoustics in the courtroom and hearing difficulties could give rise to an issue under Article.

522 CPC 39. § - 40. §

523 „Murtazaliyeva v. Russia" (2018)

The Court also held that an accused's effective participation in his or her criminal trial must equally include the right to compile notes in order to facilitate the conduct of the defence.[524] This is true irrespective of whether or not the accused is represented by counsel. Indeed, the defence of the accused's interests may best be served by the contribution which the accused makes to his lawyer's conduct of the case before the accused is called to give evidence. The dialogue between the lawyer and his client should not be impaired through divesting the latter of materials which set out his own views on the strengths and weaknesses of the evidence adduced by the prosecution. However, the Court stressed that different considerations may apply to the actual use of notes by an accused during his examination-in-chief or cross-examination. The credibility of an accused may be best tested by how he reacts in the witness box to questioning. A domestic court may therefore be justified in preventing an accused's reliance on written recollections of events or the reading out of notes in a manner which suggests that the evidence given has been rehearsed. Similarly, the Court has held that Article 6 of the Convention does not provide for an unlimited right to use any defence arguments, particularly those amounting to defamation.[525]

An issue concerning lack of effective participation in the proceedings may also arise with regard to a failure of the domestic authorities to accommodate the needs of vulnerable defendants.[526] Thus, as regards the juvenile defendants in trial proceedings, the Court has held that the criminal proceedings must be so organised as to respect the principle of the best interests of the child. It is essential that a child charged with an offence is dealt with in a manner which fully takes into account his or her age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings.[527] The right of a juvenile defendant to effectively participate in his criminal trial requires that the authorities deal with him with due regard to his vulnerability and capacities from the first stage of his involvement in a criminal investigation and, in particular, during any questioning by the police. The authorities must take steps to reduce as far as possible the child's feelings of intimidation and inhibition and to ensure that he has a broad understanding of the nature of the investigation and the stakes, including the significance of any potential penalty as well as his rights of defence and, in particular, his right to remain silent.[528]

A measure of confinement in the courtroom may also affect the fairness of a hearing by impairing an accused's right to participate effectively in the proceedings.[529] The degrading treatment of a defendant during judicial proceedings caused by confinement in an overcrowded glass cabin in breach of Article 3 of the Convention would be difficult to reconcile with the notion of a fair hearing, regard being had to the importance of equality of arms, the presumption of innocence, and the confidence which the courts in a democratic society must inspire in the public, and above all in the accused.[530]

Nevertheless, security concerns in a criminal court hearing may involve, especially in a large-scale or sensitive case, the use of special arrangements, including glass cabins.

524 „Pullicino v. Malta (2000); „Moiseyev v. Russia" (2008)
525 „Miljević v. Croatia" (2020)
526 „Hasáliková v. Slovakia" (2021), concerning defendants with intellectual impairments
527 „V. v. the United Kingdom" (1999)
528 „Blokhin v. Russia" (2016)
529 „Svinarenko and Slyadnev v. Russia" (2014)
530 „Yaroslav Belousov v. Russia" (2016)

However, given the importance attached to the rights of the defence, any measures restricting the defendant's participation in the proceedings or imposing limitations on his or her relations with lawyers should only be imposed to the extent necessary, and should be proportionate to the risks in a specific case. In a case, the Court declared as violations of Article 6. the applicant's inability to have confidential exchanges with his legal counsel during the trial due to his placement in a glass cabin, and the trial court's failure to recognise the impact of these courtroom arrangements on the applicant's defence rights.

Similarly, as regards the use of a video link in the proceedings, the Court has held that this form of participation in proceedings is not, as such, incompatible with the notion of a fair and public hearing. However, recourse to this measure in any given case must serve a legitimate aim and the arrangements for the giving of evidence must be compatible with the requirements of respect for due process, as laid down in Article 6. In particular, it must be ensured that the applicant is able to follow the proceedings and to be heard without technical impediments, and that effective and confidential communication with a lawyer is provided for.[531]

3.1.3. Right to remain silent and not to incriminate oneself (ECrHR)

On the basis of this principle, in a criminal proceeding, a person shall not be required to give a self-incriminating testimony or provide evidence against himself.[532] If the prosecuting authority (court) commits a serious breach of the rules governing incriminating statements, for example by failing to warn the accused of his right to remain silent, the evidence that has become known is considered to be unlawful and cannot form the basis of the facts. If the court nevertheless uses it in reaching a decision on the merits, this may lead to the decision being unfounded and annulled.

In this context, HÁGER points out an interesting practical problem: „If the evidence of a procedural violation is disregarded in the decision making process, the judgment is not unfounded, but the result may be different from the truth." [533]

Judicial practice strictly interprets this principle: according to a 2001 domestic decision, it is also a violation of the prohibition of self-incrimination to read out at trial, without the consent of the accused, previous statements made in connection with the case in other proceedings before the authorities.[534] However, according to the consistent case-law of the ECrHR, the use of information obtained under duress by the authorities but which exists (objectively) independently of the will of the accused is not prohibited: this could include, for example, the results of a smear test, a blood sample or a urine test.

However, the Strasbourg forum found a violation of the Convention when the accused, who had confessed in the absence of his defence lawyer, withdrew his confession during the re-interrogation, now in the presence of his defence lawyer, but the court nevertheless convicted him and did not even examine whether his interrogation in the absence of his

531 „Marcello Viola v. Italy" (2006)
532 CPC 7. § (3)
533 Andrea Noémi TÓTH – Tamás HÁGER: The testimony of the accused in the court phase of criminal proceedings, the assessment of certain procedural violations. *Miskolc Legal Review,* 2013/2. 79.
534 BH 1998/3. no. 233.; BH 2001/10.

defence lawyer was lawful at all. The Court subsequently found that he had the right to remain silent and that he was immune from self-incrimination.[535]

Based on the Convention, anyone accused of a criminal offence has the right to remain silent and not to contribute to incriminating himself. Although not specifically mentioned in Article 6, the right to remain silent and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6.[536]

The right not to incriminate oneself applies to criminal proceedings in respect of all types of criminal offences, from the most simple to the most complex.[537]

The right to remain silent applies from the point at which the suspect is questioned by the police. A person „charged with a criminal offence" for the purposes of Article 6 has the right to be notified of his or her privilege against selfincrimination.[538]

The right not to incriminate oneself presupposes that the prosecution in a criminal case seek to prove their case against the accused without recourse to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. The privilege against self-incrimination does not protect against the making of an incriminating statement per se but against the obtaining of evidence by coercion or oppression. It is the existence of compulsion that gives rise to concerns as to whether the privilege against self-incrimination has been respected. For this reason, the Court must first consider the nature and degree of compulsion used to obtain the evidence.

Through its case-law, the Court has identified at least three kinds of situations which give rise to concerns as to improper compulsion in breach of Article 6. The first is where a suspect is obliged to testify under threat of sanctions and either testifies as a result or is sanctioned for refusing to testify.[539] The second is where physical or psychological pressure, often in the form of treatment which breaches Article 3 of the Convention, is applied to obtain real evidence or statements.[540] The third is where the authorities use subterfuge to elicit information that they were unable to obtain during questioning.[541]

Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature, such as exculpatory remarks or mere information on questions of fact, may be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial, or to otherwise undermine his credibility. The privilege against self-incrimination cannot therefore reasonably be confined to statements which are directly incriminating.

However, the privilege against self-incrimination does not extend to the use in criminal proceedings of material which may be obtained from the accused through recourse to compulsory powers but which has an existence independent of the will of the suspect, such

535 „Yaremenko v. Ukraine" (2008)
536 „Bykov v. Russia" (2009)
537 „Saunders v. the United Kingdom" (1996)
538 „Ibrahim and Others v. the United Kingdom" (2016)
539 „Heaney and McGuinness v. Ireland" (2000)
540 „Gäfgen v. Germany" (2010)
541 „Allan v. the United Kingdom" (2002)

as documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.[542] Moreover, the Court held that confronting the accused in criminal proceedings with their statements made during asylum proceedings could not be considered as the use of statements extracted under compulsion in breach of Article 6.

Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination. In order for the right to a fair trial under Article 6 § 1 to remain sufficiently „practical and effective", access to a lawyer should, as a rule, be provided from the first time a suspect is questioned by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.[543]

Persons in police custody enjoy both the right not to incriminate themselves and to remain silent and the right to be assisted by a lawyer whenever they are questioned; that is to say, when there is a „criminal charge" against them. These rights are quite distinct: a waiver of one of them does not entail a waiver of the other. Nevertheless, these rights are complementary, since persons in police custody must a fortiori be granted the assistance of a lawyer when they have not previously been informed by the authorities of their right to remain silent.[544] The importance of informing a suspect of the right to remain silent is such that, even where a person willingly agrees to give statements to the police after being informed that his words may be used in evidence against him, this cannot be regarded as a fully informed choice if he has not been expressly notified of his right to remain silent and if his decision has been taken without the assistance of counsel.[545]

The right to remain silent and the privilege against self-incrimination serve in principle to protect the freedom of a suspect to choose whether to speak or to remain silent when questioned by the police. Such freedom of choice is effectively undermined in a case in which the suspect has elected to remain silent during questioning and the authorities use subterfuge to elicit confessions or other statements of an incriminatory nature from the suspect which they were unable to obtain during such questioning (in this particular case, a confession made to a police informer sharing the applicant's cell), and where the confessions or statements thereby obtained are adduced in evidence at trial.[546]

Conversely, in the case of Bykov v. Russia (2009), the applicant had not been placed under any pressure or duress and was not in detention but was free to see a police informer and talk to him, or to refuse to do so. Furthermore, at the trial the recording of the conversation had not been treated as a plain confession capable of lying at the core of a finding of guilt; it had played a limited role in a complex body of evidence assessed by the court.

The right to remain silent is not absolute. In examining whether a procedure has extinguished the very essence of the privilege against self-incrimination, the Court will have regard, in particular, to the following elements: (1) the nature and degree of compulsion; (2) the existence of any relevant safeguards in the procedure; (3) the use to which any material so obtained is put.

542 „O'Halloran and Francis v. the United Kingdom" (2007)
543 „Salduz v. Turkey" (2008)
544 „Navone and Others v. Monaco" (2013)
545 „Stojkovic v. France and Belgium" (2011)
546 „Allan v. the United Kingdom" (2002)

On the one hand, a conviction must not be solely or mainly based on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the right to remain silent cannot prevent the accused's silence – in situations which clearly call for an explanation from him – from being taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. It cannot therefore be said that an accused's decision to remain silent throughout criminal proceedings should necessarily have no implications.

Whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in the light of all the circumstances of the case, having particular regard to the weight attached to such inferences by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation. In practice, adequate safeguards must be in place to ensure that any adverse inferences do not go beyond what is permitted under Article 6. In jury trials, the trial judge's direction to the jury on adverse inferences is of particular relevance to this matter.[547]

Furthermore, the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration and weighed against the individual's interest in having the evidence against him gathered lawfully. However, public-interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights, including the privilege against self-incrimination. The public interest cannot be relied on to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings.[548]

3.1.4. The right to defence (ECrHR)

The defendant shall have (1) the right to an effective defence at all phases of a criminal proceeding and (2) the right to defend himself personally and to engage a defence counsel to carry out his defence. The court, prosecution service, or investigating authority shall provide the defendant with a defence counsel as laid down in CPC. The court, prosecution service, or investigating authority shall afford adequate time and circumstances for preparing a defence. The defendant shall have the right to defend himself at liberty. The court, prosecution service, or investigating authority shall take into account ex officio all exculpatory circumstances and circumstances mitigating criminal liability.[549]

Based on European Convention, everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.[550]

547 „O'Donnell v. the United Kingdom" (2015)
548 „Heaney and McGuinness v. Ireland" (2000)
549 CPC 3. § (1) – (6)
550 Article 6. § (3)

The requirements of Article 6 § 3 concerning the rights of the defence are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1 of the Convention.[551]

The specific guarantees laid down in Article 6 § 3 exemplify the notion of fair trial in respect of typical procedural situations which arise in criminal cases, but their intrinsic aim is always to ensure, or to contribute to ensuring, the fairness of the criminal proceedings as a whole. The guarantees enshrined in Article 6 § 3 are therefore not an end in themselves, and they must accordingly be interpreted in the light of the function which they have in the overall context of the proceedings.[552]

a) Information about the charge:

Article 6 § 3 (a) points to the need for special attention to be paid to the notification of the „accusation" to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against him.[553]

Article 6 § 3 (a) affords the defendant the right to be informed not only of the „cause" of the accusation, that is to say, the acts he is alleged to have committed and on which the accusation is based, but also of the „nature" of the accusation, that is, the legal characterisation given to those acts.[554]

The information need not necessarily mention the evidence on which the charge is based.[555]

Article 6 § 3 (a) does not impose any special formal requirement as to the manner in which the accused is to be informed of the nature and cause of the accusation against him.[556] In this connection, an indictment plays a crucial role in the criminal process, in that it is from the moment of its service that the defendant is formally put on written notice of the factual and legal basis of the charges against him or her.[557]

The duty to inform the accused rests entirely on the prosecution and cannot be complied with passively by making information available without bringing it to the attention of the defence.[558]

Information must actually be received by the accused; a legal presumption of receipt is not sufficient.[559]

If the situation complained of is attributable to the accused's own conduct, the latter is not in a position to allege a violation of the rights of the defence.[560]

In the case of a person with mental difficulties, the authorities are required to take additional steps to enable the person to be informed in detail of the nature and cause of the accusation against him.[561]

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551 „Gäfgen v. Germany" (2010); 'Sakhnovskiy v. Russia" (2010)
552 „Ibrahim and Others v. the United Kingdom (2016); „Mayzit v. Russia" (2005); „Can v. Austria (1984)
553 „Kamasinski v. Austria" (1989)
554 „Mattoccia v. Italy" (2000)
555 „Collozza and Rubinat v. Italy" (1983)
556 „Drassich v. Italy" (2007); „Giosakis v. Greece" (2011)
557 „Kamasinski v. Austria" (1989)
558 „Chichlian and Ekindjian v. France" (1989)
559 „C. v. Italy" (1988)
560 „Erdogan v. Turkey" (1992); „Campbell and Fell v. the United Kingdom" (1984)
561 „Vaudelle v. France" (2001)

b) Reclassification of the charge:

The accused must be duly and fully informed of any changes in the accusation, including changes in its „cause", and must be provided with adequate time and facilities to react to them and organise his defence on the basis of any new information or allegation.[562]

Information concerning the charges made, including the legal characterisation that the court might adopt in the matter, must either be given before the trial in the bill of indictment or at least in the course of the trial by other means such as formal or implicit extension of the charges. Mere reference to the abstract possibility that a court might arrive at a different conclusion from the prosecution as regards the qualification of an offence is clearly not sufficient.[563]

A reclassification of the offence is considered to be sufficiently foreseeable to the accused if it concerns an element which is intrinsic to the accusation.[564] Whether the elements of the reclassified offence were debated in the proceedings is a further relevant consideration.[565]

In the case of reclassification of facts during the course of the proceedings, the accused must be afforded the possibility of exercising his defence rights in a practical and effective manner, and in good time.[566]

Defects in the notification of the charge could be cured in the appeal proceedings if the accused has the opportunity to advance before the higher courts his defence in respect of the reformulated charge and to contest his conviction in respect of all relevant legal and factual aspects.[567]

c) „In detail":

The adequacy of the information must be assessed in relation to Article 6 § 3 (b), which confers on everyone the right to have adequate time and facilities for the preparation of their defence, and in the light of the more general right to a fair hearing enshrined in Article 6 § 1.[568]

While the extent of the "detailed" information varies depending on the particular circumstances of each case, the accused must at least be provided with sufficient information to understand fully the extent of the charges against him, in order to prepare an adequate defence.[569] For instance, detailed information will exist when the offences of which the defendant is accused are sufficiently listed; the place and the date of the offence is stated; there is a reference to the relevant Articles of the Criminal Code, and the name of the victim is mentioned.[570]

Some specific details of the offence may be ascertainable not only from the indictment but also from other documents prepared by the prosecution in the case and from other file

562 „Bäckström and Andersson v. Sweden" (2006); „Varela Geis v. Spain" (2013)
563 „I.H. and Others v. Austria" (2006)
564 „De Salvador Torres v. Spain" (1996); „Sadak and Others v. Turkey" (2001); „Juha Nuutinen v. Finland" (2007)
565 „Penev v. Bulgaria" (2010)
566 „Block v. Hungary" (2011); „Haxhia v. Albania" (2013); „Pereira Cruz and Others v. Portugal" (2018)
567 „Sipavičius v. Lithuania" (2002); „Zhupnik v. Ukraine" (2010); „I.H. and Others v. Austria" (2006); „Gelenidze v. Georgia" (2019)
568 „Bäckström and Andersson v. Sweden" (2006)
569 „Mattoccia v. Italy" (2000)
570 „Brozicek v. Italy" (1989)

materials.[571] Moreover, factual details of the offence may be clarified and specified during the proceedings.[572]

d) „Promptly":

The information must be submitted to the accused in good time for the preparation of his defence, which is the principal underlying purpose of Article 6 § 3 (a).[573]

In examining compliance with Article 6 § 3 (a), the Court has regard to the autonomous meaning of the words "charged" and "criminal charge", which must be interpreted with reference to the objective rather than the formal situation.[574]

e) Language:

If it is shown or there are reasons to believe that the accused has insufficient knowledge of the language in which the information is given, the authorities must provide him with a translation.[575] Whilst Article 6 § 3 (a) does not specify that the relevant information should be given in writing or translated in written form for a foreign defendant, a defendant not familiar with the language used by the court may be at a practical disadvantage if he is not also provided with a written translation of the indictment into a language which he understands.[576]

However, sufficient information on the charges may also be provided through an oral translation of the indictment if this allows the accused to prepare his defence.[577]

There is no right under this provision for the accused to have a full translation of the court files.[578]

The cost incurred by the interpretation of the accusation must be borne by the State in accordance with Article 6 § 3 (e), which guarantees the right to the free assistance of an interpreter.[579]

f) Preparation of the defence:

The „rights of defence", of which Article 6. gives a non-exhaustive list, have been instituted above all to establish equality, as far as possible, between the prosecution and the defence. The facilities which must be granted to the accused are restricted to those which assist or may assist him in the preparation of his defence.[580]

Article 6 § 3 (b) of the Convention concerns two elements of a proper defence, namely the question of facilities and that of time. This provision implies that the substantive defence activity on the accused's behalf may comprise everything which is "necessary" to prepare the trial. The accused must have the opportunity to organise his defence in an appropriate

571 „Previti v. Italy" (2009)
572 „Sampech v. Italy" (2015); Pereira Cruz and Others v. Portugal (2018)
573 „C. v. Italy" (1988), where the notification of charges to the applicant four months before his trial was deemed acceptable; see, by contrast, „Borisova v. Bulgaria" (2006), where the applicant had only a couple of hours to prepare her defence without a lawyer.
574 „Padin Gestoso v. Spain" (1999); „Cassev. Luxembourg" (2006)
575 „Brozicek v. Italy" (1989)
576 „Hermi v. Italy" (2006)
577 „Husain v. Italy" (2005)
578 „X. v. Austria" (1975)
579 „Luedicke, Belkacem and Koç v. Germany" (1978)
580 „Mayzit v. Russia" (2005)

way and without restriction as to the ability to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings.[581]

The issue of adequacy of the time and facilities afforded to an accused must be assessed in the light of the circumstances of each particular case.[582]

Adequate time: When assessing whether the accused had adequate time for the preparation of his defence, particular regard has to be had to the nature of the proceedings, as well as the complexity of the case and the stage of the proceedings.[583]

Article 6 § 3 (b) protects the accused against a hasty trial.[584] Although it is important to conduct proceedings at a good speed, this should not be done at the expense of the procedural rights of one of the parties.[585]

In determining whether Article 6 § 3 (b) has been complied with, account must be taken also of the usual workload of legal counsel; however, it is not unreasonable to require a defence lawyer to arrange for at least some shift in the emphasis of his work if this is necessary in view of the special urgency of a particular case.[586] In this context, in a case in which the applicant and his defence counsel had had five days to study a six-volume case file of about 1,500 pages, the Court did not consider that the time allocated to the defence to study the case file was enough to protect the essence of the right guaranteed by Article 6 §§ 1 and 3 (b). The Court took into account the fact that in the appeal the applicant had analysed the case material in detail, that he had been represented before the appeal court by two lawyers, who confirmed that they had had enough time to study the file, and that the applicant had not been limited in the number and duration of his meetings with the lawyers.[587]

Article 6 § 3 (b) of the Convention does not require the preparation of a trial lasting over a certain period of time to be completed before the first hearing. The course of trials cannot be fully charted in advance and may reveal elements which had not hitherto come to light and require further preparation by the parties.[588]

An issue with regard to the requirement of "adequate time" under Article 6 § 3 (b) may arise with regard to the limited time for the inspection of a file,[589] or a short period between the notification of charges and the holding of the hearing.[590] Furthermore, the defence must be given additional time after certain occurrences in the proceedings in order to adjust its position, prepare a request, lodge an appeal, etc.[591] Such „occurrences" may

581 „Can v. Austria" (1984); „Gregačević v. Croatia" (2012)
582 „Iglin v. Ukraine" (2012)
583 „Gregačević v. Croatia" (2012)
584 „Kröcher and Möller v. Switzerland (1981); „Bonzi v. Switzerland" (1978); „Borisova v. Bulgaria" (2006); „Malofeyeva v. Russia" (2013)
585 „OAO Neftyanaya Kompaniya Yukos v. Russia" (2011)
586 „Mattick v. Germany" (2005)
587 „Lambin v. Russia" (2017)
588 „Mattick v. Germany" (2005)
589 Huseyn and Others v. Azerbaijan, 2011,
§ „Iglin v. Ukraine" (2012); see: „Nevzlin v. Russia" (2022), where the defence was given two weeks, which included weekends and holidays, to examine a 19,000-page case file involving accusations concerning several episodes of murder and attempted murder.
590 „Vyerentsovv. Ukraine" (2013)
591 „Miminoshvili v. Russia" (2011)

include changes in the indictment,[592] introduction of new evidence by the prosecution,[593] or a sudden and drastic change in the opinion of an expert during the trial.

An accused is expected to seek an adjournment or postponement of a hearing if there is a perceived problem with the time allowed[594], save in exceptional circumstances,[595] or where there is no basis for such a right in domestic law and practice.[596]

In certain circumstances a court may be required to adjourn a hearing of its own motion in order to give the defence sufficient time.[597]

In order for the accused to exercise effectively the right of appeal available to him, the national courts must indicate with sufficient clarity the grounds on which they based their decision.[598] When a fully reasoned judgment is not available before the expiry of the time-limit for lodging an appeal, the accused must be given sufficient information in order to be able to make an informed appeal.[599]

States must ensure that everyone charged with a criminal offence has the benefit of the safeguards of Article 6 § 3. Putting the onus on convicted appellants to find out when an allotted period of time starts to run or expires is not compatible with the "diligence" which the Contracting States must exercise to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner.[600]

Adequate facilities: The „facilities" which everyone charged with a criminal offence should enjoy include the opportunity to acquaint himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings.[601]

The States' duty under Article 6 § 3 (b) to ensure the accused's right to mount a defence in criminal proceedings includes an obligation to organise the proceedings in such a way as not to prejudice the accused's power to concentrate and apply mental dexterity in defending his position. Where the defendants are detained, the conditions of their detention, transport, catering and other similar arrangements are relevant factors to consider in this respect.[602]

In particular, where a person is detained pending trial, the notion of "facilities" may include such conditions of detention that permit the person to read and write with a reasonable degree of concentration.[603] It is crucial that both the accused and his defence counsel should be able to participate in the proceedings and make submissions without suffering from excessive tiredness.[604] Thus, in „Razvozzhayev v. Russia" and „Ukraine and Udaltsov v. Russia" (2019), the Court found that the cumulative effect of exhaustion

592 „Pélissier and Sassi v. France" (1999)
593 „G.B.v. France" (2001)
594 „Campbell and Fell v. the United Kingdom" (1984); „Bäckström and Andersson v. Sweden" (2006); „Craxi v. Italy" (2002)
595 „Goddi v. Italy" (1984)
596 „Galstyan v. Armenia" (2007)
597 „Sadak and Others v. Turkey" (2001); „Sakhnovskiyv. Russia" (2010)
598 „Hadjianastassiou v. Greece" (1992)
599 „Zoon v. the Netherlands" (2000)
600 „Vacher v. France" (1996)
601 „Huseyn and Others v. Azerbaijan" (2011); „OAO Neftyanaya Kompaniya Yukos v. Russia" (2011)
602 „Razvozzhayev v. Russia and Ukraine and Udaltsov v. Russia" (2019)
603 „Mayzit v. Russia" (2005)
604 „Barberà, Messegué and Jabardo v. Spain" (1988); „Makhfi v. France" (2004); „Fakailo (Safoka) and Others v. France" (2014).

caused by lengthy prison transfers – in poor conditions and with less than eight hours of rest, repeated for four days a week over a period of more than four months – seriously undermined the applicant's ability to follow the proceedings, make submissions, take notes and instruct his lawyers. In these circumsatnces, and given that insufficient consideration had been given to the applicant's requests for a hearing schedule that might have been less intensive, the Court considered that he had not been afforded adequate facilities for the preparation of his defence, which had undermined the requirements of a fair trial and equality of arms, contrary to the requirements of Article 6 §§ 1 and 3 (b) of the Convention.

The facilities which must be granted to the accused are restricted to those which assist or may assist him in the preparation of his defence.[605] In some instances, that may relate to the necessity to ensure the applicant a possibility to obtain evidence in his favour.[606]

Article 6 § 3 (b) guarantees also bear relevance for an accused's access to the file and the disclosure of evidence, and in this context they overlap with the principles of the equality of arms and adversarial trial under Article 6 § 1.[607] An accused does not have to be given direct access to the case file, it being sufficient for him to be informed of the material in the file by his representatives.[608] However, an accused's limited access to the court file must not prevent the evidence being made available to the accused before the trial and the accused being given an opportunity to comment on it through his lawyer in oral submissions.[609]

When an accused has been allowed to conduct his own defence, denying him access to the case file amounts to an infringement of the rights of the defence.[610]

In order to facilitate the conduct of the defence, the accused must not be hindered in obtaining copies of relevant documents from the case file and compiling and using any notes taken.[611]

„Facilities" provided to an accused include consultation with his lawyer.[612] The opportunity for an accused to confer with his defence counsel is fundamental to the preparation of his defence.[613] Thus, an issue under Article 6 § 3 (b) arises if the placement of an accused in a glass cabin during the hearing prevents his or her effective consultation with a lawyer.[614]

Article 6 § 3 (b) overlaps with a right to legal assistance in Article 6 § 3 (c) of the Convention.[615]

3.1.5. Right to defend oneself in person or through legal assistance

Based on Article 6 § 3 (c) of the Convention, „everyone charged with a criminal offence has the following minimum rights: {...} to defend himself in person or through legal assistance

605 „Padin Gestoso v. Spain" (1999)
606 „Lilian Erhan v. the Republic of Moldova" (2022), where the police refused to accompany the applicant to a hospital to obtain a biological test to challenge the allegations of drunk-driving.
607 „Rowe and Davis v. the United Kingdom" (2000); „Leas v. Estonia" (2012)
608 „Kremzow v. Austria" (1993)
609 „Öcalan v. Turkey" (2005)
610 „Foucher v. France" (1997)
611 „Rasmussen v. Poland" (2009); „Moiseyev v. Russia" (2008); „Matyjek v. Poland" (2007); „Seleznev v. Russia" (2008)
612 „Campbell and Fellv. the United Kingdom" (1984)
613 „Bonzi v. Switzerland" (1978)
614 „Yaroslav Belousov v. Russia" (2016)
615 „Lanz v. Austria" (2002); „Trepashkin v. Russia" (2010)

of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

Article 6 § 3 (c) encompasses particular aspects of the right to a fair trial within the meaning of Article 6 § 1.[616] This sub-paragraph guarantees that the proceedings against an accused person will not take place without adequate representation of the case for the defence. It comprises three separate rights: to defend oneself in person, to defend oneself through legal assistance of one's own choosing and, subject to certain conditions, to be given legal assistance free.[617]

a) Scope of application:

Any person subject to a criminal charge must be protected by Article 6 § 3 (c) at every stage of the proceedings.[618] This protection may thus become relevant even before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with the provisions of Article 6.[619]

While Article 6 § 3 (b) is tied to considerations relating to the preparation of the trial, Article 6 § 3 (c) gives the accused a more general right to assistance and support by a lawyer throughout the whole proceedings.[620] Nevertheless, the manner in which Article 6 § 3 (c) is to be applied in the pre-trial phase (during the preliminary investigation) depends on the special features of the proceedings involved and on the circumstances of the case.[621]

Similarly, the manner in which Article 6 § 3 (c) is to be applied in relation to appellate or cassation courts depends upon the special features of the proceedings involved.[622] Account must be taken of the entirety of the proceedings conducted in the domestic legal order and of the role of the appellate or cassation court therein.[623] It is necessary to consider matters such as the nature of the leave-to-appeal procedure and its significance in the context of the criminal proceedings as a whole, the scope of the powers of the court of appeal, and the manner in which the applicant's interests were actually presented and protected before the court of appeal.

b) Right to defend oneself:

The object and purpose of Article 6 of the Convention taken as a whole show that a person charged with a criminal offence is entitled to take part in the hearing.[624] Closely linked with this right Article 6 § 3 (c) offers the accused the possibility of defending himself in person. It will therefore normally not be contrary to the requirements of Article 6 if an accused is self-represented in accordance with his or her own will, unless the interests of justice require otherwise.[625]

616 „Dvorski v. Croatia" (2015); „Correia de Matos v. Portugal" (2001); „Foucher v. France" (1997)
617 „Pakelli v. Germany" (1983)
618 „Imbrioscia v. Switzerland" (1993)
619 „Öcalan v. Turkey" (2005); „Ibrahim and Others v. the United Kingdom" (2016); „Magee v. the United Kingdom" (2000)
620 „Can v. Austria" (1984)
621 „Ibrahim and Others v. the United Kingdom" (2016); „Brennan v. the United Kingdom" (2001); „Berliński v. Poland" (2002)
622 „Meftah and Others v. France" (2002)
623 „Monnell and Morris v. the United Kingdom" (1985)
624 „Zana v. Turkey" (1997)
625 „Galstyan v. Armenia" (2007)

Article 6 §§ 1 and 3 (c) do not necessarily give the accused the right to decide the manner in which one's defence is assured. The choice between two alternatives mentioned in Article 6 § 3 (c), namely, the applicant's right to defend oneself in person or to be represented by a lawyer of one's own choosing, or in certain circumstances one appointed by the court, depends in principle upon the applicable domestic law or rules of court. In making this decision, Member States enjoy a margin of appreciation, albeit limited.[626]

In light of these principles, the Court first examines whether relevant and sufficient grounds were provided for the legislative choice applied in the particular case. Second, even if relevant and sufficient grounds were provided, it is still necessary to examine, in the context of the overall assessment of fairness of the criminal proceedings, whether the domestic courts, when applying the impugned rule, also provided relevant and sufficient grounds for their decisions. In the latter connection, it will be relevant to assess whether an accused was afforded scope in practice to participate effectively in his or her trial.

In „Correia de Matos v. Portugal" the Court took into account as a whole the procedural context in which the requirement of mandatory representation was applied, including whether the accused remained able to intervene in person in the proceedings. It further took into account the margin of appreciation enjoyed by the State and considered the reasons for the impugned choice of the legislature to be both relevant and sufficient. Since, in addition, there was no basis on which to find that the criminal proceedings against the applicant had been unfair, the Court concluded that there had been no violation of Article 6 §§ 1 and 3 (c) of the Convention.

Furthermore, where the accused chooses to defend himself, he deliberately waives his right to be assisted by a lawyer and is considered to be under a duty to show diligence in the manner in which he conducts his defence.[627] In particular, it would overstrain the concept of the right of defence of those charged with a criminal offence if it were to be assumed that they could not be prosecuted when, in exercising that right, they intentionally aroused false suspicions of punishable behaviour concerning a witness or any other person involved in the criminal proceedings.[628] The mere possibility of an accused being subsequently prosecuted on account of allegations made in his defence cannot be deemed to infringe his rights under Article 6 § 3 (c). The position might be different if, as a consequence of national law or practice in this respect being unduly severe, the risk of subsequent prosecution is such that the defendant is genuinely inhibited from freely exercising his defence rights.

c) Legal assistance, access to a lawyer:

The right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the fundamental features of a fair trial.[629] As a rule, a suspect should be granted access to legal assistance from the moment there is a "criminal charge" against him or her within the autonomous meaning of the Convention.[630] In this connection, the Court has stressed that a person acquires the status of a suspect calling for the application of the Article 6 safeguards not when that status is formally assigned to him or her, but when

626 „Correia de Matos v. Portugal" (2018)
627 „Melin v. France" (1993)
628 „Brandstetter v. Austria" (1991)
629 „Salduz v. Turkey" (2008); „Simeonovi v. Bulgaria" (2017); „Beuze v. Belgium" (2018)
630 „Simeonovi v. Bulgaria" (2017)

the domestic authorities have plausible reasons for suspecting that person's involvement in a criminal offence.[631]

Thus, for instance, the right of access to a lawyer arises when a person is taken into custody and questioned by the police[632] as well as in instances where a person was not deprived of liberty but is summoned for a questioning by the police concerning the suspicion of his or her involvement in a criminal offence.[633] This right may also be relevant during procedural actions, such as identification procedures or reconstruction of the events and on-site inspections[634] as well as search and seizure operations.[635] Moreover, the right of an accused to participate effectively in a criminal trial includes, in general, not only the right to be present, but also the right to receive legal assistance, if necessary.[636] By the same token, the mere presence of the applicant's lawyer cannot compensate for the absence of the accused.[637]

In „Beuze v. Belgium" (2018), drawing on its previous case-law, the Court explained that the aims pursued by the right of access to a lawyer include the following: prevention of a miscarriage of justice and, above all, the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused; counterweight to the vulnerability of suspects in police custody; fundamental safeguard against coercion and ill-treatment of suspects by the police; ensuring respect for the right of an accused not to incriminate him/herself and to remain silent, which can – just as the right of access to a lawyer as such – be guaranteed only if he or she is properly notified of these rights. In this connection, immediate access to a lawyer able to provide information about procedural rights is likely to prevent unfairness arising from the lack of appropriate information on rights.

In „Beuze v. Belgium" (2018) the Court also elaborated on the content of the right of access to a lawyer. It distinguished two minimum requirements as being: (1) the right of contact and consultation with a lawyer prior to the interview, which also includes the right to give confidential instructions to the lawyer, and (2) physical presence of the lawyer at the initial police interview and any further questioning during the pre-trial proceedings. Such presence must ensure legal assistance that is effective and practical.

In connection with the latter minimum requirement, it should be noted that in „Soytemizv. Turkey" (2018), the Court stressed that the right to be assisted by a lawyer requires not only that the lawyer is permitted to be present, but also that he is allowed to actively assist the suspect during, inter alia, the questioning by the police and to intervene to ensure respect for the suspect's rights. The right to be assisted by a lawyer applies throughout and until the end of the questioning by the police, including when the statements taken are read out and the suspect is asked to confirm and sign them, as assistance of a lawyer is equally important at this moment of the questioning. Thus, the police are, in principle, under an obligation to refrain from or to adjourn questioning in the

631 „Truten v. Ukraine" (2016); „Knox v. Italy" (2019); ,contrast „Bandaletov v. Ukraine" (2013), concerning voluntary statements made by an applicant as a witness; and „Sršen v. Croatia" (2019), concerning the obtaining of routine information, including the taking of blood samples, from the participants of a road accident.

632 „Simeonovi v. Bulgaria" (2017)

633 „Dubois v. France" (2022)

634 „İbrahim Öztürk v. Turkey" (2009); „Türk v. Turkey" (2017); „Mehmet Duman v. Turkey" (2018)

635 „Ayetullah Ay v. Turkey" (2020)

636 „Lagerblom v. Sweden" (2003); „Galstyan v. Armenia" (2007)

637 „Zana v. Turkey" (1997)

event that a suspect has invoked the right to be assisted by a lawyer during the interrogation until a lawyer is present and is able to assist the suspect. The same considerations also hold true in case the lawyer has to – or is requested to – leave before the end of the questioning of the police and before the reading out and the signing of the statements taken.

In „Doyle v. Ireland" (2019), the applicant was allowed to be represented by a lawyer but his lawyer was not permitted in the police interview as a result of the relevant police practice applied at the time. The Court found no violation of Article 6 §§ 1 and 3 (c) of the Convention. It considered that, notwithstanding the impugned restriction on the applicant's right of access to a lawyer during the police questioning, the overall fairness of the proceedings had not been irretrievably prejudiced.

In particular, it laid emphasis on the following facts: the applicant had been able to consult his lawyer; he was not particularly vulnerable; he had been able to challenge the admissibility of evidence and to oppose its use; the circumstances of the case had been extensively considered by the domestic courts; the applicant's conviction had been supported by significant independent evidence; the trial judge had given proper instructions to the jury; sound public-interest considerations had justified prosecuting the applicant; and there had been important procedural safeguards, namely all police interviews had been recorded on video and made available to the judges and the jury and, while not physically present, the applicant's lawyer had the possibility, which he used, to interrupt the interview to further consult with his client.

Further in „Beuze v. Belgium" (2018), the Court indicated, by way of example, that depending on the specific circumstances of each case and the legal system concerned, the following restrictions may also undermine the fairness of the proceedings: (1) a refusal or difficulties encountered by a lawyer in seeking access to the case file at the earliest stages of the criminal proceedings or during pre-trial investigation, and (2) the non-participation of the lawyer in investigative actions, such as identity parades or reconstructions.

In addition, the Court has indicated that account must be taken, on a case-by-case basis, in assessing the overall fairness of proceedings, of the whole range of services specifically associated with legal assistance: discussion of the case, organisation of the defence, collection of exculpatory evidence, preparation for questioning, support for an accused in distress, and verification of the conditions of detention.

The right to legal representation is not dependent upon the accused's presence.[638] The fact that the defendant, despite having been properly summoned, does not appear, cannot – even in the absence of an excuse – justify depriving him of his right to be defended by counsel.[639] Even if the legislature must be able to discourage unjustified absences, it cannot penalise them by creating exceptions to the right to legal assistance. The legitimate requirement that defendants must attend court hearings can be satisfied by means other than deprivation of the right to be defended.[640] Thus, an issue arises under Article 6 § 3 (c) if an applicant's defence counsel is unable to conduct the defence in the applicant's absence in a hearing before the relevant court, including an appellate court.[641]

638 „Van Geyseghem v. Belgium" (1999); „Campbell and Fell v. the United Kingdom" (1984); „Poitrimol v. France" (1993)

639 „Van Geyseghem v. Belgium" (1999); „Pelladoah v. the Netherlands" (1994); „Krombach v. France" (2001); „Galstyan v. Armenia" (2007)

640 „Tolmachev v. Estonia" (2015)

641 „Lala v. the Netherlands" (1994)

For the right to legal assistance to be practical and effective, and not merely theoretical, its exercise should not be made dependent on the fulfilment of unduly formalistic conditions: it is for the courts to ensure that a trial is fair and, accordingly, that counsel who attends trial for the apparent purpose of defending the accused in his absence, is given the opportunity to do so.[642]

Restrictions on early access to a lawyer: Prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody, provides a fundamental safeguard against coercion and ill-treatment of suspects by the police, and contributes to the prevention of miscarriages of justice and the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused.[643]

However, it is possible for access to legal advice to be, exceptionally, delayed. Whether such restriction on access to a lawyer is compatible with the right to a fair trial is assessed in two stages.

In the first stage, the Court evaluates whether there were compelling reasons for the restriction. Then, it weighs the prejudice caused to the rights of the defence by the restriction in the case. In other words, the Court must examine the impact of the restriction on the overall fairness of the proceedings and decide whether the proceedings as a whole were fair.

The Court has explained that the criterion of compelling reasons is a stringent one. Having regard to the fundamental nature and importance of early access to legal advice, in particular at the first interrogation of the suspect, restrictions on access to legal advice are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case. When assessing whether compelling reasons have been demonstrated, it is relevant whether the decision to restrict legal advice had a basis in domestic law and whether the scope and content of any restrictions on legal advice were sufficiently circumscribed by law so as to guide operational decision-making by those responsible for applying them.[644]

Such compelling reasons will exist, for instance, when it has been convincingly demonstrated that there was an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case. In such circumstances, there is a pressing duty on the authorities to protect the rights of potential or actual victims under Articles 2, 3 and 5 § 1 of the Convention in particular. On the other hand, a general risk of leaks cannot constitute compelling reasons justifying a restriction on access to a lawyer nor can compelling reasons exist when the restriction on access to a lawyer was the result of an administrative practice of the authorities.[645] The Government have to demonstrate the existence of compelling reasons. It is not for the Court to search, on its own motion, whether the compelling reasons existed in a particular case.[646]

In „Beuze v. Belgium" (2018), the Court explained that a general and mandatory (in that case statutory) restriction on access to a lawyer during the first questioning cannot amount

642 „Van Geyseghem v. Belgium" (1999)
643 „Salduz v. Turkey" (2008); „Ibrahim and Others v. the United Kingdom" (2016); „Simeonovi v. Bulgaria" (2017)
644 „Ibrahim and Others v. the United Kingdom" (2016)
645 „Simeonovi v. Bulgaria" (2017)
646 „Rodionov v. Russia" (2018)

to a compelling reason: such a restriction does not remove the need for the national authorities to ascertain, through an individual and case-specific assessment, whether there are any compelling reasons. In any event, the onus is on the Government to demonstrate the existence of compelling reasons to restrict access to a lawyer.

However, the absence of compelling reasons does not lead in itself to a finding of a violation of Article 6 of the Convention. In assessing whether there has been a breach of the right to a fair trial, it is necessary to view the proceedings as a whole, and the Article 6 § 3 rights as specific aspects of the overall right to a fair trial rather than ends in themselves.[647]

In particular, where compelling reasons are found to have been established, a holistic assessment of the entirety of the proceedings must be conducted to determine whether they were „fair" for the purposes of Article 6 § 1. Where, on the other hand, there are no compelling reasons for restricting access to legal advice, the Court applies a very strict scrutiny to its fairness assessment. The failure of the respondent Government to show compelling reasons weighs heavily in the balance when assessing the overall fairness of the trial and may tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (c). In such a case, the onus will be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice.[648]

In this connection, the Court will have particular regard to the existence of an assessment of the restriction on the applicant's access to a lawyer by the domestic courts, or to a lack thereof, and will draw the necessary inferences from it.[649]

In this context, the Court also takes into account the privilege against self-incrimination and the duty of the authorities to inform an applicant of these rights.[650] Where access to a lawyer was delayed, and where the suspect was not notified of the right to legal assistance, the privilege against self-incrimination or the right to remain silent, it will be even more difficult for the Government to show that the proceedings as a whole were fair.[651] It should also be noted that an issue from the perspective of the privilege against self-incrimination arises not only in case of actual confessions or directly incriminating remarks but also with regard to statements which can be considered as „substantially affecting" the accused's position. This is particularly true in the field of complex crime, such as complex financial offences, where the actual incriminating nature of the statements cannot be established so clearly.[652]

In „Beuze v. Belgium" (2018) the Court confirmed that the two-stage, test as elaborated in Ibrahim and Others, applied also to general and mandatory (in that case statutory) restrictions. In such circumstances, however, the Court applies very strict scrutiny to its fairness assessment and the absence of compelling reasons weighs heavily in the balance which may thus be tipped towards finding a violation of Article 6 §§ 1 and 3 (c) of the Convention.

When examining the proceedings as a whole, the following non-exhaustive list of factors should, where appropriate, be taken into account:[653]

647 „Ibrahim and Others v. the United Kingdom" (2016); „Simeonovi v. Bulgaria" (2017)
648 „Dimitar Mitev v. Bulgaria" (2018)
649 „Bjarki H. Diego v. Iceland" (2022)
650 „Ibrahim and Others v. the United Kingdom" (2016)
651 „Beuze v. Belgium" (2018)
652 „Bjarki H. Diego v. Iceland" (2022)
653 „Sitnevskiy and Chaykovskiy v. Ukraine" (2016)

– Whether the applicant was particularly vulnerable, for example, by reason of his age or mental capacity;

– The legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with; where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;

– Whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use;

– The quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;

– Where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found;

– In the case of a statement, the nature of the statement and whether it was promptly retracted or modified;

– The use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case;[654]

– Whether the assessment of guilt was performed by professional judges or lay jurors, and in the case of the latter the content of any jury directions;

– The weight of the public interest in the investigation and punishment of the particular offence in issue;

– Other relevant procedural safeguards afforded by domestic law and practice.

When conducting its fairness assessment, the Court has regard to the assessment made by the domestic courts, the absence of which is prima facie incompatible with the requirements of a fair trial. However, in the absence of any such assessment, the Court must make its own determination of the overall fairness of the proceedings. Furthermore, in carrying out that task, the Court should not act as a court of fourth instance by calling into question the outcome of the trial or engaging in an assessment of the facts and evidence or the sufficiency of the latter justifying a conviction. These matters, in line with the principle of subsidiarity, are the domain of domestic courts.[655]

Waiver of the right of access to a lawyer: Any purported waiver of a right of access to a lawyer must satisfy the „knowing and intelligent waiver" standard in the Court's case-law.[656] In applying this standard, it is implicit that suspects must be aware of their rights, including the right of access to a lawyer.[657]

Additional safeguards are necessary when the accused asks for counsel because if an accused has no lawyer, there is a diminished chance of being informed of one's rights and, as a consequence, a less chance of having those rights respected.[658]

654 See further: „Brus v. Belgium" (2021), where the Court did not accept that the reliance on the global sufficiency of evidence for the conviction could substitute for the overall fairness assessment relating to an unjustified restriction on the right of early access to a lawyer.

655 „Kohen and Others v. Turkey" (2022)

656 „Pishchalnikov v. Russia" (2009)

657 „Rodionov v. Russia" (2018)

658 „Pishchalnikov v. Russia" (2009)

A suspect cannot be found to have waived one's right to legal assistance if one has not promptly received information about this right after arrest.[659] Similarly, in the context of procedural action taken without relevant procedural safeguards, waiver of the right to a lawyer by signing a pre-printed phrase "No lawyer sought" is of questionable value for the purpose of demonstrating the unequivocal character of the waiver by an applicant.[660]

A possible earlier waiver, even if validly made, will no longer be considered valid if an applicant subsequently made an explicit request to access a lawyer.[661] Moreover, if an applicant has been subjected to inhuman and degrading treatment by the police, it cannot be considered that in such circumstances he or she validly waived his right of access to a lawyer.[662]

More generally, the Court explained that it was mindful of the probative value of documents signed while in police custody. However, it stressed that as with many other guarantees under Article 6 of the Convention, those signatures are not an end in themselves and they must be examined in the light of all the circumstances of the case. In addition, the use of a printed waiver formula may represent a challenge in ascertaining whether the text actually expresses an accused's free and informed decision to waive his or her right to be assisted by a lawyer.[663]

In any event, it is in the first place the trial court's duty to establish in a convincing manner whether or not an applicant's confessions and waivers of legal assistance were voluntary. Any flaw in respect of the confessions and waivers should be rectified in order for the proceedings as a whole to be considered fair. A failure to examine the circumstances surrounding an applicant's waiver would be tantamount to depriving the applicant of the possibility of remedying a situation, contrary to the requirements of the Convention.[664]

However, when a waiver of the right of access to a lawyer satisfies the „knowing and intelligent waiver" standard in the Court's case-law, there will be no grounds for doubting the overall fairness of the criminal proceedings against the applicant.[665]

Right to a lawyer of one's own choosing:

A person charged with a criminal offence who does not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing from the initial stages of the proceedings. This follows from the very wording of Article 6 § 3 (c), which guarantees that „[e]veryone charged with a criminal offence has the following minimum rights: {...} to defend himself {...} through legal assistance of his own choosing {...}", and is generally recognised in international human rights standards as a mechanism for securing an effective defence to the accused.[666] Moreover, this right also accordingly applies at the trial stage of the proceedings.[667]

659 „Simeonovi v. Bulgaria" (2017)
660 „Bozkaya v. Turkey" (2017); „Rodionov v. Russia" (2018); contrast with „Sklyar v. Russia" (2017), where the applicant clearly waived his right to a lawyer on the record.
661 „Artur Parkhomenko v. Ukraine" (2017)
662 „Turbylev v. Russia" (2015)
663 „Akdağ v. Turkey" (2019)
664 „Türk v. Turkey" (2017)
665 „Šarkienė v. Lithuania" (2017)
666 „Dvorski v. Croatia" (2015)
667 „Elif Nazan Şeker v. Turkey" (2022)

However, the right of everyone charged with a criminal offence to be defended by counsel of his own choosing is not absolute.[668] Although, as a general rule, the accused's choice of lawyer should be respected,[669] the national courts may override that person's choice when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.[670]

For instance, the special nature of the proceedings, considered as a whole, may justify specialist lawyers being reserved a monopoly on making oral representations.[671] On the other hand, the fact that the proceedings are held in absentia does not in itself justify the appointment of a legal aid lawyer as opposed to ensuring the right of defence by a lawyer of one's own choosing.[672]

In this context, the Court has held that in contrast to cases involving denial of access to a lawyer, where the test of "compelling reasons" applies, the more lenient requirement of „relevant and sufficient" reasons needs to be applied in situations raising the less serious issue of „denial of choice". In such cases the Court's task will be to assess whether, in light of the proceedings as a whole, the rights of the defence have been "adversely affected" to such an extent as to undermine their overall fairness.[673]

In particular, in the first step the Court assesses whether it has been demonstrated that there were relevant and sufficient grounds for overriding or obstructing the defendant's wish as to his or her choice of legal representation. Where no such reasons exist, the Court proceeds to evaluate the overall fairness of the criminal proceedings. In making its assessment, the Court may have regard to a variety of factors, including the nature of the proceedings and the application of certain professional requirements; the circumstances surrounding the designation of counsel and the existence of opportunities to challenge this; the effectiveness of counsel's assistance; whether the accused's privilege against self-incrimination was respected; the accused's age; the trial court's use of any statements given by the accused at the material time; the opportunity given to the accused to challenge the authenticity of evidence and to oppose its use; whether such statements constituted a significant element on which the conviction was based; and the strength of other evidence in the case.[674]

d) Legal aid:

The third and final right encompassed in Article 6 § 3 (c), the right to legal aid, is subject to two conditions, which are to be considered cumulatively.[675]

First, the accused must show that he lacks sufficient means to pay for legal assistance.[676] He need not, however, do so „beyond all doubt"; it is sufficient that there are „some indications" that this is so or, in other words, that a „lack of clear indications to the contrary" can be established.[677] In any event, the Court cannot substitute itself for the

668 „Meftah and Others v. France" (2002)
669 „Lagerblom v. Sweden" (2003)
670 „Croissant v. Germany" (1992)
671 „Meftah and Others v. France" (2002)
672 „Lobzhanidze and Peradze v. Georgia" (2020)
673 „Atristain Gorosabel v. Spain" (2022)
674 „Dvorski v. Croatia" (2015); see, however, „Stevan Petrović v. Serbia" (2021), where the applicant failed to substantiate his complaint about the manner in which the restriction on access to a lawyer of his own choosing effected the overall fairness of the proceedings.
675 „Quaranta v. Switzerland" (1991)
676 „Caresana v. the United Kingdom" (2000)
677 „Tsonyo Tsonev v. Bulgaria" (2010)

domestic courts in order to evaluate the applicant's financial situation at the material time but instead must review whether those courts, when exercising their power of appreciation in assessing the evidence, acted in accordance with Article 6 § 1.[678]

Second, the Contracting States are under an obligation to provide legal aid only „where the interests of justice so require".[679] This is to be judged by taking account of the facts of the case as a whole, including not only the situation obtaining at the time the decision on the application for legal aid is handed down but also that obtaining at the time the national court decides on the merits of the case.[680]

In determining whether the interests of justice require an accused to be provided with free legal representation the Court has regard to various criteria, including the seriousness of the offence and the severity of the penalty at stake. In principle, where deprivation of liberty is at stake, the interests of justice call for legal representation.[681]

As a further condition of the "required by the interests of justice" test the Court considers the complexity of the case[682] as well as the personal situation of the accused.[683] The latter requirement is looked at especially with regard to the capacity of the particular accused to present his case – for example, on account of unfamiliarity with the language used at court and/or the particular legal system – were he not granted legal assistance.[684]

When applying the „interests of justice" requirement the test is not whether the absence of legal aid has caused „actual damage" to the presentation of the defence but a less stringent one: whether it appears „plausible in the particular circumstances" that the lawyer would be of assistance.[685]

The right to legal aid is also relevant for the appeal proceedings.[686] In this context, in determining whether legal aid is needed, the Court takes into account three factors in particular: (a) the breadth of the appellate courts' power; (b) the seriousness of the charges against applicants; and (c) the severity of the sentence they face.[687]

Notwithstanding the importance of a relationship of confidence between lawyer and client, the right to be defended by counsel "of one's own choosing" is necessarily subject to certain limitations where free legal aid is concerned. For example, when appointing defence counsel the courts must have regard to the accused's wishes but these can be overridden when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.[688] Similarly, Article 6 § 3 (c) cannot be interpreted as securing a right to have public defence counsel replaced. Furthermore, the interests of justice cannot be taken to require an automatic grant of legal aid whenever a convicted person, with no objective likelihood of success, wishes to appeal after having received a fair trial at first instance in accordance with Article 6.[689]

678 „R.D. v. Poland" (2001)
679 „Quaranta v. Switzerland" (1991)
680 „Granger v. the United Kingdom" (1990)
681 „Benham v. the United Kingdom" (1996); „Quaranta v. Switzerland" (1991); „Zdravko Stanev v. Bulgaria" (2012)
682 „Quaranta v. Switzerland" (1991); „Pham Hoang v. France" (1992); „Twalib v. Greece" (1998)
683 „Zdravko Stanev v. Bulgaria" (2012)
684 „Twalib v. Greece" (1998)
685 „Artico v. Italy" (1980)
686 „Shekhov v. Russia" (2014)
687 „Mikhaylova v. Russia" (2015)
688 „Lagerblom v. Sweden" (2003)
689 „Monnell and Morris v. the United Kingdom" (1985)

e. Practical and effective legal assistance. Confidential communication with a lawyer:

The right to effective legal assistance includes, inter alia, the accused's right to communicate with his lawyer in private. Only in exceptional circumstances may the State restrict confidential contact between a person in detention and his defence counsel.[690] If a lawyer is unable to confer with his client and receive confidential instructions from him without surveillance, his assistance loses much of its usefulness.[691] Any limitation on relations between clients and lawyers, whether inherent or express, should not thwart the effective legal assistance to which a defendant is entitled.[692]

Examples of such limitations include

– the tapping of telephone conversations between an accused and his lawyer;[693]

– obsessive limitation on the number and length of lawyers' visits to the accused;[694]

– lack of privacy in videoconference;[695]

– supervision of interviews by the prosecuting authorities;[696]

– supervision of communication between the accused and the lawyer in the courtroom,[697] and impossibility to communicate freely with a lawyer due to threat of sanction.[698]

Limitations may be imposed on an accused's right to communicate with his or her lawyer out of the hearing of a third person if a good cause exists, but such limitation should not deprive the accused of a fair hearing.[699] A „good cause" in this context is one of „compelling reasons" justifying that limitation.[700] „Compelling reasons" may exist when it has been convincingly demonstrated that the measures limiting the right of confidential communication with a lawyer were aimed at preventing a risk of collusion arising out of the lawyer's contacts with the applicant, or in case of issues related to the lawyer's professional ethics or unlawful conduct,[701] including suspicion of the abuse of confidentiality and risk to safety.[702] As to the effect of such limitations on the overall fairness of the proceedings, the length of time in which they were applied will be a relevant consideration[703] and, where appropriate, the extent to which the statements obtained from an accused, who had not benefited from a confidential communication with a lawyer, were put to use in the proceedings.[704]

Effectiveness of legal assistance:

Article 6 § 3 (c) enshrines the right to „practical and effective" legal assistance. Bluntly, the mere appointment of a legal-aid lawyer does not ensure effective assistance since the

690 „Sakhnovskiy v. Russia" (2010)
691 „Brennan v. the United Kingdom" (2001)
692 „Sakhnovskiy v. Russia" (2010)
693 „Zagaria v. Italy" (2007)
694 „Öcalan v. Turkey" (2005)
695 „Sakhnovskiy v. Russia" (2010)
696 „Rybacki v. Poland" (2009); surveillance by the investigating judge of detainee's contacts with his defence counse in „Lanz v. Austria" (2002)
697 „Khodorkovskiy and Lebedev v. Russia" (2013)
698 „M v. the Netherlands" (2017)
699 „Öcalan v. Turkey" (2005)
700 „Moroz v. Ukraine" (2017)
701 „S. v. Switzerland" (1991)
702 „Khodorkovskiy and Lebedev v. Russia" (2013)
703 „Rybacki v. Poland" (2009)
704 „Moroz v. Ukraine" (2017)

lawyer appointed may die, fall seriously ill, be prevented for a protracted period from acting, or shirk his duties.[705]

However, a Contracting State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal-aid purposes or chosen by the accused.[706] Owing to the legal profession's independence, the conduct of the defence is essentially a matter between the defendant and his representative; the Contracting States are required to intervene only if a failure by counsel to provide effective representation is manifest or is sufficiently brought to their attention.[707] State liability may arise where a lawyer simply fails to act for the accused or where he fails to comply with a crucial procedural requirement that cannot simply be equated with an injudicious line of defence or a mere defect of argumentation.[708]

The same considerations related to the effectiveness of legal assistance may exceptionally apply in the context of a privately hired lawyer. In Güveç v. Turkey (2009) the Court took into account the applicant's young age (15 years old), the seriousness of the offences with which he was charged (carrying out activities for the purpose of bringing about the secession of national territory, which at the time was punishable by death), the seemingly contradictory allegations levelled against him by the police and a prosecution witness, the manifest failure of his lawyer to represent him properly (failure to attend multiple hearings) and the applicant's many absences from the hearings. In these circumstances, the Court found that the trial court should have urgently reacted to ensure the applicant's effective legal representation.

3.1.6. Language of criminal proceedings and the right to language use. Right to interpretation (CPC, ECrHR)

Based on CPC, criminal proceedings shall be conducted in the Hungarian language. Members of a national minority living in Hungary and recognised by an Act may use their national minority mother tongue in criminal proceedings. A person shall not suffer any disadvantage because he does not understand the Hungarian language. Everybody shall be entitled to use his mother tongue in a criminal proceeding. A hearing-impaired or deaf-blind person shall be entitled to use sign language in a criminal proceeding.[709]

The requirements of paragraph 3 (e) of Article 6 of the Convention are to be seen as particular aspects of the right to a fair trial guaranteed by paragraph 1. The Court thus examines complaints regarding effective interpretation under both provisions taken together.[710]

It is important that the suspect be aware of the right to interpretation, which means that one must be notified of such a right when „charged with a criminal offence".[711] This notification should be done in a language the applicant understands.[712]

Like the assistance of a lawyer, that of an interpreter should be provided from the investigation stage, unless it is demonstrated that there are compelling reasons to restrict

705 „Vamvakas v. Greece" (2015)
706 „Lagerblom v. Sweden" (2003)
707 „Imbrioscia v. Switzerland" (1993)
708 „Czekalla v. Portugal" (2002)
709 CPC 8. § (1) – (4)
710 „Baytar v. Turkey" (2014)
711 „Wang v. France" (2022)
712 „Vizgirda v. Slovenia" (2018)

this right. In the absence of interpretation, whether an accused was able to make informed choices during the proceedings can be cast into doubt. Therefore, initial defects in interpretation can create repercussions for other rights and may undermine the fairness of the proceedings as a whole.[713]

a) If the accused "cannot understand or speak the language used in court":

The right to free assistance of an interpreter applies exclusively in situations where the accused cannot understand or speak the language used in court.[714] An accused who understands that language cannot insist upon the services of an interpreter to allow him to conduct his defence in another language, including a language of an ethnic minority of which he is a member.[715]

The fact that a defendant has basic command of the language of the proceedings or, as may be the case, a third language into which interpretation is readily available, should not by itself bar that individual from benefiting from interpretation into a language he or she understands sufficiently well to fully exercise his or her right to defence.[716]

Where the accused is represented by a lawyer, it will generally not be sufficient that the accused's lawyer, but not the accused, knows the language used in court. Interpretation of the proceedings is required as the right to a fair trial, which includes the right to participate in the hearing, requires that the accused be able to understand the proceedings and to inform his lawyer of any point that should be made in his defence.[717]

Article 6 § 3 (e) does not cover the relations between the accused and his counsel but only applies to the relations between the accused and the judge.[718] However, impossibility of an applicant to communicate with his or her lawyer due to linguistic limitations may give rise to an issue under Article 6 §§ 3 (c) and (e) of the Convention.[719]

The right to an interpreter may be waived, but this must be a decision of the accused, not of his lawyer.[720]

b) Protected elements of the criminal proceedings:

Article 6 § 3 (e) guarantees the right to the free assistance of an interpreter for translation or interpretation of all documents or statements in the proceedings which it is necessary for the accused to understand or to have rendered into the court's language in order to have the benefit of a fair trial.[721]

Article 6 § 3 (e) applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings.[722]

However, it does not go so far as to require a written translation of all items of written evidence or official documents in the proceedings.[723] For example,the absence of a written

713 „Baytar v. Turkey" (2014)
714 „K. v. France" (1983)
715 „Bideault v. France" (1987)
716 „Vizgirda v. Slovenia" (2018)
717 „Kamasinski v. Austria" (1989); „Cuscani v. the United Kingdom" (2002)
718 „X. v. Austria" (1975)
719 „Lagerblom v. Sweden" (2003)
720 „Kamasinski v. Austria" (1989)
721 „Luedicke, Belkacem and Koç v. Germany" (1978); „Ucak v. the United Kingdom" (2002); „Hermi v. Italy" (2006); „Lagerblom v. Sweden" (2003)
722 „Kamasinski v. Austria" (1989); „Hermi v. Italy" (2006); „Baytar v. Turkey" (2014)
723 „Kamasinski v. Austria" (1989)

translation of a judgment does not in itself entail a violation of Article 6 § 3 (e). The text of Article 6 § 3 (e) refers to an "interpreter", not a "translator". This suggests that oral linguistic assistance may satisfy the requirements of the Convention.[724]

In sum, the interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his or her version of the events.[725]

c) „Free" assistance:

The obligation to provide „free" assistance is not dependent upon the accused's means; the services of an interpreter for the accused are instead a part of the facilities required of a State in organising its system of criminal justice. However, an accused may be charged for an interpreter provided for him at a hearing that he fails to attend.[726]

The costs of interpretation cannot be subsequently claimed back from the accused.[727] To read Article 6 § 3 (e) as allowing the domestic courts to make a convicted person bear these costs would amount to limiting in time the benefit of the Article.[728]

d) Conditions of interpretation:

The obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation. Thus, a failure of the domestic courts to examine the allegations of inadequate services of an interpreter may lead to a violation of Article 6 § 3 (e) of the Convention.[729]

Nevertheless, it is not appropriate to lay down any detailed conditions under Article 6 § 3 (e) concerning the method by which interpreters may be provided to assist accused persons. An interpreter is not part of the court or tribunal within the meaning of Article 6 § 1 and there is no formal requirement of independence or impartiality as such. The services of the interpreter must provide the accused with effective assistance in conducting his defence and the interpreter's conduct must not be of such a nature as to impinge on the fairness of the proceedings.[730]

e) Obligation to identify interpretation needs:

The verification of the applicant's need for interpretation facilities is a matter for the judge to determine in consultation with the applicant, especially if he has been alerted to counsel's difficulties in communicating with the applicant. The judge has to reassure himself that the absence of an interpreter would not prejudice the applicant's full involvement in a matter of crucial importance for him.[731]

724 „Hermi v. Italy" (2006); „Husain v. Italy" 2005)
725 „Hermi v. Italy" (2006); „Kamasinski v. Austria" (1989); „Güngör v. Germany" (2002); „Protopapa v. Turkey" (2009); „Vizgirda v. Slovenia" (2018)
726 „Fedele v. Germany" (1987)
727 „Luedicke, Belkacem and Koç v. Germany" (1978)
728 „Işyar v. Bulgaria" (2008); „Öztürk v. Germany" (1984)
729 „Knox v. Italy" (2019)
730 „Ucak v. the United Kingdom" (2002)
731 „Cuscani v. the United Kingdom" (2002)

While it is true that the conduct of the defence is essentially a matter between the defendant and his counsel,[732] the ultimate guardians of the fairness of the proceedings – encompassing, among other aspects, the possible absence of translation or interpretation for a non-national defendant – are the domestic courts.[733]

The defendant's linguistic knowledge is vital and the court must also examine the nature of the offence with which the defendant is charged and any communications addressed to him by the domestic authorities, in order to assess whether they are sufficiently complex to require a detailed knowledge of the language used in court.[734]

Specifically, it is incumbent on the authorities involved in the proceedings, in particular the domestic courts, to ascertain whether fairness of the trial requires, or required, the appointment of an interpreter to assist the defendant. This duty is not confined to situations where the foreign defendant makes an explicit request for interpretation. The Court has held that in view of the prominent place the right to a fair trial holds in a democratic society, the obligation arises whenever there are reasons to suspect that the defendant is not proficient enough in the language of the proceedings, for example if he or she is neither a national nor a resident of the country in which the proceedings are being conducted. It also arises when a third language is envisaged to be used for the interpretation. In such circumstances, the defendant's competency in the third language should be ascertained before the decision to use it for the purpose of interpretation is made.[735]

It is not for the Court to set out in any detail the precise measures that should be taken by domestic authorities with a view to verifying the linguistic knowledge of a defendant who is not sufficiently proficient in the language of the proceedings. Depending on different factors, such as the nature of the offence and the communications addressed to the defendant by the domestic authorities, a number of open-ended questions might be sufficient to establish the defendant's language needs. However, the Court attaches importance to noting in the record any procedure used and decision taken with regard to the verification of interpretation needs, notification of the right to an interpreter and the assistance provided by the interpreter, such as oral translation or oral summary of documents, so as to avoid any doubts in this regard raised later in the proceedings.

In view of the need for the right guaranteed by Article 6 § 3(e) to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided.[736]

3.2. The aggrieved party (CPC)

Aggrieved party means a natural person or an entity other than a natural person the rights or legitimate interest of whom or which were directly violated or jeopardised by the criminal offence.

732 „Kamasinski v. Austria" (1989)
733 „Cuscani v. the United Kingdom" (2002); „Hermi v. Italy" (2006); „Katritsch v. France" (2010)
734 „Hermi v. Italy" (2006); „Katritsch v. France" 2010); „Şaman v. Turkey" (2011); „Güngör v. Germany" (2002)
735 „Vizgirda v. Slovenia" (2018)
736 „Kamasinski v. Austria" (1989); „Hermi v. Italy" (2006); „Protopapa v. Turkey" (2009)

The aggrieved party shall be entitled to a) submit evidence, file motions and observations, b) address the court in the course of closing arguments, c) attend the trial and other procedural acts specified by an Act, and ask questions as provided for in this Act, d) inspect case documents produced in relation to a criminal offence that affected him, with the exceptions specified in this Act, e) be informed about his rights and obligations in a criminal proceeding by the court, the prosecution service, or the investigating authority, f) seek legal remedy as provided for by this Act, g) make use of the assistance of an aide, h) enforce a civil claim in the court procedure as a civil party, and submit a notice of his intent to do so during the investigation, i) act as a private prosecuting party or a substitute private prosecuting party.

The aggrieved party shall be entitled to make a statement, at any time, regarding any physical or mental harm or pecuniary loss he suffered as a result of the criminal offence, and whether he wishes the defendant to be convicted and punished.

The aggrieved party shall be entitled to make a statement, at any time, that he does not wish to exercise his rights as an aggrieved party in the given proceeding any longer. Such a statement shall not prevent the proceeding court, prosecution office, or investigating authority from interrogating the aggrieved party as a witness. The aggrieved party may withdraw such a statement at any time. If the aggrieved party withdraws the statement, he may resume exercising his rights as an aggrieved party in the criminal proceeding after the withdrawal.

If the aggrieved party made a statement, any submitted civil claim or corresponding declaration of intent shall be considered withdrawn.

The aggrieved party shall be entitled to be informed, upon request, about any of the following concerning the criminal offence affecting him:

– release or escape of a defendant in pre-trial detention,

– release on parole or permanent release or escape of a defendant sentenced to imprisonment to be served, or an interruption of his sentence of imprisonment,

– release or escape of a defendant sentenced to confinement, or an interruption of his sentence of confinement,

– release or escape of a person under preliminary compulsory psychiatric treatment,

– release, leave without permission, or release on adaptation leave of a person under compulsory psychiatric treatment, and

– in case of special education in a juvenile correctional institution, any temporary or permanent discharge of the juvenile, leave from the juvenile correctional institution without permission, or interruption of his special education in a juvenile correctional institution.

The aggrieved party shall be obliged to participate in procedural acts, including expert examinations, in line with the instructions given by the court, the prosecution service, or the investigating authority as laid down in this Act, and inform the proceeding court, prosecution office, or investigating authority about his home address, contact address, actual place of residence, and service address, as well as any change thereto within three working days after the change.

If the aggrieved party dies before or after instituting a criminal proceeding, his place may be taken by his relative, statutory representative, or a dependant of the aggrieved party under law or a contract, and except for the right to enforce a civil claim, he may exercise

the rights of the aggrieved party, including his right to act as a private prosecuting party or a substitute private prosecuting party.

If more than one person is entitled to act, the persons concerned may designate a person from among themselves to exercise the rights of the aggrieved party. In the absence of an agreement, the first person to take action in the proceeding may exercise the rights of the aggrieved party.

If the aggrieved party is an entity other than a natural person and it is terminated, its legal successor may take its place within one month.[737]

3.3. The private prosecuting party. Substitute private prosecuting parties (CPC)

Private prosecuting party means an aggrieved party

– who, in case of the criminal offences of causing minor bodily harm, violation of personal secrets, violation of the confidentiality of correspondence, defamation, insult, violation of the memory of a deceased person, making false audio or image recording capable of harming the reputation of another or disclosing false audio or image recording capable of harming the reputation of another, or

– which, in case of the criminal offences of violation of personal secrets, violation of the confidentiality of correspondence, insult, making false audio or image recording capable of harming the reputation of another or disclosing false audio or image recording capable of harming the reputation of another, represents the prosecution, provided that the perpetrator may be punished upon private motion.

Where a proceeding is launched by a crime report filed by one of the aggrieved parties involved in causing minor bodily harm, or committing defamation or insult mutually, and the other aggrieved party files a private motion under this Act, the latter shall act as a counter-prosecuting party, provided that there is a personal and close material connection between the acts. Provisions laid down in this Act concerning private prosecuting parties shall also apply to counter-prosecuting parties.

Insult and defamation shall be subject to public prosecution if committed against a judge, prosecutor, or member of a law enforcement organ during or because of his official proceedings.

A private prosecuting party who cannot fulfil his obligation to appear in person due to his persistent and severe illness may be replaced by his statutory representative or authorised representative.[738]

A substitute private prosecuting party means an aggrieved party who or which represents the prosecution, in a situation specified in this Act, concerning a criminal offence subject to public prosecution.

A substitute private prosecuting party who cannot fulfil his obligation to appear in person due to his persistent and severe illness may be replaced by his statutory representative or authorised representative.

737 CPC 50 § – 52. §
738 CPC 53. §

If the substitute private prosecuting party is not replaced by a representative in a situation under the CPC and the substitute private prosecuting party fails to fulfil his obligation to appear in person despite being summoned, it shall be deemed that he withdrew the crime report, abandoned the indictment or withdrew the appeal.[739]

3.4. The civil party (CPC)

Civil party means an aggrieved party who or which enforces a civil claim in a court proceeding, even if he submitted his intent to do so before the indictment.

The legal successor of an aggrieved party may act as a civil party if legal succession took place due to the death or termination of the aggrieved party, or on the basis of a statutory provision.

The enforcement and administration of civil claims shall also be subject to the provisions of the Act on the Code of Civil Procedure as specified in this Act, with the differences arising from the nature of criminal proceedings.

In the criminal proceeding, a claim for a) damages or b) release of a thing or payment of a sum may be enforced as a civil claim, provided that it incurred as a direct consequence of the act subject to indictment.

The civil claim shall also be subject to the provisions of the Act on the Code of Civil Procedure pertaining to the types of claims. A claim that may not be enforced in court may not be enforced as a civil claim in a criminal proceeding.

As for criminal offences damaging the budget and other criminal offences committed against the State, a claim may not be enforced as a civil claim if proceedings other than civil court actions, such as administrative authority, tax, or customs administration procedures, are available for the enforcement of that claim.

The prosecution service may enforce a civil claim if the conditions specified in the Act on the Code of Civil Procedure are met.

The enforcement of a civil claim by other legal means shall not be prevented by the fact that the aggrieved party did not take action as a civil party.[740]

3.5. Parties with pecuniary interest and other interested parties (CPC)

Party with a pecuniary interest means a natural person or entity other than a natural person who or which

– is the owner of or holds any attribute of ownership right regarding a thing that is or can be confiscated or seized,

– is entitled to dispose of any asset that may be subject to forfeiture of assets, or

– is entitled to dispose of any electronic data that may be ordered to be rendered permanently inaccessible.

739 CPC 54. §

740 CPC 55. § - 56. §

The party with a pecuniary interest shall be entitled to

– submit evidence and file motions and observations concerning matters affecting him,

– attend procedural acts directly affecting the thing, asset, or electronic data subject to his right of disposal,

– get informed of the ground, and of changes to such ground, for any coercive measure affecting a thing, asset, or electronic data,

– be informed about his rights and obligations in a criminal proceeding by the court, the prosecution service, or the investigating authority,

– seek legal remedy concerning matters affecting him,

– inspect the case documents of the proceeding concerning matters affecting him, with the exceptions specified in this Act,

– make use of the assistance of an aide.

If the court orders confiscation, forfeiture of assets, or rendering electronic data inaccessible, the party with a pecuniary interest may enforce his claim by other legal means after the conclusive decision becomes final and binding.

The party with a pecuniary interest shall be present at procedural acts in line with the instructions given by the court, the prosecution service, or the investigating authority as laid down in this Act.

The other interested party: In a criminal proceeding, other interested party means a natural person or entity other than a natural person (1) a right or legitimate interest of whom or which is directly affected by the decision adopted in the criminal proceeding, or (2) who or which has a right, or is subject to an obligation specified in this Act regarding a procedural act concerning him or it.

In particular, the following shall be other interested parties:

– the person reporting a crime,

– the witness,

– the person affected by search or subject to a body search,

– the person affected by data acquisition activities,

– the person affected by expert examination, inspection, or presentation for recognition,

– the aide,

– the expert and the consultant.

Organs specified by law may participate as an other interested party in criminal proceedings concerning criminal offences damaging the budget and other criminal offences committed against the State.[741]

3.6. The aides (CPC)

To represent and protect the rights and legitimate interests, and to facilitate the exercise and performance of the rights and obligations of a defendant, an aggrieved party, a party with a pecuniary interest, and an other interested party, as specified in this Act, the following may participate in a criminal proceeding as an aide:

– a statutory representative, the guardian ad litem,

741 CPC 57. § - 58. §

– an adult relative of the defendant,
– a consular officer where the defendant, aggrieved party, or witness is a foreign national,
– the spouse or cohabitant of a defendant subject to compulsory psychiatric treatment,
– the adult person providing care for the minor or the juvenile,
– an authorised representative,
– a supporter,
– an adult person specified by an aggrieved party or by the person reporting the crime,
– an attorney-at-law acting for a witness,
– an adult person who does not have an interest in the case and is authorised by a person affected by a search or who attends the search,
– an adult person specified by the person subject to a body search,
– an agent for service of process,
– a person protecting a person who participates in a Protection Programme,
– a legal aid lawyer.

A person may not serve as an aide if (1) he has not attained the age of eighteen years, (2) he was excluded from participating in public affairs by the court with final and binding effect, during the period of his exclusion, or (3) he was placed under custodianship by the court with final and binding effect.

Provisions laid down in this Act concerning an attorney-as-law acting as an aide shall apply also to a junior attorney-at-law, a registered in-house legal counsel, a European Community lawyer, a salaried attorney-at-law and a salaried European Community lawyer, provided that the conditions set out in the Act on the professional activities of attorneys-at-law are met.

The aide shall be entitled to be informed about his criminal procedural rights and obligations, as well as those of the person he aids, by the court, the prosecution service, or the investigating authority.[742]

3.6.1. The authorised representative

Unless acting in person is required under this Act, a representative authorised by an aggrieved party, a party with a pecuniary interest, an other interested party, or their statutory representative may also act in their place.

The authorised representative may exercise the rights of the represented person under this Act.

The following may act as an authorised representative in a criminal proceeding: (1) an attorney-at-law or a law office, (2) a relative of an aggrieved party, a party with a pecuniary interest, or an other interested (3) an employee of an administrative organ, other budgetary organ, economic operator, or other entity other than a natural person, in matters concerning the activities of his employer, (4) an employee of a local government organ in matters concerning the activities of his employer, and an officer specified in the organisational and operational regulations of a local government organ if the proceeding, considering its subject matter, falls within the scope of matters in the regulations in which the officer is entitled to take action, (5) a public benefit purpose organisation established

742 CPC 59. § - 60. §

to represent the interests of aggrieved parties or certain groups of aggrieved parties, (6) a person authorised to do so under the law.

An authorised attorney-at-law or law office may authorise another attorney-at-law or law office to act as a substitute.

The provisions laid down in the Act on the Code of Civil Procedure regarding agents shall apply to the representation of a civil party by way of authorisation.

The authorisation shall be given in writing or recorded in the minutes. With the exception specified in paragraph (3), the authorised representative shall annex or attach the original authorisation or a certified copy thereof to his first submission, or if the submission takes place beforehand, to the case documents at the time when he appears before the proceeding court, prosecution office, or investigating authority for the first time. A European Community lawyer shall be obliged to attach to his first submission the original cooperation contract concluded with an attorney-at-law or a law office pursuant to the Act on the professional activities of attorneys-at-law or a certified copy thereof and, if it is in a language other than Hungarian, a certified translation thereof or, if that occurs first, hand it over at the time of his first appearance to the proceeding court, prosecution office or investigating authority for attaching to the case documents.

The statement granting the authorisation may not be registered validly in the client settings register unless the authorisation is accepted and the statement of acceptance is registered in the client settings register. An authorisation recorded in the client settings register shall be effective from the time a notice of it is submitted to the proceeding court, prosecution office, or investigating authority.

A law may provide otherwise for the certification of the authorisation granted to an attorney-at-law.

Any restriction regarding an authorisation shall be effective only to the extent it is apparent from the authorisation itself.

Pursuant to the Act on legal aid, an aggrieved party, a party with a pecuniary interest, or an other interested party may request representation by a legal aid lawyer.

If the court, prosecution service, or an investigating authority notices that the conditions of permitting representation by a legal aid lawyer are met concerning an aggrieved party, a party with a pecuniary interest, or an other interested party, it shall inform the person concerned that he may request permission for being represented by a legal aid lawyer under the Act on legal aid.

The representative authorised by the defendant or by his statutory representative may act in place of the defendant in the following events: (1) receipt of an extract from, or copy of, a case document, (2) receipt of a case document addressed to the defendant at the sender, (3) posting bail, (4) placing security into deposit.

The following may act as an authorised representative for the defendant: (1) an attorney-at-law or law office, (2) an adult relative of the defendant.[743]

3.6.2. The supporter

The supporter appointed by the guardianship authority for an aggrieved party, a party with a pecuniary interest, or an other interested party (hereinafter: „supported person") may

743 CPC CPC 61. § - 64. §

participate in the criminal proceeding to facilitate supported decision-making without affecting the capacity of a person to act under an Act.

The supporter

– may attend, simultaneously with the supported person, each procedural act, including a closed trial; however, his absence shall not be an obstacle to the performance of the procedural act or to the continuation of the criminal proceeding,

– may, in the interest of facilitating statements under this Act, consult with the supported person in a manner not disturbing the order of the procedural act,

– may not make any statement in place of the supported person.

The supported person shall be solely responsible for the attendance of his supporter at the procedural act.

No cost incurred in relation to a supporter's participation in the criminal proceeding shall be considered a criminal cost; such costs shall be advanced and borne by the supported person.

The guardianship authority's decision or certificate confirming the capacity of a person as a supporter shall be presented to the court, the prosecution office, or the investigating authority at the first procedural act where the supporter appears together with the supported person.

A supporter may not participate in the criminal proceeding if

– he is a participant, or an aide to such a participant, in the criminal proceeding with interests that are contrary to the interests of the supported person,

– he proceeds or proceeded in the case as a judge, a prosecutor, or a member of the investigating authority, or he is a relative of such a person,

– he participates or participated in the case as a defence counsel, witness, or expert,

– it would be otherwise in conflict with the interests of the proceeding.

The court, prosecution office, or investigating authority before which the proceeding is pending shall decide on disqualification of the supporter. The supporter or the supported person may seek legal remedy against such a decision.[744]

3.7. Capacity to act in criminal proceedings (CPC)

The defendant and the person reasonably suspected of having committed the criminal offence may act in a criminal proceeding personally or, if acting in person is not mandatory under this Act, through an authorised representative in situations specified in this Act, regardless of his capacity to act under civil law.

An aggrieved party, a party with a pecuniary interest, or an other interested party may act in person or, if acting in person is not mandatory under this Act, through an authorised representative if (1) he has full capacity to act under civil law, or (2) he is an adult with partially limited capacity to act, whose civil law capacity to act is not restricted regarding the subject matter of the proceeding or an individual procedural act.

The aggrieved party may file a motion for a restraining order, even if he is a minor with limited capacity to act under the rules of civil law.

744 CPC 65. § - 67. §

Regarding the matter of refusing to give witness testimony and consenting to confrontation, even a minor with limited capacity to act under the rules of civil law shall act in person, and before making such a statement, he shall be allowed to consult his statutory representative.

Unless acting in person is required under this Act, the statutory representative shall act for an aggrieved party, a party with a pecuniary interest, or an other interested party if

– he does not have the capacity to act in the criminal proceeding,

– a statutory representative was appointed for him without limiting his capacity to act unless he takes action in person or through an agent, or

– he is an entity other than a natural person.

The provisions laid down in the Act on the Code of Civil Procedure regarding a person's procedural capacity shall apply to the civil party.[745]

3.7.1. Examination of a person's capacity to act in the criminal proceeding

In case of any doubt, the court, the prosecution service, or the investigating authority shall examine ex officio the capacity of a person participating in a criminal proceeding to act in the criminal proceeding, as well as the capacity as such of the statutory representative or the supporter, at any phase of the proceedings. The court, the prosecution service, or the investigating authority shall also examine ex officio at any phase of the proceeding whether the specific authorisation of the statutory representative that may be required for a procedural act has been certified.

Certification shall not be required for the capacity to act in the criminal proceeding, the statutory representation, the capacity as a supporter, or the authorisation, if it is common knowledge or the court, the prosecution service, or the investigating authority has official knowledge thereof.[746]

3.7.2. The legal standing of the statutory representative

The statutory representative of a defendant or the person reasonably suspected of having committed the criminal offence may participate in the criminal proceeding as an aide and the rules on the rights of the defence counsel shall apply to his right to attend, make observations, request information, file motions, inspect case documents, and seek legal remedy.

The statutory representative of the defendant or the person reasonably suspected of having committed the criminal offence shall be informed about all summonses and notifications to the defendant or the person reasonably suspected of having committed the criminal offence, respectively, and all decisions communicated to the defence counsel shall also be communicated to the statutory representative.

The statutory representative of an aggrieved party, a party with a pecuniary interest, or an other interested party may exercise the rights of the represented person under this Act.

745 CPC 68. § - 70. §
746 CPC 71. §

If an aggrieved party, a party with a pecuniary interest, or an other interested party has the capacity to act in the criminal proceeding under section 69, but he does not have full capacity to act under the rules of civil law, his statutory representative may exercise his right to attend, inspect case documents, and be informed to provide adequate representation in matters exceeding the represented person's capacity to act under the rules of civil law.

If a person participating in a criminal proceeding has multiple statutory representatives, the acting statutory representative shall be the statutory representative that acted first in the proceeding, unless otherwise agreed.[747]

3.7.3. The guardian ad litem

The court, the prosecution service, or the investigating authority shall appoint a guardian ad litem if

– a defendant, a person reasonably suspected of having committed the criminal offence, an aggrieved party, a party with a pecuniary interest, or an other interested party does not have full capacity to act under civil law, and he does not have a statutory representative, or the statutory representative cannot be identified,

– a defendant, a person reasonably suspected of having committed the criminal offence, an aggrieved party, a party with a pecuniary interest, or an other interested party does not have a statutory representative who is not affected by a ground for disqualification,

– the statutory representative is prevented from exercising his rights, or

– the whereabouts of the aggrieved party, the party with a pecuniary interest, or the other interested party are unknown at the time of performing a procedural act that affects him, and he does not have a statutory representative or an authorised representative.

No appeal shall lie against the appointment of the guardian ad litem. The represented person may submit a reasoned motion for the appointment of another guardian ad litem. The court, prosecution office, or investigating authority before which the proceeding is pending shall decide on the motion.

The officially appointed guardian ad litem may move for his discharge from the official appointment if justified. The court, the prosecution office, or the investigating authority before which the proceeding is pending shall decide on the motion.

The prosecution service, before the indictment, or the court, after the indictment, may disqualify the statutory representative from the proceeding if (1) it is reasonable to assume that the statutory representative committed the criminal offence together with the defendant, or person reasonably suspected of having committed the criminal offence, represented by him, (2) there is a conflict between the interests of the statutory representative and the person represented by him.

If the reason for appointing the guardian ad litem ceases to exist in the course of the proceeding, the court, the prosecution service or the investigating authority shall discharge the guardian ad litem from the appointment.

In the criminal procedure, a guardian ad litem shall have the same legal standing as astatutory representative. The provisions on the disqualification of a statutory representative shall apply to the disqualification of a guardian ad litem.

747 CPC 72. §

If the court, the prosecution service or the investigating authority discharges or disqualifies a guardian ad litem, and appointment.[748]

3.8. Special treatment in the criminal prodeeding (CPC)

Special treatment is primarily in the interest of witnesses, victims and the accused. The physical, emotional and mental capacities of these persons are often different, which is why they should be afforded greater protection.

3.8.1. Provision and the general rules of special treatment

Where the aggrieved party or the witness is a natural person, he shall be considered a person requiring special treatment, provided that, considering his personal characteristics or the nature and circumstances of the criminal offence serving as the basis for the proceeding, he is restricted in his ability a) to understand others or have himself understood by others, b) to exercise his rights or perform his obligations specified in this Act, or c) to participate in the criminal proceeding efficiently.

In particular, the following factors shall serve as grounds for providing special treatment:

– age of the person concerned,

– mental, physical, medical condition of the person concerned,

– the extremely violent nature of the act serving as the basis for the proceeding, and

– the relationship between the person concerned and another person participating in the criminal proceeding.

The court, the prosecution service, and the investigating authority a) shall examine, ex officio after getting into contact with, or upon a motion by, the person concerned if he qualifies as a person requiring special treatment, b) shall decide on providing special treatment based on individual assessment as determined by law, c) may apply measures to treat carefully and protect the person concerned, as well as to facilitate the exercise of his rights and the performance of his obligations; the decision on applying such measures shall be taken upon a motion by the person concerned or ex officio, d) may order case documents relating to initiating and examining the provision of special treatment to be handled confidentially.

The measure applied by the court, the prosecution service, and the investigating authority to treat carefully and protect a person requiring special treatment, as well as tofacilitate the exercise and performance of his rights and obligations, shall be appropriate and proportionate to the circumstances serving as the basis for special treatment. Unless otherwise provided in this Act, applying a measure qualifying as special treatment may not violate the procedural rights of any other person participating in the criminal proceeding.

The court, the prosecution service and the investigating authority shall decide on a) providing special treatment, b) applying a measure qualifying as special treatment, unless otherwise provided in this Act, and c) dismissing a motion submitted by the witness for special treatment without adopting a decision.

748 CPC 73. §

The court, the prosecution service, and the investigating authority shall decide on dismissing a motion for special treatment, which was submitted by the aggrieved party, by adopting a decision.[749]

The following persons shall qualify as persons requiring special treatment even without a specific decision:

– persons who have not attained the age of eighteen years,

– disabled persons as defined by the Act on the rights of and ensuring equal opportunities for disabled persons, as well as persons who might qualify as such persons,

– aggrieved parties of criminal offences against the freedom of sexual life and sexual morality.

A person requiring special treatment may, after being informed appropriately, refuse being provided special treatment or any individual measure qualifying as special treatment. A person requiring special treatment may not refuse a mandatory provision concerning the performance of individual procedural acts or the application of measures qualifying as special treatment.[750]

The court, the prosecution service and the investigating authority may terminate any special treatment if the conditions for providing special treatment are not met any longer due to changes in the circumstances serving as grounds for such special treatment.

The court, the prosecution service and the investigating authority shall decide on the termination of special treatment a) by adopting a decision concerning the aggrieved party, b) without adopting a decision concerning the witness.[751]

3.8.2. Measures qualifying as special treatment

The court, the prosecution service, and the investigating authority shall contribute to facilitating the exercise of rights and the performance of obligations of, and to treating carefully, a person requiring special treatment, having regard to the interests of the proceeding, preferably by the following measures:

– ensuring that the person concerned may exercise his rights and perform his obligations specified in this Act despite all obstacles that may arise from the circumstances serving as grounds for his special treatment,

– proceeding with special care during communication,

– proceeding with special care to protect the privacy of the person concerned in the course of conducting the criminal proceeding,

– providing enhanced protection for personal data of the person concerned that serve as grounds for his special treatment, in particular data concerning his health,

– facilitating the use of an aide by the person concerned,

– taking into account the personal needs of the person concerned in the course of planning and performing procedural acts, and carrying out without delay the particular procedural acts that require the presence of the person concerned,

– preparing each procedural act requiring the presence of the person concerned in a manner that allows for it to be carried out without any repetition,

749 CPC 81. §
750 CPC 83. §
751 CPC 84. §

– ensuring that the person concerned does not meet unnecessarily any other person participating in the criminal proceeding in the course or at the location of a procedural act, especially if the ground for special treatment is his relationship to that person,

– carrying out the procedural act in a room used or made suitable for such acts provided that no other means or measures would ensure that the exercise of the rights and the performance of the obligations of the person concerned are facilitated, and the person concerned is treated carefully,

– making audio-visual recordings at procedural acts requiring the participation of the person concerned,

– securing the attendance of the person concerned at a procedural act by using a telecommunication device.

To facilitate the exercise of the rights and the performance of the obligations of the person requiring special treatment, as well as to treat him carefully, the court may exclude the public from the trial or a specific part of the trial.

The court, the prosecution service, and the investigating authority may also apply other measures specified in this Act to treat carefully the person requiring special treatment and to facilitate the exercise of his rights and the performance of his obligations.[752]

The court, the prosecution service and the investigating authority shall protect a person requiring special treatment a) if his life, physical integrity, or personal freedom is in jeopardy due to his participation in the criminal proceeding, or b) to ensure that he can exercise his rights and perform his obligations under this Act without intimidation or influence.

To protect a person requiring special treatment, the court, the prosecution service and the investigating authority may, in addition to the measures specified in section 85,

– order to distort all identifying personal features of the person concerned by technical means when using a telecommunication device,

– order the production of a copy of a sound recording or an audio-visual recording of a procedural act where all identifying personal features of the person concerned are distorted by technical means,

– restrict, under this Act, the right of a defendant or a defence counsel to attend a procedural act,

– restrict the right to ask questions of a person, who attends a procedural act involving the person concerned, by permitting that motions for questions be submitted,

– refrain from confrontation involving a witness requiring special treatment,

– order, ex officio, to process the personal data of the person concerned confidentially,

– initiate ordering personal protection for the person concerned,

– declare the person concerned to be a specially protected witness, or initiate such a declaration,

– initiate the conclusion of an agreement for including the person concerned in a Protection Programme.

If a measure protecting the person requiring special treatment is applied, all case document relating to the initiation and examination of providing special treatment shall be handled confidentially.[753]

752 CPC 85. §
753 CPC 86. §

3.8.3. Special rules of measures qualifying as special treatment

A witness testimony made by a person who has not attained the age of eighteen years may not be subject to instrumental credibility examination.

The confrontation of a witness who has not attained the age of eighteen years may not be ordered without his consent.[754]

If a procedural act requires the participation of a person who has not attained the age of fourteen years,

– the procedural act may not be carried out, unless there is no alternative to the expected evidence,

– the procedural act shall be carried out in a room used or made suitable for such acts, provided that no other means or measures would ensure that the exercise of the rights and the performance of the obligations of the person concerned are facilitated, and the person concerned is treated carefully,

– the investigating authority shall ensure that the procedural act is carried out by the same person each time during the investigation unless doing so would jeopardise the success of the procedural act,

– the court, the prosecution service and the investigating authority shall prepare an audio-visual recording of the procedural act.

The confrontation of a witness who has not attained the age of fourteen years may not be ordered.

If the procedural act requires the participation of a person who has not attained the age of fourteen years, the defendant and the defence counsel shall not be allowed to be present at the location of the procedural act in person.

If the interrogation of a witness who has not attained the age of fourteen years was motioned by a defendant or a defence counsel, the court, the prosecution service and the investigating authority may ensure that the defendant, who filed the motion, and his defence counsel are present in person at the procedural act requiring the participation of the witness.[755]

3.8.4. Specially protected witness

A witness requiring special treatment may be declared a specially protected witness by the court, upon a motion by the prosecution service, if (1) his testimony is related to the substantial circumstances of a case of considerable gravity, (2) there is no alternative to the evidence expected from his testimony, and (3) the life, physical integrity, or personal freedom of the witness or his relatives would be exposed to grave threats if his identity or the fact that he was interrogated as a witness would be revealed.

No appeal shall lie against the court decision declaring a person to be a specially protected witness; the prosecution service and the witness may submit an appeal against the court decision dismissing a motion for declaring a person to be a specially protected witness.

All case documents relating to a motion for declaring a person to be a specially protected witness shall be handled confidentially among the case documents of the

754 CPC 87. §
755 CPC 88. §

proceeding until the motion is adjudicated. If the court declares a person to be a specially protected witness, all case documents concerning the motion for declaring that person to be a specially protected witness, procedural acts carried out with the participation of the witness concerned before he was declared a specially protected witness, and procedural acts carried out with the participation of the specially protected witness shall be handled confidentially among the case documents of the proceeding, unless otherwise provided in this Chapter.[756]

The court shall cancel the status of a specially protected witness

– upon a motion by the specially protected witnesses,

– ex officio or upon a motion by the prosecution service if the conditions of declaring a person a specially protected witness are not met, or

– ex officio or upon a motion by the defendant, the defence counsel, or the prosecution service if a specially protected witness engages in any behaviour that is clearly incompatible with his status as a specially protected witness.

At the time of cancelling the specially protected witness status of a person, the court shall also cancel the confidential handling of case documents pertaining to the granting of the specially protected witness status.[757]

Only the following persons may attend the procedural act requiring the participation of the specially protected witness before the indictment:

– prosecutors and members of the investigating authority,

– keepers of minutes and, if justified, experts and consultants,

– aides to the specially protected witness, and

– other persons inevitably affected by the procedural act.

After the indictment, the court shall carry out procedural acts requiring the participation of the specially protected witness primarily through a requested court or a delegate judge; the defendant and the defence counsel may not attend such acts.

The court may allow the specially protected witness to attend a procedural act by using a telecommunication device, provided that doing so does not pose any risk of revealing the identity of the witness. In this event, the court shall order the individual identifying characteristics of the witness to be distorted by technical means; the right to ask questions of the persons present shall also be limited to moving for asking questions.

In the course of carrying out a procedural act requiring the participation of a specially protected witness, it shall be ensured that the specially protected witness cannot be identified.

In the course of interrogating the specially protected witness, the credibility of the witness, the reliability of his knowledge, and all circumstances possibly affecting the trustworthiness of his testimony shall be examined and verified. All information obtained this way shall be recorded in the minutes of the interrogation.

A procedural act requiring the participation of the specially protected witness shall be recorded in a written minutes, which shall be handled confidentially. An extract of these minutes shall be produced.

The proceeding judge, prosecutor, or member of the investigating authority shall ensure that no conclusion can be drawn from the performance of the procedural act or

756 CPC 90. §
757 CPC 91. §

the extract of minutes of the procedural act regarding the identity, home address, contact address, or actual place of residence of the specially protected witness.[758]

3.8.5. Personal protection. Participating in the Protection Programme

The proceeding court, prosecution office, and investigating authority may initiate, ex officio or upon a motion from the person requiring special treatment, that the person requiring special treatment, or another person with regard to the person requiring special treatment, be granted personal protection as defined by law.

The court, the prosecution service, or the investigating authority shall decide on the initiative within eight days following receipt of the motion. No legal remedy shall lie against initiating personal protection. The person who submitted the motion may seek legal remedy if the motion is dismissed.

Case documents relating to personal protection shall be handled confidentially, except for the corresponding motion, any decision dismissing the motion, and any decision on ordering or terminating personal protection.[759]

The proceeding court, the prosecution office and, in agreement with the prosecution service, the investigating authority, may initiate ex officio, with the consent of the person requiring special treatment, or upon a motion from the person requiring special treatment, the conclusion of an agreement on participating in the Protection Programme defined by law.

The court, the prosecution service, or the investigating authority shall decide on the initiative within three days following receipt of the motion. No legal remedy shall lie against the decision.

The criminal procedural rights and obligations of a person participating in the Protection Programme shall not be affected by the fact that he is participating in the Protection Programme. If a person participates in the Protection Programme, the provisions of this Act shall apply subject to the following derogations:

– all case documents relating to his participation in the Protection Programme shall be handled confidentially,

– the person participating in the Protection Programme shall be summoned or notified through the organ protecting him, and case documents to be served on such a person may only be served through the organ protecting him,

– the person participating in the Protection Programme shall disclose his original natural identification data in the criminal proceeding and provide the address of the organ protecting him in place of disclosing his home address, contact address, or actual place of residence,

– all personal data of the person participating in the Protection Programme shall be processed confidentially,

– the confidentially processed personal data of the person participating in the Protection Programme may only be accessed by, or any case document containing such data may only be inspected by, and information regarding such data or documents may only be provided to, persons approved by the organ providing protection,

758 CPC 92. §
759 CPC 94. §

– costs incurring in relation to the appearance and participation of the person participating in the Protection Programme shall not be considered criminal costs,

– a person protecting the person participating in the Protection Programme may attend any procedural act attended by the protected person,

– the person participating in the Protection Programme may refuse to testify concerning any data based on which conclusion can be drawn regarding his new identity, new home address, contact address, or actual place of residence.[760]

760 CPC 95. §

CHAPTER IV.

QUESTIONS RELATED THE DEFENCE ROLE IN CRIMINAL PROCEEDINGS

4.1. Introduction

The defence lawyer is an independent participant in the criminal proceedings. Issues relating to the legal status of the defence lawyer could have been analysed in the previous chapter, but the relevant legislation is so varied and diverse that it is necessary to deal with this topic in this separate section.

Defense counsel may accurately be considered law enforcers. They are therefore part of the justice system and can often have a decisive influence on the final outcome of a case. Compared to police officers, prosecutors and judges, their activities cover all stages of the procedure. They therefore have an increased responsibility to ensure that the authorities and the courts respect fundamental procedural rules and do not violate the fundamental rights of the accused. As Klein writes: "While representing a lone individual against all the power of the state, counsel must "police the police" to determine if there has been an unconstitutional search, a coerced confession, an unlawfully suggestive lineup, or the fabrication of testimony {...} Perhaps most challenging of all is the need to remind the judge of the constitutional mandate as well as the professional obligation to protect the rights of the defendant rather than treat him as a docket number to be quickly processed and sent to jail." [761]

It is important to point out that the defence lawyer is free to determine the tactics of the defence, and no one (not even the client) can influence him. However, the defence lawyer is also subject to the rules of the Procedural Act, from which he cannot "step outside". He cannot commit a criminal offence (e.g. accessory after the fact, false accusation), but he/she is obliged to do everything in his/her power for his/her client. Mainly also because the accused person does not understand the law and needs effective help. "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect."[762]

761 Klein, ibid. 1-2.
762 Klein, ibid. 1-2.

The discrepancy between the resources available to the prosecutor and those for counsel for the indigent is public knowledge (e.g. the prosecutor has not only the tools of an office that is better funded, but typically has police department investigators and laboratory technicians available as well). In these circumstances, the defence is apparently at a disadvantage, but the constitutions of modern European states have nowadays developed principles to counterbalance these situations. It is also the duty of the lawyer to protect his client from unlawful coercive measures, whether it concerns his personal freedom or his property.

Hungarian publications on defence lawyers typically deal with legal, ethical and tactical issues. In the last decade, Hungarian authors have mainly focused on the historical background of the development of the profession of defence lawyer, the obligations of the lawyer and the constitutional context of this profession. It should be noted that in criminal proceedings, not only the lawyer but also the prosecutor has a legal obligation to take into account mitigating circumstances affecting the accused.

4.2. Statutory rules for defense counsel in the Hungarian CPC

An attorney-at-law may act as defence counsel based on an authorisation or official appointment. Provisions laid down in this Act concerning an attorney-as-law acting as defence counsel shall apply also to a junior attorney-at-law, a European Community lawyer, a salaried attorney-at-law and a salaried European Community lawyer, provided that the conditions set out in the Act on the professional activities of attorneys-at-law are met.

A junior attorney-at-law may act as defence counsel when acting with or as a substitute for an attorney-at-law a) before the indictment, b) after the indictment before a district court or a regional court, with the proviso that he may not deliver a closing argument before the regional court.

More than one defence counsel may act for a defendant and a person reasonably suspected of having committed a criminal offence, and a defence counsel may act for more than one defendant and person reasonably suspected of having committed a criminal offence.[763]

4.2.1. The rights and obligations of the defence counsel

Unless otherwise provided in this Act, the defence counsel may exercise all rights of the defendant that are not by nature related to the person of the defendant exclusively. A defence counsel may exercise these rights independently as rights of thedefence counsel.

A defence counsel shall be entitled to (1)) attend procedural acts the defendant may, or is obliged to, attend, (2) attend, in cases specified in this Act, procedural acts the defendant may not attend or where the attendance of the defendant may be restricted, (3) obtain and collect data for the defence within the framework of statutory possibilities and conditions, and, for this purpose, engage a private investigator under the Act on the rules of personal and property protection and private investigation activities.

A decision communicated to the defendant shall, in all cases, also be communicated to his defence counsel.

763 CPC 41. §

A defence counsel shall be obliged to

– contact the defendant without delay,

– use all lawful means and methods of defence in due time and in the interest of the defendant,

– inform the defendant about the lawful means of defence, and advise him of his rights and obligations,

– promote the detection of facts that exculpate or mitigate the liability of the defendant,

– arrange for a substitute if he is prevented from attending to his duties, except for insurmountable and previously unknown obstacles, and notify, at the same time, the proceeding court, prosecution office, or investigating authority about the fact of being prevented,

– exercise his rights and perform his obligations in a manner that does not hinder the timely completion of the criminal proceeding.

If the defendant is in detention, the proceeding court, prosecution office, or investigating authority shall inform the detaining institution about the name and contact details of the defence counsel, as well as any changes thereto, without delay but no later than upon the admission of the defendant or within forty-eight hours of becoming aware of a change.

If more than one defence counsel acts for a defendant, the first defence counsel to file the authorisation shall be considered the leading defence counsel; if more than one authorisation is filed simultaneously, the proceeding investigating authority, prosecution office, or court shall designate the leading defence counsel. Case documents, including summons and notifications, shall be served on the leading defence counsel. The leading defence counsel or the defence counsel designated by the leading defence counsel shall have the right to deliver the closing argument. The leading defence counsel or the defence counsel designated by the leading defence counsel, or in the absence thereof, the defence counsel attending the given procedural act shall have the right to make the legal remedy statement.

Provisions on the rights and obligations of the defence counsel shall also apply accordingly to the defence counsel of the person reasonably suspected of having committed a criminal offence in line with the rights of the person reasonably suspected of having committed a criminal offence.[764]

4.2.2. Disqualification of the defence counsel

A person may not serve as defence counsel if

– he is the defendant, an aide to the defendant or a relative of such a person,

– he proceeds or proceeded in the case as a judge, a prosecutor, or a member of the investigating authority, or he is a relative of such a person,

– he acted in a manner that is contrary to the interests of the defendant or the person reasonably suspected of having committed a criminal offence, or his interests are contrary to the interests of the defendant or the person reasonably suspected of having committed a criminal offence,

– he participates or participated in the case as an expert or consultant,

764 CPC 42. §

– he participates or participated in the case as an aide to a person, other than the defendant, who participates or participated in the case as a witness,

– he acts or acted in the case as a mediator,

– he participates or participated in the case, or another case related to it, as a defendant.

The same defence counsel may act for more than one defendant or person reasonably suspected of having committed a criminal offence if there is no conflict between the interests of the defendants or persons reasonably suspected of having committed a criminal offence. A defence counsel acting for more than one defendant or person reasonably suspected of having committed a criminal offence shall be disqualified from the proceeding if there is a conflict of interests among the defendants or persons reasonably suspected of having committed a criminal offence.

The matter of disqualification of a defence counsel shall be decided, before the indictment only upon a motion by the prosecution service, by the court.

If the defence counsel submits a notice of a ground for disqualification against himself, he may not act in the case after submitting the notice of the ground for disqualification.[765]

4.2.3. Mandatory participation of the defence counsel in the proceeding

The participation of a defence counsel in a criminal proceeding shall be mandatory if

– the criminal offence is punishable by imprisonment for up to five years or more under an Act,

– the defendant or the person reasonably suspected of having committed a criminal offence is subject to a coercive measure affecting personal freedom or, in another proceeding, to pre-trial detention or preliminary compulsory psychiatric treatment, or is serving a sentence of imprisonment, confinement, or special education in a juvenile correctional institution,

– the defendant or the person reasonably suspected of having committed a criminal offence is hearing-impaired, deaf-blind, blind, speech-impaired, unable to communicate or seriously impaired in his communication for any other reason, or has a mental disorder, regardless of his capacity to be held liable for his acts,

– the defendant or the person reasonably suspected of having committed a criminal offence does not know the Hungarian language,

– the defendant or the person reasonably suspected of having committed a criminal offence is unable to defend himself personally for any other reason,

– a defence counsel was appointed by the court, the prosecution service, or the investigating authority upon a motion by the defendant or the person reasonably suspected of having committed a criminal offence or because the appointment was considered necessary for any other reason,

– it is expressly provided for under this Act.[766]

765 CPC 43. §
766 CPC 44. §

4.2.4. Authorised defence counsel

Authorisation to provide defence may be granted by the person reasonably suspected of having committed a criminal offence, the defendant, their statutory representative or adult relative, or, for foreign nationals, the consular officer of their home country.

An authorised attorney-at-law may act as defence counsel after an original or certified copy of his authorisation is filed with the proceeding court, prosecution office, or investigating authority. A European Community lawyer shall be obliged to file with the proceeding court, prosecution office or investigating authority the original cooperation contract concluded with an attorney-at-law or a law office pursuant to the Act on the professional activities of attorneys-at-law or a certified copy thereof and, if it is in a language other than Hungarian, a certified translation thereof.

The statement on the authorisation of the defence counsel may not be registered validly in the client settings register (hereinafter "client settings register") as defined in Act CCXXII of 2015 on the general rules on electronic administration and trust services (hereinafter "Electronic Administration Act"), unless the authorisation is accepted and the statement of acceptance is registered in the client settings register. An authorisation recorded in the client settings register shall be effective from the time when a notice of it is submitted to the proceeding court, prosecution office, or investigating authority.

Unless provided otherwise in a given authorisation, the authorisation shall be effective until the criminal proceeding is concluded with final and binding effect, and it shall also apply to any mediation procedure, procedure for retrial, review, simplified review, removal of assets or things relating to the criminal offence, or rendering data inaccessible, as well as any special procedure.[767]

4.2.5. Officially appointed defence counsel

The court, the prosecution service, or the investigating authority shall decide on officially appointing a defence counsel if the participation of a defence counsel in the criminal proceeding is mandatory and the defendant or the person reasonably suspected of having committed a criminal offence does not have an authorised defence counsel. On the basis of the official appointment, the regional bar association of the seat of the proceeding court, prosecution office, or investigating authority shall be responsible for designating the attorney-at-law acting as the defence counsel.

The regional bar association shall designate the defence counsel by operating an information system guaranteeing, as possible, the immediacy of designation and the actual availability of the designated defence counsels.

If the participation of a defence counsel in a criminal proceeding is mandatory and the defendant or the person reasonably suspected of having committed a criminal offence does not have a defence counsel, the court, prosecution service, or investigating authority shall appoint a defence counsel (1) at the time of the summons, compulsory attendance or notification where the defendant is summoned, subjected to compulsory attendance or notified, or where a person reasonably suspected of having committed a criminal offence is summoned or subjected to compulsory attendance, to be interrogated

767 CPC 45. §

as a suspect, (2) without delay in the course of the procedural act in a situation other than those specified in point (1).

The court, the prosecution service, or the investigating authority shall appoint a defence counsel if the participation of a defence counsel in the criminal proceeding is not mandatory but is considered necessary to guarantee an effective defence for the defendant or the person reasonably suspected of having committed a criminal offence.

The prosecution service or the investigating authority shall appoint a defence counsel if the defendant is unable to arrange for defence due to his income and financial situation and moves for the official appointment of a defence counsel. Following the indictment, the court shall appoint a defence counsel upon a motion by the defendant.

No legal remedy shall lie against the official appointment or designation of a defence counsel. The defendant or the person reasonably suspected of having committed a criminal offence may submit a reasoned motion for the designation of another defence counsel. The court, the prosecution office, or the investigating authority before which the proceeding is pending shall decide on the motion.

The officially appointed defence counsel may move for his discharge from the official appointment if justified. The court, the prosecution office, or the investigating authority before which the proceeding is pending shall decide the motion.

The officially appointed defence counsel shall be entitled to a fee and the reimbursement of his costs in consideration of his assistance.[768]

Before the indictment, the investigating authority or the prosecution service shall arrange for the attendance of a defence counsel by applying the provisions on substitute defence counsels as reasonable if (1) the regional bar association fails to designate a defence counsel within one hour after the receipt of the official appointment decision, (2) at the time of designation, the designated defence counsel may not be duly summoned or notified due to the unavailability of the defence counsel, and the procedural act may not be dispensed with.[769]

The official appointment shall be effective until the criminal proceeding is concluded with final and binding effect, and it shall also apply to any mediation procedure, procedure for retrial, review, simplified review, removal of assets or things relating to the criminal offence, or rendering data inaccessible, as well as any special procedure.

An official appointment shall cease to have effect when the authorised defence counsel files the authorisation to act for the defendant or the person reasonably suspected of having committed a criminal offence in accordance with this Act, or notice is given of the registration of the authorisation in the client settings register.

If the authorisation is filed or a notice is given of the registration of the authorisation in the client settings register, the court, the prosecution service, or the investigating authority shall inform the authorised defence counsel about the name and contact details of the officially appointed defence counsel who acted earlier.

The authorised defence counsel shall inform, without delay, the officially appointed defence counsel who acted earlier about the fact that he acts as authorised defence counsel in the criminal proceeding.

768 CPC 46. §
769 CPC 47. §

Upon receipt of such information, the officially appointed defence counsel who acted earlier shall disclose and hand over to the authorised defence counsel, without delay, any and all data and case documents that may be used for defence.[770]

The court, the prosecution service, or the investigating authority shall appoint a substitute defence counsel to substitute a defence counsel if

– the defence counsel fails to appear at a procedural act despite being duly summoned,

– he fails to provide a well-grounded excuse for his absence in advance or fails to arrange for a substitute,

– all other conditions of performing the procedural act are met, and

– the procedural act may not be dispensed with.

If a substitute defence counsel is appointed, the evidentiary procedure may not be concluded in the absence of the defendant's defence counsel during the court proceeding, and the substitute defence counsel may not deliver a closing argument unless the defendant consents to doing so.

The provisions concerning the official appointment of the defence counsel shall apply to the official appointment of a substitute defence counsel with the proviso that the appointing court, prosecution office or investigating authority shall designate the acting defence counsel.

An attorney-at-law acting as the defence counsel for a person or a defendant reasonably suspected of having committed another criminal offence, and who attends the procedural act, may also be designated as the substitute defence counsel, provided that there is no conflict between the interests of the persons or defendants reasonably suspected of having committed the criminal offence.

The scope of the substitute defence counsel's official appointment shall be effective until the procedural act performed in the absence of the defence counsel is completed.

The provisions concerning the officially appointed defence counsels shall apply to the fee and cost reimbursement of the substitute defence counsels.[771]

Legal case 1. (Hungary): Being a defence attorney does not exempt one from the legal consequences of perjury. The exemption from criminal responsibility in case of the giving of false testimony applies only to accused persons who are charged with a criminal offense in the course of criminal court proceedings, and it cannot be granted to defence attorneys. The crime of legal malpractice, as defined in section 247, subsection (1) of Act no. IV of 1978 on the Criminal Code (hereinafter referred to as the Criminal Code), is a criminal offense committed by an attorney by way of breaching his professional duty with the aim of causing unlawful wrong to his client.

The district court found the sixth accused guilty of the crime of perjury [section 238, subsection (2), point c) and subsection (4), subparagraph I of the Criminal Code] and the crime of legal malpractice [section 247, subsections (1) and (2) of the Criminal Code], consequently, it sentenced him to a one year imprisonment the implementation of which was suspended for a two-year long probation period, in addition, it allocated the burden of the costs of criminal proceedings and made provisions on the pieces of evidence.

770 CPC 48. §
771 CPC 49. §

Proceeding upon the parties' appeals, the high court modified the first instance judgement in respect of the sixth accused by increasing his term of imprisonment to one year and ten months and his probation period to five years and by prohibiting him from exercising the profession of attorney for a period of five years. The high court upheld the remainder of the first instance judgement.

The defence attorney of the sixth accused submitted a petition for judicial review against the final court decision to the Curia on the basis of section 416, subsection (1), points a), b) and c) of Act no. XIX of 1998 on the Code of Criminal Procedure (hereafter referred to as the Code of Criminal Procedure). The petitioner argued that the sixth accused could not have been found guilty of the crime of perjury, since the sanctioning of the giving of false testimony, i.e. the submission of false documents to the investigating authority by the accused, acting as a defence attorney, had violated the latter's constitutional rights and had been contrary to common sense and the general principles of law.

Section 416, subsection (1), point b) of the Code of Criminal Procedure stipulates that a petition for judicial review may be submitted if an unlawful sentence has been imposed or an unlawful criminal measure has been applied due to the unlawful qualification of the criminal offense prosecuted or to the violation of any other provisions of criminal law.

By virtue of section 238, subsection (1) and subsection (2), point c) of the Criminal Code, any person who presents a false document or manipulated physical evidence in criminal or civil proceedings is guilty of perjury. Subsection (3) provides that the accused person in criminal proceedings shall not be liable for prosecution on the basis of section 238, subsection (2), point c) of the Criminal Code. The petitioner claimed that the sixth accused had acted as the defence attorney of the first accused in the criminal proceedings, which had excluded the former's criminal liability, as the Code of Criminal Procedure did not allow for his hearing as a witness. He emphasised that the sanctioning of the defence attorney in relation to the exercise of the right to be defended, a constitutional right enshrined in the Fundamental Law of Hungary, was unconstitutional.

The Curia agreed with the viewpoint of the Office of the Prosecutor General according to which the sixth accused's status as a defence attorney could not lead to the application of the exemption from criminal responsibility in his respect on the basis of section 238, subsection (3) of the Criminal Code, because the defence attorney was not an accused person in the case and therefore could not be exempted from criminal responsibility for the commission of the crime of perjury.

The court, the prosecutor and the investigating authority shall ensure that the person against whom criminal proceedings are conducted can defend himself as prescribed in the Code ofCriminal Procedure [section 5, subsection (3) of the Code of Criminal Procedure]. Article XXVIII, paragraph (3) of the Fundamental Law of Hungary stipulates that anyone indicted in criminal proceedings shall be entitled to defence at all stages of such proceedings. Defence attorneys shall not be held accountable for their opinions expressed in defence arguments. Section 50, subsection (3) of the Code of Criminal Procedure provides that with the exception of the rights attached exclusively to the person of the accused, the rights of the accused may also be exercised by his defence attorney independently. The accused person's rights of defence, however, does not entitle him to commit a criminal offense or falsely accuse another person of the commission of a criminal offense. Section 50, subsection (1), points b) and c) of the Code of Criminal Procedure clearly state that the

defence attorney is entitled and obliged to use all legal means of defence in the interest of the accused in due time, in addition, it is also evident that the legal restrictions on the accused person's rights of defence equally apply to defence attorneys, which means that such rights do not entitle them either to perpetrate a criminal offense.

It also follows from the accused person's right not to tell the truth that he cannot be held criminally liable for the provision of false evidence, therefore section 238, subsection (3) of the Criminal Code exempts the accused from criminal responsibility in such cases. The rights of defence, on the other hand, do not entitle the accused or his defence attorney to incite another person to commit a criminal offense or to falsely accuse any other person of the perpetration of a criminal offense. The above exemption from criminal responsibility may be granted only to the person against whom criminal charges have been brought, while his defence attorney is not entitled to be given such impunity.

Based on the case's factual background, the sixth accused drafted, contrary to the victim's intention, a document that contained a false statement and submitted it to the investigating authority, which exceeded the limits of lawful defence and could be qualified as perjury as defined in section 238, subsection (2), point c) of the Criminal Code. The fact that defence attorneys cannot be heard as witnesses in relation to the exercise of their defence activities in criminal proceedings does not justify the argument according to which they may insert the false statement of the threatened victim into a document to be submitted to the judicial authorities.

With regard to the above, the Curia found that the guilt of the sixth accused in respect of the commission of the crime of perjury had been lawfully established in conformity with the relevant substantive pieces of legislation.[772]

Legal case 2. (US): The requirement to provide an indigent defendant with counsel is not met when the assignment occurs under circumstances precluding counsel from providing effective assistance. The Supreme Court was absolutely clear in *Moltke v. Gillies*: "An accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings, and laws involved and then to offer his informed opinion as to what plea should be entered."[773]

The reason the appointment of counsel for indigents is mandatory before there can be any loss of liberty is because the Supreme Court was concerned that without such a mandate, the heavy volume of cases may create an obsession for speedy dispositions, regardless of the fairness of the result. The Court in *Argersinger v. Hamlin* explained that [b] eyond the problem of trials and appeals, is that of the guilty plea, a problem which looms large in misdemeanor as well as in felony cases. Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.[774] The U.S. Supreme Court should have added that counsel is needed to ensure that defendants are treated fairly by the judge.

772 Budapest, the 14th of June 2018. In: *Communication concerning the decision of the Curia of Hungary in criminal case n° Bfv.I.1.537/2017*
773 Von Moltke v. Gillies, 332 U.S. 708, 721 (1948)
774 Argersinger v. Hamlin, 407 U.S. 25 (1972)

4.3. Regulation of Act LXXVIII of 2017 on the professional activities of attorneys-at-law

The professional activities of an attorney-at-law may be pursued:

a) under an agency contract,

b) under secondment, or

c) in an employment relationship; in a government service, civil service, public service, public servant, law enforcement, regular or contractual military service employment relationship; in an ecclesiastical service relationship, or in a voluntary legal relationship under the Act on voluntary activities in the public interest, in the cases set out in this Act.

An attorney-at-law may act in the capacity of a patron lawyer under an authorisation if he also acts as a legal aid provider.

4.3.1. General principles

The profession of attorneys-at-law shall mean carrying out activities directed at assisting clients, through the application of the special knowledge of attorneys-at-law, by using the instruments of law and in the manner provided by law, and independently from public authority organs, to assert their rights and rightful interests or fulfil their obligations, and, wherever possible, to settle legal disputes between parties with opposing interests, also covering collaboration in the administration of justice.

The professional activities of an attorney-at-law are founded on the trust between the client and the person practising the profession of attorney-at-law, which everyone must respect.

The person practising the professional activities of an attorney-at-law must pursue his professional activities as an attorney-at-law conscientiously, to the best of his knowledge, and in compliance with the law.

The person practising the professional activities of an attorney-at-law shall improve his professional knowledge through self-directed learning and mandatory further training.

Practising the profession of an attorney-at-law may not be directed at evading the law, or at any purpose contrary to the law, or at participating in any such legal transaction.

Everybody is entitled to a free choice of attorney-at-law.[775]

4.3.2. Professional activities of an attorney-at-law

The professional activities of an attorney-at-law shall be:

a) legal representation;

b) defence in criminal proceedings;

c) legal counselling;

d) document drafting;

e) countersigning documents;

f) conversion of any edited document and the attachments thereto into the form of electronic documents, in relation to the professional activities of an attorney-at-law laid down in points a) to e) above;

775 Üttv. 1. §

g) handling deposits in relation to the professional activities of an attorney-at-law as laid down in points a) to f) above.

The following shall not qualify as a professional activity of an attorney-at-law:

a) legal counselling and document drafting carried out in an employment relationship with an entity other than a natural person; activities carried out in a government service, civil service, public service, public servant, law enforcement, regular or contractual military service, judicial employment or public prosecution service employment relationship; activities carried out in an ecclesiastical service relationship; and activities carried out in a voluntary legal relationship under the Act on voluntary activities in the public interest,

aa) for the employer or, in the case of an ecclesiastical service relationship, for the ecclesiastical legal person or, in the case of a voluntary legal relationship, for the host organisation (for the purpose of this section hereinafter jointly "employer"),

ab) for the employer's affiliated entity defined in the Act on corporate income tax and dividend tax (hereinafter "affiliated company"), or

ac) for organs having a controlling or operating relationship with the employer; or

b) any legal representation, legal counselling or document drafting.

The following ancillary activities may also be pursued under the scope of practising the profession of an attorney-at-law:

a) patent agency,

b) tax consultancy,

c) social security consultancy,

d) insurance consultancy,

e) labour consultancy,

f) representation in procedures other than court, authority or other public authority procedures,

g) financial and other business consultancy,

h) activities of a responsible accredited public procurement specialist advisor,

i) fiduciary asset management,

j) activities of a real estate agency,

k) activities of a common condominium representative,

l) conversion of a paper-based document drafted by a person other than one practising the professional activities of an attorney-at-law into electronic format, and

m) mediating activities carried out in mediation procedures and criminal cases.[776]

4.3.3. Persons entitled to practice the professional activities of an attorney-at-law

The following persons shall be entitled to practice the professional activities of an attorney-at-law on a regular basis and for consideration:

a) attorneys-at-law,

b) European Community lawyers,

c) foreign legal advisors,

d) registered in-house legal counsels,

e) salaried attorneys-at-law,

776 Üttv. 2. § - 3. §

f) salaried European Community lawyers,

g) junior attorneys-at-law, and

h) junior in-house legal counsels registered with the bar association (hereinafter "junior in house legal counsel").

The professional activities of an attorney-at-law shall be performed within the scope of this Act.

Unless otherwise provided by this Act, the general rules governing the persons practising the professional activities of an attorney-at-law shall apply to law offices.

The professional activities of an attorney-at-law may be carried out by any person entitled to do so under the present Act in the whole territory of Hungary. The provisions of this Act and all regulations of the bar association shall apply as well to persons entitled to practice the professional activities of an attorney-at-law if they are performing those activities outside the territory of Hungary. An attorney-at-law may freely join a foreign law office as a partner.[777]

4.3.4. General conditions of practicing the professional activities of an attorney-at-law

a) Independence of attorneys-at-law:

In their activities in this capacity, attorneys-at-law, European Community lawyers and foreign legal advisors shall be unrestricted and independent and may not undertake any obligation that endangers their professional independence.[778]

b) The attorney-at-law's oath:

Within two months of being admitted to or registered with the bar association, attorneys, registered in-house legal counsels and salaried attorneys shall take an oath and junior attorneys-at-law and junior in-house legal counsels shall take a vow before the president of the regional bar association (hereinafter "regional bar association").

The commencement of practising the professional activities of an attorney-at-law shall be subject to taking the attorney-at-law's oath or vow. The text of the oath shall be the following: "I, ...(name of the person who takes the oath) do solemnly swear that I will be faithful to Hungary and its Fundamental Law, and will comply with its laws. In the course of practising my profession of attorney-at-law, I will fulfil my professional duties conscientiously and to the best of my knowledge, in the interest of my clients/employer, and in the course of doing so shall safeguard all secrets of which I gain knowledge. (According to the belief of the oath-taker) So help me God." The text of the vow shall be laid down by the regulations of the bar association. The regional bar association shall prepare a document concerning the oath-taking or vow-taking, which shall include the text of the oath or vow (hereinafter jointly the "oath"), the date on which it was taken and the date on which practising the professional activities of an attorney-at-law commences. The regional bar association shall keep a copy of the document recording the oath.[779]

777 Üttv. 4. § - 5. §
778 Üttv. 6. §
779 Üttv. 7. §

c) Use of name:

When practising the professional activities of an attorney-at-law, a natural person shall use his family name or birth name and given name, as well as his doctoral title with reference to his capacity as laid down in section 4 hereof, or, for European Community lawyers and salaried European Community lawyers, with reference to that capacity as specified in the ministerial decree on the professional titles of European Community lawyers. The professional activities of an attorney-at-law may be carried out under a name entered into the register of attorneys-at-law which cannot be confused with any other person'sname previously entered into the register of attorneys-at-law. In the case of collaboration between an attorney-at-law or law office registered in Hungary and a foreign legal counsel or foreign law office, the name of the foreign legal counsel or foreign law office and reference to the collaboration may appear, along with the name of an attorney-at-law registered in Hungary, in the name of a law office registered in Hungary. The detailed rules on the use of names applicable to the persons practising the professional activities of an attorney-at-law shall be set forth in the regulations of the bar association.[780]

d) Confidentiality:

All facts, information and data of which the person practising the professional activities of an attorney-at-law gained knowledge in the course of carrying out his professional activities, shall qualify as attorney-client privileged information. Unless otherwise provided in this Act, the person practising the professional activities of an attorney-at-law shall keep all attorney-client privileged information confidential. This confidentiality obligation shall also apply to any document or other medium containing attorney-client privileged information. The person practising the professional activities of an attorney-at-law shall refuse to give testimony or report on attorney-client privileged information in any administrative authority or court procedures unless he was exempted from his obligation of confidentiality by the person entitled to grant such attorney-client privileged information with the proviso that, withthe exception set forth in section 12 (4) herein, no exemption may be validly granted for making a testimony and reporting on any attorney-client privileged information obtained as a defence counsel. The confidentiality obligation of the person performing the professional activities of an attorney-at-law shall not be subject to the legal relationship of practising as an attorney-at-law, and it shall persist after discontinuing such practice or upon termination of that legal relationship, for an indefinite period.

Unless otherwise provided in this Act, the person practising the professional activities of an attorney-at-law shall not have any confidentiality obligation towards the client in the course of acting on behalf of whom he obtained knowledge of the attorney-client privileged information concerned. If the subject-matter of the attorney-client privileged information has been received from another person practising the professional activities of an attorney-at-law, the person practising the professional activities of an attorney-at-law may not reveal such information to his own client affected by the case if it has been expressly forbidden by the person providing that information. No confidentiality obligation shall be imposed on registered in-house legal counsels and junior in-house legal counsels towards their employer, with whom they have an employment relationship within the scope of which

780 Üttv. 8. §

they obtained knowledge of the attorney-client privileged information, or towards the persons designated by that employer and the client either.

The confidentiality obligation of the law office shall also apply to the members of the law office; however, members shall not have a confidentiality obligation towards each other. If an Act restricts the activities that can be performed jointly for the same client or for clients with opposing interests but allows the law offices employed to have different members of the law office carry out those duties, the members concerned shall have a confidentiality obligation towards each other, and they shall ensure that the same employee or assignee of the law office will participate in fulfilling tasks relating to only one of the relevant cases.

A person practising the professional activities of an attorney-at-law shall not have a confidentiality obligation towards his employee.

A person practising the professional activities of an attorney-at-law shall not have a confidentiality obligation towards his substitute attorney-at-law and the following persons, up to the extent required for providing their services:

– the person in charge of storing, archiving or safekeeping the medium containing the attorney-client privileged information, or the person processing the information included therein, and any other contributor employed by the person practising the professional activities of an attorney-at-law as data processor;

– the person providing accounting services for the person practising the professional activities of an attorney-at-law;

– the persons involved in fulfilling an attorney's agency contract and all other persons employed to fulfil the agency, the involvement or employment of which has been approved by the client.

The confidentiality obligation of an attorney-at-law shall also apply to all persons entitled to gain knowledge of the attorney-client privileged information in question. The bodies and officers of the bar association shall keep confidential all attorney-client privileged information learnt of in the course of fulfilling their duties and exercising their powers set out herein. Courts and authorities may handle and use all attorney-client privileged information learnt of in the course of acting in the case within the framework determined by the Act regulating their procedure.

The client and his legal successor shall have the right of disposal over the attorney-client privileged information.

In the disciplinary and regulatory cases falling under the scope of this Act, the person practising the professional activities of an attorney-at-law shall be entitled to disclose to the extent:

– required for conducting the procedure, any attorney-client privileged information to the bodies of the bar association and to the court acting in the case ,

– required to assert his right of defence, any attorney-client privileged information in the criminal proceedings instituted against him;

– required for investigating and proving a criminal offence committed by a person other than his client, against him or committed against his client, attorney-client privileged information; in the event of a criminal offence committed against his client, such information may be disclosed with his client's consent.

At the request and initiative of the person entitled to dispose of the attorney-client privileged information, a person subject to an obligation of confidentiality may disclose

attorney-client privileged information in court proceedings or an administrative or other public authority procedure against him, to the extent required for the defence.

Those subject to a confidentiality obligation of attorneys-at-law shall not disclose any document or information containing attorney-client privileged information in the course of an official inspection, review or on-site search performed at his office; he shall not be obliged to give testimony or a report regarding the attorney-client privileged information, but he may not obstruct the proceedings of the authority.

A document drawn up for defence purposes shall mean a document or any part thereof which is drawn up in order for the client to exercise his right to a defence in a public authority procedure, or drawn up in a public authority procedure in the course of the communication between the person practising the professional activities of an attorney-at-law and his client, or upon recording the content of such communications, and this nature of the document is evident from the document itself. A document which is not in the possession of the client or the person practising the professional activities of an attorney-at-law shall not qualify as a document drawn up for defence purposes unless if it is proved that the document was taken from their possession unlawfully or in a criminal procedure.

Without prejudice to any right protected in this section, and only to the extent necessary, the authority shall be entitled to inspect the document in order to ascertain whether or not the reference to a document drawn up for the purposes of defence is clearly unfounded. If the classification of the document is disputed by and between the client and the authority then the authority shall have the right to take possession of the document concerned during the inspection or on-site search, with the proviso that the document shall be placed in a storage device that excludes its accessibility and subsequent alteration. In the issue of the classification of the document, the court acting in the administrative case shall, at the authority's application, decide in a non-contentious procedure, based on the hearing of the client concerned. The authority shall attach the document to its application.

If the court finds that the document or the relevant part of it does not qualify as a document drawn up for the purposes of defence then it will make it available to the authority. If the court decides otherwise then it shall hand over the document or the relevant part of it to the client concerned.[781]

e) Office, branch office, sub-office and archives:

The seat of an attorney-at-law, a European Community lawyer and a foreign legal advisor (hereinafter jointly "attorney-at-law") shall be his office located in the area of operations of the regional bar association of which he is a member, or which has registered him in the bar association register.

The sub-office of an attorney-at-law shall be the premises located outside his seat but in the area of operations of the regional bar association.

The branch office of an attorney-at-law shall be premises located in the area of operations of an other regional bar association.

The requirements applicable to the premises suitable for carrying out the professional activities of an attorney-at-law, as well as the rules which derogate from those applicable to attorneys-at-law or law offices having offices, branch offices or sub-offices at the same registered address, shall be determined by the Hungarian Bar Association in its regulations.

781 Üttv. 9. § - 12. §

If an attorney-at-law stores the documents related to his professional activities as an attorney-at-law wholly or partially at a location different from his office, sub-office or branch office, he shall notify the regional bar association that registered him in the bar association register of the address of that location.[782]

f) Substitute attorney-at-law:

An attorney-at-law who is not a member of a law office (hereinafter: "individual attorney-at-law"), a European Community lawyer or a single-member law office (hereinafter: "substituted attorney-at-law") shall assign a substitute attorney-at-law, substituting him in the event he is hindered in carrying out his professional activities as an attorney-at-law. As regards the professional activities of an attorney-at-law, a substitute attorney-at-law shall act as a fully authorised substitute for the substituted attorney-at-law. A substitute attorney-at-law may be an attorney-at-law, a European Community lawyer or a law office.

The assignment shall enter into force upon the entry of the substitute attorney-at-law as a substitute in the bar association register, and shall become ineffective if: 1. the assignment of the substitute or substituted attorney-at-law to carry out the professional activities of an attorney-at-law terminates, is voluntarily suspended or suspended by order, or 2. the qualification of the substitute attorney-at-law has been permanently deleted from the bar association register.

The agreement on substitution shall not prevent the substituted attorney-at-law from agreeing with someone else concerning substitution regarding certain cases or group of cases, within the limits of the present Act.[783]

g) Limitations of practicing the professional activities of an attorney-at-law:

Attorneys-at-law, European Community lawyers and foreign legal advisors (for the purposes of this Chapter, hereinafter jointly "attorneys-at-law") may not undertake to practice the professional activities of an attorney-at-law for clients whose interests are in conflict with each other, and also if the client's interests are in conflict with the attorney-at-law's own interests beyond the case. This prohibition shall also be applicable if a future collision of interests is foreseeable.

The person practising the professional activity activities of an attorney-at-law shall not undertake to perform any professional activities of an attorney-at-law in a case in which he had previously acted:

– in his previous legal relationship, established for performing a task directly correlating with the exercise of official powers,

– as a notary, deputy notary, bailiff, deputy bailiff, or

– as a mediator, arbitrator, or in any other capacity related to dispute settlement, except for drawing up a document on the settlement reached as a result of such mediation, and legal representation in any related procedures.

A person practising the professional activities of an attorney-at-law may not:

– be a legal representative in public authority procedures conducted by a body exercising public powers or its legal successor, with which the person had a legal relationship for performing a duty directly related to exercising public powers, or with which he had a legal

782 Üttv. 16. §
783 Üttv 17. §

relationship for performing a duty directly related to its governance or supervision, for a period of two years following the termination of that legal relationship;

– pursue any professional activities as an attorney-at-law that would be in conflict with his obligation towards his former client, unless there is no connection between the previous and the new case, or if the former client, after having been informed of such an intention, consented to that activity.

A person practising the professional activities of an attorney-at-law may pursue any activity of an attorney-at-law against his former employer if the employment relationship terminated at least three years earlier, and if he was not involved in administering the case. The former employer may grant an exemption from that restriction.

The attorney-at-law shall continuously examine the possibility of a conflict of interests of the clients even after undertaking the agency. If, upon such an examination, he finds that, under paragraph (1), he should not undertake to practice the professional activities of an attorney-at-law concurrently for two or more clients, or if the conditions set out in this Act are not met, he shall terminate the agency for the conflicting case with all clients affected.[784]

h) Grounds which exclude practicing the professional activities of an attorney-at-law; conflict of interests:

The following persons may not practice the professional activities of an attorney-at-law:

– persons against whom there is a conflict of interests as set forth in this Act,

– any person who has a prior criminal record or has been under professional disqualification from practising a profession requiring a university degree in law,

– any person who has no prior criminal record, but: 1. who has been convicted of an intentional criminal offence, for a period of eight years from the effective date of absolution in the event of a sentence of non-suspendedimprisonment for a period of five years or more; 2. a person who has been convicted of an intentional criminal offence, for a period of five years from the effective date of absolution in the event of a sentence of non-suspended imprisonment for a period of less than five years; 3. a person who has been sentenced by the court to suspended imprisonment for committing an intentional criminal offence, for a period of three years from the date of expiry of the probation period; 4. a person who has been ordered by the court to receive medical treatment in a mental institution, for a period of three years from the effective date of the court ruling for the termination of medical treatment;

– a person who is subject to a disciplinary penalty of exclusion from the bar association or deletion from the bar association register (hereinafter jointly “disbarment”),

– a person who has been placed under guardianship affecting his legal capacity, or is subject to supported decision-making,

– any person who, owing to his lifestyle or conduct, is unfit for the public trust necessary for practising the professional activities of an attorney-at-law, or

– any person who has any outstanding membership dues owed to a bar association, of at least an amount set out in the regulations of the bar association, or has any other debt based on an enforceable decision of a bar association, and has failed to pay it upon a written notice from the bar association to do so.

784 Üttv. 20. § - 21. §

Any person about whom it has been established that he practiced the professional activities of an attorney-at-law regularly and for consideration without authorisation may not pursue the professional activities of an attorney-at-law for three years, from the time when such a decision becomes final and binding.[785]

4.3.5. General rules on mandating an attorney-at-law

Unless otherwise provided by this Act and the Civil Code, the mandate to pursue the professional activities of an attorney-at-law (hereinafter "attorney-at-law mandate") shall be freely negotiated.

An agency contract on pursuing the activities of an attorney-at-law shall be concluded by an individual attorney-at-law, a European Community lawyer, a foreign legal advisor or the law office and the client. In the event that the client is in need of immediate legal protection, and the client is unable to sign the agency contract, the client's close relative shall be considered as the client's representative for the purposes of signing the agency contract. However, this does not affect the obligation to identify the client.

Unless otherwise provided by the parties, under an agency contract the agent shall have the right and obligation to perform all acts needed for the proper pursuit of the case entrusted to him, and to receive the money or things and procedural costs due to the principal as well.

When signing the contract, the client must be informed in writing of all costs that will foreseeably arise in relation to the case that are not included in the agency fee, irrespective of whether the client is obliged or not to advance those costs under the contract.

Unless otherwise provided by the parties, an individual attorney-at-law, a European Community lawyer, the members of the law office, a substitute attorney-at-law, or a salaried attorney-at-law, salaried European Community lawyer or junior attorney-at-law employed by the persons referred to herein, or a foreign legal advisor or law office, shall be entitled to act in the course of fulfilling the mandate.

The agent's liability for any breach of contract may only be limited by means of a contractual stipulation negotiated individually, and only with respect to the part of the damage exceeding the highest amount of the agent's mandatory indemnity insurance per loss event.

The agency contract must be put in writing unless it only relates to providing legal advice.

Substantive elements of an agency contract on drafting documents and carrying out legal representation related thereto may also be included in a contract countersigned by the attorney-at-law drafting the contract.[786]

a) The attorney's agency fee:

The parties shall be free to agree on the attorney's agency fee with the derogations under this section. The parties may also stipulate the use of a flat charge. Except for an outstanding claim established in an enforceable document, no claim for an attorney's agency fee and reimbursement of expenses may be transferred, without the obligor's

785 Üttv. 22. § - 23. §
786 Üttv. 28. § - 29. §

consent, to any person who is not entitled to gain knowledge of the attorney-client privileged information required to enforce such a claim. An attorney's agency fee, conditional upon the success of the professional activities of an attorney-at-law, shall not be enforceable to the extent that its amount exceeds two thirds of the attorney's entire fee. For the purpose of this paragraph, the attorney's total agency fee shall not include: 1. expenses arising from handling the case and payable by the principal as part of the attorney's fee, and 2. the part of the attorney's fee that has been waived by the attorney-at-law free of charge.

Any outstanding agency fee and claim for the reimbursement of expenses may be deducted from the money taken for the benefit of the principal, while simultaneously informing the principal thereof in writing, unless: 1. the money needs to be given to someone other than the principal, 2. the parties failed to agree on an attorney's agency fee, 3. set-off is prohibited by another Act.[787]

b) Identification:

Except for a mandate to provide legal advice, prior to entering into an agency contract, the agent and, prior to countersigning an agreement between his employer and a third party, a registered in-house legal counsel (for the purposes of this Subtitle hereinafter: "attorney-at-law"), shall perform the identification of the client, while the registered in-house legal counsel shall perform the identification of any person entering into an agreement with his employer, or any person acting as a representative thereof.

The attorney-at-law shall verify the identity of the natural person unknown to him, or of anyone whose identity he doubts, by inspecting the documents that are suitable for his identification. In order to verify that a natural person's data are identical with the information recorded in the official registers, and in order to check the validity of the documents presented by him, an attorney-at-law may apply electronically to the register of personal data and address records, to the register of driver's licences, to the register of travel documents or to the central immigration register and request the following information: personal identification data; nationality, stateless status, immigrant or permanent resident status, or EEA national status; address of domicile; facial image; signature. etc.

The attorney-at-law shall identify a legal entity or other organisation on the basis of the register of a public authority keeping records on legal entities and other organisations, or on the basis of an extract of those records.

If identification of a natural person is not possible due to an unavoidable external cause, that will not exclude the conclusion of the agency contract; however, when the external obstacle ceases to prevail, the agent shall perform the identification of the client without delay. If an agent acts on behalf of a client who is a natural person, the attorney-at-law may omit any particular identification of the client provided that the authorisation including the client's personally identifiable information has been countersigned by an attorney-at-law, ordrafted by a notary, or the principal's signature has been certified by a notary, or if the authorisation has been certified or legalised by the competent Hungarian diplomatic mission of the place of signature, or an Apostille certificate has been enclosed thereto.

In order to ensure the safety of legal transactions and enforce the restrictions applicable to the professional activities of an attorney-at-law, in those cases where legal representation is mandatory, the attorney-at-law shall keep records of all natural persons

787 Üttv. 30. § - 31. §

identified by means of inspecting their documents containing at least personal identification information, and of legal entities and other organisations. The records kept on identified natural persons shall include the following information: personal identification data; address of domicile; citizenship, stateless status, immigrant or permanent resident status, or EEA national status; type and number of the document used for identification purposes, etc. The records kept on identified legal entities and other organisations shall include the following information: name; seat, and in the case of undertakings whose head office is established abroad, address of their branch in Hungary, if any; company registration number or registration number of the legal person or other organisation identified or, in the absence of such an identifier, the name and identification number of the registration body, or the number of the decision on the establishment, registration or entry of the entity concerned; natural identification data of any person acting on behalf of the legal entity or organisation identified; identification number of the cases where identification of legal entities or other organisations is mandatory; the particulars set forth in the Act on the prevention and combating of money laundering and the financing of terrorism.[788]

c) Authorisation:

Should the professional activities of an attorney-at-law require the representation of the client, an authorisation on the right of representation shall be issued for the agent. The authorisation of the professional activities of an attorney-at-law shall be put into writing, and it shall contain an acceptance statement by the agent as well. The authorization issued in accordance with this paragraph shall qualify as a private deed of full probative value. Unless it is evident otherwise from the authorisation, and if it is not otherwise provided by an Act, under the authorisation all persons who may act in the course of fulfilling the mandate under this Act shall have the right of representation.

An authorisation shall also authorise the agent to represent the principal in respect of receiving money or things, or procedural costs due to the principal. The client may restrict or revoke the authorisation at any time. Any limitation on the authorisation to represent the client before a court or other authority or towards a third party shall be effective only to the extent that the limitation is evident from the authorization. Termination of the agency contract shall terminate the authorisation issued under the contract. The agent shall notify the court, notary or other authority in writing immediately, in the procedure of which he performed the client's legal representation or defence as an agent, of the termination of his authorisation or any restriction thereof.[789]

d) Termination of the mandate of an attorney-at-law:

Beyond those provisions listed in the Civil Code and in the agency contract, an agency contract shall terminate: 1. with the termination of the authorised agent or law office without succession, 2. with the termination of the membership of the authorised individual attorney-at-law at the bar association, or with the deletion of the European Community lawyer or the foreign legal advisor from the bar association register. The principal may unilaterally terminate the agency contract with immediate effect as well. Termination shall be communicated in writing if the parties have put the agency contract into writing. The

788 Üttv. 32. § - 33. §
789 Üttv. 34. §

agent may unilaterally terminate the agency contract with fifteen days' notice. The parties may agree on a longer notice period. The agent shall act in the client's interest during the notice period.

In the event of a change in the form of operation registered at the bar association, if the person practising the professional activities of an attorney-at-law undertakes mandates in the new form of operation, the agency shall not terminate but a legal succession in the person of the agent shall take place by virtue of this Act. If, as a result of a change in the form of operation registered at the bar association, the agent becomes a member of a law office, the law office shall be the legal successor of the agent. The agent shall notify his principal of any prospective change without delay but at least fifteen days before such change.[790]

4.3.6. Court appointmnet of attorneys-at-law

In the event of appointment by the court, an attorney-at-law shall proceed as a court-appointed defender, ad hoc custodian, ad hoc guardian or guardian ad litem (hereinafter: "court-appointed attorney-at-law").

A court-appointed attorney-at-law shall be obliged to proceed in a case, obey the summonses of the authorities, the investigating authority, the prosecution service, the notary and the court (in this Chapter hereinafter jointly "authorities"), and to make contact with the accused or, if the nature of the case permits it, with the represented person without delay.

The regional bar association must provide on-call attorney-at-law services on rest days and public holidays in order to ensure secondment.

A court-appointed attorney-at-law may require remuneration (work fee and compensation for expenses) as stipulated by the law.

A court-appointed attorney-at-law must provide for his substitute in such a manner that the proceedings are not hindered and the interests of the accused or represented person are not harmed.

The regional bar association and the court-appointed attorney-at-law shall immediately notify the authority if the court-appointed attorney-at-law

a) terminates his membership of the bar association,

b) suspends practising the professional activities of an attorney-at-law,

c) is suspended from practising the professional activities of an attorney-at-law,

d) is no longer included in the list of attorneys-at-law for court appointment, or

e) if any of the grounds for restriction set out in Chapter III have occurred.

With regard to ad hoc custodians, ad hoc guardians and guardians ad litem, the authorisation may be substituted by a decision of the authority on appointment.

The regional bar association shall maintain a list of attorneys-of-law for court appointment in the capacity of defence counsels.

The regional bar association shall compile the list in such a manner that it contains attorneys-at-law in an appropriate number required for fulfilling the duties that make court appointment necessary and also for maintaining the operability of the administration of justice.

790 Üttv. 35. §

The bar association shall establish the rules on compiling the list in such a manner that, besides voluntary registration, all attorneys-at-law are recorded into the list on the basis of the principle of equality.

The regional bar association shall continuously update the list and shall publish the changes on its website.[791]

4.3.7. Specific professional activities of an attorney-at-law

a) Legal representation:

An attorney-at-law, a registered in-house legal counsel or a European Community lawyer (for the purpose of this Subtitle hereinafter jointly "attorney-at-law"), as well as any person authorised to substitute him under his guidance, may act as the client's legal representative before any court, notary or other authority or towards third persons. If the client's own personal statement is required by law for making a juridical act, the attorney-at-law shall not be entitled to make that statement as a legal representative but otherwise shall be entitled to provide legal representation for that client. When providing legal representation, the attorney-at-law shall 1. give priority to the interests of the client, and 2. refuse to comply with the client's instructions if they infringe the law or aim at circumventing the law. If any of the client's instructions do not serve the client's interests, the attorney-at-law shall call the client's attention to that fact before carrying out the instruction concerned.[792]

b) Provision of defence in criminal procedure:

An attorney-at-law may act as the defence counsel of the defendant in criminal procedures. When providing the activity of a defender, the attorney-at-law shall, within the limits of exercising the right to a defence of the defendant, give priority to the interests of the defendant.[793]

c) Legal counselling:

An attorney-at-law, a registered in-house legal counsel, a European Community lawyer and, as provided by this Act, a foreign legal advisor (for the purpose of this Subtitle, hereinafter jointly "attorney-at-law"), as well as any person authorised to substitute for them under their guidance, shall be entitled to give a legal opinion or make recommendations to the client regarding the preparation of a statement of intent appropriate for producing legal effects concordant with the client's interests, or a legal assessment of past, present or future circumstances. When providing legal counselling, an attorney-at-law shall formulate his opinion or make his recommendations relying upon the Fundamental Law, the law, and the binding legal acts of the European Union.

When performing legal counselling, an attorney-at-law shall accept all facts alleged by the client as full, correct and true, unless more stringent requirements are stipulated by the parties.

791 Ütv. 36. § - 38. §
792 Üttv. 39. §
793 Üttv. 40. §

An attorney-at-law shall inform the client of the possible legal risks related to the opinion he formulated or the recommendations he made. The client shall be responsible for weighing all risks detailed in the information provided by the attorney-at-law.[794]

d) Drafting of documents:

An attorney-at-law, a European Community lawyer or any person authorised to substitute for him under his guidance shall be entitled to draft documents concerning the client's juridical acts. A registered in-house legal counsel or any person authorised to substitute for him under his guidance, and an employee of the registered in-house legal counsel's client who meets the requirements laid down in the regulations of the bar association, shall be entitled to draft documents concerning the juridical acts of his client and any person contracted with the latter.

An attorney-at-law, a registered in-house legal counsel or a European Community lawyer (for the purpose of this Subtitle hereinafter jointly "attorney-at-law") shall refuse to draft the document if the intention expressed in it breaches or aims at circumventing the law. When drafting documents, the attorney-at-law shall act in such a manner that the client's expressed intentions shall, within the limits of the Fundamental Law, the law and the binding legal acts of the European Union, comply with the client's interests and furthermore shall be suitable for producing legal effects.

An attorney-at-law may accept all facts alleged by the client as full, correct and true; however, he must inform the client if, having taken all reasonable care expected of an attorney, he has any doubt about the completeness, accuracy or truth of the facts alleged by the client. An attorney-at-law shall inform the client of the possible legal risks related to the legal transaction.[795]

e) Countersigning documents:

An attorney-at-law and a registered in-house legal counsel (for the purpose of this Subtitle hereinafter jointly the "attorney-at-law") may countersign a document drafted by him, his law office, substitute, or a person practising the professional activities of an attorney-at-law employed by him, or an employee of the client of the registered in-house legal counsel who meets all requirements set out in the regulations of the bar association, if it is approved by the attorney-at-law from a professional point of view.

Unless otherwise provided by law, a countersigned document:

– shall be numbered on each page in a form of consecutive pagination if the document consists of more than one page,

– shall be initialled on each page by the parties or the party authorised thereto in the

– document,

– shall be signed by the parties,

– shall be signed by the countersigning attorney-at-law, indicating his name, identification number in the bar association and the fact of countersigning, as well as the date and place of countersigning.

By countersigning a document, an attorney-at-law shall attest that:

– the document complies with the law,

794 Üttv. 41. §
795 Üttv. 42. §

– the parties stated that the content of the document conforms to their wishes,
– the attorney-at-law verified the identity of the parties indicated in the document and their
– representatives acting in the matter, and
– the parties signed the document in the presence of the attorney-at-law, or acknowledged in his presence that the signatures put on the document are theirs.[796]

f) Deposit with an attorney-at-law:

An attorney-at-law, a law office and a European Community lawyer (for the purpose of this Subtitle, hereinafter: "attorney-at-law") shall be entitled to receive money, cash equivalent payment instruments, vouchers, securities or other documents and shall be entitled to keep them in safe custody and handle them as a deposit:
– as a mandate,
– to cover the expenses of procedural acts related to the mandate, or
– for safeguarding in connection with the mandate.

Deposit contracts shall be concluded in writing. The depositor may terminate the contract on handling a deposit set out in this Act, if he is expressly entitled to do so in the deposit contract.

Any provision in the deposit contract on the exclusion or limitation of the attorney-at-law's liability in relation to safe custody services shall be null and void.

The attorney-at-law shall safeguard the deposit in accordance with the provisions of the deposit contract, safely and in a manner preventing any unauthorised access. He or she may not use the deposit for any purpose other than as a deposit; he shall not use it or give it into another person's possession or custody unless otherwise provided by this Act. The attorney-at-law shall be entitled to place the deposit in a bank as a fixed-term deposit.[797]

g) Recording case files and handling documents:

In order to ensure the verifiability of compliance with the rules on practising the professional activities of an attorney-at-law, and with a view to protecting clients' rights in the event of terminating the entitlement of an attorney-at-law to practice his professional activities, an attorney-at-law, a European Community lawyer, a foreign legal advisor or a law office (for the purpose of this Section hereinafter jointly "attorney-at-law") shall maintain records of the cases handled upon mandate.

The records maintained about the cases shall include the following information:
– the case number given by the attorney-at-law,
– the client's name,
– the subject matter of the case,
– the date of concluding the agency contract, and
– registration numbers of the court proceedings related to the case, or the filing numbers of
– other proceedings.[798]

796 Üttv. 43. § - 45. §
797 Üttv. 47. § - 51. §
798 Üttv. 53. §

4.3.8. Voluntary suspension of the professional activities of an attorney-at-law

The person practising the professional activities of an attorney-at-law may voluntarily suspend his legal practice for a definite period of time with the approval of the regional bar association, if he:

– has arranged for the handing over or cancelling of all of his mandates or those undertaken by the law office of which he will no longer be a practising member,

– has arranged the termination of the employment relationship of salaried attorneys-at-law, junior attorneys-at-law, salaried European Community lawyers and attorney assistants employed by him or employed by a law office which will have no other members continuing to practice the professional activities of an attorney-at-law, and

– submits his photo identification card to the regional bar association for the period of voluntary suspension.

The prior approval of the law firm shall also be required before a member of the law office can voluntarily suspend his professional activities as an attorney-at-law. The person practising the profession of an attorney-at-law shall perform his activities pertaining to representing the single-member law office, arising from the law, during the term of voluntary suspension as well.[799]

4.3.9. Natural persons practising the professional activities of an attorney-at-law

a) The atttorney-at-law:

An attorney-at-law shall practice the professional activities of an attorney-at-law as a business-like activity, as an individual attorney-at-law or as a member of a law office, at his own financial risk and, with the exceptions laid down in this Act, upon the mandate of his client.

An attorney-at-law may pursue the activities of an attorney-at-law as a member of the regional bar association and carry out the professional activities of an attorney-at-law in a voluntary legal relationship under the Act on voluntary activities in the public interest. The provisions of this Act pertaining to the mandate of an attorney-at-law, except for the provisions on attorney's agency fees, shall also be applied to the voluntary legal relationship of an attorney-at-law under this paragraph, while the provisions of this Act pertaining to the principal shall also be applied to the host organisation with which the attorney-at-law has established a voluntary legal relationship in the public interest as referred to in this paragraph.

The regional bar association shall, upon request, admit as an attorney-at-law anyone who:

– is a citizen of any State that is a party to the Treaty on the European Economic Area,

– has a university degree in law,

– has taken a Hungarian law school qualification exam,

– in the ten-year period before submitting the request, has carried out legal practice as an attorney-at-law for a minimum of one year,

– has indemnity insurance to cover any damage caused by the professional activities of an attorney-at-law as well as any grievance award,

799 Üttv. 54. § - 56. §

– has premises suitable for pursuing continuous legal practice in an area in which the regional bar association operates,

– meets all conditions required for electronic administration,

– except for members of a collective law office, has entered into a contract with an attorney-at-law or a law office to provide substitution for him, and

– is not subject to any grounds for exclusion from practising the activities of an attorney-at- law.

The regional bar association shall, upon request, admit as an attorney-at-law any European Community lawyer who:

– has carried out the professional activities of an attorney-at-law in Hungary in connection with Hungarian law or the application of European Union law in Hungary for at least three years,

– knows the Hungarian language at the level required to practice the professional activitiesof an attorney-at-law,

– has indemnity insurance enforceable in Hungary providing coverage for any damage caused by the professional activities of an attorney-at-law as well as for any grievance award,

– has premises suitable for conducting continuous legal practice in an area in which the regional bar association operates,

– has all conditions required for electronic administration,

– except for members of a collective law office, has entered into a contract with an attorney-at-law or a law office to provide substitution for him, and

– is not subject to any ground for exclusion from practising the activities of an attorney-at-law.[800]

b) The salaried attorney-at-law:

A salaried attorney-at-law shall carry out the professional activities of an attorney-at-law in an employment relationship with an attorney-at-law or a law office, for the clients of his employer and, if it is laid down in the employment contract, as a substitute for an attorney-at-law or for a law office belonging to the same association of attorneys-at-law or joint office of attorneys-at-law as his employer, for their clients.

A salaried attorney-at-law shall pursue the activity of an attorney-at-law as a member of the regional bar association. The regional bar association must, upon request, admit as a salaried attorney-at-law anyone who:

– is a citizen of any State that is a party to the Treaty on the European Economic Area,

– has a university degree in law,

– has taken a Hungarian law school qualification exam,

– has indemnity insurance to cover any damage caused by the professional activities of an attorney-at-law, as well as any grievance award,

– has an employment relationship with an attorney-at-law or law office who has an office and who maintains premises suitable for conducting continuous legal practice in an area in which the regional bar association operates, and

– is not subject to any ground for exclusion from practising the activities of an attorney-at-law.

800 Üttv. 57. § - 58. §

A salaried attorney-at-law may be bound by a contract of employment with more than one attorney-at-law or law office only if all employers are members of the same association of attorneys-at-law or joint office of attorneys-at-law, and the regional barassociation has been notified of that fact.

The employment relationship of a salaried attorney-at-law shall terminate, in accordance with the regulations on termination without succession of an employer, if the employer's membership of the bar association is terminated, or the bar association deletes the employer from the bar association register or suspends the employer's practice.

A salaried attorney-at-law shall not carry out the professional activities of an attorney-at-law individually; he may contribute to such activities only within his employer's scope of competence and in accordance with his instructions. The employer's rights over a salaried attorney-at-law may only be exercised by an attorney-at-law.

A salaried attorney-at-law may only carry out his activities under the mandate or court appointment provided to his employer, and may only substitute another attorney-at-law, European Community lawyer or law office with his employer's consent.

The employer shall ensure that a salaried attorney-at-law can participate in any further training, and for that purpose he will be exempted from work for the term of the training.[801]

c) The junior attorney-at-law:

In order to perform the legal practice required for the bar examination, a junior attorney-at-law shall carry out the professional activities of an attorney-at-law in an employment relationship with an attorney-at-law, or a European Community lawyer, or a law office, for the clients of his employer and, if it is thus laid down in the employment contract, as a substitute for an attorney-at-law, for a European Community lawyer or a law office belonging to the same association of attorneys-at-law or joint office of attorneys-at-law as his employer, for their clients.

Carrying out the professional activities of an attorney-at-law shall be pursued after having been admitted to the bar association as a junior attorney-at-law. The bar association shall, upon request, admit as a junior attorney-at-law anyone who:

– is a citizen of any State that is a party to the Treaty on the European Economic Area,

– has a university degree in law,

– has an employment relationship with an attorney-at-law or law office that has an office and that maintains premises suitable for conducting continuous legal practice as a junior attorney-at-law in an area in which the regional bar association operates, and

– is not subject to any grounds for exclusion from practising the professional activities of an attorney-at-law.

A junior attorney-at-law shall be provided with work, by the performing of which he may acquire the practical knowledge required to practice law and pass the bar examination. The regional bar association shall oversee the legal practice of junior attorneys-at-law and shall organise their training.

A junior attorney-at-law may only be bound by a contract of employment with more than one attorney-at-law or law office if all employers are members of the same association of attorneys-at-law or joint office of attorneys-at-law, and the regional bar association has been notified of that fact. The employer shall ensure that a junior attorney-at-law can

801 Üttv. 59. § - 61. §

participate in any training organised by the bar association for junior attorneys-at-law, and for that purpose he shall exempt him from work for the term of the training.[802]

4.3.10. The law office

A law office is a legal entity established by one or more attorneys-at-law or European Community lawyers for the purpose of jointly performing the professional activities of an attorney-at-law as a business-like activity, where a member's obligation comprises the provision of assets and other services to the law office as determined in the deed of foundation.

An attorney-at-law and a European Community lawyer can only be a member of one law office. A law office may also be established by providing subscribed capital of a size determined in the deed of foundation.

The rules on the establishment of a legal person shall apply to the establishment of a law office, with the proviso that a law office is established upon its admission to the register of law offices. Members shall provide for the establishment of a law office in the deed of foundation. In addition to the particulars set out in the Civil Code, the deed of foundation shall indicate

– the branch office or sub-office, if any, belonging to a law office;

– the voting rights to which the members of a law office are entitled, and the procedure to be followed in the event of a tied vote;

– the rules of representation of the law office, and the rules of accepting a mandate;

– the term of appointment of the office manager, and the rules for managing the law office in the event of several office managers;

– the operational rules of members' meetings;

– the rules for making settlements between the members;

– the rules on exclusion from the law office, extraordinary unilateral termination and termination of membership;

– the rules for dissolution of the law office; and

– the rules for accepting the accounts set out by the Act on accounting.

The decision-making organ of a law office shall be the members' meeting, consisting of the members of the law office. In the case of a single-member law office, the powers of the decision-making organ shall be exercised by the single member who shall make decisions in writing on all matters falling within the powers of the decision-making organ. Managing the affairs of the law office shall be carried out by one or more office managers elected from the members.[803]

4.3.11. Liability to discplinary action

a) Disciplinary offences:

A member of the bar association or a natural person registered into the bar association register who performs or voluntarily suspends the professional activities of an attorney-at-law or is subject to suspension as a penalty, shall be deemed to commit a disciplinary offence if

802 Üttv. 62. § - 65. §

803 Üttv. 87. § - 91. §

– when pursuing his professional activities as an attorney-at-law, he wilfully or by negligence violates his obligations arising from performing those activities as set out by law,

– the regulations of the Hungarian Bar Association and the statutes of the regional bar association (hereinafter: the "statutes") or in their code of conduct, or

– his wilful or negligent behaviour outside the scope of performing the professional activities of an attorney-at-law seriously jeopardises the good standing of the occupation of an attorney-at-law.[804]

b) Disciplinary penalties:

– a written reprimand,

– a fine,

– a ban from the public affairs of the bar association

– a ban from employing a junior attorney-at-law, and

– disbarment.

The disciplinary board shall impose a disciplinary penalty under its discretionary power, considering the gravity and recurrence of the disciplinary offence, the impact of the issue on the merits of the case affected by the disciplinary offence concerned, in proportion to the degree of the intent to commit the offence or the degree of negligence, considering all aggravating and mitigating circumstances found by the board, also considering whether the person subject to the proceedings rectified the injury he caused, or other penalties were imposed on him for the act that is the subject of the disciplinary action.

The fine shall be paid to the regional bar association where the person practising the profession of attorney-at-law is registered at the time of committing the disciplinary offence or, in the absence of such a regional bar association, to the Hungarian Bar Association. The regulations of the Hungarian Bar Association shall govern the use of fines.

The ban from the public affairs of the bar association shall prevail for a set period of time from the entry into force of the disciplinary decision; the minimum period of such a ban shall be one year while the maximum period shall be five years. During the term of the ban from the public affairs of the bar association, the person who committed a disciplinary offence shall not hold any office in the bar association; his right to vote and to stand for election shall be suspended, and he may not be appointed as a caretaker attorney.

A ban from employing a junior attorney-at-law shall prevail for a definite period of time. The term of the ban shall be at least one year but may not exceed five years from the entry into force of the disciplinary decision.

The term of disbarment shall be a minimum of three years but may not exceed ten years. During the term of disbarment none of the professional activities of an attorney-at-law may be pursued. Disciplinary penalties may be applied simultaneously.[805]

c) Suspension of practising the professional activities of attorneys-at-law:

The disciplinary board of the first instance may suspend the attorney-at-law from performing his professional activities if

– the person performing the professional activities of an attorney-at-law is subject to criminal proceedings due to a substantiated suspicion of an intentional offence, excluding

804 Üttv. 107. §

805 Üttv. 108. § - 109. §

any criminal procedure instituted by private prosecution or upon a substitute private prosecutor's indictment, or

– performing the professional activities of an attorney-at-law would prejudice or jeopardise the clients' rights, rightful interests or public trust in the profession of an attorney-at-law to an extent that exceeds the individual harm arising from the suspension of performing the professional activities of an attorney-at-law.

If the disciplinary board of first instance has imposed disbarment and has not suspended its enforcement, the professional activities of an attorney-at-law shall be suspended in the decision until the disciplinary procedure reaches administrative finality. A separate appeal, which has no suspensory effect, may be filed against this provision. The term of suspension shall be of six months and this term may be extended on one occasion by six months at most.[806]

4.3.12. The bar association

The Hungarian Bar Association and the regional bar associations (hereinafter: "bar association") are public bodies of those performing the professional activities of an attorney-at-law, operating on the principle of self-governance, performing professional duties and offering the representation of interests.

The bar association is not registered by regional courts; however, if any statutory regulation attaches legal effects to the registration of legal entities, these shall also apply to the bar association.

The bar association performs public duties related to professional guidance and representation of interests for those entitled to perform the professional activities of an attorney-at-law and to the security of the legal transactions that are linked to the performance of the professional activities of attorneys-at-law and specified in its statutes.

Persons entitled to perform the professional activities of an attorney-at-law may only have membership of one regional bar association in Hungary. Attorneys-at-law may operate a branch office in the area of any regional bar association.

Upon filing an application for membership, the applicant shall

– declare that no reason giving cause for conflict of interests applies to him,

– provide proof of compliance with the other requirements for admission to the bar association, and

– provide their data to be recorded into the register of the bar association for the regional bar association concerned.

Membership of a regional bar association shall terminate if

– the member of the bar association resigns his membership, on the day when he notifies the regional bar association of his resignation,

– the member of the bar association is either disbarred from the bar association or banned finally and definitely from performing the professional activities of an attorney-at-law, on the day when the decision on that reaches administrative finality,

– the member of the bar association becomes the member of another regional bar association through the transfer of his registration or, as a result of a change in the form

806 Üttv. 130. §

of operation, he is registered into the register of the bar association, on the day when the decision on that reaches administrative finality, or

– the member of the bar association dies, on the day of his death.

The regional bar associations shall establish the termination of membership ex officio, simultaneously arranging the deletion of the member from the register and the appointment of a caretaker attorney, if applicable.

The bar association shall terminate membership of a regional bar association if the member of the bar association

– fails to meet the requirements for admission to the bar association,

– fails to meet his obligation to pay the bar association membership fee or his payment obligation stemming from an enforceable disciplinary decision despite being called upon to do so,

– fails to eliminate the reason giving cause to a conflict of interests affecting him,

– is incapacitated or subject to supported decision-making,

– fails to take the attorney's oath by the prescribed deadline,

– fails to fulfil the obligation to participate in further training set out in the regulations of the bar association, or

– his tax number has been irrevocably deleted.[807]

4.4. The Attorneys' Code of Ethics in Hungary. Regulation 6/2018 (26.III.) of the Hungarian Bar Association (MÜK) on the ethical rules and expectations of the legal profession.

4.4.1. Preambulum

Respect for the legal profession is an essential condition for the rule of law and democracy in society. The widely recognised and respected principles of the European legal profession are essential for the proper functioning of justice, access to justice and the right to a fair trial. The Hungarian legal profession accepts and respects the Charter of the European Legal Profession adopted by the Council of Bars and Law Societies of Europe, which sets out the principles and core values of the legal profession as follows:

– Independence of the lawyer, free handling of the client's case;

– The lawyer's right and duty to keep the client's case confidential and to respect the attorney-client privilege;

– Avoiding conflicts of interest between different clients and between the client and the lawyer;

– The dignity and honour of the legal profession, the integrity and good reputation of the lawyer;

– Client loyalty;

– Setting fair fees;

– The professional competence of the lawyer;

– Respect for colleagues;

807 Ütv. 144. § - 151. §

– Respect for the rule of law and the fair administration of justice;
– Self-regulation of the legal profession.

4.4.2. General provisions

These Rules, in addition to the rules of conduct laid down in the Law on the Legal Profession, set out: 1. the standards of conduct applicable to the practice of the profession of lawyer; and 2. the serious breach of which constitutes a disciplinary offence if it is liable to undermine public confidence in the legal profession or to offend against the dignity of the legal profession.

Unless otherwise provided for in these Rules, the Rules of Conduct for Lawyers shall apply to practitioners admitted to the Bar and registered with the Bar.

These Rules shall apply to the acts and omissions of a practitioner of the profession of lawyer during his membership of the Bar or during his registration as a member of the Bar.

The mandatory ethical standards for cross-border legal services are set out in the Code of Ethics for Lawyers of the European Union of the Council of Bars and Law Societies of the European Union (CCBE) on cross-border legal services, as set out in Annex 1. The provisions of the Code of Ethics for Lawyers of the European Union shall be read in conjunction with the provisions of these Rules.

4.4.3. The duties of the lawyer

The practitioner shall use all legal means to enforce the rights and legitimate interests of his client, including, in the case of legal representation, communicating and exchanging information with the legal representative of the opposing party, with the consent of the opposing party or, in the absence of a legal representative, directly with the opposing party, and without undue influence on the witness, the expert and other participants in the proceedings.

The lawyer shall handle the case entrusted to him/her with knowledge of the facts, legally prepared, and with the client's factual presentations in mind.

The defence lawyer is bound by the facts presented by his/her client.

The practitioner shall not engage in conduct that is contrary to the legitimate interests of the client.

The practitioner shall respect the rules of procedure and the dignity of public authorities.

A lawyer practising as a lawyer must perform his duties with the same level of dedication, whether on a mandate, on secondment, in an employment relationship or as a probationary lawyer.

4.4.4. The obligation of legal professional privilege

A person bound by the obligation of professional secrecy is obliged to preserve the professional secrecy of the lawyer vis-à-vis all persons, with the exceptions provided for by law. If the practitioner represents or defends several clients in the same case, he is under no obligation of confidentiality towards the persons he represents in the case where the

facts of the case are identical. This fact shall be pointed out to the persons represented when the mandate is given, if the mandate is not given jointly.

Facts, data and information brought to the knowledge of the practitioner by a person who has misled the practitioner as to his identity shall not covered by legal professional privilege.

The practising lawyer shall be disciplined for duly informing his/her employees and assistants who are not subject to these Rules and who are subject to Article 10 (3) and (4) of the Act on the Activities of Lawyers, of their obligations of legal professional privilege and of the confidential nature of the information disclosed.

Bar association legal counsel and legal clerks are not responsible for ensuring that their client's employees or assistants maintain the confidentiality of any information that they may have obtained.

A practitioner shall respect the confidentiality of the other practitioner, shall not obtain or unlawfully acquire any information or fact covered by the confidentiality, or use any unlawfully acquired legal professional privilege.

The person entitled to have access to legal professional privilege

– the client,

– any person who, with a view to establishing a relationship with a lawyer or in the context of legal advice, has disclosed a fact or information which covered by legal privilege, irrespective of the establishment of the relationship,

– in the case of a contract of agency for the benefit of a third party, the principal in respect of the fact communicated by him, otherwise the represented party,

– the legal successor of the client; and

– the liquidator appointed by the court for the client.

The person entitled to dispose of the secret may grant a waiver of confidentiality. If there is more than one person entitled, the release shall be granted to all of them, unless otherwise agreed by them.

In the case of multiple heirs, any heir has the right to know the attorney-client privilege in relation to the disposition of the intestate succession made by the lawyer.

4.4.5. Conflict of interest

A person entitled to practise as a lawyer must pay particular attention to ensure that in the course of his work there is no appearance of any conflict of interest within the meaning of the Act.

A lawyer may not engage in any activity which does not violate a conflict of interest rule but which would undermine the dignity or independence of the legal profession.

Non-attorney activities that do not conflict with the conflict of interest rules must be clearly separated from the practice of law by the practitioner, with the exception of the bar association legal counsel and legal clerks.

If a lawyer is elected as an officer or member of a public body, NGO or other organisation, he/she may not use this capacity for his/her own benefit or for the benefit of his/her clients, nor may he/she use the designation of this capacity in the course of his/her activities as a lawyer.

In the exercise of his or her activities, the right to practise as a lawyer may not in any way rely on his or her office as an official or other elected position in a public body, NGO or other organisation, or engage in any conduct which suggests that he or she is in a better position to deal with any matter.

4.4.6. The mandate of a lawyer

The mandate of a lawyer may relate to any activity that may be performed by a lawyer under the Act. If the mandate is given to a law firm or a European Community law firm (hereinafter together referred to as "law firm"), the mandate shall be signed by the person authorised to represent the law firm. The law firm may, in its articles of association, by a decision of a general meeting or by ad hoc authorisation, delegate the power to accept the mandate to another member.

If the practitioner of the profession of a lawyer uses standard terms and conditions for the conclusion of the engagement agreement, the client must receive them in writing and in a verifiable manner at the same time as the mandate.

Conduct that undermines public confidence in the legal profession, even at the stage of the creation and content of the engagement agreement, is unworthy of a lawyer. The standard terms and conditions cannot be dishonest in accordance with section 6:102 of the Civil Code and the client's attention must be drawn to the specific provisions of the mandate, in particular the clauses concerning liability for results, liability for damages and termination of the mandate.

If the lawyer acts on the basis of a permanent mandate from an estate agent or a third party, he must also have a written mandate from the person on whose behalf he is acting.

The principal may mandate several lawyers, law firms, European Community lawyers, European Community law firms or foreign legal advisers with the case who 1. dealt with together in whole or in part with the case; or 2. carry out certain specific partial tasks independently.

If, depending on the nature of the mandate, different lawyers may be appointed for certain tasks, the engagement agreement must specify the division of work between the lawyers and which lawyer will be in contact with the client.

Practitioner of the profession of lawyer 1. may not accept a mandate to perform what would be contrary to public mores beyond what is provided for in the Act on the Activities of Lawyers, 2. may conclude a transactions with his/her client during the term of the mandate for his/her own benefit or for the benefit of his/her close relatives within the meaning of the Civil Code, in relation to the subject of the mandate or in connection with the mandate, with the exception of a fee arrangement for a lawyer, save with the consent of the president of the competent regional bar association, 3. may not conclude an agreement to advance bail from his/her own assets in criminal proceedings, 4. if the principal has already another lawyer, the lawyer may accept the mandate only if the termination of the previous mandate has been certified by the principal or the previous lawyer has consented to the joint appointment.

The lawyer shall provide the principal with the following information:

– the name of the lawyer, the legal form in which the lawyer is practising (sole practitioner or law firm), the address of his/her office and his/her sub-office if any, telephone and fax numbers and e-mail address;

– the name and address of the regional bar association in line with the address of the office of the lawyer;

– the tax number of the lawyer, including the EU tax number, if any.

The lawyer must act within the framework of the mandate, and may only deviate from it in exceptional cases and only if he has not had the opportunity to discuss the matter with the client beforehand and the deviation is in the interest of the client. The client must be informed of this in writing without delay.

The lawyer is entitled to independent data collection for the purposes of the performance of the mandate within the limits of the law.

Within the framework of the facts presented by the client, the lawyer shall, unless the client expressly provides otherwise:

– before the liability to pay public charges arises, the public charges directly related to the legal transaction, declaration or legal proceedings concerned by the execution of the mandate, as well as of the possibility of claiming exemptions from or reductions in such charges, the conditions thereof, the procedure and time limits for such exemptions and reductions,

– the likely direct legal consequences of the legal transaction or declaration intended to be made; and

– the public authority procedures required in connection with the a legal transaction or the declaration to be made provide the client with relevant information. The obligation to provide information does not extend to the elaboration of scenarios other than the facts communicated by the client, nor to a legal assessment.

The practitioner shall, without undue delay after becoming aware of it, notify the client's death or the termination of the mandate to those who, to his knowledge, have rights and obligations in connection with the subject matter of the mandate.

4.4.7. The lawyer's fee

If the lawyer is not acting as a favour (i.e. free of charge, pro bono), the mandate must state the fee or the express agreement of the parties as to when and in what form the fee will be agreed.

The lawyer may provide legal services without remuneration

a) in the framework of a voluntary activity in the public interest,

b) to a socially deprived natural person under the Personal Income Tax Act,

c) to a relative within the meaning of the Civil Code, and

d) on an ad hoc basis, to a natural person who is acting in the course of his or her non-businesslike economic activity and who has a close personal relationship with the lawyer which can be proved.

The method, time and conditions of settlement, the collateral, legal consequences and the possibility of set-off shall be specified in the engagement agreement. The fee for legal advice shall be communicated to the client prior to the commencement of giving legal advice. The provision of legal services without a fee does not exclude to charge the costs or overhead. The fee may be a flat fee, an hourly fee, a fixed or percentage fee based on the value of the subject of the engagement, a success fee under the conditions set by law, or a combination of these.

It is forbidden to demand any material or other consideration in addition to the agreed fee and the chargeable costs. If the assignment is terminated before its completion, the lawyer is obliged to make account in writing the fees already received, but may retain the fee received in proportion to the work performed until the termination of the mandate. The obligation to make account shall not be affected if the principal disputes its content. In the event of a dispute, the lawyer must prove occurrence of the making account.

4.4.8. The power of attorney. The defence activity

The power of attorney must contain the information on file necessary for the identification of the lawyer. The power of attorney authorises the lawyer to perform all acts towards a third party which are related to the proper performance of the case entrusted to him/her. The lawyer shall immediately notify the court or authority in charge of the proceedings of the power of attorney received, its amandment or termination, and the opposing party or its legal representative of its termination, and shall submit his/her power of attoney to the proceedings.

The provisions of defense activity shall apply to defence activities with the exceptions set out in this section. If the future assignment of the defender is made without prejudice to the previous defender's assignment, the defender shall immediately inform the previous defender about this intention of the assignee, ask for his/her opinion and, in case of refusal, refuse to accept the assignment. Where a joint defence is established, the defenders shall cooperate. The defender shall not accept a mandate or assignment for the defence of persons with a conflict of interest.

In the case of the defence of more than one person in the same case, the defender shall inform the client in writing at the time of the conclusion of the mandate or after the appointment as public defender, in his statement of facts, that if a conflict of interest subsequently arises, the defender shall terminate all mandates or, in the case of an appointment, request his own dismissal.

If a public defender has already been appointed by the authority, the assigned defender shall notify the appointed public defender about the assignment without delay.

A substitute defender, appointed to replace an appointed public defender shall promptly and in a verifiable manner report to the appointed public defender on the procedural steps taken in the absence of the appointed public defender, and shall communicate to the appointed public defender all available information in the case, and provide all documents which may be used for the effective defence.

In the performance of his/her duties, the defender shall

– is present, as far as possible, at the investigative or evidentiary act, and during the act facilitates the defence with his or her conduct,

– the defender is free to decide on the tactics of the defence, taking into account the interests of his or her client, and, on the basis of the same principle, and within the lawful limits, the defender decides on the use of the evidence at his disposal, its order and timeline,

– in his or her statements, he or she shall avoid making any adverse assessment of the person or activities of the conflicting defendants beyond what is necessary for the defence.

The defender shall submit his/her authorisation to the competent authority without delay after accepting the mandate, at the same time - within a short time after the public defender becomes aware of the appointment - request information on the status of the case

and immediately initiate personal contact with the client in custody. During the period of the restriction of personal liberty, the defender shall adapt the frequency of contact to the case and the professionally justified needs of the client.

The defender shall act in the best interests of his or her client to the best of his or her knowledge and belief. The assigned public defender shall be entitled to inform the charged person or, subject to the attorney-client privilege, any other person with regard to the possibility of the mandate.

The defender informs the client of the status of the case, the expected procedural steps, rights and obligations, and the possibility of reaching a settlement according to the current status of the case. The defender may inform the client's relatives or any other person, taking into account the interests of the charged person, in the event of a waiver of the attorney-client privilege in this respect.

In the case of a lawyer's prison visit, the defender shall comply with the rules of the detention facility, while at the same time demand the full exercise of the rights of the defender.

In the performance of his or her duties, the defender shall not contradict the client's factual statements. In the event of his client's denial, he or she shall not engage in any conduct which might give the impression that he or she has doubts as to his client's lack of criminal responsibility or which might lead to the conclusion that the accused is guilty.

The defender shall exercise the right of appeal in all cases, when 1. there is a legal possibility to do so and the defendant has exercised it, or 2. he or she is certain that his or her own appeal serves the interest of the defendant.

The defender shall inform the authority and the court of the fact of termination of the mandate without indicating the reason of the termination.

4.4.9. Requirements concerning advertising in connection with the activities of lawyers and external communications by lawyers

A lawyer, law firm, European Community lawyer, European Community law firm and foreign legal adviser is entitled to provide information to the public about the provided services, supposing that the information is accurate, not misleading and does not infringe the principles and fundamental values of the lawyer as set out in the Preamble.

Information on the activities of the lawyer shall not conflict with the provisions of other legislation on the prohibition of unfair market practices, commercial advertising, advertising by electronic means and the provisions of these Rules.

In the provision of information and advertising concerning the activities of lawyers, increased care and caution shall be taken to ensure that the duty of keeping professional secrecy and the dignity of the legal profession are respected, and that advertising concerning the activities of lawyers is compatible with the lawyer's contribution to the administration of justice and his or her role in the rule of law and democratic society.

Advertising concerning the activities of lawyers cannot

– reduce public confidence in the legal profession or the administration of justice,

– be aggressive or harass the client,

– make comparisons with other lawyers concerning quality, efficiency or remuneration that are contrary to the limits of comparative advertising,

– make reference efficiency of the lawyer's track record or the number or importance of clients,

– take advantage of the potentially vulnerable or constrained situation of the client, in particular cannot take advantage of a specific misfortune known to him or her or the circumstance seriously limiting the client's judgment, in order to influence the client's decision to choose a lawyer.

A lawyer must not create a reputation or even the appearance of that, that he or she can obtain a more favourable result in a particular court or before a particular authority generally or in particular matters than other lawyers or that he or she can settle the case more quickly.

When informing the public about court cases, judgments, the cases he/she represents and other public appearances, the lawyer shall act objectively and in a manner befitting the prestige of the legal profession, while refraining from promoting his/her person.

4.4.10. The lawyer's website

The lawyer's website, the lawyer's profile on a social media platform or other presence of the lawyer on the Internet (hereinafter together referred to as the "lawyer's website") may contain objective content compatible with the dignity of the legal profession.

The members of an lawyers' association may maintain a common website. The lawyer's website may not maintain a guest book, a counter indicating the number of visits to the website in a publicly accessible manner, nor may it collect visitors' e-mail addresses. The lawyer's website may contain links to other websites only in professionally justified cases. Separate websites of members of an lawyers' association may refer to the website of the other member of the association. In the case of a reference to another lawyer's website, the lawyer shall, at the request of the Bar Association, provide evidence of the facts justifying the reference.

The home page of the lawyer's website shall contain the information approved by the regional bar association in a clearly visible and legible manner, as well as a link to the website of the regional bar association. The case handled by the lawyer and the client represented cannot be named on the lawyer's website. This does not preclude the lawyer from indicating in general terms the type of case or client he or she represents in the description of his or her activities.

The information concerning the amount of the lawyer's fees (hereinafter: "fee information") shall be on the lawyer's website objective, accurate, not misleading and not comparative. The rules on advertising for lawyers shall apply to the fee information, except that it shall clearly state

– the activity of the lawyer concerned by the fee disclosure,

– the basis and amount of the fee,

– whether the fee covers the costs of the performance of the contract,

– the foreseeable costs incurred in connection with the performance of the case which are not included in the fee,

– where a discount is announced, the amount and the conditions under which the lawyer will grant a discount from the fee published in the fee information, where the discount to be granted, should be compatible with the dignity of the legal profession; and

– the information that the fee in the lawyer engagement contract may not be deviated, to the detriment of the client, from the published fee information prevailing at the time of the conclusion of the contract.

The lawyer is responsible for the content of the lawyer's website. A lawyer who cooperates in any legal relationship with a foreign lawyer, foreign law firm, European Community lawyer, foreign legal adviser, auditor, other national or foreign firm or other legal person or entity without legal personality is also responsible for that content of the website of the collaborator of the lawyer, which refers to the lawyer.

4.4.11. Relations of the practitioner with other practitioners, the opposing party, the court and other authorities

The practitioner may not initiate a conciliation with the opposing party without the consent of the opposing party's legal representative. If the necessity of a hearing with the opposing party arises, the lawyer shall inform his/her client without delay. The lawyer may also contact the opposing party directly if the opposing party does not have a legal representative or if the designated legal representative does not respond to the request within a reasonable time.

The lawyer may only be present at enforcement proceedings ordered by a final decision of a public authority. The legal practitioner may not intervene in an act constituting a trespass. The submission of a practitioner shall not contain statements or communications that are discriminatory or offensive to human dignity.

The person entitled to act as a lawyer shall provide services to the opposing party through its legal representative, unless the legal representative expressly provides otherwise.

The person entitled to practise as a lawyer shall send a copy of his or her pleading in due time, preferably at the same time as it is lodged, without any special request, to the electronic mail address of the opposing party's legal representative known to him or her, unless the legal representative expressly provides otherwise.

A practitioner shall avoid making remarks which are offensive to other practitioners and to certain categories of practitioners in general, and shall avoid denigrating or characterising other practitioners in a negative way.

The practising lawyer may use correspondence and offers relating to the out-of-court settlement in legal proceedings only with the consent of the opposing party's legal representative.

The practitioner shall inform the opposing party's legal representative without delay if he is unable to respond to his offer or request within a reasonable time.

If, after the termination of the mandate, the client has entrusted another lawyer with the representation of the client, the former lawyer shall provide the new lawyer with the information necessary to represent the client in the case effectively.

A practitioner may only communicate to his client a different legal opinion on the work of a former practitioner and may not criticize the work of a former practitioner.

The practitioner shall refrain from all unfair forms of solicitation. In particular, it is an unfair form of obtaining a client if he asks or accepts remuneration from a third party for having referred the client to him or if he uses an intermediary or a courier for remuneration.

If the lawyer requests the postponement of the hearing or other action due to a justified impediment to the exercise of the lawyer's profession, the opposing party's legal representative shall consent to the postponement, provided that his client has not objected to it and the postponement does not prejudice his interests.

If a lawyer becomes aware of an infringement by a court or public authority and is unable to remedy it by the available legal means, he/she shall request the intervention of the Bar Association.

Unless otherwise provided for by the parties, if the substitute lawyer initiates the termination of the substitution mandate with the substituted lawyer, the substituted lawyer shall within 30 days arrange for the establishment of a new substitution mandate and its registration in the Bar Register.

4.4.12. Relations between the lawyer and the Bar Association. Ethical expectations of the legal practitioner

The practitioner shall comply with the rules and decisions of the Bar in the conduct of his/her activities. A lawyer shall comply with the following requirements: 1. any ad hoc request by the Bar Association, based on law or the Bar Association's internal rules, 2. the lawyer's response and attachment of documents sent by the lawyer's liability insurer in the course of an insurance claim settlement procedure on matters affecting the existence or extent of the lawyer's liability.

A practitioner, whether or not he/she makes a statement, shall submit to the Bar Association and its bodies, upon request, the documents relating to the case in the event of a complaint or disciplinary proceedings against him or her, and in the case of a barrister or legal adviser, the documents over which he or she has the right to exercise control.

The practitioner shall notify the regional bar association, indicating the name of the competent authority or court and the case number, if

– he was heard as a suspect in proceedings for public prosecution,

– in a private prosecution or in proceedings for a supplementary private prosecution, the court has finally and conclusively established his or her guilt,

– except at the office, place of business, seat, establishment, branch or other premises of the Barrister and the legal adviser's client, his office is searched.

A lawyer shall, in the course of his/her proceedings and trials, in accordance with the traditions of his/her profession, deal with members of the courts, public authorities and all others with whom he comes into contact in the course of his/her proceedings, and shall accord them the respect and esteem due to him/her and expect the same from his/her fellow professionals.

The practitioner shall draw the attention of the client to the rules of judicial and official procedure, to the need to observe them and to respect the dignity of the court and the authority.

A lawyer shall wear a black robe, reaching at least to midcalf and with a green trim at the neck, when representing a client in court and in courtroom proceedings, unless the judge presiding at the hearing grants an exception.

The Presidency of the Hungarian Bar Association may issue a non-binding recommendation concerning the appearance of the robe.

A practitioner of the profession of lawyer shall: 1. prepare and present his or her statements and particularly pleadings in a legally sound and demanding manner, 2. pay particular attention to the quality of his application for review before the Curia and his application to the Constitutional Court.

Practitioners of the legal profession shall fulfil their obligations towards each other with increased diligence, maintain good collegial relations and conduct their work in accordance with standards of courtesy based on mutual trust.

In the exercise of this activity, the practitioner shall refrain from disputes arising from personal animosity between the parties and shall encourage his clients to behave in the same way.

If, in the exercise of their profession, the persons entitled to practise as lawyers have a disagreement or dispute with each other, they shall endeavour to settle the dispute by amicable means, if necessary by recourse to the conciliation forums of the regional bar association.

If proceedings against a legal practitioner appear justified in connection with his or her activities and the nature of the dispute so permits, the person concerned shall be notified in advance and invited to comply voluntarily, setting a reasonable time limit.

In the event of a termination of the mandate by the client, the new mandate holder shall, to the extent possible, assist the former mandate holder in obtaining a fair remuneration commensurate with the work performed.

The activities and membership of a lawyer in a business company or other organisation shall not be prejudicial to the reputation of the Bar.

The practitioner shall not, by failing to inform, failing to comply with an instruction, failing to communicate personally or by any other conduct, jeopardise the client's general confidence in the profession of lawyers and the legal profession.

4.5. Closing thoughts

a) With regards to defence activities and their legal theoretic definition, I first and foremost believe that the defense counsel shall not be considered neither the representative of the defendant, nor the assister of either the defendant or the court, but should be defined as an autonomous subject independent from all other participants of the proceedings. My main reason to believe so is that persons (see lawyers) acting as defense counsels i) based on their legal expertise provide the same type of work that can be evaluated as law enforcement activities similar to those of other enacting authorities, and at the same time ii) may not be ordered while doing so, as the determination of the defence strategy is executed exclusively by their own discretion.

b) I consider the current form of the scope of activities as well as the training system of being a lawyer rather disquieting. In my view, an unambiguous system of specialist examination differentiated by branches of law would be necessary, particularly with regard to the actual sphere of activities of lawyers freely chosen by the candidate. Should somebody desire to work as a defense counsel, he should enter examinations in criminal law, criminal procedure law, criminology, forensic science, psychology, law ethics as well

as lawyer's procedures related to criminal matters, and should do so before an examination board consisting of defence attorneys exclusively.

c) I also have some critical remarks in relation to the legal regulation of the legal status of the defense counsel: the first major problem is linked to the prosecutor and its presence in proceedings. According to the basic rule, the law in the act of the latter procedure solely requires the presence of the representative of the prosecutor's office, whereas no such general requirement with regards to defense counsel has been defined. This question raises concerns at the level of the rule of law in particular, when – contrary to the defense counsel – the prosecutor is present at the proceeding. I find this such a serious legislative mistake that should be remedied within reasonable time – if not for other reason, that to comply with the international requirement of the defendant's "right to fair proceedings".

I also consider it necessary that the criminal procedure should "evaluate" the sphere of activities of the defense counsel as well as the representative of the prosecutor in the hearing for evidence before court. The first step towards this would be the regulation of the "cross-examining" system as legal baseline. Based on not only practical but theoretical grounds as well, I believe that the fact-finding and pragmatic work at the judicial stage should be the task of the prosecutor as well as the defendant. Bias towards prosecution or defence, as well as the previous knowledge on the subject of the case allows a more adequate and targeted questioning, and thus it may be easier for the judge as "outsider" to evaluate the material of the evidence, and therefore the oft-mentioned "prejudicial risks" could be decreased.

In respect of the procedural rights of the defendant I would also like to highlight my concerns with regards to the regulation of the examination of the witnesses. Although this chapter does not examine the investigation phase, the defense counsel nevertheless should be granted the right to be present at the examination of not only the witnesses summoned by him but also the ones summoned by the prosecutor's office, and should be able to interrogate these witnesses directly. The right to defence includes the right to effective defence, and as such, it cannot be subordinated to the criminal investigation interests of the law enforcement authorities.

The next problem in relation to the procedural rights of the defense counsel is linked to expert evidencing. First of all, I consider it extremely perilous from the requirement aspect related to "fair procedures" that the delegation of experts suggested by the defense counsel is solely incidental, whereas expert opinions gained within their own powers by the investigating authority or the prosecutors – prior to the judicial proceedings – inevitably land on the "judge's table". I believe that it should be stipulated at the investigation or accusation stage that „if an expert opinion related to the case is already available to the investigating authority or the prosecutor and the defendant or the defense counsel also suggests the delegation of an expert, then the investigating authority or the prosecutor should {mandatorily} approve the defense counsel's suggestion on the delegation of an expert".

With regards to pleas, I consider it necessary for the criminal procedure to stipulate their fundamental elements – especially because by prosecutor's statement, certain fundamental criteria are determined with utmost precision but at the same time respecting rhetoric freedom. For this reason, I believe that amongst the relevant regulation related to pleas it should be at least imposed that „if the defense counsel submits an alternative

suggestion beside his submission for exoneration, then he should be obliged to submit a suggestion for the applied penalty or relevant measures".

With regards to the defense counsel's procedural rights, I would also mention experienced regulation problems related to revisions or review procedures, namely, that in the case of the present procedures, practicing the right of defence procedure initiation may be dependent on the will-decision of the defendant. In the case of both constructions, I find this legislative decision erroneous, since the reasons for the initiation of the above mentioned procedures i) are of a nature the recognition of which may almost exclusively be possible for a person experienced in legal matters; ii) ever since their existence, they refer to such unfavourable situations before the remedy of which should not be potentially prevented by the prohibiting statement of the defendant.

Finally, in relation to the interpretation of the sphere of action of the defense counsel, I would like to mention the tendency that is nowadays more and more illustrative of the criminal law enforcement mechanisms of the different states, namely, the different simplifying or diversionary models. What kind of consequences would the possible proliferation of these imply with regards to the future of the activities (or possibly the justification for the existence) of the defense counsel? First of all, I believe that the elimination of judicial work as a contradicting form of procedure may not appear as a long-term legislative goal neither in Hungary, nor at international level. Criminal procedures should not be shifted towards civil rights; it should ultima ratio always maintain its decision-making mechanism, in which the decision in the question of criminal responsibility is made as a result of the joint efforts of the judge, the prosecutor and the defense counsel. In other words: does the defense counsel's profession have a future? Yes, absolutely. But whether we shall meet lawyers as defense counsels or another new agent under a special denomination as participants of the judicial proceedings is another question.

CHAPTER V.

THE INVESTIGATION AND THE PROSECUTOR'S PHASE

5.1. Introduction

Investigations are - traditionally - the first stage of criminal proceedings. Its main purpose is to obtain and record evidence and to decide whether to prosecute, to proceed to an alternative procedure or to close the investigation.

Investigations are usually launched ex officio or on the basis of a denunciation. In principle, anyone can file a criminal complaint, and in some cases it is mandatory.[808]

The police have a major responsibility to ensure that a well-founded decision is taken at the end of the investigation. This is greatly influenced by the forensic methods chosen by the authorities. „Criminal investigation is a multi-faceted, problem-solving challenge. Arriving at the scene of a crime, an officer is often required to rapidly make critical decisions, sometimes involving life and death, based on limited information in a dynamic environment of active and still evolving events. After a criminal event is over, the investigator is expected to preserve the crime scene, collect the evidence, and devise an investigative plan that will lead to the forming of reasonable grounds to identify and arrest the person or persons responsible for the crime".[809]

In Hungary, the knowledge required for police work is not taught at law schools, but at police faculties. This is justified, as police work requires completely specific expertise and preparation. This is not comparable to the work of a lawyer or a prosecutor.

As far as the tasks of the prosecution service is concerned (CPC), the prosecution service shall (1) act as the public prosecutor; (2) investigate; (3) supervise the lawfulness of detection; (4) control the examination; (5) conduct preparatory proceedings, and (6) carry out its tasks specified in this Act in a preparatory proceeding conducted by another organ. The superior prosecution office shall supervise the exercise of the supervisory and control powers of a prosecution office.[810] In addition, the Prosecutor's Office is responsible for overseeing the enforcement of sentences, and has a special role in international criminal cooperation. It follows that the function of this organisation is extremely complex. It is no coincidence that the law places the preparation and investigation phases of criminal proceedings entirely under the control of the prosecution service.

808 For example, failure to report corruption offences is punishable under Hungarian law.

809 „In addition to questioning affected individuals and witnesses, the police are responsible for securing possible evidence left by the suspect. This may include fingerprints, skin particles or indications of physical injury inflicted on victims. The police can also carry out further investigative measures, such as conducting searches, seizing documents or obtaining information from public authorities; where serious criminal offences are concerned, intercepting telecommunications might also be an option. In that process, the police cooperate closely with the public prosecutor's office or the investigating judge". https://pressbooks.bccampus.ca/criminalinvestigation/chapter/chapter-1-introduction/ (09.03.2024.)

810 CPC 25. §

In the reform of the Criminal Procedure Code, the legislator introduced the „preparatory procedures", which can take place before the investigation. The purpose of this stage is to establish the suspicion of a criminal offence, whereas the purpose of the investigation is to confirm this suspicion. In the following I will describe these procedural stages.

5.2. Preparatory procedure (CPC)

The aim of the preparatory procedure is to determine whether the suspicion of a crime is present. This takes place, when the available data is insufficient for the determination of the crime, and it can be expected that, based on the preparatory procedure a decision can be made whether the preparatory procedure should be terminated or an investigation should be ordered.

The preparatory procedure can be carried out based on
– observation by the authority,
– denunciation or
– the result of covert data collection.

The preparatory procedure can be carried out by the following bodies:
– the prosecutor's office,
– the investigating authority,
– the internal crime prevention and forensics body of the police,
– the police's counter-terrorism unit.

The body that carries out the preparatory procedure may carry out the following activities:

– application of some covert instruments that are not tied to judicial or prosecutorial permissions (use of secretly cooperating person, data gathering and control, covert surveillance);

– use of some covert instruments that are bound to permission by the prosecutor (surveillance of payment operations, false purchase, undercover agent);

– application of all covert instruments bound to judicial permissions (but only against the person that is suspected to be the perpetrator or of whom can be presumed that he was in contact with the perpetrator, and the obstacles for giving testimony shall be observed);

– carrying out data gathering activities (but a warrant cannot be issued and data provision can only requested from certain bodies).

Generally, the preparatory procedure can last up to 6 months (in case of crimes where covert instruments bound to judicial permission are applied, this term is 9 months). If the preparatory procedure is not carried out by the prosecutor's office, the body that does shall inform the prosecutor's office within 24 hours of the ordering of the preparatory procedure indicating 1. data that form the base for the necessity of the preparatory procedure, 2. the covert instruments desired to be applied and 3. the planned procedural actions. After this, the prosecutor's office shall be notified at least bi-monthly.

If, based on the data gathered during the preparatory procedure, suspicion of a crime can be determined, investigation ought to be ordered. In this case, the documents and data shall without delay be handed over to the competent investigating authority or prosecutor's

office. The application of covert instruments bound to judicial (prosecutorial) permission can pursue without new permissions.

The preparatory procedure shall be terminated if
– based on the acquired data, there is no suspicion of a crime,
– no result can be expected from the continuation of the preparatory procedure or
– the term for the preparatory procedure has expired.

In these cases, the acquired data cannot be used as evidence in a criminal procedure.[811]

5.3. The investigation (CPC)

If there is no preparatory procedure, the criminal procedure commences with investigation, cleaning up and examining. The aim of cleaning up is the determination of objective and personal reasonably suspicion, and to search and ensure the means of evidence. During the examining (if necessary, by way of gathering and examining mean of evidence) the prosecutor's office decides on the closure of the investigation (termination of the procedure or indictment).

5.3.1. Initiating of the investigation

The investigation is initiated by the prosecutor's office or the investigating authority based on knowledge gained of data within official scope of authority, denunciation or covert data gathering. The victim (if known) shall be informed of the ordering of the investigation. In cases that cannot be delayed, any investigating authority can carry out procedural actions. He is obligated however to immediately inform the authoritative investigating authority about this fact.

a) Criminal procedure from ex officio:

The investigation can also be instituted based on acquired knowledge of data by the prosecutor's office's or investigating authorities scope of jurisdiction furthermore the member of the prosecutor's office or investigating authority in its official qualification. Accordingly, no denunciation is necessary for the initiating of a criminal procedure.

b) The denunciation:

In a criminal procedure, there is a general denunciation right. Anyone can denounce a crime indicted by the public prosecutor, but 1. in private prosecution cases, only the person entitled to private motion may denounce; 2. criminal procedures concerning abuse of qualified data can be only denounced by the body (person) that carried out the qualification; 3. perjury, until the main proceeding in which perjury has been committed is concluded, only initiatable by the denunciation of the proceeding authority of the main proceeding.

Generally there is no obligation to denounce but the member of the authority, the official functionary and the public body (if the law commends this) are obligated to denounce prosecutable crimes of which they have gained knowledge within their scopes

811 HERKE, ibid. 24 – 25.

of authority (however, after legal power, they do not have to denounce, but inform the prosecutor's office who collaborates with the court deciding the permissibility of retrial, and the Prosecutor General in case of judicial reviews. However, in certain cases as determined in the Criminal Code everyone is obligated to denounce a crime.

A crime can be denounced to any authority. If 1. done at the investigating authority or prosecutor's office with jurisdiction and competence, he shall proceed; 2. done at the investigating authority or prosecutor's office without jurisdiction or competence, he shall transfer the procedure (the case however shall immediately be registered); 3. not done at the prosecutor's office or investigating authority, then the authority registering the denunciation (e.g. court, notary, etc.) shall send the denunciation to the investigating authority or prosecutor's office with jurisdiction and competence (in case crimes within the exclusive investigative scope of authority of the prosecutor's office, the denunciation shall be sent to the prosecutor's office).

The following actions can be taken within 3 days of reception of the denunciation (in case there is no need for transfer or sending): 1. rejection of the denunciation, 2. completion of the denunciation or 3. order of the investigation.

The denunciation can be rejected if there is an obstacle for the conduction of the criminal procedure. This obstacle can be one of the classic procedural obstacles (such as absence of crime, lack of evidence or culpability, res iudicata) but there are numerous other reasons for rejection of a denunciation.

Simple reasons for rejection of denunciation:

– the action is not a crime;

– lack of the suspicion of a crime;

– apart from the necessity for involuntary treatment in a mental institution, there is ground for exemption from punishability;

– simple grounds of the reason for ceasing the punishability (death, statute of limitation, clemency);

– res iudicata,

– procedural obstacles that cannot be overcome (absence of private motion, denunciation or decree by Prosecutor General),

– the case does not fall under the jurisdiction of Hungarian law.

Further proceedings initiated with the rejection of the denunciation:

– the denunciated action is not indicted by the public prosecutor (the victim shall be sent the decree of rejection with the addition that he shall have 1 month to act as a private prosecutor);

– the rejection by decree (in case the denunciated action is only a misdemeanour, the appropriate authorities shall be informed by sending the documents).

Specific reasons for rejection of denunciation:

– concerning a cooperative person, or

– concerning an undercover agent.

Res iudicata as an excluding reason for procedure appears as a basic principle in the CPC. According to the act, the criminal procedure cannot be initiated (the already initiated criminal procedure shall be terminated), if the action of the perpetrator (defendant) has already been adjudicated (exception: extraordinary remedy procedures and certain special procedures), even when

– the action effectuates multiple crimes, but the court (in accordance with the indictment qualification) does not determine the defendant's guilt due to all the crimes as determined by the finding of facts of the indictment;

– the defendant's responsibility is determined as misdemeanor;

– adjudication shall take place in another member state of the European Union.

In case of a crime pursued to private motion, the case can only be initiated or continued by the entitled person. This needs to be motioned within 1 month from the day that the person entitled to private motion acquired knowledge of the crime. If it comes to the attention that the crime is punishable following the actuation of the criminal procedure only upon private motion, the person entitled to advancing the private motion shall provide a statement. From calling upon this, there is a term of 1 month available for this.

The prosecutor's office or the investigating authority shall order completion of the denunciation if based on the available data, it is not possible to order investigation, to rejection of the denunciation or the transfer of the case. For completion of the denunciation the following can be requested within 1 month:

– providing information,

– providing documents and data,

– notification of the damage (substantial value, decrease of tax revenue, decrease of customs revenue, committing value); and

– acquisition of permission by General Prosecutor for crimes committed abroad by non-Hungarian citizens.

If the denunciation cannot be rejected, and a decision can be made concerning the order of the investigation (i.e. the completion of the denunciation is not required), the prosecutor's office or the investigating authority shall order the investigation. The investigation can last 2 years from the moment of questioning of the suspect. In case of juveniles this is 1 year if the procedure is in progress for a crime that cannot be punished with a prison sentence of more than 5 years.

c) Gathering covert information:

Criminal procedure can be ordained based on data from covert information gathering. In this case covert information gathering is ordered by other laws (laws on the prosecutor's office, the police, the National Tax and Customs Office or the national security services), but its results shall be used within the framework of the criminal procedure.

The result of covert information gathering that is bound to judicial/external permission can be used as evidence in a criminal procedure when the body entitled to initiate criminal proceedings decides within 3 days based on the covert data gathering on the initiation of a criminal procedure, or the use of it in an ongoing criminal procedure. In this case, the application of covert instruments needs to be permitted newly. The document attesting the legitimacy of the ordering and execution of the covert information gathering shall also be enclosed. The fact of the ordering is attested by president of the tribunal court.

The result of covert information gathering can be used in a criminal procedure as evidence if 1. it is used for proving a crime, for which the application of covert instruments bound to judicial permission could be possible (according to CPC); 2. the body carrying out covert information gathering initiated the initiating of the criminal procedure within 8 days (national security service, counter terrorism unit: within 30 days, in exceptional

cases: within 1 year) of acquiring the data. The result of covert information gathering that is bound to external permission may exclusively used for the proof of guilt of the person mention therein. If no person involved is determined, it can be used against anyone.[812]

5.3.2. Cleaning up

The first main phase of investigation is „cleaning up". According to CPC the investigation shall be carried out in a short a time frame as possible. If since the ordering of the investigation 6 months have come to pass the investigating authority presents the documents of the investigation to the prosecutor's office (after this half-yearly) and shall report on the standing of the investigation.

During cleaning up, the prosecutor's office and the investigating authority create a written protocol on the procedural actions. In some cases continuous audio and video recording are made, and notes on the taken measures.

The CPC records which investigative actions the prosecutor's office and the investigating authority have to adopt decision. These can be formal issues (such as transfer) or substantive decisions (e.g. rejection of denunciation, suspension or termination of the procedure) and decisions on coercive measures and the adjudication of complaints.

During cleaning up, the principal of limited publicity is valid, i.e. during the procedural actions, only the persons summed up by the law can participate:

– the prosecutor, the member of the investigating authority and the keeper of minutes in all cases;

– the victim (and one adult person specified by the victim) can be present at the hearing of the expert in connection with the crime committed to his detriment, at the inspection, reconstruction and the presentation for identification;

– the consular functionary of the foreign national defendant, victim or witness at the questioning of the given person and other procedural actions with his participation.[813]

Coercive measures during cleaning up:

According to CPC human dignity shall be respected during criminal procedure and the right to freedom and personal safety shall be ensured. There are four conditions for limitation of fundamental rights:

– only in procedures determined in CPC,
– only due to reasons determined in CPC,
– only in a manner as determined in CPC and
– only in the degree as determined in CPC.

Basic principle in general provisions for the application is that the authorities have to strive that the given coercive measure limits the fundamental rights of the involved person only to the most necessary extent and time. Accordingly, a graver coercive measure can only be ordained if the intended aims cannot be ensured with lesser coercive measures or other procedural actions.

812 Herke, ibid. 27. – 28.
813 Herke, ibid. 28. – 29.

The coercive measures can be gruped by 1. procedural law aims, and 2. the limitation of human rights due to the measure. Division of the coercive measures according to 1. subjects and 2. attachment to the decision.

According to procedural law aims, coercive measures can be directed at:

– ensuring the presence of the participants of the criminal procedure or other persons (e.g. apprehension, arrest),

– ensuring the absence of the participants of the criminal procedure or other persons (e.g. restraining order, leading out or expulsion from trial),

– for the acquisition of means of evidence (e.g. search, body search, seizure),

– to ensure the unperturbed execution of evidentiary actions (e.g. application of bodily force),

– maintenance of the procedural order (e.g. disciplinary penalty),

– prevention of delay of procedure (e.g. obligation to pay the resulting costs),

– to ensure the execution of punishment decisions (e.g. preliminary involuntary treatment in a mental institution, sequestration).

Regarding the limitation of human rights, there are coercive measures limiting or not limiting personal freedom. The limited other human rights are for example the following:

– property right (e.g. seizure, sequestration),

– human dignity (e.g. body search),

– inviolability of private residence (e.g. search) or

– inviolability of letters (e.g. seizure).

According to subjects, there are active subjects (persons applying coercive measures) and passive subjects (persons concerned by coercive measures):

– Coercive measures are usually applied by the authorities. Certain measures can be ordered by any authority (e.g. search), other ones only by certain authorities (e.g. detention only by the court). The only criminal procedural coercive measure applicable by anyone is the capture of the person caught in the act.

– The majority of coercive measures (resulting from the character of the criminal procedure) concern the defendant. Certain coercive measures can only be ordered for the defendant (see: gravest coercive measures limiting personal freedom), but numerous coercive measures can be applied to other participants (or entirely outside person), such as search, removal from the place of investigation or disciplinary penalty.

The CPC generally demands that coercive measures are applied following the initiation of the procedure (order of investigation), since coercive measure serve procedural aims. Concordantly, coercive measures are preceded by two decrees: the ordainment of the investigation and of the given coercive measure. In certain instances (so-called undelayable coercive measures) the application of coercive measures can take place before the ordainment of the investigation (e.g. search, custody). In these cases, only the coercive measures are ordered before its carrying into effect (in urgent cases, not even then, e.g. search, body search).

The CPC classifies the coercive measures according to 2 main aspects:[814]

– coercive measures concerning assets and limiting personal freedom according to human rights of the involved person;

814 272. §

– differentiates between coercive measures bound to or not bound to judicial permission.[815]

Coercive measures that can be applied to the detriment of the defendant can only take place following the pronouncement of reasonable suspicion (the defendant legal status only opens up following this). The pronouncement of reasonable suspicion and the questioning as a suspect take place in the final phase of the cleaning up, so, it can be stated, that during cleaning up, those coercive measures can be ordained, that can be ordained to other persons too (not just the defendant). Based on the previous, the most important coercive measures can be grouped as follows:

Coercive measure limiting personal freedom:
– capture of a perpetrator caught in the act;
– apprehension;
– custody;
– application of bodily force;
– accompany;
– restraining order;
– criminal supervision;
– technical tool for tracking the defendant's movement;
– bail;
– detention;
– preliminary involuntary;
– treatment in a mental institution.
Coercive measures against property:
– search;
– body search;
– seizure;
– sequestration;
– temporary rendering electronic information inaccessible;
– disciplinary penalty.

a) Capture of a perpetrator caught in the act:

Anyone can capture a perpetrator caught in the act committing a crime. Caught in the act means that the perpetrator is apprehended while committing a crime, if someone is disturbed in committing a crime and fleas the crime scene but is apprehended as a result of continual pursuit. If the given person is not caught in the act by an authority, then the person apprehending is obliged to hand over the perpetrator to the investigating authority (if there is no possibility for this, the police shall be informed).

b) Apprehension:

The person (e.g.) that through own fault defaults to appear even though shall be arraigned, which is the temporary cessation of personal freedom in order to bring the defence person before the authority or to ensure his presence at the procedural actions. Apprehension can be ordered by a separate decree and is generally carried out by the police. The decree can contain that it is sufficient to order the person to make his way,

815 HERKE, ibid. 29 - 30.

i.e. it is not necessary to accompany him before the authority. It can also be ordered that the person shall be arraigned immediately on the given day. Apprehension of soldier is possible by way of his superior.

c) Custody:

This is the temporary cessation of personal freedom of the defendant or the person that can be reasonably suspected of having committed a crime. If we speak of the custody of the defendant, obviously the ordainment of it takes place in the examining phase. However, it can happen that a person is taken into custody to whom reasonable suspicion has not been conveyed yet, or has not been questioned yet. In these cases the custody takes place at the very end of the cleaning up. The condition for custody is that reasonable suspicion of a crime punishable by a imprisonment is present towards the given person. There are four cases of criminal procedure custody: 1. caught in the act: if the identity of the person caught in the act cannot be established; 2. if against the to be detained person coercive measures bound to judicial permission and touching upon personal freedom can be expected; 3. if the defendant causes disorderly conduct at the court trial; 4. if the conditions for arraignment are in place, custody can be ordered to serve this aim as well.[816] Custody can last maximum 72 hours (respectively until ordainment of the coercive measure bound to judicial permission and touching upon personal freedom), in which the authoritative custody prior to ordainment of the custody shall be included. The execution of the custody generally takes place in the police detention-room. Following ordainment of custody, the authority shall take the following measures:

– Information obligation: 1. obligation within 8 hours of custody an adult person determined by the defendant shall be informed about the fact and the place of the detainment (if this person should endanger the procedure, another person shall be determined by the defendant); 2. In case of custody of soldoer, the superior.

– Actions obligation: 1. placement of the underage child and cared person who are left without supervision; 2. assets (house) that are left without supervision shall be looked after; 3. if the custody of soldier is not ordered by military investigating authority, the defendant shall be transferred to the authoritative prosecutor's office.

In procedure for crime in connection with the border barrier there are some special rules when ordering custody:[817]

– juveniles arriving together with the defendant shall not be unnecessarily parted from their relatives;

– custody can also be executed within establishments serving the placement, tending and custody of persons under the force of the law on asylum (in these cases relatives should not be divided)

d) Application of bodily force:

This is required to ensure or execute procedural actions, the authority ordering or carrying out the procedural action shall dispose over the defendant, the victim, the witness, and the person obstructing the procedure. Decree on application of bodily force is only compulsory if the person suffering the application of bodily force motions for this within 3 days.

816 CPC 725. §
817 CPC 830. §

e) Search:

The search usually limits the right of inviolability of private residence. Search can be ordained by any authority (notary and lawyer offices only by court) against anyone for the successful conduct of the criminal procedure if it can reasonably assumed that it will lead to apprehension of the perpetrator who committed the crime, clarification of traces of the crime, finding mean of evidence, finding object of forfeiture (confiscation of property) or inspection of an information system (data recorder). The object of the search can be: the apartment, other spaces, enclosed area, the vehicle, or the information system (data recorder). The search of the property (vehicle, data recorder) shall be carried out in the presence of the owner, proprietor or user (and their defence counsel, representative or proxy). If there is no such person present, an adult that is not interested in the case shall proceed for the protection of the interests of the concerned person (there is no exception to this). The progression of the search is as follows: 1. prior to the search, the decision that orders the search shall be made known (if possible, it should be served there too); *2.* if the search is for a determined person (object), the concerned person shall be told to convey the whereabouts; if he does, generally the search is discontinued (only if it can be reasonably assumed that it can lead to the finding of other relevant objects); 3. in the course of the search, the general provisions for coercive measures are authoritative (humane treatment of concerned person, if possible during daytime, without causing unnecessary damage, etc.).

f) Body search:

This can be ordered of any person by the prosecutor's office or investigating authority. If it is the aim to find mean of evidence or object of forfeiture (confiscation of property) by examining the clothing and body of the person that is being searched, because it can be reasonably assumed that the person has such objects on him. Body search limits the statutory rights to human dignity and personal inviolability. If the body search is aimed at finding a determined object, the concerned person shall be summoned to surrender the searched object voluntarily (contrary to search, body search cannot be continued after the object of the summon has been fulfilled). Apart from non-delayable cases, body search of a person can only be carried out by a person of the same gender and only a person of the same gender may be present (dual gender rule). Examination of body cavities may only be performed by a doctor (health care employee may be present), the dual gender rule does not apply to them.

g) Seizure:

This can generally be ordered against anyone by any authority (in notary and lawyer's offices only by the court; non-delivered consignments and press materials during investigation by the prosecutor's office, during judicial phase by the court). It limits proprietary rights. Its aim is to ensure mean of evidence or object of forfeiture (confiscation of property) for the effective conduct of the criminal procedure. The object of seizure can be 1. goods, 2. account money, 3. electronic money or 4. electronic data. At the same time, CPC excludes certain things from seizability (e.g. information between the defendant and his defence counsel, between the defendant and the person entitled to refuse testimony, notes of the defence counsel, certain guarded objects of the person entitled to refuse testimony). Seizure can be carried out in the following ways: occupation; ensuring preservation in other way;

leaving with the defence person; seizure of electronic data. Seizure can only be carried out by leaving it with the defence person or ensuring preservation in other way if the object is not suitable for occupation, the proprietor's (operator's) interest is intertwined with its use, or other important reasons justify this. In these cases, the object can only be passed on with the permission of the authority that ordained the seizure. If during the procedure there is no need for the original of a document (cannot be forfeitured, does not carry traces of the crime, etc.), a copy of it shall be made within the shortest period of time (maximum 2 months). The document shall only be seized until the copy has been made. Electronic data shall be seized by means of creating a copy (generally) or transfer of the electronic data, exceptionally by seizure of the data carrier (if it is evidence or object os forfeiture, or if it carries too much data). A period of 3 months the preservation obligation of electronic data can be decreed to further the clarification of the crime or respectively for the interest of evidence.[818] This limits the right to dispose over the electronic data of the person concerned. He shall be obliged to preserve and not alter the electronic data and shall only provide information to others upon permission of the authority that decreed. If the object that is seized during the procedure is not of any use anymore in the interest of evidence, it needs to be examined immediately ex officio whether 1. there is place for the termination of the seizure or 2. the seized objects are sellable. If in the interest of the procedure seizure is not necessary anymore: 1. termination of the seizure and return of the seized object shall be organised immediately (also when the procedure is terminated or the investigation term is expired); 2. forfeiture of the seized object shall be motioned; 3. if the seizure of an object took place solely for the interest of confiscation of property, during the investigation the prosecutor's office (after that the court) may permit the redemption of the seized object. If in the interest of evidence there is no further need for the seized object but there is no place for the termination of the seizure, the seized object may be sold if nobody has motioned a grounded claim with regards to this object (or contributed to the sale of the object), and the object perishes quickly, is not suitable for long-term storage, treatment (storage, guarding) would mean disproportionate and considerate costs, or the value would greatly diminish due to the anticipated time of the seizure of it. Counter value of the sale or redemption of the seized object shall step into the place of the seized object. If the seized object has no value and nobody claims it, it shall be destroyed following termination of seizure. Otherwise it shall be released to: 1. principally to the person that was the owner of the object at the time of the crime and there 2. are no reasonable doubts considering his proprietary rights; 3. if there is no such person, the person that motions a grounded claim, 4. if there is no such person, to the person of whom it was seized. The object that is to be released to the defendant can be withheld as a security for financial obligations that shall be determined. In case of a civil claim the execution or the motion of security measure shall be attested within 2 months, or otherwise it shall be released.

h) Sequestration (for the purpose of confiscation of property or civil claim, in the letter case motioned by private party):

This serves the limitation of disposal right over the sequestrated object, if it can be reasonably assumed that the appeasement of this shall be thwarted. If there is place for the sequestration of property, a decree is mandatory. Generally, sequestration can be ordained by any authority. The object of sequestration can be: goods, account or electronic money,

818 CPC 316. §

financial tools, rights of property value, or property claim (collectively: possessions). If there is no public register in which sequestrated possessions are registered, an entity shall be appointed that is able to exercise cessation of the right of disposal over the possessions and the implementation of the sequestration. The redemption of possessions can be permitted by the prosecutor's office (until indictment) or (after the indictment) by the court. The redemption shall only be ordained with the contribution of the private party in the case of sequestration to ensure civil claims and maximum up until the rate of the civil claim. Sequestration is ceased with reconstitution. The reconstitution shall take place when

– the reason for ordering has ceased, the criminal procedure is terminated or the term of the investigation has expired (unless initiated civil proceedings to uphold the claim within 2 months thereafter);

– the sequestrated property has been redeemed;

– the proceeding has been concluded without applying confiscation of property, or the civil claim has been dismissed;

– upon winning a civil claim, the private party failed to request execution within 2 months following the expiry of the agreed date of performance;

– after the civil claim has been referred to other legal ways, the prosecutor or the private party fails to prove the initiation of the enforcement of their claim within 2 months;

– the private party has recalled his civil claim, and has not attested his enforcement of claim within 2 months;

– the victim has declared not to enforce his civil claim (and there is no other reason to maintain the sequestration).

i) The temporary rendering electronic information inaccessible:

This is ordained by the court when the procedure is in progress because of a crime indicted by the public prosecutor in which there is place for making data permanently inaccessible, and this is necessary for the discontinuation of the crime. Coercive measures consist of two main types: 1. temporary restriction to the right of disposal over data made public by way of electronic newscaster network (temporary removal of data): the hosting service provider shall remove the data within 1 working day (if permanent inaccessibility is not ordained, the data shall be restored); 2. temporary obstruction of access to data: this can be ordained in emphasised drugs cases, crimes against the state or in connection with terrorism, if e.g. the removal is not carried out, or when it cannot be ascertained who should be removing the data (and in certain legal assistance cases); when the data is removed, or when the procedure has terminated, the coercive measure will cease. Prior to ordering the temporary inaccessibility of data, the media content provider or hosting services provider can be called upon to voluntarily remove the electronic data (not mandatory to do so).

j) Disciplinary penalty:

In order to maintain the procedural order and due to offences against procedural obligations, a disciplinary penalty can be imposed by any authority in cases as determined in the CPC. If the conduct that gave reason for imposing the disciplinary penalty causes a delay of more than 1 month, it is mandatory to impose a disciplinary penalty. Legal remedies against the imposing of the disciplinary penalty shall have delaying effect.[819]

819 Herke, ibid. 29 – 37.

5.3.3. The examining

The next stage in the investigation is the examining. This takes place after questioning of the suspect (this is the reason why the questioning of the suspect is the final substantive phase of the cleaning up). In certain cases the case transfers swiftly to the examining stage (if the defendant is taken into custody, he shall be questioned within 24 hours and following this the files need to be sent within 8 days). In case of getting caught in the act, the cleaning up phase can essentially be omitted, unless a thorough cleaning up has foregone the getting caught in the act.

In general, all procedural actions can be carried out during examining as during cleaning up. At the same time, there are certain coercive measures and evidences that are principally or exclusively characteristic to the examining. Following the general provisions, we shall deal with these and shall also touch upon temporary or definitive obstacles for investigation and the legal remedies that are at the disposal during investigation.[820]

a) General provisions of examining:

Following the questioning of the suspect, the prosecutor's office examines the files of the investigation and shall decree upon the continuation of the case as follows:

– there can be place for severance, consolidation or transfer (non-substantive decision);

– procedural actions need to be carried out within the framework of the examining;

– there can be a possibility for a „diversion"; the procedure is not continued in the traditional way (envisage prosecutorial measure or decision, initiation of arrangement, suspension of the procedure in the benefit of a mediation procedure, conditional prosecutorial suspension);

– the procedure has to be terminated;

– indictment has to take place.

The term of the investigation is 2 years from the questioning of the suspect,[821] which can be prolonged by the prosecutor's office (in a decision that cannot be contested with legal remedies) with a maximum of 6 months. The defence shall have the possibility to view the files during investigation in order to be able to influence the course of the procedure. The CPC decrees that the possibility to view the files shall be ensured at least 1 month before the closure of investigation (the defence can give up this right). In procedures for crime in connection with the border barrier, the disposable term can be shortened or omitted.[822] If the court or prosecutor that takes over representation of the indictment orders investigation in private prosecution cases, then the court (prosecutor's office) shall determine the term in a maximum of 2 months (which can be prolonged twice with 2 months).

During investigation, the CPC governs the right to be present at procedural actions in a broader sense. Because reasonable suspicion has been conveyed and the suspect has been questioned, the presence rights of the defence become activated: 1. the suspect and his defence counsel can be present at the hearing of experts, the inspection, reconstruction and presentation for recognition; 2. the defence counsel can be present at the questioning

820 Herke, ibid. 50.
821 CPC 351. §
822 CPC 828. §

of a witness that was motioned by him (through the suspect defended by him) and during evidentiary action with participation of such a witness.

Even in these cases, the defence does not need to be informed if urgency or other important interests (such as e.g. the protection of the witness) warrants this. However, the defence shall be informed on the procedural action within 8 days. The CPC makes electronic contact widely available (mandatory). This concerns primarily the defence counsel and that is the reason for its significance in the course of the examining.[823]

The Law on E-administration (Axt CCXXII of 2015) regularizes[824] the conformity of declarations of electronic administration. There are two conditions: 1. electronic identification of the declarant is done adequately (with electronic identification service, adequate electronic identification instruments (eIDAS) or by electronic identification service that is pronounced suitable by the body ensuring electronic administration) and 2. it is ensured that the delivered electronic document complies with the document approved by the declarant.

Electronic contact can have the following forms:

b) Facultative electronic contact:

– a non obligated participant or his/her representative that is not qualified as a legal representative undertake it

– suitability of electronic declarations

– contact must with authority via electronic way and vica versa

– if the authorities deliver in paper, they will inform the addressee on the electronic possibility

– motion presented without declaration: the authority shall warn the person electronically that contact shall be kept electronically in the future.

Mandatory electronic contact:

– mandatory participants shall present all petitions electronically to the authority and the authority shall deliver electronically too

– the person whose right to electronic contact is suspended is exempt from electronic administration.

Electronic contact with the expert:

– usually concerns the expert whose electronic contact is mandatory

– the expert that is not obligated can choose for electronic contact: 1. by registering in the forensic expert database; 2. experts not in this database (registering with the authorities)

– the expert with mandatory electronic contact (and the one that chooses for this) can present his expert opinion (and other files) electronically to the authority/the authority shall send all files electronically to the expert;

– the expert that proceeds paper-based can be summoned to submit the expert opinion on a data carrier if this needs to be delivered electronically.

c) Electronic contact among the authorities and between other bodies:

The authorities are in electronic contact with each other/bodies ensuring electronic administration by law/bodies appointed by the government that perform public tasks.

823 Herke, ibid. 51.
824 17. § (1)

In case of electronic contact by the commissioned defence counsel and legal representative, the electronic or digitalised commission shall be enclosed to the first submitted motion (except if his commission is recorded in the disposal register). The authority can summon the above-mentioned to submit the original commission (in order to determine uniformity). The represented participant that has no mandatory electronic administration can submit a paper-based commission withdrawal (and declares whether there will further be a defence counsel or legal representative; if yes, the commission shall be enclosed too). In case of paper-based documents and electronic contact exists, the participant himself shall ensure of digitalisation and of safe-guarding of the paper-based documents. If this does not take place, the authority shall digitalise this within 10 working days. However, if a paper-based document needs to be presented, it does not need to be submitted electronically.

In connection with electronic contact, the forwarding of documents at the disposal in electronic form to the e-mail address shall be mentioned. The participant can motion for this, if the document is available at the authority. In this case, the document shall be forwarded in electronic form, electronic document or electronic copy of a paper-based document.[825]

d) Specific rules for the application of coercive measures during examining:

In connection with coercive measures, we have previously established that the majority of personal freedom limiting coercive measures are ordained during the examining (defendant legal standing is required), while other human rights limiting coercive measures can already be applied during cleaning up. There are some exceptions, e.g. custody is usually ordained for the goal of questioning and some coercive measures concerning property (such as sequestration) are more characteristic for the examining phase. If a perpetrator is caught in the act, the case shall go into the examining phase almost immediately then the coercive measures (such as search) that are typically characteristic for cleaining up can also be ordained during the examining phase.

Warrant of arrest and accompany:

The most severe coercive measures are in many cases applied following the decree of a warrant of arrest. Any authority is entitled to do so, but only in cases of crimes punishable with imprisonment, and only in the interest of the ordainment of the custody of the defendant (the person suspected beyond reasonable doubt of having committed the crime) if (1) in the interest of ensuring the aims of coercive measures bound to judicial permission and touching upon personal freedom, apprehension and custody is motivated (known or unknown place of residence) or (2) the person held detained abroad is handed over to Hungary (extradition) is based on a motivated and grounded European (international) warrant of arrest.

An apprehended person shall be held in custody and shall be brought before the investigating authority/prosecutor's office within 24 hours, and before the court within 72 hours.

If the defendant shows up voluntarily, the warrant of arrest shall be recalled and custody shall only be ordered if it is deemed necessary in the interest of ensuring the aims

825 CPC 159. §

of coercive measures bound to judicial permission and touching upon personal freedom. Another coercive measure (touching upon personal freedom) that can be ordained against the defendant is accompany. Its aim is to ensure presence of the defendant at the procedural actions. Accompany can be ordered by the the prosecutor's office and the investigating authority, when the conditions for subpoena of the defendant are present, but ensuring presence by way of subpoena is not practical for the interests of the procedure. Accompany is usually initiated by the police (the superior if the defendant is a soldier). The costs for the warrant of arrest is considered criminal cost, accompany is not (accompany's cost paid by the state).

Common rules for coercive measures bound to judicial permission and touching upon personal freedom:

Coercive measures bound to judicial permission and touching upon personal freedom can only be ordained following the pronouncement of reasonably suspicion (respectively the charge) and only then when this is paramount for reaching the aims. Special (positive) conditions are based on § 276. and can be summarised as follows:

– Under collusion we usually mean the encumberment or the abortion of proof, which can manifestate itself in the threatening of a person, the destruction (falsifying, hiding) of an object and other conducts that endanger proof. Under danger of collusion we mean that the defendant has not executed this conduct, but based on the evidence (data) it can be assumed that he will.

– Coercive measures bound to judicial permission and touching upon personal freedom during examining shall be decreed upon by the investigating judge upon motion of theprosecutor (restraining order can be requested by the victim too). The investigating judge is only bound to the motion from „above", since he cannot ordain graver coercive measures than what has been motioned for. Milder coercive measures can always be ordered.

– The term of coercive measures bound to judicial permission and touching upon personal freedom is governed by the CPC per procedural stage and in concrete periods of time. In the examining stage the regulation per procedural stage is simpler: the gravest coercive measures ordained/maintained before the indictment shall take until the decision taken during the pre-trial of the court of first instance (except: coercive measures bound to judicial permission and touching upon personal freedom ordained before arraignment. This lasts until the end of the trial on the day of arraignment.[826]

– Concerning the concrete periods of time, there is great deviation between certain coercive measures during examining: (1) restraining order and criminal supervision can only be ordained for 4 months, the investigating judge can prolong this with a maximum of 4 months per occasion; (2) detention can last for a maximum of 1 month, the court can prolong this to 1 year measured from the ordainment of the detention with periods of a maximum of 3 months per occasion, following this, the court can prolong this with periods with a maximum of 2 months; the CPC also determines a final period of time (except if the final decision of first instance has already been taken or if the committed crime can be punished with life-long imprisonment), and this final period complies with the threat of imprisonment of the committed crime; (3) preliminary involuntary treatment in a mental

826 CPC 275. §

institution can be ordered for a maximum period of 6 months, which can be prolonged by the investigating judge with a maximum of another 6 months.

– In certain cases coercive measures bound to judicial permission and touching upon personal freedom will expire without decision, in some cases these will have to (can) specifically be terminated.[827]

Restraining order:

Restraining order limits the right of the defendant to freely keep contact, free movement and the free choice of his domicile (place of residence).[828] In the decision ordaining restraining order the following rules of conduct can be ordered to prevent contact with a specific person: (1) leaving a specific residence (staying away from there); (2) restraining order of the person from the concerned person's actual residence (workplace, other regularly visited places such as educational and health care institutions, etc.).

Criminal supervision:

Criminal supervision limits the right of free movement of the defendant and the free choice of domicile (residence).[829] During criminal supervision can be ordered that the defendant (1) the determined place (flat, institution) shall only be left with permission and because of reasons determined in the order; (2) not to visit certain determined public places; (3) to present himself at the police station at determined times and manner; (4) to comply with other rules of conduct.

If the defendant violates the rules of conduct of the restraining order or criminal supervision, he/she can be ordered disciplinary penalty, or can be taken into custody in repeated or serious cases, and the application of a technical tool for tracking movement can be ordered, more disadvantageous or other rules of conduct can be determined, or graver coercive measures can be ordered.

Technical tool for tracking the defendant's movement:

The court may ordain that the police applies a technical tool for tracking the defendant's movement in the interest of compliance with the restraining order's (criminal supervision's) rules of conduct.[830] Mandatory application shall be ordained if the criminal supervision is ordered because the maximum time limit of detention has elapsed.

Bail

Bail is an amount of money determined by the court with the aim to support compliance with the rules of conduct of the restraining order (criminal surveillance) ordered by the court and the presence of the defendant at procedural actions.[831] In case of ordering bail, lighter coercive measure(s) may be ordered concurrently. Accordingly, the severity order of coercive measures is: detention, criminal supervision, restraining order (or in case of criminal supervision the particular rules of conduct may also be mitigated). The object of bail may be a minimum of 500 thousand HUF which may be deposited by the defendant

827 CPC 279. §
828 CPC 280. §
829 CPC 281. §
830 CPC 283. §
831 CPC 284. §

or his defence counsel within 3 months of becoming final of the decision on the bail. The amount is determined by the court with regard to (1) the objective severity of the crime, (2) the individual circumstances of the defendant and

(3) the financial situation of the defendant. Bail shall be forfeited if the detention of the defendant is ordered due to violation of the rules of conduct (or it is not ordered only due to the inaccessibility of the defendant). Otherwise, bail shall be reimbursed following the termination of the procedure or the termination of the necessity of the coercive measure.

Detention

Detention means the deprival of personal freedom of the defendant by the court prior to the sententially decision.[832] Detention is ordered in CPC only after the other coercive measures requiring judicial decision because detention may only be ordered if the set goals cannot be achieved by means of other coercive measures.

Juveniles may only be detentioned if it is required due to the special objective severity of the crime,[833] i.e. the scope of the general conditions is extended. In case of a soldier the reasons for detention shall be supplemented: the detention of a soldier during his military service may also be ordered if a procedure is conducted versus him by reason of military crime or another crime committed at the place of service (in the context of service) to be punished by imprisonment and the defendant may not be left at liberty due to a cause related to service or discipline.[834]

The detention shall generally be enforced in a penal institution, however, upon the provisions of the prosecutor's office the detention may be implemented in police detentionroom for at most 60 days if carrying out the investigative actions justifies this. In case of juveniles, the court shall make a decision on the place of the enforcement of the detention upon the motion of the prosecution, with regard to the personality of the juvenile and the nature of the crime imputed to him but he may be detained temporarily if he is over 14 years of age and only upon the ruling of the court. During procedures for crime in connection with the border barrier the detention may be enforced in facilities for the accommodation, catering and detention of persons subject to the act on asylum even devoid of the separation of relatives and the place of enforcement may also be the police detention-room without limitations.[835]

The monitoring of mental state and preliminary coercive treatment in a mental institution:

Albeit the monitoring of the mental state is circumscribed among the evidences by the CPC, it is substantially a coercive measure (at least the examination under coercion of the conditions of preliminary coercive treatment in a mental institution). The investigating judge shall order the monitoring of mental state upon the motion of the prosecution if, according to the opinion of the expert, a longer observation of the mental state of the defendant by an expert is required.[836] In such cases the detained defendant shall be referred to a forensic psychiatric and mental institution; the defendant at liberty shall be hospitalised in an in-patient psychiatric ward as defined by law. The observation may last

832 CPC 296. §
833 CPC 688. §
834 CPC 705. §
835 CPC 830. §
836 CPC 195. §

for 1 month (the court may prolong it by 1 month). In general, based on data obtained during the monitoring of mental state, preliminary coercive treatment in a mental institution of the defendant may ensue, which means the judicial deprival of personal freedom of the insanity defendant prior to making the sententially final decision.[837] Accordingly, the conditions of the coercive measure conform to the conditions of involuntary treatment in a mental institution: (1) insanity, (2) violent crime against persons or crime causing public danger, (3) required to prevent crime, (4) in case of punishability punishment exceeding 1 year imprisonment should be passed.

The rules of detention shall duly apply to preliminary coercive treatment in a mental institution with the clause that the spouse or domestic partner of the defendant is entitled to appeal against the decisions and they are also entitled to motion for termination. The institution implementing the preliminary coercive treatment in a mental institution is the National Forensic Psychiatric and Mental Institution (IMEI) which shall inform the prosecution during the investigation without delay if the termination of preliminary coercive treatment in a mental institution is justified.

Preventive patronage

Preventive patronage is a specific coercive measure applied against juvenils not pertaining to the parental right of custody. Pursuant to § 68/D. of Act XXXI. of 1997 the guardianship authority shall contact the probation supervision service in order to obtain a study of living conditions and risk analysis of threats to the child from the viewpoint of crime prevention following the indication of the investigating authority in the procedure designed to provide protection conducted due to crime or alongside the already subsisting provision of protection. Based on the risk analysis the guardianship authority may take the following measures:

– In case of a high degree of threat from the viewpoint of crime prevention preventive patronage shall be ordered. The juvenile and his legal representative shall be obligated to cooperate with the preventive probation officer, to meet him in person at regular occasions determined by the preventive probation officer and observe the defined rules of conduct.

– In case of a medium degree of threat the measures above may be ordered (though not mandatory) at the request of the legal representative or upon the recommendation of the children's welfare centre.

– In case of a low degree of threat the measures above shall not be taken. If the preventive patronage is neglected the guardianship authority shall review its decision within 6 months ex officio, and if it discerns that the risk of repetition of crime has changed unfavourably, it may contact the probation supervision service in order to carry out a repeated risk analysis again.

– In case of preventive patronage the following may be determined: (1) who the juvenile may keep in contact with, (2) where and with what activities the juvenile may spend his free time and (3) from the viewpoint of the usual conduct of the juvenile what changes are justified and what assignments shall be set to effectuate them.

The guardianship authority shall review the justification of the uphold of preventive patronage (at request at any time or at least annually ex officio)

837 CPC 301. §

5.3.4. Suspension of the procedure

The procedure shall be suspended in case of a temporary obstacle, i.e. when the data of the procedure suggest that the obstacle is likely to cease sooner or later and the procedure may be continued.

The suspension of the procedure generally first ensues in the examining stage. However, certain causes of suspension can be conceptually construed only in the cleaning up stage (since, for example, the perpetrator could not be identified during the investigation, the presumed defendant could not be interrogated, therefore, the case could not enter the examining stage).

The reasons for suspension may be either mandatory or possible, in certain cases only the prosecutor is entitled to effect the suspension, for other reasons the investigating authority can too.

a) Grounds for suspending the proceeding:

The prosecution service or the investigating authority shall suspend the proceeding if the identity of the perpetrator could not be established during the investigation, or the perpetrator cannot participate in the proceeding due to his permanent and serious illness or a mental disorder that occurred after the commission of the criminal offence. The prosecution service shall suspend the proceeding for the purpose of conducting a mediation procedure if the applicable conditions are met.

The prosecution service and the investigating authority may suspend the proceeding if

– the whereabouts of the perpetrator are unknown or he is staying in another country,

– an authority of another country needs to execute a request for legal assistance,

– a decision on a preliminary question needs to be obtained to conduct the proceeding, or

– a criminal proceeding against the perpetrator is pending in court regarding the act that is the subject of the suspicion.

The prosecution service may suspend the proceeding if

– doing so is necessary for the performance of a settlement concluded in a mediation procedure,

– the conditions for conditional suspension by the prosecutor are met,

– a consultation procedure, as defined in the Act on cooperation with the Member States of the European Union in criminal matters, is instituted,

– an authority of another country postponed the surrender or extradition of the perpetrator on the basis of an international arrest warrant or a European arrest warrant,

– an international criminal court, in a case falling within its jurisdiction, requests the Hungarian authority to transfer the criminal proceeding,

– it initiated the recognition of a foreign judgment or a judgment delivered in a Member State, and there is no further procedural act to be carried out in Hungary, and the proceeding may not be continued without the recognition of the foreign judgment, or the judgment delivered in a Member State, or

– it is necessary for the performance of an obligation undertaken by the defendant in a concluded agreement.

If the ground for suspension changes during the period of suspension, the prosecution service or the investigating authority shall pass a new decision on suspending the proceeding without ordering the proceedings to be continued.

If the prosecution service or the investigating authority suspends a proceeding because the identity of the perpetrator could not be established during the investigation, it shall inform the party reporting the crime, the aggrieved party, and the person who filed a private motion, at the time of communicating its decision, that in case the proceeding is terminated due to any statute of limitations without ordering the proceeding to be continued, the decision terminating the proceeding will be served on him only if a motion for service is filed within one month after the decision suspending the proceeding is received.[838]

b) The duration of the suspension:

The prosecution service or the investigating authority may suspend the proceeding for a period of up to

– six months if the suspect or the person reasonably suspected of having committed the criminal offence is abroad,

– two months if a decision on a preliminary question needs to be obtained to conduct the proceeding, and the proceeding on deciding the preliminary question is yet to be instituted,

– twelve months if an authority of another country is to execute a request for legal assistance, or

– six months if it is necessary for the performance of an obligation undertaken by the defendant in a concluded agreement.

At the time of suspending a proceeding, the prosecution service or the investigating authority shall set the time-limit, corresponding to the period of suspension, for 1. the suspect or the person reasonably suspected of having committed the criminal offence staying abroad to return, 2. the interested party to institute a proceeding on deciding the preliminary question.[839]

c) Continuing a suspended proceeding:

Unless an exception is made in this Act, the prosecution service or the investigating authority shall order the proceeding to be continued if the grounds for suspension have ceased. If a proceeding was suspended by the prosecution service, only the prosecution service may order it to be continued. No complaint shall lie against a decision ordering a proceeding to be continued. A proceeding shall be continued without passing a decision on the day when the period of suspension, as determined by the prosecution service or the investigating authority or as extended by the prosecution service, expires.[840]

d) Miscellaneous provisions:

The duration of suspension shall not be included in the time limit open for investigation. The decision suspending or continuing a proceeding shall be served simultaneously on the

838 CPC 394. §
839 CPC 395. §
840 CPC 396. §

suspect, the person reasonably suspected of having committed the criminal offence, the defence counsel, the party reporting the crime, the aggrieved party, and the person who filed a private motion.[841]

5.3.5. Terminating a proceeding

a) Grounds for terminating a proceeding:
The prosecution service or the investigating authority may terminate the proceeding if

– the act does not constitute a criminal offence,

– the criminal offence was not committed by the suspect,

– the commission of a criminal offence may not be established on the basis of available data and means of evidence,

– a ground excluding the perpetrator's liability to punishment or the punishability of the act can be established,

– liability to punishment is terminated due to death, statute of limitations, or a pardon,

– the act has already been adjudicated with final and binding effect,

– the act does not constitute a criminal offence subject to public prosecution, or

– the case does not fall within Hungarian criminal jurisdiction.

The prosecution service shall terminate the proceeding if

– it cannot be established on the basis of available data and means of evidence that the criminal offence was committed by the suspect,

– the criminal proceeding is conducted by an authority of another state as a result of transferring the criminal proceeding or conducting a consultation procedure as defined in the Act on cooperation with the Member States of the European Union in criminal matters,

– liability to punishment is terminated due to active repentance, demonstrating the behaviour required under a conditional suspension by the prosecutor, passing the period of conditional suspension by the prosecutor successfully, or for any other reason specified by an Act,

– reprimand is applied, or

– it is conducted regarding a criminal offence that is, in comparison to another criminal offence of greater material gravity also subject to the indictment, not significant for establishing criminal liability.

A proceeding shall be continued if, in a complaint filed against a decision terminating the proceeding, the defendant or, in agreement with the defendant, his defence counsel challenges the application of a reprimand, and there is no other reason for terminating the proceeding.

The statement of reasons in the decision terminating a proceeding shall specify only the ground for terminating the proceeding and a reference to the laws applied, provided that 1. the proceeding was suspended because the identity of the perpetrator could not be established during the investigation, and 2. the suspended proceeding is terminated by the prosecution service or the investigating authority due to statute of limitations.

The prosecution service may terminate the proceeding if the suspect, or the person reasonably suspected of having committed the criminal offence, cooperates and contributes to detecting and proving the given, or any other, criminal case to such an extent that the

841 CPC 397. §

national security or law enforcement interest in his cooperation exceeds the interest in establishing the criminal liability of the person reasonably suspected of having committed a criminal offence or of the suspect.[842]

b) Continuing a terminated proceeding:

Unless an exception is made in this Act, the termination of a proceeding shall not prevent the proceeding from being continued in the same case subsequently. Ordering the continuation of a proceeding terminated by the investigating authority shall fall within the responsibility of the prosecution service; however, during detection, the investigating authority may also order the continuation of the proceeding.

No complaint shall lie against a decision ordering a proceeding to be continued. The court may order the continuation of the proceeding if 1. new evidence or circumstance is brought up in the case, 2. false or falsified means of evidence was used in the case, 3. a member the prosecution service or the investigating authority violated his duties in the case in a manner contrary to criminal law.[843]

c) Communicating the decision when the proceeding is terminated:

At the time of serving the decision terminating the proceeding, the defendant shall also be informed about the legal basis of any recompense he may claim, the fact that he may decide to enforce his claim in a simplified recompense procedure or a property dispute for recompense (hereinafter: "recompense action"), the time limit for enforcing such a claim, the day the time limit is calculated from, and that the time limit is a term of preclusion.[844]

d) Criminal costs upon the termination of the proceeding:

Where the proceeding is terminated, the prosecution service may oblige the suspect to pay the criminal costs, in whole or in part, if the proceeding is terminated 1. due to active repentance, 2. on the ground that the period of conditional suspension by the prosecutor passed successfully, 3. applying reprimand, or 4. based on a reason for terminating liability to punishment that depends on the conduct of the defendant under the Special Part of the Criminal Code.

The obligations of the suspect shall be determined on the basis of the material gravity on the criminal offence and the financial, income and personal situation and lifestyle of the suspect. If the suspect or the defence counsel, in a complaint submitted against the decision terminating the proceeding, challenges also the provisions on the obligation to bear the criminal costs, and the superior prosecution office does not grant the complaint, the suspect and the defence counsel may file a motion for revision against the provisions imposing the obligation to bear the criminal costs. If the suspect or the defence counsel challenges only the provisions imposing the obligation to bear the criminal costs, laid down in the decision terminating the proceeding, the application for remedy shall be considered a motion for revision. In that event, the prosecution service shall forward the motion for revision, the case documents, and its observations and motion to the investigating judge within three working days.

842 CPC 398. § - 399. §
843 CPC 400. §
844 CPC 401. §

An application for a payment moratorium or for payment in instalments shall not have a suspensory effect. The application shall be decided on by the prosecution office that imposed the obligation to bear criminal costs. No complaint shall lie against this decision.[845]

5.4. The intermediate proceeding. Alternatives to indictment (CPC). The indictment

The intermediate proceeding is not expressly regulated by the CPC. However, albeit the actions of the prosecutor following the investigation on the merits (aiming at its completion) are structurally contained in the chapter on investigation under this act, the actions are not substantively part of the investigation (as the actions are not designed to detect either the crime or the perpetrator or to obtain relevant evidence, etc.).

5.4.1. The prosecutor's phase

The cleaning up shall be concluded by the investigating authority serving the files of the investigation to the prosecutor's office within 8 days following the questioning of the suspect.[846] In doing so the investigating authority does not only report on the status of the investigation and make recommendations on the procedural actions deemed necessary during the examining, but it may also motion for the closure of investigation. This may be especially justified if the suspect has admitted the commission of the crime, which resulted in the initiation of envisage prosecutorial measure or decision or the conclusion of an arrangement. If so, the investigating authority shall serve a report to the prosecutor's office without delay.

It is by no accident that the CPC prioritises the opportunity for measures expediting the procedure. The goal is to avoid lengthy investigation and the subsequent not too brief judicial procedure in case of cooperative suspects admitting the crime because following the due examination of the threat of the crime and of danger the defendant represents to society, the prosecutor's office disposes of several options from not submitting the act of accusation to the court to submitting the act of accusation in a simplified way so that a simplified judicial procedure should ensue.[847]

The primary function of these procedures can be identified as the simplification of criminal proceedings („simplifying procedures"), and the application aspects of the processes under consideration can be:

– the level of evidence;

845 CPC 402. § - 403. §

846 CPC 390. §

847 The main pillars of the hungarian criminal proceedings are the so-called „simplifying" (alternative) procedures that can be initiated by the prosecutor's office. These constructions are primarily based on the Anglo-Saxon model, and their introduction is quite controversial in both domestic and international legal literature. Some of the authors took the position that these procedures completely override the classic functions of criminal justice. The primary reason for this is that their goal is not to find out the material truth, but simply to relieve the courts while observing the basic procedural rules. At the same time, another group of authors considers certain options of not bringing charges to be advantageous, primarily for the reason of reducing the costs of the proceedings, and on the other hand for the reason of promoting the resocialization of the accused.

– the personal circumstances of the suspect (e.g. age);

– the behaviour of the accused during the proceedings (e.g. possible cooperation, confession);

– the social danger of the perpetrator, and

– the seriousness of the crime.

Pursuant to CPC[848], the prosecutor's office may inform the suspect at any time about what measure it may take or what decision it may expect if the suspect admits to committing the crime. These measures may be taken even if the defendant did not admit committing the crime before but confesses at the request of the prosecutor's office (prospect of a prosecution measure or decision). This legal institution is essentially a „precursor" to alternative procedures, as it does not yet involve a direct (positive) legal consequence for the perpetrator.

The prosecutor may take the following measures:

– suspension of the procedure in order to conduct a mediation or, with respect to the result of the mediation, the termination of the procedure;

– conditional prosecutorial suspension and, with respect to its result, the termination ofthe procedure;

– termination of the procedure or rejection of the denunciation with regard to the cooperation of the suspect;

– entering into a plea bargain (arrangement on the confession to culpability);

– if none of the above is possible, the prosecutor shall submit the charge to the court, however, even in that case the measures required for arraignment or a penalty order may be taken and, in certain cases, it is not the prosecutor's office that submits the accusation to the court (private prosecution, substitute private prosecution).

The prosecutor's office shall inform the suspect about the above (even included in the protocol of the interrogation of the suspect). During the interrogation of the suspect, he will be made to declare whether he accepts the measure or decision and their conditions envisaged by the prosecution.[849] It is not mandatory for the prosecutor's office to take the envisaged measure accepted by the suspect or make a decision if the suspect fails to fulfil the undertaken conditions or makes a false confession.

However, these measures (decisions) may not only be motioned by the prosecutor's office ex officio but, any time during the investigation, the suspect and the defence counsel may inform the prosecutor's office or the investigating authority that the suspect will confess to the commission of the crime in the interest of the above. If the prosecutor's office does not agree with the motion, it shall inform the suspect and the defence counsel; otherwise it shall conduct the given procedure (make the decision).[850]

5.4.2. Alternative procedures in general

The legal policy reasons for introducing simplification procedures are mainly motivated by considerations of expediency and economy of litigation. This approach undoubtedly reduces the role of evidence as a whole in criminal proceedings, and it is still debated

848 See: 404. §
849 CPC 406. §
850 Herke, ibid. 72. – 73.

among procedural law scholars whether these legal instruments are necessary at all, and to what extent their application affects the original, real functions of criminal proceedings (e.g. the need to establish material truth, the principle of the immediacy of the trial, the principle of publicity).[851]

The Council of Europe issued a recommendation on the need to introduce legal instruments based on the principle of opportunity as early as 1981. Behind these efforts lies primarily the desire to reduce the burden on the judiciary and to develop a culture of conflict management. It should be noted that some European jurisdictions, including the US, had already known about „shortcut procedures" before the Recommendation was issued. Indeed, even today, the ECrHR does not necessarily consider it a violation of the Convention for national courts to refrain from holding trials, depending on the subject matter of the case and the personal interests of the accused.[852]

The general expectations for „simplification" or „alternative" procedures are summarised below:

– They must be based on the voluntary participation of the accused, backed up by various legal safeguards.

– The law must define the precise legal content of the cooperation, such as the conditions of application, the expectations of the accused and the positive legal consequences of the scheme.[853]

Each procedure can be grouped in several ways: 1. according to the need for a contribution; 2. as a condition of the confession;[854] 3. according to the level of the criminal sanctions; 4. the nature (extent) of the discretionary power of the prosecution or court.

Objections to the legality of alternative procedures are mostly found in the domestic literature, but according to Tibor Király, such questions can only arise if the legislator makes the „simplification" dependent on the person of the defendant rather than the subject of the case.[855] Moreover, according to Péter Hack, it would be necessary to reconsider in its entirety „[...] whether it is worth insisting on the trial as the exclusive form of procedure [...], which is essentially more similar to the misdemeanour procedure than to the criminal procedure, namely when the judge is alone with the accused [...]."[856]

The popularity of these procedures is largely related to the fact that – as Klein mentions[857] – „judges are under ever-increasing pressure to move their calendars and „dispose" of cases.

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851 For my part, I believe that the application of the general rules of procedure (i.e. the taking of evidence) is necessary in all cases where (1) the adjudication of the case requires a more complex investigation (e.g. witness hearings, expert evidence) or (2) the accused is in denial of any of the offences contained in the indictment.

852 In „Jussila v. Finland" (2006), the Court of Justice did not find a breach of the Convention in a case in which the applicant was fined more than EUR 300 without a hearing for failings in his VAT declaration.

853 Erzsébet Kadlót: What kind of criminal procedural law do we want? In: Erika Csemáné Váradi (ed.): *Concepts and their realisation in the post-change criminal policy. Hungarian Society of Criminology.* Miskolc, Bíbor Publishing House, 2009. 55.

854 According to Árpád Erdei (1991), it is not sufficient to apply the summary procedure to a mere investigative confession: if the accused is not willing to repeat it in court, the case should be transferred to the ordinary trial procedure. „A proper balance of the components of the interest will help to exclude the possibility that the tactics of the accused will result in a delay rather than a simplification of the proceedings." In: Árpád Erdei: The reign of the dethroned queen or the sacred cow of the theory of evidence. *Hungarian Law*, 1991/4. 210-216.

855 Tibor Király:Evidence in the Criminal Procedure Code. *Criminological Publications,* 1996/54. 215.

856 Péter Hack: The reform of the criminal procedure. In: Erika Csemáné Váradi (ed.), ibid. 64.

857 Klein, ibid. 5.

They are often evaluated by how quickly cases are concluded; the more efficient the judge is, the more likely it will be that he obtains favorable treatment by the court administrators. The quickest disposition occurs when the defendant enters a plea of guilty. And that means that the judge will want a lawyer who understands and cooperates, and a defendant who understands that if there is no plea, the sentence after trial may very well be the maximum permissible."

5.5. General features of the mediation procedure

According to its legal definition, mediation is a procedure to facilitate the agreement between the suspect and the victim, the reparation of the consequences of the crime and the future law-abiding behaviour of the suspect, which may be applied at the request of the suspect or the victim or with their voluntary consent.[858] This definition indicates a complex legislative intention, since it also includes aspects aimed at developing a culture of conflict management, compensating the victim and re-socialising the perpetrator. The use of mediation is therefore essentially based on a 'prosecution hypothesis' that the nature of the offence and the person of the accused or victim justify the out-of-court resolution of the case.

In Hungary, the introduction of victim protection measures and the reform of the penal system based on new approaches was only possible after the political regime change in 1989, so the literature on the subject was still waiting to be written. However, the use of alternative dispute resolution has become a fundamental legal practice in the US and in Western European countries. [859]

The conditions of the mediation procedure are contained partly by the CPC and partly by the Criminal Code. Based on CPC, a mediation procedure may be conducted upon the motion by the suspect or the aggrieved party, or with their voluntary consent, with a view to facilitating the conclusion of an agreement between the suspect and the aggrieved party, the reparation of the consequences of the criminal offence, and the future law abiding conduct of the suspect. The suspect may submit his consent or motion serving as a ground for the mediation procedure through also his defence counsel.

With a view to conducting a mediation procedure, the prosecution service shall suspend the proceeding if (1) the suspect or the aggrieved party initiates, or consents to, a mediation procedure, (2) the suspect confessed to having committed the criminal offence before the indictment, and (3) having regard to the nature of the criminal offence, the manner of its commission, and the identity of the suspect, a) reparation of the consequences of the criminal offence can be expected, and b) conducting a criminal proceeding may be dispensed with, or conducting a mediation procedure is not inconsistent with the principles of sentencing.

Suspending the proceeding for the purpose of conducting a mediation procedure shall not be prevented by the fact that the suspect has already voluntarily paid for, in whole or in part, the damages or pecuniary loss caused by his criminal offence or the value affected by the criminal offence, or he provided reparation for the injury caused by his criminal offence, in a manner and to an extent accepted by the aggrieved party.[860]

858 CPC 412. §
859 Ilona Görgényi: *Restitution in criminal law, mediation in criminal cases.* Budapest, HVG-ORAC, 2006. 61.
860 CPC 412. §

a) Proceedings prior to a mediation procedure:

If the suspect or the aggrieved party initiates, or consents to, a mediation procedure without the conditions of conducting a mediation procedure, as specified in this Act, being met, the prosecution service shall pass a decision refusing to suspend the proceeding for the purpose of conducting a mediation procedure.

If the suspect or the aggrieved party initiates a mediation procedure, the prosecution service shall make the necessary arrangements to obtain a statement of consent from the suspect or the aggrieved party. After obtaining such a statement, the prosecution service shall decide whether to suspend or refuse to suspend the proceeding for the purpose of conducting a mediation procedure.

If the aggrieved party initiates a mediation procedure before the suspect is interrogated, the prosecution service, after interrogating the suspect, shall make the necessary arrangements to obtain a statement of consent from the suspect and (1) to suspend the proceeding for the purpose of conducting a mediation procedure, or (2) to refuse to conduct a mediation procedure.

A decision passed by the prosecution service on suspending the proceeding, or refusing to do so, for the purpose of conducting a mediation procedure shall be communicated to the suspect and the aggrieved party who initiated, or consented to, the mediation procedure.[861]

The prosecution service may suspend a proceeding once for a period of six months for the purpose of conducting a mediation procedure.

A decision suspending the proceeding shall also be communicated by the prosecution service to the probation service with subject-matter and territorial competence to conduct a mediation procedure.

A statement made by the suspect or the aggrieved party in the course of a mediation procedure may not be used as evidence in the case. The result of a mediation procedure may not be taken into account to the detriment of the suspect.

The detailed rules of conducting a mediation procedure shall be laid down by an Act.[862]

b) Proceedings after an agreement is reached in a mediation procedure:

If an agreement, as defined in the Act on mediation procedures, is concluded by and between the aggrieved party and the suspect in the course of a mediation procedure, the mediator shall submit the agreement to the prosecution service.

The prosecution service shall set aside the agreement if it is in conflict with the Act on mediation procedures. The prosecution service shall communicate the decision to the mediator and to all parties to the agreement set aside.

If the prosecution service does not set aside the agreement within five working days after receiving the agreement, it shall be deemed that the prosecution service did not raise any objection regarding the legality of the agreement.

If an obligation set out in the agreement may not be performed while the proceeding is suspended, the prosecution service may extend the period of suspension for an additional period of up to eighteen months.

861 CPC 413. §
862 CPC 414. §

If the mediation procedure is concluded while the proceeding is suspended, and the proceeding may not be terminated or suspended for any other reason, the prosecution service shall order the proceeding to be resumed.[863]

c) Based on CC, the positive conditions of mediation procedure are as fallows:

– In case of any of the six types of crime: against against life, limb and health (Chapter XV. of CC), against personal freedom (Chapter XVIII of CC), against human dignity and fundamental rights (Chapter XXI. of CC), crime against traffic regulations (Chapter XXII. of CC), against property (Chapter XXXVI. of CC), against intellectual property rights (Chapter XXXVII. of CC).

– The crime punishable with imprisonment not exceeding five years.

– Motioned by/with the consent of the suspect and the victim.

– The suspect has made a confession to the crime before the indictment.

– Reparation of the consequences of the crime is expected (with regard to the nature of the crime, method of perpetration and the identity of the suspect) and the conduct of the judicial procedure is omissible / the mediation procedure is not contrary to the principles of the imposition of the punishment.

d) Negative conditions:

– the defendant is repeat offender or habitual recidivist;

– perpetration in criminal organization;

– the crime caused death;

– intentional perpetration during probation/conditional sentence/conditional prosecutorial suspension;

– participation in mediation procedurewithin two years;

– crime committed to the detriment military body in military criminal procedure.

As I mentioned, the public prosecutor's office will suspend the proceedings for the purpose of mediation if the objective and subjective conditions for mediation are met. It follows (in principle) from the grammatical interpretation of this norm that the prosecution service will order the procedure to be compulsory in such cases. However, the use of the word „may" instead of „suspend" would clearly have been appropriate, since it is an optional procedural option. The main reason for this is that certain statutory conditions (e.g. the personal circumstances of the suspect) are in themselves a matter for consideration and therefore raise issues which are subject to subjective judgement and need to be decided. It is a different matter that in the legal literature different views have developed as to the legitimacy of the prosecution's monopoly in this area:

– According to Herke, the possibility of prosecutorial discretion „{...} allows for a completely subjective assessment of the case, unduly restricting the ordering of mediation proceedings."[864]

– However, according to Gellér, „the deletion of the condition ensuring the possibility of prosecutorial discretion from the conditions for the ordering of mediation proceedings cannot be supported. The contrary view ignores two aspects. On the one hand, the reason

863 CPC 415. §

864 Csongor Herke: On the subjective conditions for ordering mediation. *Prosecution Review,* 2016/4. 91.

for the existence of mediation and active remorse as legal instruments is that the State withdraws from its criminal claim {...} at its own discretion. And if that is so, it may necessarily reserve the right to maintain its claim for punishment in certain cases {...}."[865]

As a criticism of the current regulation, it should be noted that the legislator in the CPC – breaking with the solution of the former act – does not define the material legal conditions of the procedure in an exact manner. Nevertheless, the conditions of application of the active remorse provided for in the CC will of course continue to apply. The conditions of application of the procedure described in the current CPC too general, and, in my view, the victim's interests cannot justify them. Overall, the solution could be for the Prosecutor General's Office to continuously specify the normative provisions on the use of the procedure in circulars or other internal instructions.

The „mediability" of certain crimes is a separate point of discussion. In my opinion, violent crimes (see: crimes against life, health, human freedom, etc.) should be excluded from the scope of the procedure as a whole. The nature of these and the „privileged" role of the fundamental right they violate or threaten make the state's obligation to protect them to such an extent that the prosecutor should not be able to refrain from the indictment. On the contrary, the use of the procedure may be justified in the case of crimes against traffic, property, or intellectual property rights.

In the case of traffic crimes, cases with fatal results are obviously out of the question. In many cases, mediation will also not take place because there is often no victim of the crime (e.g. drink-driving).[866]

In the case of crimes against property or intellectual property rights, the application of the procedure should be much more extended. This would clearly be in the interest of the victims. However, the application of the procedure could be problematic in those cases, where the distinction between natural and legal persons is not clear (e.g. in the case of fraud, the passive person and the victim are not the same).[867]

Overall, the frequency of these procedures depends on the effectiveness of the agreements. However, it is clear that it will take many decades before this possibility becomes common practice in the Hungarian procedural system.

5.6. Conditional suspension by the prosecutor (CPC)

Unlike mediation, this procedure does not require the consent of the victim and is usually initiated by the prosecutor's office.

Based on CPC, the prosecution service may suspend the proceeding by a decision if the proceeding is expected to be terminated in light of the future behaviour of the suspect.

Conditional suspension by the prosecutor shall be permitted if (1) the proceeding is conducted for a criminal offence punishable under an Act by up to three or, in cases

865 Balázs Gellér – István Ambrus: *General Doctrines of Hungarian Criminal Law I.*. ELTE Eötvös Publishers, Budapest, 2017. 335-336.

866 Görgényi, ibid. 162.

867 For example: if the car actually used by the family was legally purchased in the name of a business company and is stolen, the family members are considered victims in addition to the victim legal person. József Kó: Methodological results of the research. In: Ferenc Irk (ed.): *Victims and opinions*. Budapest, 2004. In: Görgényi, ibid. 162.

deserving special consideration, five years of imprisonment, and (2) the behaviour of the suspect is expected to change in a favourable manner as a result of conditional suspension by the prosecutor, having regard to the nature of the criminal offence, the manner of its commission, and the identity of the suspect.

This procedure shall not be permitted if the suspect

– is a multiple recidivist,

– committed the criminal offence in a criminal organisation,

– committed a criminal offence causing death, or

– committed an intentional criminal offence during the probationary period of a suspended imprisonment or after being sentenced to imprisonment to be served for committing an intentional criminal offence, but before enforcement of the sentence was completed, or during the period of release on probation or conditional suspension by the prosecutor.

If conditional suspension by the prosecutor is permitted, the prosecution service may suspend the proceeding once, determined in years or years and months, for a period within the penalty range specified in the Special Part of the Criminal Code, but for at least one year.[868]

a) Conditional suspension by the prosecutor with regard to other reasons for terminating liability to punishment:

The prosecution service shall suspend the proceeding, ex officio or upon request by the defendant or his defence counsel for a period of one year with a view to meeting a condition specified by an Act if, after the start of the proceeding, the defendant behaves in a manner that constitutes a reason for terminating his liability to punishment under the Special Part of the Criminal Code, and the defendant can be expected to behave in a manner that would result in the termination of his liability to punishment.[869]

If the prosecution service intends to impose rules of behaviour in addition to applying conditional suspension by the prosecutor, it shall make arrangements to clarify whether (1) the suspect is capable of complying with the rule of behaviour or the obligation planned, (2) the suspect consents to the planned psychiatric treatment or to the planned treatment of his alcohol dependence, and (3) the aggrieved party consents to reparation, if it is possible.[870]

The prosecution service may require the suspect, by way of imposing a rule of behaviour or an obligation, to

– pay for the damages, pecuniary loss, tax revenue loss, or customs revenue loss caused by his criminal offence, or the value affected by the criminal offence,

– provide reparation to the aggrieved party in another way,

– provide material means to a specific cause, or perform work to the benefit of the public,

– undergo psychiatric treatment or treatment for alcohol dependence, subject to his prior consent.

868 CPC 416. §
869 CPC 417. §
870 CPC 418. §

At the time of ordering conditional suspension by the prosecutor, a prosecution servicemay also order the supervision by a probation officer of the suspect.

In case conditional suspension by the prosecutor is applied, if the amount of damages, pecuniary loss, tax revenue loss, or customs revenue loss caused by the criminal offence, or the value affected by the criminal offence, can be quantified and was not recovered during the proceeding, the prosecution service shall oblige a suspect to pay that amount or restore the original situation, provided that the suspect is able to do so and the aggrieved party consents to this option.[871]

b) Proceedings after applying conditional suspension by the prosecutor:

If the proceeding may not be terminated or suspended for any other reason, the prosecution service shall order the proceeding to be resumed if

– the suspect, or with consent from the suspect, his defence counsel, files a complaint against the conditional suspension by the prosecutor,

– during the period of conditional suspension by the prosecutor, the suspect is interrogated as a suspect for an intentional criminal offence committed during the period of conditional suspension by the prosecutor, including any situation where the reasonable suspicion may not be communicated because the whereabouts of the suspect are unknown or he is staying abroad,

– the suspect violates seriously the rules of supervision by a probation officer or a rule of behaviour imposed in the decision applying conditional suspension by the prosecutor, or fails, and is unlikely, to perform his obligations.[872]

5.7. Cooperation of the suspect

If the person who may be reasonably suspected to have committed a criminal act cooperates by contributing to the detection of the case (or other criminal case), or to the presentation of evidence to such an extent that the interests of national security or criminal prosecution related to cooperation takes priority over the interest of establishing the criminal liability of the person reasonably suspected to have committed a crime, depending on the stage of the proceeding, the prosecutor's office shall 1. reject the denunciation[873] or 2. terminate the procedure.[874]

Cooperation shall be excluded if the object of incrimination is a crime which

– intentionally causes the death of another person,

– causes permanent disability or

– intentionally causes serious health impairment.

In case of cooperation the state shall compensate for damages (compensation for immaterial injuries) which the defendant is liable to effect pursuant to civil law (if it is not indemnified in any other way).

871 CPC 419. §
872 CPC 420. §
873 CPC 382. §
874 CPC 399. §

If a decision is made on the compensation for damages (compensation for immaterial injuries) in a civil procedure, the legal grounds of this claim shall be protected and the state shall be represented by the Minister of Justice in the civil procedure. The statement in the civil procedure may not encompass facts according to which the identity of the defendant and the reasons for cooperation may be deducted.[875]

5.8. Plea bargain

The arrangement regulated under the CPC is a form of plea bargain in a broader sense. However, in a narrower sense it may be called only a plea bargain-like arrangement because no agreement is concluded related to the facts of the case but only related to certain legal issues.

Before the indictment the prosecutor's office and the defendant may conclude an arrangement in relation to the crime committed by the defendant on the admission of culpability and its consequences.[876] The private prosecutor may not conclude an arrangement with the accused.[877]

The conclusion of the arrangement may be initiated by the defendant, the defence counsel and the prosecutor's office alike (the prosecutor's office even during the interrogation of the defendant). The participation of the defence counsel in the procedure directed at the conclusion of the arrangement is mandatory.

In the interest of the conclusion of an arrangement the prosecutor's office, the defendant and the defence counsel (with the consent of the defendant only the prosecutor's office and the defence counsel) may conciliate concerning the admission of culpability and the substantial elements of the arrangement (except for the findings of fact and the classification of the crime according to the Criminal Code). If the prosecutor's office and the defendant have agreed in the purport of the arrangement, the prosecutor's office shall warn the defendant of the consequences of the planned arrangement during the interrogation of the defendant as suspect, and the arrangement shall be included in the protocol of the interrogation of the suspect. The protocol shall be signed jointly by the prosecutor, the defendant and the defence counsel.

If the prosecutor's office and the defendant did not conclude an arrangement, the initiation and the related documents may not be used as evidence and the prosecutor's office may not inform the court about the motion for the conclusion of the arrangement either.

In the arrangement the defendant may confess to his culpability in relation to all or only certain crimes substantiating the criminal procedure.[878]

The purpose of the arrangement:

a) Mandatory substantial elements of the arrangement:

– the findings of fact and classification of the crime according to the Criminal Code (established by the prosecutor's office);

875 Herke, ibid. 76 – 77.
876 CPC 407. §
877 CPC 786. §
878 CPC 410. §

– statement of the defendant admitting culpability and his intention to make a testimony

– type, degree and length of punishment (independently imposed measures) (even by consideration of the mitigating §)

b) Potential substantial elements of the arrangement:

– additional penalty

– measure imposed in addition to the penalty or measure

– termination of the procedure (rejection of denunciation) in relation to specific crimes (e.g., less significant crime, cooperation)

– (partial) dispensation from cost of criminal proceedings

– other obligations undertaken by the defendant (cooperation, compensation for the damages of the victim, participation in mediation, other obligations may be prescribed within conditional prosecutorial suspension)

c) The object of the arrangement may not be:

– involuntary treatment in a mental institution

– forfeiture

– confiscation of property

– irreversibly rendering electronic information inaccessible.[879]

I would note that in the US – what is less understandable, and more bothersome and unjust – is the role of the trial judge in the plea bargaining process. The ABA Model Code of Judicial Conduct requires judges to act honorably, fairly, and with integrity.[880] In recognizing the need to identify ethical standards relating to plea bargaining for defense counsel, prosecutors, and judges, the ABA has adopted Standards for Criminal Justice (Pleas of Guilty, Chapter 14). The most recent edition deleted previous provisions that had established procedures for judicial participation in plea bargaining, and instead, added a new section providing that "a judge should not ordinarily participate in plea negotiation discussions among the parties."[881] To emphasize the importance of the requirement of judicial detachment, there is a separate mandate: "A judge should not through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered." The Commentary to the Standards is explicit: "These standards reflect the view that direct judicial involvement in plea discussions with the parties tends to be coercive and should not be allowed.[882]

The defense counsel has the professional and ethical obligation to explain to his client all significant consequences of a guilty plea. Judges' attempts to obtain a guilty plea by offering a shorter prison sentence than what would be imposed after trial ignore the substantial collateral consequences that may impact a defendant who accepts the plea bargain. Judges very rarely inform a defendant that accepting the "one-time offer" (1) might affect his livelihood; (2) might make the imposition of civil damages more likely; (3)

879 Herke, ibid. 77 – 78.

880 See: ABA Model Code of Judicial Conduct, In 2003, the Model Code of Judicial Conduct's Canon 1, Commentary, was amended to explain what was meant by "integrity": "A judiciary of integrity is one in which judges are known for their probity, fairness, honesty, uprightness, and soundness of character." Id. (Any resemblance to the Boy Scout Pledge, is, I'm sure, completely unintended.). In: Klein, ibid. 5.

881 See ABA Standards for Criminal Justice, Chapter 14 - Pleas of Guilty, at Standard 14-3.3(d) (2d ed. 1986)

882 Id. at Standard 14-3.3 cmt.

might require the defendant to register as a sex offender; (4) might subject the defendant to mandatory substance abuse testing; (5) could result in the defendant and his family being denied access to governmental benefits such as public assistance funds; (6) could result in defendant no longer being eligible to live in public housing; and (7) might result in loss of the right to vote. Defense counsel must understand the threat that these consequences pose to the individual's capacity for re-entry into the society. Denying an ex-inmate the possibilities of employment and acceptance by the community is nonsensical and counterproductive.[883]

5.8.1. Plea bargain (ECrHR)

The ECrHR has noted that it can be considered a common feature of European criminal-justice systems for an accused to receive a lesser charge or a reduced sentence in exchange for a guilty or nolo contendere plea in advance of trial, or for providing substantial cooperation with the investigative authority.[884] There cannot therefore be anything improper in the process of charge or sentence bargaining in itself, or in the pressure an individual to accept pre-trial resolution of the case by the fact that he or she would be required to appear in court.[885] For the Court, plea bargaining, apart from offering important benefits of speedy adjudication of criminal cases and alleviating the workload of courts, prosecutors and lawyers, can also, if applied correctly, be a successful tool in combating corruption and organised crime and can contribute to the reduction of the number of sentences imposed and, as a result, the number of prisoners.[886]

The Court has also noted that the effect of plea bargaining is that a criminal charge against the accused is determined through an abridged form of judicial examination, which amounts, in substance, to a waiver of a number of procedural rights.[887] This cannot be a problem in itself, since neither the letter nor the spirit of Article 6 prevents a person from waiving these safeguards by free will.[888] Thus, by analogy with the principles concerning the validity of waivers, the Court has found that a decision to accept the plea bargain should have been accompanied by the following conditions: (a) the bargain had to be accepted by the applicant in full awareness of the facts of the case and the legal consequences and in a genuinely voluntary manner; and (b) the content of the bargain and the fairness of the manner in which it had been reached between the parties had to be subjected to sufficient judicial review.[889]

In „V.C.L. and A.N. v. the United Kingdom" (2021), a case of human trafficking where the victims of trafficking were prosecuted for drug-related offences (committed in relation to their trafficking) and where they pleaded guilty to the charges in question, the Court found, in particular, that in the absence of any assessment by the authorities of whether the applicants had been trafficked and, if so, of whether that fact could have had any impact on their criminal liability, those pleas were not made „in full awareness of the facts". Moreover, in such circumstances, any waiver of rights by the applicants would have

883 Klein, ibid. 6-7.
884 „Natsvlishvili and Togonidze v. Georgia" (2014)
885 „Deweer v. Belgium" (1980)
886 „Natsvlishvili and Togonidze v. Georgia" (2014)
887 „Navalnyy and Ofitserov v. Russia" (2016)
888 See: Section General considerations of Article 6 in its criminal aspect.
889 „Natsvlishvili and Togonidze v. Georgia" (2014)

run counter to the important public interest of combatting trafficking and protecting its victims. The Court therefore did not accept that the applicants' guilty pleas amounted to a waiver of their rights under Article 6 of the Convention.

5.9. Indictment (CPC)

Charge implies the demand of the state for punishment enforced by the entitled person or body (the accuser) versus a specific person (the accused) before the court because the suspicion is reasonably that certain conduct of the specific person performed the findings of fact of a crime.

The indictment has two major forms. In case of public accusation the public prosecutor and in case of private prosecution the private prosecutor (generally the victim) is entitled to the rights of the representation of accusation. The form of public accusation is the indictment or the memorandum and the form of private prosecution is the motion for prosecution (in case of substitute private prosecution) or the denunciation (in case of private prosecution).

Four forms of private prosecution shall be differentiated:

a) Main private prosecution: the victim is entitled to the representation of accusation without the consent of the prosecutor (private prosecution is in essence such pursuant to the CPC).

b) Subsidiary private prosecution: the representation of the accusation by the victim or harmed party implemented accessorily or relatively independently and concurrently with the prosecutor (in Hungary the private party is similar to the accessory private prosecutor, who enforces the civil claim as the victim).

c) Substitute private prosecution: the representation of accusation by the victim instead of the prosecutor if the prosecutor omits the formal accusation, drops the charge or does not appeal against the verdict of acquittal, etc. (substitute private prosecution is enforced within limitations in Hungary, however, in case of the absence of appeal, for example, it is not enforced).

d) The counter charge: in case of certain mutually committed criminal acts subject to private prosecution, the accused may also bring charges versus the private prosecutor.[890]

890 „In the US, after the prosecutor studies the information from investigators and the information they gather from talking with the individuals involved, the prosecutor decides whether to present the case to the grand jury. When a person is indicted, they are given formal notice that it is believed that they committed a crime. The indictment contains the basic information that informs the person of the charges against them. For potential felony charges, a prosecutor will present the evidence to an impartial group of citizens called a grand jury. Witnesses may be called to testify, evidence is shown to the grand jury, and an outline of the case is presented to the grand jury members. The grand jury listens to the prosecutor and witnesses, and then votes in secret on whether they believe that enough evidence exists to charge the person with a crime. A grand jury may decide not to charge an individual based upon the evidence, no indictment would come from the grand jury. All proceedings and statements made before a grand jury are sealed, meaning that only the people in the room have knowledge about who said what about whom. The grand jury is a constitutional requirement for certain types of crimes (meaning it is written in the United States Constitution) so that a group of citizens who do not know the defendant can make an unbiased decision about the evidence before voting to charge an individual with a crime. Grand juries are made up of approximately 16-23 members. Their proceedings can only be attended by specific persons. For example, witnesses who are compelled to testify before the grand jury are not allowed to have an attorney present. At least twelve jurors must concur in order to issue an indictment." https://www.justice.gov/usao/justice-101/charging (21.03.2024.)

5.9.1. The indictment

The prosecutor's office shall bring charges via the submission of the indictment to the court.[891] The prosecutor's office working beside the court competent to adjudge the case of first instance is generally authorised to bring charges, in case of criminal acts subject to the competence of various prosecutor's offices, the prosecutor's office which took measures earlier according to the principle of precedence shall proceed.[892]

The indictment has legal and other elements[893]:

a) The legal elements of the indictment:

– identifiable denomination of the accused,

– accurate description of the act as an object of the accusation,

– classification of the act as an object of the accusation under the Criminal Code,

– motion for the imposition of penalty (order of measure) or for the acquittal of the accused not punishable by reason of his mental incapacity (if the accused makes a confession at the preparatory session, for the specific degree as well).

b) Other elements of the indictment:

– denomination of the means of evidence,

– motions for proof,

– denomination of the statutes pertaining to the competence and the jurisdiction of the court and the prosecutor's office,

– statements of the prosecutor's office,

– further motions of the prosecutor's office,

– motion for the maintenance of the coercive measure bound to judicial consent concerning personal freedom.

The prosecutor's office may motion in the indictment the termination of the parental right of custody of the accused ex officio or at initiation. The presentation of the motion for the termination of the parental right of custody may be motioned for by the child of the accused or the other parent. If the prosecutor's office does not agree with the initiation, it shall send the initiation to the guardianship authority in the interest of the consideration of the institution of action for the termination of the parental custodial right and it shall also inform the motioner about that.[894]

If the prosecution and the accused has concluded an arrangement, the prosecutor's office shall bring charges by reason of the findings of fact and the classification in the arrangement included in the protocol.[895] In that case the prosecutor's office shall make a motion within the indictment (supplemented by the protocol) for the court

– to affirm the arrangement,

– what punishment it should impose (what measure it should order) in accordance with the contents of the arrangement,

891 CPC 421. §
892 CPC 29. §
893 CPC 422. §
894 CPC 572. §
895 CPC 424. §

– what other provisions it should apply in correspondence with the arrangement.

If the indictment is submitted in the absence of the accused, in a given case even the innuendo may be omitted before the submission of the indictment. At the same time, the indictment should contain the enumeration of the circumstances concerning the conditions of the proceedings in the absence of the accused.[896]

5.9.2. The memorandum in case of immediate summary procedures

Another form of public accusation besides the indictment is the memorandum in case of this special accelerated procedure, which does not necessarily require the cooperation of the accused and is not intended to apply less severe sanctions to the accused. So, this procedure is therefore clearly and exclusively aimed at shortening the proceedings and has no other purpose.

Based on CPC, a prosecution office may bring a defendant before a court in an immediate summary procedure within two months after a criminal offence is committed, provided that (1) the criminal offence is punishable by imprisonment for up to ten years under an Act, (2) the evaluation of the case is simple, (3) the evidence is available, and (4) the defendant was caught in the act when he committed the criminal offence or the defendant confessed to the commission of the criminal offence.[897]

In this cases, the proceeding prosecution office shall inform the suspect that it intends to conduct an immediate summary procedure. If the defendant does not wish to authorise a defence counsel, the prosecution service shall appoint a defence counsel without delay.

The prosecution service shall

– prepare a memorandum containing personal data suitable for the identification of the suspect, a description, and the qualification pursuant to the Criminal Code, of the act serving as ground for the immediate summary proceeding, and a list of all means of evidence;

– ensure the inspection of the case documents for the defendant and his defence counsel, after the trial date is set, at a time and in a way adequate for preparing the defence, but one hour before the commencement of the trial at the latest.[898]

a) On the whole, I think that the application of this procedure – similar to the mediation procedure and the conditional suspension of the prosecutor – could be applied in the case of crimes with a maximum term of imprisonment of up to 5 years.

b) The second condition for application is the simplicity of the case. Here, the simplicity of the facts and the legal classification must be considered together. With regard to the facts, it is necessary to examine whether the investigative evidence clearly establishes who committed what, when, where and how. With regard to the simplicity of the legal classification, the relevant criteria are: (1) whether there are other criminal proceedings pending against the defendant; (2) whether it is clear that a specific crime was committed; (3) whether there is no contradiction in the evidence (a „closed logical chain" of evidence is a basic requirement in this case). It should be noted that there is not necessarily a correlation between the simplicity of the facts and the substantive seriousness of the crime.

896 CPC 748. §
897 CPC 723. §
898 CPC 726. §

c) The third condition is the availability of evidence, which can usually be established on the basis of the evidence obtained in the case of a person caught „red-handed" or on the basis of a confession. At the same time, many other means of evidence may be available to the prosecutor to justify the ordering of such proceedings (e.g. camera or audio recordings, fingerprints).

d) A further condition is that the accused is caught in the act or confesses. In judicial practice, being caught in the act means that the offender commits the crime in the presence of witness(es), in whole or in part, or is apprehended during the pursuit or when leaving the scene. This is most often the case in the case of drink-driving offences, where police officers pull over and stop a suspect driving a vehicle and take a breathalyser test.

I would remark that „accelerated procedures" are used across Europe and in all cases the prosecutor initiates this proceedings:

– In Spain (from 2003) these procedures are available for certain less serious crimes. The process is used for common offences where a simple factual assessment allows the proceedings to be completed within fifteen days (used in around 5% of cases).[899]

– Under the Italian procedural code, under the „giudicio direttissimo" judicial construction, the prosecutor has to bring a suspect caught in the act before the competent judge within 48 hours. Thereafter, if the prosecutor considered that, despite the clear evidentiary situation, the short time available was not sufficient to allow a full investigation, he could request a „direct procedure", in which he had 90 days to conduct the investigation.[900]

– In England, the accused is able to notify the prosecutor's office in writing that he or she wished to make a confession. If this was accepted, the proceedings would proceed without a trial.[901]

5.9.3. The denunciation

The private prosecution (counter charge) procedure commences upon a denunciation.[902] In the denunciation it needs to be presented that (1) versus who, (2) by reason of what act and (3) on the basis of what evidence the institution of the criminal procedure is requested by the victim.

In a private prosecution procedure the prosecution is represented by the victim. If the person with international immunity proceeds as a private prosecutor, the court shall suspend the procedure concurrently with the passing of the case from the minister of justice to the minister of foreign affairs until the decision on immunity based on international law is made (and if immunity exists, the procedure shall be terminated).

The denunciation must be made at the court, but in such a case the charge may not be based on the address of the victim (his residence).

If the denunciation was rejected (or the procedure was terminated) because the act is not a crime to be persecuted by public prosecution, the prosecutor's office in its decision

899 Anna Kiss – Adám Mészáros: *The timeliness of investigations and the acceleration of investigations.* https://bm-tt.hu/wp-content/uploads/2022/02/be_gyorsitas_kutjel_meszaros_kiss_2011-doc.pdf (21.03.2024.).

900 László Pusztai: The new Italian Code of Criminal Procedure from the perspective of domestic codification. *Hungarian Law,* 1991/4. 236.

901 Miklós Lévai: The system of criminal sanctions in England and Wales; lessons from criminal policy. *Criminological Publications,* 1991/42. 30.

902 CPC 765. §

shall inform the victim that by reason of the obtainment of a crime to be persecuted by private prosecution, the charge needs to be made by a private prosecutor. The victim may take action as a private prosecutor within one month as of the receipt of the decision rejecting his complaint, and in the absence of a private motion, he may supplement his statement within this deadline.[903]

The denunciation shall be examined by the court, and if transfer, suspension or termination of the procedure is inadmissible, the court

– shall send the denunciation and the documents of the procedure to the prosecutor's office, if the act needs to be punished by public prosecution or it must be taken into consideration whether the representation of accusation should be taken over by prosecutor's office (concerning this the prosecutor's office needs to make a declaration within 8 days),

– may request the victim to specify the denunciation in writing,

– may order investigation if the identity of the denounced person or the crime cannot be established on the basis of the denunciation (if the identity of the unknown perpetrator cannot be established on the basis of the data of the investigation either, the court shall terminate the procedure), or if means of evidence need to be detected.

The prosecutor's office may take over once the representation of the accusation from the private prosecutor, who in this case is endowed with the rights of the victim and burdened by the obligations of the victim. While the private prosecutor may drop the charge at any time, the prosecutor's office may only withdraw from the representation of the accusation, in such a case the right of the private prosecutor to prosecution renascences.[904]

5.9.4. The motion for prosecution and the written announcement

In a substitute private prosecution the victim may take action as prosecutor, therefore, substitute private prosecution is admissible only in case of those criminal acts which have a victim. In substitute private prosecution the provisions concerning international immunity are directive.[905]

The conditions of proceeding as a substitute private prosecutor are summarised in the following table:

a) In case of the rejection of the denunciation: 1. the act does not qualify as crime; 2. the suspicion of a crime is absent; 3. ground for exemption from punishability or culpability.

b) The reason for termination of the procedure: 1. the act does not qualify as crime; 2. the crime was not committed by the suspect; 3. the commission of a crime cannot be established; 4. ground for exemption from punishability or culpability.

c) In case of dropping the charge: 1. the victim may take action within 15 days as of the receipt of the court notification about dropping the charge; 2. no cause for the exclusion of a substitute private prosecution exists (except for: an undercover agent, a cooperative defendant, an arrangement).

Formal accusation in the substitute private prosecution takes the form of a motion for prosecution (in case of dropping the charge the written announcement of the victim about his intention to take action as a substitute private prosecutor).

903 CPC 372. §
904 Herke, ibid. 80. – 81.
905 CPC 721. §

The grounds for exemption of the substitute private prosecution are stipulated under CPC 787. § (3) as fallows:

– the denounced person (the defendant) is juvenile,

– ground for exemption from punishability or culpability is minor age or insanity,

– the crime did not injure or threaten the rights or rightful interests of the victim directly,

– the victim is the state or a body exercising public authority,

– rejection of the denunciation (termination of the procedure) against an undercover agent, a member of a body entitled to apply covert instruments or a covertly cooperating person,

– rejection of the denunciation (termination of the procedure) by reason of an arrangement with the defendant,

– termination of the procedure in the case of a less significant crime within the framework of an arrangement.

In the substitute private prosecution procedure the presence of the legal representative of the victim as well as of the defence counsel are mandatory. In the substitute private prosecution procedure the victim files his civil claim in the motion for prosecution at the latest and a mediation proceeding is admissible only if the prosecutor's office has taken over the representation of accusation (namely, this may ensue on one occasion).

From a certain point of view the motion for prosecution has less content-based elements than the indictment (it does not include motion for the sanctions, no motions for evidence are necessary, nor does it refer to competence and jurisdiction etc.), whereas its mandatory element is e.g., the denomination of the civil claim (if any) and the scope of testimonies to be read out.

The motion for prosecution and the written announcement shall be signed by the victim and the legal representative too. Substitute private prosecution may not be instituted at the court competent in re the residence of the victim as well.

The court shall reject the motion for prosecution (written announcement) under a nonconclusive order:

– expiry of the deadline determined by law,

– the victim does not have a legal representative (this may be substituted within 15 days as of the service of the order),

– taking action as a substitute private prosecutor is inadmissible,

– the motion for prosecution /written announcement does not include the legal accessories (this may be substituted within 15 days).[906]

5.9.5. The notion of „ciminal charge" (ECrHR)

a) General principles:

The concept of a „criminal charge" has an „autonomous" meaning, independent of the categorisations employed by the national legal systems of the member States.[907] This is true both for the determination of the "criminal" nature of the charge and for the moment from which such a „charge" exists.

906 Herke, ibid. 81. – 82.

907 „Blokhin v. Russia" (2016)

In using the terms „criminal charge" and „charged with a criminal offence", the three paragraphs of Article 6 refer to identical situations. Therefore, the test of applicability of Article 6 under its criminal head will be the same for the three paragraphs.

b) The existence of a „charge":

The concept of „charge" has to be understood within the meaning of the Convention. The Court takes a „substantive", rather than a „formal", conception of the „charge" contemplated by Article 6.[908] Charge may thus be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", a definition that also corresponds to the test whether „the situation of the [suspect] has been substantially affected".[909]

The Court held that a person arrested on suspicion of having committed

– a criminal offence,[910]

– a suspect questioned about his involvement in acts constituting a criminal offence,[911]

– a person who has been questioned in respect of his or her suspected involvement in an offence,[912] irrespective of the fact that he or she was formally treated as a witness,[913] as well as

– a person who has been formally charged with a criminal offence under procedure set out in domestic law[914] could all be regarded as being "charged with a criminal offence" and claim the protection of Article 6 of the Convention. On the other hand, a person questioned in the context of a border control, in the absence of a need to determine the existence of a reasonable suspicion that she had committed an offence, was not considered to be under a criminal charge.[915] In „Sassi and Benchellali v. France" (2021), concerning statements given by the applicants to certain French authorities on a US base at Guantánamo, the Court did not consider that the questioning in the context of administrative missions, unrelated to the judicial proceedings, with the aim of identifying the detainees and collecting intelligence, not for the purpose of gathering evidence of an alleged criminal offence, amounted to the existence of a criminal charge.

In „Deweer v. Belgium" (1980), a letter sent by the public prosecutor advising the applicant of the closure of his business establishment and soliciting him to pay a sum of money as a settlement for avoiding prosecution amounted to the existence of a "criminal charge" triggering the applicability of Article 6 of the Convention.

Similarly, in „Blaj v. Romania" (2014), the Court examined the context in which actions were taken against the applicant who had been caught in the very act of committing an offence of a corruptive nature (in flagrante delicto). For the Court, the taking of forensic samples on the crime scene and from the applicant and inviting the applicant to open an envelope in his office suggested that the authorities had treated the applicant as a suspect. In these circumstances, the information communicated to the applicant during the

908 „Deweer v. Belgium" (1980)
909 „Eckle v. Germany" (1982); „Ibrahim and Others v. the United Kingdom" (2016); „Simeonovi v. Bulgaria" (2017)
910 „Heaney and McGuinness v. Ireland" (2000); „Brusco v. France" (2010)
911 „Aleksandr Zaichenkov v. Russia" (2010); „Yankov and Others v. Bulgaria" (2010)
912 „Stirmanov v. Russia" (2019)
913 „Kalēja v. Latvia" (2017)
914 „Pélissier and Sassi v. France" (1999); „Pedersen and Baadsgaard v. Denmark" (2004)
915 „Beghal v. the United Kingdom" (2019)

ensuing questioning had implicitly and substantially affected his situation, triggering the applicability of Article 6.

c) The "criminal" nature of a charge:

As regards the autonomous notion of "criminal", the Convention is not opposed to the moves towards "decriminalisation" among the Contracting States. However, offences classified as „regulatory" following decriminalisation may come under the autonomous notion of a „criminal" offence. Leaving States the discretion to exclude these offences might lead to results incompatible with the object and purpose of the Convention.[916]

Moreover, the Court has held that the Convention allows States, in the performance of their function as guardians of the public interest, to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line, but only subject to certain conditions. The Convention leaves the States free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects. Such a choice, which has the effect of rendering applicable Articles 6 and 7, in principle escapes supervision by the Court. The converse choice, for its part, is subject to stricter rules. If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a „mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction under Article 6 to satisfy itself that the disciplinary does not improperly encroach upon the criminal sphere.[917]

The starting-point for the assessment of the applicability of the criminal aspect of Article 6 of the Convention is based on the criteria outlined in „Engel and Others v. the Netherlands" (1976): (1) classification in domestic law; (2) nature of the offence; (3) severity of the penalty that the person concerned risks incurring.

The first criterion is of relative weight and serves only as a starting-point. If domestic law classifies an offence as criminal, then this will be decisive. Otherwise the Court will look behind the national classification and examine the substantive reality of the procedure in question.[918]

In evaluating the second criterion, which is considered more important,[919] the following factors can be taken into consideration:

– whether the legal rule in question is directed solely at a specific group or is of a generally binding character;[920]

– whether the proceedings are instituted by a public body with statutory powers of enforcement;[921]

– whether the legal rule has a punitive or deterrent purpose;[922]

916 „Öztürk v. Germany" (1984)
917 „Gestur Jónsson and Ragnar Halldór Hall v. Iceland" (2020)
918 „Gestur Jónsson and Ragnar Halldór Hall v. Iceland" (2020)
919 „Jussila v. Finland" (2006)
920 „Bendenoun v. France" (1994)
921 „Benham v. the United Kingdom" (1996)
922 „Öztürk v. Germany" (1984); Bendenoun v. France (1994)

– whether the legal rule seeks to protect the general interests of society usually protected by criminal law;[923]

– whether the imposition of any penalty is dependent upon a finding of guilt;[924]

– how comparable procedures are classified in other Council of Europe member States.[925]

The third criterion is determined by reference to the maximum potential penalty for which the relevant law provides.[926]

The second and third criteria laid down in „Engel and Others v. the Netherlands" (1976) are alternative and not necessarily cumulative; for Article 6 to be held to be applicable, it suffices that the offence in question should by its nature be regarded as "criminal" from the point of view of the Convention, or that the offence rendered the person liable to a sanction which, by its nature and degree of severity, belongs in general to the "criminal" sphere.[927]

The fact that an offence is not punishable by imprisonment is not in itself decisive, since the relative lack of seriousness of the penalty at stake cannot divest an offence of its inherently criminal character.[928]

A cumulative approach may, however, be adopted where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge.[929]

5.10. Concluding thoughts

The exclusiveness of the indicment as a classical prosecutorial function is showing a decreasing trend, which is also confirmed by the normative material of the CPC and the regulatory solutions of the European procedural codes. The use of alternative procedures requires a serious reflection of the prosecution's office, as the prosecutor must assess, depending on the legal instrument in question, the admissibility of the charge, the interests of simplifying and shortening the proceedings, the complexity of the facts, the availability of evidence and the interests of criminal prosecution.

The decisions in question can be linked to the (intermediate) stage of the criminal proceedings. In this regard, the main problems of the CPC are structural in nature. On the one hand, the legislator does not refer to the separate (intermediate) stage of the criminal proceedings, which, however, must be separated from the investigation stage for the reasons set out above. While the investigative phase only involves the examination of procedural alternatives, including the taking of evidence, which fall within the prosecution's jurisdiction, the subsequent prosecutorial phase involves the taking of various decisions (rulings) and the conduct of the chosen process (e.g. conditional suspension).

The other codification problem is that the legal provisions relating to confessions of the accused are completely scattered in the current CPC. In this respect, it would have been

923 „Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia" (2018)
924 „Benham v. the United Kingdom" (1996)
925 „Öztürk v. Germany" (1984)
926 „Campbell and Fell v. the United Kingdom" (1984)
927 „Lutz v. Germany" (1987)
928 „Nicoleta Gheorghe v. Romania" (2012)
929 „Bendenoun v. France" (1994)

advisable to introduce a separate chapter in which these rules would have been placed in a uniform manner, for example under the heading „possibilities for cooperation in relation to the accused".

Nevertheless, the advantages of simplify procedures are evident at all procedural stages: the investigation, as a separate stage, is essentially a preparatory stage for the use of alternative prosecution procedures, during which the prosecutor's office seeks to use consensual processes of typical Anglo-Saxon origin. These tendencies fundamentally reduce the classical role of the investigation, since if the conditions for these procedures are met, further investigative acts become „pointless".

Overall, the prosecution (intermediate) stage has become the main arena for „simplifying" or expedited procedures. The filing of an indictment, as a classical prosecutorial function, has become a subsidiary function in cases where the law allows for the use of other procedural options. This approach is also supported by the structure of the CPC, since the legislator has classified the simplifying procedural option before the rules on the indictment.

I would note that in some EU Member States there is now a clear mix of elements of the continental and Anglo-Saxon systems. Rather, the criminal justice systems of countries that have been based on continental legal traditions are gradually adopting the procedural constructs of the US and the UK, mainly with a view to simplifying criminal proceedings. There is no doubt that the role of evidence is diminishing, and the need to establish substantive (material) justice is becoming secondary.[930] However, as NELKEN puts it, it is simply a matter of understanding the underlying meaning of the different legal institutions and being able to step outside the rigid framework of our current thinking.[931]

930 Thus, Petra BÁRD's approach suggests that the „suspicion" and fear of each other is diminishing. This is a major step forward, given that the US Supreme Court in the 1960s - in its decisions on the prohibition of self-incrimination and the right to remain silent - saw the continental tradition as a clear negative example. In: Petra BÁRD: The Different Conception of Justice in Anglo-Saxon and Continental Criminal Procedure. In: *Memory of László Pusztai* (eds. Petra BÁRD – Peter HACK – Katalin HOLÉ). OKRI, ELTE-ÁJK, Budapest, 2014. 42.

931 NELKEN, David: *Comparative criminal justice: making sense of difference.* London, Sage, 2010. 43.

CHAPTER VI.

THE GENERAL RULES OF COURT PROCEEDINGS

6.1. Introduction

In relation to court proceedings, it is necessary to analyse not only first instance but also appeal proceedings. In the Hungarian legislation (CPC), the legislator has created a number of variations of appeal procedures, which means that first instance decisions can be challenged in many respects. This is both desirable and beneficial in terms of the rule of law and contributes to a more efficient administration of justice. This chapter also covers the ECrHR's case law on judicial proceedings.

6.2. The forms of court proceedings and the proceedings of junior judges (CPC)

A court shall hold a trial if evidence is taken for the purpose of establishing the criminal liability of an accused. In situations specified in this Act, the court shall hold a public session, a session, or a panel session. The provisions on trials shall apply to public sessions subject to the derogations laid down in this Act.

A junior judge may proceed in a criminal proceeding regarding the following matters:

– appointing a defence counsel and discharging a defence counsel from his appointment,
– data requests,
– determining the amount of criminal costs,
– measures concerning legal aid,
– appointing an expert,
– rectifying or supplementing a decision that may be passed by a junior judge,
– performing request for administrative assistance from other courts, and
– in matters permitted in this Act.[932]

6.3. Attendance at court proceedings (CPC)

The single judge, the members of a panel, and, unless otherwise provided in this Act, a keeper of minutes, shall be present for the entire duration of a trial, a court session, or a panel session. If a member of a panel is inevitably prevented from attending a trial, a conclusive decision may be announced in a trial by a panel consisting of other members. Unless otherwise provided in this Act, a court session may not be held in the absence

932 CPC 425. § - 426. §

of a defendant, a prosecutor, or, if participation of a defence counsel in the criminal proceeding is mandatory, a defence counsel. Upon a motion by a defendant who is a foreign national, his defence counsel or an aggrieved party or witness who is a foreign national, a consular officer of the state of the foreign national may attend the trial or court session. In addition to the provisions laid down in CPC, the participation of a defence counsel in a court proceeding shall be mandatory before a regional court proceeding as a court of first instance, or if the accused waived his right to attend the trial.[933]

6.3.1. Attendance of an accused at a trial

The attendance of an accused at a trial shall be mandatory if (1) he has not waived his right to attend the trial pursuant to CPC, or (2) he is obliged by the court to attend the trial.[934]

If a proceeding is conducted against more than one accused, parts of a trial that do not affect an absent accused may be held in his absence. In that event, such parts of the trial may be held in the absence of the defence counsel of an absent accused, even if the participation of a defence counsel in the criminal proceeding is mandatory.

A trial may be held in the absence of an accused (1) if it might become necessary to commit the accused to compulsory psychiatric treatment during the proceeding, and he cannot appear at the trial, or is unable to exercise his rights, because of his condition; (2) who is at liberty and was duly summoned, but the evidentiary procedure may not be concluded. A court may acquit or terminate the criminal proceeding against an accused in his absence; a decision to that effect, including information about available legal remedies, shall be communicated to the accused and his defence counsel by way of service.[935]

An accused may waive his right to attend the trial at any time after the indictment, provided that he is represented by a defence counsel, and he mandates his defence counsel to act as an agent for service of process. In this situation, the court, after a statement to that effect is made or received by the court, shall serve all case documents addressed to the accused, other than orders obliging the accused to attend a trial, or a summons, on his agent for service of process.[936] If an accused submitted a notice of his intent to attend the trial, (1) he may not subsequently waive his right to attend the trial without the permission of the court (no appeal shall lie against an order concerning the matter of permission); (2) the court may present a summary of the minutes of the trial held in the absence of the accused, and it may order the taking of evidence to be carried out again in whole or in part.[937]

Ensuring the attendance of an accused: if the attendance of an accused at a trial is mandatory, but he fails to appear despite being duly summoned, the court shall take measures to ensure the attendance of the accused by way of forced attendance, or issuing an arrest warrant. If it is reasonable to assume that forced attendance would not be successful on the set trial date within a reasonable time, the proceeding single judge, or the chair of the panel, shall order the forced attendance of an absent accused on the next trial date. If the forced attendance of an absent accused has already been ordered during

933 CPC 427. §
934 CPC 428. §
935 CPC 429. §
936 CPC 430. §
937 CPC 431. §

the court proceeding, an arrest warrant shall be issued, provided that the criminal offence is punishable by imprisonment.[938]

A court shall issue an arrest warrant, and initiate a proceeding for the extradition or surrender of an accused pursuant to a European arrest warrant if the attendance of the accused at a trial is mandatory, and the accused fails to appear despite a summons being duly issued to his place of residence abroad. If the extradition, or transfer under a European arrest warrant, of an accused was refused, or such extradition or transfer is not possible, the court may initiate the transfer of the criminal proceeding, provided that the applicable conditions are met. An arrest warrant may not be issued against an accused staying at a known location in another country if the prosecution service did not move for a sentence of imprisonment in its indictment document.[939]

6.3.2. Attendance of a defence counsel and a procesutor at a trial

Unless otherwise provided in this Act, the attendance of a defence counsel at a trial shall be mandatory if the participation of a defence counsel in the criminal proceeding is mandatory.[940]

The attendance of a prosecutor at a trial shall be mandatory. In a district court, (1) a junior prosecutor may also represent the prosecution; (2) a trainee prosecutor may also represent the prosecution, unless

– the criminal offence is punishable, under an Act, by imprisonment for up to five years or more,

– the accused is detained,

– the accused has a mental disorder, regardless of his capacity to be held liable for his acts.[941]

6.4. The publicity of trials (CPC)

Trials shall be open to the public. With a view to duly conducting a trial, maintaining its dignity and security, or meeting space-related constraints, the proceeding single judge, or the chair of the panel, may limit the number of audience members. A person who has not attained the age of fourteen years may not attend a trial as a member of the audience; a person who has not attained the age of eighteen years may be banned from the audience by the proceeding single judge or chair of the panel. By passing a reasoned decision ex officio or upon a motion by the prosecution service, an accused, a defence counsel, an aggrieved party, or a party with a pecuniary interest, the court may exclude the public from a trial, or any part of a trial, and may order a closed trial for (1) reasons related to morality, (2) protecting a person requiring special treatment, or (3) protecting classified data or other protected data (hereinafter „closed trial”). A motion to exclude the public may be submitted at any stage of a proceeding.[942]

938 CPC 432. §
939 CPC 433. §
940 CPC 434. §
941 CPC 435. §
942 CPC 436. §

A decision passed by a court on ordering a closed trial shall be announced at a public trial. No appeal shall lie against a decision on ordering a closed trial. Even if a closed trial was ordered, the court may permit public officers performing tasks relating to the administration of justice to attend the trial. In a proceeding instituted against a foreign national accused, or for a criminal offence committed against a foreign national aggrieved party, a consular officer of the country of the foreign national or, on the basis of an international treaty promulgated in an Act, a member of an authority of the foreign country shall be permitted to attend the trial. If a closed trial is ordered, an aggrieved party acting without a representative, or an accused acting without a defence counsel, may move that a person present at the place of the trial, identified by him and other than a person to be interrogated at the trial, be allowed to attend the trial. Such a motion may not be submitted if a closed trial was ordered by the court for the protection of classified data. No appeal shall lie against a decision on such a motion. If the court orders a closed trial, it shall advise all persons present that they may not disclose any information heard during the trial; the court shall also advise them of the criminal consequences of the misuse of classified data, if required. Such an advice shall be indicated in the minutes.[943]

A trial shall be continued in public, if the reason for ordering a closed trial has ceased. Even if the public was excluded from a trial, the entire operative part and, with the restriction specified in paragraph (3), the statement of reasons of a decision adopted by a court in a trial shall be announced in public. The court shall not announce in public any data contained in the statement of reasons of a decision that, if published, would harm the interest for the protection of which the closed trial was ordered by the court.[944]

6.5. Conducting, and maintaining the dignity and order of, a trial (CPC)

A trial shall be conducted by the proceeding single judge or the chair of the panel, who shall determine the order of acts to be carried out under the framework of this Act.

A single judge or the chair of a panel shall ensure that (1) the provisions of the Act are observed, and that the persons participating in the criminal proceeding can exercise their rights; (2) the dignity of the trial is maintained; to this end, he shall have a person disrespecting the trial removed from the courtroom. A single judge or the chair of a panel shall call to order and may impose a disciplinary fine on a person who violates the human dignity of a person attending the trial in a manner that results in disrespecting also the trial.[945]

6.5.1. Maintaining the order of a trial

A single judge or the chair of a panel shall call to order and may impose a disciplinary fine on a person who disturbs the order or due course of a trial. In case of repeated or grave disturbance, a single judge or the chair of a panel may expel or order the disturber

943 CPC 437. §
944 CPC 438. §
945 CPC 439. §

to be removed from the courtroom, or exclude the audience if disturbance was caused by members of the audience.

A court shall continue a trial even in the absence of an accused expelled or removed from the courtroom; the accused shall be called back to the court before the conclusion of the evidentiary procedure, and the summary of the taking of evidence conducted in his absence shall be presented to him.

If the accused does not cease his disturbing conduct and, by his conduct, he makes it impossible to continue the trial in his presence, the trial may be finished in his absence with his defence counsel present.[946]

a) Disturbance by a prosecutor or defence counsel:

A prosecutor who disturbs a trial may be called to order. If a trial could not be continued because of the disturbing conduct of a prosecutor, the proceeding single judge or the chair of the panel shall interrupt the trial and request the head of the prosecution office to designate another prosecutor. If it is not possible to designate another prosecutor immediately, the trial shall be postponed.

A defence counsel who disturbs a trial may be called to order; in case of repeated or grave disturbance, a disciplinary fine may be imposed on him, but he may not be expelled or removed from the trial. If a trial could not be continued because of the disturbing conduct of a defence counsel, the proceeding single judge or the chair of the panel shall interrupt the trial. In that event, the accused may authorise another defence counsel or, if the attendance of a defence counsel at the trial is mandatory, another defence counsel shall be appointed. If this is not possible immediately, the trial shall be postponed at the expense of the disrupting defence counsel.[947]

b) Committing a criminal or disciplinary offence in a trial:

If a disturbing behaviour displayed on a trial may serve as grounds for a criminal or disciplinary proceeding, the proceeding single judge or chair of the panel shall notify the competent authority or the person exercising disciplinary powers. If the behaviour may serve as a ground for a criminal proceeding, the court may order the disturber to be taken into custody.[948]

6.6. Minutes and inspection of case documents (CPC)

6.6.1. Methods of taking minutes, and recordings of procedural acts

The proceedings of a court shall be recorded in minutes. In accordance with the law, a procedural act may be recorded by preparing a) a continuous sound or audio-visual recording, in addition to keeping minutes simultaneously, or b) an audio-visual recording, in place of keeping minutes simultaneously.

946 CPC 440. §
947 CPC 441. §
948 CPC 442. §

In addition to situations specified by law, a court may also order, ex officio or upon a motion submitted at least five days before a given procedural act by the prosecution service, accused, defence counsel, or aggrieved party summoned to, or notified about, a procedural act, recording the given procedural act by preparing a continuous sound recording or an audio-visual recording.

The making of a continuous sound recording or audio-visual recording shall be interrupted for the period when the court adopts its conclusive decision, and may be interrupted for the period of making any other decision. If the court interrupts a procedural act for an important reason for a short period, the continuous sound recording or audio-visual recording may also be interrupted for the same period.[949]

6.6.2. Requirements concerning the form and content of minutes

The following shall be recorded in minutes:

– proceeding court, and case number,

– subject matter of the indictment, indicating the criminal offence and the name or other description suitable for the identification of the accused,

– venue of the court proceeding, set and actual date and time of opening the trial, the reason for the difference, if any, and date and time of closing the minutes,

– form of the court proceeding, and whether the proceeding is open to the public,

– names of the proceeding members of the court, the keeper of minutes, and any present prosecutor, defence counsel, interpreter, expert, and witness,

– name or other description suitable for the identification of the accused present,

– other personal data specified in this Act,

– name of other persons attending the procedural act, and the capacity in which they are attending,

– whether there is any audience.

The minutes may also record orders passed in the course of a proceeding. If only written minutes are taken, and a means of evidence is presented or a means of physical evidence is attached, only the fact of doing so shall be referred to in the minutes. If only written minutes are taken and a person attending the procedural act moves for recording in the minutes a circumstance occurred or a statement made during the proceedings, the motion shall be complied with, unless the court does not have any knowledge of the respective circumstance occurring or statement being made. If only written minutes are taken, the minutes need not include any part of a testimony or expert opinion that is identical to the content of the minutes taken earlier during the court proceeding; instead, a reference shall be made to the previous minutes.[950]

6.6.3. The preparation, supplementation, and rectification of the minutes

If an audio-visual recording qualifying as minutes is made of a procedural act, the attendance of a keeper of minutes at the procedural act shall not be mandatory. A written

949 CPC 444. §
950 CPC 445. §

minutes shall be prepared by a keeper of minutes normally at the same time when the given procedural act is performed, but not later than eight days after its performance.

If the minutes are not prepared within eight days, the proceeding single judge or the chair of the panel shall inform the prosecution service, the accused, and the defence counsel about the time by when the minutes are prepared. If a continuous sound recording or audio-visual recording is made, all persons attending the given procedural act shall be informed, within eight days after completing the procedural act, of where, when and how they may listen to or view the recording. The provisions on inspecting and copying case documents shall apply to continuous sound recordings and audio-visual recordings. When this Act requires a fact or statement to be recorded or indicated in minutes, it shall also mean its recording on a continuous sound recording or an audio-visual recording.

If there is any difference between the content of a continuous sound recording or audio-visual recording and the written minutes, or a written extract of the minutes, the reason for such difference shall be clarified.

If the written minutes or a written extract of the minutes are produced at the same time when the given procedural act is performed, they may be supplemented or rectified ex officio or upon a motion, on the basis of a comment made by the prosecutor, accused, defence counsel, aggrieved party, party with a pecuniary interest, or other interested party at the time of performing the procedural act. A motion to that effect, if dismissed, shall be recorded in the written minutes or written extract of the minutes. Any wording that becomes unnecessary due to a modification shall be deleted in a manner that ensures the legibility of the deleted wording.

A person participating in the criminal proceeding who attended the given procedural act may file a motion to rectify or supplement the written minutes or the written extract of the minutes within eight days after inspecting the written minutes, written extract of the minutes, or continuous sound recording or audio-visual recording. A motion to rectify or supplement may not be filed over fifteen days after the written minutes or written extract of the minutes are produced. Any rectification or supplementation shall be recorded on the written minutes or written extract of the minutes concerned, indicating the date of rectification, and preparing a new minutes; otherwise, the dismissal of the motion shall be indicated among the case documents.

The court may order ex officio the written minutes or written extract of the minutes to be rectified.

The written minutes, written extract of the minutes, and any modification to such minutes or extract shall be signed by the keeper of minutes and the proceeding single judge or chair of the panel. If the chair of the panel is prevented from signing, the written minutes or written extract of the minutes shall be signed in his place by another member of the panel, indicating his capacity as substitute.[951]

Minutes shall be taken of the panel session if a decision is not passed unanimously. The minutes of a panel session, the dissenting opinion of a judge of a minority opinion, and the draft decision of the court shall be handled confidentially. The minutes of a panel session and the dissenting opinion of a judge of a minority opinion may be inspected only by a court proceeding with regard to an appeal or an extraordinary legal remedy, a disciplinary

951 CPC 446. §

court proceeding with regard to a disciplinary procedure, or a prosecution office or court proceeding with regard to a criminal proceeding already commenced.[952]

6.7. Adopting a decision in a court procedure (CPC)

6.7.1. Court decisions

In the course of its proceeding, the court shall decide by way of a) a conclusive decision, b) a non-conclusive order, or c) a court measure that does not require passing a decision. A conclusive decision shall be a judgment or a conclusive order. A court shall decide in particular on the matter of

– disqualifying a judge,
– appointing or discharging a defence counsel or an expert,
– ordering forced attendance, or issuing a search warrant,
– issuing, withdrawing, or modifying an arrest warrant,
– obliging an accused to attend a trial,
– permitting an accused to again waive his right to attend a trial, and
– ordering a closed trial by passing a non-conclusive order.

A case administration order means a non-conclusive order on setting the course of the proceeding after the arrival of a case to the court passed for the purpose of preparing or performing a procedural act, including in particular

– an order on sending a case to a trial,
– an order on setting, postponing, adjourning, or interrupting a preparatory session or a trial,
– an order on issuing a summons for, or a notification about, a preparatory session or a trial,
– an order on joining or separating cases,
– an order on sending, or refusing to send, a case to a court panel,
– an order on conducting, and maintaining the order of, a trial, with the exception of imposing a disciplinary fine or an obligation to bear costs, or ordering custody,
– an order on establishing a qualification other than that specified in the indictment,
– an order on a motion for evidence.[953]

6.7.2. Deliberation and voting. Parts of a decision

A court panel shall adopt a decision by voting after deliberation. If the voting is not unanimous, the decision shall be decided by the majority of votes. Younger judges shall vote before more senior judges, and the chair of the panel shall cast the last vote. If a vote on imposing a penalty, or applying a measure, is not unanimous, majority shall be determined in a way that a vote in favour of the most severe legal consequence shall support, and be calculated in favour of, the legal consequence closest to it. Deliberation and voting shall be secret. Only the chair and members of the proceeding panel, and a keeper of minutes may

952 CPC 447. §
953 CPC 449. §

be present during deliberation and voting. When adopting its judgment, the court shall establish the facts of the case and decide, on the basis of the established facts, whether the accused is guilty, and if so, of what criminal offence; then, the court shall decide on the penalty to be imposed or measure to be applied, as well as on any other provision to be made. Any non-material issue raised in a trial may be decided by way of quiet deliberation during the trial.[954]

Unless otherwise provided in this Act, a decision shall consist of an introductory part, an operative part, a legal remedies part, a statement of reasons, and a closing part.

– The introductory part shall specify (1) the name of the court, (2) the court case number, (3) the place and form of the court proceeding, (4) whether the proceeding was open to the public if the decision was passed in a trial, (5) the place and date of passing the decision.

– The operative part shall specify the decision of the court and the person subject to the provisions, including all data required for his identification. If the decision is communicated by means of service, the legal remedies part shall specify if any legal remedy is available against the decision, the participants of the proceedingwho may seek such legal remedy, as well as the place of and time limit for doing so.

– The statement of reasons shall specify all material facts and circumstances the court established and relied on when passing its decision, as well as the laws underlying the decision.

– The closing part shall include the place and date of passing the decision, as well as the name and signature of the single judge or the chair of the panel and all members of the panel.

If an appeal against a non-conclusive order has a suspensory effect under this Act, information on this matter shall be provided in the legal remedies part of the order. A statement of reasons need not be provided for a case administration order or a court measure that does not require passing a decision. A decision recorded in minutes shall not include an introductory or closing part.[955]

6.7.3. Recording a decision in writing. Rectifying and communicating a decision

Unless otherwise provided in this Act, a decision not recorded in minutes shall be recorded in writing within one month, or within two months if requiring a longer statement of reasons, after it is passed or announced. This time limit may be extended once by the president of the court for up to two months. The date when a decision is recorded in writing in full shall be indicated on the decision. If the court communicates the operative and legal remedy part of its decision by means of service, the first day of the time limit shall be (1) the day when the time limit open for seeking legal remedy expired without any application for legal remedy being submitted, (2) the day when a legal remedy statement is received by the court from all persons eligible to file an appeal.[956]

If a decision contains any misspelling or miscalculation, the court may order its rectification either ex officio or upon a motion. The merit of a decision may not be changed

954 CPC 450. §
955 CPC 451. §
956 CPC 452. §

by a rectification. A rectification shall be recorded on the decision concerned, or a new decision shall be produced concerning the rectification. If a decision had already been served before rectification, the order on rectification shall be served on all persons to whom the rectified decision was sent by the court. No appeal shall lie against an order on rectification, unless the court (1) rectifies the operative part of a decision that may be challenged by an appeal, or (2) dismisses a motion to rectify the operative part of the decision. An appeal against an order ordering rectification may be filed by the prosecution service and any person concerning whom the decision or its rectification contains a provision, including a defence counsel acting for the accused concerned.

A motion for rectification shall not have a suspensory effect regarding the submission of an appeal against the decision concerned or the implementation or enforcement of the decision concerned.[957]

A decision shall be communicated to all persons concerned by any of its provisions. A conclusive decision and any decision transferring the case, designating a court, or suspending the proceeding shall also be communicated to the aggrieved party. With the exception of a case administration order passed in the context of administering a trial and keeping its order, all decisions shall be communicated to the prosecution service.[958]

A decision shall be communicated by way of announcement to any person present and by way of service to any other person. A decision shall be announced by the proceeding single judge or chair of the panel; during announcement, the operative part shall be read out loud, and a summary of the statement of reasons shall be presented and, if necessary, explained. If the operative part of a conclusive decision is recorded in writing before its announcement, it shall be served, together with the legal remedy part, on all persons eligible to appeal who are not present. A conclusive decision containing a statement of reasons shall also be served on the prosecution service, the accused, his defence counsel, and the aggrieved party, even if the operative part of the decision was already communicated to them by way of announcement or service; otherwise, if a person other than those referred to in this paragraph filed an appeal against a decision, a decision also containing a statement of reasons shall be served on the appellant. The persons, other than those specified in this section, to whom a decision, or information on the content of a decision, is to be sent shall be specified by a law. If an accused does not understand the Hungarian language, the parts of a judgment or conclusive order that concern him shall be translated after announcement into the language he used previously in the proceeding, and the translation shall be served on the accused. At the time of communicating a conclusive decision, the defendant shall also be informed about the legal basis of any recompense he may claim, the fact that he may decide to enforce his claim in a simplified recompense procedure or a recompense action, the time limit for enforcing such a claim, the day the time limit is calculated from, and that the time limit is a term of preclusion.[959]

957 CPC 453. §
958 CPC 454. §
959 CPC 455. §

6.7.4. The final and binding effect and administrative finality of decisions, and their certification

A final and binding conclusive decision of a court shall contain a universally binding decision with administrative finality on the relevant indictment, the criminal liability of the defendant, and the applicable legal consequences under criminal law, or the absence thereof. A conclusive decision that becomes final and binding may be changed only as the result of seeking extraordinary legal remedy or conducting a special procedure.

If a conclusive decision on the indictment becomes final and binding, another criminal proceeding may not be instituted against the defendant for the act adjudicated in that decision.

As soon as a conclusive decision becomes final and binding, the enforcement of any penalty imposed and measure applied by the decision shall be commenced, the provisions of the decision shall be implemented; the legal consequences of convicting or acquitting the defendant or terminating the proceeding shall also become effective as soon as the decision becomes final and binding.

The enforcement of a penalty imposed or a measure applied by, or the implementation of the provisions of, a final and binding conclusive decision may be suspended or interrupted by a court in situations specified in this Act.[960]

An appeal filed against a conclusive decision shall prevent the challenged part to be revised by the proceeding court of appeal from becoming final and binding. A conclusive decision shall become final and binding in part, if it contains any provision not to be revised by the proceeding court of appeal.[961]

A conclusive decision of a court of first instance shall become final and binding on the day when (1) it is announced, provided that filing an appeal is prohibited under this Act, (2) all persons eligible to appeal declare that they accept the conclusive decision or withdraw all appeals, (3) the time limit open for submitting an appeal expires without any appeal being submitted, (4) the conclusive decision passed by the court of first instance is upheld by the court of second instance.

A conclusive decision of a court of second instance shall become final and binding on the day when

– it is passed, provided that no third-instance proceedings can be brought,

– all persons eligible to appeal declare that they accept the conclusive decision or withdraw all appeals,

– the time limit open for submitting an appeal expires without any appeal being submitting, or

– the conclusive decision passed by the court of second instance is upheld by the court of third instance.

A conclusive decision of a court of third instance shall become final and binding on the day when it is passed. A punishment order shall become final and binding on the day when

– all persons eligible to file a motion for holding a trial declare that they do not request a trial to be held,

960 CPC 456. §
961 CPC 457. §

– any motion for holding a trial is withdrawn, or

– the time limit open for filing a motion for holding a trial expires without any such motion being filed.[962]

After a conclusive decision becomes final and binding, the proceeding single judge or chair of the panel shall confirm that the conclusive decision became final and binding, including the day of becoming final and binding, by placing a corresponding clause on the decision (hereinafter „final and binding effect clause"). If a conclusive decision becomes final and binding only in part, the final and binding effect clause shall specify the date when the decision became final and binding in part, as well as the provisions that became final and binding. All persons who were eligible to file an appeal against a decision shall be notified of the confirmation of the final and binding effect of that decision.[963]

Unless otherwise provided in this Act, a non-conclusive order may not be changed after it reaches administrative finality. A non-conclusive order shall reach administrative finality on the day when a) it is passed or announced, provided that challenging it by means of an appeal is prohibited under this Act, b) all persons eligible to appeal declare that they accept the non-conclusive order or withdraw all appeals, c) the time limit open for submitting an appeal expires without any appeal being submitted, or d) all appeals are dismissed, or the non-conclusive order passed by the court of first instance is upheld by the court of second instance. A non-conclusive order shall be implemented or enforced regardless of whether it reached administrative finality, unless an appeal against the given non-conclusive order has a suspensory effect under this Act. In exceptionally justified cases, both the court that passed the non-conclusive order and the court proceeding on the basis of the appeal may suspend the implementation or enforcement of a non-conclusive order.[964]

An administrative finality clause shall be added to

– an order on ordering a coercive measure affecting personal freedom subject to judicial permission,

– an order on dismissing a motion for retrial,

– an order on dismissing a substitute private prosecution indictment,

– an order on setting aside a conclusive decision, and

– any other order, if an appeal has a suspensory effect on the implementation or enforcement of that order under this Act.[965]

If necessitated by any subsequent factor, a final and binding effect clause or an administrative finality clause may be rectified or clarified by a court ex officio or upon a motion. A decision rectified or clarified this way shall be served on all persons to whom the decision subjected to rectification was sent by the court.[966]

962 CPC 458. §
963 CPC 459. §
964 CPC 460. §
965 CPC 461. §
966 CPC 462. §

6.8. Proceeding of a court before the indictment (CPC)

6.8.1. General rules of procedure. The forms of court proceedings

Before the indictment, the tasks of a court shall be carried out, at first instance, by a district court judge designated by the president of the respective regional court as investigating judge.[967] Before the indictment, a court shall decide on

– motions relating to coercive measures falling within the subject-matter competence of courts,

– motions relating to the observation of the mental condition of a person,

– disqualifying a defence counsel,

– granting a witness the status of a specially protected witness,

– issuing or withdrawing a European or international arrest warrant,

– a motion for revision,

– converting a disciplinary fine into confinement, etc.[968]

An investigating judge shall proceed in the course of proceedings conducted by any prosecution office within the territory of the given regional court. If the president of a regional court designates investigating judges at more than one district court, he shall determine the territorial jurisdiction of each investigating judge.

Cases may not be joined or separated during the proceedings of a court before the indictment, but a court may adjudicate motions filed regarding the same subject matter together or may pass more than one decision on a motion seeking multiple decisions.

A proceeding conducted before the indictment may not be terminated or suspended by the court.[969]

A court shall hold a session if a motion is aimed at

– ordering a coercive measure affecting personal freedom subject to judicial permission,

– extending the period of pre-trial detention, and the motion invokes a fact as the reason for such an extension that is new in comparison to the previous decision,

– extending the period of pre-trial detention for over six months from the date when it was ordered, or

– ordering the observation of the mental condition of a person,

A court may decide on the basis of case documents and without holding a court session if

– a motion for restraining order was filed by the aggrieved party, and it can be established that the conditions of issuing a restraining order are not met,

– a motion is aimed at ordering a coercive measure that restricts personal freedom to a lesser extent than the one in place at the time of filing the motion,

– in the course of assessing a motion for extending the period of a coercive measure affecting personal freedom subject to judicial permission, it orders a coercive measure

967 CPC 463. §
968 CPC 464. §
969 CPC 465. §

subject to judicial permission that restricts personal freedom to a lesser extent, provided that holding a court session is not mandatory for any other reason, or

– a motion is prohibited by an Act, late, or filed by an ineligible person.[970]

6.8.2. Preparation of a court session

If the court holds a session, it shall set a date for the session. If the defendant is in custody and the prosecution service files a motion for ordering a coercive measure affecting personal freedom subject to judicial permission, the court shall set a date for its session in a manner that allows for the session to be held before the time limit of custody expires. If a motion is filed for extending the period of pre-trial detention, the court shall set a date in a way that allows for the session to be held at least one day before the time limit of the pre-trial detention expires. If a motion for restraining order is filed by an aggrieved party, the court shall set a date in a way that allows for the session to be held within five days after the motion is received by the court.[971]

If a motion is filed for ordering a pre-trial detention or preliminary compulsory psychiatric treatment, the suspect and the defence counsel shall be enabled to inspect the case documents referred to in the motion after the motion is sent. If a motion is filed for extending the period of pre-trial detention, the suspect and his defence counsel shall be enabled to inspect, after the motion is sent, the case documents that are referred to in the motion and were produced after the last decision on the matter of pretrial detention was passed.[972]

If a motion was filed by a prosecution service, it shall ensure that the suspect appears at the court session. The prosecution service shall (1) notify the defence counsel about the place, date, and time of the court session, or (2) summon the defence counsel if his attendance at the court session is mandatory. If the attendance of an interpreter or another person at a court session is necessary, his appearance shall be ensured by the prosecution service.[973]

If a motion for restraining order was filed by an aggrieved party, the court shall notify the prosecution service, the aggrieved party, and the defence counsel about the date and time of its session; it shall also call upon the prosecution service to ensure that the defendant appears. The court shall forward the motion for restraining order to the defendant and the defence counsel. If the attendance of an interpreter or another person at a court session is necessary, hisappearance shall be ensured by the court.[974]

The attendance of a prosecutor at a court session shall be mandatory. A junior prosecutor may act in place of a prosecutor in a court session. The attendance of a defence counsel at a court session shall be mandatory if (1) the subject matter of a motion is ordering the observation of the mental condition of a person, or (2) the subject matter of a motion is ordering preliminary compulsory psychiatric treatment.[975] If a person who filed a motion does not appear at the relevant court session, his motion shall be considered withdrawn.[976]

970 CPC 466. §
971 CPC 468. §
972 CPC 470. §
973 CPC 471. §
974 CPC 472. §
975 CPC 474. §
976 CPC 475. §

6.8.3. Proceeding of a court on the basis of case documents. Court decisions

If a motion is filed by the prosecution service, it shall transfer all case documents of the investigation to the court at the time of filing the motion. If a motion is filed for extending the period of the pre-trial detention, the suspect and the defence counsel shall, after the motion is sent, be enabled to inspect the case documents that are referred to in the motion and were produced after the last decision on the matter of the pre-trial detention was passed.

If a motion was filed not by the prosecution service and this Act does not provide otherwise, the motion shall be sent by the court to the prosecution service, and it shall set a time limit for the prosecution service to submit its motions and observations and to transfer the case documents of the investigation.

The court shall examine if the statutory conditions for filing the motion are met, if there is any obstacle to conducting a criminal proceeding, and if there is any reasonable doubt regarding the grounds for the motion.

Unless otherwise provided in this Act, the court shall pass a decision on the basis of the case documents within eight days after receipt of the motion.

If a motion is aimed at ordering sequestration or adjudicating a motion for the revision of a sequestration order, and the case documents attached are of considerable volume, the court shall decide on the motion as a matter of priority, but not later than one month after receipt of the motion.[977]

If adjudicating a motion is not prevented by any obstacle, the court shall decide by passing a non-conclusive order a) granting, in full or in part, the motion and passing a provision meeting the legal requirements or, in case of a court review, amending or setting aside the decision, or

b) dismissing the motion. The statement of reasons for a decision shall include a summary of the motion, a short description and qualification, pursuant to the Criminal Code, of the facts relating to the actunderlying the proceeding, and a reference to whether the statutory conditions for filing the motion were met. If a motion was dismissed by a court with a non-conclusive order with administrative finality, no other motion may be filed on the same grounds. The court may refrain from passing a decision on such a motion, but doing so shall not prevent the court from passing another non-conclusive order on the matter.

If a motion for restraining order was filed by the aggrieved party but the conditions of issuing a restraining order are not met, the court shall inform the person who filed the motion that he may initiate issuing a temporary preventive restraining order pursuant to the Act on restraining orders applicable in case of violence between relatives. Subject to consent of the person who filed the motion, the court may send the motion for restraining order, as an application for temporary preventive restraining order, to the police organ established to carry out general policing tasks.[978]

In the course of a court session, a decision shall be communicated by announcement. If a decision was passed on the basis of case documents, it shall be communicated by way of service without delay after it is recorded in writing. The court shall serve, through the prosecution service, a) a decision on granting a witness specially protected status on the

977 CPC 476. §
978 CPC 478. §

witness concerned, and b) a decision on ordering a search in the offices of an attorney-at-law or notary on the person affected by the search.[979]

6.8.4. Legal remedies

An appeal against a court decision may be submitted by (1) the prosecution service, (2) the person who filed the motion, (3) a person subjected to a provision of the decision, or (4) a defence counsel if the decision was communicated to the suspect.

An appeal against a decision communicated during a court session shall be submitted immediately after its announcement. If a person eligible to appeal is not present when the decision is announced, he may submit an appeal within three days after the court session. An eligible person may submit an appeal against a decision passed on the basis of case documents within three days after the decision is served.

If a motion for pre-trial detention is dismissed, including situations where the court orders criminal supervision, or issues a restraining order, in placer of ordering pre-trial detention, the prosecution service, the defendant or the defence counsel may file a motion, together with a legal remedy statement, for the appeal to be adjudicated in a court session. A defendant shall be advised of this provision when legal remedy statements are made.[980]

An appeal shall be sent by the proceeding court directly to the regional court with subject-matter and territorial jurisdiction to adjudicate the appeal after the statements are received, or the time limit for appeals expired, without delay.

An appeal filed against a decision of an investigating judge shall be adjudicated by a second instance panel of a regional court. The court shall adjudicate an appeal in a panel session.[981] No appeal shall lie against a decision (1) on the conversion of a disciplinary fine, (2) on granting a witness the status of a specially protected witness, (3) on a motion for revision.[982] The court may refrain from passing a decision on an appeal filed against a nonconclusive order with administrative finality, but doing so shall not prevent the court from passing another non-conclusive order on the matter. If filing an appeal against a non-conclusive order of a court is permitted under the Act, the court that passed the decision at first instance shall be bound by its challenged nonconclusive order until it reaches administrative finality. If the court of second instance sets aside the decision passed by the court of first instance and instructs the court to conduct a new proceeding on the basis of an appeal submitted against a decision passed by the court of first instance on ordering, or extending the period of, a coercive measure affecting personal freedom subject to judicial permission, the court of second instance may order the coercive measure from the date of passing the decision that was set aside or extend its period. The time limit for a coercive measure thus ordered or extended shall be not longer than 72 hours from the date when the decision was passed by the court of second instance.[983]

979 CPC 479. §
980 CPC 480. §
981 CPC 481. §
982 CPC 482. §
983 CPC 483. §

6.9. Preparation of a trial (CPC)

6.9.1. Examination of case documents

Within a month of receipt, the court shall examine all case documents with a view to determining if it is necessary or possible to

– transfer the case,
– join or separate the cases,
– suspend the proceeding,
– terminate the proceeding,
– request the prosecution service to remedy any deficiencies of the indictment document,
– pass a decision regarding a coercive measure,
– establish a qualification different from that specified in the indictment document,
– refer the case to a court panel, or
– conduct a proceeding for passing a punishment order.

The court shall hold a session to interview the prosecutor, the accused, the defence counsel or the aggrieved party.[984]

a) Transferring a case:

If adjudicating a case does not fall within the subject-matter or territorial jurisdiction of the proceeding court, it shall transfer the case to a court with subject-matter and territorial jurisdiction over the case.[985]

b) Joining and separating cases:

If a new proceeding is instituted against a person released on probation for a criminal offence committed during the probationary period, or if a proceeding is instituted against a person released on probation before or during the probationary period for a criminal offence committed before the probationary period, the cases shall be joined, and the court with subject-matter and territorial jurisdiction over the new case shall conduct the proceeding.

If the court does not find the accused guilty in the new proceeding, or if the criminal offence was committed before release on probation and the probationary period expired before the cases are adjudicated jointly, the court shall separate the joined cases.[986]

c) Suspending a proceeding:

The court shall suspend its proceeding if the accused is unable to exercise his rights and perform his obligations provided for under this Act due to his permanent and serious illness, or a mental disorder that occurred after the commission of the criminal offence.[987]

The court may suspend its proceeding if

– the whereabouts of the accused are unknown or he is staying in another country,

984 CPC 484. §
985 CPC 485. §
986 CPC 486. §
987 CPC 487. §

– a measure was taken to remedy any deficiencies of the indictment document or to perform a procedural act,

– an authority of another country is to execute a request for legal assistance,

– a decision on a preliminary matter needs to be obtained to conduct the proceeding,

– a consultation procedure, as defined in the Act on cooperation with the Member States of the European Union in criminal matters, is instituted,

– the surrender or extradition of the accused was postponed by an authority of another country pursuant to an international arrest warrant or European arrest warrant,

– an international criminal court, in a case falling within its jurisdiction, requests the Hungarian authority to transfer the criminal proceeding,

– the recognition adaptation of a foreign judgment, or a judgment delivered in a Member State, was initiated, or

– the execution of extradition or surrender of the accused was postponed by a foreign judicial authority having regard to conducting a pending criminal proceeding, or enforcing a sentence of imprisonment imposed, or a custodial measure applied, in the other country.

The court may suspend its proceeding for a period of one year if (1) the behaviour of a defendant following the commencement of the proceeding constitutes a reason for terminating his liability to punishment under the Special Part of the Criminal Code, and (2) his behaviour is expected to serve as a ground for terminating his liability to punishment.[988]

A court may initiate, ex officio or upon a motion, a proceeding before the Constitutional Court for establishing that a law, provision of law, public law regulatory instrument, or uniformity decision is in conflict with the Fundamental Law or an international treaty pursuant to the Act on the Constitutional Court. A court may initiate, ex officio or upon a motion, a proceeding before the Curia for reviewing a local government decree pursuant to the Act on the organisation and administration of the courts. If initiating a proceeding before the Constitutional Court or the Curia, the proceeding court shall pass a corresponding order and, at the same time, suspend its proceeding.[989]

A court may initiate, ex officio or upon a motion, a preliminary ruling procedure before the Court of Justice of the European Union pursuant to the provisions of the treaties on which the European Union is founded. If initiating a preliminary ruling procedure, the court shall pass a corresponding order and, at the same time, suspend its proceeding. In its order, the court shall determine the question requiring the preliminary ruling of the Court of Justice of the European Union, and it shall present a summary of the facts of the case and the relevant Hungarian laws to the extent required for answering the question asked. The order of the court shall be served on the Court of Justice of the European Union and, for information purposes, it shall be served on the Minister responsible for justice simultaneously.If dismissing a motion for initiating a preliminary ruling procedure, the court shall pass a corresponding order.[990]

d) Terminating a proceeding:

A court shall terminate its proceeding with a conclusive order if

– the act serving as ground for the indictment does not constitute a criminal offence,

988 CPC 488. §
989 CPC 489. §
990 CPC 490. §

– the accused is not liable to punishment due to infancy,

– the liability to punishment of the accused was terminated by his death, a statute of limitations, a pardon, or on any other grounds specified in an Act,

– the act serving as ground for the indictment has already been adjudicated with final and binding effect,

– the prosecution service abandoned the indictment and neither private prosecution nor substitute private prosecution can be brought, and the aggrieved party did not take action as a private prosecuting party or substitute private prosecuting party,

– it is conducted regarding a criminal offence that is, in comparison to another criminal offence of greater material gravity also subject to the indictment, not significant for establishing criminal liability.

The court shall inform any civil party about terminating the proceeding, also advising any such party that he may enforce his civil claim by other legal means.[991]

e) Remedying the deficiencies of an indictment document:

If an indictment document does not contain the statutory elements required under CPC, or contains only some of those, the court, acting ex officio or upon a motion, shall pass an order specifying any deficiencies and calling upon the prosecution service to remedy the specified deficiencies of the indictment document. The prosecution service may remedy the deficiencies of the indictment document within two months after receipt of the order specified.[992]

f) Decisions on coercive measures:

A court shall decide, ex officio or upon a motion, on maintaining, ordering, or terminating a coercive measure affecting personal freedom subject to judicial permission. If a court orders or, where a new circumstance is invoked in a motion as ground for maintaining a measure in comparison to the earlier decision, maintains a coercive measure affecting personal freedom subject to judicial permission, it shall pass its decision in a court session. The period of a coercive measure maintained or ordered by the court that orders the transfer of the case concerned shall last until a decision is passed, in the course of the preparation of a trial, by the court to which the case was transferred.[993]

g) Option to establish a qualification different than that specified in the indictment:

If it is reasonable to assume that a) an act serving as ground for an indictment may constitute a criminal offence that is different than, or additional to, the criminal offence as qualified in the indictment document, or b) that the criminal offence may be qualified as less or more severe than that specified in the indictment document,the court shall pass an order establishing how the act serving as ground for the indictment may be qualified differently. If the court establishes that the act serving as ground for the indictment constitutes a criminal offence subject to private prosecution, a statement from the prosecution service need not be obtained regarding taking over the prosecution.[994]

991 CPC 492. §
992 CPC 493. §
993 CPC 494. §
994 CPC 495. §

h) Referring a case to a court panel

Before a preparatory session is concluded, a court shall refer a case to a panel of three professional judges if it considers it necessary due to the complexity of the case, the volume of case documents, the number of persons participating in the criminal proceeding, orfor any other reason.[995]

i) Communicating an indictment document:

The court shall serve the indictment document on the accused and the defence counsel upon the expiry of a period of one month after the receipt of the case documents by the court. The court shall call upon the accused and the defence counsel to file any motion for taking, or excluding, any piece of evidence during the preparatory session at the latest. [996]

j) Measures for performing procedural acts:

A court shall, ex officio or upon a motion filed by an eligible person, take measures to ensure that all means of evidence specified in a motion for evidence are available at the trial. A court shall obtain data regarding the criminal record of an accused, and data relating to the accused from the infraction records system; the court may also obtain, ex officio, data relating to the accused or the subject matter of the indictment from any other publicly certified register established by law. The court shall ensure the recognition of a judgment delivered in a Member State, or foreign judgment, concerning the suspect, which may be taken into account during the proceeding.[997]

6.10. Preparatory sessions (CPC)

6.10.1. The concept and date and time of preparatory sessions, and the persons attending

A preparatory session is a public court session held for the purpose of preparing a trial after the indictment is brought, where the accused and the defence counsel may, before the trial, present their position on the indictment and may be involved in setting the further course of the criminal proceeding. A court shall hold a preparatory session within three months after an indictment document is served. If a corresponding motion is filed by a defence counsel within three working days after receipt of an indictment document, the court shall set the date of the preparatory session to a date more than one month after the service of the indictment document. The provisions concerning the date and time of a preparatory session shall not apply if a summons to the preparatory session need to be served on an accused in another country, and the time needed for service does not allow for holding the preparatory session within the applicable time limit. The attendance of a prosecutor and the accused at a preparatory session shall be mandatory. If a defence counsel participates in the proceeding, the preparatory session may not be held in the absence of the defence counsel.[998]

995 CPC 496. §
996 CPC 497. §
997 CPC 498. §
998 CPC 499. §

An accused and a defence counsel shall be summoned to, and the prosecution service shall be notified about the date of, a preparatory session by the court. If there is more than one accused in a case, the court shall notify the co-accused and their defence counsels about the data of the preparatory session. In its summons, the court shall also advise the accused that

– he may confess his guilt of the criminal offence he was indicted for, and he may waive his right to a trial within the scope of his confession of guilt,

– should the court accept his confession of guilt, it shall not examine the validity of the facts presented in the indictment document, or the matter of guilt,

– should he not confess his guilt in line with the indictment document, he may present the facts and the supporting evidence his defence is based on, and he may move for taking or excluding evidence, at the preparatory session.

The court shall notify the aggrieved party about the date of the preparatory session and advise him of the option of filing a civil claim. The summons or the notification shall be issued at a time that allows for it to be served at least fifteen days before the preparatory session.[999]

If an accused fails to appear at a preparatory session, the court shall take measures to ensure the appearance of the accused as provided for under this Act. If the appearance of an absent accused, defence counsel, or prosecutor may not be ensured within a reasonable time on the due date of a preparatory session, the court shall postpone the preparatory session and schedule a new preparatory session for a date within the following two months.[1000]

6.10.2. Proceeding of a preparatory session

If holding a preparatory session is not prevented by any obstacle, the proceeding prosecutor shall, upon an invitation from the court after the commencement of the preparatory session, present a summary of the indictment and specify the means of evidence supporting the indictment; he may also file motions regarding the value or period of a penalty or measure, should the defendant confess to the commission of the criminal offence during the preparatory session.

Presenting the summary of the indictment may be omitted upon a motion by the accused or, with the consent of the accused, his defence counsel. Subsequently, the court shall interrogate the accused taking account of the characteristics of the preparatory session. The court shall appoint a defence counsel and postpone the preparatory session if the accused does not have an authorised defence counsel and the court has any doubt as to whether the accused understood the indictment or the accused moves for the appointment of a defence counsel.

If the indictment document is to be deemed served on the basis of fiction of service, the court shall, upon a motion by the accused or, with consent from the accused, his defence counsel, postpone the preparatory session, with the exception of a case where the accused refused to accept the indictment document.

The proceeding members of the court may ask questions from the prosecutor, the accused, and, with regard to any civil claim, any civil party. The prosecutor, the defence

999 CPC 500. §
1000 CPC 501. §

counsel, and, with regard to any civil claim, a civil party may ask the accused questions; the accused and the defence counsel may file motions for questions to be asked from the prosecutor.[1001]

If there is more than one accused in the case and all other conditions of separation are met, the court, with a view to announcing a judgment, may separate, as regards the accused that confessed his guilt, the cases pending before it.[1002]

a) Proceeding following a confession of guilt:

If an accused confesses his guilt and waives his right to a trial within the scope of his confession, the court shall decide, on the basis of the above fact, the case documents, and the interrogation of the accused, whether it accepts the confession of guilt by the accused.

Acceptance of a confession of guilt shall be subject to the following conditions:

– the defendant understands the nature of, and the consequences of accepting, the confession,

– there is no reasonable doubt regarding the capacity of the defendant to be held liable for his acts, and the voluntary nature of his confession,

– the defendant's confession of guilt is clear and supported by the case documents.

If the court finds it possible to adjudicate the matter during a preparatory session, it shall also interrogate the accused regarding all sentencing factors. After interrogating the accused, first the prosecutor and then the defence counsel may address the court. The court may pass its judgment even during the preparatory session.[1003]

If it is not possible to administer a case during a preparatory session, the accused and the defence counsel may file, without affecting the grounds supporting the facts presented in the indictment document or the matter of guilt, a) motions for taking evidence or performing other procedural acts b) motions for excluding pieces of evidence.

If holding a trial is not prevented by any obstacle, a trial may be held by the court immediately.[1004]

b) Proceeding without a confession of guilt:

If an accused does not confess his guilt during a preparatory session, he may still confess his guilt at any later stage of the proceeding. If a court refuses to accept a confession of guilt by an accused, or an accused refuses to answer regarding the confession of his guilt, it shall be assumed that the accused did not confess his guilt. The same procedure shall be followed if an accused confessed his guilt but did not waive his right to a trial within the scope of his confession.

If an accused did not confess his guilt, he may specify the facts he accepts as true from among those stated in the indictment document during his interrogation.

An accused or a defence counsel may present the facts and the supporting evidence underlying the defence; he may also file motions for taking or excluding evidence or performing other procedural acts.[1005]

1001 CPC 502. §
1002 CPC 503. §
1003 CPC 504. §
1004 CPC 505. §
1005 CPC 506. §

A court shall exclude a piece of evidence, ex officio or upon a motion, if it is clear from the case documents that using the given piece of evidence would be in conflictwith the provisions of this Act. If, due to the complexity of the case or on the basis of case documents, it is not possible to decide whether to exclude a piece of evidence, the court may examine the piece of evidence to be excluded before passing a decision on the matter. Pieces of evidence excluded and documents containing such pieces of evidence shall be handled among the case documents confidentially.[1006]

On the basis of statements made by the accused and after hearing any observation made by prosecutor, the court may (1) set a date for a trial immediately and the trial may be held immediately unless doing so is prevented by an obstacle, (2) determine the framework and scope of taking evidence, as well as the order of pieces of evidence to be taken, (3) decide not to take evidence regarding facts that are accepted as true by the prosecutor, the accused, and the defence counsel, and regarding a criminal offence that is, in comparison to another criminal offence of greater material gravity also subject to the indictment, not significant for establishing criminal liability.[1007]

6.10.3. Other rules on the preparation of a trial

Within one month after closing the preparatory session, the court shall examine all motions for evidence, set a date for the trial, and make the arrangements necessary for holding the trial and issuing summons and notifications. As a general rule, trials shall be held in the official premises of the court. The court may, if it considers necessary to do so, make different arrangements and set a trial at a venue falling outside its territorial jurisdiction. If it is clear in light of the volume of the evidence to be taken that the case may not be concluded within one day of trial, the court may set more than one date or a single continuous date.[1008]

The court shall summon to the trial date set all persons whose attendance is mandatory. The court shall notify the prosecution service and, unless an exception is made in this Act, the experts, and all persons who may attend the trial under this Act. If the prosecution service files a motion to terminate the parental custody rights of the accused, the court shallnotify the guardianship authority and the other parent, provided that the other parent also has parental custody rights.

In the summons or notice, the court shall invite the aggrieved party and any party with a pecuniary interest to file their motions for evidence before the trial without delay. At the time of sending out summons and notices, the court shall also inform the prosecution service, the accused and the defence counsel about the taking of evidence the court intends to carry out on the trial date set. A summons shall be served on the accused and the defence counsel at least eight days before the trial. A notification shall be issued at a time that allows for it to be served at least eight days before the trial.[1009]

If a court proceeds as a panel, any decision on the termination of the proceeding or any coercive measure affecting personal freedom subject to judicial permission shall be passed

1006 CPC 507. §
1007 CPC 508. §
1008 CPC 509. §
1009 CPC 510. §

by the panel in the course of the preparation of the trial. The court panel may decide on any matter that falls within the powers of the chair of the panel.

In the course of the preparation of a trial, a junior judge may proceed regarding the following matters:

– transferring a case,
– joining and separating cases,
– remedying the deficiencies of an indictment document,
– suspending a proceeding,
– communicating an indictment document,
– taking measures for performing procedural acts,
– setting or postponing a preparatory session or a trial,
– issuing summons and notifications.[1010]

6.11. Trial before court of first instance (CPC)

Once commenced, a trial shall not be interrupted by the court until the case is concluded, if possible. If necessitated by the scope of the case or any other reason, the proceeding single judge or the chair of the panel may interrupt a trial commenced for a period of up to eight days, and the court may postpone the trial for the purpose of taking evidence or other important reason.

A trial may be resumed without any repetition, provided that the composition of the proceeding panel remained unchanged; in any other situation, the trial shall be repeated. If more than six months passed since the last trial date, the trial shall be repeated if a motion to that effect is filed by the prosecutor, the accused or the defence counsel. A trial shall be repeated by having a summary of earlier trial materials presented by the court. After presenting the summary of earlier trial materials, the court shall advise the prosecutor, the accused and the defence counsel that they may make observations regarding the presentation and they may file motions for supplementing the presentation or repeating any procedural act.[1011]

6.11.1. Opening a trial

The proceeding single judge or chair of the panel shall open a trial by specifying the subject matter of the indictment, and then he shall advise members of the audience of keeping order and the consequences of any disturbance. He shall state the name of the proceeding members of the court, the keeper of minutes, the prosecutor, and the defence counsel. The proceeding single judge or chair of the panel shall take account of the persons present, and determine if those summoned or notified are present; based on this determination, he shall decide whether it is possible to hold a trial. If the attendance of an accused at a trial is mandatory, but he fails to appear despite being duly summoned, the court shall take measures to ensure the attendance of the accused. If it is reasonable to assume that forced attendance could be successfully enforced on the set trial date within a reasonable time,

1010 CPC 512. §
1011 CPC 518. §

the proceeding single judge or the chair of the panel shall order, as possible, the forced attendance of any witness who is absent despite being duly summoned. The proceeding single judge or chair of the panel shall call upon the prosecutor or expert, if absent, to appear at the trial. Such a call shall be extended to a prosecutor through the head of his prosecution office.

If holding a trial is not prevented by any obstacle, the proceeding single judge or the chair of the panel shall instruct all witnesses, other than the aggrieved party, to leave the courtroom, also advising them of the consequences of being absent without excuse. An expert shall be instructed to leave the courtroom only if the court considers it necessary to do so; otherwise, an expert may attend a trial from its beginning. The trial need not be postponed for a failure to observe the summons period if the accused and the defence counsel concordantly move for, or agree to, the holding of the trial. If an authorised defence counsel fails to appear at a trial and the participation of a defence counsel is not mandatory in the criminal proceeding, the trial may be postponed, provided that a) a motion to that effect is filed by the accused, and b) the authorised defence counsel was not notified, or it is not possible to determine if he was duly notified. If holding a trial is prevented by any obstacle, the court shall postpone the trial.[1012]

Before the commencement of a trial, the prosecutor, the accused, the defence counsel and the aggrieved party may (1) file a motion for transferring, joining, or separating the case, (2) file a motion for disqualifying the proceeding single judge or chair, or member, of the panel or the keeper of minutes, or (3) invoke any other circumstance that may prevent the trial from being held or should be taken into account before the commencement of the trial. Before the commencement of a trial, the accused, the defence counsel, or the aggrieved party may file a motion for disqualifying the proceeding prosecutor.

6.11.2. Commencement of a trial

If the proceeding single judge or the chair of the panel establishes that holding a trial is not prevented by any obstacle, and the witness or expert has left the courtroom, the trial shall be commenced by the court.

When instructed by the proceeding single judge or the chair of the panel, (1) the prosecutor shall present a summary of the indictment, provided that it was not presented during a preparatory session or a corresponding motion was filed by the aggrieved party because he did not attend the preparatory session, (2) the aggrieved party, if present, or his representative shall state whether he intends to enforce any civil claim; if the aggrieved party intends to enforce a civil claim, the proceeding single judge or the chair of the panel shall instruct the aggrieved party to present his claim, and then the aggrieved party, if he is to be interrogated as a witness, shall leave the courtroom.

Presenting the summary of the indictment may be omitted upon a motion by the accused or, with the consent of the accused, his defence counsel. If a statement of confession of guilt was accepted by the court during the preparatory session, the court shall present a summary of its corresponding order in place of the indictment.[1013]

1012 CPC 513. §- 515. §
1013 CPC 517. §

6.11.3. Motions for evidence

In the course of taking evidence, motions may be filed and observations may be made by the prosecution service, the accused, the defence counsel, the aggrieved partyand, regarding matters affecting him, any party with a pecuniary interest or any other interested party. The proceeding single judge or the chair of the panel shall decide on any motion for evidence and the sequence of such motions. As a general rule, evidence moved for by the prosecution service shall be taken before evidence moved for by the accused or the defence counsel. A court may refrain from taking evidence regarding (1) facts that are accepted as true by the prosecution service, the accused, and the defence counsel, or (2) a criminal offence that is, in comparison to another criminal offence of greater material gravity also subject to the indictment, not significant for establishing criminal liability.[1014]

After the preparation of a trial, the prosecution service, the accused, or the defence counsel may file a motion for evidence, if (1) the fact or means of evidence underlying the motion came into existence after the preparatory session, or the person filing the motion became aware thereof after the preparatory session through no fault of his own, or (2) the motion is filed to refute the probative value of a means of evidence or the outcome of taking evidence, provided that the method or means of doing so became known to the person filing the motion from the evidentiary procedure. The motion may be filed within fifteen days after becoming aware of the fact or means of evidence underlying the motion; at the same time, the person filing the motion shall substantiate the likely date of becoming aware of such fact or means of evidence and the likelihood of the absence of own fault.[1015]

If a statement of confession of guilt was accepted by the court, no further evidence may be taken regarding the grounds supporting the facts stated in the indictment document or the matter of guilt.[1016]

a) Interrogating an accused:

A procedure for taking evidence shall begin by interrogating the accused. If the accused gave a testimony during the preparatory session, his interrogation may be omitted,with consent from his defence counsel, as regards questions already covered by his testimony given during the preparatory session. As a general rule, an accused shall be interrogated in the absence of any co-accused not yet interrogated. Acting ex officio or upon a motion from the prosecutor or, for the safety of the accused, from an accused or his defence counsel, the proceeding single judge or the chair of the panel shall have any co-accused already interrogated removed from the courtroom for the period of the interrogation of the accused if the presence of the co-accused would disturb the accused during his interrogation. An accused may confer with his defence counsel during a trial without disturbing the order of the trial, but he may not do so during his interrogation without permission from the proceeding single judge or the chair of the panel. If an accused made a statement regarding his personal data during the investigation or the court procedure, the data recorded in the case documents may also be verified by a trainee judge, a junior judge, or an administrative court officer outside the trial, with the proviso that the proceeding single judge or the chair

1014 CPC 519. §
1015 CPC 520. §
1016 CPC 521. §

of the panel shall record only the fact that verification was performed and any changes that occurred to such data.[1017]

The proceeding single judge or the chair of the panel shall also advise the accused, in addition to providing him defendant advice, that he may ask questions from other interrogated persons and he may file motions and observations during the procedure for taking evidence. The advice shall also include that the summary of any testimony made by him earlier as defendant may be presented, or read out loud, if he does not testify. If the accused intends to give a testimony after being advised pursuant to these, the proceeding single judge or the chair of the panel shall ask the accused if he confesses his guilt. An accused shall be provided with the possibility to give a testimony regarding the indictment, and also presenting his defence, without interruption. An accused may be asked questions by the proceeding members of the court and then by the prosecutor, the defence counsel, the aggrieved party, and, regarding matters affecting him, any party with a pecuniary interest, in this order. The proceeding single judge or the chair of the panel shall prohibit an accused from answering a question if asking that particular question is prohibited by this Act; answering a question may be prohibited if the question is asked repeatedly regarding the same subject matter. The proceeding single judge or the chair of the panel shall ensure that the method of questioning does not violate the human dignity of the accused.[1018]

If an accused does not wish to give a testimony during trial, or his whereabouts are unknown, the proceeding single judge or the chair of the panel shall present ex officio or may read out loud, or have the keeper of minutes read out loud, upon a motion from the prosecutor, the accused or the defence counsel a summary of the testimony given by the accused during investigation or the preparatory session. A summary of individual parts of a testimony given by an accused, as a suspect or accused, earlier during the proceeding may be presented or read out loud if the testimony of the accused is inconsistent with his earlier testimony. The summary of individual parts of an earlier testimony may not be presented, unless the accused is asked a question regarding any fact or circumstance included in the presentation, or the accused testified regarding any such fact or circumstance during the trial. The proceeding single judge or the chair of the panel shall ensure that the scope of the presentation is sufficient for establishing the facts of the case. If the court decided not to interrogate the accused because he gave a testimony during the preparatory session, the testimony given during the preparatory session shall be presented upon a motion from the prosecutor, the accused, or the defence counsel.[1019]

b) Interrogating witnesses:

As a general rule, the aggrieved party shall be interrogated first from among all witnesses. A witness not yet interrogated may not attend the interrogation of another witness. With a view to protecting a witness requiring special treatment and acting ex officio or upon a motion from the prosecutor, the accused, his defence counsel, or the witness, the proceeding single judge or the chair of the panel shall have any accused or audience member removed from the courtroom, provided that the presence of that person would disturb the witness requiring special treatment during his interrogation. A summary

1017 CPC 522. §
1018 CPC 523. §
1019 CPC 524. § - 525. §

of the testimony given by the witness shall be presented by the court to the accused later. A witness may be asked questions by the proceeding members of the court and then by the prosecutor, the accused, the defence counsel and the aggrieved party, and, regarding matters affecting them, any party with a pecuniary interest and an expert, in this order.[1020]

The proceeding single judge or the chair of the panel shall present ex officio or may read out loud, or have the keeper of minutes read out loud, upon a motion from the prosecutor, the accused or the defence counsel a summary of the testimony given by a witness earlier during a proceeding if the witness may not be interrogated during the trial, or doing so is not possible due to the witness staying abroad for a prolonged period.[1021]

The proceeding single judge or the chair of the panel, acting ex officio or upon a motion from the prosecutor, the accused, or the defence counsel, may present individual parts of a testimony given by a witness earlier if the witness does not remember the events or there is any inconsistency between his earlier witness testimony and his witnesstestimony given at trial. Individual parts of an earlier testimony may not be presented, unless the witness is asked a question regarding any fact or circumstance included in the presentation, or the witness testified regarding any such fact or circumstance during the trial. The proceeding single judge or the chair of the panel shall ensure that the scope of the presentation is sufficient for establishing the facts of the case.[1022]

c) Hearing an expert:

An expert shall be heard applying the provisions on interrogating a witness accordingly. In the course of his hearing, an expert may use his expert opinion and notes submitted in writing, and he may use tools for demonstration.[1023]

The proceeding single judge or the chair of the panel shall present ex officio or may read out loud, or have the keeper of minutes read out loud, upon a motion from the prosecutor, the accused or the defence counsel a summary of the expert opinion submitted in writing. If, after the summary of the expert opinion is presented or read out loud, the prosecutor, the accused, the defence counsel, or the aggrieved party intends to ask questions from the expert, the trial shall be postponed, and the expert shall be summoned for the trial date set.[1024]

d) Presenting and reading out loud a summary of a document:

In the course of a trial, the proceeding single judge or the chair of the panel shall present a summary of documents used as means of evidence. The single judge or the chair of the panel may order, upon a motion from the prosecutor, the defence counsel, or the accused, individual parts of a document to be read out loud in place of presenting the summary of the given document. A document attached or filed during a trial shall be enclosed to the minutes of the trial by the proceeding single judge or the chair of the panel.[1025]

1020 CPC 526. §
1021 CPC 527. §
1022 CPC 528. §
1023 CPC 529. §
1024 CPC 530. §
1025 CPC 531. §

e) Using a recording of a procedural act:

In the course of a trial, the proceeding single judge or the chair of the panel may, acting ex officio or upon a motion from the prosecutor, the accused or the defence counsel, present a video recording, sound recording, or audio-visual recording of a procedural act.[1026]

f) Inspection by a judge:

In the course of a trial, a means of physical evidence shall be demonstrated by the proceeding single judge or the chair of the panel. If that is not possible, a photograph of the means of physical evidence shall be demonstrated, and a description of the item shall be provided. The court, acting ex officio or upon a motion, shall carry out an inspection during the trial. An inspection shall be carried out by the court or a delegated member of the panel.[1027]

g) Taking evidence through a delegate judge or a requested court:

If taking a piece of evidence is not possible, or would involve extraordinary difficulties, at trial, the proceeding single judge or a member of the panel shall act as delegate judge, or another court of identical subject-matter jurisdiction shall be requested, if necessary. The prosecution service, the accused, his defence counsel, and the aggrieved party shall be notified about the taking of evidence. A requested court shall be informed about the names and contact details of the accused, the defence counsel, and the aggrieved party, the facts to be clarified by the taking of evidence, the names and contact details of the persons to be interrogated, and the circumstances regarding which such persons are to be interrogated. All case documents necessary for carrying out the request for administrative assistance shall be sent, in original or copy, to the requested court.

A requested court shall carry out a request for administrative assistance within one month. If a requested court fails to carry out a request for administrative assistance within one month, it shall inform the requesting court about the reason for its failure. If another court of identical subject-matter jurisdiction has territorial jurisdiction over carrying out parts of a request for administrative assistance, the requested court, after taking the evidence it is tasked with, shall send the case documents to the other court with territorial jurisdiction and shall inform the requesting court accordingly. The minutes of the proceedings of a delegate judge or a requested court shall be read out loud at trial.

6.11.4. Decisions passed outside a trial. Modifying and abandoning an indictment

After postponing a trial, a court proceeding as a panel may pass a decision on the following matters even during a panel session, if necessary: (1) transferring the case, (2) joining or separating cases, (3) suspending or terminating the proceeding, or (4) maintaining a coercive measure affecting personal freedom subject to judicial permission. After postponing the trial, the court shall decide on ordering a coercive measure affecting personal freedom subject to judicial permission in a court session.[1028]

1026 CPC 532. §
1027 CPC 533. §
1028 CPC 537. §

If the prosecution service finds, in light of the facts specified in the indictment document and other related facts, that the accused (1) is guilty of another criminal offence or the criminal offence qualified in the indictment document qualifies as a criminal offence of greater or lesser gravity, it shall change the indictment, (2) is also guilty of any criminal offence other than that specified in the indictment, it shall extend the indictment. If an indictment is modified, the prosecution service shall either submit a new motion for imposing a penalty or applying a measure, or maintain its corresponding motion included in the indictment document. The prosecution service may modify the indictment until a conclusive decision is passed at the latest.

If an indictment is changed, the court may postpone the trial, provided that a corresponding motion is filed by the prosecutor or, with a view to preparing for a defence, the accused or the defence counsel. If an indictment is extended, the court shall postpone the trial for a period of at least eight days upon a joint motion from the accused and the defence counsel, or it may do so ex officio, or it shall separate the case covered by the extension. A case shall be transferred, if adjudicating the modified indictment exceeds the subjectmatter jurisdiction of the proceeding court, is subject to military criminal proceedings, or another court has exclusive territorial jurisdiction over the case.[1029]

The prosecution service shall abandon an indictment if it is convinced by the evidence taken that (1) the act serving as ground for the indictment does not constitute a criminal offence, (2) the criminal offence was not committed by the accused, or (3) the criminal offence is not subject to public prosecution. The prosecution service may abandon an indictment until a conclusive decision is passed; the reasons for abandoning an indictment shall be stated. If an aggrieved party may act as a substitute private prosecuting party should the indictment be abandoned, the court shall postpone the trial, and it shall serve on the aggrieved party the statement of the prosecution service on abandoning the indictment within fifteen days. At the time of serving such a statement, the court shall inform the aggrieved party about the possibility of, and conditions for, acting as a substitute private prosecuting party, including the rights and obligations of a substitute private prosecuting party.

6.11.5. Concluding an evidentiary procedure. Closing arguments, addresses, and the right to the last word. Reopening an evidentiary procedure

When the taking of evidence is finished, the proceeding single judge or the chair of the panel shall declare the evidentiary procedure to be concluded, and it shall invite all eligible persons to deliver their closing arguments and addresses, provided that no further motion for evidence was filed or all such motions were dismissed by the court.[1030]

Prosecutors and defence counsels shall deliver closing arguments, and accused persons, aggrieved parties, and parties with pecuniary interests may address the court. If an aggrieved party or a party with a pecuniary interest is represented by more than one representative, the court may be addressed by one representative as agreed among themselves. If the defence counsel does not attend the trial, the closing argument may be delivered by the accused. A closing argument may also be filed with the court in writing. In

1029 CPC 538. §
1030 CPC 540. §

that event, the closing argument shall be served on the prosecution service, the accused, and the defence counsel. If a closing argument is filed in writing, presenting a summary of the closing argument shall suffice when delivering the closing argument orally.[1031]

If a prosecutor finds that the accused can be found guilty, he shall submit a motion to the court, as part of his closing argument and invoking specific laws, for (1) finding the accused guilty of the criminal offence stated on the basis of the facts stated, (2) imposing a penalty or applying a measure, (3) passing any other provision. In his closing argument, a prosecutor may not move for a specific value or period of a penalty or measure. If a statement of confession of guilt was accepted by the court during the preparatory session, the prosecutor, in his closing argument, may not change his motion for imposing a penalty or applying a measure to the detriment of the accused. In his closing argument, a prosecutor shall submit a reasoned motion, invoking specific laws, for acquitting the accused if he finds, on the basis of evidence taken, that a) the commission of the criminal offence, or the fact that is was committed by the accused, is not proven, or b) infancy or any mental disorder, coercion, threat, error, justifiable defence, or necessity that excludes liability to punishment can be established to the benefit of the accused.[1032]

After the prosecutor, aggrieved parties and parties with pecuniary interests may also address the court. An aggrieved party may present his position regarding the subject matter of the indictment, and he may state if he wishes the accused to be found guilty and punished. A civil party may file, and provide reasons for, motions regarding matters concerning his civil claim; in the absence of a civil party, the civil claim he submitted shall be read out loud from the case documents. A party with a pecuniary interest may file motions regarding matters directly affecting his rights or legitimate interests.[1033]

After the addresses, the defence counsel shall deliver his closing argument. If there is more than one accused, the order of closing arguments shall be determined by the proceeding single judge or the chair of the panel. After the closing arguments and addresses, a rejoinder may be delivered in their order. A rejoinder may be delivered to a rejoinder; the last word shall be granted to the defence counsel or the accused. After the closing arguments, addresses, and rejoinders, a hearing-impaired accused shall be allowed to read the minutes upon request.[1034]

Before a conclusive decision is passed, the accused shall be allowed to exercise his right to the last word.[1035]

If a closing argument or an argument delivered by exercising the right to the last word seeks to protract the proceeding, the proceeding single judge or the chair of the panel may, after warning him once, direct the speaker to discontinue speaking. A closing argument, an address by an aggrieved party, or an argument delivered by exercising a right to the last word may not be interrupted, unless it includes any expression that constitutes a criminal offence or incites disturbance.[1036]

A court shall reopen an evidentiary procedure before passing a conclusive decision if it considers necessary to do so in light of any information expressed in the closing

1031 CPC 541. §
1032 CPC 542. §
1033 CPC 543. §
1034 CPC 544. §
1035 CPC 545. §
1036 CPC 546. §

arguments, addresses, or arguments delivered by exercising a right to the last word.[1037] If the court establishes, after the closing arguments, addresses, and last words are delivered, that the qualification of the acts stated in the indictment may differ from the qualification presented in the indictment document, it may postpone the trial to facilitate preparations for the defence, and it shall also obtain the opinion of the prosecutor, the accused, and the defence counsel on this matter.[1038]

6.11.6. Passing and announcing a decision. Legal remedy statements. Decisions on coercive measures. Closure of a trial

After the closing arguments, addresses, and last words, the court shall retire for passing a conclusive decision. In passing a decision, the operative part of a decision shall be put in writing and signed by the proceeding members of the court. Once passed, a conclusive decision shall be announced immediately. The operative part of a decision passed in trial, and signed by the proceeding members of the court, shall be handled together with the minutes of the trial. The operative part of a conclusive decision shall be read out loud by the proceeding single judge or the chair of the panel, standing, with all persons present standing and listening. The single judge or the chair of the panel may excuse a person present from this obligation in light of his health. After reading out loud the operative part, the single judge or the chair of the panel shall present a summary of the statement of reasons orally; this includes presenting a summary of the facts of the case as established by the court. In this context, the court may fulfil its obligation to provide reasons also by specifying facts of the case that are different than the facts referred to in the indictment document. After announcement, the proceeding single judge or the chair of the panel shall hand over the operative part of the conclusive decision on all persons who are present and eligible to file an appeal.[1039]

If necessitated by the complexity of a case, the considerable volume of a decision, or any other important reason, the trial may be postponed for eight or, exceptionally, fifteen days for the purpose of passing and announcing a decision. The due date of announcing a decision shall be set at the time of postponing the trial. If an accused or a defence counsel fails to appear at trial despite being duly summoned, the decision may be announced in the absence of the accused or the defence counsel. No application for excuse shall be accepted for such an omission.[1040]

After announcing a conclusive decision, the proceeding single judge or the chair of the panel shall ask any person who is present and eligible to appeal if (1) he accepts the conclusive decision, (2) he submits an appeal, or (3) he reserves a time limit of three working days for making a statement. The statements shall be made in the following order: statement by the prosecutor, the civil party, the party with a pecuniary interest, the accused, and the defence counsel.[1041]

If a conclusive decision does not become final and binding upon announcement, the court shall decide on any coercive measure affecting personal freedom subject to

1037 CPC 547. §
1038 CPC 548. §
1039 CPC 549. §
1040 CPC 550. §
1041 CPC 551. §

judicial permission immediately. If the trial may be held in the absence of the accused, the court may order the custody of the accused for the purpose of taking a decision on ordering a coercive measure affecting personal freedom subject to judicial permission. The court shall terminate any coercive measure affecting personal freedom subject to judicial permission and, if the accused is subject to pre-trial detention or preliminary compulsory psychiatric treatment, arrange for the accused to be released immediately if the accused is acquitted, released on probation, ordered to perform reparation work, not sentencedto imprisonment to be served, not sentenced to special education in a juvenile correctional institution, or not subject to compulsory psychiatric treatment if acquitted, or the proceeding is terminated.[1042]

After the legal remedy statements are made and the decision on coercive measures, if any, is passed, the proceeding single judge or the chair of the panel shall close the trial.[1043] Even after a conclusive decision becomes final and binding, the proceeding single judge or the chair of the panel may decide on (1) translating a decision to be served, (2) rectifying a decision, or (3) lifting a sequestration. After a conclusive decision becomes final and binding or a non-conclusive order terminating a proceeding reaches administrative finality, the proceeding single judge or the chair of the panel shall decide on the amount, and bearing, of criminal costs that arose after the adoption of the decision.[1044]

6.11.7. Conclusive decisions of a court of first instance

The introductory part of a conclusive decision shall specify the trial dates. The operative part of a conclusive decision shall contain the following: (1) information on any preliminary detention of the accused, (2) name and personal data of the accused, (3) designation of the criminal offence under the Criminal Code with reference to the statutory provision applied, including a reference to the statutory provision defining the simple case of the criminal offence where a qualified case of a criminal offence is established; specification of the criminal offence as a felony or a misdemeanour; specification of the criminal offence as being committed on multiple counts or in a continuous manner, as applicable; if the criminal offence was committed by negligence, a reference to this fact; and the type of perpetrator involvement and stage of commission, (4) any other provision, and (5) provisions on bearing the criminal costs.

The statement of reasons for a conclusive decision shall include the following:

– a reference to the indictment, the qualification stated in the indictment, and a summary of the facts stated in the indictment document, if necessary,

– facts established with regard to the personal circumstances of the accused, and facts relating to any prior conviction of the accused that were relevant at the time of passing the decision,

– facts established by the court,

– pieces of evidence the court relied on when passing its decision, and brief reasons as to why each individual piece of evidence was accepted or not accepted for the purpose of establishing the facts of the case,

1042 CPC 552. §
1043 CPC 553. §
1044 CPC 554. §

– qualification of the act based on the facts established by the court,

– a reasons for any other provisions laid down in the decision and for dismissing any motion, in particular any motion for evidence, with reference to the laws applied.[1045]

The court shall decide on an indictment by passing a judgment if it acquits or finds the accused guilty.[1046]

a) Judgments of guilt:

The court shall declare an accused guilty if it establishes that the accusedcommitted a criminal offence and is liable to punishment. The operative part of a judgment of guilt shall contain the following: (1) decision of the court to hold the accused guilty, (2) penalty imposed or measure applied, as well as any other legal consequence, (3) any other rules of behaviour set by the court, provided that the court subjects the accused to supervision by a probation officer, (4) if the court decides to refrain from imposing punishment, a reference to this fact.

If an accused is found guilty of a criminal offence committed while, or before, being released on probation, the court shall set aside the provision concerning his release on probation, terminate the release on probation, and impose a concurrent sentence.

A statement of reasons for a judgment of guilt shall contain the following: (1) reasons for imposing, or not imposing, a penalty and applying, or not applying, a measure, with reference to the laws applied, (2) if the court took into account the protraction of the criminal proceeding as a mitigating circumstance during sentencing, a reference to this fact.[1047] If a statement of confession of guilt was accepted by the court, the accused shall be found guilty based on his confession of guilt, the acceptance of his confession of guilt, and the case documents of the proceeding.[1048]

b) Judgments of acquittal:

A court shall acquit an accused if (1) the act does not constitute a criminal offence, (2) the criminal offence was not committed by the accused, (3) the commission of the criminal offence is not proven, or it is not proven that the criminal offence was committed by the accused, or (4) a ground excluding the liability for punishment of the accused or the punishability of the act can be established. The operative part of a judgment of acquittal shall contain the decision of the court to acquit the accused. The court shall order the compulsory psychiatric treatment of the accused if the conditions for ordering compulsory psychiatric treatment of an accused acquitted due to mental disorder are met. If acquittal is based on infancy or a mental disorder, the court may order confiscation, forfeiture of assets, or rendering electronic data permanently inaccessible.[1049]

c) Orders terminating a proceeding:

A court shall terminate its proceeding with a conclusive order if (1) the liability to punishment of the accused was terminated due to his death, the statute of limitations, a pardon, or for any other reason specified in a law, (2) the act has been adjudicated with final

1045 CPC 561. §
1046 CPC 563. §
1047 CPC 564. §
1048 CPC 565. §
1049 CPC 566. §

and binding effect, (3) the prosecution service abandoned the indictment and neither private prosecution nor substitute private prosecution can be brought, or the aggrieved party did not take action as a private prosecuting party or substitute private prosecuting party, (4) it is conducted regarding a criminal offence that is, in comparison to another criminal offence of greater material gravity also subject to the indictment, not significant for establishing criminal liability, or (5) a private motion is missing and it may not be rectified any longer.

A court shall terminate its proceeding with a non-conclusive order if (1) the indictment was brought by an ineligible person, (2) the indictment document does not contain or imperfectly contain all statutory elements, (3) the criminal proceeding is conducted by an authority of another country due to the transfer of the criminal proceeding or the result of a consultation procedure as defined in the Act on cooperation with the Member States of the European Union in criminal matters, (4) the case does not fall within Hungarian criminal jurisdiction. The operative part of an order terminating a proceeding shall contain the decision of the court to terminate its proceeding. If it becomes known after a conclusive decision is announced, but before it becomes final and binding, that the accused deceased or was granted a procedural pardon, and if no appeal was submitted against the decision, the court shall set aside its conclusive decision that is not final and binding, or the part of its decision relating to the accused concerned, and it shall terminate its proceeding due to the death of, or the procedural pardon granted to, the accused.[1050] If the prosecution service abandoned an indictment and a substitute private prosecuting party may proceed, the fact that the statement made by the prosecution service on abandoning the indictment could not be served on the aggrieved party because his whereabouts were unknown shall not be an obstacle to terminating the proceeding.[1051]

d) Ordering electronic data to be rendered permanently inaccessible by preventing access permanently:

Acting ex officio, or upon a motion by the prosecution service, the court shall order electronic data to be rendered permanently inaccessible by preventing access to such electronic data permanently if access to such electronic data was ordered to be prevented temporarily, and preventing access to such data is still justified.[1052]

e) Adjudicating civil claims:

A court shall decide on the merits of a civil claim by passing a judgment either granting or dismissing the claim. If the court determines, in its judgment, the amount of damages or pecuniary loss caused by committing the criminal offence, or the value affected by the criminal offence, it shall adjudicate the merits of any civil claim submitted up to that amount. The provisions laid down in the Act on the Code of Civil Procedure regarding the limits of a decision on the merits of a claim, the time limit for performance, and the calculation of such a time limit, shall apply when adjudicating a civil claim. A court may declare provisions of its judgment concerning a civil claim to be preliminarily enforceable pursuant to the provisions laid down in the Act on the Code of Civil Procedure regarding preliminary enforceability.[1053]

1050 CPC 567. §
1051 CPC 568. §
1052 CPC 570. §
1053 CPC 571. §

g) Terminating parental custody rights:

Acting on the basis of a motion filed by the prosecution service, the court may terminate the parental custody rights of an accused pursuant to the provisions laid down in the Act on the Civil Code regarding the termination of parental custody rights, provided that the court finds the accused guilty of an intentional criminal offence against his child. Filing a motion for terminating parental custody rights may be initiated by the child of the accused, or the other parent of the child of the accused, at the proceeding prosecution office. If the prosecution service does not agree with the initiative, it shall transmit the initiative without delay to the guardianship authority for the purpose of considering the possibility of filing an action for terminating parental custody rights, and it shall inform the initiating person accordingly. A court shall order a claim for terminating parental custody rights to be enforced by other legal means if adjudicating the corresponding motion would delay the conclusion of the criminal proceeding considerably, or adjudicating the merits of the motion during the criminal proceeding is prevented by any other circumstance.[1054]

h) Adjudicating infractions:

If a court finds, in light of the outcome of a trial, that an act stated in the indictment document constitutes an infraction and, as a consequence, it acquits the accused, it shall adjudicate the infraction. If an accused is indicted for more than one criminal offence, and the court establishes that an act stated in the indictment document constitutes an infraction, the court may terminate the proceeding regarding that infraction, provided that the given act is, in comparison to another criminal offence also subject to the indictment, not significant for establishing criminal liability.[1055]

i) Bearing the criminal costs:

A court shall oblige an accused to bear all criminal costs if the accused is found guilty or liable for an infraction. An accused may be obliged to bear criminal costs only if they arose in connection with an act, or an element of the facts of the case, he is found guilty of or liable for.

An accused may not be obliged to bear any criminal cost that arose unnecessarily, for a reason other than an omission on his part, or to the bearing of which another person is to be obliged by virtue of an Act. Each accused a court finds guilty shall be obliged to bear criminal costs separately. If the criminal costs, or any criminal cost, may not be broken down into lots that are attributable to individual accused persons who are found guilty, the court shall oblige all accused persons to bear such criminal costs jointly and severally.

If a court acquits an accused, or terminates a proceeding against him, the criminal costs shall be borne by the State. If an accused is acquitted, or the proceeding against him is terminated, he shall still be obliged to bear all costs that arose due to any omission on his part. If a proceeding is terminated, the court may oblige the accused to bear all or some of the criminal costs, provided that the proceeding was terminated because the liability to punishment of the accused was terminated for a reason that depends on the behaviour of the accused and is specified in the Special Part of the Criminal Code. The obligation of the accused shall be determined taking into account the material gravity of

1054 CPC 572. §
1055 CPC 573. §

the criminal offence and the financial, income and personal situation and lifestyle of the accused.[1056]

The State shall bear (1) all costs an accused is not obliged to bear, and (2) all costs that arose because the accused is hearing-impaired, speech-impaired, blind, or deaf-blind, does not understand the Hungarian language, or used his national minority mothertongue in the course of the proceeding. If prosecution was represented by the prosecution service and the court acquitted the accused, or terminated the proceedings against the accused because the prosecution service abandoned the indictment, the State shall reimburse, in an amount specified by law, the costs incurred by the accused, and the fee and costs of his authorised defence counsel, within one month after the conclusive decision becomes final and binding.[1057]

In its conclusive decision, the court shall, without specifying the amount, or specifying a proportionate part of the fee, determine who shall pay the fee of a legal aid lawyer. A court passing a final and binding conclusive decision shall inform the legal aid service that acted in the matter of the authorisation of legal aid about arrangements for bearing the legal aid lawyer's fee by communicating the below data within eight days: (1) decision on the payment of the legal aid lawyer's fee, (2) name, home address, contact address, actual place of residence, service address, mother's name, and date of birth of the person, or the name, seat, name of registering organ, and registration number of the organisation obliged to pay the legal aid lawyer's fee.[1058]

6.11.8. Appeals

Appeals against a conclusive decision passed by a court of first instance may be submitted to a court of second instance. Appeals against a non-conclusive order passed by a court of first instance may be submitted to a court of second instance, unless appealing is prohibited under this Act.[1059]

No appeal shall lie

– against ordering a motion to terminate parental custody rights, or a civil claim, to be enforced by other legal means,

– against dismissing an appeal submitted after a judgment is accepted,

– on the ground that the court passed a conclusive decision in the absence of the accused, provided that the attendance of the accused at trial was not mandatory,

– against a case administration order, or

– against taking a court measure that does not require passing a decision.

If a statement of confession of guilt made by an accused is accepted, by way of an order by the court, no appeal shall lie against the judgment on the ground that a) it establishes guilt, or b) the facts of the case or the qualification thereof are established in line with the indictment. If no appeal lies against an order passed, or measure taken, by a court, a person eligible to appeal against the conclusive decision may challenge the order passed, or measure taken, by the court in an appeal against the conclusive decision.[1060]

1056 CPC 574. § - 575. §
1057 CPC 576. §
1058 CPC 577. §
1059 CPC 579. §
1060 CPC 580. §

An appeal against a judgment of a court of first instance may be filed by
– the accused,
– the prosecution service,
– the defence counsel,
– an heir of the accused with regard to any provision granting a civil claim,
– by the spouse or cohabitant of the accused if compulsory psychiatric treatment is ordered,
– a civil party with regard to any provision on the merits of his civil claim,
– a party with a pecuniary interest with regard to a provision affecting him.[1061]

A person to whom the judgment of a court of first instance is communicated by announcement may submit an appeal immediately or may reserve three working days to do so. No application for excuse shall be accepted for failing to meet this time limit. If a non-conclusive order of a court of first instance is communicated by announcement, appeals shall be submitted at the time of announcement. Appeals against a judgment communicated by service may be filed within eight days. This provision shall also apply where the operative part of a judgment of a court of firstinstance is communicated by service. At a time other than the time of announcement, an appeal shall be filed in writing with, or recorded in minutes at, the court of first instance. The court of first instance shall inform the accused and the defence counsel about any appeal filed by the prosecution service.[1062]

An appeal may be filed on legal or factual grounds. An appeal may be filed against any provision of, or the statement of reasons for, a judgment. An appeal may also be filed solely against (1) a provision on imposing a penalty or applying a measure, also including a provision on expungement in advance, (2) a judgment provision that is subject to a simplified review procedure, or adjudicates the merits of a motion for terminating parental custody rights or a civil claim, or (3) an element of a statement of reasons for a judgment of acquittal, or an element of a statement of reasons for a terminating decision. An appeal may be filed by the prosecution service either to the detriment or the benefit of an accused, or by an accused or a defence counsel only to the benefit of a defendant; the prosecution service shall indicate in an appeal if it is to the detriment of an accused.[1063]

An appellant shall specify the judgment provision, or the part of the statement of reasons, challenged by the appeal. If a defendant, in a court judgment, is found guilty of, or acquitted from, more than one criminal offence, or a proceeding against him is terminated concerning more than one criminal offence, an appeal shall specify the criminal offence a provision on which is challenged in the appeal.

No new fact or piece of evidence may be invoked in an appeal, unless the appellant substantiates that the fact or means of evidence underlying his appeal arose, or was created, only after the announcement of the judgment, or that he became aware of that fact or means of evidence only after the announcement of the judgment through no fault of his own. In an appeal, a motion for evidence may be submitted, even if it was dismissed by the court of first instance.

The prosecution service or a defence counsel shall provide a written statement of reasons for his appeal. A statement of reasons may be submitted to the court of first or,

1061 CPC 581. §
1062 CPC 582. §
1063 CPC 583. §

after the case documents are forwarded, to the court of second instance on the fifteenth day before the panel session of, or the trial held by, the court of second instance at the latest.[1064]

A civil party may amend his civil claim, in an appeal filed against a provision passed by a court of first instance on the merits of his civil claim or during the proceedings of the court of second instance, pursuant to the provisions laid down in the Act on the Code of Civil Procedure regarding the amendment of actions during procedural remedy proceedings and related procedures.[1065]

A person affected by an appeal may make observations concerning the appeal before the court of first instance or, after the case documents are forwarded, before the court of second instance.

The prosecution service, an accused affected by an appeal, or his defence counsel, and the appellant may invoke in an observation any issue that the court of second instance revises ex officio, even if he has not filed an appeal or filed an appeal on a ground other than that issue.[1066]

An appellant may withdraw his appeal until a decision is passed by the court of second instance on the appeal. An appeal filed by the prosecution service may be withdrawn, after the case documents are forwarded, by the prosecution office attached to the court of second instance. If an appeal is withdrawn by the prosecution service, and no other appeal was filed, the case documents shall be sent back to the court of first instance with a corresponding statement. An appeal submitted to the benefit of an accused by another person may be withdrawn by the appellant only with the consent of the accused. This provision shall not apply to an appeal by the prosecution service. A withdrawn appeal may not be submitted again.[1067]

An appeal shall be dismissed by the court of first instance if it is prohibitedby law, or it was filed by an ineligible person or late. If an appeal is filed in such a manner repeatedly, it shall be dismissed by the court without stating any reason as to its merits. If the time limit for appeal expired with respect to all persons entitled to appeal, the single judge or the chair of the panel proceeding at first instance shall forward, through the prosecution office attached to the court of second instance, the case documents to the court of second instance without delay after laying down its conclusive decision in writing. If an appeal is based on a procedural violation of law the circumstances of which are not clear from the case documents, the proceeding single judge or the chair of the panel shall provide information on this matter when forwarding the case documents. The prosecution office attached to the court of second instance shall send the case documents and its motion to the court of second instance within one month or, if the case is particularly complex or extensive, two months. Exceptionally, the head of the prosecution office may extend the time limit by one more month.[1068]

1064 CPC 584. §
1065 CPC 585. §
1066 CPC 586. §
1067 CPC 587. §
1068 CPC 588. §

6.12. Court prodecure at second instance (CPC)

6.12.1. Provisions to be applied in a court proceeding at second instance

Unless an exception is made in this Act, a court of second instance shall revise a judgment, including the prior court proceeding, challenged by an appeal. Unless otherwise provided in this Act, the court shall revise the grounds of the judgment, all judgment provisions on establishing guilt, qualifying the criminal offence, imposing a penalty, and applying a measure, as well as the correctness of the statement of reasons, and compliance with all procedural rules, regardless to the appellant or the grounds of the appeal. If the judgment of the court of first instance includes provisions on more than one criminal offence, the court of second instance shall revise only the provisions, or parts, of the judgment that concern the criminal offence affected by the appeal.[1069]

A decision of a court of second instance shall be based on facts established by a court of first instance, unless the judgment of the court of first instance is groundless, or any new fact was stated or evidence was invoked in the appeal, as a result of which the court of second instance conducts a procedure to take evidence. A court of second instance shall not examine the grounds of a first instance judgment, and, when passing its decision, it shall rely on the facts established by the court of first instance.[1070]

a) Groundlessness and its consequences

A first instance judgment shall be considered groundless in its entirety if the court of first instance failed to establish the facts of the case, or all facts of the case remain undetected. A first instance judgment shall be considered groundless in part if

– the court of first instance failed to establish all facts of the case,

– some facts of the case remain undetected,

– the facts established are inconsistent with the content of case documents concerning the evidence taken by the court, or

– the court of first instance reached incorrect conclusions regarding a further fact on the basis of the facts established.[1071]

A court of second instance shall eliminate any partial groundlessness of a judgment and, in the course of doing so, it

– supplements or rectifies the facts of the case, provided that the correct facts can be established on the basis of case documents relating to the evidence taken by the court of first instance, of drawing factual conclusions, or of the evidence taken,

– may establish facts that deviate from the facts established by the court of first instance on the basis of case documents relating to the evidence taken by the court of first instance, of drawing factual conclusions, or of the evidence taken, provided that acquitting the accused in full or in part or terminating the proceeding in full or in part is in order,

– may find an accused, originally acquitted by the court of first instance, guilty by establishing facts that deviate from the facts established by the court of first instance on

1069 CPC 590. §
1070 CPC 591. §
1071 CPC 592. §

the basis of case documents relating to the evidence taken by the court of first instance, of drawing factual conclusions, or of evidence taken upon a motion submitted by the prosecution service.

If, when eliminating the partial groundlessness of a judgment, on the basis of taking of evidence for establishing the correct facts of the case, the content of case documents or drawing factual conclusions, the court of second instance establishes facts that are different from those established by the court of first instance, it may evaluate pieces of evidencerelating to these different facts in deviation from the court of first instance. The court of second instance cannot evaluate a piece of evidence in deviation from the court of first instance if it does not relate to a fact established by the court of second instance or it relates to a fact not affected by the groundlessness.

A court of second instance shall revise a first instance judgment on the basis of the corrected, supplemented, or differently established facts of the case.[1072]

In a court proceeding at second instance, evidence may be taken to eliminate any partial groundlessness or procedural violation of law, or if any new fact was stated, or evidence was invoked, in the appeal. A court of second instance shall not take evidence regarding any fact that is irrelevant to establishing guilt, acquitting, terminating a proceeding, qualifying a criminal offence, imposing a penalty, or applying a measure.[1073]

b) Prohibition of reformatio in peius

An accused acquitted by a court of first instance may be found guilty, or a penalty imposed on or a measure applied in place of a penalty against an accused may berendered more severe, only if an appeal is submitted to the detriment of the accused. This provision shall also apply if a criminal offence of greater gravity can be established on the basis of any evidence taken by the court of second instance. An appeal shall be deemed as submitted to the detriment of an accused if it is aimed at finding him guilty, qualifying his criminal offence as one of greater gravity, rendering more severe his penalty, or a measure applied in place of a penalty, or imposing a penalty in place of such a measure. If a court of first instance, in addition to imposing a penalty, or a measure applied in place of a penalty, for committing a criminal offence, acquits an accused from a criminal offence he was indicted for, or terminates a proceeding against him, the penalty, or measure applied in place of a penalty, imposed for committing the criminal offence may not be rendered more severe, provided that an appeal submitted to the detriment of the accused challenges his acquittal or the termination of the proceeding only, unless the appeal against the judgment provision on his acquittal, or on the termination of the proceeding, is successful. Due to the prohibition of reformatio in peius, a court of second instance may not impose, in the absence of an appeal submitted to the detriment of the accused, (1) any penalty on a person the case of whom was adjudicated at first instance by applying a measure that may be applied on its own, (2) imprisonment, even if suspended, in place of any confinement, community service, financial penalty, disqualification from a profession, disqualification from driving a vehicle, ban on entering certain areas, ban on visiting sports events, or expulsion, (3) imprisonment to be served in place of suspended imprisonment, (4) imprisonment for a longer period, even if suspended, in place of imprisonment to be served, (5) any penalty in addition to

1072 CPC 593. §
1073 CPC 594. §

the number of penalties imposed by the court of first instance, not including any penalty applied in place of imprisonment, (6) any secondary penalty not applied by the court of first instance, (7) imprisonment, even if suspended, in place of demotion or discharge from service. If life imprisonment is imposed as penalty, setting the earliest date of release on parole to a later date or excluding the possibility of release on parole shall be considered rendering a penalty more severe, and an appeal submitted for such an end shall be deemed as submitted to the detriment of the accused concerned. If a court of first instance, in conflict with the provisions of an Act, did not provide for confiscation, forfeiture of assets, or rendering electronic data permanently inaccessible, the court of second instance may also decide on these even if no appeal was submitted to the detriment of the defendant, provided that the facts of the case contain all data required for passing such a decision. If a court of first instance applied any legal consequence on the ground of committing an infraction, that legal consequence may be rendered more severe in a second-instance proceeding, provided that an appeal is filed for the purpose of challenging the acquitting provision or rendering more severe the legal consequence applied for infraction.[1074]

c) Preparing for the administration of an appeal. Panel session and public:

The chair of a second-instance court panel shall

– take measures, as necessary, to remedy deficiencies, supplement case documents, obtain new case documents, or receive information from the court of first instance,

– send back case documents to the court of first instance if all appeals are withdrawn,

– serve on the accused and the defence counsel any appeal submitted by any other person, or any motion by the prosecution office attached to the court of second instance,

– send to the prosecution office attached to the court of second instance any statement of reasons for an appeal filed by an accused or the defence counsel if it was submitted before the court of second instance and was not yet sent to the prosecution office directly,

– examine if the attendance of a prosecutor or a defence counsel in the second-instance proceeding is mandatory,

– examine if any decision on a coercive measure affecting personal freedom subject to judicial permission needs to be passed.

For the closest possible due date within two months after receipt of the case documents, the chair of the panel shall schedule a panel session, public session, or trial for adjudicating the appeal. A court of second instance may order evidence to be taken before a trial, and the chair of the panel may take measures as necessary to do so.[1075]

A court of second instance shall decide in a panel session

– on dismissing an appeal, transferring, joining or separating a case, or suspending a proceeding,

– on acquitting, or terminating a proceeding against, an accused,

– on acquitting, or terminating a proceeding against, an accused not affected by an appeal, provided that any such provision regarding an accused affected by the same appeal is also passed in a panel session,

– if the court of first instance passed its judgment in violation of a procedural rule,

– if the court of first instance terminated the criminal proceeding,

1074 CPC 595. §
1075 CPC 596. §

– if an appeal against a non-conclusive order of the court of first instance may be adjudicated without taking any evidence.

The chair of a panel may schedule a public court session or a trial in a case to be handled in a panel session.[1076]

A court of second instance shall hold a public session to administer an appeal, unless the case is to be administered in a panel session, or a trial is to be held. In a public session, a court of second instance may (1) establish the complete and correct facts of the case where the first instance judgment is partially groundless, provided that doing so is possible on the basis of factual conclusions or the content of case documents concerning the evidence taken by the court of first instance, (2) interview the accused in the case with a view to clarifying further all sentencing factors. The presentation of the case in a public court session may be omitted, unless a motion for presenting the case is submitted by a person present. An appeal may also be adjudicated in the absence of an accused who was duly summoned if it can be established as a result of the public session that an interview with the accused is not necessary.[1077]

d) Trial:

A court of second instance shall hold a trial if (1) a case may not be handled in a panel session, (2) it is necessary to take evidence, (3) a trial is set by the chair of the panel in a case to be handled in a panel session or a public session. Aggrieved parties and appellants shall be notified about a trial. A trial may also be held in the absence of an accused who was duly summoned, and the appeal may be adjudicated, if no appeal was submitted to the detriment of the accused. No application for excuse shall be accepted for failing to appear at trial.[1078]

At trial, the judge designated by the chair of the panel shall present the case. He shall present a summary of the first instance judgment, the appeal, and any observation made concerning the appeal; he shall also present case documents that are necessary for the purpose of revision. Presenting the statement of reasons for the first instance judgment may beomitted if no motion for such a presentation is submitted by the persons present, and the court of second instance considers such a presentation to be unnecessary. The members of the court, the prosecutor, an accused, a defence counsel, or an aggrieved party may request the presentation of the case to be supplemented; subsequently, persons eligible to appeal shall be allowed to present and submit their observations and motions. After the case is presented and evidence is taken, eligible persons may deliver closing arguments or address the court. The appellant shall be the first to deliver a closing argument. If an appeal was filed also by the prosecution service, the prosecutor shall be the first to deliver a closing argument.[1079]

e) Decisions on coercive measures:

If a judgment of a court of first instance is set aside, the court of second instance, in its setting aside order, shall decide on the matter of any coercive measure affecting personal freedom subject to judicial permission.[1080]

1076 CPC 598. §
1077 CPC 599. §
1078 CPC 600. §
1079 CPC 601. §
1080 CPC 602. §

After concluding a court procedure at second instance, the decision shall be served by the court of second instance. An order setting aside a first instance judgment shall be served on the appellant, any aggrieved party, and any person eligible to appeal against the decision of the court of second instance, even if the operative part of the decision has already been communicated to any such person by announcement.A court of second instance shall send back all case documents, together with its decision and the minutes of the trial, to the court of first instance if no appeal is submitted against the second instance decision, or all appeals were dismissed by the court of second instance.[1081]

6.12.2. Decisions by courts of second instance

In situations specified in this Act, a court of second instance shall
– uphold a judgment of a court of first instance,
– amend a judgment of a court of first instance, or
– set aside a judgment of a court of first instance, and (1) terminate the proceeding, or (2) instruct the court of first instance to conduct a new proceeding.

A court of second instance shall decide by passing a judgment if it amends the judgment of a court of first instance, or an order, in any other case. The operative part of a decision shall contain the following: (1) name of the court of first instance that passed the decision challenged in the appeal, and reference number of the decision challenged, (2) decision of the court, (3) personal data. The statement of reasons for the decision shall contain a summary of the operative part of the first instance judgment and the motion filed by the prosecution office attached to the court of second instance; it shall identify the appellant and the ground for his appeal; and it shall describe the reasons for the decision of court.[1082]

a) Upholding a first instance judgment:

A court of second instance shall uphold a first instance judgment if an appeal is groundless and there is no other reason to set aside the judgment, or if it is not necessary to amend the judgment, or doing so is not possible due to the prohibition of reformatio in peius. If a court of second instance does not supplement or correct the facts of the case, a penalty imposed in the first instance judgment within the penalty range may not be changed to a minor extent. An order of a court of second instance upholding a first instance judgment shall constitute a conclusive decision. The statement of reasons for a decision shall provide a short description of the reasons for upholding the judgment.[1083]

b) Amending a first instance judgment:

If a court of first instance applied the law incorrectly, but it is not necessary to set aside its judgment, the court of second instance shall amend the judgment and pass a decision in compliance with the legal requirements. A court of second instance may also amend a first instance judgment if it eliminated the partial groundlessness of the first instance judgment. If a first instance judgment is based on an accepted confession of guilt by an accused, the court of second instance may not amend the provisions of the appealed

1081 CPC 603. §
1082 CPC 604. §
1083 CPC 605. §

judgment with regard to the establishment of guilt or any qualification in line with the indictment document, unless it can be established that acquitting the accused, terminating the proceeding or changing the qualification of the criminal offence would be in order.[1084]

c) Setting aside a first instance judgment:

The court of second instance shall set aside the first instance judgment with a non-conclusive order and instruct the court of first instance to conduct a new proceeding if (1) the court panel was not formed in accordance with the law, or not all members of the panel were present during the entire trial, (2) a judge disqualified by an Act participated in the passing of a judgment, (3) the court exceeded its subject-matter jurisdiction, or adjudicated a case that is subject to military criminal proceeding or falls within the exclusive territorial jurisdiction of another court, (4) the trial was held in the absence of a person the attendance of whom was mandatory under an Act, (5) the statement of reasons for the first instance judgment is fully inconsistent with its operative part, etc.[1085]

The court of second instance shall set aside the first instance judgment with a non-conclusive order, and instruct the court of first instance to conduct a new proceeding, if a procedural violation of law was committed, which could not be remedied in a second-instance proceeding but had a material impact on the course of the proceeding, the establishment of guilt, the qualification of a criminal offence, imposing a penalty or applying a measure. Procedural violations of law shall include, in particular, situations where

– any provision on the legality of taking evidence is violated after the indictment,

– a person participating in a criminal proceeding could not exercise, or was restricted in exercising, any of his statutory rights after the indictment,

– the public was excluded from a trial without a lawful reason,

– the court of first instance failed to perform, in whole or in part, its obligation to state its reasons for establishing guilt, acquitting, terminating a proceeding, qualifying an act pursuant to the Criminal Code, imposing a penalty or applying a measure.

A judgment provision acquitting the accused or terminating the proceeding need not be set aside if a procedural violation of law limited the exercise of a statutory right of the accused or his defence counsel.[1086]

If a first instance judgment is completely groundless, the court of second instance shall pass a non-conclusive order setting aside the first instance judgment and instructing the court of first instance to conduct a new proceeding.[1087]

In a statement of reasons for a setting aside order, the court of second instance shall specify the reason for setting aside and provide guidance regarding the repeated procedure. A court of second instance may order the case to be tried by another panel of the court of first instance or, exceptionally, by another court.[1088]

d) Provisions concerning other matters:

If a party with a pecuniary interest submitted an appeal against a provision of a first instance judgment concerning confiscation, forfeiture of assets, or rendering electronic

1084 CPC 606. §
1085 CPC 608. §
1086 CPC 609. §
1087 CPC 610. §
1088 CPC 611. §

data permanently inaccessible, and the court of second instance did not refrain from applying, on the basis of that or any other appeal, the first instance judgment provision on any confiscation, forfeiture of assets, or rendering electronic data permanently inaccessible affecting an ownership right, asset, or the right to dispose of electronic data, of the party with a pecuniary interest, the court of first instance shall communicate the decision of the court of second instance to the party with a pecuniary interest. If a court of second instance orders any confiscation, forfeiture of assets, or rendering electronic data permanently inaccessible affecting an ownership right of a party with a pecuniary interest, the operative part of its decision shall include information to the party with a pecuniary interest about his right. If deciding on the termination of parental custody rights would delay the conclusion of the criminal proceeding considerably, or adjudicating the merits of the matter during the criminal proceeding is prevented by any other circumstance, the court of second instance shall set aside the provisions passed by the court of first instance regarding this matter, and the motion for terminating parental custody rights shall be ordered to be enforced by other legal means.[1089]

e) Appeals against decisions by courts of second instance:

Appeals against a judgment of a court of second instance may be submitted to a court of third instance, provided that the decision of the court of second instance contradicts that of the court of first instance. A contradiction between the relevant decisions exists if the court of second instance a) found an accused guilty or ordered compulsory psychiatric treatment for an accused who was acquitted, or the proceeding against whom was terminated, by the court of first instance, b) acquitted, or terminated the criminal proceeding against, an accused who was found guilty at first instance, c) found the accused guilty of a criminal offence on which the court of first instance did not pass any provision. A contradiction between the relevant decisions cannot be established if an act of the accused constitutes more than one criminal offence and in the light of this, changing the qualification established by the court of first instance would have been justified in the secondinstance proceeding. An appeal may challenge a contradicting decision. In an appeal, no motion for evidence may be submitted, no new fact may be stated, and no new evidence may be invoked.[1090] An appeal against a judgment passed by a court of second instance may be submitted by the accused, the prosecution service, the defence counsel, the spouse or cohabitant of the accused if compulsory psychiatric treatment is ordered.[1091]

6.13. Third-instance court proceedings (CPC)

6.13.1. General rules of third-instance court proceedings

A court of third instance shall revise

– in a second instance judgment (1) any contradicting decision challenged on appeal, (2) those provisions or parts of the second instance judgment that were passed as a result

1089 CPC 612. §
1090 CPC 615. §
1091 CPC 616. §

of revising, in connection with the challenged contradicting decision, the first instance judgment, and

– the first and second-instance court proceeding without taking into account the person of the appellant or the ground for his appeal.

A court of third instance shall decide ex officio on all matters subject to a simplified review, as well as any provision concerning parental custody rights or a civil claim.

A judgment provision on acquittal, or terminating a proceeding, may not be subject to a revision, unless the provision concerned was challenged on appeal.[1092]

a) The binding effect of facts established in a judgment subject to a revision:

A decision passed by a court of third instance shall be based on the same facts the court of second instance relied on in its judgment, unless the second instance judgment is groundless as regards the contradicting decision challenged by an appeal. Evidence may not be taken in a third-instance court proceeding. If the second instance judgment is groundless as regards the contradicting decision challenged by the appeal, and the facts may be established correctly on the basis of case documents concerning evidence taken by the court of first or second instance, or if the incorrect factual deduction may be eliminated on the basis of case documents concerning evidence taken by the court of first or second instance, the court of third instance shall supplement or correct the facts of the case ex officio.[1093]

b) Administering an appeal:

An appeal shall be adjudicated by a court of third instance in a panel session, or otherwise in a public court session. The participation of a defence counsel in a third-instance court proceeding shall be mandatory. If an accused does not have a defence counsel, the chair of the panel shall appoint a defence counsel without delay after the appeal is received by the court of third instance.[1094]

A court of third instance shall decide in a panel session if (1) an appeal may not be adjudicated because the challenged judgment is groundless, (2) the court of first or second instance passed its judgment in violation of a procedural rule. A court of third instance shall also decide in a panel session if no appeal was submitted against a judgment to the detriment of an accused, and the prosecution service, the accused, the defence counsel, or the appellant did not move for a public session. If the chair of a panel does not set a public court session ex officio, the information provided on setting a panel session shall also include that a motion for setting a public session may be submitted by the time limit open for filing observations. No application for an excuse shall be accepted for failing to meet this time limit. In a public court session, the attendance of a prosecutor and a defence counsel shall be mandatory.[1095]

If a judgment of a court of first or second instance is set aside, the court of third instance, in its setting aside order, shall decide on the matter of any coercive measure affecting personal freedom subject to judicial permission. After administering an appeal

1092 CPC 618. §
1093 CPC 619. §
1094 CPC 620. §
1095 CPC 621. §

and serving its decision, a court of third instance shall send back all case documents, including its decision and the minutes of the third-instance proceeding, to the court of second instance or the court instructed to conduct a new proceeding.[1096]

6.13.2. Decisions by courts of third instance

a) Upholding a second instance judgment:
A court of third instance shall uphold a second instance judgment if an appeal is groundless and there is no other reason to set aside the judgment, and if it is not necessary to amend the judgment, or doing so is not possible due to the prohibition of reformatio in peius.[1097]

b) Amending a second instance judgment:
If a court of second instance applied the law incorrectly, but it is not necessary to set aside its judgment, the court of third instance shall amend the judgment and pass a decision in compliance with the legal requirements. A court of third instance may also amend a second instance judgment if it eliminated the partial groundlessness of the second instance judgment.[1098]

c) Setting aside a second instance judgment:
A court of third instance shall set aside a second instance judgment, and instruct the court of second instance to conduct a new proceeding, if the court of second instance passed its judgment
– in violation of a procedural rule,
– in violation of the prohibition of reformatio in peius.
In addition to setting aside a second instance judgment, a court of third instance shall also set aside the related first instance judgment, and instruct the court of first instance to conduct a new proceeding, if a procedural violation of law was committed by the court of first instance. A court of third instance shall set aside a second instance judgment, as well as the first instance judgment if necessary, and instruct the court of second or first instance to conduct a new proceeding if it is unable to eliminate the groundlessness of the second instance judgment.[1099]

6.14. Right of access to a court (ECrHR)

The „right to a court" is no more absolute in criminal than in civil matters. It is subject to implied limitations.[1100] However, these limitations must not restrict the exercise of the right in such a way or to such an extent that the very essence of the right is impaired. They must pursue a legitimate aim and there must be a reasonable proportionality between the means employed and the aim sought to be achieved.[1101]

1096 CPC 622. §
1097 CPC 623. §
1098 CPC 624. §
1099 CPC 625. §
1100 „Deweer v. Belgium" (1980)
1101 „Guérin v. France" (1998); „Omar v. France" (1998), citing references to civil cases

a) Limitations 1.: parlaimentary immunity

The guarantees offered by both types of parliamentary immunity (non-liability and inviolability) serve the same need – that of ensuring the independence of Parliament in the performance of its task. Without a doubt, inviolability helps to achieve the full independence of Parliament by preventing any possibility of politically motivated criminal proceedings and thereby protecting the opposition from pressure or abuse on the part of the majority.[1102] Furthermore, bringing proceedings against members of parliament may affect the very functioning of the assembly to which they belong and disrupt Parliament's work. This system of immunity, constituting an exception to the ordinary law, can therefore be regarded as pursuing a legitimate aim.

However, without considering the circumstances of the case no conclusions can be drawn as to the compatibility with the Convention of this finding of the legitimacy of parliamentary immunity. It must be ascertained whether parliamentary immunity has restricted the right of access to a court in such a way that the very essence of that right is impaired. Reviewing the proportionality of such a measure means taking into account the fair balance which has to be struck between the general interest in preserving Parliament's integrity and the applicant's individual interest in having his parliamentary immunity lifted in order to answer the criminal charges against him in court. In examining the issue of proportionality, the Court must pay particular attention to the scope of the immunity in the case before it. The less the protective measure serves to preserve the integrity of Parliament, the more compelling its justification must be. Thus, for example, the Court has held that the inability of a member of parliament to waive his immunity did not infringe his right to a court, since the immunity was simply a temporary procedural obstacle to the criminal proceedings, being limited to the duration of his term of parliamentary office.

b) Limitations 2.: Procedural rules

These are, for example, the admissibility requirements for an appeal. Article 6 of the Convention does not compel the Contracting States to set up courts of appeal or of cassation.[1103] However, where such courts do exist, the guarantees of Article 6 must be complied with, for instance in that it guarantees to an applicant an effective right of access to the court.[1104]

Although the right of appeal may of course be subject to statutory requirements, when applying procedural rules the courts must avoid excessive formalism that would infringe the fairness of the proceedings.[1105] The particularly strict application of a procedural rule may sometimes impair the very essence of the right of access to a court,[1106] particularly in view of the importance of the appeal and what is at stake in the proceedings for an applicant who has been sentenced to a long term of imprisonment.

The right of access to a court is also fundamentally impaired by a procedural irregularity, for example where a prosecution service official responsible for verifying the admissibility of appeals against fines or applications for exemptions acted ultra vires by

1102 „Kart v. Turkey" (2009), citing references to civil cases
1103 „Dorado Baúlde v. Spain" (2015)
1104 „Maresti v. Croatia" (2009); „Reichman v. France" (2016)
1105 „Walchli v. France" (2007); „Evaggelou v. Greece" (2011)
1106 „Labergère v. France" (2006)

ruling on the merits of an appeal himself, thus depriving the applicants of the opportunity to have the „charge" in question determined by a community judge.[1107]

The same applies where a decision declaring an appeal inadmissible on erroneous grounds led to the retention of the deposit equivalent to the amount of the standard fine, with the result that the fine was considered to have been paid and the prosecution was discontinued, making it impossible for the applicant, once he had paid the fine, to contest before a „tribunal" the road-traffic offence of which he was accused.[1108]

A further example: the applicant suffered an excessive restriction of his right of access to a court where his appeal on points of law was declared inadmissible for failure to comply with the statutory time-limits, when this failure was due to the defective manner in which the authorities had discharged their obligation to serve the lower court's decision on the applicant.[1109]

c) Limitations 3.: Requirement of enforcement of a previous decision

As regards the automatic inadmissibility of appeals on points of law lodged by appellants who have failed to surrender to custody although warrants have been issued for their arrest:

– where an appeal on points of law is declared inadmissible on grounds connected with the applicant's having absconded, this amounts to a disproportionate sanction, having regard to the signal importance of the rights of the defence and of the principle of the rule of law in a democratic society;[1110]

– where an appeal on points of law is declared inadmissible solely because the appellant has not surrendered to custody pursuant to the judicial decision challenged in the appeal, this ruling compels the appellant to subject himself in advance to the deprivation of liberty resulting from the impugned decision, although that decision cannot be considered final until the appeal has been decided or the time-limit for lodging an appeal has expired.[1111]

This imposes a disproportionate burden on the appellant, thus upsetting the fair balance that must be struck between the legitimate concern to ensure that judicial decisions are enforced, on the one hand, and the right of access to the Court of Cassation and the exercise of the rights of the defence on the other.

The same applies where the right to appeal on points of law is forfeited because of failure to comply with the obligation to surrender to custody.[1112]

However, the requirement to lodge a deposit before appealing against a speeding fine – the aim of this requirement being to prevent dilatory or vexatious appeals in the sphere of road-traffic offences – may constitute a legitimate and proportionate restriction on the right of access to a court.[1113]

1107 „Josseaume v. France" (2012)
1108 „Célice v. France" (2012)
1109 „Davran v. Turkey" (2009); „Maresti v. Croatia" (2009), contrast with „Johansen v. Germany" (2016)
1110 „Poitrimol v. France" (1993); „Guérin v. France" (1998); „Omar v. France" (1998)
1111 „Guérin v. France" (1998)
1112 „Khalfaoui v. France" (1999); „Papon v. France" (2002)
1113 „Schneider v. France" (2009)

d) Limitations 4.: Other restrictions in breach of the right of access to a court

They may occur, for example, where an accused person is persuaded by the authorities to withdraw an appeal on the basis of a false promise of remission of the sentence imposed by the first-instance court;[1114] or where a court of appeal has failed to inform an accused person of a fresh time-limit for lodging an appeal on points of law following the refusal of his officially assigned counsel to assist him.[1115]

There will also be a restriction on access to court if an applicant is unable to challenge a fine imposed by an administrative authority before a tribunal having sufficient power of review of the administrative decision.[1116]

6.15. General guarantees: institutional requirement (ECrHR)

The concept of a „tribunal established by law", together with the concepts of „independence" and „impartiality" of a tribunal, forms part of the „institutional requirements" of Article 6. In the Court's case-law, there is a very close interrelationship between these concepts.[1117]

The Court has held, in particular, that a judicial body which does not satisfy the requirements of independence – in particular from the executive – and of impartiality may not even be characterised as a „tribunal" for the purposes of Article 6. Similarly, when determining whether a tribunal is established by law, the reference to law comprises any provision of domestic law – including, in particular, provisions concerning the independence of the members of a court – which, if breached, would render the participation of one or more judges in the examination of a case „irregular".

Moreover, when establishing whether a court can be considered to be „independent" within the meaning of Article 6., the Court has regard, inter alia, to the manner of appointment of its members, which pertains to the domain of the establishment of a "tribunal". Accordingly, while they each serve specific purposes as distinct fair trial guarantees, there is a common thread running through the institutional requirements of Article 6., in that they are guided by the aim of upholding the fundamental principles of the rule of law and the separation of powers.

a) The notion of a „tribunal":

In the Court's case-law a tribunal is characterised in the substantive sense of the term by its judicial function, that is to say, determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner. It must also satisfy a series of further requirements – independence, in particular of the executive; impartiality; duration of its members' terms of office; guarantees afforded by its procedure – several of which appear in the text of Article 6. In addition, it is inherent in the very notion of a tribunal that it be composed of judges selected on the basis of merit – that is, judges who fulfil the requirements of technical competence and moral integrity to perform the judicial functions required of it in a State governed by the rule of law.[1118]

1114 „Marpa Zeeland B.V. and Metal Welding B.V. v. the Netherlands" (2004)
1115 „Kulikowski v. Poland" (2009)
1116 „Julius Kloiber Schlachthof GmbH and Others v. Austria" (2013)
1117 „Guðmundur Andri Ástráðsson v. Iceland" (2020)
1118 „Guðmundur Andri Ástráðsson v. Iceland" (2020)

Thus, for instance, conferring the prosecution and punishment of minor "criminal" offences on administrative authorities is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6.[1119] Therefore, decisions taken by administrative authorities which do not themselves satisfy the requirements of Article 6. of the Convention must be subject to subsequent review by a „judicial body that has full jurisdiction". The defining characteristics of such a body include the power to quash in all respects, on questions of fact and law, the decision of the body below:[1120] for instance, administrative courts carrying out a judicial review that went beyond a „formal" review of legality and included a detailed analysis of the appropriateness and proportionality of the penalty imposed by the administrative authority.[1121] Similarly, a judicial review may satisfy Article 6 requirements even if it is the law itself which determines the sanction in accordance with the seriousness of the offence.[1122]

The power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of „tribunal".

b) Tribunal established by law:

Under Article 6 § 1 of the Convention, a tribunal must always be established by law. This expression reflects the principle of the rule of law, which is inherent in the system of protection established by the Convention and its Protocols.[1123] Indeed, an organ not established according to the legislation would be deprived of the legitimacy required, in a democratic society, to hear individual complaints.

„Law", within the meaning of Article 6., comprises in particular the legislation on the establishment and competence of judicial organs but also any other provision of domestic law which, if breached, would render the participation of one or more judges in the examination of a case unlawful. The phrase „established by law" covers not only the legal basis for the very existence of a tribunal, but also compliance by the tribunal with the particular rules that govern it, and the composition of the bench in each case. Moreover, having regard to its fundamental implications for the proper functioning and the legitimacy of the judiciary in a democratic State governed by the rule of law, the Court has found that the process of appointing judges necessarily constitutes an inherent element of the concept of the "establishment" of a court or tribunal „by law".

The object of the term "established by law" in Article 6 „is to ensure that the judicial organisation in a democratic society does not depend on the discretion of the executive, but that it is regulated by law emanating from Parliament". Nor, in countries where the law is codified, can the organisation of the judicial system be left to the discretion of the judicial authorities, although this does not mean that the courts do not have some latitude to interpret relevant domestic legislation.

In principle, a violation of the domestic legal provisions on the establishment and competence of judicial organs by a tribunal gives rise to a violation of Article 6. The Court

1119 „Öztürk v. Germany" (1984); „A. Menarini Diagnostics S.R.L. v. Italy" (2011); „Flisar v. Slovenia" (2018)
1120 „Schmautzer v. Austria" (1995); „Gradinger v. Austria" (1995); „Grande Stevens and Others v. Italy (2014)
1121 „A. Menarini Diagnostics S.R.L. v. Italy" (2011), in respect of a fine imposed by an independent regulatory authority in charge of competition
1122 „Malige v. France" (1998), in respect of the deduction of points from a driving licence
1123 „Jorgic v. Germany" (2007)

is therefore competent to examine whether the national law has been complied with in this respect. However, in general, having regard to the general principle that it is in the first place for the national courts themselves to interpret the provisions of domestic law, the Court will not question their interpretation unless there has been a flagrant violation of domestic law. The Court's task is therefore limited to examining whether reasonable grounds existed for the authorities to establish jurisdiction.

The Court has further explained that the examination under the „tribunal established by law" requirement must not lose sight of the common purpose of the institutional requirements of Article 6. and must systematically enquire whether the alleged irregularity in a given case was of such gravity as to undermine the aforementioned fundamental principles and to compromise the independence of the court in question. "Independence" refers, in this connection, to the necessary personal and institutional independence that is required for impartial decision making, and it is thus a prerequisite for impartiality. It characterises both (i) a state of mind, which denotes a judge's imperviousness to external pressure as a matter of moral integrity, and (ii) a set of institutional and operational arrangements – involving both a procedure by which judges can be appointed in a manner that ensures their independence and selection criteria based on merit –, which must provide safeguards against undue influence and/or unfettered discretion of the other State powers, both at the initial stage of the appointment of a judge and during the exercise of his or her duties.

In this context, the Court has also noted that a finding that a court is not a "tribunal established by law" may have considerable ramifications for the principles of legal certainty and irremovability of judges. However, upholding those principles at all costs, and at the expense of the requirements of „a tribunal established by law", may in certain circumstances inflict even further harm on the rule of law and on public confidence in the judiciary. As in all cases where the fundamental principles of the Convention come into conflict, a balance must therefore be struck in such instances to determine whether there is a pressing need – of a substantial and compelling character – justifying the departure from the principle of legal certainty and the force of res judicata and the principle of irremovability of judges, as relevant, in the particular circumstances of a case.

As regards the alleged breaches of the "tribunal established by law" requirement in relation to the process of appointing judges, the Court has devised the following criteria which, taken cumulatively, provide a basis to guide its assessment:

– In the first place, there must, in principle, be a manifest breach of domestic law in the sense that it must be objectively and genuinely identifiable. However, the absence of such a breach does not rule out the possibility of a violation, since a procedure that is seemingly in compliance with the rules may nevertheless produce results that are incompatible with the above object and purpose;

– Secondly, only those breaches that relate to the fundamental rules of the procedure for appointing judges (that is, breaches that affect the essence of the right in question) are likely to result in a violation: for example, the appointment of a person as judge who did not fulfil the relevant eligibility criteria or breaches that may otherwise undermine the purpose and effect of the „established by law" requirement. Accordingly, breaches of a purely technical nature fall below the relevant threshold;

– Thirdly, the review by domestic courts, of the legal consequences of a breach of a domestic rule on judicial appointments, must be carried out on the basis of the relevant Convention standards. In particular, a fair and proportionate balance has to be struck to determine whether there was a pressing need, of a substantial and compelling character, justifying the departure from competing principles of legal certainty and irremovability of judges, as relevant, in the particular circumstances of a case. With the passage of time, the preservation of legal certainty would carry increasing weight in the balancing exercise.

In a legal case, the Court found that the very essence of the applicant's right to a „tribunal established by law" had been impaired on account of the participation in his trial of a judge whose appointment procedure had been vitiated by a manifest and grave breach of a fundamental domestic rule intended to limit the influence of the executive and strengthen the independence of the judiciary. The first and second criteria were thereby satisfied. As to the third criteria, the Supreme Court had failed to carry out a Convention compliant assessment and to strike the right balance between the relevant competing principles, although the impugned irregularities had been established even before the judges at issue had taken office. Nor had it responded to any of the applicant's highly pertinent arguments. The restraint displayed by the Supreme Court in examining the applicant's case had undermined the significant role played by the judiciary in maintaining the checks and balances inherent in the separation of powers.

c) Examples: Examples where the Court found that the body in question was not „a tribunal established by law":

– the Court of Cassation which tried co-defendants other than ministers for offences connected with those for which ministers were standing trial, since the connection rule was not established by law;[1124]

– a court composed of two lay judges elected to sit in a particular case in breach of the statutory requirement of drawing of lots and the maximum period of two weeks' service per year;[1125]

– a court composed of lay judges who continued to decide cases in accordance with established tradition, although the law on lay judges had been repealed and no new law had been enacted;[1126]

– a court whose composition was not in accordance with the law, since two of the judges were disqualified by law from sitting in the case;[1127]

The Court found that the tribunal was „established by law" in the following cases:

– a German court trying a person for acts of genocide committed in Bosnia and Herzegovina;[1128]

– a special court established to try corruption and organised crime;[1129]

– where a single-judge was seconded from a higher court to hear the applicants' case;[1130]

– reassignment of a case to a specialised court done in accordance with the law and without an indication of intention to affect the outcome of the case.[1131]

1124 „Coëme and Others v. Belgium", 2000.
1125 „Posokhov v. Russia", 2003.
1126 „Pandjikidze and Others v. Georgia", 2009.
1127 „Lavents v. Latvia", 2002.
1128 „Jorgic v. Germany", 2007.
1129 „Fruni v. Slovakia", 2011.
1130 „Maciszewski and Others v. Poland", 2020.
1131 „Bahaettin Uzan v. Turkey", 2020.

6.16. Pre-trial (ECrHR)

As regards the pre-trial stage (inquiry, investigation), the Court considers criminal proceedings as a whole, including the pre-trial stage of the proceedings. In its early jurisprudence, the Court stressed that some requirements of Article 6, such as the reasonable-time requirement or the right of defence, may also be relevant at this stage of proceedings insofar as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them. Although investigating judges do not determine a „criminal charge", the steps taken by them have a direct influence on the conduct and fairness of the subsequent proceedings, including the actual trial. Accordingly, Article 6 § 1 may be held to be applicable to the investigation procedure conducted by an investigating judge, although some of the procedural safeguards envisaged by Article 6. might not apply.[1132]

6.17. Prejudicial publicity (ECrHR)

The Court has held that a virulent press campaign can adversely affect the fairness of a trial by influencing public opinion and, consequently, the jurors called upon to decide the guilt of an accused.[1133]

In this way, a virulent press campaign risks having an impact on the impartiality of the court under Article 6. § (1) as well as the presumption of innocence enshrined in Article 6. § (2).[1134]

At the same time, press coverage of current events is an exercise of freedom of expression, guaranteed by Article 10 of the Convention.[1135] If there is a virulent press campaign surrounding a trial, what is decisive is not the subjective apprehensions of the suspect concerning the absence of prejudice required of the trial courts, however understandable, but whether, in the particular circumstances of the case, his or her fears can be held to be objectively justified.[1136]

Some of the factors identified in the case-law as relevant to the Court's assessment of the impact of such a campaign on the fairness of the trial include: the time elapsed between the press campaign and the commencement of the trial, and in particular the determination of the trial court's composition; whether the impugned publications were attributable to, or informed by, the authorities; and whether the publications influenced the judges or the jury and thus prejudiced the outcome of the proceedings.[1137]

Moreover, in the context of a trial by jury, the content of any directions given to the jury is also a relevant consideration.[1138] National courts which are entirely composed of professional judges generally possess, unlike members of a jury, appropriate experience and training enabling them to resist any outside influence.[1139]

1132 https://www.echr.coe.int/documents/d/echr/guide_art_6_criminal_eng (14.03.2024.)
1133 „Akay v. Turkey" (2002) and „Craxi v. Italy" (2002)
1134 „Ninn-Hansen v. Denmark" (1999) and „Anguelov v. Bulgaria" (2004)
1135 „Bédat v. Switzerland" (2016)
1136 „Włoch v. Poland" (2000); „Daktaras v. Lithuania" (2000); „G.C.P. v. Romania" (2011)
1137 „Beggs v. the United Kingdom" (2012); „Abdulla Ali v. the United Kingdom" (2015); „Paulikas v. Lithuania" (2017)
1138 „Beggs v. the United Kingdom" (2012)
1139 „Mircea v. Romania" (2007)

6.17.1. The presumption of innocence - statements by judicial authorities (ECrHR)

The presumption of innocence will be violated if a judicial decision concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. In this connection, the lack of intention to breach the right to the presumption of innocence cannot rule out a violation of Article 6 § 2 of the Convention.[1140]

It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court regards the accused as guilty.[1141] A premature expression of such an opinion by the tribunal itself will inevitably fall foul of this presumption.[1142] Thus, an expression of "firm conviction that the applicant had again committed an offence" during the proceedings for suspension of a prison sentence on probation violated Article 6 § 2.[1143]

However, in a situation where the operative part of a judicial decision viewed in isolation is not in itself problematic under Article 6 § 2, but the reasons adduced for it are, the Court has recognised that the decision must be read with and in light of that of another court which has later examined it.

Where such a reading demonstrated that the individual's innocence was no longer called into question, the domestic case was considered to have ended without any finding of guilt and there was no need to proceed with any hearing in the case or examination of evidence for domestic proceedings to be found to be in accordance with Article 6 § 2.[1144]

What is important in the application of the provision of Article 6 § 2 is the true meaning of the statements in question, not their literal form.[1145] Even the regrettable use of some unfortunate language does not have to be decisive as to the lack of respect for the presumption of innocence, given the nature and context of the particular proceedings.[1146] Thus, a potentially prejudicial statement cited from an expert report did not violate the presumption of innocence inproceedings for a conditional release from prison when a close reading of the judicial decision excluded an understanding which would touch upon the applicant's reputation and the way he is perceived by the public. However, the Court stressed that it would have been more prudent for the domestic court to either clearly distance itself from the expert's misleading statements, or to advise the expert to refrain from making unsolicited statements about the applicant's criminal liability in order to avoid the misconception that questions of guilt and innocence could be in any way relevant to the proceedings at hand.[1147]

1140 „Avaz Zeynalov v. Azerbaijan" (2021)
1141 „Minelli v. Switzerland" (1983); „Nerattini v. Greece" (2008); „Didu v. Romania" (2009); „Gutsanovi v. Bulgaria" (2013)
1142 „Nešťák v. Slovakia (2007)
1143 „El Kaada v. Germany" (2015)
1144 „A.v. Norway" (2018)
1145 „Lavents v. Latvia" (2002)
1146 „Lähteenmäki v. Estonia" (2016)
1147 „Müller v. Germany" (2014)

The fact that the applicant was ultimately found guilty cannot vacate his initial right to be presumed innocent until proved guilty according to law.[1148] However, the higher court may rectify the impugned statements made by the lower courts by correcting their wording so as to exclude any prejudicial suggestion of guilt.[1149]

6.17.2. The publicity of court hearings (ECrHR)

The public character of proceedings protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society.[1150]

While the overall fairness of the proceedings is the overarching principle under Article 6 of the Convention, the (non-)violation of the defendant's right to a public hearing vis-à-vis the exclusion of the public and the press does not necessarily correlate with the existence of any actual damage to the defendant's exercise of his other procedural rights, including those protected under paragraph 3 of Article 6. Thus, even where an applicant would be afforded otherwise an adequate opportunity to put forward a defence with due regard to his right to an oral hearing and the principles of equality of arms and adversarial procedure, the authorities must show that the decision to hold a hearing in camera is strictly required in the circumstances of the case.[1151]

The principle of the public nature of court proceedings entails two aspects: the holding of public hearings and the public delivery of judgments.[1152]

a) The right to an oral hearing and presence at the hearing:

The entitlement to a „public hearing" in Article 6 § 1 necessarily implies a right to an „oral hearing."[1153] The obligation to hold a hearing is, however, not absolute in all cases falling under the criminal head of Article 6. In light of the broadening notion of a "criminal charge" to cases not belonging to the traditional categories of criminal law (such as administrative penalties, customs law and tax surcharges), there are „criminal charges" of differing weights. While the requirements of a fair hearing are the strictest concerning the hard core of criminal law, the criminal-head guarantees of Article 6 do not necessarily apply with their full stringency to other categories of cases falling under that head yet not carrying any significant degree of stigma.[1154]

1148 „Nešťák v. Slovakia" (2007), concerning decisions prolonging the applicants' detention on remand; see also „Vardan Martirosyan v. Armenia" (2021), where the Court laid emphasis on the fact that the relevant higher court had made no attempt to rectify the prejudicial statement.
1149 „Benghezal v. France" (2022)
1150 „Riepan v. Austria" (2000); „Krestovskiy v. Russia" (2010); „Sutter v. Switzerland" (1984)
1151 „Kilin v. Russia" (2021)
1152 „Tierce and Others v. San Marino" (2000)
1153 „Döry v. Sweden" (2002)
1154 „Jussila v. Finland" (2006)

Nevertheless, refusing to hold an oral hearing may be justified only in exceptional cases.[1155] The character of the circumstances which may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be dealt with by the competent court – in particular, whether these raise any question of fact or law which could not be adequately resolved on the basis of the case file. An oral hearing may not be required where there are no issues of credibility or contested facts which necessitate an oral presentation of evidence or cross-examination of witnesses, and where the accused was given an adequate opportunity to put forward his case in writing and to challenge the evidence against him. In this connection, it is legitimate for the national authorities to have regard to the demands of efficiency and economy.[1156] However, in cases where the impugned offence has been observed by a public officer, an oral hearing may be essential for the protection of the accused person's interests in that it can put the credibility of the officers' findings to the test.[1157]

Moreover, in some instances, even where the subject matter of the case concerns an issue of a technical nature, which could normally be decided without an oral hearing, the circumstances of the case may warrant, as a matter of fair trial, the holding of an oral hearing.[1158]

In any event, when dispensing with the oral hearing in a case, the domestic courts must provide a sufficient reasoning for their decision.[1159]

The principle of an oral and public hearing is particularly important in the criminal context, where a person charged with a criminal offence must generally be able to attend a hearing at first instance.[1160]

Without being present, it is difficult to see how that person could exercise the specific rights set out in sub-paragraphs (c), (d) and (e) of paragraph 3 of Article 6, namely the right to „defend himself in person", „to examine or have examined witnesses" and „to have the free assistance of an interpreter if he cannot understand or speak the language used in court". The duty to guarantee the right of a criminal defendant to be present in the courtroom ranks therefore as one of the essential requirements of Article 6.[1161]

Moreover, the right to be present at the hearing allows the accused to verify the accuracy of his or her defence and to compare it with the statements of victims and witnesses.[1162] Domestic courts must exercise due diligence in securing the presence of the accused by properly summoning him or her[1163] and they must take measures to discourage his unjustified absence from the hearing.[1164]

While Article 6 § 1 cannot be construed as conferring on an applicant the right to obtain a specific form of service of court documents such as by registered post, in the interests

1155 „Grande Stevens and Others v. Italy" (2014)
1156 Suhadolc v. Slovenia" (2011); „Sancaklı v. Turkey" (2018)
1157 „Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia" (2018)
1158 „Özmurat İnşaat Elektrik Nakliyat Temizlik San. ve Tic. Ltd. Şti. v. Turkey" (2017)
1159 „Mtchedlishvili v. Georgia" (2021), concerning the absence of an oral hearing at the appellate stage despite certain questions requiring, as a matter of fair trial, a direct assessment of the evidence given in person by the individuals concerned.
1160 „Igor Pascari v. the Republic of Moldova" (2016), concerning the applicant's exclusion from the proceedings in which his guilt for a road traffic accident had been determined.
1161 „Hermi v. Italy" (2006); „Sejdovic v. Italy" (2006); „Arps v. Croatia" (2016)
1162 „Medenica v. Switzerland" (2001)
1163 „Colozza v. Italy" (1985); „M.T.B. v. Turkey" (2018)
1164 „Medenica v. Switzerland" (2001)

of the administration of justice, the applicant should be notified of a court hearing in such a way as to not only have knowledge of the date, time and place of the hearing, but also to have enough time to prepare his or her case and to attend the court hearing.[1165]

A hearing may be held in the accused's absence, if he or she has waived the right to be present at the hearing. Such a waiver may be explicit or implied thorough one's conduct, such as when he or she seeks to evade the trial.[1166] However, any waiver of guarantees under Article 6 must satisfy the test of a "knowing and intelligent" waiver as established in the Court's case-law.[1167]

Relatedly, the Court has held that where a person charged with a criminal offence had not been notified in person, it could not be inferred merely from one's status as a "fugitive", which was founded on a presumption with an insufficient factual basis, that the defendant had waived the right to appear at trial and defend oneself. Moreover, a person charged with a criminal offence must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to force majeure. At the same time, it is open to the national authorities to assess whether the accused showed good cause for his absence or whether there was anything in the case file to warrant finding that he had been absent for reasons beyond his control. In any event, objective factors need to be shown to conclude that an accused could have been deemed to have had effective knowledge of the proceedings against him or her.

The Court has also held that the impossibility of holding a trial by default may paralyse the conduct of criminal proceedings, in that it may lead, for example, to dispersal of the evidence, expiry of the time-limit for prosecution, or miscarriage of justice.[1168] Thus, holding a hearing in an accused's absence is not in itself contrary to Article 6. However, when domestic law permits a trial to be held notwithstanding the absence of a person „charged with a criminal offence" who is in the applicant's position, that person should, once he becomes aware of the proceedings, be able to obtain, from a court which has heard him, a fresh determination of the merits of the charge.[1169]

Although proceedings that take place in the accused's absence are not of themselves incompatible with Article 6 of the Convention, a denial of justice nevertheless occurs where a person convicted in absentia is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself or that he intended to escape trial. This is because the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during original proceedings or at a retrial – ranks as one of the essential requirements of Article 6.[1170]

In „Sanader v. Croatia" (2015) the Court held that the requirement that an individual tried in absentia, who had not had knowledge of his prosecution and of the charges against him or sought to evade trial or unequivocally waived his right to appear in court, had to appear before the domestic authorities and provide an address of residence during the criminal proceedings in order to be able to request a retrial, was disproportionate. This

1165 „Vyacheslav Korchagin v. Russia" (2018)
1166 „Lena Atanasova v. Bulgaria" (2017); „Chong Coronado v. Andorra" (2020)
1167 „Sejdovic v. Italy" (2006)
1168 „Colozza v. Italy" (1985)
1169 „Sanader v. Croatia" (2015)
1170 „Stoichkov v. Bulgaria" (2005)

was particularly so because once the defendant is under the jurisdiction of the domestic authorities, he would be deprived of liberty on the basis of the conviction in absentia. In this regard, the Court stressed that there can be no question of an accused being obliged to surrender to custody in order to secure the right to be retried in conditions that comply with Article 6 of the Convention. It explained, however, that this did not call into question whether, in the fresh proceedings, the applicant's presence at the trial would have to be secured by ordering his detention on remand or by the application of other measures envisaged under the relevant domestic law. Such measures, if applicable, would need to have a different legal basis – that of a reasonable suspicion of the applicant having committed the crime at issue and the existence of „relevant and sufficient reasons" for his detention (see, by contrast, Chong Coronado v. Andorra, 2020, where the detention was not mandatory in the context of a retrial).

Lastly, an issue with regard to the requirement of presence at the hearing arises when an accused is prevented from taking part in his trial on the grounds of his improper behaviour.[1171]

In this context, the Court has held that it is essential for the proper administration of justice that dignity, order and decorum be observed in the courtroom as the hallmarks of judicial proceedings. The flagrant disregard by a defendant of elementary standards of proper conduct neither can, nor should, be tolerated. However, when an applicant's behaviour might be of such a nature as to justify his removal and the continuation of his trial in his absence, it is incumbent on the presiding judge to establish that the applicant could have reasonably foreseen what the consequences of his ongoing conduct would be prior to the decision to order his removal from the courtroom.[1172] Moreover, the relevant consideration is whether the applicant's lawyer was able to exercise the rights of the defence in the applicant's absence[1173] and whether the matter was addressed and if appropriate remedied in the appeal proceedings.[1174]

b) Exceptions to the rule of publicity:

A trial complies with the requirement of publicity if the public is able to obtain information about its date and place, and if this place is easily accessible to the public.[1175] The requirement to hold a public hearing is subject to exceptions. This is apparent from the text of Article 6 § 1 itself, which contains the proviso that „the press and public may be excluded from all or part of the trial {...} where the interests of juveniles or the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice". Holding proceedings, whether wholly or partly, in camera must be strictly required by the circumstances of the case.[1176]

If there are grounds to apply one or more of these exceptions, the authorities are not obliged, but have the right, to order hearings to be held in camera if they consider that such

1171 „Idalov v. Russia" (2012); „Marguš v. Croatia" (2014); „Ananyev v. Russia" (2009)
1172 „Idalov v. Russia" (2012)
1173 „Marguš v. Croatia" (2014)
1174 „Idalov v. Russia" (2012)
1175 „Riepan v. Austria" (2000)
1176 „Welke and Białek v. Poland" (2011)

a restriction is warranted.[1177] Moreover, in practice, the Court, in interpreting the right to a public hearing, has applied a test of strict necessity whatever the justification advanced for the lack of publicity.[1178]

Although in criminal proceedings there is a high expectation of publicity, it may on occasion be necessary under Article 6 to limit the open and public nature of proceedings in order, for example, to protect the safety or privacy of witnesses or to promote the free exchange of information and opinion in the pursuit of justice.[1179]

Security problems are a common feature of many criminal proceedings, but cases in which security concerns alone justify excluding the public from a trial are nevertheless rare.[1180] Security measures should be narrowly tailored and comply with the principle of necessity. The judicial authorities should consider all possible alternatives to ensure safety and security in the courtroom and give preference to a less strict measure over a stricter one when it can achieve the same purpose.[1181] Thus, for instance, the mere presumed possibility that some members of an illegal armed group have not been arrested cannot justify the exclusion of the public from the overall proceedings for safety purposes.[1182]

Considerations of public order and security problems may justify the exclusion of the public in prison disciplinary proceedings against convicted prisoners.[1183]

The holding of a trial in ordinary criminal proceedings in a prison does not necessarily mean that it is not public. However, in order to counter the obstacles involved in having a trial outside a regular courtroom, the State is under an obligation to take compensatory measures so as to ensure that the public and the media are duly informed about the place of the hearing and are granted effective access.[1184]

The mere presence of classified information in the case file does not automatically imply a need to close a trial to the public, without balancing openness with national-security concerns. Before excluding the public from criminal proceedings, courts must make specific findings that closure is necessary to protect a compelling governmental interest, and must limit secrecy to the extent necessary to preserve such an interest.[1185] Moreover, a theoretical possibility that the classified information might be examined at some point during the proceedings cannot justify the exclusion of the public from the proceedings.[1186]

The Court's usual approach in these cases is to analyse the reasons for the decision to hold a hearing in camera and assess, in the light of the facts of the case, whether those reasons appear justified. However, the application of a strict necessity test can present particular challenges when the ground invoked for holding part of a trial in camera concerns national security. The sensitive nature of national security concerns means that the very reasons for excluding the public may themselves be subject to confidentiality arrangements and respondent Governments may be reluctant to disclose details to this Court. Such sensitivities are, in principle, legitimate and the Court is ready to take the

1177 „Toeva v. Bulgaria" (2004)
1178 „Yam v. the United Kingdom" (2020)
1179 „B. and P. v. the United Kingdom" (2001)
1180 „Riepan v. Austria" (2000)
1181 „Krestovskiy v. Russia" (2010)
1182 „Kartoyev and Others v. Russia" (2021)
1183 „Campbell and Fell v. the United Kingdom" (1984)
1184 „Riepan v. Austria" (2000)
1185 „Belashev v. Russia" (2008)
1186 „Kartoyev and Others v. Russia" (2021)

necessary steps to protect secret information disclosed by the parties during proceedings before it. However, even such confidentiality guarantees may be considered insufficient in some cases to mitigate the risk of serious damage to fundamental national interests should information be disclosed. The Court can therefore be required to assess whether the exclusion of the public and the press met the strict necessity test without itself having access to the material on which that assessment was made at the domestic level.[1187]

In this connection, the Court is not well-equipped to challenge the national authorities'judgment that national security considerations arise. However, even where national security is at stake, measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision. In cases where the Court does not have sight of the national security material on which decisions restricting human rights are based, it will therefore scrutinise the national decision-making process to ensure that it incorporated adequate safeguards to protect the interests of the person concerned. It is also relevant, when determining whether a decision to hold criminal proceedings in camera was compatible with the right to a public hearing under Article 6, whether public interest considerations were balanced with the need for openness, whether all evidence was disclosed to the defence and whether the proceedings as a whole were fair.

Lastly, when deciding to hold a hearing in camera, the domestic courts are required to provide sufficient reasoning for their decision demonstrating that closure is strictly necessary within the meaning of Article 6 § 1.[1188]

6.17.3. Public pronouncement of judgments (ECrHR)

The Court has not felt bound to adopt a literal interpretation of the words „pronounced publicly."[1189] Despite the wording, which would seem to suggest that reading out in open court is required, other means of rendering a judgment public may be compatible with Article 6 § 1. As a general rule, the form of publication of the "judgment" under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object pursued by Article 6 § 1 in this context, namely to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial. In making this assessment, account must be taken of the entirety of the proceedings.[1190] Thus, providing the judgment in the court's registry and publishing in official collections could satisfy the requirement of public pronouncement.

Complete concealment from the public of the entirety of a judicial decision cannot be justified. Legitimate security concerns can be accommodated through certain techniques, such as classification of only those parts of the judicial decisions whose disclosure would compromise national security or the safety of others.[1191]

The right to a public hearing and the right to public pronouncement of a judgment are two separate rights under Article 6. The fact that one of these rights is not violated

1187 „Yam v. the United Kingdom" (2020)
1188 „Chaushev and Others v. Russia" (2016)
1189 „Sutter v. Switzerland" (1984); „Campbell and Fell v. the United Kingdom" (1984)
1190 „Welke and Białek v. Poland" (2011), where limiting the public pronouncement to the operative part of the judgments in proceedings held in camera did not contravene Article 6.
1191 „Raza v. Bulgaria" (2010)

does not in itself mean that the other right cannot be breached. In other words, public pronouncement of the sentence is incapable of remedying the unjustified holding of hearings in camera.[1192]

6.18. Reasoning of judicial decisions (ECrHR)

According to established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based.[1193]

Reasoned decisions serve the purpose of demonstrating to the parties that they have been heard, thereby contributing to a more willing acceptance of the decision on their part. In addition, they oblige judges to base their reasoning on objective arguments, and also preserve the rights of the defence. National courts should indicate with sufficient clarity the grounds on which they base their decision. The reasoned decision is important so as to allow an applicant to usefully exercise any available right of appeal.[1194] However, the extent of the duty to give reasons varies according to the nature of the decision and must be determined in the light of the circumstances of the case.

Thus, for instance, in the context of the dismissal of a criminal appeal, consequent on a tie vote which existed as a possibility in the domestic order, the Court stressed that a tied vote did not constitute per se a violation of Article 6. In each case it was necessary to examine whether, in the particular circumstances of the case, the judgments resulting in the dismissal of the applicant's appeal were reasoned enough to allow the applicant to understand why the dismissal was the result of the operation of the relevant domestic law, and whether that decision was clear enough as to its conclusion and outcome.

While courts are not obliged to give a detailed answer to every argument raised, it must be clear from the decision that the essential issues of the case have been addressed and that a specific and explicit reply has been given to the arguments which are decisive for the outcome of the case.[1195]

Moreover, in cases relating to interference with rights secured under the Convention, the Court seeks to establish whether the reasons provided for decisions given by the domestic courts are automatic or stereotypical. In sum, an issue with regard to a lack of reasoning of judicial decisions under Article 6. of the Convention will normally arise when the domestic courts ignored a specific, pertinent and important point raised by the applicant.[1196]

With regard to the manner in which the domestic judicial decisions are reasoned, a distinct issue arises when such decisions can be qualified as arbitrary to the point of prejudicing the fairness of proceedings. However, this will be the case only if no reasons are provided for a decision or if the reasons given are based on a manifest factual or legal error committed by the domestic court, resulting in a „denial of justice".[1197]

1192 „Artemov v. Russia" (2014)
1193 „Moreira Ferreira v. Portugal" (2017)
1194 „Hadjianastassiou v. Greece" (1992)
1195 „S.C. IMH Suceava S.R.L. v. Romania" (2013)
1196 „Rostomashvili v. Georgia" (2018)
1197 „Navalnyy v. Russia" (2018)

6.18.1. Reasons for decisions given by juries (ECrHR)

The Court has noted that several Council of Europe member States have a lay jury system, which is guided by the legitimate desire to involve citizens in the administration of justice, particularly in relation to the most serious offences. However, there is no right under Article 6. of the Convention to a jury trial. Juries in criminal cases rarely give reasoned verdicts and the relevance of this to fairness has been touched upon in a number of cases, first by the Commission and latterly by the Court.

The Convention does not require jurors to give reasons for their decision and Article 6. does not preclude a defendant from being tried by a lay jury even where reasons are not given for the verdict. Nevertheless, for the requirements of a fair trial to be satisfied, the accused, and indeed the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness.[1198]

In the case of assize courts sitting with a lay jury, any special procedural features must be accommodated, seeing that the jurors are usually not required – or not permitted – to give reasons for their personal convictions. In these circumstances, Article 6 requires an assessment of whether sufficient safeguards were in place to avoid any risk of arbitrariness and to enable the accused to understand the reasons for his conviction.[1199] Such procedural safeguards may include, for example, directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced and precise, unequivocal questions put to the jury by the judge, forming a framework on which the verdict is based or sufficiently offsetting the fact that no reasons are given for the jury's answers.[1200] Where an assize court refuses to put distinct questions in respect of each defendant as to the existence of aggravating circumstances, thereby denying the jury the possibility of determining the applicant's individual criminal responsibility the Court has found a violation of Article 6.[1201]

In „Bellerín Lagares v. Spain" (2003), the Court observed that the impugned judgment – to which a record of the jury's deliberations had been attached – contained a list of the facts which the jury had held to be established in finding the applicant guilty, a legal analysis of those facts and, for sentencing purposes, a reference to the circumstances found to have had an influence on the applicant's degree of responsibility in the case at hand. It therefore found that the judgment in question had contained sufficient reasons for the purposes of Article 6 § 1 of the Convention. In Matis v. France (2015), the Court held that a document that gave reasons for the judgment (feuille de motivation) by setting out the main charges which were debated during the proceedings, developed during the deliberations and ultimately formed the basis for the finding of guilt satisfied the requirements of sufficient reasoning.

Regard must be had to any avenues of appeal open to the accused.[1202] In this case only four questions were put as regards the applicant; they were worded in identical terms to the questions concerning the other co-accused and did not allow him to determine the factual or legal basis on which he was convicted. Thus, his inability to understand why he was found guilty led to an unfair trial.

1198 „Legillon v. France" (2013)
1199 „Lhermitte v. Belgium" (2016)
1200 „Papon v. France" (2001)
1201 „Goktepe v. Belgium" (2005)
1202 „Taxquet v. Belgium" (2010)

In „Judge v. the United Kingdom" (2011), the Court found that the framework surrounding a Scottish jury's unreasoned verdict was sufficient for the accused to understand his verdict. Moreover, the Court was also satisfied that the appeal rights available under Scots law would have been sufficient to remedy any improper verdict by the jury. Under the applicable legislation, the Appeal Court enjoyed wide powers of review and was empowered to quash any conviction which amounts to a miscarriage of justice. By contrast, in another case the Court found that, in one of the first cases following a cardinal reform of the criminal procedure introducing jury trials in the domestic order, the appellate court needed to address the specific procedural complaints raised by the applicant and could not reject his appeal on points of law without providing any reasons. In this connection, the Court stressed that, having regard to the lack of reasons in jury verdicts, the role that an appellate court plays was crucial, as it was up to it to examine whether the various procedural safeguards functioned effectively and properly and whether a presiding judge's handling of a jury trial resulted in unfairness.

In „Lhermitte v. Belgium" (2016) the Court noted the following factors on the basis of which it found no violation of Article 6 § 1: procedural safeguards put in place during the trial (in particular, the applicant's effective participation in the examination of evidence and the fact that the questions put by the president to the jury had been read out and the parties had been given a copy), the combined impact of the facts set out in the indictment and the nature of the questions put to the jury, the proper presentation of the sentencing judgment, and the limited impact of the expert opinions which had been at odds with the jury's findings.

Similarly, in „Ramda v. France" (2017), concerning the reasoning of a judgment delivered by a special anti-terrorist assize court, the Court found no violation of Article 6. in light of the combined examination of the three carefully reasoned committal orders, the arguments heard both at first instance and on appeal, as well as the many detailed questions put to the Assize Court, which allowed the applicant to understand the guilty verdict against him.

6.18.2. Reasons for decisions given by superior courts (ECHR)

In dismissing an appeal, an appellate court may, in principle, simply endorse the reasons for the lower court's decision.[1203] With regard to the decision of an appellate court on whether to grant leave to appeal, the Court has held that Article 6. cannot be interpreted as requiring that the rejection of such leave be subject itself to a requirement to give detailed reasons.[1204]

Nevertheless, when an issue arises as to the lack of any factual and/or legal basis of the lower court's decision, it is important that the higher court gives proper reasons of its own. Moreover, in case of an explicit objection to the admissibility of evidence, the higher court cannot rely on that evidence without providing a response to such an argument.[1205]

In „Baydar v. the Netherlands" (2018), in the context of a decision by the domestic superior court refusing to refer a question to the Court of Justice of the European Union

1203 „García Ruiz v. Spain" (1999)
1204 „Sawoniuk v. the United Kingdom" (2001)
1205 „Shabelnik v. Ukraine" (2017)

(CJEU) for a preliminary ruling, the Court had regard to the principle according to which courts of cassation comply with their obligation to provide sufficient reasoning when they base themselves on a specific legal provision, without further reasoning, in dismissing cassation appeals which do not have any prospects of success.[1206] The Court concluded that a reference to the relevant legal provision by the superior court, with an indication that there was no need to seek a preliminary ruling since the matter did not raise a legal issue that needed to be determined, provided for an implied acknowledgment that a referral to the CJEU could not lead to a different outcome in the case. The Court thus considered that this satisfied the requirement of a sufficient reasoning under Article 6.

6.19. Administration of evidence (ECrHR)

While Article 6. guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law.[1207]

It is not, therefore, the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair.[1208] This involves an examination of the alleged unlawfulness in question and, where the violation of another Convention right is concerned, the nature of the violation found. Thus, for instance, the Court criticised the approach taken by the domestic courts to give decisive weight to the statements of the arresting police officers concerning the charges of rebellion against the applicant where the Government themselves recognised (in an unilateral declaration) that the circumstances of the arrest had been contrary to the prohibition of degrading treatment under Article 3 of the Convention.

In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence have been respected. In particular, it must be examined whether the applicant was given an opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, as must the circumstances in which it was obtained and whether these circumstances cast doubt on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker. In this connection, the Court also attaches weight to whether the evidence in question was or was not decisive for the outcome of the criminal proceedings.

As to the examination of the nature of the alleged unlawfulness in question, the above test has been applied in cases concerning complaints that evidence obtained in breach of the defence rights has been used in the proceedings. This concerns, for instance, the use of evidence obtained through an identification parade, an improper taking of samples

1206 „Talmane v. Latvia" (2016)
1207 „Schenk v. Switzerland" (1998)
1208 „Ayetullah Ay v. Turkey" (2020)

from a suspect for a forensic analysis, exertion of pressure on a co-accused (including the questioning of a co-accused in the absence of a lawyer), use of planted evidence against an accused, unfair use of other incriminating witness and material evidence against an accused, use of self-incriminating statements in the proceedings, and use of expert evidence in the proceedings.

The same test has been applied in cases concerning the question whether using information allegedly obtained in violation of Article 8 as evidence rendered a trial as a whole unfair under the meaning of Article 6. This concerns, for instance, cases related to the use of evidence obtained by secret surveillance, search and seizure operations.[1209]

However, particular considerations apply in respect of the use in criminal proceedings of evidence obtained in breach of Article 3. The use of such evidence, secured as a result of a violation of one of the core and absolute rights guaranteed by the Convention, always raises serious issues as to the fairness of the proceedings, even if the admission of such evidence was not decisive in securing a conviction.[1210]

Therefore, the use in criminal proceedings of statements obtained as a result of a violation of Article 3 – irrespective of the classification of the treatment as torture, inhuman or degrading treatment – renders the proceedings as a whole automatically unfair, in breach of Article 6. The same principles apply concerning the use in criminal proceedings of statements obtained as a result of ill-treatment by private parties.[1211]

This also holds true for the use of real evidence obtained as a direct result of acts of torture. The admission of such evidence obtained as a result of an act classified as inhuman treatment in breach of Article 3, but falling short of torture, will only breach Article 6 if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant, that is, had an impact on his or her conviction or sentence.

These principles apply not only where the victim of the treatment contrary to Article 3 is the actual defendant but also where third parties are concerned. In particular, the Court has found that the use in a trial of evidence obtained by torture would amount to a flagrant denial of justice even where the person from whom the evidence had thus been extracted was a third party.[1212]

In this connection, it should be noted that the Court has held that the absence of an admissible Article 3 complaint does not, in principle, preclude it from taking into consideration the applicant's allegations that the police statements had been obtained using methods of coercion or oppression and that their admission to the case file, relied upon by the trial court, therefore constituted a violation of the fair trial guarantee of Article 6.[1213] Similar considerations apply where an applicant complains about the use of evidence allegedly obtained as a result of ill-treatment, which the Court could not establish on the basis of the material available to it (no substantive violation of Article 3 of the Convention). In such instances, in so far as the applicant made a prima facie case about the real evidence potentially obtained through ill-treatment, the domestic courts have a duty to elucidate the circumstances of the case and their failure to do so may lead to a violation of Article 6.[1214]

1209 „Prade v. Germany" (2016)
1210 „Mehmet Ali Eser v. Turkey" (2019)
1211 „Ćwik v. Poland" (2020)
1212 „Kormev v. Bulgaria" (2017)
1213 „Mehmet Duman v. Turkey" (2018)
1214 „Bokhonko v. Georgia" (2020)

In „Sassi and Benchellali v. France" (2021), the Court examined the applicants'complaint about a lack of fairness of the criminal proceedings against them in France relating to the use of statements they had given to certain French authorities on a US base at Guantánamo. While the Court had previously noted allegations of ill-treatment and abuse of terrorist suspects held by the US authorities in this context, in the present case the applicants' Article 3 complaint in respect of the French agents had been declared inadmissible. The Court, nevertheless, considered that it wasrequired to examine, under Article 6, whether and to what extent the domestic courts had taken into consideration the applicants' allegations of ill-treatment, even though it had allegedly been sustained outside the forum State, together with any potential impact on the fairness of the proceedings. In particular, the Court had to examine whether the domestic courts had properly addressed the objections raised by the applicants as to the reliability and evidential value of their statements and whether they had been given an effective opportunity to challenge the admissibility of those statements and to object to their use. On the facts, the Court found this to be the case. Noting also that the impugned statements had not been used as a basis either for the bringing of criminal proceedings against the applicants or for their conviction, the Court found no violation of Article 6. of the Convention.

An issue related to the administration of evidence in the proceedings arises also with regard to the admission of evidence provided by witnesses cooperating with the prosecution. In this connection, the Court has held that the use of statements made by witnesses in exchange for immunity or other advantages may put in question the fairness of the hearing granted to an accused and is capable of raising delicate issues since, by their very nature, such statements are open to manipulation and may be made purely in order to obtain advantages or for personal revenge. However, use of this kind of statement does not in itself suffice to render the proceedings unfair.[1215] In each case, in making its assessment, the Court will look at the proceedings as a whole, having regard to the rights of the defence but also to the interests of the public and the victims in the proper prosecution of the crime and, where necessary, to the rights of witnesses.[1216]

In „Adamčo v. Slovakia" (2019), concerning the conviction based to a decisive degree on statements by an accomplice arising from a plea-bargaining arrangement, the Court found a violation of Article 6 of the Convention having regard to the following considerations: the statement constituted, if not the sole, then at least the decisive evidence against the applicant; the failure by the domestic courts to examine the wider context in which the witness obtained advantages from the prosecution; the fact that the plea-bargaining agreement with the prosecution was concluded without the judicial involvement; and the domestic courts' failure to provide the relevant reasoning concerning the applicant's arguments.

By contrast, in Kadagishvili v. Georgia (2020), the Court did not consider that the reliance on the statements of suspects, who had concluded plea-bargaining agreements with the prosecution, rendered the trial as a whole unfair. The Court laid emphasis on the fact that the pleabargaining procedure had been carried out in accordance with the law and was accompanied by adequate judicial review. Moreover, the witnesses concerned gave statements to the trial court in the applicants' case, and the latter had ample opportunity to cross-examine them. It was also important for the Court that no finding of fact in the

1215 „Verhoek v. the Netherlands" (2004)
1216 „Habran and Dalem v. Belgium" (2017)

plea-bargaining procedure was admitted in the applicants' case without full and proper examination at the applicants' trial.

Lastly, it should be noted that in some instances, a positive obligation may arise on the part of the authorities to investigate and collect evidence in favour of the accused. In „V.C.L. and A.N. v. the United Kingdom" (2021), concerning a case of human trafficking where the victims of trafficking were prosecuted for drug-related offences (committed in relation to their trafficking), the Court stressed that evidence concerning an accused's status as a victim of trafficking should be considered as a „fundamental aspect" of the defence which he or she should be able to secure without restriction. In this connection, the Court referred to the positive obligation on the State under Article 4 of the Convention to investigate situations of potential trafficking. In the case at issue, the Court considered that the lack of a proper assessment of the applicants' status as victims of trafficking prevented the authorities from securing evidence which may have constituted a fundamental aspect of their defence.

6.20. Legal certainty and divergent case-law (ECrHR)

The principle of legal certainty requires domestic authorities to respect the binding nature of a final judicial decision. The protection against duplication of criminal proceedings is one of the specific safeguards associated with the general guarantee of a fair hearing in criminal proceedings under Article 6.[1217]

However, the requirements of legal certainty are not absolute. In criminal cases, they must be assessed in the light of, for example, Article 4 § 2 of Protocol No. 7, which expressly permits a State to reopen a case due to the emergence of new facts, or where a fundamental defect is detected in the previous proceedings, which could affect the outcome of the case. Nevertheless, compliance with Article 4 of Protocol No. 7 is not in itself sufficient to establish compliance with the requirements of a fair trial under Article 6.[1218]

Certain special circumstances of the case may reveal that the actual manner in which the procedure for reopening of a final decision was used impaired the very essence of a fair trial. In particular, the Court has to assess whether, in a given case, the power to launch and conduct such a procedure was exercised by the authorities so as to strike, to the maximum extent possible, a fair balance between the interests of the individual and the need to ensure the effectiveness of the system of criminal justice.

The principle of legal certainty also guarantees certain stability in legal situations and contributes to public confidence in the courts. The persistence of conflicting court decisions, on the other hand, can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law. However, the requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency of case-law, and case-law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement.[1219]

1217 „Bratyakin v. Russia" (2006)
1218 „Nikitin v. Russia" (2004)
1219 „Borg v. Malta" (2016)

In its assessment of whether conflicting decisions of domestic superior courts were in breach of the fair trial requirement enshrined in Article 6 § 1, the Court applies the test first developed in civil cases,[1220] which consist of establishing whether „profound and long-standing differences" exist in the case-law of a supreme court, whether the domestic law provides tools for overcoming these inconsistencies, whether such tools have been applied, and, if appropriate, to what effect.

Lastly, an issue of legal certainty may also arise in case of a legislative intervention in the pending criminal proceedings. In „Chim and Przywieczerski v. Poland" (2018), relying on its case-law under Article 7 of the Convention, the Court found no violation of Article 6 § 1 with respect to legislative amendments extending the duration of the limitation periods to the case against the applicant.

6.21. Presence at the appeal hearing (ECrHR)

The principle that hearings should be held in public entails the right of the accused to give evidence in person to an appellate court. From that perspective, the principle of publicity pursues the aim of guaranteeing the accused's defence rights.[1221]

Thus, when an accused provides justification for his or her absence from an appeal hearing, the domestic courts must examine that justification and provide sufficient reasons for their decision.[1222]

However, the personal attendance of the defendant does not take on the same crucial significance for an appeal hearing as it does for a trial hearing. The manner in which Article 6 is applied to proceedings before courts of appeal depends on the special features of the proceedings involved, and account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein.[1223]

Leave-to-appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6, despite the fact that the appellant is not given the opportunity to be heard in person by the appeal or cassation court, provided that a public hearing is held at first instance.[1224]

Even where the court of appeal has jurisdiction to review the case both as to the facts and as to the law, Article 6 does not always require a right to a public hearing, still less a right to appear in person.[1225] In order to decide this question, regard must be had to the specific features of the proceedings in question and to the manner in which the applicant's interests were actually presented and protected before the appellate court, particularly in the light of the nature of the issues to be decided by it.[1226]

However, where the appellate court is competent to modify, including to increase, the sentence imposed by the lower court and when the appeal proceedings are capable of raising issues involving an assessment of the accused's personality and character and his

1220 „Nejdet Şahin and Perihan Şahin v. Turkey" (2011)
1221 „Tierce and Others v. San Marino" (2000)
1222 „Henri Rivière and Others v. France" (2013)
1223 „Hermi v. Italy" (2006)
1224 „Monnell and Morris v. the United Kingdom" (1985), as regards the issue of leave to appeal; „Sutter v. Switzerland" (1984), as regards the court of cassation.
1225 „Fejde v. Sweden" (1991)
1226 „Seliwiak v. Poland" (2009); „Sibgatullin v. Russia" (2009)

or her state of mind at the time of the offence, which make such proceedings of crucial importance for the accused, it is essential to the fairness of the proceedings that he or she be enabled to be present at the hearing and afforded the opportunity to participate in it.[1227] This is particularly so where the appellate court is called upon to examine whether the applicant's sentence should be increased.[1228] In this context, where the issues at stake in the proceedings require an applicant's personal presence, he or she may need to be invited to the hearing even without his or her specific request to that effect.[1229]

As a rule, when an appellate court overturns an acquittal at first instance, it must take positive measures to secure the possibility for the accused to be heard.[1230] In the alternative, the appeal court must limit itself to quashing the lower court's acquittal and referring the case back for a retrial.[1231] In this connection, a closely related issue to the presence of an accused at the trial arises also with respect to the necessity of a further examination of evidence relied upon for the applicant's conviction.[1232] This may concern, where relevant, the necessity to question witnesses.[1233]

However, an accused may waive his right to participate or be heard in the appeal proceedings, either expressly or by his conduct. Nevertheless, a waiver of the right to participate in the proceedings may not, in itself, imply a waiver of the right to be heard in the proceedings. In each case it is important to establish whether the relevant court didall what could reasonably be expected of it to secure the applicant's participation in the proceedings. Questioning via video-link could be a measure ensuring effective participation in the proceedings.

The Court's case-law on this matter seems to draw a distinction between two situations: on the one hand, where an appeal court, which reversed an acquittal without itself hearing the oral evidence on which the acquittal was based, not only had jurisdiction to examine points of fact and law but actually proceeded to a fresh evaluation of the facts; and, on the other hand, situations in which the appeal court only disagreed with the lower court on the interpretation of the law and/orits application to the established facts, even if it also had jurisdiction in respect of the facts. For example, in the case of „Igual Coll v. Spain" (2008), the Court considered that the appeal court had not simply given a different legal interpretation or made another application of the law to facts already established at first instance, but had carried out a fresh evaluation of facts beyond purely legal considerations.[1234] Similarly, in „Marcos Barrios v. Spain" (2010), the Court held that the appeal court had expressed itself on a question of fact, namely the credibility of a witness, thus modifying the facts established at first instance and taking a fresh position on facts which were decisive for the determination of the applicant's guilt.

By contrast, in „Bazo González v. Spain" (2008) the Court found that there had not been a violation of Article 6 § 1 on the ground that the aspects which the appeal court had been called on to analyse in order to convict the applicant had had a predominantly legal character, and its judgment had expressly stated that it was not for it to carry out a fresh

1227 „Dondarini v. San Marino" (2004); „Popovici v. Moldova" (2007); „Lacadena Calero v. Spain" (2011).
1228 „Zahirović v. Croatia" (2013); „Hokkeling v. the Netherlands" (2017)
1229 „Mirčetić v. Croatia" (2021)
1230 „Botten v. Norway" (1996); „Dănilă v. Romania" (2007); „Gómez Olmeda v. Spain" (2016)
1231 „Júlíus Þór Sigurþórsson v. Iceland" (2019)
1232 „Marilena-Carmen Popa v. Romania" (2020)
1233 „Dan v. the Republic of Moldova" (2020)
1234 „Spînu v. Romania" (2008)

evaluation of the evidence; rather, it had only adopted a legal interpretation different to that of the lower court. Similarly, in „Ignat v. Romania" (2021), where the first-instance and final-instance courts disagreed over the manner of assessing the available documentary evidence, the Court did not considered that the final-instance court was required to directly hear witness evidence.

However, as explained by the Court in „Suuripää v. Finland" (2010), it should be taken into account that the facts and the legal interpretation can be intertwined to an extent that it is difficult to separate the two from each other.

CHAPTER VII.

METHODS OF PROOF

7.1. Introduction

Evidence in criminal proceedings starts during the investigation and continues until the case is closed in court. Methods of proof are very varied but their types are regulated in a similar way in different European laws.

In Hungarian law, there is no difference between the types of evidence that can be used in an investigation and in court proceedings. It is therefore up to the law enforcement authorities alone to choose the most appropriate procedures, with the obvious aim of bringing the case to a conclusion as quickly as possible.

It should be noted that certain acts of evidence may seriously infringe the personal liberty or even the property of the parties to the proceedings. For this reason, some evidentiary acts require special judicial authorisation, and some evidentiary activities cannot be carried out. These rules are essentially the prohibitions on evidence. In the following, I will give an overview of the methods of evidence available under Hungarian law, and I will also refer to the relevant decisions of the ECrHR with regard to certain acts.

7.2. Aquisition of data (CPC)

7.2.1. Data request

In the criminal proceeding, the court, the prosecution service, and the investigating authority or, in cases specified in an Act, the organ conducting a preparatory proceeding may request any organ, legal person, or other organisation without a legal personality to provide data.

After the indictment, the prosecution service may request the provision of data with a view to submitting a motion for evidence or locating or securing a means of evidence. Within the framework of a data request,

– the transfer of data that is relevant to the criminal proceeding and is in the possession of the organisation,

– the transfer of electronic data or documents that are relevant to the criminal proceeding and are in the possession of the organisation, or

– the provision of information relevant to the criminal proceeding that can be provided by the organisation may be requested.

A data request may also be aimed at the transfer or receipt of data processed in a register of the State or a local government.

The following shall be specified in a data request:

– the conditions and purpose of the data request pursuant to this Act,

– data identifying the subject matter of the data request, which is required for compliance with the data request, such as, in particular, data on the person, object, or service concerned,

– the scope of data to be provided, and

– the method and time limit for data provision.[1235]

The investigating authority, the police organ performing internal crime prevention and crime detection activities, and the counter-terrorism police organ may not request data without the permission of the prosecution service from an electronic communications service provider, a postal service provider or a person or organisation pursuing the activities of a postal contributor, an organisation processing data constituting bank, payment, securities, fund or insurance secret, pertaining to such data and an organisation processing health data and personal data as defined in the Act on the processing and protection of health data and related personal data, pertaining to such data. The case documents justifying the data request shall be attached to the motion for the permission required for the data request.

If obtaining permission for a data request would cause any delay that would significantly jeopardise the purpose of the data request, data provision may be requested even without a permission. Data provision may not be refused on the ground that the permission of a prosecutor is missing. In such a situation, the permission of the prosecution service shall be obtained ex-post without delay. If the prosecution service does not permit the data request, data obtained in this manner may not be used as evidence and shall be deleted without delay.[1236]

If permitted by an Act, an organ requesting data shall receive the necessary data by accessing the records or data files directly and may make use, for requesting data, of the assistance of the national security service designated by the Act on national security service for the performance of such services.

A time limit of 1. at least one and up to thirty days if the data is to be provided by electronic means, 2. at least eight and up to thirty days if the data is to be provided by any other means, may be set for the provision of the requested data. Unless otherwise provided by an Act, the organ requested to provide data shall comply with the request within the set time limit or indicate a detected obstacle, if any, without delay. A data request shall be performed even if only incomplete or partial data can be provided. The organ requested to provide data shall comply with the request free of charge, including in particular the processing, as well as the recording and transfer of the data in writing or by electronic means.

If the data has been encrypted or otherwise rendered inaccessible, it shall be restored by the organ requested to provide data into its original condition, or it shall be rendered accessible to the organ requesting the data prior to disclosure or provision. The volume and extent of any personal data requested under a data request shall be limited to data that is indispensable for achieving the purpose of the data request.

If, as a result of a data request, any personal data that is not relevant for the data request is disclosed to the organ requesting the data, it shall be deleted without delay. If

1235 CPC 261. §
1236 CPC 262. §

the data to be deleted is contained in an original document, an extract of the personal data that is relevant for the data request shall be produced, and the original document shall be returned to the organ requested to provide data.

Any original document acquired by the organ requesting the data shall be returned to the organ requested to provide data by the completion of the proceeding at the latest.

If providing any information about the data request would jeopardise the success of the criminal proceeding, the organ requested to provide data, if specifically instructed by the organ requesting the data, may not provide any information to any other person or entity about, and shall ensure the secrecy of, the request, its content, or any data transferred in the course of complying with the request. If a person affected by the request requests information concerning the processing of his own personal data, he shall be provided with information that does not reveal that his personal data were transferred for the purpose of a data request. The organisation requested to provide data shall be advised about this provision in the data request.

A disciplinary fine may be imposed on the organisation requested to provide data if it fails to comply with the request within the time limit specified in the request, refuses to comply without reason or violates its obligation. In addition to a disciplinary fine, another coercive measure specified in this Act may also be applied where the applicable conditions are met. If an organisation requested to provide data fails to comply with the request because doing so is prohibited by an Act, no further procedural act may be taken concerning the requested organisation to obtain data held by the requested organisation.[1237]

7.2.2. Conditional data request

Should a specified condition be met, a State organ, a local government organ, an organ of a national minority self-government, a budgetary organ or a statutory professional body may be requested to provide data by 1. the prosecution service, or 2. the investigating authority, the police organ performing internal crime prevention and crime detection activities, and the counter-terrorism police organ, subject to the permission of the prosecution service.

A conditional data request may be issued for a period of up to three months, which may be extended repeatedly for an additional period of three months each time. The total period of a conditional data request may not exceed one year.

If the condition is not met during the period of the conditional data request, the organisation requested to provide data under the conditional data request shall erase the data indicated in the request of the organ requesting the data.

The following shall be specified in a conditional data request:

– the conditions and purpose of the data request under this Act,

– data identifying the subject matter of the data request, which is required for compliance with the data request, such as, in particular, data on the person, object, or service concerned,

– the scope of data to be provided,

– the period of the conditional data request,

– the method and time limit for data provision, and

– the condition, the occurrence of which makes data provision mandatory.

1237 CPC 263. § - 265. §

In other respects, the provisions on data requests shall apply to conditional data requests, with the provison that, under a conditional data request, the data may be requested to be provided without delay when the specified condition is met.[1238]

7.2.3. Data collection

The prosecution service, the investigating authority, the police organ performing internal crime prevention and crime detection activities, and the counter-terrorism police organ may collect data to establish the suspicion of a criminal offence or whether there are any means of evidence and where they are located.

After the indictment, the prosecution service may collect data and may also make use of an investigating authority and the asset recovery organ of the investigating authority to submit a motion for evidence, to locate or secure a means of evidence and to detect and secure things or assets that may be confiscated or are subject to forfeiture of assets.

In the course of data collection,

– data may be collected from the registers specified in the Act on the prosecution service, the Act on the police, and the Act on the National Tax and Customs Administration,

– data may be collected from a data file or source prepared for publication or published in a lawful manner,

– information may be requested from any person,

– the selection or identification of a person or object may be requested by presenting an image, sound, or audio-visual recording, and

– the scene of a criminal offence may be inspected.

A member of the authority carrying out a data collection shall draw up a memorandum of the data collection. A statement recorded in the memorandum of a data collection may be used as a testimony, provided that the person who made that statement maintains his statement during his interrogation as a defendant or witness.[1239]

7.2.4. Other activities to acquire data

The court, the prosecution service, and the investigating authority may issue, by adopting a decision, a search warrant for

– a thing that serves as a means of evidence, to determine the location of a thing at an unknown location or to identify a thing of an unknown source,

– a thing that may be subject to confiscation or forfeiture of assets, to determine the location of the thing at an unknown location or to identify a thing of an unknown source,

– a witness or a person reasonably suspected of having committed a criminal offence if his identity is unknown,

– a witness, a person reasonably suspected of having committed a criminal offence or a defendant, whose whereabouts are unknown, to determine his contact details,

– a corpse, or part of a corpse, that serves as a means of evidence, to identify the corpse or part of a corpse concerned.

1238 CPC 266. §
1239 CPC 267. §

The court, prosecution office, or investigating authority of the proceeding shall decide on withdrawing or amending a search warrant. A search warrant issued by an investigating authority before the indictment may also be withdrawn or amended by the prosecution service.

If the court, prosecution office, or investigating authority that issued the arrest warrant is not the same as that of the proceeding, or if the proceeding court, prosecution office, or investigating authority changes during the proceeding, while the conditions of the search warrant are still met, the proceeding court, prosecution office, or investigating authority shall not withdraw the search warrant, but take action, in justified cases, to have the change entered into the search warrant register.

No legal remedy shall lie against the issuance, withdrawal or amendment of a search warrant.

The prosecution service, the investigating authority, or the police organ performing internal crime prevention and crime detection activities, and the counter-terrorism police organ may

– request data to be transferred from the register of criminal and policing biometric data as provided for by an Act,

– make use the facial image analysis activities of an organ responsible for keeping the register of facial image analyses and operating the system of facial image analysis as provided for by an Act, and

– order the placement of an alert for checking the person or object concerned in the Schengen Information System as provided for by an Act.

The prosecution service, the investigating authority, or the police organ performing internal crime prevention and crime detection activities, and the counter-terrorism police organ may use a consultant if specialised knowledge is needed to detect, search for, acquire, collect, or record a means of evidence. After the indictment, the prosecution service may make use of a consultant for submitting a motion for evidence or locating or securing a means of evidence.

If an act affecting the inviolability of the subject's body needs to be carried out in the course of the proceedings of a consultant, the prosecution service or the proceeding investigating authority shall issue orders on the matter separately.

The provisions pertaining to the disqualification of a prosecutor, or a member of theinvestigating authority shall also apply, as appropriate, to the disqualification of a consultant. The fact of using a consultant, as well as the method and extent of his involvement, shall be indicated in the minutes or memorandum of the given procedural act. A consultant may be interrogated as a witness regarding a procedural act carried out with his involvement.[1240]

7.3. Covert means (CPC)

The use of covert means means a special activity carried out by authorised organs in the criminal proceedings without the knowledge of the persons concerned, as such means restrict the fundamental rights of persons to the privacy of homes, personal secrets, the confidentiality of correspondence, and the protection of personal data.

1240 CPC 268. § - 270. §

Covert means may be used by authorised organs to carry out their law enforcement tasks, as specified in applicable legislation, only according to the rules laid down in this CPC. This rule shall not affect any secret information gathering carried out by national security services and the counter-terrorism police organ for their law enforcement tasks according to the Act on national security services.

Covert means that are

a) not subject to permission of a judge or a prosecutor,

b) subject to permission of a prosecutor, or

c) subject to permission of a judge may be used in a criminal proceeding.

A covert means may be used if 1. it is reasonable to assume that a piece of information or evidence to be acquired is indispensable for achieving the purpose of a criminal proceeding, and it cannot be acquired by other means, 2. its use does not restrict any fundamental right of the person concerned, or any other person, in a disproportional manner considering the attainable law enforcement goal, and 3. it is likely that information or evidence relating to a criminal offence may be obtained by its use.[1241]

7.3.1. Covert means not subject to persmission of a judge or a prosecutor

a) The organ authorised to use covert means may use persons cooperating in secret to acquire information regarding a criminal offence.

b) A member of the organ authorised to use covert means may collect and verify information relating to a criminal offence while keeping the actual purpose of his proceeding secret.

c) The organ authorised to use covert means may use a trap not causing injury or damaging health to interrupt a criminal offence, identify the perpetrator of a criminal offence, or take evidence.

d) A member of the organ authorised to use covert means may, to interrupt a criminal offence, identify the perpetrator of a criminal offence, or take evidence, replace an aggrieved party or another person to protect his life and physical integrity.

e) The organ authorised to use covert means may covertly surveil a person, home, other room, fenced area, public area, premises open to the public, orvehicle, or an object serving as means of physical evidence, that are associated with the criminal offence, and it may collect information on events taking place, and it may use technical means to record such events (hereinafter: "covert surveillance"). For the purpose of covert surveillance, the organ authorised to use covert means may also use persons cooperating in secret.

f) The organ authorised to use covert means may, to interrupt a criminal offence, identify the perpetrator of a criminal offence, or take evidence, disclose false or misleading information to the person involved in the use of covert means by concealing the source of information. The organ authorised to use covert means may also use persons cooperating in secret to transfer such information. This may not be used during the interrogation of a defendant or witness or during an evidentiary act, contain any promise that is inconsistent with the law, or constitute a threat or instigation, and it may not drive the person concerned

1241 CPC 214. §

towards the commission of a criminal offence, the gravity of which is greater than that of the criminal offence he initially planned to commit.

g) The organ authorised to use covert means may secretly acquire, using technical means, the data necessary for interrupting the criminal offence, identifying the perpetrator of the criminal offence or, for the purpose of taking of evidence, establishing that communication was carried out using an electronic communications network or device or through an information system or identifying the electronic communications device or information system or determining the location thereof.[1242]

7.3.2. Covert means subject to permission of a prosecutor

The prosecution service shall decide on granting permission to use covert means upon a corresponding motion submitted by an authorised senior official of an organ authorised to use covert means within seventy-two hours after the prosecution service receives the motion.

The following shall be stated or provided in the course of filing a motion:

– the name of the organ authorised to use covert means, the date of ordering the preparatory proceeding or investigation, and the case number,

– the qualification under the Criminal Code and a short description of the facts of the criminal offence underlying the proceeding and the data serving as a ground for suspecting, or suggesting the possibility of, a criminal offence,

– all data confirming that the statutory conditions of using such means are met,

– the designation of the covert means to be used, and data required for granting permission to use such means, and

– the decision underlying the permission of a prosecutor.

If granting permission to use a covert means subject to a permission of a prosecutor would significantly jeopardise the objective of using covert means due to the delay involved, an authorised senior official of the organ authorised to use covert means may begin using the covert means until the prosecution service makes a decision. In the event of beginning to use a covert means in this way, an authorised senior official of the organ authorised to use covert means shall file a motion with the prosecution service for ex-post permission within seventy-two hours after the decision on beginning the use of a covert means was made. The prosecution service shall decide on the motion within one hundred and twenty hours after the decision on beginning the use of a covert means was made.

In the course of a preparatory proceeding conducted by the prosecution office, or of a prosecutorial investigation, the superior prosecution office shall carry out the tasks relating to granting permission to use a covert means subject to a permission of a prosecutor.[1243]

a) Surveillance of payment transactions:

The organ authorised to use covert means may order, subject to the permission of the prosecution service, an organisation providing financial services or supplementary financial services as defined in the Act on credit institutions and financial undertakings (hereinafter "service provider"), to record, keep, and transmit data pertaining to payment

1242 CPC 215. §
1243 CPC 228. § - 230. §

transactions, as defined in the Act on providing payment services, to the ordering entity during a specified period.

In particular, the surveillance of payment transactions may be aimed at the recording and transmission of data pertaining to 1. all payment transactions relating to a payment account as defined in the Act on providing payment services, 2. payment transactions meeting pre-determined criteria.

The ordering entity may order the specified data to be transmitted without delay or within a set time limit. The surveillance of payment transactions may be ordered for a maximum period of three months, with the proviso that the surveillance period, subject to the permission of the prosecution service, may be extended once for an additional period of three months.

The following shall be specified in a decision ordering the surveillance of payment transactions:

– data that are suitable for identifying the payment account concerned,

– the starting and finishing date, specified in days, of the surveillance of payment transactions,

– the exact scope of data to be transmitted,

– the applicable conditions, if the ordering entity set any condition for recording or transmitting the data,

– the method of, and time limit for, transmitting the data.

In the course of the surveillance of payment transactions, the service provider shall record and transmit the data specified in the ordering decision in the manner, and by the time limit, specified in the decision.

Within the framework of the surveillance of payment transactions, the ordering entity may also order a service provider to suspend the execution of payment transactions between certain payment accounts and persons, or payment transactions that meet certain conditions.

The period of suspending the execution of payment transactions may last for up to four working days following the notification of the ordering organ; this period may be extended once by up to three working days subject to the permission of the prosecution service.

During the suspension of the payment transaction, the ordering entity shall examine whether the suspended payment transaction can be connected to a criminal offence. If the suspension of the payment transaction is unnecessary, the service provider shall be notified that the payment transaction may be executed. If further follow-up of a suspended payment transaction is necessary, the ordering entity, subject to the permission of the prosecution service, may also order other service providers to monitor the payment transactions, and then it shall notify the service provider that the suspended payment transaction may be executed.

If the ordering entity establishes that the conditions for the seizure or sequestration of scriptural money or electronic money involved in the payment transaction are met, it shall order the seizure or sequestration.

A service provider shall not inform any person about the surveillance of payment transactions, the content of the ordering decision, the content of data transfers completed, or the suspension of executing a payment transaction, and it shall ensure that such information is kept secret. If a person affected by the surveillance of payment transactions

requests information concerning the processing of his own personal data, he shall be provided with information that does not reveal that his personal data were transferred for the surveillance of payment transactions. The service provider shall be advised about this provision when the surveillance of payment transactions is ordered.[1244]

b) The prospect of avoiding the establishment of criminal liability:

The organ authorised to use covert means may, with permission from the prosecution service, enter into an agreement with the perpetrator of a criminal offence, offering that no criminal proceeding would be instituted against him or a pending criminal proceeding would be terminated, if he provided information and evidence for detecting and proving the case, or another criminal case, provided that the national security or law enforcement interest that may be realised through such an agreement exceeds the interest in establishing the criminal liability of the perpetrator. When outlining the prospect of avoiding the establishment of criminal liability, it may be set out as a condition that the perpetrator pays, in whole or in part and through the State, damages and grievance awards he is liable to pay under civil law.

No agreement may be concluded if a criminal proceeding is to be conducted against a perpetrator due to a criminal offence involving the intentional killing of another person or causing any permanent disability or serious degradation of health intentionally. An agreement shall be terminated if the organ authorised to use covert means learns that the person providing information committed any such criminal offence.

An agreement offering avoidance of the establishment of criminal liability shall specify 1. data that are suitable for identifying the perpetrator of the criminal offence, 2. the qualification under the Criminal Code and a short description of the facts of the criminal offence, the prospect of avoiding the establishment of criminal liability for which is outlined, 3. the qualification under the Criminal Code and a short description of the facts of the criminal offence, concerning which the perpetrator agrees to provide information and evidence, 4. the commitment to provide information and evidence, including the method thereof, and 5. details of paying any damages or grievance award if doing so is part of the agreement.

If the perpetrator of the criminal offence performs the agreement, no criminal proceeding may be instituted against him, and any pending criminal proceeding against him shall be terminated. If no criminal proceeding is instituted against the perpetrator, or any pending criminal proceeding is terminated, due to an agreement, the State shall pay the damages or grievance award the perpetrator is liable to pay under civil law, provided that the perpetrator has not paid it. To pay any damages or grievance award, the organ authorised to use covert means may initiate the conclusion of a confidentiality agreement with the aggrieved party, and it may draft documents that are necessary for doing so.[1245]

c) Consented surveillance:

Subject to the permission of the prosecution service and the written consent of the aggrieved party, the organ authorised to use covert means may use surveillance regarding 1. a criminal offence of usury, domestic violence, or harassment, or 2. any criminal offence committed by threat.

1244 CPC 216. § - 218. §
1245 CPC 219. §

Subject to the permission of the prosecution service and the written consent of the person who was invited, or sought to be induced, the organ authorised to use covert means may use surveillance

– regarding an invitation to commit a criminal offence, provided that preparation constitutes a punishable act under the Criminal Code, or inviting another person to commit a given criminal offence constitutes a criminal offence, or

– if seeking to induce to the act constitutes a criminal offence.[1246]

d) Simulated purchases:

Subject to the permission of the prosecution service, sham contracts

– on acquiring things or samples, or using services that are presumably related to a criminal offence,

– on acquiring a thing or using a service that would provide a means of physical evidence regarding a criminal offence, in order to reinforce trust in the seller,

– on acquiring a thing or using a service, to apprehend the perpetrator of a criminal offence or secure a means of physical evidence, may be concluded and performed.[1247]

e) Using undercover investigators:

Subject to the permission of the prosecution service, an organ authorised to use covert means may use, in a criminal proceeding, members who conceal their identity and association with the organ permanently and are employed for such tasks specifically (hereinafter: "undercover investigator").

An undercover investigator may be used to

– infiltrate a criminal organisation,

– infiltrate a terrorist group or an organisation that provides or collects material means to arrange the conditions that are necessary to commit terrorist acts, or supports the commission of terrorist acts or the operations of a terrorist group by providing material means or in any other way,

– carry out simulated purchases,

– carry out secret surveillance,

– transfer information, or

– acquire information and evidence relating to the criminal offence.

The undercover investigator may be used for a period required to achieve the purpose of his use, but not exceeding six months. If the conditions of ordering the use of an undercover investigator are still met, the use of an undercover investigator may be extended repeatedly, subject to the permission of the prosecution service, by up to six months each time.

Under the provisions on using covert means subject to permission of a judge or prosecutor, an undercover investigator may be used in combination with other covert means subject to permission of a judge or prosecutor, or to enable the use of other covert means subject to permission of a judge or prosecutor.

1246 CPC 220. §
1247 CPC 221. §

The undercover investigator may not be punished for a criminal offence, infraction, or a violation punishable by an administrative fine that he committed while being used as an undercover investigator if committing the offence, infraction or violation

– is necessary for the success, or to achieve the law enforcement objective, of using an undercover investigator, and the law enforcement interest to be achieved through using him exceeds the interest in holding the undercover investigator liable,

– is necessary to ensure the safety, and prevent the exposure, of the undercover investigator, and the interest in ensuring the safety, and preventing the exposure, of the undercover investigator exceeds the interest in holding the undercover investigator liable or

– is necessary to prevent or interrupt the commission of another criminal offence, and the interest in preventing or interrupting the other criminal offence exceeds the interest in holding the undercover investigator liable.

If a criminal offence, infraction, or violation punishable by an administrative fine needs to be foreseeably committed for an undercover investigator to be successful, this shall be specified in the decision on using the undercover investigator.

The undercover investigator may not commit any criminal offence that involves the intentional killing of another person or causing permanent disability or serious degradation of health intentionally.

The undercover investigator may not induce another person to commit a criminal offence, and he may not drive a person concerned towards the commission of a criminal offence the gravity of which is greater than that of the criminal offence initially planned. Making a simulated purchase shall not constitute inducement in and of itself.[1248]

f) Simulated purchases by members of organs authorised to use covert means and persons cooperating in secret:

To make a simulated purchase, a member of an organ authorised to use covert means may be used, and an organ authorised to use covert means may also use a person cooperating in secret. An organ authorised to use covert means may use a person cooperating in secret to make a simulated purchase if the objective of making a simulated purchase may not be achieved, or may be achieved only with a significant delay, by using an undercover investigator or a member of the organ authorised to use covert means. The provisions on undercover investigators shall apply as appropriate to the use of members of organs authorised to use covert means and persons cooperating in secret for making simulated purchases.[1249]

g) Cover deeds, cover institutes, and cover data: Subject to the permission of the prosecution service, the organ authorised to use covert means may, in the course of using another covert means,

– produce or use deeds or public deeds containing false data, facts, or statements (hereinafter: "cover deed") to detect and prove a criminal offence,

– establish and maintain an organisation by applying the provisions on cover institutions as laid down in applicable Acts, to detect and prove a criminal offence, or

1248 CPC 222. § - 225. §
1249 CPC 226. §

– have false data (hereinafter: "cover data") entered in publicly certified registers to detect and prove a criminal offence, and to protect a cover deed or an organisation.

Cover deeds shall be destroyed, and cover data shall be erased from publicly certified registers when they are not needed in a criminal proceeding any longer.[1250]

7.3.3. Covert means subject to permission of a judge

In a criminal proceeding, the following covert means may be used subject to permission of a judge: 1. secret surveillance of an information system, 2. secret search, 3. secret surveillance of a locality, 4. secret interception of a consignment, 5. interception of communications.

a) In the course of *secret surveillance of an information system*, the organ authorised to use covert means may, with permission from a judge, secretly access, and record by technical means, data processed in an information system. For that purpose, any necessary electronic data may be placed in an information system, while any necessary technical device may be placed at a home, other room, fenced area, vehicle, or other object used by the person concerned, except for public areas, premises open to the public, and means of public transport.

b) In the course of a *secret search*, the organ authorised to use covert means may, with permission from a judge, secretly search a home, other room, fenced area, vehicle, or other object used by the person concerned, except for public areas, premises open to the public, and means of public transport; it may also record its findings by technical means.

c) In the course of *secret surveillance of a locality*, the organ authorised to use covert means may, with permission from a judge, secretly surveil and record events taking place at a home, other room, fenced area, or vehicle, except for public areas, premises open to the public, and means of public transport. For that purpose, any necessary technical means may be placed at the place of operation.

d) In the course of *secret interception of a consignment*, the organ authorised to use covert means may, with permission from a judge, secretly open, and intercept, verify, and record the contents of a postal item or other sealed consignment.

e) In the course of *interception of communications*, the organ authorised to use covert means may, with permission from a judge, intercept and record communications conducted through an electronic communications network or device, using an electronic communications service, or an information system.

Any technical means used, or electronic data placed in an information system, in the course of using a covert means subject to permission of a judge shall be removed without delay after finishing the use of the given covert means. If an obstacle prevents such removal, the technical means or electronic data concerned shall be removed without delay after the obstacle is eliminated. To place or remove a technical means or data used in the course of using a covert means subject to permission of a judge, the organ authorised to use covert means may use covert means not subject to permission of a judge, and the organ performing the use of a covert means may engage in secret information gathering under the Act applicable to that organ.

Covert means subject to permission of a judge may be used regarding intentional criminal offences punishable by imprisonment for five years or more.

1250 CPC 227. §

Covert means subject to permission of a judge may also be used regarding the following intentional criminal offences punishable by imprisonment for three years:

– criminal offences committed on a commercial basis or in a criminal conspiracy,

– abuse of drug precursors, counterfeiting of medicinal products, abuse of performanceenhancing substance, counterfeiting of medical products,

– sexual abuse, procuring, facilitating prostitution, living on the earnings of prostitution, exploitation of child prostitution, child pornography,

– damaging the environment, damaging natural values, game poaching, organising illegal animal fights, violation of waste management regulations,

– criminal offences against justice, except for breach of seal,

– corruption criminal offences, except for failure to report a corruption criminal offence,

– criminal offence against the order of election, referendum and European citizens' initiative, illegal employment of a third-country national, organising illegal gambling,

– insider trading and illegal market manipulation.

Covert means subject to permission of a judge may also be used regarding any intentionally committed misuse of classified data, abuse of office, violence against a public officer, violence against an internationally protected person, counterfeiting non-cash payment instruments, unauthorised financial activity, or organising a pyramid scheme.[1251]

a) Granting permission to use covert means subject to permission of a judge:

Covert means that are subject to permission of a judge may be used on the basis of, and within the limits specified in, a permission granted by a court. The covert means subject to the permission of a judge that may be used against the person concerned shall be specified in the court's permission. The court may extend the period of its permission, withdraw its permission, extend the scope of its permission to other covert means, and prohibit any further use of a covert means already covered by a permission.

The court shall decide on granting permission to use any covert means subject to permission of a judge upon a motion submitted by the prosecution service. Such a motion shall include the following:

– the name of the organ authorised to use covert means, the date of ordering the preparatory proceeding or investigation, and the case number,

– available data identifying the person concerned,

– the planned date and time, indicated in days and hours, of starting and finishing the use of the covert means subject to permission of a judge against the person concerned,

– detailed reasons confirming that the conditions of permitting the use of the covert means subject to permission of a judge are met, including the following: 1. the qualification under the Criminal Code and a short description of the facts of the criminal offence underlying the proceeding, and the data serving as a ground for suspecting, or suggesting the possibility of, a criminal offence, 2. the purpose of using covert means subject to permission of a judge, 3. the designation of the covert means to be used, 4. data clearly identifying the information system subject to secret surveillance; the room, vehicle, or object subject to a secret search; the room or vehicle subject to secret surveillance of a locality; the place of posting and receipt, and the sender or recipient in case of the secret

1251 CPC 231. § - 234. §

interception of a consignment; the electronic communications service or device, or information system subject to interception of communications.

A motion shall be accompanied by documents serving as a ground for the content of the motion.

The court shall decide within seventy-two hours after the filing of the motion. On the basis of a motion, the court shall grant a permission, in whole or in part, or dismiss the motion.

A permission shall be granted by the court in part, if it permits the use of covert means subject to permission of a judge, but dismisses any part of the motion regarding the use of certain covert means in its decision.

If the court permits, in whole or in part, the use of covert means, it shall specify the following in its corresponding decision: 1. available data identifying the person concerned, 2. the date and time, indicated in days and hours, of starting and finishing the use of the covert means subject to permission of a judge, 3. the relevant criminal offence and the purpose of use, indicating the qualification under the Criminal Code and a short description of the facts of the criminal offence, and 4. the covert means subject to permission of a judge for which permission is granted.[1252]

b) Ex-post permission:

If granting or extending a permission to use a covert means subject to permission of a judge would significantly jeopardise the objective of using covert means due to the delay involved, the prosecution service may order a secret search or the use of a covert means until the court adopts its decision, but no longer than one hundred and twenty hours.

If the court dismisses a motion for ex-post permission to use covert means or certain means specified in the motion, the result of using any non-permitted covert means may not be used as evidence, and all data acquired in such a manner shall be erased without delay.[1253]

c) The period and extension of use:

Permission to use covert means subject to permission of a judge may be granted for a period of up to ninety days; this period may be extended repeatedly by up to ninety days each time. In a criminal proceeding, the total period of using a covert means subject to permission of a judge against a person concerned may not exceed three hundred and sixty days.

Not later than five days before the expiry of the permitted period, the prosecution service may move for the extension of the period of using a covert means; the court shall decide on the motion within seventy-two hours after it is filed. The court shall either extend the period of use or dismiss the motion. If the period of use is extended, the court shall prohibit the use of any covert means concerning which the statutory conditions of use are not met. If the period of using a covert means is extended, the finishing date of use shall be calculated from the finishing date specified in the previous permission. Any document produced since the previous permission shall be attached at the time of submitting a motion.[1254]

1252 CPC 235. § - 237. §
1253 CPC 238. §
1254 CPC 239. § - 240. §

d) Extending the scope of use:

The scope of use may be extended if, before the date of finishing the use of covert means as specified in the permission, it is necessary to use a covert means 1. not covered by the permission, or 2. already included in the permission concerning another information system subject to secret surveillance; another room, vehicle, or object subject to a secret search; another room or vehicle subject to secret surveillance of a locality; another place and another sender or recipient subject to the secret interception of a consignment; another electronic communications service or device, or information system subject to interception of communications against the person concerned.[1255]

e) Withdrawing a permission and prohibiting the use of covert means:

Upon a call from the court, the organ authorised to use covert means shall present all data available to it at the time of such call and acquired during the use of a covert means subject to permission of a judge. The court shall also examine the legality of using covert means when deciding on a motion to extend the period or scope of use. The court shall prohibit the use of any covert means concerning which the statutory conditions of use are not met. If the court 1. withdraws its permission to use a covert means, all data acquired during its use, 2. prohibits the use of a covert means, all data acquired using the prohibited covert means shall be erased without delay.[1256]

7.3.4. Common rules of using covert means

a) Implementing the use of covert means:

The use of covert means shall be recorded in minutes or memorandum. The minutes or memorandum of the proceeding of an undercover investigator shall be signed by an authorised senior official of the organ authorised to employ undercover investigators. The minutes or memorandum shall be drafted in a way that it does not allow for any conclusion regarding the identity of an undercover investigator. The organ authorised to use covert means shall implement the use of a covert means itself, or with assistance from a police organ designated to assist in the implementation of the use of covert means, or by engaging a national security service designated to perform such services by the Act on national security services.

In the course of a preparatory proceeding or investigation conducted regarding a criminal offence falling within its subject-matter competence under the Act on the police, the police organ performing internal crime prevention and crime detection tasks, or the counterterrorism police organ, shall assist, upon request, in implementing the use of a covert means used by an investigating authority. Upon invitation, the following shall participate in implementing the use of a covert means used by the prosecution service: 1. the investigating authority or the police organ performing internal crime prevention and crime detection activities, or 2. the counter-terrorism police organ in a proceeding conducted for a criminal offence within its subject-matter competence under the Act on the police.

If the preparatory proceeding is conducted by the police organ performing internal crime prevention and crime detection activities, or the counter-terrorism police organ, and

1255 CPC 241. §
1256 CPC 242. §

the investigation is ordered while covert means are already in use, the organ conducting the preparatory proceeding shall assist in implementing the use of covert means until instructed otherwise by the investigating authority or the prosecution service.

If a covert means subject to permission of a judge or a prosecutor is used in the course of a preparatory proceeding or investigation conducted against a member of the professional personnel of national security services, or the counter-terrorism police organ, for committing a criminal offence, the national security service, or the counter-terrorism police organ concerned shall assist, upon invitation, in implementing the use of the covert means.

An organisation providing electronic communications services or engaged in the transfer, technical processing or processing of postal items, other sealed consignments, or data stored in information systems shall be obliged to enable the use of covert means and cooperate with organs authorised to use such means.[1257]

b) Terminating the use of covert means:

The head of the organ authorised to use covert means, or the prosecution service, shall terminate the use of covert means, or certain covert means, if

– it is clear that no result may be expected from any further use, including situations where extending the scope of use would be in order, but the data necessary to do so are not available,

– it is clear that the use of a covert means may not be continued any longer within the limits specified in the corresponding permission,

– the purpose specified in the permission is achieved,

– the period set or extended in the permission expired,

– the motion for ex-post permission is dismissed by the court or the prosecution service,

– the time limit for a preparatory proceeding expired during a use ordered in a preparatory proceeding, without an investigation being ordered, or

– the proceeding has been terminated or the time limit for an investigation expired.[1258]

7.3.5. Common rules concerning data acquired during the use of convert

a) Erasing data acquired during the use of covert means:

Within thirty days after the use of a covert means is terminated, the following data shall be erased from among data acquired during the use of the covert means: 1. data that are not related to the purpose of using covert means, 2. all personal data that are not necessary for the criminal proceeding, 3. data that may not be used as evidence in the criminal proceeding. [1259]

b) The confidentiality of data acquired during the use of covert means:

In the course of permitting and implementing the use of covert means, or using any data generated as a result of such use, it shall be ensured that no unauthorised person may access, or get informed of, any measure or data. If the organ authorised to use covert means

1257 CPC 243. § - 244. §
1258 CPC 245. §
1259 CPC 246. §

classified any data related to the use of a covert means in accordance with the rules laid down in the Act on the protection of classified data, the review provided for under the Act shall be carried out immediately after terminating the use of the covert means and every two years thereafter. If data related to the use of covert means are processed as classified data in the criminal proceeding, the court, the prosecution service, or the investigating authority may initiate the review or revision of classification.[1260]

c) Handling case documents produced in the course of using covert means:

Pursuant to the provisions of CPC, the case documents of a proceeding include 1. means of evidence produced during the use of covert means, including, in particular, data recorded by technical means, and 2. any permission to use covert means. Unless ordered otherwise by the prosecution service, means of evidence produced by using a covert means, including, in particular, data recorded by technical means and any permission to use a covert means, shall not form part of the case documents of a proceeding before finishing the use of the covert means concerned. Before finishing the use of a covert means, a means of evidence or document specified may be inspected only by a member of the organ authorised to use covert means, the prosecutor, the senior official of the prosecution service, or the judge or the senior court official who proceeds concerning the use of the covert means.

If doing so does not jeopardise the success of another criminal proceeding or any secret information gathering carried out under the Act on the prosecution service, the Act on the police, the Act on the National Tax and Customs Administration, or the Act on national security services, a person concerned specified in a permission from a judge shall be informed about the fact of the use of covert means subject to permission of a judge 1. after the completion of a preparatory proceeding, if no investigation is launched, or 2. after the completion of an investigation, if the person concerned is neither interrogated as a suspect nor indicted. A person concerned may not be informed about any other data relating to the use of a covert means subject to permission of a judge. A request for information regarding such data shall be denied in writing and with reference to this provision.[1261]

7.3.6. The result of using covert means

The result of using a covert means subject to permission of a judge may be used to prove a criminal offence, because of which, and against the person concerned, as regards whom the court permitted the use of the covert means. As regards whom a court permitted the use of covert means subject to permission of a judge, the result of such use may also be used to prove a criminal offence not specified in the permission, provided that the conditions for using such means, as specified in CPC, are met with regard to the latter criminal offence as well. Where the court permitted the use of a covert means subject to permission of a judge to prove a criminal offence, the result of such use may be used against all perpetrators. In these situations, the result of using a covert means may be used where the organ authorised to use covert means orders or initiates launching a preparatory proceeding or investigation, or using such a result in the pending criminal proceeding, regarding the person or criminal

1260 CPC 247. § - 248. §
1261 CPC 249. § - 251. §

offence not specified in the permission within thirty days after finishing the use of a covert means subject to permission of a judge. The organ authorised to use covert means shall, through the prosecution service, notify the court that granted permission to use the covert means about doing so. If the organ authorised to use covert means does not use the covert means itself, the time limit specified shall be calculated from the day when every data-storage medium document or an extract thereof containing the results of using the covert means arrives at the organ authorised to use covert means after the use of covert means has been terminated.

Concerning a criminal offence not specified in the permission committed by a person not specified in the permission, the result of using a covert means subject to permission of a judge may only be used to prove a criminal offence involving the intentional killing of a person; kidnapping; a criminal offence against the State under Chapter XXIV of the Criminal Code that is punishable by five or more years of imprisonment; a terrorist act; terrorism financing; or causing public danger intentionally, provided that

– the other conditions of using such means as specified in this Act are met,

– the organ authorised to use covert means orders or initiates a preparatory proceeding or investigation to be launched regarding a criminal offence not specified in the permission committed by a person not specified in the permission, or orders or initiates using such data in a pending criminal proceeding, within eight days after acquiring the data to be used in a criminal proceeding, and

– the court permits the result of using covert means to be used concerning the criminal offence not specified in the permission committed by the person not specified in the permission.

The organ authorised to use covert means shall initiate that the use of the result of using covert means be permitted by the prosecution service within three working days after a preparatory proceeding or investigation or after using such a result in a pending criminal proceeding. The prosecution service shall file a motion with the court for permission to use the result of using covert means within seventy-two hours after such initiative. The court shall decide within seventy-two hours after the filing of the motion.

When using an undercover investigator, a memorandum of implementation and a permission from a prosecutor to use an undercover investigator shall be attached to the case documents of a proceeding. The undercover investigator may be interrogated as a witness only after obtaining the position of the organ employing the undercover investigator. After the indictment, the undercover investigator may be interrogated as a witness, and any other evidentiary act requiring his presence in person may be carried out only upon a motion filed by the prosecution service and subject to the condition that his testimony may not be substituted by any other means. If it is necessary to interrogate an undercover investigator as a witness or to carry out any other evidentiary act requiring his presence in person, the undercover investigator shall be considered a specially protected witness without any decision by the court. The court may not cancel the status of an undercover investigator as a specially protected witness without the consent of the organ employing the undercover investigator concerned. The attendance of the undercover investigator at a procedural act may be ensured using a telecommunication device only with consent from the organ employing the undercover investigator. If consent is granted, the organ employing the undercover investigator shall specify the following to ensure the attendance

of the undercover investigator: 1. whether distorting by technical means the individual identifying characteristics of the person concerned is to be omitted, 2. the separate location where the undercover investigator is to be present. In the course of using the result of using an undercover investigator as evidence, all necessary measures shall be taken to keep the identity of the undercover investigator secret and ensure his security.[1262]

7.3.7. Legal assessment of entrapment by the ECrHR

The Court has recognised the need for the authorities to have recourse to special investigative methods, notably in organised crime and corruption cases. It has held, in this connection, that the use of special investigative methods – in particular, undercover techniques – does not in itself infringe the right to a fair trial. However, on account of the risk of police incitement entailed by such techniques, their use must be kept within clear limits.[1263]

While the rise of organised crime requires the States to take appropriate measures, the right to a fair trial, from which the requirement of the proper administration of justice is to be inferred, nevertheless applies to all types of criminal offence, from the most straightforward to the most complex. The right to the fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed for the sake of expedience. In this connection, the Court has emphasised that the police may act undercover but not incite.[1264]

Moreover, while the Convention does not preclude reliance, at the preliminary investigation stage and where this may be warranted by the nature of the offence, on sources such as anonymous informants, the subsequent use of such sources by the trial court to found a conviction is a different matter. Such a use can be acceptable only if adequate and sufficient safeguards against abuse are in place, in particular a clear and foreseeable procedure for authorising, implementing and supervising the investigative measures in question. As to the authority exercising control over undercover operations, the Court has considered that, while judicial supervision would be the most appropriate means, other means may be used provided that adequate procedures and safeguards are in place, such as supervision by a prosecutor.[1265]

While the use of undercover agents may be tolerated provided that it is subject to clear restrictions and safeguards, the public interest cannot justify the use of evidence obtained as a result of police incitement, as this would expose the accused to the risk of being definitely deprived of a fair trial from the outset. The undercover agents in this context may be the State agents or private parties acting under their instructions and control. However, a complaint related to the incitement to commit an offence by a private party, who was not acting under the instructions or otherwise control of the authorities, is examined under the general rules on the administration of evidence and not as an issue of entrapment.[1266]

The prohibition of entrapment extends to the recourse to operation techniques involving the arrangement of multiple illicit transactions with a suspect by the State authorities. The

1262 CPC 252. § - 255. §
1263 „Ramanauskas v. Lithuania" (2008)
1264 „Khudobin v. Russia" (2006)
1265 „Bannikova v. Russia" (2010) and „Tchokhonelidze v. Georgia" (2018)
1266 „Shannon v. the United Kingdom" (2004)

Court has held that such operation techniques are recognised and permissible means of investigating a crime when the criminal activity is not a one-off, isolated criminal incident but a continuing illegal enterprise. However, in keeping with the general prohibition of entrapment, the actions of undercover agents must seek to investigate ongoing criminal activity in an essentially passive manner and not exert an influence such as to incite the commission of a greater offence than the one the individual was already planning to commit without such incitement. Accordingly, when State authorities use an operational technique involving the arrangement of multiple illicit transactions with a suspect, the infiltration and participation of an undercover agent in each illicit transaction must not expand the police's role beyond that of undercover agents to that of agents provocateurs. Moreover, any extension of the investigation must be based on valid reasons, such as the need to ensure sufficient evidence to obtain a conviction, to obtain a greater understanding of the nature and scope of the suspect's criminal activity, or to uncover a larger criminal circle. Absent such reasons, the State authorities may be found to be engaging in activities which improperly enlarge the scope or scale of the crime.[1267]

In particular, as a result of improper conduct of undercover agents in one or more multiple illicit transactions or involvement in activities enlarging the scope or scale of the crime, the State authorities might unfairly subject the defendant to increased penalties either within the prescribed range of penalties or for an aggravated offence. Should it be established that this was the case, the relevant inferences in accordance with the Convention must be drawn either with regard to the particular illicit transaction effected by means of improper conduct of State authorities or withregard to the arrangement of multiple illicit transactions as a whole. As a matter of fairness, the sentence imposed should reflect the offence which the defendant was actually planning to commit. Thus, although it would not be unfair to convict the person, it would be unfair for him or her to be punished for that part of the criminal activity which was the result of improper conduct on the part of State authorities.

The Court's case-law on entrapment also concerns instances of indirect entrapment. This is a situation where a person is not directly in contact with the police officers working undercover but was involved in the offence by an accomplice who had been directly incited to commit an offence by the police. In this connection, the Court set out the following test for its assessment: (a) whether it was foreseeable for the police that the person directly incited to commit the offence was likely to contact other persons to participate in the offence; (b) whether that person's activities were also determined by the conduct of the police officers; and (c) whether the persons involved were considered as accomplices in the offence by the domestic courts.[1268]

In its case-law on the subject of entrapment, the Court has developed criteria to distinguish entrapment breaching Article 6 § 1 of the Convention from permissible conduct in the use of legitimate undercover techniques in criminal investigations. The Court has explained that whereas it is not possible to reduce the variety of situations which might occur in this context to a mere checklist of simplified criteria, the Court's examination of complaints of entrapment has developed on the basis of two tests: the substantive and the procedural test of incitement.[1269]

1267 „Grba v. Croatia" (2017)
1268 „Akbay and Others v. Germany" (2020)
1269 „Matanović v. Croatia" (2017)

The Court has defined entrapment, as opposed to a legitimate undercover investigation, as a situation where the officers involved - whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is to provide evidence and institute a prosecution.

In deciding whether the investigation was "essentially passive" the Court examines the reasons underlying the covert operation and the conduct of the authorities carrying it out. In particular, it will determine whether there were objective suspicions that the applicant had been involved in criminal activity or was predisposed to commit a criminal offence.[1270]

In its assessment the Court takes into account a number of factors. For example, in the early landmark case of „Teixeira de Castro v. Portugal" (1998) the Court took into account, inter alia, the fact that the applicant had no criminal record, that no investigation concerning him hadbeen opened, that he was unknown to the police officers, that no drugs were found in his home and that the amount of drugs found on him during arrest was not more than the amount requested by the undercover agents. It found that the agents' actions had gone beyond those of undercover agents because they had instigated the offence and there was nothing to suggest that without their intervention the offence in question would have been committed.

A previous criminal record is not by itself indicative of a predisposition to commit a criminal offence. However, the applicant's familiarity with the modalities of the offence and his failure to withdraw from the deal despite a number of opportunities to do so or to report the offence to the authorities, have been considered by the Court to be indicative of pre-existing criminal activity or intent.[1271]

Another factor to be taken into account is whether the applicant was pressured into committing the offence in question. Taking the initiative in contacting the applicant in the absence of any objective suspicions that the applicant had been involved in criminal activity or was predisposed to commit a criminal offence, reiterating the offer despite the applicant's initial refusal, insistent prompting, raising the price beyond average and appealing to the applicant's compassion by mentioning withdrawal symptoms[1272] have been regarded by the Court as conduct which can be deemed to have pressured the applicant into committing the offence in question, irrespective of whether the agent in question was a member of the security forces or a private individual acting on their instructions.

A further question of importance is whether the State agents can be deemed to have „joined"or „infiltrated" the criminal activity rather than to have initiated it. In the former case the action in question remains within the bounds of undercover work. In „Milinienė v. Lithuania" (2008) the Court considered that, although the police had influenced the course of events, notably by giving technical equipment to the private individual to record conversations and supporting the offer of financial inducements to the applicant, their actions were treated as having "joined" the criminal activity rather than as having initiated it as the initiative in the case had been taken by a private individual. The latter had complained to the police that the applicant would require a bribe to reach a favourable

1270 „Bannikova v. Russia" (2010)
1271 „Gorgievski v. the former Yugoslav Republic of Macedonia" (2009)
1272 „Vanyan v. Russia" (2005)

outcome in his case, and only after this complaint was the operation authorised and supervised by the Deputy Prosecutor General, with a view to verifying the complaint.

The manner in which the undercover police operation was launched and carried out is relevant in assessing whether the applicant was subjected to entrapment. The absence of clear and foreseeable procedures for authorising, implementing and supervising the investigative measure in question tips the balance in favour of finding that the acts in question constitute entrapment: see, for example, Teixeira de Castro v. Portugal (1998), where the Court noted the fact that the undercover agents' intervention had not taken place as part of an official anti-drug-trafficking operation supervised by a judge; Ramanauskas v. Lithuania (2008), where there was no indication of what reasons or personal motives had led the undercover agent to approach the applicant on his own initiative without bringing the matter to the attention of his superiors; and Tchokhonelidze v. Georgia (2018), where there was no formal authorisation and supervision of the undercover operation in question.

In „Vanyan v. Russia" (2005), where the Court noted that the police operation had been authorised by a simple administrative decision by the body which later carried out the operation, that the decision contained very little information as to the reasons for and purposes of the planned test purchase, and that the operation was not subject to judicial review or any other independent supervision. In this connection, the „test purchase" technique used by the Russian authorities was closely scrutinised in the case of Veselov and Others v. Russia (2012), where the Court held that the procedure in question was deficient and that it exposed the applicants to arbitrary action by the police and undermined the fairness of the criminal proceedings against them.

It further found that the domestic courts had also failed to adequately examine the applicants' plea of entrapment, and in particular to review the reasons for the test purchase and the conduct of the police and their informants vis-à-vis the applicants.

In cases raising issues of entrapment, Article 6 of the Convention will be complied with only if the applicant was effectively able to raise the issue of incitement during his trial, whether by means of an objection or otherwise. The mere fact that general safeguards, such as equality of arms or the rights of the defence, have been observed is not sufficient. In such cases the Court has indicated that it falls to the prosecution to prove that there was no incitement, provided that the defendant's allegations are not wholly improbable.

If a plea of entrapment is made and there is certain prima facie evidence of entrapment, the judicial authorities must examine the facts of the case and take the necessary steps to uncover the truth in order to determine whether there was any incitement. Should they find that there was, they must draw inferences in accordance with the Convention. The mere fact that the applicant pleaded guilty to the criminal charges does not dispense the trial court from the duty to examine allegations of entrapment. Indeed, the Court has held that the defence of entrapment necessarily presupposes that the accused admits that the act he or she is charged with was committed but claims that it happened due to unlawful incitement by the police.[1273]

In this connection the Court verifies whether a prima facie complaint of entrapment constitutes a substantive defence under domestic law or gives grounds for the exclusion of evidence or leads to similar consequences. Although it is up to the domestic authorities to decide what procedure is appropriate when faced with a plea of incitement, the

1273 „Berlizev v. Ukraine" (2021)

Court requires the procedure in question to be adversarial, thorough, comprehensive and conclusive on the issue of entrapment. Moreover, in the context of non-disclosure of information by the investigative authorities, the Court attaches particular weight to compliance with the principles of adversarial proceedings and equality of arms.

Where an accused asserts that he was incited to commit an offence, the criminal courts must carry out a careful examination of the material in the file, since for the trial to be fair within the meaning of Article 6 § 1 of the Convention, all evidence obtained as a result of police incitement must be excluded or a procedure with similar consequences must apply.[1274] This is especially true where the police operation took place without a sufficient legal framework or adequate safeguards. In such a system the judicial examination of an entrapment plea provides the only effective means of verifying the validity of the reasons for the undercover operations and ascertaining whether the agents remained „essentially passive" during those operations.[1275] It is also imperative that the domestic courts' decisions dismissing an applicant's plea of entrapment are sufficiently reasoned.

If the available information does not enable the Court to conclude whether the applicant was subjected to entrapment, the judicial review of the entrapment plea becomes decisive in accordance with the methodology of the Court's assessment of entrapment cases.[1276]

In the application of the substantive and procedural tests of entrapment, the Court must first satisfy itself that the situation under examination falls prima facie within the category of „entrapment cases". If the Court is satisfied that the applicant's complaint falls to be examined within the category of "entrapment cases", it will proceed, as a first step, with the assessment under the substantive test of incitement. Where, under the substantive test of incitement, on the basis of the available information the Court could find with a sufficient degree of certainty that the domestic authorities investigated the applicant's activities in an essentially passive manner and did not incite him or her to commit an offence, that will normally be sufficient for the Court to conclude that the subsequent use in the criminal proceedings against the applicant of the evidence obtained by the undercover measure does not raise an issue under Article 6.

However, if the Court's findings under the substantive test are inconclusive owing to a lack of information in the file, the lack of disclosure or contradictions in the parties' interpretations of events, or if the Court finds, on the basis of the substantive test, that an applicant was subjected to incitement contrary to Article 6., it will be necessary for the Court to proceed, as a second step, with the procedural test of incitement. The Court has explained that it applies this test in order to determine whether the necessary steps to uncover the circumstances of an arguable plea of incitement were taken by the domestic courts, and whether in the case of a finding that there has been incitement or in a case in which the prosecution failed to prove that there was no incitement, the relevant inferences were drawn in accordance with the Convention. The proceedings against an applicant would be deprived of the fairness required by Article 6 of the Convention if the actions of the State authorities had the effect of inciting the applicant to commit the offence for which he or she was convicted, and the domestic courts did not appropriately address the allegations of incitement.[1277]

1274 „Akbay and Others v. Germany" (2020)
1275 „Lagutin and Others v. Russia" (2014)
1276 „Ali v. Romania" (2010)
1277 „Virgil Dan Vasile v. Romania" (2018)

7.4. Taking of evidence (CPC)

7.4.1. The general rules of taking evidence

a) The subject matter of taking of evidence:
Evidence shall be taken concerning facts that are relevant to the application of substantive and procedural criminal law. Evidence may also be taken concerning facts that are significant to adjudicating matters that are ancillary to the criminal proceeding.

In a criminal proceeding, the court, prosecution service, or investigating authority shall decide on the basis of real facts.

During sentencing, the court shall establish the facts of the case within the limits of the indictment.

No evidence shall be required concerning facts that are (1) commonly known, (2) officially known to the proceeding court, prosecution office, or investigating authority, or (3) accepted as real by the prosecutor, the defendant, and the defence counsel jointly in the given case.

The prosecutor shall be responsible for discovering all facts required to prove the indictment, and making available, or moving to acquire, all supporting means of evidence.

In the course of clarifying the facts of the case, a court shall acquire pieces of evidence on the basis of motions.

In the absence of a motion, the court shall not be obliged to acquire or examine any pieces of evidence.[1278]

b) Means of evidence:
The following means shall be accepted as evidence:
– witness testimonies,
– defendant testimonies,
– expert opinions,
– opinions by a probation officer,
– means of physical evidence, including documents and deeds, and
– electronic data.[1279]

c) The lawfulness of taking of evidence:

Any means of evidence shall be detected, collected, secured, and used in compliance with the provisions of the CPC. The manner of performing and conducting evidentiary acts, and examining and recording means of evidence may be specified by law.[1280]

d) The assessment of pieces of evidence:

Any means of evidence or evidentiary act specified in this Act may be used or applied freely in the criminal proceeding. The CPC may also order the use of certain means of evidence.

1278 CPC 163. § - 164. §
1279 CPC 165. §
1280 CPC 166. §

Any means of physical evidence produced or acquired by an authority before, or at the time of, instituting the criminal proceeding in the course of carrying out its statutory tasks may be used in the criminal proceeding.

The probative value of individual means of evidence shall not be determined in advance by an Act.

The court, the prosecution service, and the investigating authority shall assess pieces of evidence freely both individually and in their totality, and it shall determine the outcome of taking evidence according to its resulting conviction.

A fact originating from a means of evidence may not be taken into account as evidence if the court, the prosecution service, the investigating authority, or another authority referred to in paragraph (2) acquired the given means of evidence by way of a criminal offence, a material violation of the procedural rights of a person participating in the criminal proceeding, or in any other prohibited manner.[1281]

7.4.2. Witness testimony

A person may be interrogated as a witness if he may have knowledge concerning a fact to be proven. A witness shall be obliged to testify unless an exception is made in the CPC. The proceeding court, prosecution office, or investigating authority shall establish and reimburse, upon a motion by the witness, the costs incurred by the appearance of the witness in person to the extent set out by law. The witness shall be informed about this option in his summons or at the end of his interrogation. An authorised attorney-at-law may act for the witness if the witness considers it necessary to receive information regarding his rights. The witness shall be informed about this option in his summons.[1282]

a) Impediments to providing testimony:

The following shall be recognised as impediments to providing witness testimony: (1) prohibition of providing testimony, (2) refusal to provide testimony.

An impediment to providing witness testimony shall be taken into account if it applied at the time of the commission of the criminal offence and also if it applies at the time of the interrogation.

A testimony by a witness whose interrogation took place in violation of the provisions on impediments to providing testimony may not be taken into account as a means of evidence unless an exception is made in the CPC.[1283]

b) Prohibition of giving testimony:

The following persons shall not be interrogated as a witness:

– the defence counsel concerning any fact he learned or communicated to the defendant in his capacity as defence counsel,

– the church personnel or members of a religious association who perform on a professional basis religious rites concerning any fact covered by their professional obligation of confidentiality,

1281 CPC 167. §
1282 CPC 168. §
1283 CPC 169. §

– any person who clearly is unlikely to testify correctly due to his physical or mental condition,

– a person who has not been discharged from his obligation of confidentiality concerning any classified data.[1284]

c) Refusal to give testimony:

– Relatives of the defendant may refuse to give witness testimony.[1285]

– A person who would incriminate himself or a relative of his of committing a criminal offence may refuse to give witness testimony regarding related matters.

– A person who is under an obligation of confidentiality due to his profession or public mandate, not including an obligation of confidentiality concerning classified data, may refuse to give witness testimony if he would breach his obligation of confidentiality by giving witness testimony, unless, in line with applicable legislation, (1) he was discharged from his obligation by the authorised person or entity, or (2) an organ requested to provide data is obliged to transfer the data covered by its obligation of confidentiality upon request by the court, the prosecution service, or the investigating authority. An obligation of confidentiality shall remain in effect during the period specified by law unless the witness was discharged from his obligation of confidentiality.[1286]

– If a media content provider, or a person who is in an employment relationship or another employment-related relationship with a media content provider, would reveal the identity of a person who provided him with information in relation to media content provision activities by giving witness testimony, he may refuse to give witness testimony concerning any related matter unless he was ordered by the court to reveal the identity of the person providing the information. The court may order a media content provider, or a person who is in an employment relationship or another employment-related relationship with a media content provider, to reveal the identity of a person who provided him with information in relation to media content provision activities if (1) identifying the person providing the information is indispensable for detecting an intentional criminal offence punishable by imprisonment for three years or more, (2) the evidence expected from doing so may not be replaced in any other way, and (3) the interest in detecting that criminal offence is so significant, in particular, due to the material gravity of the criminal offence, that it clearly exceeds the interest in keeping the source of information secret.[1287]

The proceeding court, prosecution office, or investigating authority shall decide on the lawfulness of a refusal to give witness testimony. If a witness refuses to testify by invoking an impediment to testifying, any legal remedy sought against a decision dismissing the refusal shall have a suspensory effect. If a witness lawfully refuses to testify, he may not be confronted or asked any further question, unless he decides to testify.[1288]

d) Witness advice:

The witness shall be advised at his first interrogation during the investigation or a first or second-instance court procedure that (1) he may refuse to give witness testimony

1284 CPC 170. §
1285 CPC 171. §
1286 CPC 172. § - 173. §
1287 CPC 174. §
1288 CPC 175. §

if the grounds for his refusal exist or existed at the time of his interrogation or the commission of the criminal offence, (2) if he testifies, he is obliged to tell the truth to the best of his knowledge and in good conscience, (3) perjury and unlawful refusal to give witness testimony in court constitute punishable acts under the Criminal Code, and (4) if he testifies, his testimony may be used in the given or any other case as means of evidence, even if he subsequently refuses to testify.

If the witness advice or the response thereto is not recorded in the minutes, statements made by the witness may be taken into account as a witness testimony, provided that the witness maintains his statements after he is provided witness advice. A witness may not withdraw such a statement.

A witness testimony provided by a witness in the case earlier, or in another case, may be used as a means of evidence, even if the witness subsequently refuses to testify. Doing so shall be subject to the condition that the witness advice and the response by the witness thereto are clearly reflected in the minutes recording his witness testimony.

If a witness was interrogated as a defendant in the case earlier or in another case, his testimony provided as a defendant may be used as means of evidence, provided that defendant advice and his response thereto is clearly reflected in the minutes recording his testimony. In this case, the testimony provided by the witness earlier as a defendant may be used, even if the witness subsequently refuses to testify.[1289]

e) Interrogating the witness:

Witnesses shall be interrogated one by one. The identity of the witness shall be established at the commencement of his interrogation. To this end, the witness shall provide the following information:

– name, birth name,
– place and date of birth,
– mother's name,
– nationality,
– identity document number,
– home address, contact address, actual place of residence,
– service address, phone number,
– profession.

If the witness is interrogated continuously at the same stage of the proceeding, his personal data need not be recorded each time, provided that they remain unchanged.[1290]

After a witness is identified, any possible impediment to him testifying and any circumstance indicating his bias or interest in the case shall be clarified. The witness shall be obliged to answer these questions, even if there is an obstacle to him testifying, or he invokes such an obstacle.

The witness shall be provided witness advice and he shall be informed of his rights concerning interrogation.

An attorney-at-law acting in his interests may attend the interrogation of the witness; such an attorney-at-law may provide the witness with information about his rights, but he may not carry out any other activity or influence the testimony. After the interrogation,

1289 CPC 176. § - 177. §
1290 CPC 178. §

he may inspect the minutes of the interrogation and make observations in writing or orally.[1291]

During his interrogation, the witness shall provide his testimony without interruption, and then he shall answer questions. During the interrogation of the witness, it shall also be clarified, with due regard to the provisions on protecting witnesses, how the witness learned the information he provided in his testimony.

If the testimony of the witness differs from an earlier testimony of the same witness, the reason for the differences shall be clarified.

At a motion by the witness, individual parts of his witness testimony shall be recorded verbatim in the minutes.

A witness may not be asked a question that (1) includes the answer or contains any guidance regarding the answer, (2) contains any promise that is inconsistent with the law, or (3) includes a false statement of fact.[1292]

f) Written witness testimony

The court, the prosecution service, or the investigating authority may allow the witness to provide a testimony in writing after, or in place of, being interrogated orally.

If testifying in writing is permitted, the witness shall (1) write down and sign his testimony in his own hands, (2) sign his testimony with a qualified electronic signature or an advanced electronic signature based on a qualified certificate, (3) provide his testimony by means of electronic communication, or (4) have his testimony authenticated by a judge, notary, or another person specified by law.

Where the witness provides testimony in writing, it must be clear from the written testimony that the witness made his testimony being aware of the impediments to testifying and of the witness advice.

Providing witness testimony in writing does not exclude the witness from being summoned by the court, the prosecution service, or the investigating authority for interrogation, if necessary.[1293]

g) Measures against witnesses failing to perform their obligations:

If a witness refuses, without being authorised to do so, to assist in a procedural act, or to testify, even after being advised of the consequences, a disciplinary fine may be imposed on him and he shall be obliged to reimburse any criminal cost caused.[1294]

7.4.3. Defendant testimony

Any statement of fact made in the criminal proceeding orally or in writing before, or addressed to, the court, prosecution service, or investigating authority by the defendant after he was advised as a defendant regarding the subject matter of taking evidence shall be considered a defendant testimony. If the defendant wishes to give a testimony, he shall be granted an opportunity to do so. Defendants shall be interrogated one by one. Even if

1291 CPC 179. §
1292 CPC 180. §
1293 CPC 181. §
1294 CPC 182. §

the defendant confesses his guilt, further pieces of evidence shall also be acquired, unless otherwise provided in the CPC.[1295]

a) Establishing the identity of a defendant:

The interrogation of the defendant shall begin with establishing and verifying the identity and contact details of the defendant. In the course of establishing his identity, the defendant shall state the following data to identify himself and enable communication with him:

– name, birth name,
– place and date of birth,
– mother's name,
– nationality,
– identity document number,
– home address, contact address, actual place of residence,
– service address, phone number.[1296]

b) Defendant advice:

After the defendant is identified, he shall be informed about his rights and advised that (1) he is not obliged to give a testimony; he may refuse to testify and to answer any question at any time during the interrogation; but he may decide to testify at any time, even if he refused to do so earlier, (2) refusing to testify does not hinder the continuation of the proceeding or affect the right of the defendant to ask questions, make observations, or file motions, (3) if he testifies, anything he says or makes available may be used as evidence, (4) he may not accuse falsely another person of having committed a criminal offence, and he may not violate any right to respect for the deceased by stating any false fact.

The defendant shall be provided defendant advice at his first interrogation during the investigation and the first or second-instance court procedure.

The defendant advice and the response given by the defendant to the advice shall be recorded in the minutes. If the defendant advice and the response thereto are not recorded in the minutes, the defendant testimony may not be used as a means of evidence, with the exception as fallows: if the defendant advice and the response thereto is not recorded in the minutes, a statement made by the defendant may be taken into account as a testimony, if the defendant (1) was already advised as a defendant during the proceeding, and his defence counsel attended his continuous interrogation, or (2) maintains his statement after he is provided defendant advice.[1297]

c) Giving a testimony:

If the defendant wishes to give a testimony, he shall be asked, after being provided defendant advice, about his

– profession,
– place of work,
– level of education,

1295 CPC 183. §
1296 CPC 184. §
1297 CPC 185. §

– family situation,
– health,
– income,
– financial situation,
– military rank, honorary rank, and distinctions.

The defendant shall be granted an opportunity to give his testimony without interruption, and then he may be asked questions. If the testimony of the defendant differs from his earlier testimony, the reason for such differences shall be clarified.

A defendant may not be asked a question that (1) includes the answer or contains any guidance regarding the answer, (2) contains any promise that is inconsistent with the law, or (3) includes a false statement of fact.

If the defendant gives a testimony after refusing to do so, he may be asked questions.[1298]

A testimony given by the defendant as a witness in the case earlier, or in another case, may be used as a means of evidence, provided that the witness advice and his response thereto is clearly reflected in the minutes recording his witness testimony. A testimony provided by the defendant in another case may be used as a means of evidence, provided that the defendant advice and his response thereto are clearly reflected in the minutes recording his testimony.[1299]

7.4.4. The expert opinion

If specialised expertise is required to establish or assess a fact to be proven, an expert shall be employed. In the criminal proceeding, an expert opinion may be provided by an expert or ad hoc expert in accordance with the Act on judicial experts. A law may specify the technical matters regarding which only a specific expert shall be entitled to deliver an opinion.[1300]

a) The expert:

The expert shall be employed by way of an appointment unless otherwise provided by an Act. No legal remedy shall lie against the decision on the appointment of the expert. If a partial examination needs to be carried out urgently to provide an expert opinion, this examination may be carried out on the basis of an oral order by the prosecution service or the investigating authority without a decision on the appointment. The prosecution service or the investigating authority shall send such an order to the expert concerned within fifteen days in writing.

The head of an expert institution or institute, or a company, or the president of an expert body, as defined in the Act on judicial experts, shall notify the entity that arranged for the appointment about the acting expert, or members of the ad hoc committee, within eight days following receipt of the decision on the appointment.

An entity that arranged for the appointment shall inform defendants, defence counsels, parties with a pecuniary interest, and other interested parties, and, if the expert was appointed by a court, the prosecution service about the acting expert, or members of

1298 CPC 186. §
1299 CPC 187. §
1300 CPC 188. §

the ad hoccommittee, within eight days after the date of the decision on the appointment or, in a situation specified in paragraph (3), of the receipt of the notification.

The proceeding court, prosecution office, or investigating authority may discharge an expert for a material reason by way of a decision. No legal remedy shall lie against such a decision.

The period taken to submit an expert opinion, other than the opinion of a party-appointed expert, may not exceed two months. This time limit may be extended once by up to one month upon a request submitted by the expert before the expiry of the time limit.[1301]

The defendant and the defence counsel may move for the appointment of an expert, and the expert may be specified in the corresponding motion. The proceeding court, the prosecution office, or the investigating authority shall decide on the motion. No legal remedy shall lie against the decision.

The defendant and the defence counsel may mandate an expert to provide an opinion as a party-appointed expert if (1) the court, the prosecution service, or the investigating authority dismissed their motion to appoint an expert, or (2) the prosecution service or the investigating authority decided to appoint an expert other than the one specified in the motion.

The defendant and the defence counsel may mandate only one expert to provide an opinion on the same technical matter. The defendant or the defence counsel shall notify, within eight days, the proceeding court, prosecution office, or investigating authority of mandating a party-appointed expert to provide an opinion, the termination of such a mandate, the mandated expert, and the time limit for providing the expert opinion. The time limit for notification shall be calculated from the date of the mandate or its termination.[1302]

b) Disqualification of the expert:

A person shall not act as an expert if

– he participates or participated in the case as a defendant, person reasonably suspected of having committed a criminal offence, defence counsel, aggrieved party, party with a pecuniary interest, party reporting a crime, an aide to any such person, or he is a relative of any such person,

– he proceeds or proceeded in the case as a judge, a prosecutor, or a member of the personnel carrying out investigation tasks of an investigating authority, or he is a relative of such a person,

– he participates or participated in the case as a witness or an aide to a witness,

– in the context of exhumation or examination of the cause and circumstances of death, he is a doctor who treated the deceased person directly before his death or established his death,

– he is an expert of an expert institution or organisation, or a member of an expert body, provided that the head of the expert institution, organisation,

– he was used in the case as a consultant,

– he is unlikely to provide an unbiased expert opinion for any other reason.

The expert shall submit a notice of a ground for disqualification against himself to the entity that arranged for the appointment without delay. If an appointment is for a company

1301 CPC 189. §
1302 CPC 190. §

or expert institution, organisation, or body, the notice shall be submitted through the head of the appointed company or organ.

The proceeding court, prosecution office, or investigating authority shall decide on the matter of disqualifying an expert.

The provisions on impediment to testifying as a witness shall also apply to experts accordingly.[1303]

c) Expert examination:

An expert shall be obliged and entitled to access any data that is necessary for the performance of his task; to this end, he may

– inspect case documents of the proceeding, except for documents specified by an Act,

– attend procedural acts,

– request information from defendants, aggrieved parties, witnesses, parties with a pecuniary interests, other interested parties, and experts appointed in the proceeding,

– request further data, case documents, and information from the entity that arranged for the appointment,

– inspect, examine, and sample, subject to an authorisation by the entity that arranged for the appointment, means of physical evidence or electronic data that was not handed over to him.

During an examination, the expert may inspect and examine persons, means of physical evidence or electronic data, and he may question persons.

If the expert examines a means of physical evidence or electronic data that changes or gets destroyed during the examination, part of the examined means of evidence or data shall be retained by the expert in its original condition, if possible, in a way that allows for its identification and the establishment of its origin.

The entity that arranged for the appointment may specify certain examinations the expert is to carry out in the presence of the entity that arranged for the appointment.

If more than one expert carries out expert examination in the criminal proceeding, the experts shall notify each other about the examination they wish to carry out, and the notified expert may attend the examination carried out by the other expert.[1304]

When the party-appointed expert prepares his opinion, the expert shall provide his opinion on the basis of data, case documents, and objects provided by his principal, but he may only examine a person if the person concerned consents.

The proceeding of an expert mandated to provide an opinion as a party-appointed expert may not delay or disproportionally protract any examination to be carried out by the appointed expert.[1305]

d) Obligation to cooperate during the procedure of an expert:

No expert examination affecting the inviolability of the subject's body may be carried out without a specific instruction by the entity that arranged for the appointment. The defendant, the aggrieved party, and the witness shall be obliged to subject themselves to the examination or intervention of the expert, except for surgeries and examination

1303 CPC 191. §
1304 CPC 192. §
1305 CPC 193. §

procedures qualifying as surgery. The aggrieved party and the witness shall be obliged also to facilitate the completion of an expert examination in other ways. On the basis of a specific instruction by the entity that arranged for the appointment, the defendant, the aggrieved party, the witness, and the holder of an inspection object shall tolerate that the expert examines the object in his possession, even if the object is damaged or destroyed during the examination. Pursuant to the applicable legislation, recompense may be claimed for any damage caused during an expert examination. If he fails to fulfil his obligation to cooperate, (1) the defendant may be subjected to forced attendance and the use of physical force, (2) the aggrieved party and the witness may be subjected to forced attendance and a disciplinary fine, (3) the defendant, the aggrieved party, and the witness shall be obliged to reimburse all criminal costs caused.[1306]

e) Observation of mental condition:

If the expert opinion concludes that observing the mental condition of the defendant for an extended period by an expert is necessary, the court may, before the indictment only upon a motion by the prosecution service, may order the observation of the mental condition of the defendant. If observation of mental condition is ordered, the detained defendant shall be referred to a forensic psychiatric and mental institution, while the defendant at liberty shall be referred to a psychiatric in-patient institute specified by law. The observation period may last up to one month; this time limit may be extended by the court by up to one month on the basis of an opinion by the institute performing the observation.

If the observation of mental condition is ordered, no legal remedy sought shall have suspensory effect, unless the defendant is at liberty.

During the observation of the mental condition of the defendant at liberty, the personal freedom of the defendant may be restricted as provided for by the Act on healthcare.

If the defendant does not subject himself to the observation of his mental condition, the psychiatric institute shall notify the court that ordered the observation of his mental condition without delay.[1307]

f) Submitting the expert opinion:

If more than one expert participated in the examination, the expert opinion shall specify which expert performed which examination.

Before an expert opinion is submitted orally, the identity of the expert shall be verified, and it shall be clarified that he is not affected by a ground for disqualification. The expert shall be advised of the consequences of giving a false expert opinion. The advice and the response given by the expert to the advice shall be recorded in the minutes. The expert may be asked questions after he submitted his expert opinion.

A statement made by the defendant, the witness, and the aggrieved party before an expert may not be used as evidence if it relates to data concerning the subject matter of the examination, any examination procedure or instrument, or any change to the examined object, or the act underlying the proceeding.

1306 CPC 194. §
1307 CPC 195. §

The defendant or the defence counsel shall decide whether an opinion by a party-appointed expert sis to be submitted.[1308]

g) Assessing an expert opinion and using another expert:

If an expert opinion may not be accepted without any reservation due to any deficiency and, in particular, if (1) it does not contain the mandatory statutory elements of an expert opinion, (2) it is not clear, (3) it is inconsistent with itself or any data provided to the expert, or (4) there is a serious doubt regarding its correctness, the expert shall provide clarification, or supplement his expert opinion if called upon to do so by the court, the prosecution service, or the investigating authority.

If the clarification or supplemented expert opinion requested from the expert does not produce any result, another expert shall be appointed. The concerns relating to the acceptability of the previous expert opinion shall be specified in a motion for the appointment of an expert or the decision on the appointment.

If the opinions provided by the experts differ, the differences shall be clarified by hearing the experts in the presence of each other.

After this measures, a new expert may be appointed if any unresolvable difference continues to remain regarding a technical matter, which is key to deciding the case, between the expert opinions prepared on the basis of the same examination material regarding the same fact to be proven. The expert appointed in such an event shall provide an opinion on the ground for such differences between the expert opinions and the possible need to supplement any of the expert opinions or to obtain a new expert opinion in the case.

The expert opinion prepared on the same technical matter by an expert appointed in another proceeding may be taken into account as an expert opinion in the criminal proceeding.[1309]

If an opinion by a party-appointed expert qualifies as an expert opinion and is submitted orally, or if a clarification is provided, the expert opinion is supplemented orally, or experts are heard in the presence of each other on the basis of a mandate, the expert shall be obliged to also answer questions asked by the court, the prosecution service, or the investigating authority.[1310]

h) The expert's fee:

An expert shall be entitled to (1) a fee for carrying out the tasks of an expert, and appearing before the court, the prosecution service, or the investigating authority when summoned, and (2) reimbursement for all costs incurred in relation to his proceeding. The amount of the expert fee shall be determined based on a fee information document, filed by the expert, in a decision after the expert opinion is received or the expert is heard, if applicable, but no later than one month. The decision determining the amount of the expert fee shall be communicated to the expert concerned, the defendant and the defence counsel; if a court adopted the decision, it shall also be communicated to the prosecution service. These persons or entities may seek legal remedy against the decision on an expert fee. The expert fee shall be advanced by the court, the prosecution office,

1308 CPC 196. §
1309 CPC 197. §
1310 CPC 198. §

or the investigating authority, as specified by law. The defendant or the defence counsel shall advance the expert fee and costs of a party-appointed expert mandated to provide an opinion.[1311]

i) Consequences of violating the expert's obligations:

A disciplinary fine may be imposed on the expert, and he shall be obliged to reimburse all criminal costs caused if he (1) refuses to provide assistance or an opinion without being entitled to do so even after he was advised of the consequences of refusal, (2) fails to meet the time limit for submitting his expert opinion, or (3) protracts the proceeding by violating any other obligation. If the expert designated by the head of the appointed company or organisation fails to submit an expert opinion, the disciplinary fine and the obligation to reimburse all criminal costs caused shall be imposed on the appointed company or expert institution, organisation, or body. If an expert refuses to provide an opinion by invoking an obstacle to testifying as a witness, he shall not be obliged to assist until any legal remedy sought against a decision dismissing such refusal is adjudicated.[1312]

j) The interpreter

The provisions on experts shall also apply accordingly to interpreters, with the proviso that (1) the provisions on party-appointed experts shall not apply, (2) to the inspection of a case document translated by an interpreter, the provisions on the original case document shall apply, (3) a decision on the appointment or discharge of the interpreter shall be served only on the interpreter, (4) a decision determining the fee of the interpreter shall be communicated to the interpreter and a decision by the court shall be communicated also to the prosecution service.A person may be used as an interpreter if he meets all conditions specified by law. If that is not possible, a person with adequate language competence may also be appointed as an ad hoc interpreter. Interpreters shall be construed to mean also specialised translators. An interpreter shall be advised of the consequences of interpreting falsely at the time of his appointment. Persons attending a procedural act where an interpreter is used may move for the appointment of another interpreter due to the inadequate quality of interpreting.[1313]

7.4.5. The opinion by a probation officer

The court and the prosecution service may order that an opinion be sought from a probation officer before (1) imposing a penalty or applying a measure, (2) applying conditional suspension by the prosecutor, or (3) referring a case to a mediation procedure.

Obtaining the opinion of a probation officer may be mandatory under an Act. It shall be the responsibility of the probation officer to give an opinion. The probation officer shall be obliged and entitled to access all data that is needed for giving an opinion; to this end, he may inspect case documents of the proceeding, and he may request information from the defendant, the aggrieved party, the witness, and any other person involved in the proceeding. He may also request further data, case documents,

1311 CPC 199. §
1312 CPC 200. §
1313 CPC 201. §

and information from the prosecution service or the court if doing so is necessary for performing his task.[1314]

The opinion by the probation officer shall describe the facts and circumstances characterising the personality and living conditions of the defendant, in particular his family situation, health, any addiction, housing situation, education, qualification, workplace or, in the absence of a workplace, data on his occupation, financial situation and assets; it shall also present any relationship between the discovered facts, circumstances, and the commission of the criminal offence, as well as the risk of reoffending, and the needs of the defendant.

In the opinion, the probation officer shall provide information on employment possibilities that would be suitable for the defendant considering his skills, as well as healthcare and social care options available to him; he may suggest individual rules of behaviour, or obligations, to be imposed on a defendant, as well as interventions to be taken to mitigate the risk of reoffending.

If instructed by the court or the prosecution service, the opinion by the probation officer shall cover whether the defendant is willing and capable of complying with any foreseen rule of behaviour or obligation and if the aggrieved party consents to any reparation to be provided to him.[1315]

7.4.6. Means of physical evidenc, electronic data

Means of physical evidence means objects, including documents and deeds, that are suitable for proving any fact to be proven, including, in particular, objects that

– carry marks of a criminal offence or a perpetrator in relation to a criminal offence,
– were created by way of committing a criminal offence,
– were used as a means of committing a criminal offence, or
– were the subject of a criminal offence.

Document means all means of physical evidence that carries data by technical, chemical, or any other method, including, in particular, texts, drawings, and illustrations recorded in a paper-based form or as electronic data.

Deed means a document that was produced and is suitable for proving that a fact or data is true, an event occurred, or a statement was made. The provisions on deeds shall also apply to extracts of deeds.[1316]

Electronic data means any representation of facts, information, and terms that is suitable for being technically processed by an information system, including any program that implements a function of an information system.[1317]

7.4.7. Evidentiary acts

An evidentiary act means, in particular, an inspection, on-site interrogation, reconstruction of a criminal offence, presentation for identification, confrontation, and instrumental credibility examination of a testimony.[1318]

1314 CPC 202. §
1315 CPC 203. §
1316 CPC 204. §
1317 CPC 205. §
1318 CPC 206. §

a) The inspection:

The court, the prosecution service, or the investigating authority may order and carry out an inspection if a person, object, or site needs to be inspected, or an object or site needs to be observed, to discover or establish a fact to be proven.

In the course of an inspection, means of physical evidence shall be located and collected, and arrangements shall be made for the proper preservation of such evidence. In the course of an inspection, circumstances that are relevant to the taking of evidence shall be recorded in detail, including, in particular, the course, method, location, and status of locating and collecting the inspection object. In the course of locating, recording, and securing means of physical evidence, measures shall be taken to ensure that compliance with rules of procedure can be verified subsequently. An image, sound or audio-visual recording, drawing, or sketch shall be taken of the object of inspection, if possible and necessary, and it shall be attached to the minutes.

If the object of inspection cannot be inspected on-site, or such inspection would cause considerable difficulties or costs, the inspection shall be carried out before the organ that ordered the inspection.

Experts may be used during inspections.

If for the identification of the perpetrator biometric sample needs to be captured in the course of the criminal proceeding, the prosecution service and the investigating authority may capture biometric sample from persons who came into contact with the person, object, location or other means of physical evidence concerned in order to be able to exclude the accidental contamination of another biometric sample.[1319]

b) On-site interrogations:

The court, the prosecution service, or the investigating authority may interrogate the defendant and the witness on-site if it is necessary to give testimony at the scene of the criminal offence or another location related to the criminal offence or to present the place where the criminal offence was committed, another location related to the criminal offence, a means of physical evidence, or the progress of the criminal offence.

Before conducting an on-site interrogation, the defendant or the witness shall be interrogated regarding the circumstances under which he detected a given location, act, or means of physical evidence, as well as the marks he would rely on for identification.[1320]

c) The reconstruction of a criminal offence:

The court, the prosecution service, or the investigating authority may order and carry out a reconstruction of a criminal offence if it needs to be established or verified whether a given event or phenomenon could have happened at a specific time or location, in a specific manner or under specific circumstances.

If possible, a criminal offence shall be reconstructed under circumstances that are identical to the circumstances under which the given event or phenomenon happened or may have happened.[1321]

1319 CPC 207. §
1320 CPC 208. §
1321 CPC 209. §

d) The presentation for identification:

The court, the prosecution service, or the investigating authority may order and carry out a presentation for identification if doing so is necessary for the identification of a person or object. At least three persons or objects shall be presented to the defendant or the witness for identification. A person or object may be presented to the defendant or the witness for identification by way of an image, sound or audio-visual recording if no other option is available.

Before a presentation for identification, the person expected to identify shall be interrogated in detail regarding the circumstances under which he detected the given person or object, as well as his relationship to, and any known distinctive mark of, that person or object.

When presenting persons for identification, the person in question shall be presented in a group of other persons who are not related to the case, unknown to the recognising person, and similar to the person concerned in terms of the prominent distinctive marks specified by the identifying person, in particular in terms of sex, age, build, colour, hygiene, and clothing.

When presenting objects for identification, an object concerned shall be presented among similar objects. The placement of a person or object concerned may not be considerably different from that of other persons or objects in the same group, and may not be prominent in any way.

If there is more than one identifying person, the presentation for identification shall be carried out separately, in the absence of the other identifying persons.

If it is necessary for the protection of the witness, presentation for identification shall be carried out in a manner that prevents the person concerned from recognising or detecting the witness. If personal data of the witness were ordered to be processed confidentially, such processing shall also be ensured in the event of a presentation for identification.[1322]

e) Confrontation:

If the testimonies of the defendants, the witnesses, or the defendant and the witness contradict each other, the court, the prosecution service, or the investigating authority may clarify the contradiction by way of a confrontation. During a confrontation, each person shall state his testimony orally in front of the other confronted person, and subsequently, each confronted person may be permitted to ask questions from the other confronted person. Confrontation of the witness or the defendant shall be dispensed with if doing so is necessary to treat carefully or protect the witness or the defendant.[1323]

f) Instrumental credibility examination of testimonies:

In the course of the investigation, the prosecution service or the investigating authority may undertake an instrumental credibility examination of the testimony of the witness and the suspect. Such verification shall be subject to the consent of the witness or the suspect concerned.

1322 CPC 210. §
1323 CPC 211. §

In the course of instrumental credibility examination, using a consultant shall be mandatory; the consultant used may subsequently be interrogated as a witness regarding the procedure and his findings.[1324]

g) Common provisions:

The rules on inspection shall apply to reconstructions of criminal offences and presentations for identification accordingly. In order to carry out an inspection, reconstruction of a criminal offence, or presentation for identification, the court and the prosecution service may also make use of the investigating authority. The defendant, the witness, and another person, including in particular a person disposing of or possessing the subject of the inspection, shall subject himself to an inspection, reconstruction of a criminal offence, or presentation for identification, and he shall make the object in his possession available for inspection, reconstruction of a criminal offence, or presentation for identification. To enforce compliance with such obligations, the defendant may be subject to coercion, or the aggrieved party, the witness, and another person may be subject to coercion and a disciplinary fine. The inspection, the reconstruction of a criminal offence, and the presentation for identification shall be recorded using an audio-visual recording, if possible.[1325]

7.5. Relevant decisions of the ECrHR

7.5.1. Disclosure of evidence

As a rule, Article 6. requires that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused. In this context, the relevant considerations can also be drawn from Article 6., which guarantees to the applicant „adequate time and facilities for the preparation of his defence."

An issue with regard to access to evidence may arise under Article 6. insofar as the evidence at issue is relevant for the applicant's case, specifically if it had an important bearing on the charges held against the applicant. This is the case if the evidence was used and relied upon for the determination of the applicant's guilt or it contained such particulars which could have enabled the applicant to exonerate oneself or have the sentence reduced. The relevant evidence in this context is not only evidence directly relevant to the facts of the case, but also other evidence that might relate to the admissibility, reliability and completeness of the former.[1326]

The accused may, however, be expected to give specific reasons for his or her request for access to evidence, and the domestic courts are entitled to examine the validity of these reasons. In any case, in systems where the prosecuting authorities are obliged by law to take into consideration both the facts for and against the suspect, a procedure whereby the prosecuting authorities themselves attempt to assess what may or may not be relevant to

1324 CPC 212. §
1325 CPC 213.
1326 „Rowe and Davis v. the United Kingdom" (2000)

the case, without any further procedural safeguards for the rights of the defence, cannot comply with the requirements of Article 6.[1327]

However, the entitlement to disclosure of relevant evidence is not an absolute right. In criminal proceedings there may be competing interests, such as national security or the need to protect witnesses who are at risk of reprisals or to keep secret the methods used by the police to investigate crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6.[1328] Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.

In many cases where the evidence in question has never been revealed, it would not be possible for the Court to attempt to weigh the relevant interest involved against that of the accused without having sight of the material. It must therefore scrutinise the decision-making procedure to ensure that, as far as possible, it complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused.[1329]

In making its assessment of the relevant procedural guarantees, the Court must also have regard to the importance of the undisclosed material and its use in the trial, where the non-disclosed information could not have been in itself of any assistance to the defence). It must in particular satisfy itself that the domestic procedure allowed that the impact of the relevant material on the safety of the conviction be considered in the light of detailed and informed argument from the defence.

For instance, in Rowe and Davis v. the United Kingdom (2000), the Court found a violation of Article 6. on account of the prosecution's failure to lay the evidence in question before the trial judge and to permit him to rule on the question of disclosure, thereby depriving the applicants of a fair trial. However, in Jasper v. the United Kingdom [GC], 2000 (§ 58), the Court found no violation of Article 6., relying on the fact that the material which was not disclosed formed no part of the prosecution case whatsoever, and was never put to the jury. In Edwards and Lewis v. the United Kingdom (2004), the applicants were denied access to the evidence, and hence it was not possible for their representatives to argue the case on entrapment in full before the judge. TheCourt accordingly found a violation of Article 6. because the procedure employed to determine the issues of disclosure of evidence and entrapment did not comply with the requirements to provide adversarial proceedings and equality of arms, nor did it incorporate adequate safeguards to protect the interests of the accused.

In the context of disclosure of evidence, complex issues may arise concerning the disclosure of electronic data, which may constitute a certain mass of information in hands of the prosecution. In such a case, an important safeguard in the sifting process is to ensure that the defence is provided with an opportunity to be involved in the laying-

1327 „Matanović v. Croatia" (2017)
1328 „Paci v. Belgium" (2018)
1329 „Dowsett v. the United Kingdom" (2003)

down of the criteria for determining what might be relevant for disclosure. Moreover, as regards identified or tagged data, any refusal to allow the defence to have further searches of such data carried out in principle raises an issue with regard to the provision of adequate facilities for the preparation of the defence. [1330]

A breach of the right to an adversarial trial has also been found where the parties had not received the reporting judge's report before the hearing, whereas the advocate-general had, nor had they had an opportunity to reply to the advocate-general's submissions.[1331]

7.5.2. Burden of proof

The requirements related to the burden of proof from the perspective of the principle of the presumption of innocence provide inter alia, that it is for the prosecution to inform the accused of the case that will be made against him or her, so that he or she may prepare and present his or her defence accordingly, and to adduce evidence sufficient to convict him or her.[1332]

The presumption of innocence is violated where the burden of proof is shifted from the prosecution to the defence.[1333] However, the defence may be required to provide an explanation after the prosecution has made a prima facie case against an accused.[1334] Thus, for instance, the drawing of adverse inferences from a statement by an accused which is found to be untrue does not raise an issue under Article 6 § 2.[1335]

The Court has also held that the in dubio pro reo principle (doubts should benefit the accused) is a specific expression of the presumption of innocence.[1336] An issue from the perspective of this principle may arise if the domestic courts' decisions finding an applicant guilty are not sufficiently reasoned,[1337] or if an extreme and unattainable burden of proof was placed on the applicant so that his or her defence does not have even the slightest prospect of success.[1338]

The burden of proof cannot be reversed in compensation proceedings following a final decision to discontinue the proceedings.[1339] Exoneration from criminal liability does not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof.[1340]

7.5.3. Presumptions of fact and of law

A person's right in a criminal case to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her is not absolute, since presumptions of fact or of law operate in every criminal-law system and are not prohibited

1330 „Sigurður Einarsson and Others v. Iceland" (2019)
1331 „Reinhardt and SlimaneKaïd v. France" (1998)
1332 „Janosevic v. Sweden" (2002)
1333 „Telfner v. Austria" (2001)
1334 „Poletan and Azirovik v. the former Yugoslav Republic of Macedonia" (2016)
1335 „Kok v. the Netherlands" (2000)
1336 „Tsalkitzis v. Greece" (2017)
1337 „Melich and Beck v. the Czech Republic" (2008)
1338 „Nemtsov v. Russia" (2014); „Topić v. Croatia" (2013); „Frumkin v. Russia" (2016)
1339 „Capeau v. Belgium" (2005)
1340 „Ringvold v. Norway" (2003)

in principle by the Convention.[1341] In particular, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence.[1342]

However, Article 6 § 2 requires States to confine these presumptions within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.[1343]

In employing presumptions in criminal law, the Contracting States are required to strike a balance between the importance of what is at stake and the rights of the defence; in other words, the means employed have to be reasonably proportionate to the legitimate aim sought to be achieved.[1344]

7.5.4. Examination of witnesses

The guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision, and the Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings. In making this assessment, the Court looks at the proceedings as a whole, including the way in which the evidence was obtained, having regard to the rights of the defence but also to the interests of the public and the victims in proper prosecution and, where necessary, to the rights of witnesses.[1345]

a) Autonomous meaning of the term „witness":

The term „witness" has an autonomous meaning in the Convention system, regardless of classifications under national law.[1346] Where a deposition may serve to a material degree as the basis for a conviction, it constitutes evidence for the prosecution to which the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention apply.[1347] This may Guide on Article 6 of include, for instance, evidence provided by a person in the context of an identification parade or face-to-face confrontation with a suspect.[1348] The term includes a co-accused,[1349]

1341 „Falk v. the Netherlands" (2004), concerning a fine on a registered car owner who had not been the actual driver at the time of the traffic offence.

1342 „Salabiaku v. France" (1988), concerning a presumption of criminal liability for smuggling inferred from possession of narcotics; „Janosevic v. Sweden" (2002), concerning tax surcharges on the basis of objective grounds and enforcement thereof prior to a court determination; „Busuttil v. Malta" (2021), concerning the presumption of responsibility of a director for any act which by law must be performed by the company.

1343 „Radio France and Others v. France" (2004), concerning the presumption of criminal liability of a publishing director for defamatory statements made in radio programmes; „Västberga Taxi Aktiebolag and Vulic v. Sweden" (2002), concerning objective responsibility for tax surcharges; „Klouvi v. France" (2011), regarding inability to defend a charge of malicious prosecution owing to a statutory presumption that an accusation against a defendant acquitted for lack of evidence was false; „Iasir v. Belgium" (2016), concerning substantive presumptions on participation in an offence by co-accused; „Zschüschen v. Belgium" (2017), concerning money laundering proceedings.

1344 „Janosevic v. Sweden" (2002)

1345 „Schatschaschwili v. Germany" (2015)

1346 „Damir Sibgatullin v. Russia" (2012)

1347 „Kaste and Mathisen v. Norway" (2006)

1348 „Vanfuli v. Russia" (2011)

1349 „Trofimov v. Russia" (2008)

victims,[1350] expert witnesses,[1351] and police officers.[1352] Article 6 § 3 (d) may also be applied to documentary evidence,[1353] including reports prepared by an arresting officer.[1354]

b) General principles:

Given that the admissibility of evidence is a matter for regulation by national law and the national courts, the Court's only concern under Articles 6 §§ 1 and 3 (d) of the Convention is to examine whether the proceedings have been conducted fairly.[1355]

Article 6 §§ 1 and 3 (d) of the Convention contains a presumption against the use of hearsay evidence against a defendant in criminal proceedings. Exclusion of the use of hearsay evidence is also justified when that evidence may be considered to assist the defence.[1356]

Pursuant to Article 6 § 3 (d), before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe upon the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings.[1357] These principles particularly hold true when using witness statements obtained during police inquiry and judicial investigation at a hearing.[1358]

As for applicability in the diverse legal systems of Contracting States, and in particular in the context of both common-law and continental-law systems, the Court has stressed that while it is important for it to have regard to substantial differences in legal systems and procedures, including different approaches to the admissibility of evidence in criminal trials, ultimately it must apply the same standard of review under Articles 6 §§ 1 and 3 (d) irrespective of the legal system from which a case emanates.[1359]

c) Non-attendance of witnesses at trial:

Considering the importance of the right to a fair administration of justice in a democratic society, any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice, then that measure should be applied.[1360] Possibility for the accused to confront a material witness in the presence of a judge is an important element of a fair trial.[1361]

In „Al-Khawaja and Tahery v. the United Kingdom" (2011), the Court clarified the principles to be applied when a witness does not attend a public trial. These principles may be summarised as follows:[1362]

1350 „Vladimir Romanov v. Russia" (2008)
1351 „Doorson v. the Netherlands" (1996)
1352 „Ürek and Ürek v. Turkey" (2019)
1353 „Mirilashvili v. Russia" (2008)
1354 „Butkevich v. Russia" (2018)
1355 „Al-Khawaja and Tahery v. the United Kingdom" (2011)
1356 „Thomas v. the United Kingdom" (2005)
1357 „Hümmer v. Germany (2012); „Lucà v. Italy" (2001); „Solakov v. the former Yugoslav Republic of Macedonia" (2001)
1358 „Schatschaschwili v. Germany" (2015)
1359 „Al-Khawaja and Tahery v. the United Kingdom" (2011); , „Schatschaschwili v. Germany" (2015)
1360 „Van Mechelen and Others v. the Netherlands" (1997)
1361 „Tarău v. Romania" (2009)
1362 „Seton v. the United Kingdom" (2016); „Dimović v. Serbia" (2016); „T.K. v. Lithuania" (2018)

– The Court should first examine the preliminary question of whether there was a good reason for admitting the evidence of an absent witness, keeping in mind that witnesses should as a general rule give evidence during the trial and that all reasonable efforts should be made to secure their attendance;

– When a witness has not been examined at any prior stage of the proceedings, allowing the admission of a witness statement in lieu of live evidence at trial must be a measure of last resort;

– Admitting as evidence statements of absent witnesses results in a potential disadvantage for the criminal defendant, who, in principle, should have an effective opportunity to challenge the evidence against him. In particular, he should be able to test the truthfulness and reliability of the evidence given by the witnesses, by having them orally examined in his presence, either at the time the witness was making the statement or at a later stage in the proceedings;

– According to the "sole or decisive rule", if the conviction of a defendant is solely or mainly based on evidence provided by witnesses whom the accused is unable to question at any stage of the proceedings, his defence rights are unduly restricted;

– However, as Article 6 § 3 of the Convention should be interpreted in a holistic examination of the fairness of the proceedings, the sole or decisive rule should not be applied in an inflexible manner;

– In particular, where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1. At the same time, where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards.

The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance to the case.

These principles have been further clarified in „Schatschaschwili v. Germany" (2015, in which the Court confirmed that the absence of good reason for the non-attendance of a witness could not, of itself, be conclusive of the lack of fairness of a trial, although it remained a very important factor to be weighed in the balance when assessing the overall fairness, and one which might tip the balance in favour of finding a breach of Article 6 §§ 1 and 3(d). Furthermore, The Courtexplained that given that its concern was to ascertain whether the proceedings as a whole were fair, it should not only review the existence of sufficient counterbalancing factors in cases where the evidence of the absent witness was the sole or the decisive basis for the applicant's conviction, but also in cases where it found it unclear whether the evidence in question was sole or decisive but nevertheless was satisfied that it carried significant weight and its admission might have handicapped the defence.

Good reason for non-attendance of a witness:

The requirement that there be a good reason for the non-attendance of a witness is a preliminary question which must be examined before any consideration is given as

to whether that evidence was sole or decisive. When witnesses do not attend to give live evidence, there is a duty to enquire whether their absence is justified.[1363] In this context, although it is not the Court's function to express an opinion on the relevance of the evidence produced, failure to justify a refusal to examine or call a witness can amount to a limitation of defence rights that is incompatible with the guarantees of a fair trial.[1364]

Moreover, the applicant is not required to demonstrate the importance of personal appearance and questioning of a prosecution witness.[1365] In principle, if the prosecution decides that a particular person is a relevant source of information and relies on his or her testimony at the trial, and if the testimony of that witness is used by the court to support a guilty verdict, it must be presumed that his or her personal appearance and questioning are necessary.[1366]

However, as explained in „Schatschaschwili v. Germany" (2015) [GC], lack of good reason for the non-attendance of a witness could not, of itself, be conclusive of the lack of fairness of a trial, although it remained a very important factor to be weighed in the balance when assessing the overall fairness, and one which might tip the balance in favour of finding a breach of Article 6 §§ 1 and 3(d).

Article 6 § 1 taken together with § 3 requires the Contracting States to take positive steps to enable the accused to examine or have examined witnesses against him.[1367]

In the event that the impossibility of examining the witnesses or having them examined is due to the fact that they are missing, the authorities must make a reasonable effort to secure their presence.[1368]

It is not for the Court to compile a list of specific measures which the domestic courts must have taken in order to have made all reasonable efforts to secure the attendance of a witness whom they finally considered to be unreachable. However, it is clear that they must have actively searched for the witness with the help of domestic authorities including the police and must, as a rule, have resorted to international legal assistance where a witness resided abroad and such mechanisms were available. Moreover, the need for all reasonable efforts on the part of the authorities to secure the witness's attendance at trial further implies careful scrutiny by domestic courts of the reasons given for the witness's inability to attend trial, having regard to the specific situation of each witness.[1369]

However, impossibilium nulla est obligatio, provided that the authorities cannot be accused of a lack of diligence in their efforts to afford the defendant an opportunity to examine the witnesses in question, the witnesses' unavailability as such does not make it necessary to discontinue the prosecution.[1370] Moreover, in cases where a witness has gone into hiding and has been evading justice the domestic courts face a situation where, in practical terms, they have no means to locate a witness and it would be excessive and formalistic to compel the domestic courts to take steps in addition to the efforts already

1363 „Al-Khawaja and Tahery v. the United Kingdom" (2011)
1364 „Bocos-Cuesta v. the Netherlands" (2005)
1365 „Süleyman v. Turkey" (2020)
1366 „Keskin v. the Netherlands" (2021)
1367 „Trofimov v. Russia" (2008); „Sadak and Others v. Turkey" (2001); „Cafagna v. Italy" (2017)
1368 „Karpenko v. Russia" (2012); „Damir Sibgatullin v. Russia" (2012); „Pello v. Estonia" (2007); „Bonev v. Bulgaria" (2006); „Tseber v. the Czech Republic" (2012); „Lučić v. Croatia" (2014)
1369 „Schatschaschwili v. Germany" (2015)
1370 „Gossa v. Poland" (2007); „Haas v. Germany" (2005); „Calabrò v. Italy and Germany" (2002); „Ubach Mortes v. Andorra" (2000); „Gani v. Spain" (2013)

made by the respective authorities within a special legal framework for the search of persons evading justice. In such cases the trial court, prior to concluding that there is good reason for the non-attendance of a witness, must satisfy itself, in the first place, that the witness is evading justice, and, secondly, that the defendant is informed thereof in a way affording a possibility to comment on the measures taken.[1371]

Good reason for the absence of a witness must exist from the trial court's perspective, that is, the court must have had good factual or legal grounds not to secure the witness's attendance at trial. If there was a good reason for the witness's non-attendance in that sense, it follows that there was a good reason, or justification, for the trial court to admit the untested statements of the absent witness as evidence.[1372]

There are a number of reasons why a witness may not attend trial, such as absence owing to death or fear,[1373] absence on health grounds,[1374] or the witness's unreachability,[1375] including his or her detention abroad.[1376] However, the fact that the witness is absent from the country where the proceedings are being conducted is not in itself sufficient reason to justify his or her absence from the trial.[1377] Nor does the fact that the witness lives in another part of the same country suffice of itself to justify his or her absence from the trial.[1378]

Lastly, different considerations apply with regard to the questioning of attesting witnesses for a search, when their testimony has been adduced by the prosecution.[1379] Attesting witnesses act as neutral observers of an investigative measure and, unlike material witnesses, they are not expected to have any knowledge of the case. Thus, they do not testify about the circumstances of the case or the defendants' guilt or innocence. Accordingly, their attendance at the hearing will only be necessary exceptionally, such as if the domestic courts rely on their statements in a substantial manner or that their testimony in court could otherwise influence the outcome of the criminal proceedings against the applicant.[1380] In other words, the absence of attesting witnesses from criminal trials does not infringe the guarantees of Article 6 §§ 1 and 3 (d) of the Convention insofar as their testimony is limited to the manner of conducting investigative measures and is, in essence, redundant evidence.[1381]

Nevertheless, when the domestic trial court specifically refers to the statements of the attesting witnesses in convicting the applicant and lists them as elements of evidence separate from the relevant police reports which those witnesses certified, then it is appropriate to examine the matter of non-attendance of those witnesses at the trial and reliance on their pre-trial statements in light of the Al-Khawaja and Tahery and Schatschaschwili principles.[1382]

1371 „Lobarev and Others v. Russia" (2020)
1372 „Schatschaschwili v. Germany" (2015)
1373 „Mika v. Sweden" (2009); „Ferrantelli and Santangelo v. Italy" (1996); „Al-Khawaja and Tahery v. the United Kingdom" (2011)
1374 „Bobeş v. Romania" (2013); „Vronchenko v. Estonia" (2013)
1375 „Lučić v. Croatia" (2014)
1376 „Štefančič v. Slovenia" (2012)
1377 „Gabrielyan v. Armenia" (2012)
1378 „Faysal Pamuk v. Turkey" (2022), where the trial court used the possibility of requesting the examination of witnesses by the courts of their places of residence if they were residing somewhere other than where the trial was taking place.
1379 „Murtazaliyeva v. Russia" (2018)
1380 „Shumeyev and Othersv. Russia" (2015)
1381 „Murtazaliyeva v. Russia" (2018)
1382 „Garbuz v. Ukraine" (2019)

On the other hand, when the defence intends to rely on the testimony of attesting witnesses, such witnesses are to be considered as „witnesses on behalf" of the defence within the meaning of Article 6 § 3 (d) of the Convention.[1383]

d) The importance of the witness statement for the conviction:

An issue concerning admission into evidence of statements of witnesses who did not attend the trial arises only if the witness statement is the "sole" or "decisive" evidence, or it it "carried significant weight" in the applicant's conviction.[1384]

The „sole" evidence is to be understood as the only evidence against the accused. The term „decisive" should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case. Where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supportive evidence: the stronger the other incriminating evidence, the less likely that the evidence of the absent witness will be treated as decisive. The evidence that carries "significant weight" is such that its admission may have handicapped the defence.[1385]

In this context, as it is not for the Court to act as a court of fourth instance, its starting point for determining the importance of a witness statement for an applicant's conviction is the judgment of the domestic courts. The Court must review the domestic courts' evaluation in light of its standards for the assessment of importance of a witness statement as evidence and decide whether the domestic courts' evaluation of the weight of the evidence was unacceptable or arbitrary. It must further make its own assessment of the weight of the evidence given by an absent witness if the domestic courts did not indicate their position on that issue or if their position is not clear.

e) Counterbalancing factors:

The extent of the counterbalancing factors necessary in order for a trial to be considered fair would depend on the weight of the evidence of the absent witness. The more important that evidence, the more weight the counterbalancing factors would have to carry in order for the proceedings as a whole to be considered fair. These counterbalancing factors must permit a fair and proper assessment of the reliability of that evidence.

In „Schatschaschwili v. Germany" (2015) the Court identified certain elements that may be relevant in this context:

– Whether the domestic courts approached the untested evidence of an absent witness with caution, having regard to the fact that such evidence carries less weight, and whether they provided detailed reasoning as to why they considered that evidence to be reliable, while having regard also to the other evidence available.[1386] Any directions given to the jury by the trial judge regarding the absent witnesses' evidence is another important consideration.[1387]

1383 „Murtazaliyeva v. Russia" (2018)
1384 „Seton v. the United Kingdom" (2016); „Sitnevskiy and Chaykovskiy v. Ukraine" (2016), where the witness statement was not of any such importance.
1385 „Schatschaschwili v. Germany" (2015)
1386 „Przydział v. Poland" (2016)
1387 „Simon Price v. the United Kingdom" (2016)

– Existence of a video recording of the absent witness's questioning at the investigation stage.

– Availability at trial of corroborative evidence supporting the untested witness statement, such as statements made at trial by persons to whom the absent witness reported the events immediately after their occurrence; further factual evidence, forensic evidence and expert reports; similarity in the description of events by other witnesses, in particular if such witnesses are cross-examined at trial.

– The possibility for the defence to put its own questions to the witness indirectly, for instance in writing, in the course of the trial, or, where appropriate, in the pre-trial stage of theproceedings.[1388] However, pre-trial confrontations conducted before an investigator who did not meet the requirements of independence and impartiality, who had the largely discretionary power to block questions and in which the applicants were unrepresented, are not a substitute for the examination of witnesses in open court.[1389]

– Possibility for the applicant or defence counsel to question the witness during the investigation stage. These pre-trial hearings are an important procedural safeguard which can compensate for the handicap faced by the defence on account of absence of a witness from the trial.[1390] Moreover, the Court has accepted that in exceptional circumstances there may be reasons for hearing evidence from a witness in the absence of the person against whom the statement is to be made on the condition that his lawyer was present during the questioning.[1391] However, there may nevertheless be circumstances where the defence counsel's involvement alone may not suffice to uphold the rights of the defence and the absence of a direct confrontation between a witness and the accused might entail a real handicap for the latter. Whether an applicant's direct confrontation with the witness against him or her was needed, is a matter to be determined on the facts of each case on the basis of the Court's criteria for the assessment of the overall fairness of the proceedings under Article 6 § 3 (d).[1392]

– The defendant must be afforded the opportunity to give his or her own version of the events and to cast doubt on the credibility of the absent witness. However, this cannot, of itself, be regarded a sufficient counterbalancing factor to compensate for the handicap under which the defence laboured.[1393] Moreover, domestic courts must provide sufficient reasoning when dismissing the arguments put forward by the defence.[1394]

In this connection, the Court has not been ready to accept a purely formal examination of the deficiencies in the questioning of witnesses by the domestic higher courts when their reasoning could be seen as seeking to validate the flawed procedure rather than providing the applicant with any counterbalancing factors to compensate for the handicaps under which the defence laboured in the face of its inability to examine a witness.[1395] Also, in some instances, an effective possibility to cast doubt on the credibility of the absent witness evidence may depend on the availability to the defence of all the material in the file related to the events to which the witness' statement relates.[1396]

1388 „Paić v. Croatia" (2016)
1389 „Chernika v. Ukraine" (2020)
1390 „Palchik v. Ukraine" (2017)
1391 „Šmajgl v. Slovenia" (2016)
1392 „Fikret Karahan v. Turkey" (2021)
1393 „Palchik v. Ukraine" (2017)
1394 „Prăjină v. Romania" (2014
1395 „Al Alo v. Slovakia" (2022)
1396 „Yakuba v. Ukraine" (2019)

In view of the autonomous meaning given to the term „witness", the above principles concerning absent witnesses are accordingly relevant in cases of absent expert witnesses.[1397] However, in this context, the Court has explained that the role of an expert witness can be distinguished from that of an eyewitness, who must give to the court his personal recollection of a particular event. In analysing whether the appearance in personof an expert at the trial was necessary, the Court is therefore primarily guided by the principles enshrined in the concept of a "fair trial" under Article 6 § 1 of the Convention, and in particular by the guarantees of "adversarial proceedings" and "equality of arms".[1398] Nevertheless, some of the Court's approaches to the examination in person of "witnesses" under Article 6 § 3 (d) may be applied, mutatis mutandis, with due regard to the difference in their status and role.[1399]

f) Other restrictions on the right to examine witnesses:

The above principles related to absent witnesses are accordingly applicable to other instances in which a defendant was not in a position to challenge the probity and credibility of witness evidence, including its truthfulness and reliability, by having the witnesses orally examined in his or her presence, either at the time the witness was making the statement or at some later stage of the proceedings, or where the witnesses do appear before the trial court but procedural irregularities prevent the applicant from examining them.[1400]

This may concern the admission into evidence of statements made by witnesses whose full identity is concealed from

– the accused (anonymous testimony);[1401]

– witnesses, including the co-accused, who refuse to testify at trial or to answer questions from the defence[1402] and

– other witnesses who are questioned under special examination arrangements involving, for instance, impossibility for the defence to attend the witnesses' questioning[1403] or impossibility for the defence to have access to sources on which a witness based his or her knowledge or belief.[1404]

It should also be noted that the principles related to the admission into evidence of statements of absent witnesses accordingly apply to instances where the outcome of the proceedings complained of does not comprise guilt or innocence, but rather the factual circumstances relevant for the ultimate severity of sentence. Thus, where witness testimony could influence the outcome of an applicant's case in relation to determining the severity of the sentence, the Court will proceed to examine whether the impossibility to question that witness at any stage of the proceedings handicapped the applicant's defence to the point of rendering the trial against him or her as a whole unfair.[1405]

1397 „Constantinides v. Greece" (2016)
1398 „Kartoyev and Others v. Russia" (2021)
1399 „Danilov v. Russia" (2020)
1400 „Chernika v. Ukraine" (2020)
1401 „Al-Khawaja and Tahery v. the United Kingdom" (2011); „Scholer v. Germany" (2014); „Balta and Demir v. Turkey" (2015); „Asani v. the former Yugoslav Republic of Macedonia" (2018); , „Süleyman v. Turkey" (2020)
1402 „Craxi v. Italy" (2002); „Vidgen v. the Netherlands" (2012); „Sofri and Others v. Italy" (2003); „Sievert v. Germany" (2012); „Cabral v. the Netherlands (2018); „Breijer v. the Netherlands" (2018)
1403 „Papadakis v. the former Yugoslav Republic of Macedonia" (2013)
1404 „Donohoe v. Ireland" (2013)
1405 „Dodoja v. Croatia" (2021)

However, when a witness makes a statement at the pre-trial stage of the proceedings and then retracts it or claims to have no longer any recollection of facts when cross-examined at the trial, the principles related to absent witnesses will not necessarily apply. In other words, a change of attitude on the part of a witness does not of itself give rise to a need for compensatory measures. Indeed, the Court has refused to hold in the abstract that evidence given by a witness in open court and on oath should always be relied on in preference to other statements made by the same witness in the course of criminal proceedings, not even when the two are in conflict. In such a situation, the Court will seek to determine whether the proceedings as a whole, including the way in which evidence was taken, were fair.[1406] Moreover, in such instances, other procedural guarantees may be of importance such as, for instance, the principle of equality of arms between the prosecution and the defence in examining a witness who has retracted his or her statement that was of a decisive importance for the applicant's conviction.[1407]

g) Anonymous witnesses:

While the problems raised by anonymous and absent witnesses are not identical, the two situations are not different in principle, since each results in a potential disadvantage for the defendant. The underlying principle is that the defendant in a criminal trial should have an effective opportunity to challenge the evidence against him.[1408]

In particular, the Court has held that precise limitations on the defence's ability to challenge a witness in proceedings differ in the two cases (anonymous and absent witnesses). Absent witnesses present the problem that their accounts cannot be subjected to searching examination by defence counsel. However, their identities are known to the defence, which is therefore able to identify or investigate any motives for falsification. On the other hand, anonymous witnesses about whom no details are known as to their identity or background, present a different problem: the defence faces the difficulty of being unable to put to the witness, and ultimately to the jury, any reasons which the witness may have for lying. However, in practice, some disclosure takes place which provides material for cross-examination. The extent of the disclosure has an impact on the extent of the handicap faced by the defence. Thus, given the underlying concern in both types of cases, the Court has consistently taken a similar approach in the context of anonymous witnesses to that which it has followed in cases involving absent witnesses. The use of statements made by anonymous witnesses to convict is not under all circumstances incompatible with the Convention.[1409]

While Article 6 does not explicitly require the interests of witnesses to be taken into consideration, their life, liberty or security of person may be at stake, as with interests coming generally within the ambit of Article 8 of the Convention. Contracting States should organise their criminal proceedings so that those interests are not unjustifiably impaired. The principles of a fair trial therefore require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.[1410]

1406 „Vidgen v. the Netherlands" (2019); „Makeyan and Others v. Armenia" (2019)
1407 „Bonder v. Ukraine" (2019)
1408 „Al-Khawaja and Tahery v. the United Kingdom (2011); „Asani v. the former Yugoslav Republic of Macedonia" (2018)
1409 „Doorson v. the Netherlands" (1996); „Van Mechelen and Others v. the Netherlands" (1997); „Krasniki v. the Czech Republic" (2006)
1410 „Doorson v. the Netherlands" (1996); „Van Mechelen and Others v. the Netherlands" (1997)

Domestic authorities must have adduced relevant and sufficient reasons to keep secret the identity of certain witnesses.[1411]

The Court's case-law shows that it is more common for witnesses to have a general fear of testifying, rather than that fear being directly attributable to threats made by the defendant or his agents. For instance, in many cases, the fear has been attributable to the notoriety of the defendant or his associates. There is, therefore, no requirement that a witness' fear be attributable directly to threats made by the defendant in order for that witness to be excused from presenting evidence at trial. Moreover, fear of death or injury of another person or of financial loss are all relevant considerations in determining whether a witness should be required to give oral evidence. This does not mean, however, that any subjective fear of the witness will suffice. The trial court must conduct appropriate enquiries to determine, first, whether or not there are objective grounds for that fear, and, second, whether those objective grounds are supported by evidence.[1412]

The Court has also held that the balancing of the interests of the defence against arguments in favour of maintaining the anonymity of witnesses raises special problems if the witnesses in question are members of the State's police force. Although their interests – and indeed those of their families – also deserve protection under the Convention, it must be recognised that their position is to some extent different from that of a disinterested witness or a victim. They owe a general duty of obedience to the State's executive authorities and usually have links with the prosecution; for these reasons alone their use as anonymous witnesses should be resorted to only in exceptional circumstances. On the other hand, the Court has recognised that, provided that the rights of the defence are respected, it may be legitimate for the police authorities to wish to preserve the anonymity of an agent deployed in undercover activities for his own or his family's protection and to not impair his usefulness for future operations.[1413]

If the anonymity of prosecution witnesses is maintained, the defence will be faced with difficulties which criminal proceedings should not normally involve. In such cases, the handicap faced by the defence must be sufficiently counterbalanced by the procedures followed by the judicial authorities.[1414]

h) Witnesses in sexual abuse cases:

Criminal proceedings concerning sexual offences are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor. In assessing whether the accused received a fair trial, the right to respect for the private life of the alleged victim must be taken into account.

Therefore, in criminal proceedings concerning sexual abuse, certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with the adequate and effective exercise of the rights of the defence. In securing

1411 „Doorson v. the Netherlands" (1996); „Visser v. the Netherlands" (2002); „Sapunarescu v. Germany" (2006); „Dzelili v. Germany" (2009)

1412 „Al-Khawaja and Tahery v. the United Kingdom" (2011); „Balta and Demir v. Turkey" (2015)

1413 „Van Mechelen and Others v. the Netherlands" (1997); „Bátěk and Others v. the Czech Republic" (2017); „Van Wesenbeeck v. Belgium" (2017)

1414 „Doorson v. the Netherlands" (1996); „Van Mechelen and Others v. the Netherlands" (1997) „Haas v. Germany" (2005); „Asani v. the former Yugoslav Republic of Macedonia" (2018)

the rights of the defence, the judicial authorities may be required to take measures which counterbalance the handicap under which the defence operates.[1415]

Having regard to the special features of criminal proceedings concerning sexual offences, Article 6 § 3 (d) cannot be interpreted as requiring in all cases that questions be put directly by the accused or his or her defence counsel through cross-examination or by other means.[1416]

Relatedly, the Court has held that since a direct confrontation between the defendants charged with criminal offences of sexual violence and their alleged victims risks further traumatisation of the victim, personal cross-examination by defendants should be subject to the most careful assessment by the national courts, the more so the more intimate the questions are.[1417]

However, this does not mean that measures related to the protection of victims, particularly the non-attendance of a witness to give evidence at the trial, are applicable automatically to all criminal proceedings concerning sexual offences. There must be relevant reasons adduced by domestic authorities for applying such measures and, as regards the possibility of excusing a witness from testifying on grounds of fear, the trial court must be satisfied that all available alternatives, such as witness anonymity and other special measures, would be inappropriate or impracticable.[1418]

The accused must be able to observe the demeanour of the witnesses under questioning and to challenge their statements and credibility.[1419]

The viewing of a video recording of a witness account cannot alone be regarded as sufficiently safeguarding the rights of the defence where no opportunity to put questions to a person giving the account was given by the authorities.[1420]

i) Witnesses who refuse to testify in court:

In some instances, a witness' refusal to give a statement or answer questions in court may be justified in view of the special nature of the witness' position in the proceedings. This will be the case, for instance, if a co-accused uses one's right to protection against self-incrimination.[1421]

The same is true for a former co-suspect refusing to give a statement or answer questions at the hearing as a witness,[1422] or a former co-suspect who is facing the charges of perjury for trying to change his initial statement inculpating the applicant.[1423] Moreover, this may concern a witness who relied on testimonial privilege in order to not testify at the trial due to her relationship with one of the co-accused[1424] or a witness who refused to give a statement due to a fear of reprisals.[1425]

1415 „Aigner v. Austria" (2012); „D. v. Finland" (2009); „F and M v. Finland" (2007); „Accardi and Others v. Italy" (2005); „S.N. v. Sweden" (2002); „Vronchenko v. Estonia" (2013)
1416 „S.N. v. Sweden" (2002); „W.S. v. Poland" (2007)
1417 „Y. v. Slovenia" (2015); „R.B. v. Estonia" (2021), concerning the participation in the proceedings of a four-year old alleged victim of sexual abuse by a parent).
1418 „Al-Khawaja and Tahery v. the United Kingdom" (2011); „Lučić v. Croatia" (2014)
1419 „Bocos-Cuesta v. the Netherlands" (2005); „P.S.v. Germany" (2001); „Accardi and Others v. Italy" (2005); „S.N. v. Sweden" (2002)
1420 „D. v. Finland" (2009); „A.L. v. Finland" (2009)
1421 „Vidgen v. the Netherlands" (2012)
1422 „Sievert v. Germany" (2012)
1423 „Cabral v. the Netherlands" (2018)
1424 „Sofri and Others v. Italy" (2003)
1425 „Breijer v. the Netherlands" (2018)

In each of these cases, the Court must assess whether the proceedings as a whole were fair and whether there was a possibility of putting the incriminating statement of a witness to the test in order to satisfy itself that the defence's handicap was offset by effective counterbalancing measures.[1426]

j) Right to call witnesses for the defence:

As a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce. Article 6 § 3(d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses. It does not require the attendance and examination of every witness on the accused's behalf; its essential aim, as is indicated by the words "under the same conditions", is full "equality of arms" in the matter.[1427]

Article 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the domestic courts to decide whether it is necessary or advisable to examine a witness.[1428]

However, when a trial court grants a request to call a defence witness, it is obliged to take effective measures to ensure the witnesses' presence at the hearing[1429] by way of, at the very least, issuing a summons or by ordering the police to compel a witness to appear in court.[1430]

There may be exceptional circumstances which could prompt the Court to conclude that the failure to examine a person as a witness was incompatible with Article 6.[1431]

It is not sufficient for a defendant to complain that he has not been allowed to question certain witnesses; he must, in addition, support his request by explaining why it is important for the witnesses concerned to be heard, and their evidence must be necessary for the establishment of the truth and the rights of the defence.[1432] If the statement of witnesses the applicant wished to call could not influence the outcome of his or her trial, no issue arises under Articles 6 §§ 1 and 3 (d) if a request to hear such witnesses is refused by the domestic courts.[1433]

When a request by a defendant to examine witnesses is not vexatious, is sufficiently reasoned, is relevant to the subject matter of the accusation and could arguably have strengthened the position of the defence or even led to his or her acquittal, the domestic authorities must provide relevant reasons for dismissing such a request.[1434]

Having regard to the above considerations in its case-law, in „Murtazaliyeva v. Russia" (2018) the Court has formulated the following three-pronged test for the assessment of whether the right to call a witness for the defence under Article 6 § 3 (d) has been complied

1426 „Sievert v. Germany" (2012); „Cabral v. the Netherlands" (2018); „Breijer v. the Netherlands" (2018)
1427 „Perna v. Italy" (2003); „Murtazaliyeva v. Russia" (2018); „Solakov v. the former Yugoslav Republic of Macedonia" (2001)
1428 „S.N. v. Sweden" (2002); „Accardi and Others v. Italy" (2005)
1429 „Polufakin and Chernyshev v. Russia" (2008)
1430 „Murtazaliyeva v. Russia" (2018)
1431 „Murtazaliyeva v. Russia" (2018); „Dorokhov v. Russia" (2008); „Popov v. Russia" (2006); „Bricmont v. Belgium" (1989); „Pereira Cruz and Others v. Portugal" (2018), concerning the refusal by an appellate court to question a witness for the defence who had retracted his incriminating statement against the applicant.
1432 „Perna v. Italy" (2003)
1433 „Kapustyak v. Ukraine" (2016)
1434 „Vidal v. Belgium" (1992); „Polyakov v. Russia" (2009); „Sergey Afanasyev v. Ukraine" (2012); „Topić v. Croatia" (2013)

with: (1) whether the request to examine a witness was sufficiently reasoned and relevant to the subject matter of the accusation; (2) whether the domestic courts considered the relevance of that testimony and provided sufficient reasons for their decision not to examine a witness at trial; and (3) whether the domestic courts' decision not to examine a witness undermined the overall fairness of the proceedings.

In respect of the first element the Court held that it is necessary to examine whether the testimony of witnesses was capable of influencing the outcome of a trial or could reasonably be expected to strengthen the position of the defence. The „sufficiency" of reasoning of the motions of the defence to hear witnesses will depend on the assessment of the circumstances of a given case, including the applicable provisions of the domestic law, the stage and progress of the proceedings, the lines of reasoning and strategies pursued by the parties and their procedural conduct.

As to the second element of the test, the Court explained that generally the relevance of testimony and the sufficiency of the reasons advanced by the defence in the circumstances of the case will determine the scope and level of detail of the domestic courts' assessment of the need to ensure a witness' presence and examination. Accordingly, the stronger and weightier the arguments advanced by the defence, the closer must be the scrutiny and the more convincing must be the reasoning of the domestic courts if they refuse the defence's request to examine a witness.

With regard to the overall fairness assessment as the third element of the test, the Court stressed that compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident. While the conclusions under the first two steps of that test would generally be strongly indicative as to whether the proceedings were fair, it cannot be excluded that in certain, admittedly exceptional, cases considerations of fairness might warrant the opposite conclusion.

In „Kikabidze v. Georgia" (2021), the Court examined a situation where the defence application to admit a list of witnesses to be called on behalf of the defence into evidence was rejected on procedural grounds because the defence had produced the list after the expiry of the relevant time-limit. The de facto outcome of that decision was that in the course of the jury trial –introduced in the domestic legal order shortly before the trial in the applicant's case – not a single witness was heard on behalf of the defence. The Court found that state of affairs troubling, particularly given the nature of the subject matter of the criminal case (an aggravated murder committed in prison in the presence of some seventy prisoners), the absence of evidence other than witnesses, and the fact that the case was decided by a jury. The Court therefore considered that, from the point of view of the Convention requirements of fair trial, and the applicant's right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him, the decision to exclude all witnesses proposed by the defence had to be motivated by weighty reasons going beyond the issue of the applicant's compliance with a procedural time-limit. On the facts of the case, the Court found that the presiding judge's rejection of the defence witness list in its entirety resulted from a rigid and restrictive application of domestic law to the applicant's detriment, which was particularly troubling given the absence of established judicial practice following implementation of the cardinal reform of the criminal procedure shortly before the applicant's trial.

CHAPTER VIII.

ACT C OF 2012 ON THE CRIMINAL CODE. LEGAL CASES

In this chapter I present some of the offences of the Hungarian Criminal Code (hereinafter: CC) and the related case law of the Curia (Hungarian Supreme Court). Judicial decisions are based on cases in which not only the substantive legal classification but also the interpretation of procedural law provisions have challenged the law enforcement bodies.

8.1. Statutes of Limitations

CC 26. § (1) Save where Subsections (2)-(3) apply, and unless otherwise provided for by the Act on the Exclusion of Statutes of Limitation for Certain Crimes, prosecution is barred upon the lapse of time equal to the maximum penalty prescribed, or after not less than five years.

(2) In connection with voluntary manslaughter, intentional grievous bodily injury punishable by imprisonment of more than three years, kidnapping, trafficking in human beings, illegal restraint, including criminal offense against sexual freedom and sexual offenses - if at the time when the crime was committed the victim is under the age of eighteen years, and prosecution of the crime is statute barred before the perpetrator's twenty-third birthday - the limitation period is extended until the time the victim reaches the age twenty-three years, or until the time that such person would have reached the age of twenty-three years.

(3) No statute of limitations applies to the crimes defined in Chapters XIII and XIV, and to crimes which carry a maximum sentence of life imprisonment.

CC 27. § The first day of the period of limitation is:

a) in case of a completed criminal act, the day when the crime is actually committed;

b) in case of attempt and preparation, the day when the act resulting in consequence is carried out;

c) in case of an act that is considered a criminal offense only if relates to a breach of duty, the last day that of which the perpetrator has to discharge his duty without the consequences set out in this Act;

d) in case of criminal offenses which manifests in the maintenance of an infringement, on the day when the infringement ceases to exist.

CC 28. § (1) The statute of limitation shall be interrupted by any action of the court, the public prosecutor, the investigating authorities, or - in international cases - by the minister in charge of the judicial system or the competent foreign authority taken against the perpetrator in connection with the crime. The period of limitation shall restart on the day of the interruption.

(2) If the criminal proceedings are suspended, the period of suspension shall not be included in the period of limitation. This provision shall not apply where criminal proceedings are suspended if the investigation failed to turn up evidence as to the perpetrator's identity, and if the perpetrator cannot be located or has become mentally ill.

(3) When a criminal proceeding is postponed or suspended on the grounds of exemption stemming from holding a public office, and by virtue of the fact that the immunity granted by law was not suspended by the body having powers to do so, the period of time of such delay shall not be included in the period of limitation. This provision shall not apply to criminal cases under private prosecution, where the case is presented by the private prosecutor.

(4) The period of deferral of prosecution, in the case of a conditional sentence, the period of probation and the period of work performed in reparation shall not be included in the period of limitation.

Legal case: The period of limitation shall be interrupted by any and all procedural steps aiming at taking the criminal case forward whose factual background is identical to that of a criminal offence on which prosecution was subsequently based, even if the accused person has not yet been interrogated as a criminal suspect at the time of the implementation of such procedural steps.

The lower instance courts found the seventh accused guilty of two counts of committing, as a co-perpetrator, the crime of forgery of public documents as defined in section 274, subsection (1), point c) of Act no. IV of 1978 on the Criminal Code and consequently imposed a total fine of 360 000,- HUF on him.

The seventh accused lodged a petition for judicial review with the Curia against the lower instance decisions. He argued that the period of limitation to commence criminal proceedings had expired in respect of the criminal act with which he had been charged in point 2 of the case's facts, since he had committed the crime of forgery of public documents by entering false data in a public register on 5 January 2005, while he had been interrogated as a suspect in that regard only on 2 April 2009. During this period, he was interrogated as a simple witness on 1 March 2007, but such taking of witness evidence, in his opinion, could not interrupt the period of limitation to his detriment.

The Curia established that the petition for judicial review was ill-founded. In its view, the period of limitation shall be interrupted by any and all procedural steps aiming at taking the criminal case forward on the merit i) whose factual background is identical to that of a criminal offence on which prosecution was subsequently based or ii) which seek to clarify the role of a specific person – who later becomes an accused – in contributing to the occurrence of the aforementioned facts. In the present case, the investigation documents showed that the procedural steps taken by the investigating authority apart from the interrogation of the accused as a witness and prior to his interrogation as a suspect had undoubtedly sought to clarify the criminal acts that could be imputed to him and on which prosecution had been subsequently based, consequently these procedural steps had interrupted the period of limitation.

The Curia therefore upheld the lower instance court decisions.[1435]

1435 Budapest, the 9th of June 2015. In: Communication concerning the decision of the Curia of Hungary in criminal case n° Bfv.I.329/2015.

8.2. Homicide (CC 160. §)

(1) Any person who kills another human being is guilty of a felony punishable by imprisonment between five to fifteen years.

(2) The penalty shall be imprisonment between ten to twenty years, or life imprisonment, if the homicide is committed:

a) deliberately with premeditation;

b) for financial gain;

c) with malice aforethought or with malicious motive;

d) with particular cruelty;

e) against a public official or a foreign public official during or because of his official proceedings, against a person performing public duties when carrying out such duties, or against a person providing assistance to or acting in defense of such persons performing official or public duties;

f) against more than one person;

g) endangering the life of a number of persons;

h) by a habitual recidivist;

i) against a person under the age of fourteen years;

j) against a person incapable of self-defense; or

k) against a person whose ability to defend himself is diminished due to his old age or disability.

(3) Any person who engages in preparations to commit homicide is punishable by imprisonment between one to five years.

(4) Any person who commits negligent homicide is guilty of a misdemeanor punishable by imprisonment between one to five years.

(5) Any person who persuades another to commit suicide shall be punishable in accordance with Subsection (1) if such person is under the age of fourteen years or is unable to express his will, and if the suicide is in fact committed.

(6) In the application of Paragraph h) of Subsection (2), the following shall be construed as crimes of similar nature within the meaning of habitual recidivism:

a) genocide [Paragraph a) of Subsection (1) of Section 142], voluntary manslaughter (Section 161);

b) aggravated cases of kidnapping and assault on a superior officer or representative of public authority [Subsection (4) of Section 190, Paragraph a) of Subsection (5) of Section 445];

c) acts of terrorism, unlawful seizure of a vehicle, and aggravated cases of mutiny, if causing death and the act is committed intentionally [Subsection (1) of Section 314, Subsection (2) of Section 320, Subsection (4) of Section 442].

Legal case 1.: The court of first instance found the accused guilty of the attempt to commit homicide and sentenced him to four years' imprisonment and to four years' ban on participating in public affairs. The court of second instance upheld the first instance judgement.

The defence attorney of the accused submitted a petition for judicial review to the Curia against the final judgement on the basis of section 416, subsection (1), point a) of

https://kuria-birosag.hu/sites/default/files/selected_case_law/criminal_case_june_2015.pdf (06.03.2024.)

the Code of Criminal Procedure. The petitioner argued that the lower instance courts had wrongly interpreted the issue of legitimate defence, as the accused had committed the impugned acts in order to prevent an unlawful attack posing a direct threat to him and his sibling by an attacker carrying a deadly weapon.

According to the facts of the case as clearly established by the court of first instance, the accused persons and the victim and his friend exchanged blows during which the victim was stabbed after having fallen to the ground as a result of an unbalanced move, having dropped the deadly weapon from his hand and having gotten into a half-sitting and half-lying position. In addition, the court of second instance correctly pointed out that while it was the victim who triggered the conflict, the accused person got willingly involved in the brawl when he accepted the victim's challenge after having gotten off the bus.

In the Curia's legal viewpoint, the applicable legal provisions excluded the possibility of lodging a petition for judicial review in the present case. In the reasoning part of its decision, the Curia stated that, pursuant to section 423, subsection (1) of the Code of Criminal Procedure, the factual background established in the final court decision should prevail in the Curia's judicial review proceedings and petitioners are not entitled to challenge the already established facts of the case in such proceedings.

The Curia referred to its consistent case-law according to which the grounds for exemption from criminal responsibility – such as legitimate defence – should be assessed in judicial review proceedings only in the light of the already established facts of the case. The facts of the case clearly show that the accused persons and the victim and his friend exchanged blows during which the victim was stabbed after having fallen to the ground as a result of an unbalanced move, having dropped the deadly weapon from his hand and having gotten into a half-sitting and half-lying position. Although it was the victim who triggered the conflict, the accused person got willingly involved in the brawl when he accepted the victim's challenge.

In its judicial review proceedings, the Curia could have been entitled to acquit the accused person on the basis of legitimate defence only if the circumstances underlying the existence of such ground for exemption from criminal responsibility had been completely included in the case's factual background as established by the lower instance courts.

With regard to the above, the Curia rejected the petition for judicial review.[1436]

Legal case 2.: The imposition of real life imprisonment on the perpetrators of qualified homicide. In its judgement resulting from criminal proceedings initiated against the first accused and his co-perpetrators, the Budapest Surroundings High Court found the followings:

The first, second and third accused agreed to get weapons in order to carry out attacks on individuals belonging to the Roma minority and "chastise" them. To that end, they drew up a plan on how to get weapons and chose a number of municipalities as the locations of their armed attacks. They acquired cell phones, two-way VHF radiotelephones, military garments, a pair of field glasses and a night vision equipment, furthermore, they surveyed and photographed the locations of their planned actions.

1436 Budapest, the 26th of October 2017. In: Communication concerning the decision of the Curia of Hungary in criminal case n° Bfv.I.884/2017.
https://kuria-birosag.hu/sites/default/files/selected_case_law/criminal_case_october_2017.pdf (06.03.2024.)

On the night of 7 March 2008, they broke into the house of a professional hunter and his family. They threatened and used violence against the hunter and his partner to get their firearms – three bullet firing hunting rifles and four hunting shotguns – and ammunition, and upon completion of their raid, they left the couple and their two minor-aged children tied up in the house. On 2 June 2008, the first accused led an attack on a Debrecen-based refugee camp in which several refugees were accommodated. One of the shots fired by the first accused caused injuries to a Serbian citizen with Roma ethnic origin. Between 2 June 2008 and 3 August 2009, the first accused and his co-perpetrators carried out nine additional attacks in various municipalities by setting fire with Molotov cocktails to houses inhabited by Roma families and firing gunshots at such houses and their residents. These attacks caused the deaths of six people, including that of a four and a half years old child, severely injured several persons whose life could be saved only due to prompt medical intervention, resulted in injuries causing permanent disability and grievous deterioration of health in case of an adult and a small child, and threatened the life and physical integrity of several other people. The fourth accused joined in for the last two attacks by transporting the other accused persons.

In its judgement delivered on 6 August 2013, the high court found the accused persons guilty of the following criminal offences:

– the crime of homicide committed by a premeditated act for malicious motive and with extreme; brutality on more than one person and against a person under the age of fourteen with the involvement of the first accused partly as perpetrator, partly as co-perpetrator and partly as accomplice, the second accused partly as co-perpetrator and partly as accomplice, and the third accused as co-perpetrator;

– two counts of the crime of robbery committed with a deadly weapon and in a group with the involvement of the accused persons as co-perpetrators;

– the crime of the illegal possession of firearms and ammunition with the involvement of the accused persons as co-perpetrators;

– the crime of the criminal misuse of military items with the involvement of the accused persons as co-perpetrators; and

– the crime of homicide committed by a premeditated act for malicious motive on more than one person and against a person under the age of fourteen with the involvement of the fourth accused as accomplice.

The high court sentenced the first, second and third accused for their criminal offences committed in affiliation with organised crime to life imprisonment and ten years' prohibition from public affairs, and the fourth accused for his criminal offence committed in affiliation with organised crime to thirteen years' imprisonment and ten years' prohibition from public affairs. In addition, the high court precluded the accused persons' eligibility for parole and decided on other supplementary issues.

The prosecutor, the accused persons and their defence attorneys submitted appeals against the first instance decision. In its judgement delivered on 8 May 2015, the Metropolitan Court of Appeal, acting as a court of second instance, upheld the overwhelming majority of the provisions of the first instance judgement and provided for some minor amendments and rectification to the case's factual background without affecting the substance of the criminal offences. Thus, the court of appeal partially modified the first instance judgement and concluded the followings:

– it also found the first, second and third accused guilty of four counts of the crime of the violation of personal freedom committed for malicious motive with their involvement as co-perpetrators, including two counts of such crime committed against a person under the age of eighteen, with regard to the robbery of arms in the hunter's house;

– it established that the acts of homicide had been committed by the first, second and third accused as co-perpetrators and also against a person incapable of self-defence;

– it found that the acts of the illegal possession of firearms and ammunition and the criminal misuse of military items should unitedly be qualified as the criminal act of the illegal possession of firearms and ammunition in the present case; and

– it re-qualified the accused persons' robbery to establish that the latter had not been committed in a group.

The first, second and third accused and their defence attorneys lodged appeals against the second instance judgement, which became final in respect of the fourth accused on the date of its delivery. Proceeding upon the above appeals as a court of third instance, the Curia upheld the second instance judgement in respect of the first, second and third accused.[1437]

Legal case 3.: In its first instance judgement delivered in June 2011, the County Court of Veszprém sentenced the first and second accused, Mr. S. R. and Mr. G. N. to life imprisonment with the earliest possible parole after 30 years, and sentenced the third accused, Mr. I. S. to 20 years of imprisonment for aggravated, multiple homicides and bodily harms.

As a result of the appeals submitted by the accused, the Regional Appellate Court of Győr, in its final judgement rendered on 27 April 2012, significantly alleviated the criminal sanctions inflicted by the court of first instance: Mr. S. R. and Mr. G. N. were sentenced to 18 years of imprisonment for homicide, while Mr. I. S. was condemned to 8 years of imprisonment for multiple bodily harms. The court of second instance sought to notably differ from the viewpoint of the court of first instance, because the regional appellate court found no evidence that the three accused had arrived at a concurrence of wills in respect of the act of homicide, and it concluded that the common willingness of the accused could only cover the committal of bodily harms.

Subsequently, the General Prosecution Service submitted a petition for judicial review in order to have the Curia set aside the final judgement and refer the case back to the court of second instance for reconsideration, arguing that the court of second instance infringed its obligation to state reasons in delivering its judgement, mistakenly qualified the criminal offences and unlawfully alleviated the criminal sanctions inflicted by the court of first instance.

In its decision delivered at a public hearing on 1 October 2012, the Curia of Hungary rejected the above petition as regards setting aside the final judgement and referring the case back for reconsideration, since it held that the regional appellate court had fulfilled its obligation to state reasons in rendering its decision. However, the Curia accepted the petition concerning the false qualification of the criminal offence committed by Mr. I. S., and consequently aggravated the criminal sanction inflicted upon the third accused.

1437 Budapest, the 15th of February 2016. In: Communication concerning the decision of the Curia of Hungary in criminal case n° Bhar.I.1320/2015.
https://kuria-birosag.hu/sites/default/files/selected_case_law/criminal_case_january_2016.pdf (06.03.2024.)

According to the highest instance judicial forum, the court of first instance mistakenly held that the acts of the accused had constituted multiple homicides, and unlawfully sentenced them to life imprisonment and a 20-year-long imprisonment, given that no accused had intended to murder more than one person.

As to the factual background of the case, on 8 February 2009 in the town of Veszprém, Mr. S. R. as first accused, Mr. G. N. as second accused, Mr. I. S. as third accused and their friends, with the clear intention to provoke others, went to a discotheque where they displayed aggressive behaviour, found faults with guests, and finally confronted the victims: Mr. M. C. of Romanian nationality, Mr. Z. S. of Serb nationality and Mr. I. P. of Croatian nationality, all of them team members of the local handball club, who had their night out with their fellow team members in the same discotheque. The critical events took place in just two minutes.

During this period of time, Mr. S. R. stabbed Mr. M. C. twice with a knife, one of the stabs reached the victim's heart, causing him death within minutes. Meanwhile, Mr. G. N. stabbed Mr. I. P., the life-threatening stab grievously damaged the victim's kidney, whose life was saved only due to speedy medical intervention, but his injured kidney, almost sliced-in-half, had to be removed from his body. The offenders kicked Mr. Z. S. in the head, who sustained life-threatening injuries, in addition, numerous punches and kicks landed on the victims who tried to defend themselves or, to some extent, launch counter-attacks.

The Curia argued that the court of second instance had made an error in the interpretation of the above factual background when it had unnecessarily separated the sequence of interconnected events. This misinterpretation was particularly obvious as regards the acts of Mr. I. S. who had conduced as a physical accomplice to the murder of Mr. M. C., because his threatening behaviour had divided the victim's attention, hindering the victim's capacity to efficiently defend himself against the fatal stab from Mr. S. R.

Pursuant to the viewpoint of the Curia, the imputed behaviour and acts of Mr. I. S. proved that he had had a common willingness with Mr. S. R. to murder Mr. M. C. Thus, Mr. I. S. had shared the intention of the first accused to kill the victim, and his complicity had largely contributed to the victim's death. Furthermore, the Curia esteemed that the third accused had conduced as a psychological accomplice, by his menacing presence, to the attempted homicide of Mr. I. P. and to the attempted life-threatening bodily harm to the detriment of Mr. Z. S.

The regional appellate court held that Mr. I. S. had committed multiple bodily harms, punishable with a cumulative sentence of up to 12 years of imprisonment, and decided, within its discretionary competence, to condemn the third accused to 8 years of imprisonment. The Curia disapproved the provisions of the final judgement related to the third accused, and reversed them by finding that Mr. I. S. had been involved in three criminal offences, namely he had acted as an accomplice in the commission of the murder of Mr. M. C., the attempted homicide against Mr. I. P. and the attempted life-threatening bodily harm against Mr. Z. S.

The above multiple complicity could be punished with a sentence of up to 20 years of imprisonment, hence, the Curia reversed the lighter criminal sanction unlawfully applied by the court of second instance and raised the prison term of the third accused from 8 to 13 years.

The Curia also found that some of the imputed acts of the first accused had been mistakenly qualified, but it had no competence in the judicial review proceedings to implement

unsubstantial modifications concerning the prison term of the first accused. Finally, the Curia confirmed the provisions of the final judgement as regards the second accused.

No further appeal lies against the judgement of the highest instance judicial forum.[1438]

8.3. Battery (CC 164. §)

(1) Any person who causes bodily harm to or injures the health of another person is guilty of battery.

(2) If the injury or illness caused by battery takes less than eight days to heal, the perpetrator is guilty of the misdemeanor of simple battery punishable by imprisonment not exceeding two years.

(3) If the injury or illness caused by battery takes more than eight days to heal, the perpetrator is guilty of the felony of aggravated battery punishable by imprisonment not exceeding three years.

(4) The penalty for a felony shall be imprisonment not exceeding three years if the simple battery is committed:

a) with malice aforethought or with malicious motive;

b) against a person incapable of self-defense or unable to express his will; or

c) against a person whose ability to defend himself is diminished due to his old age or disability.

(5) The penalty shall be imprisonment between one to five years if the simple battery results in permanent disability or serious health impairment.

(6) The penalty shall be imprisonment between one to five years, if the aggravated battery is committed:

a) with malice aforethought or with malicious motive;

b) against a person incapable of self-defense or unable to express his will;

c) against a person whose ability to defend himself is diminished due to his old age or disability;

d) causing permanent disability or serious health impairment;

e) with particular cruelty

(7) Any person who engages in preparations for the criminal act referred to in Subsection (3) or (6) is guilty of a misdemeanor punishable by imprisonment not exceeding one year.

(8) The penalty shall be imprisonment between two to eight years if the battery is life-threatening or results in death.

(9) Any person who commits aggravated battery by way of negligence shall be punishable for misdemeanor by imprisonment:

a) not exceeding one year in the case defined in Subsection (3);

b) not exceeding three years in the cases defined in Paragraphs b)-c) of Subsection (6);

c) not exceeding five years in the case of causing a life-threatening injury.

1438 Budapest, the 26th of November 2012. In: Communication concerning the decision of the Curia of Hungary in the criminal case nº Bfv.III.868/2012. https://kuria-birosag.hu/sites/default/files/selected_case_law/criminal_case_september_2012.pdf (07.03.2024.)

(10) The perpetrator of the criminal offense defined in Subsection (2) shall only be prosecuted upon private motion.

Legal case: The first and third accused lived in a common household with their son, the second accused, and his minor child, the victim, for whom the guardianship office ordered an adoption by the maternal grandparent, the first accused, and appointed the first accused as the victim's guardian. The child was in excellent health and physical condition. The minor victim was a pupil at the local primary school, he regularly got into fights with and abused his classmates, and he did not pay attention in class, thus disrupting the order of education and the learning process of his peers. As a punishment for the misbehaviour of the minor victim, the first and second accused treated him in an abusive, humiliating, rude and violent manner by constantly using obscene words and expressions and threatening to beat him. The first and second accused abused the victim because of his misbehaviour, pranks and other minor discipline issues by striking him in the face with the palm of their hand with small force in the yard of their property and in the street in front of their house, and the first accused struck him on the back with a thin stick with small force on several occasions. As a punishment, the first accused also refused to feed the minor victim or only gave him scraps of food two or three times a month.

As a separate factual element, the final judgment established that, on the day of the commission of the criminal offence, the first accused had an argument with the 12-year-old minor victim because of the escape of a dog and the regular complaints from the school. On their way home, the first accused threatened to beat the child on the street. Upon their return home, the minor victim wanted to go to a nearby fishing pond without the permission of the first accused. As a result of the above, the first, second and third accused began to argue with and shout loudly at the minor victim. The minor victim and the second accused then went out into the street in front of the house, and the second accused held the minor victim by his sweater and lifted him up to his head, then dropped him to the ground and kicked him several times on the back with little force. Subsequently, the first and third accused also went out into the street and the first accused hit the victim several times with a wooden stick in his hand with low to medium force all over his body.

The third accused then took a tool consisting of a wooden handle and a metal point in his hands and started waving it threateningly towards the abdomen and then, due to a rotating movement, the back of the minor victim, who was 2-2.5 metres away, in order to intimidate him. In the meantime, he shouted to the other accused persons by saying the followings: "Kill this faggot motherfucker!". The minor victim ran away from the scene in fear. The second accused ran after the minor victim, caught up with him at a street intersection and hit him several times with a wooden stick with low to medium force on the back and head. The minor victim was crying and screaming for help, while the first and third accused were in the street and were shouting obscene words at him. Hearing the incident, the minor victim's mother went out into the street from her own residence and told her former partner, the second accused, not to hit the victim or she would inform the police. On hearing the mother's threating words, the second accused abandoned his actions and went home. The defiantly anti-social and violent behaviour of the first, second and third accused was capable of causing panic and indignation in those who observed their conduct.

In its judgment, the High Court of Debrecen found the first, second and third accused guilty of the misdemeanour of battery, which they committed as co-perpetrators [section 164, subsections (1) and (2) of the Criminal Code], and the felony of public nuisance, which they also committed as co-perpetrators [section 339, subsection (1), subsection (2), points a) and d) of the Criminal Code], therefore the court imposed a cumulative fine of 100 daily units – the amount of one daily unit being 1 000,- HUF – on the first, second and third accused as recidivists.

Acting as a court of second instance to deal with the parties' appeals, the Regional Appellate Court of Debrecen reversed the judgment of the court of first instance. The appellate court also established the guilt of the first, second and third accused for the felony of endangering a minor [section 208, subsection (1) of the Criminal Code]. In addition, the appellate court changed the classification of the criminal offence of battery in respect of the first, second and third accused, and requalified their conduct as the felony of attempted battery [section 164, subsections (1) and (3) of the Criminal Code]. The criminal sanction imposed on the first accused was increased to 60 days' imprisonment, while the criminal sanctions imposed on the second and third accused were increased to 1 year 6 months' imprisonment and 3 years' exclusion from public affairs. The appellate court found that the second and third accused were recidivists and therefore they could not be released on parole from their custodial sentence.

Acting as a court of third instance to deal with the second-instance appeals of the first, second and third accused and their defence attorneys, the Curia of Hungary upheld the judgment of the Regional Appellate Court of Debrecen in respect of the first, second and third accused.[1439]

8.4. Professional Misconduct (CC 165. §)

(1) Any person who engages in misconduct in the course of engaging in his profession, thus causing imminent danger to the life, bodily integrity or health of another person or persons by his failure to act with reasonable care, or causes bodily harm, is guilty of a misdemeanor punishable by imprisonment not exceeding one year.

(2) The penalty shall be:

a) imprisonment for up to three years if the criminal offense results in permanent physical disability or a serious health impairment, or a mass catastrophe;

b) imprisonment between one to five years if the crime results in death;

c) imprisonment between two to eight years if the criminal offense results in the death of two or more persons or in a fatal mass catastrophe.

(3) Any person who is responsible for causing imminent danger willfully is guilty of a felony punishable by imprisonment not exceeding three years in the case of Subsection (1), or by imprisonment between one to five years, between two to eight years, or between five to ten years in the case of Subsection (2), taking into account the distinction made therein.

1439 Budapest, 9 March 2022. In: Communication concerning the decision of the Curia of Hungary in criminal case number Bhar.I.1059/2021. https://kuria-birosag.hu/sites/default/files/selected_case_law/criminal_case_january_2022.pdf (05.03.2024.)

(4) For the purposes of this Section, rules of a profession shall also cover the rules relating to the use and handling of firearms, blasting agents and explosives.

Legal case: The first instance court found the first and second accused guilty of causing danger by professional misconduct [Article 171, paragraph (1) and paragraph (2), point c) of Act nº IV of 1978 on the Criminal Code], therefore it sentenced both of the accused to two years and eight months' imprisonment, suspended for two years' probation, and to two years' disqualification from the practice of profession.

The second instance court changed the first instance decision and increased theimprisonment of the first accused to three years and four months, suspended the execution of half of the imprisonment for a probation period of two years and held that the accused cannot be released on parole in respect of the executable imprisonment.

The first accused, as the managing director of W.B. Ltd, ran a club which he hired out to D.M. Ltd for an event to be held on 15 January 2011. The contract was signed, however, not by the person authorised to sign it on the part of D.M. Ltd but by the third accused, a person in business contact with the person authorised to sign. The latter knew neither about the intention nor about the fact of signing. The second accused also took part in organising and running the event.

On 15 January 2011 there were music programmes both on the ground floor and on the third and fourth floors, near the staircase on the second floor there was a cloakroom. One and a half hours after the opening there was a huge crowd in the club (eight-ten times more than the number of people allowed according to the permission), and due to the continually arriving guests people were unable to move. Due to the small size of security staff the crowd could not be controlled properly and there were no guards at the stairs who could have ensured the flow of people. As a result people on the ground floor and the stairs were stuck, three persons on the stairs fell and died of suffocation and several people were lightly or seriously injured.

A petition for judicial review against the final decision was filed by the first and second accused. The first accused requested primarily acquittal, secondarily the discontinuation of the proceeding for lack of statutory charges, and thirdly the annulment of the final decision and an order to remit the case to the second instance court. The second accused requested primarily acquittal in lack of crime, secondarily a change in the qualification of the crime and lighter punishment.

The Curia did not find the petitions well-founded. It held that the first and second accused were organisers of the event concerned and – violating the rules of the profession – they did not provide security for the participants. The first accused was aware of the fact that the building was not suitable for a mass event but carelessly hoped that no emergency situation would arise, the second accused did not foresee the possibility of injurious consequences due to carelessness. Their criminal liability cannot be contested: there is a causal link between the breach of regulations and the serious result. Therefore, the Curia upheld the final decision with respect to the first and second accused.[1440]

1440 Budapest, the 15th of April 2014. In: Communication concerning the decision of the Curia of Hungary in criminal case nº Bfv.III.1.051/2013.
https://kuria-birosag.hu/sites/default/files/selected_case_law/criminal_case_march_2014.pdf (06.03.2024.)

8.5. Criminal offenses against health

8.5.1. Drug Trafficking (CC 176. § – 177. §)

CC 176. § (1) Any person who offers or supplies narcotic drugs or is engaged in the distribution or trafficking in narcotic drugs is guilty of a felony punishable by imprisonment between two to eight years.

(2) The penalty shall be imprisonment between five to ten years if the criminal act is committed:

a) in criminal association with accomplices;

b) by a public official or a person entrusted with public functions, acting in such official capacity; or

c) in any facility of the Hungarian Armed Forces or law enforcement agencies, or the facilities of the Nemzeti Adó- és Vámhivatal (National Tax and Customs Authority).

(3) The penalty shall be imprisonment between five to twenty years or life imprisonment if the criminal act is committed in respect of a substantial quantity of narcotic drugs.

(4) Any person who provides material assistance for the criminal acts defined in Subsections (1)-(3) shall be punishable as set forth therein.

(5) Any person who offers or supplies a small quantity of narcotic drugs shall be punishable:

a) for a misdemeanor by imprisonment not exceeding two years in the case of Subsection (1);

b) by imprisonment between one to five years in the cases defined in Paragraphs b)-c) of Subsection (2).

(6) Any person who:

a) is engaged in preparations for the criminal offenses defined in Subsections (1) and (2) is punishable by imprisonment not exceeding three years;

b) is engaged in preparations for the criminal offense defined in Subsection (3) is punishable by imprisonment between one to five years.

CC 177. § (1) Any person over the age of eighteen years who:

a) offers or supplies narcotic drugs to a person under the age of eighteen years;

b) is engaged in the distribution of or trafficking in narcotic drugs by using a person under the age of eighteen years;

c) inside or in the proximity of a building serving the purpose of education, public learning, child welfare or child protection activities:

ca) offers or supplies narcotic drugs,

cb) engaged in the distribution of or trafficking in narcotic drugs,

is guilty of a felony punishable by imprisonment between five to ten years.

(2) The penalty shall be imprisonment between five to twenty years or life imprisonment if the criminal act is committed:

a) in respect of a substantial quantity of narcotic drugs;

b) in criminal association with accomplices;

c) by a public official or a person entrusted with public functions, acting in such official capacity.

(3) Any person who provides material assistance for the criminal acts defined in Subsections (1)-(2) shall be punishable as set forth therein.

(4) Any person who commits the criminal offense defined in Paragraph a) or Subparagraph ca) of Subsection (1) in respect of a small quantity of narcotic drug is punishable by imprisonment between one to five years, or between two to eight years if committed by a public official or a person entrusted with public functions, acting in such official capacity.

(5) Any person who engages in preparations for the criminal act described in Subsection (1) or (2) is punishable by imprisonment not exceeding three years.

8.5.2. Possession of Narcotic Drugs (CC 178. § - 180. §)

CC 178. § (1) Any person who produces, manufactures, acquires, possesses, imports or exports, or transports narcotic drugs in transit through the territory of Hungary is guilty of a felony punishable by imprisonment between one to five years.

(2) The penalty shall be:

a) imprisonment between two to eight years, if the criminal offense is committed:

aa) on a commercial scale,

ab) in criminal association with accomplices,

ac) by a public official or a person entrusted with public functions, acting in such official capacity;

b) imprisonment between five to ten years if the criminal act is committed in respect of a substantial quantity of narcotic drugs;

c) imprisonment between five to fifteen years if the criminal act is committed in respect of a particularly substantial quantity of narcotic drugs.

(3) Any person who provides material assistance for the criminal acts defined in Subsections (1)-(2) shall be punishable as set forth therein.

(4) Any person who engages in preparations for the criminal acts described in Subsections (1)-(2) is guilty of a felony punishable by imprisonment not exceeding three years.

(5) If the criminal act is committed in respect of a small quantity of narcotic drugs, the penalty shall be:

a) for a misdemeanor imprisonment not exceeding two years in the case of Subsection (1);

b) imprisonment not exceeding three years in the cases defined in Subparagraphs aa) and ac) of Subsection (2).

(6) Any person who consumes narcotic drugs, or acquires or possesses a small quantity of narcotic drugs for own consumption is guilty of a misdemeanor punishable by imprisonment not exceeding two years, insofar as the act did not result in a more serious criminal offense.

CC 179. § (1) Any person over the age of eighteen years who produces, manufactures, acquires or possesses narcotic drugs:

a) by using a person under the age eighteen years; or

b) inside or in the proximity of a building serving the purpose of education, public learning, child welfare or child protection activities;

is guilty of a felony punishable by imprisonment between two to eight years.

(2) Any person over the age of eighteen years who, by using a person under the age of eighteen years, imports or exports, or transports narcotic drugs in transit through the territory of Hungary is punishable in accordance with Subsection (1).

(3) The penalty shall be:

a) imprisonment between five to ten years if the criminal offense is committed:

aa) in criminal association with accomplices,

ab) on a commercial scale,

ac) by a public official or a person entrusted with public functions, acting in such official capacity;

b) imprisonment between five to ten years if the criminal act is committed in respect of a substantial quantity of narcotic drugs;

c) imprisonment between five to twenty years or life imprisonment if the criminal act is committed in respect of a particularly substantial quantity of narcotic drugs.

(4) Any person who provides material assistance for the criminal acts defined in Subsections (1)-(3) shall be punishable as set forth therein.

(5) Any person who engages in preparations for the criminal act described in Subsections (1)-(3) is guilty of a felony punishable by imprisonment not exceeding three years.

(6) If the criminal act is committed in respect of a small quantity of narcotic drugs, the penalty shall be for a felony:

a) imprisonment not exceeding three years in the cases of Subsections (1) and (2);

b) imprisonment between one to five years in the cases defined in Subparagraphs ab) and ac) of Subsection (3).

CC 180. § (1) Any person who produces, manufactures, acquires or possesses a small quantity of narcotic drugs for own consumption shall not be prosecuted if the perpetrator has admitted to have committed the criminal offense and if able to produce a document before being sentenced in the first instance to verify that he has been treated for drug addiction for at least six consecutive months or that he has participated in a drug rehabilitation program or a preventive-consulting service relating to dependency.

(2) The provisions of Subsection (1) shall not apply if inside a period of two years before the criminal offense was committed:

a) prosecution was deferred, and/or the investigation or the proceedings was suspended upon the perpetrator having agreed to receive treatment for drug addiction or to participate in a drug rehabilitation program or a preventive-consulting service relating to dependency, or

b) the perpetrator was found guilty of unlawful drug trafficking or possession of narcotic drugs.

(3) In the cases provided for in Subsections (1), (5)-(6) of Section 178 and in Subsections (1) (2) and (6) of Section 179, if Subsection (1) does not apply, the penalty may be reduced without limitation if the perpetrator provides information for the identification of the dealer of narcotic drugs before being indicted.

Legal case 1.: In the apartment he occupied, the accused person kept 146.2 grams net weight of cannabis (with a total THC-content of 6.84 grams) and 13 pills of pentedrone (with a net weight of 6.66 grams), a digital scale contaminated with delta-9-THC and a

Chinese pressing machine marked TDP 1.5 t. The pentedrone pills found on the accused person were made by a person who remained unknown during the proceedings by way of using the pressing machine seized from the accused person. The latter consumed a small quantity of the cannabis he had obtained.

The court of first instance sentenced the accused person to three years' imprisonment and three years of prohibition from public affairs for the crime of drug abuse [section 282, subsection (1) of the former Criminal Code] as a multiple recidivist, with the proviso that the accused person could not be released on parole from the sentence imposed. Acting upon an appeal submitted by the accused person and his defence attorney, the court of second instance overturned the judgment of the court of first instance and reduced the sentence to one year and 10 months' imprisonment. The remainder of the first instance judgment was upheld by the court of second instance.

The accused person filed a petition for judicial review against the final on-the-merits decision, arguing that the impugned judgment had convicted him of drug trafficking in violation of the speciality rule set out in section 30, subsection (1) of Act number CLXXX of 2012 on Criminal Cooperation with the Member States of the European Union (hereinafter referred to as the EU Criminal Cooperation Act).

The Curia of Hungary found the petition for judicial review to be unfounded. In fact, the accused person's objections formulated in his petition for judicial review could be considered to meet the grounds for judicial review under section 649, subsection (2), point f) of the currently applicable Code of Criminal Procedure.

The judicial review procedure is governed by the provisions of the currently applicable Code of Criminal Procedure (Court Decisions number 2019.103). Section 30, subsection (1) of the EU Criminal Cooperation Act has already stipulated with temporal effect for the entire duration of the main proceedings that the transferred person may not be prosecuted, convicted or otherwise deprived of his or her liberty for an offence committed before the transfer other than the offence on the basis of which the transfer was made, with the exceptions listed in subsection (2). However, the statutory provisions on international cooperation in criminal matters and on criminal cooperation with the Member States of the European Union do not fall within the scope of the rules of substantive criminal law and within the scope of procedural infringements that give rise to the unconditional quashing of the impugned criminal court decision (Court Decisions of Principle number 2013.B.4).

Section 721/A of the Code of Criminal Procedure contains the relevant provisions governing the exemption based on the speciality rule with effect from 1 January 2021. However, they can be interpreted only in accordance with the other provisions governing the judicial review procedure, such as section 659, subsection (2) of the Code of Criminal Procedure.

The Code of Criminal Procedure in force at the time of the delivery of the final judgment at second instance did not provide for the unconditional quashing of the impugned judgment as a legal consequence of the infringement of the rule of speciality. Accordingly, under the criminal procedural law in force at the time of the delivery of the impugned judgment, the alleged breach of the law could be assessed as a so-called relative procedural infringement under section 609, subsection (1) of the Code of Criminal Procedure, which could not result in an unconditional quashing, and therefore could not be remedied in the judicial review proceedings.

The rules of section 721/A of the Code of Criminal Procedure in force as of 1 January 2021 only in accordance with section 659, subsection (2) thereof were not applicable in the judicial review proceedings at hand. Factual and legal changes that occurred after the contested decisions became final cannot be taken into account in the judicial review procedure, even if they are in favour of the accused (Court Decisions of Principle number 2011.2305).

For the reasons set out above, the Curia of Hungary dismissed the petition for judicial review and upheld the impugned court decision.[1441]

Legal Case 2.: In its order taking effect on 2 February 2011, the Pest Central Districts Court placed the juvenile accused on a one-year long probation with the appointment of a probation officer on account of drug abuse [Article 282, paragraph (1), and paragraph (5), point a) of Act nº IV of 1978 on the Criminal Code] committed on 30 January 2007. In its judgement taking effect on 5 April 2013, the Court of Budapest Districts XX, XXI and XXIII found the juvenile accused guilty of public nuisance, and setting aside the probation ordered by the Pest Central Districts Court and joining it with the criminal case before it, it found the accused guilty of drug abuse too. Therefore, it imposed a cumulative punishment on the accused and sentenced him to twelve days of community service.

The Metropolitan Chief Prosecutor petitioned a motion for judicial review in favour of the accused under Article 416, paragraph (1), point a) of the Code of Criminal Procedure. It argued that since the Pest Central Districts Court as a juvenile court placed the accused on a one-year long probation on 2 February 2011 for drug abuse and the Court of Budapest Districts XX, XXI and XXIII convicted the accused only on 5 April 2013 for public nuisance committed on 29 March 2007 (before probation), the latter court proceeded in contravention of Article 73, paragraph (2) of the Criminal Code in respect of drug abuse. Therefore it requested the Curia to change the decision. According to the Prosecutor General the argumentation of the motion for judicial review was well-founded and added a further argument for judicial review in respect of the offence of public nuisance.

The Curia also found the motion for judicial review well-founded. In terms of the Criminal Code that was in force when the disputed decision was taken, probation shall be terminated and punishment shall be imposed if the person placed on probation is convicted during the probation period for a crime committed before the probation period. The order placing the juvenile accused on probation was taken by the Pest Central Districts Court on 2 February 2011 and the one-year long probation period terminated on 1 February 2012. The juvenile accused committed the criminal act of public nuisance leading to another criminal procedure before the probation period, on 29 March 2007, on account of which a punishment was imposed on him only on 5 April 2013, after the probation period had terminated.

Since the court did not make a decision on the crime committed before the probation period until the end of the probation period, the punishability of the accused terminated in respect of drug abuse with the end of the probation period. Therefore, there was no statutory basis for setting aside the decision on probation and for imposing a cumulative sentence on the accused that contained punishment for the offence of drug abuse.

1441 Budapest, 27 April 2022. In: Communication concerning the decision of the Curia of Hungary in criminal case number Bfv.II.505/2021.
https://kuria-birosag.hu/sites/default/files/selected_case_law/criminal_case_april_2022.pdf (03.03.2024.)

According to the facts of the case as established by the judgement of the Court of Budapest Districts XX, XXI and XXIII, the juvenile accused punched the fifteen-year old victim in the face after the latter had asked him to justify an earlier made statement. The victim's nose started to bleed as a result of the punch. The judgement argued that the act of the accused was capable of raising indignation and fear in others. Under Article 271, paragraph (1) of the Criminal Code the person "who displays an apparently anti-social and violent conduct aiming to incite indignation or fear in other people is guilty of public nuisance, if such act does not result in a criminal act of greater gravity". The Prosecutor General pointed out that anti-social conduct as included in the statutory definition of public nuisance means a conduct that consciously disregards the rules of social life and endangers public peace, therefore, not every violent act that raises indignation or fear in others shall be regarded as "apparently anti-social".

The conduct of the juvenile accused cannot be considered "apparently anti-social" which is a condition of public nuisance. His conduct was rather an act of light bodily harm as defined in Article 170, paragraph (1) of the Criminal Code, however, the prosecutor's office terminated the investigation in respect of light bodily harm against the accused.

That is, the juvenile accused was held guilty of public nuisance and punishment was imposed on him in contravention of the rules of criminal substantive law. The Curia changed the decision of the Court of Budapest Districts XX, XXI and XXIII, it acquitted the accused of the charge of public nuisance in default of the criminal act, it quashed the provisions that set aside probation as ordered by the Pest Central Districts Court as well as the provisions on declaring the accused guilty of drug abuse and the provisions imposing a penalty for that crime, at the same time it separated the case that led to probation from the present proceeding.[1442]

8.6. Trafficking in Human Beings (CC 192. §)

(1) Any person who:

a) sells, purchases, exchanges, or transfers or receives another person as consideration; or

b) transports, harbors, shelters or recruits another person for the purposes referred to in Paragraph a), including transfer of control over such person; is guilty of a felony punishable by imprisonment not exceeding three years.

(2) Any person who - for the purpose of exploitation - sells, purchases, exchanges, supplies, receives, recruits, transports, harbors or shelters another person, including transfer of control over such person, is punishable by imprisonment between one to five years.

(3) The penalty shall be imprisonment between two to eight years if trafficking in human beings is committed:

a) against a person held in captivity;

b) by force or by threat of force;

c) by deception;

1442 Budapest, the 12th of June 2014. In: Communication concerning the decision of the Curia of Hungary in criminal case nº Bfv.I.182/2014.
https://kuria-birosag.hu/sites/default/files/selected_case_law/criminal_case_may_2014.pdf (06.03.2024.)

d) by tormenting the aggrieved party;

e) against a person who is in the care, custody or supervision of or receives medical treatment from, the perpetrator, or if abuse is made of a recognized position of trust, authority or influence over the victim;

f) for the unlawful use of the human body;

g) by a public official, acting in an official capacity;

h) in criminal association with accomplices; or

i) on a commercial scale.

(4) The penalty shall be imprisonment between five to ten years, if:

a) the criminal offense provided for in Subsection (2) is committed against a person under the age of eighteen years;

b) the criminal offense provided for in Subsection (2) is committed against a person held in captivity, and either of the aggravating circumstances under Paragraphs b)-i) of Subsection (3) apply; or

c) the criminal offense provided for in Subsection (2) results in particularly great damage or danger to life.

(5) The penalty shall be imprisonment between five to fifteen years if:

a) the criminal offense provided for in Subsection (2) is committed against a person under the age of fourteen years;

b) the criminal offense provided for in Subsection (2) is committed against a person under the age of eighteen years, and either of the aggravating circumstances under Subsection (3) apply;

c) the criminal offense provided for in Subsection (2) is committed against a person under the age of eighteen years, and results in particularly great damage or danger to life; or

d) the criminal offense provided for in Subsection (2) is committed against a person under the age of eighteen years for the purpose of child pornography.

(6) The penalty shall be imprisonment between five to twenty years or life imprisonment if:

a) the criminal offense provided for in Subsection (2) is committed against a person under the age of fourteen years, and either of the aggravating circumstances under Subsection (3) apply;

b) the criminal offense provided for in Subsection (2) is committed against a person under the age of fourteen years, and results in particularly great damage or danger to life; or

c) the criminal offense provided for in Subsection (2) is committed against a person under the age of fourteen years for the purpose of child pornography.

(7) Any person who engages in preparations for trafficking in human beings is guilty of misdemeanor punishable by imprisonment not exceeding two years.

(8) In the application of this Section, 'exploitation' shall mean the abuse of power or of a position of vulnerability for the purpose of taking advantage of the victim forced into or kept in such situation

Legal case 1.: According to the facts of the case, the first accused "sold" his sister, a person verging on the border of low and medium level mental retardation, for the price of 40 000,- HUF to the fourth accused and his co-perpetrators who intended to exploit the victim as

a prostitute outside Hungary, made photographs of her and transmitted them to unknown addressees via Internet. The accused persons took away the victim's identity papers, did not let her leave her place of stay without being accompanied by one of them, then transported her to Italy where, during her four-day long stay, she was forced to dance in a bar while hardly wearing any clothes to entertain the bar's male clients and was subjected to sexual violence. The victim was forced to accept her fate by the accused persons' continuous threat that her eventual opposition would lead to his brother, the first accused assaulting, "getting" her.

By virtue of Directive 2011/36/EU, exploitation shall also mean taking advantage of another person' s prostitution.

With regard to the above, the courts seized with the case correctly established that the accused persons had committed the criminal offence of trafficking in human beings as defined in section 192, subsection (2) of the Criminal Code.

Since the accused persons took away the victim's identity papers, did not let her leave her place of stay without being accompanied by one of them, then transported her to Italy, and the victim was subjected to continuous threats and was deprived of her personal liberty, the trafficking in human beings was committed to the detriment of a person deprived of her personal liberty. Hence, the high court and the regional appellate court correctly referred to section 192, subsection (3), point a) and subsection (4), point b) of the Criminal Code both in the operative and reasoning part of their judgement.

On the other hand, the lower instance courts failed to qualify the impugned criminal offence as one committed by threat of force as well.

According to the facts of the case, the accused persons also used threats on the victim for the purposes of her exploitation, and, with special regard to her mental retardation, the threats – the prospect of his brother assaulting and "getting" her – were evidently so serious that they were capable of making her fearful in compliance with the condition laid down in section 459, subsection (1), point 7 of the Criminal Code.

Hence, the criminal offence committed by the fourth accused had to be re-qualified and a more serious sanction had to be imposed on him by the Curia on the basis of section 192, subsection (2), subsection (3), points a) and b) and subsection (4), point b) of the Criminal Code.[1443]

Legal case 2.: In the criminal proceedings initiated against Mr. M and his accomplices for trafficking in human beings, the defence attorney of the second accused submitted a petition for judicial review to the Curia of Hungary which upheld – as regards the second accused – the judgement of the Municipal Court of Sopron and the second instance order of the County Court of Győr-Moson-Sopron.

In its judgement, the Municipal Court of Sopron found the second accused guilty of trafficking in human beings by providing aid, for financial gain and in a pattern of business operation within the framework of a criminal organisation, to multiple persons for crossing the state borders in an unauthorised manner [Article 218, paragraph (1), point b), and paragraph (3), point c) of the Criminal Code].

1443 Budapest, the 6th of September 2017. In: Communication concerning the decision of the Curia of Hungary in criminal case n° Bfv.I.81/2017. https://kuria-birosag.hu/sites/default/files/selected_case_law/criminal_case_september_2017.pdf (06.03.2024.)

Acting as an appellate court, the County Court of Győr-Moson-Sopron confirmed the first instance judgement concerning the second accused, and held that the incriminated acts constituted the crime of trafficking in human beings as defined by Article 218, paragraph (1), point b), paragraph (2), points a-b), and paragraph (3), point c) of the Criminal Code.

The factual background of the case can be summarised as follows: between May and October 2007, the accused persons provided aid, for financial gain, to Serbian migrants for crossing the Hungarian-Austrian border in an unauthorised manner, organised their illegal entry into Italy or transported them to their places of accommodation in Hungary. The first, second, fourth and fifth accused transported the illegal migrants to the close vicinity of the Hungarian-Austrian border. The first accused, in co-operation with the second accused, arranged the crossing of state borders. The transportation of migrants to Italy was aided by the sixth accused.

The defence attorney of the second accused submitted a petition for judicial review against the first and second instance decisions and put forward the following arguments: Hungary aligned to the provisions of the Schengen Borders Code on 21 December 2007 by placing its Schengen borders from the western regions to the eastern and southern frontiers, and eliminating border controls at the Hungarian-Austrian border. Since the above date, Hungary has been bound by the Regulation n° 562/2006/EC of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (also known as the Schengen Borders Code, hereinafter referred to as the Regulation). The Regulation and its annexes provide for internal and external borders. Article 20 of the Regulation stipulates that internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out. Consequently, the control of persons has been abolished at the Hungarian-Austrian border, being an internal border within the meaning of the above Article.

The defence attorney argued that the crime of trafficking in human beings could have been committed only at the external borders of the Schengen Area. The legal representative of the second accused also pointed out that persons, who provided aid to foreign nationals illegally residing in the territory of any Member State of the European Union for crossing the internal borders of the Schengen Area, could only commit the crime of aiding in illegal residence as defined by Article 214/A of the Criminal Code.

The General Prosecution Service motioned for the Curia to reject the petition for judicial review. The prosecution explained that the definition of the crime of trafficking in human beings had not changed during criminal proceedings, and the commission of such crime remained punishable by the Criminal Code. As a result of Hungary's accession to the Convention implementing the Schengen Agreement, the amended provisions of the Criminal Code regulated that Hungarian nationals who provided aid, within the territory of Hungary or abroad, to other persons for crossing the state borders in an unauthorised manner, as well as foreign nationals who provided aid within the territory of Hungary to other persons for crossing the state borders in an unauthorised manner should be punishable for the commission of trafficking in human beings. The prosecution noted that the act of trafficking could be committed not only in the vicinity of state borders, but anywhere in or outside the territory of the country as well, consequently the decisions of the lower instance courts were justified concerning the second accused.

With regard to the above arguments, the General Prosecution Service motioned for the Curia to uphold the first and second instance decisions.

The Curia agreed with the motion tabled by the General Prosecution Service and rejected the petition for judicial review. By virtue of Article 218, paragraph (1) of the Criminal Code, persons who provide aid to other persons for crossing the state borders (of Hungary or any other country) without authorisation or in an unauthorised manner shall be punishable for the commission of trafficking in human beings.

The incriminated acts, enlisted in Article 218 of the Criminal Code, are considered criminal offences, not because the perpetrator violates the imaginary border-line between different countries, but because they violate or threaten state sovereignty.

The provisions of the Regulation shall be applicable to all persons crossing the internal or external borders of the Member States of the European Union.

Article 1 of the Regulation sets out as a general principle that the Regulation shall provide for the absence of border control of persons crossing the internal borders between the Member States of the European Union. Article 2 of the Regulation gives the definitions of the key terms. With regard to the present case, the Curia emphasises the following definitions: Article 2, point 1 – internal borders means: (a) the common land borders, including river and lake borders, of the Member States; (b) the airports of the Member States for internal flights; (c) sea, river and lake ports of the Member States for regular ferry connections. Article 2, point 2 – external borders means the Member States' land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders. Article 2, point 6 – third-country national means any person who is not a Union citizen within the meaning of Article 17, paragraph (1) of the Treaty and who is not covered by point 5 of this Article (persons enjoying the Community right of free movement).

The Curia stated that the arguments put forward by the defence attorney of the second accused were unjustified. Pursuant to the correct interpretation of Article 11 of the Act n° LXXXIX of 2007 on the State Border (hereinafter referred to as the State Border Act), border checks on European citizens and non-European citizens at the internal borders of the Schengen Area are eliminated, however, the absence of crossing points and the lack of controls over border-crossers do not exempt persons from fulfilling the required entry conditions.

Hence, the creation of internal borders within the Schengen Area have not resulted in abolishing state borders, it only led to the elimination of border controls of persons at the internal borders. Article 5 of the Regulation provides for the entry conditions for third-country nationals.

The Curia points out the importance of the following three conditions: a) third-country nationals shall be in possession of a valid travel document or documents authorising them to cross the border; b) they shall be in possession of a valid visa or a valid residence permit; c) they shall justify the purpose and conditions of the intended stay, and they shall have sufficient means of subsistence.

Crossing the state borders in an unauthorised manner means that the perpetrator violates the legal rules governing the movement of persons across borders. With regard to Article 11 of the State Border Act, if foreign nationals seeking to enter the country do not meet the relevant entry conditions, their residence in Hungary shall be considered illegal.

In this case, the movement of foreign nationals across state borders shall be qualified unlawful, regardless of whether border checks are carried out at the frontiers. Thus, the absence of border controls does not exempt foreign nationals from fulfilling the required entry conditions.[1444]

8.7. Sexual violence (CC 197. §)

(1) Sexual violence is a felony punishable by imprisonment between two to eight years if committed:

a) by force or threat against the life or bodily integrity of the victim;

b) by exploiting a person who is incapable of self-defense or unable to express his will, for the purpose of sexual acts.

(2) Sexual violence shall also include, and the penalty shall be imprisonment between five to ten years if the perpetrator commits a sexual act upon a person under the age of twelve years, or forces such person to perform a sexual act.

(3) The penalty shall be imprisonment between five to ten years if the criminal act described in Subsection (1) is committed:

a) against a person under the age of eighteen years;

b) by a family member or against a person who is in the care, custody or supervision of or receives medical treatment from, such family member, or if abuse is made of a recognized position of trust, authority or influence over the victim; or

c) by more than one person on the same occasion, in full knowledge of each other's acts.

(4) The penalty shall be imprisonment between five to fifteen years if:

a) the criminal offense defined in Paragraph a) of Subsection (1) and in Paragraph b) or c) of Subsection (3) is committed against a person under the age of twelve years; or

b) the provisions of Paragraph b) or c) of Subsection (3) also apply to the criminal offense defined in Paragraph a) of Subsection (3).

(5) Any person who provides the means necessary for or facilitating the commission of sexual violence is guilty of a felony punishable by imprisonment not exceeding three years.

Legal case: The 52-year-old accused person had been sexually abusing, for about six months, an 8-year-old child, who had been periodically accommodated and looked after by him, by way of committing and having his victim carry out sexual acts for the satisfaction of his sexual desire and by forcing his victim, on one occasion, to watch an adult erotic movie with him.

The court of first instance, hence, found the accused guilty of sexual violence committed continuously against a person in his care and under the age of twelve years [section 197, subsection (2), subsection (3) and subsection (4), point a), part II of the Criminal Code] and imposed a seven years imprisonment on him.

The court of second instance modified the first instance judgement and found the accused also guilty of the crime of abuse of a minor [section 208, subsection (1) of the

1444 Budapest, the 18th of February 2013. In: Communication concerning the decision of the Curia of Hungary in the criminal case nº Bfv.II.573/2012/5. https://kuria-birosag.hu/sites/default/files/selected_case_law/criminal_case_january_2013.pdf (06.03.2024.)

Criminal Code], and consequently aggravated his punishment by cumulatively sentencing him to an eight years and six months imprisonment. On the other hand, the appellate court prescribed the type of incarceration one degree down.

Since the court of second instance found the accused guilty of a criminal offence that had not been previously examined by the court of first instance, the provisions of section 386, subsection (1), point b) of the Code of Criminal Procedure opened the way for third instance appellate proceedings.

Proceeding upon the third instance appeals submitted by the accused and his defence attorney, the Curia modified the second instance judgement and, based on the pieces of evidence correctly assessed by the lower instance courts, decided to abandon the factual elements referring to the accused person's aggressive conduct. With regard to the above and the fact that, as a result of the Constitutional Court's decision (decision no. 19/2017 AB of 18 July 2017) to declare the Curia's uniformity decision no. 2/2016 BJE unconstitutional, the Curia quashed the latter by uniformity decision no. 1/2017 BJE, the supreme judicial forum re-qualified the crime of sexual violence committed by the accused to make it fall under the less severe provisions of section 197, subsection (2) of the Criminal Code.

The Curia, however, established that there was no possibility for the alleviation of the criminal sanctions imposed on the accused, as the re-qualification had no impact on the applicable legal framework of imprisonment.[1445]

8.8. Living on Earnings of Prostitution (CC 202. §)

Any person who supports himself wholly or in part from the earnings of a person engaging in prostitution is guilty of a felony punishable by imprisonment not exceeding three years.

Legal case: In its judgement n° 6.B.488/2009/158 delivered on 10 February 2011, the County Court of Jász-Nagykun-Szolnok condemned the sixth accused for committing, as a co-perpetrator, the crimes of trafficking in human beings [Article 175/B, paragraph (1) and paragraph (2), points a) and d) of the Criminal Code] and living on earnings of prostitution [Article 206 of the Criminal Code]; consequently imposed a term of imprisonment of three years on the sixth accused and deprived him of his civil rights for an additional three years. The term of imprisonment was reduced by the accused person's pre-trial detention period, in addition, he was obliged to pay the criminal costs. With its judgement n° Bf.II.428/2011/35 rendered on 12 December 2011, the Regional Appellate Court of Debrecen modified the first instance court decision, partially re-qualified the imputed acts of the sixth accused as regards the crime of trafficking in human beings [Article 175/B, paragraph (2), points a) and d), and paragraph (4), point a) of the Criminal Code], and further reduced the imposed term of imprisonment by the accused person's pre-trial detention time elapsed between the delivery of the first and second instance judgements.

According to the facts of the case, the second and fifth accused sold the victim to the sixth accused, enabling him to obtain earnings from the victim's prostitution activities.

1445 Budapest, the 10th of January 2018. In: Communication concerning the decision of the Curia of Hungary in criminal case n° Bhar.I.1018/2017.
https://kuria-birosag.hu/sites/default/files/selected_case_law/criminal_case_january_2018.pdf (05.03.2024.)

In November 2001, the victim had sexual intercourse with men on a regular basis in the apartment of the sixth accused, the prostitution-related earnings were given to the sixth accused who used them for personal purposes. As a sign of their failed business agreement, the first and second accused demanded money from the sixth accused who shortly after the conclusion of the "sales agreement" changed his mind and, on the basis of the victim's behaviour, no longer wished to employ the victim for prostitution purposes. The defence attorney of the sixth accused submitted a petition for judicial review against the final court decision, arguing that the lower instance courts had violated substantive criminal law and had acted without lawful indictment. The defence attorney pointed out that the findings according to which the sixth accused had purchased the victim from the second and fifth accused and those according to which the first and second accused had demanded money from the sixth accused due to the failure of their business agreement were contradictory, and this contradiction could lead to the conclusion that the sixth accused had not committed the crime of trafficking in human beings. Since the victim's testimony did not contain any relevant information and no evidence was gathered to prove the existence of the "sales agreement", the defence attorney emphasised that the sixth accused had only been given a mandate to take care of the victim, but could not handle her, and decided to give her back to the second accused; therefore due to the lack of mutual will no "sales agreement" had been concluded between the parties. Pursuant to Article 2, paragraph (2) of the Code of Criminal Procedure, the indictment shall be considered lawful if, in order to initiate court proceedings, the prosecution submits its accusatory instrument to the court against a particular person for the alleged commission of precisely determined acts that violate the provisions of the Criminal Code. In its criminal departmental opinion nº BKv 4, the Curia stressed that, with regard to Article 2, paragraph (4) of the Code of Criminal Procedure, the courts are not bound by the qualification of the imputed acts given by the prosecution, and are entitled at their discretion to re-qualify them; the indictment can be considered lawful even if it contains no specific reference to the violated provisions of the Criminal Code. If as a result of the taking of evidence the court deems that the aggravated case of the imputed criminal act can be established, it is entitled to examine the aggravated case – by respecting the principle of the identity of the imputed acts and the rules of competency – even in the absence of the modification of the indictment by the prosecution. Furthermore, the indictment included that the victim had been under the age of eighteen at the time the criminal acts had been committed, and it also precisely determined the victim's age. Consequently, the indictment judged by the impugned court decisions was completely lawful. The facts of the case demonstrate that the accused person undoubtedly committed the crimes of trafficking in human beings and living on earnings of prostitution, and his criminal liability for these two acts was established in accordance with the relevant provisions of substantive criminal law. Hence, in its court order nº Bfv.I.229/2013/6 delivered at its public hearing held on 11 June 2013, the Curia examined the petition for judicial review submitted by the defence attorney of the sixth accused, and upheld the first and second instance judgements as regards the sixth accused.[1446]

1446 Budapest, the 3rd of July 2013. In: Communication concerning the decision of the Curia of Hungary in the criminal case nº Bfv.I.229/2013.
https://kuria-birosag.hu/sites/default/files/selected_case_law/criminal_case_june_2013.pdf (06.03.2024.)

8.9. Violence Against a Member of the Community (CC 216. §)

(1) Any person who displays an apparently anti-social behavior against others for being part, whether in fact or under presumption, of a national, ethnic, racial or religious group, or of a certain societal group, in particular on the grounds of disability, gender identity or sexual orientation, of aiming to cause panic or to frighten others, is guilty of a felony punishable by imprisonment not exceeding three years.

(2) Any person who assaults another person for being part, whether in fact or under presumption, of a national, ethnic, racial or religious group, or of a certain societal group, in particular on the grounds of disability, gender identity or sexual orientation, or compels him by force or by threat of force to do, not to do, or to endure something, is punishable by imprisonment between one to five years.

(3) The penalty shall be imprisonment between two to eight years if violence against a member of the community is committed:

a) by displaying a deadly weapon;

b) by carrying a deadly weapon;

c) by causing a significant injury of interest;

d) by tormenting the aggrieved party;

e) in a gang; or

f) in criminal association with accomplices.

(4) Any person who engages in the preparation for the use of force against any member of the community is guilty of a misdemeanor punishable by imprisonment not exceeding two years.

Legal case: According to the summarised facts of the case, after leaving a catering establishment, the hugely drunk accused persons noticed a man with an African ethnic background, the victim to the present case, who was of Ivorian nationality and was given subsidiary protection in Hungary. The victim was walking towards the small railway station in the town of Bicske. The accused persons stopped him because of his racial and national origin and shouted at him the followings: "Black man, go back to Africa! Here is Hungary, not Africa!". Subsequently, the first accused slapped him in the face, then hit his raised arm and the side of his head. They prevented him from continuing his walk towards the railway station and made him turn around and run on Kossuth street. The accused persons followed him, then seemingly abandoned the chase, but finally came back to attack him again, while he, equipped with a 1.5 meter-long fence-post to counter the accused persons' eventual attacks, was seeking to reach the railway station once again. The first accused got behind him and stroke him from ambush. With the wooden fence-post, the self-defending victim broke the first accused person's left little finger and bruised his left shoulder blade. Being in a dominant position, the first accused took the fence-post away from the victim, who fled towards the railway station. The second accused joined the first accused and, in their indignation over the injuries suffered by the latter, they went to the railway station to pursue the victim. They noticed him and a couple of other persons of African origin at a railway platform. Upon seeing the accused persons approaching, the victim and the other African individuals fled and left their luggages behind. The first accused run after the victim, while the second accused tore one of the luggages apart, causing the clothing items

contained therein to fall onto the tracks. The first accused caught the victim, and hit him – by saying "You dared to hit me? You broke my finger! You're gonna die!" – several times with the fence-post, which broke into pieces. The second accused joined the aggression and kicked the victim several times, while he was lying defenceless between the tracks. They caused him a bleeding head injury and even knocked him out for a short period of time. They put him on the platform, then onto the tracks, but finally put him back on the platform by saying that "We are not murderers!". The victim suffered wounds that would heal within eight days. After completing their aggression, the accused persons sat down at the bottom of the station's pedestrian bridge near the lying victim. The police officers on the scene found and arrested them.

The lower instance criminal courts qualified the accused persons' acts as the criminal offence of violence against a member of a community based on the accused persons' hate crime-related motives on grounds of their racial, national and ethnic discrimination and hatred. The criminal offence was committed against the victim by way of assaulting, while the other persons of African origin at the platform were also subject to the same offence, which, in their regard, was committed by way of displaying an apparently anti-social behaviour against them for being part of a national, ethnic and racial group, aiming to cause panic or to frighten them.

Proceeding as a judicial review court, the Curia reviewed and modified some elements of the qualification of the criminal offences attributed to the first and second accused and rendered a new decision in compliance with the applicable legal provisions. The Curia took into account as a mitigating circumstance the accused persons' clean criminal record and the fact that the court proceedings had been significantly protracted for reasons out of their control, as more than three and a half years had elapsed between the commission of the impugned acts and the delivery of the final judgement. The Curia took into consideration in favour of the second accused that he had two minor children to look after and that he had been largely influenced by the first accused who had a more pro-active role in the duo. Consequently, the Curia imposed more severe criminal sanctions on the first accused. Despite the existence of the aforementioned mitigating circumstances, the Curia increased the length of imprisonment of both accused persons and excluded the possibility of the suspension of their implementation.[1447]

8.10. Violation of Waste Management Regulations (CC 248. §)

(1) Any person who:

a) engages in the disposal of waste at a site that has not been authorized by the competent authority for this purpose,

b) engages in waste management activities without authorization, or by exceeding the scope of the authorization, or engages in any other unlawful activity involving waste, is guilty of a felony punishable by imprisonment not exceeding three years.

1447 Budapest, the 30th of May 2017. In: Communication concerning the decision of the Curia of Hungary in criminal case n° Bfv.I.1722/2016.
https://kuria-birosag.hu/sites/default/files/selected_case_law/criminal_case_april_2017.pdf (06.03.2024.)

(2) The penalty shall be imprisonment between one to five years if the criminal offense described in Subsection (1) is committed involving waste that is deemed hazardous under the Act on Waste.

(3) Any person who commits the criminal offense by way of negligence shall be punishable for misdemeanor by imprisonment not exceeding one year in the case provided for in Subsection (1), or with imprisonment not exceeding two years in the case provided for in Subsection (2).

(4) In the application of this Section:

a) 'waste' shall mean any substance that is deemed waste under the Act on Waste, and that may be hazardous to human life, bodily integrity or health, or the earth, the air, the water, and their constituents, and the species of living organisms;

b) 'waste management activity' shall mean the collection, gathering, transportation of waste as defined in the Act on Waste, including if exported from or imported into the country, or transported through the country in transit, and the pre-processing, storage, recovery and disposal of waste.

Legal case: By its judgment having become final at first instance, the District Court acquitted the accused of the charge of having violated the waste management regulations. The acquittal was based on the finding that the conduct of the accused as specified in the bill of indictment – namely, the dumping of community liquid waste from his sludge tanker truck not on an area licensed for receiving waste but on a privately owned land parcel – did not constitute an offence, as under the Act on Waste Management, as in force at the time of adjudication, liquid waste no longer amounted to waste.

The County Public Prosecutor's Office filed a petition for judicial review against the final decision, seeking the quashing of the judgment and the remittal of the case to the first instance court.

According to the reasoning of the petition, the District Court erroneously concluded that cesspit sludge amounted to community liquid waste, that is waste water, and that underDirective 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives and under section 1 subsection (2) item a) of Act no. CLXXXV of 2012 on Waste, as in force at the time of adjudication, it did not amount to waste.

According to the reasoning of the petition, the phrase "sludge from septic tanks" featuring under code number EWC 20304 in the Annex to Decree no. 72/2013 (VIII. 27.) of the minister of rural development giving the list of waste materials in force at the time of the submission of the petition was almost verbatim the same as the phrase „sludge from cesspits" in Annex no. 1 to Decree no. 16/2001 (VII. 18.) of the minister of environment and water resources, as in force at the time of the commission of the offence.

The County Public Prosecutor's Office was of the opinion that materials deposited without authorisation did, irrespective of their designation, amount to waste both under Act no. XLIII of 2000 on Waste Management and Act no. CLXXXV of 2012 on Waste.

According to the reasoning of the decision of the Curia, the legal interest sought to be protected by the criminal provision was the protection of the environment from the harmful effects of hazardous waste materials.

The criminal provision governing the offence of violation of waste management regulations is a framework provision whose constituent elements are to be found primarily in Act no. CLXXXV of 2012 on Waste and in the implementing decrees for that Act.

In the meantime, Directive no. 2006/12/EC of the European Parliament and of the Council of

5 April 2006 on waste – with which the Act on Waste Management had been in full conformity – was repealed by Directive 2008/98/EC, whose Article 2(2) excluded wastewaters from the scope of the Directive where and inasmuch as such waters were covered by another piece of Community legislation. With a view to bringing domestic legislation in line with this Directive, Act no. CLXXXV of 2012 on Waste was adopted, whose section 1 subsection (2) provided that in case a piece of legislation transposing or implementing an EU legal instrument other than Directive 2008/98/EC contained a regulation different from the one contained in the Act on Waste, the Act on Waste would not be applicable to wastewaters.

According to the reasoning to section 102 of the Act on Waste, under the waste management regulations municipalities continued to be under the obligation of setting up a public service for the collection and transportation of residential wastewaters uncollected by public utilities. Directive 2008/98/EC provided that the waste regulation contained in the Directive should be incorporated into the water legislation, and in this context the Directive did not introduce any change in respect of the duty of setting up a public service.

Section 102 of the Act on Waste incorporated Chapter IX/A on public services to be set up for the collection of wastewaters uncollected by a public utility into Act no. LVII of 1995 on Water Management.

Under section 44/J subsection (1) of the Act on Water Management, where an activity related to residential wastewaters uncollected by a public utility is carried out by a real estate owner or a public service provider not in conformity with the law or the notification of such activity, a public service fine shall be imposed on the real estate owner or on the public service provider.

Under subsection (2) of the same Act, the public service fine shall be imposed by the water management authority.

For the foregoing reasons the Baja District Court, relying on Criminal Uniformity Decision no.1/1999, correctly concluded that due to the change in the administrative norms having constituted the content of the framework provision contained in section 281/A of the Criminal Code, the object of the offence was missing hence the conduct of the accused could not be deemed to have been in conformity with the provision governing the offence.

Therefore the District Court, correctly interpreting and applying the substantive provisions of criminal law, lawfully acquitted the accused of the charge brought against him.

Therefore the Curia rejected the petition for judicial review, and under section 426 subsection

(1) of the Code of Criminal Procedure upheld the contested decision.[1448]

1448 Budapest, the 24th of November 2014. In: Communication concerning the decision of the Curia of Hungary in criminal case n° Bfv.III.574/2014.
https://kuria-birosag.hu/sites/default/files/selected_case_law/criminal_case_october_2014.pdf (06.03.2024.)

8.11. Perjury (CC 272. §)

(1) Any witness who gives false testimony before the authority concerning an essential circumstance of a case, or suppresses evidence is guilty of perjury.

(2) The provisions relating to perjury shall be applied to any person who:

a) gives false opinion as an expert or false information as a special adviser;

b) falsely translates as an interpreter or a translator;

c) presents a false document or manipulated physical evidence in criminal or civil proceedings, Paragraph b) of Subsection (1) of Section 268 notwithstanding.

(3) The defendant in criminal proceedings shall not be prosecuted on the basis of Paragraph c) of Subsection (2).

(4) Perjury committed in a criminal case shall be construed as a felony punishable by imprisonment between one to five years. If perjury concerns a crime that carries a maximum sentence of life imprisonment, the penalty shall be imprisonment between two to eight years.

(5) Perjury committed in a civil case shall be punishable by imprisonment not exceeding three years. If the civil case concerns a particularly considerable value or any other form of interest that is considered particularly substantial, the penalty shall be imprisonment between one to five years.

(6) Any person who commits perjury by way of negligence shall be punishable for a misdemeanor by imprisonment not exceeding one year.

Legal case: Being a defence attorney does not exempt one from the legal consequences of perjury. The exemption from criminal responsibility in case of the giving of false testimony applies only to accused persons who are charged with a criminal offense in the course of criminal court proceedings, and it cannot be granted to defence attorneys. The crime of legal malpractice, as defined in section 247, subsection (1) of Act no. IV of 1978 on the Criminal Code (hereinafter referred to as the Criminal Code), is a criminal offense committed by an attorney by way of breaching his professional duty with the aim of causing unlawful wrong to his client.

The district court found the sixth accused guilty of the crime of perjury [section 238, subsection (2), point c) and subsection (4), subparagraph I of the Criminal Code] and the crime of legal malpractice [section 247, subsections (1) and (2) of the Criminal Code], consequently, it sentenced him to a one year imprisonment the implementation of which was suspended for a two-year long probation period, in addition, it allocated the burden of the costs of criminal proceedings and made provisions on the pieces of evidence.

Proceeding upon the parties' appeals, the high court modified the first instance judgement in respect of the sixth accused by increasing his term of imprisonment to one year and ten months and his probation period to five years and by prohibiting him from exercising the profession of attorney for a period of five years. The high court upheld the remainder of the first instance judgement.

The defence attorney of the sixth accused submitted a petition for judicial review against the final court decision to the Curia on the basis of section 416, subsection (1), points a), b) and c) of Act no. XIX of 1998 on the Code of Criminal Procedure (hereafter referred to as the Code of Criminal Procedure). The petitioner argued that the sixth accused

could not have been found guilty of the crime of perjury, since the sanctioning of the giving of false testimony, i.e. the submission of false documents to the investigating authority by the accused, acting as a defence attorney, had violated the latter's constitutional rights and had been contrary to common sense and the general principles of law.

Section 416, subsection (1), point b) of the Code of Criminal Procedure stipulates that a petition for judicial review may be submitted if an unlawful sentence has been imposed or an unlawful criminal measure has been applied due to the unlawful qualification of the criminal offense prosecuted or to the violation of any other provisions of criminal law.

By virtue of section 238, subsection (1) and subsection (2), point c) of the Criminal Code, any person who presents a false document or manipulated physical evidence in criminal or civil proceedings is guilty of perjury. Subsection (3) provides that the accused person in criminal proceedings shall not be liable for prosecution on the basis of section 238, subsection (2), point c) of the Criminal Code. The petitioner claimed that the sixth accused had acted as the defence attorney of the first accused in the criminal proceedings, which had excluded the former's criminal liability, as the Code of Criminal Procedure did not allow for his hearing as a witness. He emphasised that the sanctioning of the defence attorney in relation to the exercise of the right to be defended, a constitutional right enshrined in the Fundamental Law of Hungary, was unconstitutional.

The Curia agreed with the viewpoint of the Office of the Prosecutor General according to which the sixth accused's status as a defence attorney could not lead to the application of the exemption from criminal responsibility in his respect on the basis of section 238, subsection (3) of the Criminal Code, because the defence attorney was not an accused person in the case and therefore could not be exempted from criminal responsibility for the commission of the crime of perjury.

The court, the prosecutor and the investigating authority shall ensure that the person against whom criminal proceedings are conducted can defend himself as prescribed in the Code of Criminal Procedure [section 5, subsection (3) of the Code of Criminal Procedure]. Article XXVIII, paragraph (3) of the Fundamental Law of Hungary stipulates that anyone indicted in criminal proceedings shall be entitled to defence at all stages of such proceedings. Defence attorneys shall not be held accountable for their opinions expressed in defence arguments.

Section 50, subsection (3) of the Code of Criminal Procedure provides that with the exception of the rights attached exclusively to the person of the accused, the rights of the accused may also be exercised by his defence attorney independently. The accused person's rights of defence, however, does not entitle him to commit a criminal offense or falsely accuse another person of the commission of a criminal offense. Section 50, subsection (1), points b) and c) of the Code of Criminal Procedure clearly state that the defence attorney is entitled and obliged to use all legal means of defence in the interest of the accused in due time, in addition, it is also evident that the legal restrictions on the accused person's rights of defence equally apply to defence attorneys, which means that such rights do not entitle them either to perpetrate a criminal offense.

It also follows from the accused person's right not to tell the truth that he cannot be held criminally liable for the provision of false evidence, therefore section 238, subsection (3) of the Criminal Code exempts the accused from criminal responsibility in such cases. The rights of defence, on the other hand, do not entitle the accused or his defence attorney to

incite another person to commit a criminal offense or to falsely accuse any other person of the perpetration of a criminal offense. The above exemption from criminal responsibility may be granted only to the person against whom criminal charges have been brought, while his defence attorney is not entitled to be given such impunity.

Based on the case's factual background, the sixth accused drafted, contrary to the victim's intention, a document that contained a false statement and submitted it to the investigating authority, which exceeded the limits of lawful defence and could be qualified as perjury as defined in section 238, subsection (2), point c) of the Criminal Code. The fact that defence attorneys cannot be heard as witnesses in relation to the exercise of their defence activities in criminal proceedings does not justify the argument according to which they may insert the false statement of the threatened victim into a document to be submitted to the judicial authorities.

With regard to the above, the Curia found that the guilt of the sixth accused in respect of the commission of the crime of perjury had been lawfully established in conformity with the relevant substantive pieces of legislation.[1449]

8.12. Crimes of corruption I.

8.12.1. Active corruption (CC 290. §)

(1) Any person who gives or promises unlawful advantage to a person working for or on behalf of an economic operator, or to another person on account of such employee, to induce him to breach his duties is guilty of a felony punishable by imprisonment not exceeding three years.

(2) The penalty shall be imprisonment between one to five years if the criminal offense described in Subsection (1) is committed in connection with a person working for or on behalf of an economic operator who is authorized to act in its name and on its behalf independently.

(3) The penalty shall be:

a) imprisonment between one to five years in the case under Subsection (1);

b) imprisonment between two to eight years in the case under Subsection (2);

if the crime of corruption is committed in criminal association with accomplices or on a commercial scale.

(4) Any person who commits the act of corruption in connection with a person working for or on behalf of a foreign economic operator shall be punishable in accordance with Subsections (1)-(3).

(5) The penalty may be reduced without limitation - or dismissed in cases deserving special consideration - against the perpetrator of a criminal offense defined in Subsection (1) if he confesses the act to the authorities first hand and unveils the circumstances of the criminal act.

1449 Budapest, the 14th of June 2018. In: Communication concerning the decision of the Curia of Hungary in criminal case n° Bfv.I.1.537/2017.
https://kuria-birosag.hu/sites/default/files/selected_case_law/criminal_case_april_2018.pdf (06.03.2024.)

8.12.2. Passive corruption (CC 291. §)

(1) Any person who requests or receives an unlawful advantage in connection with his activities performed for or on behalf of an economic operator, for himself or for a third party, or accepts a promise of such an advantage, or is in league with the person requesting or accepting the advantage for a third party on his behest, is guilty of a felony punishable by imprisonment not exceeding three years.

(2) If the perpetrator:

a) breaches his official duty in exchange for unlawful advantage he is punishable by imprisonment between one to five years,

b) commits the criminal offense defined in Subsection (1) in criminal association with accomplices or on a commercial scale he is punishable by imprisonment between two to eight years.

(3) If the perpetrator is working for or on behalf of an economic operator who is authorized to act in its name and on its behalf independently, the penalty shall be imprisonment:

a) between one to five years in the case under Subsection (1);

b) between two to eight years in the case under Paragraph a) of Subsection (2);

c) between five to ten years in the case under Paragraph b) of Subsection (2).

(4) Any person working for or on behalf of a foreign economic operator shall be punishable in accordance with Subsections (1)-(3) for the commission of the criminal offense defined therein.

(5) The penalty may be reduced without limitation - or dismissed in cases deserving special consideration - against the perpetrator of a criminal offense defined in Subsection (1) if he confesses the act to the authorities first hand, surrenders the obtained unlawful financial advantage in any form to the authorities, and unveils the circumstances of the criminal act.

Legal case: Among the accused persons affected by third instance appeals, the first instance court found the fifth accused guilty of seven counts of bribery, the second, sixth, ninth and twelfth accused guilty of one count of bribery, the eighth and tenth accused guilty of two counts of bribery respectively.

The regional court of appeal modified the first instance judgement and acquitted the fifth accused of five counts of bribery, the second, sixth, eighth, ninth, tenth and twelfth accused of one count of bribery respectively.

The facts of the case in respect of the accused persons affected by third instance appeals were established by the first instance court and were clarified and supplemented by the second instance court as follows:

The fifth accused worked as a maternity nurse, while the second, sixth, eighth, ninth, tenth and twelfth accused worked as obstetrician-gynecologists in a state-run healthcare institution where they solicited and accepted preliminary remuneration for providing otherwise free healthcare services (such as conducting deliveries and carrying out epidural anaesthesia).

The prosecutor submitted a third instance appeal with the aim of increasing the criminal liability of the second, fifth, sixth, eighth, ninth, tenth and twelfth accused, while

the fifth accused and his defence attorney, as well as the defence attorneys of the eighth and tenth accused lodged third instance appeals for acquittal against the second instance judgement.

The Office of the Prosecutor General upheld the prosecutor's third instance appeal. Proceeding as a third instance appellate court, the Curia pointed out the followings. As a matter of long-established social custom, parasolvency is customarily paid – in the form of tips or gratuities – by service users as a recognition to certain service sector workers who provide service beyond the expectation. For various and well-known reasons, the practice of gratuity payments is deeply rooted in the Hungarian healthcare sector. Tips and gratuities, however, cannot be qualified as illegal gains, since Annex no. 1 to Act no. CXVII of 1995 on Personal Income Tax explicitly enumerates these two forms of payments as lawful gains, in addition, pursuant to point 7.2 of the aforementioned annex, gratuities – as opposed to tips – are considered taxable income.

With regard to the above, the act of accepting gratuities (if they are not offered for the purpose of remunerating breaches of duty) does not qualify as the crime of bribery on the basis of either the relevant provisions of Act no. IV of 1978 on the Criminal Code (in force at the time of the perpetration of the impugned acts) or section 291 of Act no. C of 2012 on the new Criminal Code (in force at the time of adjudication), irrespective of whether the healthcare worker accepted the gratuities without his employer's prior consent which shall be otherwise requested according to section 52, subsection (2) of Act no. I of 2012 on the Labour Code. The lack of the employer's prior consent can have legal consequences only in the field of labour law: the employee's failure to request such consent may constitute a disciplinary offence.

The Curia subsequently clarified the notion of gratuity. Gratuity is a sum of money given by a patient or his relative to a healthcare worker who previously provided healthcare service for them as a way to show graciousness or thankfulness. This definition clearly implies that preliminary payments for subsequent services and involuntary payments for services do not qualify as gratuities. Hence, payments received as a result of previous solicitation do not fall within the category of gratuity. Solicitation covers all instances of behaviour – such as allusions or references to the practice of gratuity payments – which exclude the voluntary nature of payments made by the patients.

In the present case, the Curia found that there was no reason to doubt that gratuity payments had been made in cases where the accused persons had only answered the enquiries of the women before childbirth or their relatives as to the practice of such payments.

Proceeding upon the third instance appeals and in light of the above, the Curia modified the judgement of the regional court of appeal in respect of the fifth, eighth, tenth and twelfth accused and, on the basis of section 251, subsection (1) of the Criminal Code, found the fifth accused guilty of an additional four counts of bribery, the eighth and tenth accused guilty of an additional one count of bribery respectively and the twelfth accused guilty of one count of bribery.[1450]

1450 Budapest, the 25th of June 2015. In: Communication concerning the decision of the Curia of Hungary in criminal case n° Bhar.III.6/2015.
https://kuria-birosag.hu/sites/default/files/selected_case_law/criminal_case_may_2015.pdf (06.03.2024.)

8.12.3. Active Corruption of Public Official (CC 293. §)

(1) Any person who attempts to bribe a public official by giving or promising unlawful advantage to such person or to another person for influencing such official's actions in an official capacity is guilty of a felony punishable by imprisonment not exceeding three years.

(2) Any person committing bribery is punishable by imprisonment between one to five years if he gives or promises the advantage to a public official to induce him to breach his official duty, exceed his competence or otherwise abuse his position of authority.

(3) The penalties defined in Subsections (1)-(2) shall apply to any person who commits the criminal offense set out therein in connection with a foreign public official.

(4) The director of an economic operator, or any person working for or on behalf of the economic operator vested with authority to exercise control or supervision shall be punishable according to Subsection (1), if the person working for or on behalf of the economic operator commits the criminal offense defined in Subsections (1)-(3) for the benefit of the economic operator or on its behalf, and the criminal act could have been prevented had he properly fulfilled his control or supervisory obligations.

(5) The director of an economic operator, or any person working for or on behalf of the economic operator vested with authority to exercise control or supervision shall be punishable for misdemeanor by imprisonment not exceeding two years, if the criminal offense defined in Subsection (4) is committed by way of negligence.

(6) The penalty may be reduced without limitation - or dismissed in cases deserving special consideration - against the perpetrator of a criminal offense defined in Subsections (1) and (2) if he confesses the act to the authorities first hand and unveils the circumstances of the criminal act.

8.12.4. Passive Corruption of Public Officials (CC 294. §)

(1) Any public official who requests or receives an unlawful advantage in connection with his actions in an official capacity, for himself or for a third party, or accepts a promise of such an advantage, or is in league with the person requesting or accepting the advantage for a third party on his behest, is guilty of a felony punishable by imprisonment between one to five years.

(2) The penalty shall be imprisonment between two to eight years if the criminal offense is committed by a high ranking public official.

(3) The penalty shall be imprisonment between two to eight years in the case provided for in Subsection (1) or imprisonment between five to ten years in the case provided for in Subsection (2) if:

a) for the advantage the public official:

aa) breaches his official duties,

ab) exceeds his competence, or

ac) otherwise abuses his position of authority; or

b) if the offense is committed in criminal association with accomplices or on a commercial scale.

(4) A foreign public official shall be punishable in accordance with Subsections (1)-(3) for the commission of the criminal offense defined therein.

(5) The penalty may be reduced without limitation – or dismissed in cases deserving special consideration – against the perpetrator of a criminal offense defined in Subsections (1) and (2) if he confesses the act to the authorities first hand, surrenders the obtained unlawful financial advantage in any form to the authorities, and unveils the circumstances of the criminal act.

Legal case: The military panel of the competent high court found the first accused, a former police sergeant and the second accused, a former police staff sergeant guilty of the crime of passive corruption of public officials [section 294, subsection (1) of Act no. C of 2012 on the Criminal Code (hereinafter referred to as the Criminal Code)], and sentenced each of them to a one year and six months imprisonment the implementation of which was suspended for a two-year long probation period, imposed a fine representing fifty days on each of them and degraded them.

The first instance judgement became final in respect of the first accused. Proceeding upon the appeal of the defence attorney of the second accused, the military panel of the regional appellate court reversed the first instance judgement and acquitted the accused persons, the acquittal came into effect in respect of the first accused on the basis of the provisions of section 349, subsection (2) of Act no. XIX of 1998 on the Code of Criminal Procedure (hereinafter referred to as the Code of Criminal Procedure).

The prosecution services submitted a third-instance appeal against the second instance judgement and requested the Curia to establish the guilt of the second accused, sentence him to suspended imprisonment, impose a fine on him and degrade him. The prosecution services were of the opinion that the second instance military panel erred in finding that, during the reliability examination, the undercover officer had no real intention of corrupting, therefore his acts had no harmful effect and had not posed any danger to society. They referred to sections 7/A-C of Act no. XXXIV of 1994 on the Police (hereinafter referred to as the Police Act) and section 12, subsection (1) of Government Decree no. 293/2010 (of 22 December 2010), and stressed that it was not disputed that, within the framework of the reliability examination, a corruption offense had been committed, the security officer had not exerted any pressure on the accused persons, hence, the criminal complaint and the establishment of criminal liability by the court of first instance had been completely lawful. They argued that the court of second instance erred in referring to Curia decision no. Bhar.I.520/2017/3 and finding that the impugned acts had not constituted any threat to society and, based on section 4 of the Criminal Code, could not be qualified as a criminal offense. The prosecution services therefore requested the Curia to reverse the judgement of the military panel of the regional appellate court, establish the guilt of the second accused in the crime of passive corruption of public officials [section 294, subsection (1) of the Criminal Code], sentence him to suspended imprisonment, impose a fine on him and degrade him. In their viewpoint, the establishment of the criminal liability of the second accused excludes the application of the provisions of section 349, subsection (2) of the Code of Criminal Procedure in the case of the first accused, thus, the acquitting decision should be disapplied.

The Curia considered the third-instance appeal to be well-founded. The military panel of the regional appellate court essentially based its acquitting judgement on Curia decision no. Bhar.I.520/2017/3 – that had also been published as a court decision of principle

(decision no. EBH 2018.B.1) –, but failed to take into account the fact that there had been a number of significant differences between the criminal acts judged by the Curia and those adjudicated in the present case.

It was clear in the present case that the security officer had intentionally provoked the accused persons to check whether they had been involved in street corruption. The reliability examination was carried out in accordance with the plan previously authorised by the competent prosecutor. In its decision of principle no. EBH 2018.B.1, the Curia pointed out that the State was entitled and obliged to verify to what extent the members of its law enforcement bodies were suited to perform their duties. By the adoption of the Police Act's provisions on reliability examination, the legislator decided to provide, on the basis of section of 24 of the Criminal Code, an exemption from criminal responsibility for security officers who carry out reliability examinations and incite other persons to commit criminal offenses.

There is no legal obstacle for the launch of criminal proceedings for crimes detected within a reliability examination, moreover, section 7/C, subsection (1) of the Police Act stipulates that if, based on the findings of a reliability examination, there is a suspicion of the commission of a criminal offense, then the competent police internal affairs unit shall immediately report the impugned acts to the competent police department [the reporting of such crimes is compulsory also on the basis of section 171, subsection (2) of the Code of Criminal Procedure].

With regard to the above and pursuant to section 398, subsection (1) of the Code of Criminal Procedure, the Curia accepted the prosecution services' third-instance appeal and found the second accused guilty of the crime of passive corruption of public officials [section 294, subsection (1), subparagraph II and subsection (3), subparagraph I, point a), subpoint aa) of the Criminal Code].

Based on the case's factual background, the security officer briefly bargained with and then handed over an amount of 50 000,- HUF to the accused persons in a file pocket with the aim of getting them to breach their duties. The security officer's behaviour aroused the accused persons' suspicion, therefore they gave him the money back and told him that they would file no police report against him and they would not check the relevant register, subsequently, they sent him away and did not report the incident. The above facts, however, show that the accused persons accepted the cash bribe in exchange for breaching their duty to take official action. They also failed to comply with their duty to file a police report and check the relevant register of vehicles, in addition, they sent the security officer away from the site of the roadside check. Their acts constituted passive corruption of public officials despite the fact that they returned the bribe to the bribe-giving security officer within a short period of time, elapsed between the acceptance of the bribe and the breach of their duty. They committed the aggravated form of passive corruption, because their conduct resulted in the breach of their duty.

The first instance judgement became final in respect of the first accused on the day of its delivery. Based on section 349, subsection (2) of the Code of Criminal Procedure, the court of second instance, however, wrongfully acquitted the first accused who was originally not affected by the other accused person's appeal. Despite the regional appellate court's proper provision of information, the High Prosecution Services of Budapest omitted to submit a third-instance appeal against the acquittal of the first accused.

Having regard to the above, there is no legal ground to accept the third-instance appeal in respect of the first accused. The procedural provisions on third instance court proceedings contain no rule to follow by the court of third instance in the event that the court of second instance erred in acquitting, on the basis of section 349, subsection (2) of the Code of Criminal Procedure, an accused person who had originally not been affected by another accused person's appeal. In the absence of such rule and by virtue of section 385 of the Code of Criminal Procedure, the provisions on second instance court proceedings are to be applied to third instance proceedings accordingly, as a consequence, section 346, subsection (4) of the Code of Criminal Procedure – which stipulates that an appeal suspends the part of the judgement to become final which is to be reviewed by the court of second instance (in the present case, by the court of third instance) owing to the appeal – should apply.

With regard to the fact that the second instance prosecution services incorrectly failed to submit an appeal to the detriment of the first accused who had been unlawfully acquitted based on section 349, subsection (2) of the Code of Criminal Procedure, the court of third instance was not entitled to review the impugned judgement in his respect. As there is no legal ground to disapply the second instance acquitting decision in the third instance court's proceedings, the acceptance of the prosecution services' appeal would result in the violationof the principle of the prohibition of reformatio in peius. Consequently, the Curia avoided reviewing the impugned court decision in respect of the first accused.[1451]

8.13. Acts of Terrorism (CC 314. § - 316. §)

CC 314. § (1) Any person who commits a violent crime against the persons referred to in Subsection (4) or commits a criminal offense that endangers the public or involves the use of arms in order to:

a) coerce a government agency, another State or an international body into doing, not doing or countenancing something;

b) intimidate the general public;

c) conspire to change or disrupt the constitutional, economic or social order of another State, or to disrupt the operation of an international organization;

is guilty of a felony punishable by imprisonment between ten to twenty years or life imprisonment.

(2) Any person who seizes considerable assets or property for the purpose defined in Paragraph

a) and makes demands to government agencies or international organizations in exchange for refraining from harming or injuring said assets and property or for returning them shall be punishable according to Subsection (1).

(3) The punishment of any person who:

a) abandons the commission of the terrorist act defined under Subsection (1) or (2) before any grave consequences have resulted therefrom; and

1451 Budapest, the 14th of June 2018. In: Communication concerning the decision of the Curia of Hungary in criminal case n° Bhar.I.1857/2017.
https://kuria-birosag.hu/sites/default/files/selected_case_law/criminal_case_march_2018.pdf (06.03.2024.)

b) confesses his conduct to the authorities; in such a manner as to cooperate with the authorities to prevent or mitigate the consequences of such criminal act, apprehend other coactors, and prevent other criminal acts may be reduced without limitation.

(4) For the purposes of this Section, violent crime against the person, or criminal offense that endangers the public or involves the use of arms shall include:

a) homicide [Subsections (1)-(2) of Section 160], battery [Subsections (2)-(6) and (8) of Section 164], professional misconduct with intent [Subsection (3) of Section 165];

b) kidnapping [Subsections (1)-(4) of Section 190], violation of personal freedom (Section 194);

c) offenses against transport security [Subsections (1)-(2) of Section 232], endangerment of railway, air or water transport systems [Subsections (1)-(2) of Section 233];

d) misappropriation of radioactive materials [Subsections (1)-(2) of Section 250];

e) assault on a public official [Subsections (1)-(5) of Section 310], assault on a person entrusted with public functions (Section 311), assault on a person aiding a public official or a person entrusted with public functions (Section 312), assault on a person under international protection [Subsection (1) of Section 313];

f) unlawful seizure of a vehicle [Subsections (1)-(2) of Section 320], public endangerment [Subsections (1)-(3) of Section 322], interference with works of public concern [Subsections (1)-(3) of Section 323], criminal offenses with explosives or blasting agents [Subsections (1)-(2) of Section 324], criminal offenses with firearms and ammunition [Subsections (1)-(3) of Section 325];

g) criminal offenses with weapons prohibited by international convention [Subsections (1)-(5) of Section 326], criminal offenses with military items and services [Subsections (1)-(3) of Section 329], criminal offenses with dualuse items [Subsections (1)-(2) of Section 330];

h) robbery [Subsections (1)-(4) of Section 365] and vandalism [Subsections (1)-(6) of Section 371];

i) breach of information system or data [Subsections (1)-(3) of Section 423].

CC 315. § (1) Any person who instigates, suggests, offers, joins or collaborates in the commission of any of the criminal acts defined in Subsection (1) or (2) of Section 314 or any person who is involved in aiding and abetting such criminal conduct by providing any of the means intended for use in such activities is guilty of a felony punishable by imprisonment between two to eight years.

(2) Any person who is engaged in the conduct referred to in Subsection (1) or in the commission of any of the criminal acts defined in Subsection (1) or (2) of Section 314 in a terrorist group, is punishable by imprisonment between five to ten years.

(3) The perpetrator of a criminal act defined in Subsection (1) or (2) shall not be prosecuted if he confesses the act to the authorities first hand and unveils the circumstances of the criminal act.

CC 316. § Any person threatening to commit a terrorist act is guilty of a felony punishable by imprisonment between two to eight years.

8.13.1. Failure to Report a Terrorist Act (CC 317. §). Terrorist Financing (CC 318. §)

CC 317. § Any person who has positive knowledge concerning plans for a terrorist act and fails to promptly report that to the authorities is guilty of a felony punishable by imprisonment not exceeding three years.

CC 318. § (1) Any person who provides or collects funds with the intention that they should be used in order to carry out an act of terrorism, or who provides material assistance to a person who is making preparations to commit a terrorist act or to a third party on his behest is guilty of a felony punishable by imprisonment between two to eight years.

(2) Any person who commits the criminal offense referred to in Subsection (1) in order to carry out an act of terrorism in a terrorist group, or on behalf of any member of a terrorist group, or supports the activities of the terrorist group in any other form is punishable by imprisonment between five to ten years.

(3) For the purposes of this Section 'material assistance' shall mean the assets specified in Point 1 of Article 1 of Council Regulation (EC) No. 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, including legal documents and instruments in any form.

Legal case: The High Court of Miskolc acquitted the accused of the charge of threats to commit a terroristact (section 316 of the Criminal Code) in the absence of any criminal offence. According to the facts of the case established by the court of first instance, the accused has been working for many years on "helping foreign currency retail borrowers" and he drafted a document entitled "Act no. MIC of 2013 on the Abolition of the Foreign Currency Retail Borrowers' Slavery and on the Solution to the Problem of Foreign Currency Loan Agreements", which he sent to each member of the Hungarian National Assembly.

Subsequently, the accused uploaded a document entitled "Letter to the Chairperson of the National Assembly" to a publicly available webpage edited by him. The uploaded document included a letter entitled "Pledge" in which the accused stated the following: "I undertake that, in order to reduce crimes of genocide, I will execute those members of the National Assembly who [...] will not vote in favour of the adoption of Act no. MIC of 2013 on the Abolition of the Foreign Currency Retail Borrowers' Slavery till 20 August 2013, and I will carry out the executions at a convenient time and place and in a convenient manner and in a way exemplary for my fellow citizens".

The high court argued that the accused person's letter entitled "Pledge" had only been an idle threat with pretentious statements aiming at raising public awareness and the accused had no intention to commit violent crimes against the person, therefore his criminal liability could not be established.

The competent prosecution service lodged an appeal with the Regional Appellate Court of Debrecen against the first instance decision. The regional appellate court modified the high court decision and found the accused guilty of the crime of threats to commit a terrorist act as defined in section 316 of the Criminal Code, consequently it sentenced him to 10 months' imprisonment, the enforcement of which was suspended for 2 years.

According to the viewpoint of the regional appellate court, the accused carried out a criminal act by way of threats to commit violent crimes against the person (homicide)

in order to coerce the National Assembly (a State body) into doing something, hence, his criminal liability could be established.

As the first and second instance courts rendered divergent decisions in respect of the accused person's liability, third instance proceedings could be launched, and the accused and his defence attorney submitted a third instance appeal against the second instance decision.

Proceeding upon the third instance appeal, the Curia partially modified the decision of the regional appellate court and re-qualified the accused person's act as the crime of engaging in preparations to commit homicide [as defined in section 160, subsection (3) of the Criminal Code], while it upheld the remainder of the second instance decision. In its decision, the Curia clarified that the accused had undertaken in his published and openly accessible letter to commit voluntary homicides on those members of the National Assembly who would not vote in favour of the adoption of a bill drafted by him until the expiry of a deadline set by him.

By virtue of section 160, subsection (3) of the Criminal Code, any person who engages in preparations to commit homicide shall be punishable by imprisonment between 1 to 5 years. Criminal intent is the result of a hidden process in one's mind, on the other hand, crime preparations are intended and overt acts or actions – about which others can find out – performed by criminal offenders during any period of time before the actual crime is committed.

Crime preparations are punishable separately only if the intended criminal offence remains uncommitted, irrespective of whether the non-commission is due to a change in intention, the lack of conditions or the detection of the preparatory acts. The commission of crime preparations does not demonstrate in itself that the offender would start to carry out the intended criminal offence even if the conditions necessary for the commission of the offence are perfectly met. In the event that the intended offence is attempted or committed, preparations alone are not punishable.

With regard to the above, the Curia, acting as a court of third instance, partially modified the judgement of the court of second instance in respect of the qualification of the criminal acts referred to in the third instance appeal on the basis of section 398, subsection (2) of the Code of Criminal Procedure, while it upheld the remainder of the second instance decision – in particular as regards the imposition of sanctions – in application of section 397 of the Code of Criminal Procedure.[1452]

8.14. Criminal offenses against public peace

8.14.1. Use of Symbols of Totalitarianism (CC 335. §)

Any person who:

a) distributes,

b) uses before the public at large, or

c) publicly exhibits,

1452 Budapest, the 22nd of June 2016. In: Communication concerning the decision of the Curia of Hungary in criminal case n° Bhar.III.561/2016. https://kuria-birosag.hu/sites/default/files/selected_case_law/criminal_case_may_2016.pdf (06.03.2024.)

the swastika, the insignia of the SS, the arrow cross, the sickle and hammer, the five-pointed red star or any symbol depicting the above so as to breach public peace - specifically in a way to offend the dignity of victims of totalitarian regimes and their right to sanctity - is guilty of a misdemeanor punishable by custodial arrest, insofar as the did not result in a more serious criminal offense.

Legal case: In solidarity with his fellow party member Mr. A. V. who had been prosecuted for the prohibited use of a totalitarian symbol, Mr. J. F. as a member of the Hungarian Workers' Party decided to wear a five-pointed red star with a diameter of two centimeters on the lapel of his jacket on the occasion of a demonstration organised by the National Confederation of Hungarian Trade Unions on 1 May 2004 in the town of Pécs. In its court order rendered without trial and dated 3 September 2007, the Municipal Court of Pécs considered that the above act of Mr. F. had constituted a misdemeanor, namely the prohibited use of a totalitarian symbol, consequently the perpetrator was sentenced to a probation period of one year. The accused requested the court to hold a trial, and as a result of the trial phase of first instance proceedings, the Municipal Court of Pécs attenuated the criminal sanction against the perpetrator by inflicting a reprimand on him with its court order dated 6 March 2008. In its judgement rendered on 23 September 2008, the County Court of Baranya as appellate court, arguing that no act of crime had been committed, acquitted the accused of the charge for using a totalitarian symbol. The judgement of the court of second instance was then reversed by the Regional Appellate Court of Pécs which inflicted a reprimand on the accused by its judgement dated 5 March 2010.

The accused submitted an individual petition to the European Court of Human Rights which ruled in its judgement dated 3 November 2011 and became final on 8 March 2012 that Hungary had violated Article 10 – on the freedom of expression – of the Convention and awarded the applicant just satisfaction.

Based on the above judgement of the European Court of Human Rights and pursuant to Article 416, paragraph (1), point g) of the Hungarian Code of Criminal Procedure, the defense attorney of the accused and subsequently the General Prosecution Service submitted their petition for judicial review to the Curia of Hungary in order to obtain acquittal of the accused in the absence of any act of crime.

Pursuant to Article 423, paragraph (3) of the Hungarian Code of Criminal Procedure, the Curia of Hungary examined the petitions for judicial review on the basis of the decision of the international human rights organisation. The highest judicial forum of Hungary referred to the compelling arguments and considerations put forward in the judgement of the Strasbourg-based Court and stated that the accused, as a member of a registered political party, had displayed the totalitarian symbol at a lawful demonstration. Thus, displaying the symbol of a five-pointed red star at the above political event fell within the lawful exercise of his right to freedom of expression, therefore it shall be protected by the European Convention on Human Rights signed at Rome, on 4 November 1950. The behaviour of the accused presented no danger to a democratic society, and could not be considered in any case as an action aiming at restoring communist dictatorship, furthermore, no conclusion could be drawn about the willingness of the accused to identify himself with totalitarian ideas by displaying the symbol of a red star.

In its judgement delivered on 10 July 2012, the Curia of Hungary ruled that there had been a violation of substantive criminal law, since there had been no legal ground to impute criminal liability to the accused in light of the place, time, method and motivations of the perpetration of the alleged act of crime. Consequently, the Curia of Hungary – arguing that no act of crime had been committed – acquitted the accused of the charge for using a totalitarian symbol, an act qualified as a misdemeanor by Article 269/B, paragraph (1), point b) of the Hungarian Criminal Code.[1453]

8.14.2. Public Nuisance (CC 339. §)

(1) Any person who displays an apparently anti-social and violent conduct aiming to incite indignation or alarm in other people is guilty of a misdemeanor punishable by imprisonment not exceeding two years, insofar as the act did not result in a more serious criminal offense.

(2) The penalty for a felony shall be imprisonment not exceeding three years if public nuisance is committed:

a) in a gang;
b) in a manner gravely disturbing public peace;
c) by displaying a deadly weapon;
d) by carrying a deadly weapon, or
b) in a public event.

Legal case: In its judgement n° 8.Fk.27.246/1010/83 rendered on 3 March 2011, the Pest Central Districts Court acting as a juvenile court condemned the first and second accused for contributing, as accomplices, to the commission of crimes of violence against a member of a community [Article 174/B, paragraph (1) and paragraph (2), points b) and e) of the Criminal Code], furthermore, it condemned the third, fourth, fifth, sixth and seventh accused for committing, as co-perpetrators, crimes of violence against a member of a community [Article 174/B, paragraph (1) and paragraph (2), points b) and e) of the Criminal Code] and other criminal offences.

With its judgement n° 31.Fkf.8472/2011/38 adopted on the basis of its public hearing held on 24 October 2011, the Metropolitan Court acting as a court of second instance modified the first instance decision and partially re-qualified the criminal offences attributed to the accused persons; thus condemned the first and second accused for contributing, as accomplices, to the commission of crimes of public nuisance [Article 271, paragraph (1) and paragraph (3), points a) and d) of the Criminal Code], while condemned the fourth, fifth, sixth and seventh accused for committing, as co-perpetrators, the above mentioned crimes.

As to the factual background of the case, on 23 September 2009 in the 8th district of Budapest, the accused persons found faults with and aggressively confronted the victim while verbally insulting him for daring to cross, as a person of Hungarian ethnicity, the accused persons' Roma neighbourhood. The accused persons and their supporters ceased their aggressive behaviour only upon the arrival of police patrol units. In the reasoning part

1453 Budapest, the tenth of July 2012. In: Communication concerning the decision of the Curia of Hungary in the criminal case n° Bfv.III.570/2012/2.
https://kuria-birosag.hu/sites/default/files/selected_case_law/criminal_case_august_2012.pdf (07.03.2024.)

of its judgement, the court of first instance stated without unreasonable doubt that, at the beginning of the conflict situation, the third and seventh accused started to verbally insult the victim for his Hungarian ethnicity, subsequently, the other accused persons joined them to verbally insult and physically abuse the victim, while the third and fifth accused threatened the victim with knives. The verbal insults accompanying the physical abuse and coercion unambiguously referred to the fact that the accused persons attacked the victim because of his different ethnicity. With regard to the aforementioned, the court of first instance condemned the accused persons for their involvement in crimes of violence against a member of a community, acts punishable by Article 174/B of the Criminal Code. The court of second instance modified the first instance decision and re-qualified the criminal offences attributed to the accused persons with the exception of the third accused. The appellate court argued that the first, second, fourth, fifth, sixth and seventh accused had confronted and abused the victim not for his different ethnicity, but because they had sought to avenge the victim's preceding insult to the third accused. In the course of the chase and assault, the agitated accused persons voiced their insults in connection with the victim's ethnicity presumably as a simple means of swearing.

The Metropolitan Prosecution Service submitted a petition for judicial review against the final court decision in order to request the Curia of Hungary to re-qualify the imputed crimes of public nuisance of the first, second, fourth, fifth, sixth and seventh accused as crimes of violence against a member of a community, and, consequently, to aggravate the criminal sanctions imposed on them.

With reference to Article 416, paragraph (1), point b) of the Code of Criminal Procedure, the General Prosecution Service upheld the above petition for judicial review. Pursuant to Article 420, paragraph (1) and Article 424, paragraph (1) of the Code of Criminal Procedure, the Curia held a public hearing, during which the representative of the General Prosecution Service reiterated the written statements contained in the petition for review.

The defence attorneys of the accused persons motioned for the Curia to reject the petition for judicial review and to uphold the final court decision. The Curia agreed with the petition submitted by the Metropolitan Prosecution Service as regards all the accused persons, and dismissed the motions tabled by the defence attorneys. Based on the petition for judicial review, the Curia had to decide whether the imputed acts of the first, second, fourth, fifth, sixth and seventh accused constituted crimes of public nuisance (crime against the public order) or violence against a member of a community (crime against persons).

According to Article 174/B of the Criminal Code, as adopted by Article 2, paragraph (1) of the Act n° LXXIX of 2008 and entered into force on 1 February 2009, any person who assaults another person for belonging, whether in fact or under presumption, to a national, ethnic, racial or religious group, or to a certain social group, or compels him by applying coercion or duress to do, not to do, or to endure something, shall be guilty of the crime of violence against a member of a community and shall be punishable by a term of imprisonment of no more than five years. This definition – broader than the one given by the previous regulation – provides criminal protection for the members of various groups or communities in the event that these persons, due to their actual or presumed membership statuses, are assaulted or compelled by applying coercion or duress to do, not to do, or to endure something. This provision aims at preserving human dignity and, in particular, protecting various minorities by prohibiting abuses against national, ethnic,

racial, religious or other groups. In that respect, the Curia also noted that Article 174/B, paragraph (1a) of the Criminal Code, as adopted by Article 1 of the Act n° XL of 2011 and entered into force on 7 May 2011, provided an additional protection against apparently anti-social behaviours, and stipulated that any person who displays an apparently anti-social behaviour against others for belonging, whether in fact or under presumption, to a national, ethnic, racial or religious group, or to a certain social group, aiming to cause panic or to frighten others, shall be punishable by imprisonment.

The underlying reasons for the adoption of Article 174/B of the Criminal Code were the promotion of the elimination of discrimination in society and the protection of persons belonging to various groups and communities against abuses.

As a well-established matter of fact, the accused persons primarily sought to avenge the victim's preceding insult, namely a kick to the third accused. On the other hand, the third accused and his companion, the seventh accused with the subsequently joining other accused persons started to physically abuse the victim for his Hungarian ethnicity. The kicked third accused also actively participated in the commission of the imputed criminal acts. The accused persons confronted the victim despite the fact that they could observe that the third accused had not suffered any serious injury that would have justified their retaliation. Thus, the Metropolitan Prosecution Service correctly pointed out in its petition for judicial review that the decisive reason behind the accused persons' acts had been the victim's different ethnicity. With regard to the above, their acts constituted crimes of violence against a member of a community, punishable by aggravated sanctions, since the imputed acts were committed in a group and with the use of potentially deadly weapons.

As regards the motives for committing the imputed acts, the Curia noted that it was irrelevant whether the accused persons other than the third accused primarily sought revenge, and subsequently turned violent because of the victim's different ethnicity or the above motives coexisted during their criminal acts. In the latter case, both motives should be examined and assessed.

Undoubtedly, the imputed acts also constituted crimes of public nuisance, committed in a group and with the use of potentially deadly weapons, leading to the disturbance of public peace. Pursuant to Article 271, paragraph (3), points a) and d) of the Criminal Code, these crimes shall be punishable by imprisonment between one to five years. On the other hand, public nuisance shall not be taken into account in the event that the imputed acts result at the same time in a criminal act of greater gravity. Thus in the present case, violence against a member of a community, punishable by imprisonment between two to eight years, shall override the qualification of the accused persons' acts as crimes of public nuisance.

Consequently, the Curia established that the first and second accused had contributed, as accomplices [Article 21, paragraph (2) of the Criminal Code], to the commission of crimes of violence against a member of a community [Article 174/B, paragraph (1) and paragraph (2), points b) and e) of the Criminal Code], while the third, fourth, fifth, sixth and seventh accused had committed, as co-perpetrators [Article 20, paragraph (2) of the Criminal Code], the above mentioned crimes.

Given that the Curia re-qualified the criminal offences attributed to the accused persons, it also reviewed and aggravated the criminal sanctions imposed on them.[1454]

1454 Budapest, the 20th of March 2013. In: Communication concerning the decision of the Curia of Hungary in the criminal case n° Bfv.II.590/2012.

8.14.3. Disorderly Conduct (CC 340. §)

1) Any conduct of violent or intimidating resistance against the actions of the keeper or security personnel to maintain order at a public event is guilty of a misdemeanor punishable by imprisonment not exceeding two years, insofar as the act did not result in a more serious criminal offense.

(2) Any person who in a sports event enters without authorization or breaches any restricted area where no visitors are allowed, or that is restricted for a specific group of visitors, or if throws any object into such an area and thereby jeopardizing the sport event or the physical integrity of others shall be punishable in accordance with Subsection (1), insofar as the act did not result in a more serious criminal offense.

(3) The penalty for a felony shall be imprisonment not exceeding three years if disorderly conduct is committed:

a) in a gang;

b) by displaying a deadly weapon;

c) by carrying a deadly weapon; or

h) by a habitual recidivist.

(4) Within the meaning of habitual recidivism, the following shall be construed as crimes of similar nature:

a) battery [Subsections (3)-(6) and (8) of Section 164];

b) assault on a public official [Subsections (1)-(5) of Section 310], assault on a person entrusted with public functions (Section 311), assault on a person aiding a public official or a person entrusted with public functions (Section 312);

c) public nuisance (Section 339);

d) vandalism [Subsections (1)-(6) of Section 371].

Legal case: By its judgment taken at a public hearing on 30 October 2018 the Curia's review bench determined the petition for review filed by the defence counsel and acquitted the camera operator for lack of criminal offence from the charge of misdemeanour disorderly conduct. On 8 September 2015 at Röszke border crossing the camera operator, while broadcasting about a mass migration at the Serbian-Hungarian border in the midst of the rush of several hundred migrants fleeing the police measures, kicked two persons in the leg and attempted to kick another person, after one of those persons pushed her aside.

The Curia has found that the first and the second instance courts violated the rules of substantive criminal law in having found the defendant guilty of the misdemeanour offence of disorderly conduct and having imposed a measure (probation) on her for the commission of that offence. For in the absence of the element of "outrageous antisociality" the defendant's conduct did not amount to misdemeanour disorderly conduct but to an illicit and morally improper conduct having constituted the regulatory offence of "causing disturbance". That regulatory offence, however, had, meanwhile become time-barred, therefore proceedings had to be discontinued.

Not sharing the defence's position, the Curia has been of the opinion that the conduct cannot be regarded to have constituted criminal self-help, which is an obstacle

https://kuria-birosag.hu/sites/default/files/selected_case_law/criminal_case_february_2013.pdf (06.03.2024.)

to punishability, because not the defendant's conduct but the chaotic rush of the several hundred migrants fleeing the police measure is to be regarded as having been antisocial. When the defendant interfered in an already disruptive situation she did not become the cause of the chaos that was already ongoing, and her improper reaction was not unique or outrageous in that situation.

According to the established jurisprudence, in the absence of the element of "outrageous antisociality", even violent conducts suitable for causing indignation or alarm shall not constitute the criminal misdemeanour of disorderly conduct. And this is what happened in the case at issue, too.

The indignation and negative opinions expressed subsequently, following the media coverage and the interpretations of the events did not form part of the charge, therefore they were not evaluated under the rules of criminal law. The sentiments that may be stirred by subsequent media reports are consequences that cannot be evaluated by the courts.[1455]

8.15. Forgery of Administrative Documents (CC 342. § - 343. §)

CC 342. § (1) Any person who:

a) prepares a forged administrative document or falsifies the contents of an administrative document;

b) uses a falsified or forged administrative document or an administrative document issued under the name of another person;

c) collaborates in the inclusion of false data, facts or declarations in an administrative document regarding the existence, changing or termination of a right or obligation;

is guilty of a felony punishable by imprisonment not exceeding three years.

(2) Any person who engages in preparations for the forging of administrative documents as defined in Paragraph a) or b) of Subsection (1) is guilty of misdemeanor punishable by imprisonment not exceeding one year.

(3) Any person who performs the forging of administrative documents under Paragraph c) of Subsection (1) by way of negligence shall be punishable for a misdemeanor by custodial arrest.

CC 343. § (1) Any public official who, by abusing his official competence:

a) prepares a forged administrative document;

b) falsifies the contents of an administrative document; or

c) includes falsely any essential fact in an administrative document;

is guilty of a felony punishable by imprisonment between one to five years.

(2) The provisions of this Section shall also apply to those members of the judicial and law enforcement authorities of a foreign State who operate in the territory of Hungary pursuant to statutory authorization.

Legal case 1.: The act of forging a single and individualised public document by reproducing without modification the features of the original which involves the likelihood

1455 Budapest, the 30th October 2018. In: Communication concerning the decision of the Curia of Hungary in criminal case number Bfv.III.796/2018. https://kuria-birosag.hu/sites/default/files/selected_case_law/criminal_case_october_2018.pdf (05.03.2024.)

of confusion with the original constitutes the crime of forgery of public documents as defined in section 274, subsection (1), point a) of Act no. IV of 1978 on the Criminal Code (hereinafter referred to as the Criminal Code). By contrast, the act of identically reproducing a single and individualised public document without giving the false impression that the reproduced document has been lawfully issued by the competent authority (notary public) does not qualify as the crime of forgery of public documents. In the event that the above factual elements were not properly assessed by the lower instance courts, no decision on the accused persons' guilt could be taken with sufficient certainty. In such a case, the final judgement shall be quashed and the first instance court shall be ordered to reopen its proceedings.

The first instance court found the first accused guilty of inciting to commit the crimes of forgery of public documents [section 274, subsection (1), point a) of the Criminal Code] and theft [section 316, subsection (1) and subsection (2), phrase II, point d) of the Criminal Code], the second accused guilty of committing the crime of forgery of public documents [section 274, subsection (1), point a) of the Criminal Code], and consequently imposed criminal sanctions on them.

According to the relevant facts of the case, the first accused, a Romanian national, was seriously concerned that he would lost his ID card by having it permanently with him and that the replacement of a lost ID card would cause him a significant expenditure of time and money, since the lost ID card could be replaced only in Romania. With regard to his concern, he had a colour photocopy of his ID card made, laminated and cut to size in a quick print station accessible to the public by the second accused, an employee working there. The first accused subsequently carried the photocopy and presented it to the authorities after having committed a theft a few months later.

The first instance judgement became final in respect of the first accused. Acting upon an appeal submitted by the second accused and his defence attorney, the second instance court acquitted both accused persons of the charge of forgery of public documents by overruling the partially final judgement regarding the first accused. The second instance court basically argued that the photocopied ID card could not be qualified as a public document.

The prosecutor submitted a petition for judicial review against the final judgement to the detriment of both accused persons. He reasoned that the second accused – incited by the first accused – made a falsified copy of the Romanian ID card that gave the false impression of being authentic and having been issued by the competent Romanian authority. Thus, the imputed acts constituted the crime of forgery of public documents. In its decision no. Bfv. III.1.449/2014/5 rendered at a public hearing held on 24 March 2015, the Curia concluded that the second instance court had made a manifest error of assessment in finding that the imputed acts could not be qualified as the crime of forgery of public documents due to the fact that the falsified copy had not been issued by the competent authority and therefore could not be considered a public document.

On the contrary, the Curia stated that the forgery had resulted from the document being issued by an unauthorised person. The act of forging a single and individualised public document by reproducing without modification the features of the original which involves the likelihood of confusion with the original, however, constitutes the crime of forgery of public documents as defined in section 274, subsection (1), point a) of the Criminal Code.

On the other hand, the act of identically reproducing a single and individualised public document without giving the false impression that the reproduced document has been lawfully issued by the competent authority (notary public) does not qualify as the crime of forgery of public documents.

In the event that the above factual elements were not properly assessed by the lower instance courts, no decision on the accused persons' guilt could be taken with sufficient certainty. In the case at issue, the lower instance courts failed to record whether the imputed photocopy had been made of a plastic card or a paper-based document (e.g. Hungarian identity cards are issued in plastic card format) and they only established that the paper-based copy had been cut to size and laminated. In this event, it becomes clearly evident to any person who takes the photocopy of the ID card in his hands that the accused did not intend to forge a public document, but rather sought to make a simple photocopy with which he could demonstrate the existence of the single original public document and that of the data contained therein. Hence, the above photocopy could be regarded a pictorial presentation of the public document.

Despite the need for them to be assessed, these factual elements were not taken into account by the lower instance courts. Consequently, the Curia quashed the first and second instance judgements and ordered the first instance court to reopen its proceedings.[1456]

Legal case 2.: In its judgement n° 14.B.950/2009/73 delivered on 14 September 2011, the Municipal Court of Székesfehérvár acquitted the accused person of charges of forging public documents, a criminal offence punishable under Article 274, paragraph (1), point c) of the Criminal Code. In its court order n° 1.Bf.18/2012/10 rendered on 11 September 2012, the Tribunal of Székesfehérvár as a court of second instance upheld the first instance judgement.

According to the facts of the case, the accused decided to have a house built in the community of Sukoró and to rent a separate house till the end of the construction works. On 1 July 2008, he concluded a rental agreement for an indefinite period concerning a house in 5 K. Street with the aim of renewing the rented building as well. On 2 July, one day after the conclusion of the above agreement, the accused and his attorney-at-law went to the mayor's office of Sukoró in order to get the rented property registered as his place of residence. The discussions involving the mayor and the notary were conducted in English and Hungarian, since the accused could not fully understand or speak Hungarian, therefore the accused person's attorney provided interpretation. Following the discussions, the notary escorted them to the competent office clerk who filled in the requested registration form for the accused. Despite the fact that the completed form was not translated, the accused put his signature to it. The accused was not informed that the registration of the rented house as his place of residence required him to habitually reside in the registered property. The accused signed the registration form believing that he did not really have to move into the rental. Based on the completed form, the rented house was registered as the accused person's place of residence in the public register on July 2008, and subsequently, on 12 July, the competent authority issued a certificate of residence for him. Before the start of construction and renovation works in September 2008, the accused, having dual citizenship,

1456 Budapest, the 17th of April 2015. In: Communication concerning the decision of the Curia of Hungary in criminal case n° Bfv.III.1.449/2014.
https://kuria-birosag.hu/sites/default/files/selected_case_law/criminal_case_march_2015.pdf (06.03.2024)

travelled to Israel to visit his ailing father. Upon his return to Hungary in Spring 2009, he decided to cancel his construction project and to have only his rented home renovated. To this end, on 23 April 2009, the accused person purchased the rented property. The accused has never resided in or moved to the previously rented building.

On the basis of Article 416, paragraph (1), point a) of the Code of Criminal Procedure, the Prosecution Service of Fejér County submitted a petition for judicial review before the Curia of Hungary against the final court decision. In its court order n° Bfv.I.393/2013/16 delivered at its public hearing held on 17 September 2013, the Curia upheld the judgement of the first instance court and the court order rendered by the appellate court. Pursuant to Article 423, paragraph (1) of the Code of Criminal Procedure, in judicial review proceedings the factual background of cases pending before the Curia cannot be contested or reviewed.

According to the facts of the case, as established indisputably by the lower instance courts, the accused mistakenly assumed during the committal of the impugned acts of crime that his acts posed no danger to society and public order. As the reasoning part of the second instance decision emphasised, the accused person's assumption was confirmed by the mayor, the notary and the office clerk as well. The aforementioned civil servants construed the relevant piece of legislation as meaning that the registration of the rented property as the accused person's place of residence did not require the accused to actually move in to the rental. The facts show that based on the completed registration form, the rented property located in 5 K. Street was registered as the accused person's place of residence in the public register, and subsequently the competent authority issued a certificate of residence for the accused. Given that the public register and the certificate of residence qualify as public documents, the accused, by mistakenly assuming that habitual residence at his registered place of residence was not a legal requirement, collaborated in the inclusion of false data in them.

The relevant provision of the Criminal Code states that any person who collaborates in the inclusion of false data, facts or declarations in a public document regarding the existence, changing or termination of a right or obligation shall be punishable by imprisonment for forging public documents.

In the present case, the impugned acts constitute a criminal offence only if the forged documents have an effect on the existence, changing or termination of a right or obligation. The public register not only includes, but also attests a person's place of residence. Hence, the first and second instance courts correctly concluded that the accused had committed the criminal offence of forging public documents by collaborating in the inclusion of false data in them during the filling in of the registration form.

However, the courts had also justifiable grounds for finding that the accused should not be liable to be punished, since he had mistakenly assumed that his acts had posed no danger to society and public order.

According to the consistent case-law of the criminal courts, the accused may not be aware that his acts constitute a threat to society and public order if the competent authority or civil servant provides him with improper information as regards his rights and obligations. The mayor, the notary and the office clerk undoubtedly qualify as competent civil servants.

Given that the accused person's attorney and the civil servants at the mayor's office all misinterpreted the applicable legal provision, the accused could not have been held liable

even if he himself tried to interpret the meaning of the ambiguous provision and agreed with the opinion of the civil servants, presumably experts in their respective legal fields; the accused person's latter conduct would also lead to his impunity.

With regard to the above, the first and second instance courts reasonably concluded that the accused could not be charged with intent or negligence in respect of the consequences of his acts and he should not be liable to be punished as he had erroneously interpreted the applicable piece of legislation and had mistakenly assumed that his acts had posed no danger to society and public order.

On the basis of Article 426 of the Code of Criminal Procedure, the Curia upheld the decisions of the lower instance courts.[1457]

8.16. Embezzlement (CC 372. §)

(1) 'Embezzlement' shall mean when a person unlawfully appropriates or disposes of as his own a thing with which he has been entrusted.

(2) The penalty for a misdemeanor shall be imprisonment not exceeding one year if:

a) the embezzlement involves a minor value; or

b) the embezzlement involves a petty offense value, and it is committed:

ba) in criminal association with accomplices,

bb) at a place of emergency,

bc) on a commercial scale.

(3) The penalty for a felony shall be imprisonment not exceeding three years if:

a) the embezzlement is committed for a considerable value;

b) the embezzlement involves a minor value and it is committed by either of the means referred to in Subparagraphs ba)-bc) of Subsection (2); or

c) the embezzlement is committed in respect of objects classified as protected cultural goods or archeological findings.

(4) The penalty shall be imprisonment between one to five years if:

a) the embezzlement is committed for a substantial value;

b) the embezzlement involves a considerable value and it is committed by either of the means referred to in Subparagraphs ba)-bc) of Subsection (2); or

c) the embezzlement is committed against a person whose ability to defend himself is diminished due to his old age or disability.

(5) The penalty shall be imprisonment between two to eight years if:

a) the embezzlement is committed for a particularly considerable value; or

b) the embezzlement involves a substantial value and it is committed by either of the means referred to in Subparagraphs ba)-bc) of Subsection (2).

(6) The penalty shall be imprisonment between five to ten years if:

a) the embezzlement is committed in respect of particularly substantial value; or

b) the embezzlement involves a particularly considerable value and it is committed by either of the means referred to in Subparagraphs ba)-bc) of Subsection (2).

1457 Budapest, the 30th of September 2013. In: Communication concerning the decision of the Curia of Hungary in criminal case n° Bfv.I.393/2013. https://kuria-birosag.hu/sites/default/files/selected_case_law/criminal_case_september_2013.pdf (06.03.2024.)

Legal case: In its decision rendered out of trial on 18 April 2012 and coming into force on 2 May 2012, the Municipal Court of Orosháza sentenced the accused to a probation period of one year for embezzlement. It obliged the accused to pay 45 000,- HUF for the victim and 1 500,- HUF for the state in respect of procedural costs.

According to the facts established in the final decision, the accused agreed with the disabled victim on 20 March 2011 that the accused would obtain an electric engine for the electric vehicle of the victim. On the same day the victim gave the accused 45 000,- HUF in cash to enable him to obtain the engine. However, the accused did not spend the sum on the engine but spent it on purposes of his own between April and December 2011.

Based on Article 416, paragraph (1), point a), section II of the Code of Criminal Procedure, against the final decision and to the advantage of the accused, the Prosecutor's Office of County Békés submitted a petition for review by the Curia of Hungary with reference to Articles 2 and 138/A of the Criminal Code.

According to the petitioner, the accused was convicted by violating procedural law since according to Article 177, paragraph (1), point a) of the Act n° II of 2012 on Petty Offences (hereinafter referred to as the Petty Offences Act) that entered into force on 15 April 2012, stealing, embezzling or unlawfully appropriating an amount not exceeding 50 000,- HUF constitutes a petty offence. Since the accused caused a damage of 45 000,- HUF, the act constitutes a petty offence as of 15 April 2012. Therefore, the petitioner asked the Curia to modify the order of the Municipal Court of Orosháza and withdraw the charge brought against him on account of the crime of embezzlement and re-examine the act as a petty offence of embezzlement committed against property.

The Curia held a public hearing on 30 October 2012 on which it considered the petition well-founded based on the following.

In its order of 18 April 2012, the proceeding court wrongly applied the measure of probation on account of the crime of embezzlement against the accused. Article 2 of the Criminal Code states that a crime has to be examined according to the law that was in force at the time of committal. If the act does not constitute a crime or draws a more lenient penalty according to the new criminal code that entered into force by the time of the adjudication of the act, the new law shall apply, otherwise the new law has no retroactive effect.

According to the new criminal code that was in force at the time of the adjudication of the act committed by the accused, it was not a crime but a petty offence committed against property through embezzlement violating Article 177, paragraph (1) of the Petty Offences Act.

Therefore, in view of Article 2 of the Criminal Code and based on Article 267, paragraph (1), point a) and Article 6, paragraph (3), point a) of the Code of Criminal Procedure, instead of applying a criminal measure against the accused the court should have terminated the procedure and taking Article 252, paragraph (5) of the Petty Offences Act into account should have referred the case to the organ in charge of the preparatory procedure.

Therefore, approving this part of the petition for review, the Curia acquitted the accused of the charge in default of a crime based on Article 427, paragraph (1), point a) of the Code of Criminal Procedure.

The petitioner also proposed that besides acquitting the accused the Curia shall adjudicate the petty offence committed against property through embezzlement. The Curia refused this proposal because of the following.

According to Article 337, paragraph (1) of the Code of Criminal Procedure, if the court considers that the charge constitutes a petty offence and acquits the accused, it shall adjudicate the petty offence. This can happen, however, only if the court holds a hearing based on the charge of a crime, takes evidences and as a result of this procedure it establishes that the charge does not constitute a crime but only a petty offence. Otherwise a petty offence cannot be judged within the framework of a criminal procedure.

In this case the court proceeded without holding a trial, therefore, no taking of evidences took place. The Curia, as a court reviewing final decisions, cannot hold a hearing. Therefore, in spite of the fact that the Curia established that the act constitutes not a crime but a petty offence at the time of adjudication, the law does not entitle the Curia to judge the petty offence in the framework of the review procedure.

There is no possibility to judge the petty offence within the review procedure for other reasons either.

The review procedure is an extraordinary remedy ruled by the Code of Criminal Procedure. There is no remedy against a decision taken in the framework of a review procedure. According to Article 35 of the Petty Offences Act, a remedy shall be available against the decisions and measures of the petty offence authority and the court. The Petty Offences Act provides for an ordinary remedy of one instance without restrictions against a local court decision on a petty offence that is punishable with confinement.

If, in the present case, the Curia adjudicated the act as a petty offence, it would deprive the accused of the possibility of remedy, violating thereby Article XXVIII, paragraph (7) of the Fundamental Law that ensures that everybody shall have the right to have remedy against an authority or court decision that violates their right or lawful interest.

Therefore the Curia refused this part of the petition and referred the case to the competent police department to proceed in examining the petty offence.

8.17. Misappropriation of Funds (CC 376. §)

(1) Misappropriation of funds' shall mean the act of a person in wrongfully taking or using another's assets that has been entrusted to him for a specific purpose.

(2) The penalty for a misdemeanor shall be imprisonment not exceeding two years if:

a) the misappropriation results in minor financial loss; or

b) the misappropriation results in financial loss under the petty offense limit and it is committed by the guardian or executor in that capacity.

(3) The penalty for a felony shall be imprisonment not exceeding three years if:

a) the misappropriation results in considerable financial loss; or

b) the misappropriation results in minor financial loss and it is committed by the guardian or executor in that capacity.

(4) The penalty shall be imprisonment between one to five years if: a) the misappropriation results in substantial financial loss; or b) the misappropriation results in considerable financial loss and it is committed by the guardian or executor in that capacity.

(5) The penalty shall be imprisonment between two to eight years if:

a) the misappropriation results in particularly considerable financial loss; or

b) the misappropriation results in substantial financial loss and it is committed by the guardian or executor in that capacity.

(6) The penalty shall be imprisonment between five to ten years if:

a) the misappropriation results in particularly substantial financial loss;

b) the misappropriation results in particularly considerable financial loss and it is committed by the guardian or executor in that capacity.

Legal case: In its judgement delivered on 24 January 2017, the High Court of Budapest found the second accused guilty of the crime of misappropriation of funds [section 376, subsection (1) and subsection (5), point a) of the Criminal Code], committed as a co-perpetrator. Consequently, the high court sentenced him to two years' imprisonment, suspended for a probationary period of five years and to a fine representing three hundred and fifty days in the total sum of 70 000 000,- Hungarian forints. In addition, the high court obliged the second accused – jointly and severally with the other accused persons – to pay the victim, a local municipality in the present case, the sum of 131 700 000,- Hungarian forints as damages and interest and to pay the State the amount of 900 000,- Hungarian forints as court fees. The high court ordered that the remainder of the victim's civil claim be dealt with within the framework of civil court proceedings. Moreover, the high court obliged the second accused to pay 258 888,- Hungarian forints as criminal costs.

In its judgement rendered on 28 February 2018, the Regional Appellate Court of Budapest, acting as a court of second instance, partially modified the first instance judgement in respect of the second accused: it put the fine aside, reduced the amount of the damages awarded to 123 010 000,- Hungarian forints, changed the starting date of the accused persons' obligation to pay interest and rectified the victim's name. The court of second instance upheld the remainder of the first instance judgement in respect of the second accused.

According to the facts of the case, the second, third, fourth, fifth, sixth, seventh, late eighth, ninth, tenth, eleventh, twelfth, thirteenth and fifteenth accused were, in the year 2004, members of the municipal council of the District Municipality of Terézváros (District number VI of Budapest). At that time, the district mayor was the late first accused, while the second accused acted as the district's deputy mayor in charge of property matters.

On the basis of statutory mandates, the district municipality adopted a number of municipal decrees on asset management. In various procedures for the sale of some of the municipality's real estates, the second accused presented the tenderers' bids to the municipal council for discussion in a way to favour certain companies and by avoiding competitive tendering procedures, even though he was aware that his actions were in violation with the relevant rules of the municipality's Housing Decree and Assets Decree. The accused persons approved the second accused's propositions without taking the rules of the Assets Decree on competitive tendering procedures into due account, consequently, the municipal council decided to sell the real estates concerned to the favoured companies, which caused the District Municipality of Terézváros to suffer material harm amounting to 285 000 000,- Hungarian forints.

Based on section 649, subsection (1), point a), subpoint aa) and subsection (2), points a) and d) of the Code of Criminal Procedure, the defence attorney of the second accused submitted a petition for judicial review to the Curia of Hungary against the final judgement

in order to request the quashing of the challenged court decision. In the context of section 649, subsection (2), point a) of the Code of Criminal Procedure, the petitioner argued that the second accused was a national of the Central African Republic and had been appointed as a diplomatic officer by the Minister for Foreign Affairs of the Central African Republic, acting on behalf of the said country's President. In the petitioner's viewpoint, the instrument of appointment and the second accused's diplomatic passport prove that the latter has diplomatic immunity, but the criminal authorities failed to request the lifting of his immunity and the courts, therefore, had no jurisdiction to hear his case. The petitioner submitted in the alternative that even if the authorities' failure to request the lifting of the second accused's immunity would not result in the establishment of the courts' lack of jurisdiction, such a failure should be regarded as a ground for exemption from criminal liability [section 15, point h) of the Criminal Code], which excludes, as a substantive legal ground, the possibility of prosecuting him. The petitioner also complained that the courts had failed to assess all the facts presented for their consideration and they had relied only on the statement of the Ministry for Foreign Affairs of Hungary.

The Curia was of the opinion that the courts had lawfully prosecuted the second accused, as the petitioner's reference to the courts' lack of jurisdiction and the ground for exemption from criminal liability had been ill-founded. The court of second instance correctly argued that the second accused had been given no diplomatic immunity from Hungary's criminal jurisdiction, hence, the authorities had not been required to request the lifting of his immunity. The court of first instance exercised due care and attention when it turned to the Ministry for Foreign Affairs to obtain the latter's statement on the matter. In addition, the court of second instance rightly pointed out that the ministerial statement was binding on the courts and any other authorities in respect of the assessment of the immunity of the person concerned [section 5, subsection (1) of Law Decree number 7 of 1973 on the procedure to be followed in case of diplomatic and other immunities].

It is a matter of fact that the second accused has a dual Hungarian and Central African nationality and has been working as a diplomatic officer at the Embassy of the Central African Republic in Geneva, Swiss Confederation. He referred to his immunity in the territory of Hungary based on his diplomatic status in Switzerland. By virtue of section 3 of the Criminal Code on the latter's personal scope, Hungarian criminal law shall apply to any act of Hungarian citizens committed either in Hungary or abroad, if such an act is criminalized under Hungarian law.

Section 2, subsection (2) of Act number LV of 1993 on Hungarian Citizenship unambiguously stipulates that – unless an Act provides otherwise – any Hungarian citizen who also holds citizenship in another country shall be regarded as a Hungarian citizen for the purposes of the application of Hungarian law. Furthermore, as the court of second instance correctly held, diplomatic immunity is not unlimited, since the content as well as the personal and temporal scope thereof are defined, among others, by the 1961 Vienna Convention on Diplomatic Relations, promulgated by Law Decree number 22 of 1965. According to Article 31, paragraph (1) of the Vienna Convention, a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State, while Article 31, paragraph (4) thereof stipulates that the immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State. By virtue of Article 39, paragraph (1) of the Vienna Convention, every person entitled

to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.

Having regard to the above, it can be established that the diplomatic status of the second accused, a dual Hungarian and Central African national, at the Embassy of the Central African Republic (sending State) in Geneva, Swiss Confederation (receiving State) does not and could not entitle him to diplomatic immunity and privileges within the territory of Hungary, thus, he could not be exempted from Hungary's criminal jurisdiction in respect of his criminal offence committed in the territory of Hungary. It follows from the aforementioned that the petitioner's argumentation was ill-founded both in terms of the Criminal Code's personal and territorial scope.

With regard to the foregoing, the Curia upheld the final judgement in respect of the second accused.[1458]

8.18. Economic and business related offenses in general

Broadly defined, economic crimes cover a wide range of offences, including swindling and fraud, money laundering, corruption, intellectual property crime and environmental crime. Criminal investigations primarily tackling some other form of crime, such as drug trafficking, terrorist activities or trafficking in human beings (THB), usually also include economic crimes, such as money laundering.

Economic crimes often have a cross-border element: criminals move their assets to other countries to try to avoid freezing or confiscation orders. Working together to trace, freeze and confiscate assets that have been acquired by breaking the law is a strategic priority in the European Union's fight against organised crime and a major focus of Eurojust's casework.

Eurojust has built up significant institutional knowledge of solutions and best practice, which can significantly improve the effectiveness of the investigations, prosecutions and ultimately the recovery of criminal proceeds.

In a general sense, the crime type of swindling and fraud comprises the act of illegally depriving another person or entity of money, property or legal rights. The perpetrator deliberately deceives the victim about facts. This deception results in an error on the part of the person who has been deceived, which in turn causes the victim, for instance, to hand over money, surrender things or provide services. This causes the deceived person or a third person to suffer financial loss and, at the same time, leads to an unlawful enrichment of the perpetrator or another person.

Swindling and fraud come in many shapes and forms, such as investment fraud, insurance fraud, benefit fraud, tax and excise fraud or consumer fraud. Since these crimes usually combine high profits and low risks, they are popular with organised crime groups

1458 Budapest, the 6th of November 2019. In: Communication concerning the decision of the Curia of Hungary in criminal case number Bfv.III.500/2019. https://kuria-birosag.hu/sites/default/files/selected_case_law/criminal_case_september_2019.pdf (05.03.2024.)

(OCGs). The perpetrators often operate across borders, benefitting from differences in national legislations and adding complexity to the nvestigations required to uncover these criminal acts. Moreover, recent years have seen a rapid growth in fraud committed on the internet, with criminals taking advantage of huge numbers of unsuspecting users.

To guarantee effective prosecution of swindling and fraud, international judicial cooperation is paramount.

a) Types of fraud: some of the most common types of fraud include:

– Tax fraud: the illegal evasion of taxes by individuals or entities, ranging from knowingly underreporting taxable income or overestimating business deductions to sophisticated international VAT carousel frauds.

– Excise fraud: a variation of tax fraud in which import duties or taxes are evaded by smuggling or illegally importing excise goods, illegally manufacturing excise goods or diverting excise goods, for example alcohol, cigarettes or fuel.

– Counterfeiting: fraudulently imitating or copying items with the intent to deceive, for instance consumer products, food, pharmaceuticals, technical products such as parts for aircraft or automobiles, artworks, money or documents (forgery).

– Investment fraud: luring investors to make purchase or sale decisions based on false information, often in variations of boiler room schemes, Ponzi schemes or pyramid schemes, resulting in high losses of the victims.

– Benefit fraud: illegally claiming benefits a person is not entitled to, for instance unemployment benefits, grants, pensions or compensations, by providing false information or not reporting changes in the circumstances determining the eligibility for receiving such benefits.

b) Money laundering: Transnational criminal networks have one thing in common: money. Organised criminal activity is profit-driven, and all crime groups need resources to finance their activities. This is where money laundering comes into play. The introduction of illegally obtained assets into the legal financial and economic cycle aims to provide criminals with explainable and seemingly legal resources that make it increasingly difficult to be traced back to their true source.

Effective prosecution of money laundering including the recovery of illegally obtained assets contributes significantly to a successful fight against organised crime. As profits are taken away from perpetrators, crime becomes less attractive. At the same time, decisive action against money laundering prevents assets from being used to commit further criminal offenses.

Stages of money laundering: money laundering is not a single act, but rather a process that can be divided into three stages.

– Placement stage: the proceeds of crime are, for the first time, introduced into the legal financial system, often broken up into smaller amounts. The risk of being discovered is particularly high in this phase.

– Layering stage: financial transactions take place, which are often complex and involving banks and/or companies in multiple countries. The main objective of this phase is to separate the illegally acquired funds from their source, thereby obscuring the paper trail and severing any connection to the original crime. Through mostly international transactions, the funds are moved around between several actors in order not to be discovered. For this purpose, loopholes in the legal provisions of the respective countries may be used.

– Integration stage: the money comes back to the criminal from a seemingly legal source. The aim is to reunite the money with the criminal without attracting attention, while giving the money the appearance of legal origin. This money is subsequently reinvested in the legal economic cycle, for example through real estate, luxury goods or business ventures.

c) Environmental crime: this crime is the fourth-largest criminal activity in the world, growing at a rate of between 5% and 7% per year, according to an Interpol and UN Environment Programme estimate. This increase, combined with the organised, transnational nature of environmental crime, requires administrative, law enforcement and judicial authorities to adopt a coordinated approach at national and international level.

A new casework report on environmental crime, prepared during 2020 and published in January 2021, showed that early Eurojust involvement allows for effective international cooperation, coordination from the start of investigations, the effective exchange of information and the development of common strategies.

d) Intellectual property crime: Eurojust supports national judicial authorities in dealing with infringements of intellectual property rights, which are often related to other crime types such as tax fraud, cybercrime, crimes against human health or trafficking in substandard products. This organisation supported a growing number of large cases tackling this form of crime in 2020, notably several large-scale operations tackling illegal online streaming services and pirate-copied movies and TV series, including Operation Sundance, initiated by the Liaison Prosecutor of the USA. Another major coordinated action concerned 'K boxes' used for illegal audiovisual streaming services in more than 20.000 households and was initiated at the request of the Liaison Prosecutor of Switzerland. In 2021, Eurojust and the European Union Intellectual Property Office (EUIPO) established the Intellectual Property Crime Project (IPC Project), aimed at boosting cooperation and ensuring a more coherent and robust response against IP infringements across the EU.[1459]

8.18.1. Budget Fraud (CC 396. §)

(1) Any person who:

a) induces a person to hold or continue to hold a false belief, or suppresses known facts in connection with any budget payment obligation or with any funds paid or payable from the budget, or makes a false statement to this extent;

b) unlawfully claims any advantage made available in connection with budget payment obligations; or

c) uses funds paid or payable from the budget for purposes other than those authorized;

and thereby causes financial loss to one or more budgets, is guilty of misdemeanor punishable by imprisonment not exceeding two years.

(2) The penalty shall be imprisonment not exceeding three years for a felony if:

a) the budget fraud results in considerable financial loss; or

b) the budget fraud defined in Subsection (1) is committed in criminal association with accomplices or on a commercial scale.

(3) The penalty shall be imprisonment between one to five years if:

a) the budget fraud results in substantial financial loss; or

1459 https://www.eurojust.europa.eu/crime-types-and-cases/crime-types/economic-crimes (06.03.2024.)

b) the budget fraud results in considerable financial loss and is committed in criminal association with accomplices or on a commercial scale.

(4) The penalty shall be imprisonment between two to eight years if:

a) the budget fraud results in particularly considerable financial loss; or

b) the budget fraud results in substantial financial loss and is committed in criminal association with accomplices or on a commercial scale.

(5) The penalty shall be imprisonment between five to ten years if:

a) the budget fraud results in particularly substantial financial loss; or

b) the budget fraud results in particularly considerable financial loss and is committed in criminal association with accomplices or on a commercial scale.

(6) Any person who manufactures, obtains, stores, sells or trades any excise goods in the absence of the criteria specified in the Act on Excise Taxes and Special Regulations on the Marketing of Excise Goods or in other legislation enacted by authorization of this Act, or without an official permit, and thereby causes financial loss to the central budget, shall be punishable in accordance with Subsections (1)-(5).

(7) Any person who either does not comply or inadequately complies with the settlement, accounting or notification obligations relating to funds paid or payable from the budget, or makes a false statement to this extent, or uses a false, counterfeit or forged document or instrument, is guilty of a felony punishable by imprisonment not exceeding three years.

(8) The penalty may be reduced without limitation if the perpetrator provides compensation for the financial loss caused by the budget fraud referred to in Subsections (1)-(6) before the indictment is filed. This provision shall not apply if the criminal offense is committed in criminal association with accomplices or on a commercial scale.

(9) For the purposes of this Section:

a) 'budget' shall mean the sub-systems of the central budget - including the budgets of social security funds and extra-budgetary funds -, budgets and/or funds managed by or on behalf of international organizations and budgets and/or funds managed by or on behalf of the European Union. In respect of crimes committed in connection with funds paid or payable from a budget, 'budget' shall also mean - in addition to the above - budgets and/or funds managed by or on behalf of a foreign State;

b) 'financial loss' shall mean any loss of revenue stemming from non-compliance with any budget payment obligation, as well as the claiming of funds from a budget unlawfully or the use of funds paid or payable from a budget for purposes other than those authorized.

Legal case 1.: In its decision n° 14.B.780/2011/37 delivered on 28 November 2012 the Municipal Court of Zalaegerszeg found the first accused guilty in the following crimes: two violations of the financial interests of the European Communities [Article 314, paragraph (1), point a) of Act n° IV of 1978 – hereinafter the old Criminal Code], two unlawful acquisitions of economic advantage [Article 288, paragraph (1), point a) of the old Criminal Code], two frauds [Article 318, paragraph (1), paragraph (5), point a) of the old Criminal Code], fraud [Article 318, paragraph (1), paragraph (4), point a) of the old Criminal Code], two and continuous tax frauds [Article 310, paragraph (1), paragraph (3) of the old Criminal Code], two tax frauds [Article 310, paragraph (1), paragraph (2) of the old Criminal Code] and five frauds of private documents [Article 276 of the old Criminal Code] out of which one was committed continuously. As a cumulative sentence two years' imprisonment and

two years' prohibition from public affairs was imposed on the first accused, as well as he was prohibited from holding an executive post in a commercial organisation or business company for five years. The Tribunal of Zalaegerszeg, proceeding upon the appeals of the convicts, upheld the judgement of the first instance court.

According to the facts of the case the first accused committed the crimes against the same victim within a small period of time, with unified intention in a pattern of business operation to generate profits on a regular basis – causing a financial loss of 57 960 250,- HUF.

The defence lawyer of the first accused submitted a petition for judicial review of the final decision. According to the petition, Article 310 of the old Criminal Code, which was in force at the time of adjudication, the crimes committed by the first accused should have been punished as a unified crime of budget fraud and not as an accumulation of a large number of separate crimes. Besides, the provisions in force at the time of adjudication would have given rise to a lighter punishment since the first accused, before the submission of the indictment, reimbursed the financial loss caused by his conduct, which would have enabled the court based on statutory provisions to apply unrestricted reduction of punishment. In light of Article 2 of the Criminal Code the crimes should have been considered based on the provisions in force at the time of adjudication, therefore, ignoring this demand, the punishment was imposed on the first accused in a manner violating the substantive rules of criminal law.

According to the facts of the case and based on the provisions of the old Criminal Code in force at the time of adjudication, the acts of the first accused would qualify as a budget fraud committed continuously as stipulated in Article 310, paragraph (5), point b), to be punishable by imprisonment from five to ten years. Taking into account the five frauds of private documents, based on Article 85, paragraph (3) a cumulative sentence of five to fifteen years of imprisonment would be guiding in the case, and when defining the exact period of punishment, in light of Article 83, paragraphs (2) and (3), the median term of punishment should be imposed.

At the same time, according to the statutory provisions in force at the time of committing the crime, when defining the frame of a cumulative sentence tax fraud [according to Article 310, paragraph (3)] and fraud [according to Article 318, paragraph (5)] are guiding, since they are to be punished by imprisonment of one to five years. The extent of the cumulative punishment according to statutory provisions is thus an imprisonment of one to seven and a half years, and the median term is not guiding when defining the exact period of imprisonment.

The reference to the fact that the first accused reimbursed the financial loss caused by his conduct is not correct because the sum reimbursed was only a small part of the total loss.

In light of all this, the application of statutory provisions that were in force at the time of adjudication would not result in a more favourable decision in respect of the first accused.

Therefore, the Curia upheld the decisions of the first and second instance courts in respect of the first accused.[1460]

1460 Budapest, the 12th of March 2014. In: Communication concerning the decision of the Curia of Hungary in criminal case n° Bfv.I.1011/2013. https://kuria-birosag.hu/sites/default/files/selected_case_law/criminal_case_february_2014.pdf (06.03.2024.)

Legal case 2.: Proceeding upon the petition for judicial review submitted by the defence attorney of the accused, the Curia upholds the decisions of the first and second instance courts with respect to the accused in the criminal case of tax fraud and other crimes.

The Curia found the accused guilty in tax fraud and in falsifying private documents, thereby violating Article 310, paragraphs (1)-(3) and Article 276 of the Criminal Code.

In the petition for judicial review the defence attorney of the accused complained that criminal substantive law was violated when establishing the guiltiness of the accused. The defence attorney stated in particular that

– according to the facts of the case the accused did not violate the Act on VAT;

– nothing forbids selling goods for an amount different from their market value, the difference in price might be due to various considerations that do not render the transaction illegal;

– according to the Act on VAT that was in force in the period concerned, the unit price and the amount paid shall appear on the invoice, neither of which is necessarily the same as the market value;

– according to Article 34 of the Act n° XCI of 1990 on Taxation "the person subject to VAT obligations shall issue a certificate (invoice) prescribed by law, including the receipts received by cash registers approved by an agency authorised thereunto by legal regulation in respect of the sales they effect." With respect to this, no omission or violation was established in the facts of the case.

The petition for judicial review was not well-founded. According to the facts governing the review proceeding the appliance, that was worth at most 1 million HUF, was sold by the accused on behalf of G Ltd. to F Ltd. The accused, acting on behalf of F Ltd. registered the invoice in the accounting of the latter Ltd. and included the VAT in the tax declaration of the company represented by him. By submitting a false declaration the accused caused a damage of 4,612,500 HUF for the state budget.

According to the facts established the accused did not even intend to pay the price of the appliance when concluding the contract. The false invoice was issued and registered in order to cause damage for the state budget.

Tax fraud can be committed only by a person subject to tax payment, since tax fraud postulates that the person concerned is subject to taxation.

In making the decision the Curia took into account Council Directive 2006/112/EC on the common system of value added tax, the judgements of the European Court of Justice, as well as the Act n° LXXIV of 1992 on VAT. According to the latter, "the taxable person has the right to deduct from the tax he is required to pay the amount of tax he was charged in connection with the purchase of goods and services by another taxable person provided that this is subject to the value added tax system". The right can be exercised only if there is authentic evidence (e.g. invoice) that proves the amount of the value added tax. Therefore, if there is no such document, the right to deduct cannot be exercised.

The Curia established based on the facts of the case that the accused did not have such a document. The invoice used by him was false in its content, and he was not entitled to deduct a VAT amount of 4,612,500 HUF.

The Curia examined the case also according to Article 44, paragraph (5) of the Act on VAT, according to which "the issuer shall be responsible for the authenticity of the data entered in the invoice and simplified invoice. The tax-related rights of the taxable person

indicated on the invoice as the buyer shall not be compromised if, in connection with tax obligations, he has acted with due circumspection with a view to the circumstances of the supply of goods and services". In the present case "due circumspection" is not verified since the accused accepted and registered an invoice of false content that indicated a price absurdly differing from the real market value of the appliance.

Therefore, the Curia established that no criminal substantive law was violated in establishing the guiltiness of the accused.[1461]

8.18.2. Fraudulent Bankruptcy (CC 404. §)

(1) Any person who, in connection with the imminent insolvency of an economic operator covered by the Act on Bankruptcy Proceedings and Liquidation Proceedings, actually or fictitiously, diminishes the economic operator's assets:

a) by concealing, disguising, damaging, deteriorating or destroying, or by making unusable such assets or any part thereof;

b) by concluding a fictitious transaction, or recognizing a doubtful claim; or

c) by other means, in contradiction to the requirements of prudent management;

and thereby prevents the satisfaction of his creditor or creditors in part or in whole is guilty of a felony punishable by imprisonment between one to five years.

(2) Any person who, in connection with an economic operator covered by the Act on Bankruptcy Proceedings and Liquidation Proceedings:

a) engages in either of the conducts referred to in Subsection (1) to artificially induce the economic operator's insolvency, or to cause the perception of insolvency; or

b) in the case of the economic operator's insolvency, engages in either of the conducts referred to in Subsection (1); with intent to prevent the satisfaction of his creditor or creditors in part or in whole is punishable in accordance with Subsection (1).

(3) The penalty shall be imprisonment between two to eight years if:

a) fraudulent bankruptcy is committed in respect of an economic operator of preferential status for strategic considerations; or

b) the dimunition of assets, actually or fictitiously, is particularly substantial.

(4) Any person who, following the order of liquidation, provides preferential treatment to any creditor in violation of the sequence of satisfaction specified in the Act on Bankruptcy Proceedings and Liquidation Proceedings is guilty of a misdemeanor punishable by imprisonment not exceeding two years.

(5) The criminal offenses provided for in Subsections (1)-(3) are punishable if:

a) bankruptcy proceedings have been opened;

b) liquidation proceedings, involuntary de-registration or compulsory winding-up proceedings have been ordered; or

c) liquidation proceedings had not been opened by derogation from the relevant statutory provisions.

1461 Budapest, the 12th of February 2013. In: Communication concerning the decision of the Curia of Hungary in the criminal case nº Bfv.II.222/2012/5. https://kuria-birosag.hu/sites/default/files/selected_case_law/criminal_case_december_2012.pdf (06.03.2024.)

(6) Fraudulent bankruptcy shall be considered a criminal act if committed by a person who has powers to control the assets, or any part thereof, of the debtor economic operator, or has the opportunity to do so, and also if the contract for any transaction with the assets is considered invalid.

Legal case: Pursuant to section 2, subsection (2) of Act no. CIV of 2001 on Measures Applicable to Legal Entities under Criminal Law (hereinafter referred to as the Legal Entities' Criminal Liability Act), such measures may be applied to a legal person if the accused person, acting as the executive officer of a limited liability company that had been liquidated as a result of fraudulent bankruptcy, intentionally diverted assets from the liquidated company in favour of a newly established limited liability company, thus the accused person's criminal offense resulted in a financial gain realised by the latter legal person.

The court of first instance found the first accused guilty of the crime of fraudulent bankruptcy committed as co-perpetrator [section 290, subsection (1), points a) and b) and subsection (2) of Act no. IV of 1978 on the Criminal Code] and guilty of the crime of forgery of public documents committed as accomplice [section 274, subsection (1), point c) of Act no. IV of 1978 on the Criminal Code]. Consequently, the court cumulatively sentenced him to a one year and eight months imprisonment – the implementation of which was suspended for a three-year long probation period – and imposed on him a five-year long prohibition to exercise the functions of an executive officer in a business entity.

The court of second instance partially modified the first instance judgement, and found the first accused guilty of the crime of fraudulent bankruptcy committed as co-perpetrator [section 404, subsection (1), points a) and b), and subsection (2), point a) of Act no. C of 2012 on the Criminal Code] and guilty of the crime of forgery of public documents [section 342, subsection (1), point c) of Act no. C of 2012 on the Criminal Code]. The high court increased the accused person's imprisonment to two years and his probation period to four years.

Upon the competent prosecutor's motion, the high court also imposed a fine of 6 000 000,-HUF on the limited liability company represented first by the first accused and then by the second accused, the spouse of the first accused on the basis of section 2, subsection (1), point a) of the Legal Entities' Criminal Liability Act. The remainder of the first instance judgement was upheld by the high court.

Based on section 416, subsection (1), point b) of Act no. XIX of 1998 on the Code of Criminal Procedure and section 24, subsection (3) of the Legal Entities' Criminal Liability Act, the legal representative of the limited liability company on which the fine had been imposed submitted a petition for judicial review to the Curia against the final court decision.

The petitioner argued that the crime of fraudulent bankruptcy committed by the first accused had been completely unrelated to the newly established limited liability company on which the fine had been imposed. The establishment, pursuant to section 2, subsection (1) of the Legal Entities' Criminal Liability Act, of the criminal liability of a legal person due to the commission of a criminal offense by its executive officer requires that the latter person perpetrate his criminal acts within the legal person's area of business and that, as a consequence, the legal person obtain a financial gain or that the criminal acts, at least, aim at obtaining such gain.

The Curia found the petition for judicial review to be ill-founded. Based on the established facts of the case, it is undoubtedly clear that the first accused, acting as the

executive officer of the limited liability company that had been liquidated as a result of his criminal offense, intentionally diverted assets from the liquidated company in favour of the newly established limited liability company. The accused person's criminal acts resulted in the insolvency of the liquidated company, therefore he was found guilty of the crime of fraudulent bankruptcy. The first accused decreased the assets of the liquidated company by diverting them to the newly established company that was also represented by him, the whole transaction resulted in a financial gain realised by the latter company.

According to section 2, subsection (2) of the Legal Entities' Criminal Liability Act, criminal measures may also be applied to legal persons if the criminal offense resulted in a financial gain realised by them, or if the criminal offense was committed through them and their executive officer, representative, employee, officer, manager or supervisory board member was aware of the criminal acts.

It is an unquestionable fact that the criminal offence committed by the first accused aimed at and resulted in obtaining a financial gain for the legal person concerned. The case's facts also clearly show that the first accused, as the registered executive officer of both legal persons, was well aware of the commission of the criminal acts, since he intentionally perpetrated the crime of fraudulent bankruptcy, with the aim of diverting assets from the liquidated company to avoid the satisfaction of its creditors.[1462]

8.18.3. Unauthorized Financial Activities (CC 408. §)

Any person who performs:

a) financial services or engages in activities auxiliary to financial services;

b) investment services or engages in activities auxiliary to investment services, commodity exchange services, investment fund management services, venture capital management services, exchange services, clearing and settlement services, central depository services or the activities of a central counterparty;

c) insurance activities, reinsurance activities or the activities of independent insurance intermediaries;

d) activities of voluntary mutual insurance funds, private pension funds or institutions for occupational retirement provision;

without the authorization prescribed by the relevant legislation is guilty of a felony punishable by imprisonment not exceeding three years.

8.18.4. Capital Investment Fraud (CC 411. §)

Any person who induces other persons to make a new capital investment or to increase an existing one, or to sell or reduce a capital investment:

a) by disclosing or broadcasting false information concerning the financial position of an economic operator or the executive employee of such economic operator in connection

1462 Budapest, the 14th of June 2018. In: Communication concerning the decision of the Curia of Hungary in criminal case n° Bfv.I.1.381/2017. https://kuria-birosag.hu/sites/default/files/selected_case_law/criminal_case_february_2018.pdf (06.03.2024.)

with his office, or concerning financial instruments in relation to the economic operator, or by concealing information; or

b) by concluding any fictitious transaction relating to financial instruments;

is guilty of a felony punishable by imprisonment not exceeding three years.

8.18.5. Breach of Accounting Regulations (CC 403. §)

(1) Any person who infringes the documentation system or violates the annual reporting, bookkeeping and auditing obligations prescribed in the Accounting Act or in the regulations adopted under its authorization, and thereby:

a) causes an error that is construed as having a significant impact on true and fair view; or

b) prevents the overview or inspection of his financial situation in the given financial year;

is guilty of a felony punishable by imprisonment not exceeding three years.

(2) Any private entrepreneur and any other operator not covered by the Accounting Act, who violates his record keeping and documentation obligation prescribed by law, and thereby prevents the overview or inspection of his financial situation shall be punishable in accordance with Subsection (1).

(3) In the case provided for in Subsection (1) the penalty shall be imprisonment between two to eight years if the criminal offense is committed within the scope of activities of a financial institution, investment firm, commodities broker, investment fund manager, venture capital fund manager, exchange market, clearing house, central depository, a body acting as a central counterparty, insurance company, reinsurance company or independent insurance intermediary, voluntary mutual insurance fund, private pension fund, an institution for occupational retirement provision or by a regulated real estate investment company.

(4) For the purposes of this Section 'error construed as having a significant impact on true and fair view' shall mean if the total of all errors (whether negative or positive) for a given financial year and the impacts thereof - increasing or decreasing the profit or loss or the equity - exceeds twenty per cent of the net sales revenue shown in the financial report for the financial year when the error was made, as well as twenty per cent of the balance sheet total. If the total of all errors (whether negative or positive) for a given financial year and the impacts thereof - increasing or decreasing the profit or loss or the equity - exceeds five hundred million forints shall be treated as an error construed as having a significant impact on true and fair view in all cases.

Legal case: In its judgement rendered on a hearing held on 12 March 2012, the Metropolitan Tribunal, within the framework of its reopened proceedings as a result of a quashing decision delivered by a superior court in respect of nine accused, found the accused persons guilty of criminal bankruptcy, unauthorised financial activities, capital investment fraud, the violation of accounting regulations and abetment respectively.

As regards the four accused persons who later submitted a petition for judicial review, the court suspended the execution of the imprisonment of the second, fourth and sixth accused, while it placed the fifth accused on a probation.

The criminal court established that 1 810 private parties injured are entitled to launch civil actions for damages only before other competent state bodies and provided for further subsidiary issues.

In its judgement rendered and delivered on a public hearing held on 20 November 2013, the Metropolitan Court of Appeal, acting as a court of second instance that examined both the prosecution's and the accused persons' appeals, modified the first instance judgement in respect of the second, fourth, fifth and sixth accused: it re-qualified their criminal offences on the basis of the new Criminal Code, partially annulled the first instance decision's provisions as regards the guilt of the second accused, on the other hand, it aggravated the criminal sanctions imposed on the second, fourth and sixth accused, while imposed a sanction on the fifth accused. It rejected the overwhelming majority – all of them with three exceptions – of the private parties' civil claims for damages and provided for further subsidiary issues.

The defence attorney of the second, fourth, fifth and sixth accused submitted a petition for judicial review before the Curia of Hungary against the final and conclusive court decision. The Curia's competent head of panel referred the case to a judicial panel composed of five judges and set the date of a public hearing.

In its judgement, the Curia modified the impugned court decision only in respect of the fifth accused and annulled the provisions that placed him on a probation, while it upheld the remainder of the second instance judgement.

The summary of the Curia's decision is as follows:

1. The Curia found that the crimes of capital investment fraud and the violation of accounting regulations constituted multiple criminal offences, since there was no means-ends relationship between these two crimes, meaning that the crime of capital investment fraud could not be regarded as a goal and the violation of accounting regulations could not be considered as a non-punishable instrumental act of crime that could be assimilated into the crime of capital investment fraud.

The court of second instance disregarded the fact that the second accused committed the above two types of crimes to the detriment of different companies and at different points in time, hence, no means-ends relationship could be established between the two criminal offences in the present case.

2. The Curia held that a fine can be imposed on the accused person sentenced to imprisonment even if the accused has no sufficient income or property. Section 50, subsection (2) of the new Criminal Code contains specific provisions in this regard, according to which the person who is sentenced to a fixed-term imprisonment for a criminal offence committed with the purpose of financial gain and has sufficient income or property shall also have a fine imposed.

3. The Curia emphasised that the criminal provisions covering the different forms of criminal bankruptcy are incomplete rules which do not contain all of the constituent elements of the offences they create, wherefore they must be filled out by the provisions of substantive bankruptcy law, namely Act n° XLIX of 1991 on Bankruptcy Proceedings and Liquidation Proceedings (hereinafter referred to as the Bankruptcy Act – BH 1996.187.). The notion of insolvency as defined by section 27, subsection (2) of the Bankruptcy Act governs the term "insolvency" in respect of criminal bankruptcy. By contrast, the court of first instance found that the debtor became insolvent on the date when it first failed to

settle its debts. In its legal assessment, the court of second instance went even further and provided an absurd and erroneous interpretation of bankruptcy law by stating that, with reference to its low liquidity ratio, the debtor, a co-operative society in the present case, had been insolvent since its establishment. However, none of the lower instance courts held that the co-operative society was insolvent during the period of time covered by the prosecution's indictment. The court dealing with the debtor's liquidation proceedings, on the other hand, fixed the date on which the debtor became insolvent, therefore this date is the determining criterion for the qualification of the act of criminal bankruptcy.

4. The accused persons purchased real estate for themselves with financial assets obtained from criminal offences committed by others, which constitutes the crime of money laundering as defined by section 399, subsection (2), point a) of the Criminal Code. Money laundering is a more specific act of crime in comparison with abetment (abetment in the form of securing profits resulting from an act of crime), and the former entails more serious punishment than the latter, therefore money laundering absorbs abetment.

5. The non-adjudication of each count of the indictment charges is not listed among the unconditional procedural irregularities that are exhaustively enumerated in section 373, subsection (1) of the Code of Criminal Procedure and are mainly referred to by section 416, subsection (1), point c) of the Code of Criminal Procedure. Consequently, the non-adjudication of each count is considered as a so-called relative procedural irregularity, which, on the basis of section 375, subsection (1) of the Code of Criminal Procedure, should have resulted in the first instance judgement being quashed and the first instance court being ordered to reopen its proceedings by a decision of the court of second instance. This relative procedural irregularity, however, has not been detected before the delivery of the final and conclusive judgement, and it cannot give rise to a petition for judicial review. Pursuant to section 423, subsection (1) of the Code of Criminal Procedure, the factual background of the criminal case brought before the Curia cannot be reviewed, which includes that the supplementation of the facts cannot be contested either.

6. The Curia indicated that criminal bankruptcy has no passive subject, meaning that it is not committed against specific persons, while its victims comprise the whole circle of investors, i.e. the full mass of creditors. The scope of the term "victim" is broader than that of the term "passive subject". Passive subjects are always deemed victims of crime, on the other hand, victims of crime are not necessarily considered passive subjects. The Curia pointed out that, on the basis of section 54, subsection (2) of the Code of Criminal Procedure, criminal courts are given the competence to decide on civil claims for damages only in respect of damage caused by an act of crime that has been made part of the prosecution's indictment. The victims of criminal bankruptcy are the full mass of creditors who are entitled to seek compensation for their financial losses after the imposition of liquidation solely within the procedural framework of liquidation proceedings and through the intervention of the liquidator. No financial claim can be brought against insolvent business organisations outside the framework of liquidation proceedings.[1463]

1463 Budapest, the 22nd of September 2014. In: Communication concerning the decision of the Curia of Hungary in criminal case nº Bfv.II.538/2014.
https://kuria-birosag.hu/sites/default/files/selected_case_law/criminal_case_september_2014.pdf (06.03.2024.)

CHAPTER IX.

DOGMATIC ISSUES OF HUNGARIAN CRIMINAL LAW. INVASION OF PRIVACY, HARRASMENT, POACHING FISH

In this chapter I will analyse three offences that have raised serious questions in Hungarian law. These questions are primarily related to the possible ways of committing amd sanctioning these crimes.

9.1. The possible ways of interpreting the criminal law protection of personal secrets

The scope of criminal acts related to secrets is widely defined both on the level of laws and on that of science. The common basis for these delinquencies is constituted by personal secrets, the definition of the conceptual features of which is generally accepted. One example for this is that the information that constitutes the basis for personal secrets is only known in a narrow circle, and also, that the owner has a legitimate interest in preserving this information. Of course, these criteria should also be met with regard to the further types of secrets that are generated from personal secrets in order to be able to define them as criminal acts.

This chapter focuses on perhaps the most ancient type of secrets, i.e. the question of personal secrets, as well as on the analysis of the concepts of the three ways of its manifestation, which include confessional secrets, medical secrets and attorney-client privileged information. The reason why I undertook this task was perhaps because the statutory regulation of the three above-mentioned categories is rather incomplete, the content-related criteria of these have mostly been defined by legal science and judicial practice in the recent decades. Thus, the study of the question may primarily be based on case law solutions but I strongly believe that further references regarding the above categories would be necessary on the level of the CC and on that of the CPC alike, taking the frequency of the situations that they affect into account, as well as the legal disadvantages arising from the violation of these types of secrets.

Based on Hungarian regulation, any person who reveals any private secret he has obtained in a professional or official capacity without due cause is guilty of a misdemeanor punishable with custodial arrest. The penalty shall be imprisonment not exceeding one year if the criminal offense causes a substantial injury of interest (Invasion of Privacy).[1464]

1464 CC 223. §

In the criminal law enforcement, quite a number of types of secrets are familiar: personal data[1465], special personal data, the privacy of letters, the secrets related to the secrecy of elections and referendums, business secrets, classified data, bank secrets, securities secrets, etc.[1466] Some of them are mentioned in the Btk., while the interpretation of some other types of secrets only becomes clear from judicial practice or different positions of jurisprudence. I do not venture into analyzing all the concept of secrets from a dogmatic and practical point of view in one single study, what I am striving for instead is to present the forms of manifestation of personal secrets, which, in my view, are the ones that mean the basis for these other categories and which require the most complex interpretation.

The violation of personal secrets is indicated as a statutory definition in the criminal code of nearly each EU member state. From these, I would like to highlight the German and Austrian statutory rules, as these are the systems that most resemble the Hungarian legislative solutions, through their nature.

Pursuant to the provisions set out in the German Criminal Code, those who disclose any data related to another person without being authorized to do so commit a crime. In the law, the scope of those persons who, as special subjects, may commit such crimes, is defined. This group includes medical doctors, dentists, pharmacists, psychologists, attorneys, patent agents, notaries public, financial advisors, tax advisors, auditors, marriage counsellors, social workers, employees of insurance companies, public servants, experts, etc. Thus, it is defined by the German law in which occupations or activities is it possible to violate personal secrets. Such behavior is sanctioned more gravely if the person demonstrates this for gaining benefits.[1467]

The Austrian Code also limits the punishability of the act to professional secrets: pursuant to this, those who disclose any of the data obtained in the course of exercising one of the professions defined in the law commit the crime of "violating professional secrets". In the law, the health care, social security and official sectors are specifically mentioned, based on which "{...} those who communicate or utilize any data on another person's health status commits a crime if such data was entrusted to them, or such data became accessible to them during exercising their profession related to curing patients, the supply of medicine, the management of the medical institution, or the performance of social security-related tasks, and the disclosure such secret causes a violation of interests.[1468] A crime will be committed by any experts appointed by the court or another authority as well if they disclose the secret obtained in their capacity as experts.[1469]

As regards the Hungarian regulation, the idea of the unlawfulness of violating secrets emerged as early as in the so-called Csemegi Code: the source of law, as the "forerunner"

1465 The development of the legal protection of personal secrets chronologically precedes the emergence of the protection of personal data and the subject of regulation is also a narrower group of data and facts (a personal secret of a private individual always qualifies as a personal data at the same time). In: András JÓRI: *The Generations of Data Protection Law and the Detailed Analysis of a Second Generation Regulation.* http://ajk.pte.hu/files/file/doktori-iskola/jori-andras/jori-andras-vedes-ertekezes.pdf (07.03.2024)

1466 Mihály TÓTH: Criminal Law „Interwoven" with Secrets. *Iustum, Aequum, Salutare,* 2005/1. 57-58.

1467 See: There is no such element of statutory definition in the Hungarian law, as this belongs to the conceptual scope of another crime. In: Ervin BELOVICS – Gábor MOLNÁR – Pál SINKU: *Criminal Law 2, Special Part.* Budapest, HVG-ORAC, 2015. 281.

1468 121. § (1)

1469 121. § (3) In: BELOVICS – MOLNÁR – SINKU, ibid. 281-282

of personal secrets, provided on professional secrets, the obligors of which included public officials, lawyers, physicians, surgeons, pharmacists and midwives.

A personal secret as a concept of criminal law first emerged in the ministerial justification of Act V of 1961. This explanation of the law regarded it as a primary goal to define the subjective scope in the regulation of violating personal secrets. In the justification, the scope of the applicability of the crime was extended as compared to the earlier criteria by having formulated the secrecy obligation for all the persons who exercised a profession in general[1470], however, only extended to those types of secrets whose disclosure jeopardized the reputation of a family or a person. It is obvious that the current definition excluded quite a number of such factors from the scope of secrecy, in the case of which confidentiality would have been highly desirable for the offended party).

When examining the concept of personal secrets, first of all, it will be necessary to clarify the legal literature standpoints on the definition of secrets. The criterion according to which in this case, we are talking about an item of data, a fact or a circumstance that is known to a rather narrow group of persons and that can become known to a limited range of persons, can be regarded as a "common denominator" to a certain extent. Thus, the subject of legal protection is not the secret itself but one of its external forms of manifestation.

The criminal law protection of personal secrets is built on that in our society, any and all persons can be required to keep personal secrets who come in possession of such secrets in any way whatsoever. We can only talk about secrets as long as only a narrow group of persons is familiar with a fact or an item of data, as long as it is possible to keep such secrets. Public disclosure, however, should always be interpreted in relative terms.[1471]

The concept of personal secrets has not been defined by any of our criminal codes. This is missing from the currently valid Criminal Code (the Btk, i.e. Act C of 2012) as well, however, the definition of a personal secret as all such confidential facts, circumstances or data only familiar to a narrow group of persons and keeping which is a legitimate interest of the person concerned and the disclosure of which will involve a violation of the interests of the offended party (judicial decision, i.e. BH No. 2004.170) can still be regarded as one that has governing effect. Such data may include the personal, family, pecuniary situation, health status of a passive subject, or any other knowledge on their personal habits. However, there are specific statutory provisions referring to the cases of violating financial secrets, business secrets and classified data.

Personal secrets may affect a high number of the passive subject's interests: besides the protection of personality, I would also list the interests of uninterrupted participation in primary and secondary communities in this category, as through violating personal secrets, the family and social connections of the offended party are also damaged or jeopardized.

There are several positions taken in legal literature regarding setting up the categories of personal secrets, from which I would like to highlight Kereszti's attempt at classification: "Based on its form of manifestation, personal secrets can be so-called notional secrets (they are only fixed in the minds of the insiders), material secrets (they are fixed in some tangible form such as facts or data written down, photographed, or recorded as an image or audio recording). As regards their content, they may be of a personal or moral nature (such as the offended party's illness, mental or physical defect, as well as other circumstances

1470 See: The legal protection ensured by the earlier Official Compilation of Criminal Rules.
1471 Károly Törő: *The Protection of Personality Rights in Civil Law*. Budapest, KJK, 1979. 434

that involve family, moral or social judgment), or related to property or substance (like the offended party's pecuniary position, debts, creditability, bank or savings deposits, etc.)."[1472]

The delinquent behavior is the disclosure of the personal secret. The concept of this includes all such acts as consequence of which the information that constitutes the subject matter of the personal secret becomes known. Accordingly, the delinquent behavior may be both active and passive, so the criminal act can be committed by action or default. It holds no relevance either how many persons become familiar with the personal secret in question.[1473]

However, the facts of the action can only be established if the delinquent behavior is demonstrated without a well-substantiated reason. Also, it is well-established regulatory practice that, based on certain interests, the criminal codes allow the disclosure of data, facts, circumstances, etc. that otherwise qualify as personal secrets: among others, those cases can be listed here during which the "apparent wrong-doers" meet some of their data supply[1474] or reporting obligation[1475]. The case of approval by the offended party can also be listed in this category. Based on the above line of thought, the punishability of the act is excluded by the lack of the act's endangering society.

The witness to the crime is in a peculiar situation regarding this criminal act. The witness is not obliged to testify if they are obliged to secrecy and if they have not been exempted from their secrecy obligation. If, however, the witness testifies, they will not commit a crime, as in such a case, the unlawfulness of the action is missing, as the exploration of the criminal act qualifies as a substantiated reason. Ervin Belovics thinks that the above-mentioned case is in the conceptual scope of the permission in the law, as the Be "leaves it to the witness whether they would like to use their right to refuse giving testimony. If the witness testifies despite their not having been exempted from their obligation of secrecy and they disclose the personal secret before the authority, the witness will not commit a crime, with regard to the permission in the law."[1476]

The crime is a delictum proprium, i.e. it can only be committed by a person who has the necessary personal qualifications: based on this, the requirements of this statutory definition can only be met by those who get in possession of secrets through their occupations or public mandates.[1477] I would like to note that if the offender is a public official at the same time, then their act will qualify as official misconduct if the disclosure of the secret is coupled with the purpose of gaining unlawful advantages or causing unlawful disadvantages.

Occupation is defined as all such regularly performed activities which are pursued by the offender in exchange for a consideration, however, it holds no significance whether the legal relationship is regulated by the rules of civil law or labor law. Public mandates include such activities which are performed by the offender for some public or social organization without receiving any consideration. No personal qualification is required for the participants of committing the crime, i.e. the crime can be committed by anybody in the capacity of an instigator or accomplice.

1472 Tibor Horváth – Béla Kereszti –Vilmosné Maráz – Ferenc Nagy – Mihály Vida: *The Special Part of Hungarian Criminal Law.* Budapest, Korona, 1999. 172–173.

1473 Those who secretly record the content of a conversation conducted with them do not commit a crime, not even if this is done in another person's private household (judicial decision No. BH 2014. 134).

1474 e.g. reporting exculpatory evidence, giving a testimony

1475 e.g. the obligation to report bribery in the case of public officials

1476 Belovics – Molnár – Sinku, ibid. 282 – 283.

1477 judicial decision No. BH 2004.170.

From my part, I think that it is unneseccary to make a distinction between the concepts of occupation and public mandates in the law, as both cases suggest an activity aimed at performing work. It is irrelevant from the aspect of statutory definitions what institution the offender performs the activity in question for, or in exchange for what consideration they do so, or whether they perform the activity for free. This means that it would make sense to simplify the words of the law like this: a criminal act is committed by a person who discloses a secret that they became aware of during practicing their profession without a substantiated reason.

Personal secrets can only be violated intentionally, where both dolus directus and dolus eventualis may come up. Accordingly, the offender must be conscious of that a) the secret that they possess is a personal secret and that b) the circumstance that justifies its disclosure is not well-substantiated. Regarding the latter, although the possibility of a mistaken assessment of the threat of the action to society may come up as a reason for exclusion from punishability but only if the offender had good reason to make such a mistake. The criminal act has no negligent form.

The establishment of the realization phase of the criminal action is adjusted to whether the offending behavior is demonstrated verbally or in a written form. In the case of verbal statements, one cannot talk of attempts, as the criminal act is completed by communication in the presence of another person and by the other person becoming aware of such information. In the case of a written offence, however, an attempt will become possible if the offender does his/her best to expose the information but the result, i.e. the other party's becoming aware of such information is not achieved for some reason. Consequently, an attempt at violating a personal secret can be established if a letter containing a personal secret is posted by mail and if it does not reach the addressee for some other reason, etc.[1478]

The causing of a material breach of interest is regulated by the Btk as a classified case: in such cases, the offender will be held liable even if it is only their negligence that extends to the current result. The following can, for example, be regarded as a material breach of interest: negative points occurring in the passive subject's career, moral acknowledgement, or family relationships but all those financial advantages as consequence of which the offended party loses their job or any other source of income can also be listed here.[1479]

The number of crimes depends on the number of passive subjects. If the offending behavior is demonstrated with regard to several personal secrets concerning the same passive subject, then these acts should be regarded as a natural unit. Such crimes are exclusively punishable following a private motion.

9.1.2. The canonical law and criminal law aspects of the concept of confessional secrets

As regards the secrecy obligation, there is no considerable difference between canonical law and secular law, both types of cases require absolute secrecy from the clergymen conducting the holy confession. "In the holy confession, {...} it is important that the priest be aware of the weight of his task and to be appropriately prepared and qualified to perform

1478 Belovics – Molnár – Sinku, ibid. 283.
1479 Belovics – Molnár – Sinku, ibid. 196.

his task {...} He should be fully aware of what he may allow himself and his penitent in this position of confidentiality." [1480]

Based on the Codex Juris Canonici (hereinafter: CIC), holy confessions can be made before all such members of the clergy who are entitled to perform the activity of confession. However, László HÁDA points it out that a holy confession to priests of another rite "requires a very high level of experience from the confessor, as the faculties given to the confessors may be different."[1481] However, the freedom of the penintents to choose the clergyman that they would like to confess their sins to cannot be denied. This rule of the canon law puts extra emphasis on the importance of the confidential relationship between the worshipper and the priest, thus indirectly suggesting the importance of secrecy as well.

It is expressed in Canon 220 of CIC that "no one is entitled to unlawfully damage any other person's reputation, nor can the universal right to the protection of privacy be breached."[1482] As regards the importance of this principle, there is some overlapping on the level of international treaties, as Article 12 of the Universal Declaration of Human Rights says that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."[1483] Thus, the regulatory princples of canonical law and international law can be considered homogeneous based on the above.

The importance of keeping confessional secrets is also emphasized in the rules set out in foreign canon law. Münsterischer Kommentar explains all this by the preservation of the authenticity of ecclesiastical preaching: "if a servant of God loses his authenticity, this may also lead to his dismissal from service."[1484]

Kanonisches Recht approaches these questions from the aspect of personality rights: it expressly describes confessional secrets as an aspect of the right to reputation and the right to privacy. All this means that respecting such rights is justified not only in the case of the believers but also, in the case of all persons who perform holy confessions.[1485]

"The basis of this right is the human person himself and his dignity. More precisely, the basis is the interiority of the person, i.e. respect for the forum of conscience, which has a double dimension: on the one hand, a person will disclose his own inner world to a person that he finds worthy for it, a person that he would like to share this with. On the other hand, a person will always protect himself from those who would like to find out the secret of his personality unlawfully. This is what is protected by the virtue of modesty. Respecting the latter is what we call ontological respect {...}. It is this ontological respect that reputation is built on, which indicates a person's honor in society. The basis for this, on the other hand, is moral respect, and this is what the law safeguards."[1486]

1480 László HÁDA: *The Definition, Legal Status and Legal Protection of the Confessor's Discretion and Confessional Secrecy.* Doctoral thesis, Budapest, 2012. 8.

1481 CIC, canon 991. In: HÁDA, ibid. 41.

1482 Cf. CIC, canon 220 and CCEO, canon 23. In: HÁDA, ibid. 42.

1483 HÁDA, ibid. 42.

1484 LÜDICKE, K.: *Cf. Münsterischer Kommentar zum Codex Iuris Canonici.* Münster, 1987, 220/2. In: HÁDA, ibid. 42.

1485 AYMANS – MÖRDORFS: *Kanonisches Recht, Lehrbuch aufgrund des Codex Iuris Canonici.* Paderborn – München – Wien – Zürich, 1997. 109. In: HÁDA, ibid. 42.

1486 Géza KUMINETZ: The Rights and Obligations of the Clergy. In: Géza KUMINETZ (ed.): *A Clergyman's Form of Existence, Selected Studies in Pastoral Theology and Canon Law.* Budapest, 2010. 283.

The author also makes a distinction between the right to reputation and the right to privacy. "Although the right to reputation and the right to privacy are very similar, they are not equivalent. The right to reputation is meant to protect external honor, while the right to the respect of privacy protects internal honor, so that no one finds it out unlawfully. Such items of information may gravely damage a person's reputation, i.e. his honor as well."[1487]

Anyway, the "private autonomy of canon law" has been expressed in several areas in the past few centuries, besides the holy confession: for example, among others, in the so-called private penitence; in the sacramental seal; in the freedom of choosing the confessor; in the scope of procedural rules regarding the confession priests; in the mail secrets, as well as the secrecy obligations of ecclesiastical archives.

In summary, it can be stated that the confessor is the primary obligor of confidentiality, and it is only the pentitent who can exempt him from such obligation. "The permission of the pentitent should be express and given absolutely freely, so that the confessor can freely use this permission outside the confession"[1488]. The secondary obligors of the confessional secret are all those who may obtain any kind of information from the holy confession.

As regards the rules of secular law, one can only find very scarce references to the protection of confessional secrets as personal secrets. The definitions "confession – holy confession" fundamentally belong to the conceptual apparatus of the Roman Catholic Church, this is why the terminology used by secular law should extend the legal evaluation of those actions during which the penitent shares the information qualifying as personal secrets to a clergyman of his or her own choice to a broader scope. The use of the expressions "clergyman" or "information concerning personality rights" may prove to be an appropriate way to do so. The relevant laws follow this method of solution completely: pursuant to the provisions set out in Act CCVI of 2011 on the Right to Freedom of Conscience and Religion, and on the Legal Status of Churches, Religious Denominations and Religious Communities, a clergyman will not be obliged to share the information affecting personality rights that he has become aware of during his religious service with any public authority.[1489]

A fundamental regulatory discrepancy can be observed in the case of the rules on the obstacles of hearing witnesses in our procedural system, as the information that constitutes the subject of confessional secrets is viewed as an absolute obstacle to witness hearing by the provisions set out in CPC, while the same is considered only a relative obstacle to witness hearing by Act CXXX of 2016 on the Code of Civil Procedure (hereinafter: Pp). Based on this, a clergyman and a member of an organization performing religious activities who performs religious rituals as his profession cannot be heard as a witness according to the provisions of the previus Be., as these persons have a secrecy obligation with regard to these items of information through their occupation.[1490] The grammatical interpretation of this provision of the law suggests that such persons shall not even be summoned as witnesses.

However, from the grammatical interpretation of the Pp, one can conclude that the clergyman is free to decide during the procedure whether he would like to give a testimony, or whether he refuses to do so, with reference to reasons of conscience or canon law, or by quoting the lack of exemption received from the owner of the secret.

1487 Géza Kuminetz: *The Right to Protect Reputation and Privacy, Causing Scandals.* In: Háda, ibid. 43.
1488 J. Császár: *Confessors' Handbook..* Budapest, 1944. 117.
1489 13. § (3)
1490 81. § (1), point a)

The text of the rule says that those persons who are obliged to keep secrets through their occupation (see e.g. clergymen) may refuse to give a testimony if they would breach their secrecy obligation by testifying, except if they were exempted from this obligation by the affected person.[1491]

It also becomes obvious from the above that by using the expression "clergyman", the Be contains a specific reference to the relationships affecting the privacy of the church and the worshippers, while the Pp fails to do so, as it exclusively provides on persons "who are obliged to secrecy through their occupation".

I think that this regulatory conflict in itself does not run counter to the provisions set out in the Fundamental Law of Hungary, still, the homogenization of our procedural codes would be necessary with regard to the definition of the obstacles to giving a testimony and the legal consequences thereof.

9.1.3. The appearance of medical secrets as personal secrets in the health care acts of Hungary

"One of the characteristics of medical activity is that it definitely affects personality rights, the medical doctor inevitably restricts these rights by recording the very medical history. This is why trust, reliance, the sincere disclosure of the medical history and the symptoms are required but these may be misused by both sides. Thus, trust has a higher ranking ethical requirement in this situation."[1492] The definition in Act XLVII of 1997 on the Management and Processing of Patient Data (hereinafter: Eüak) says that medical secrets include the health care and personal identification data that the data manager becomes aware of during the medical treatment, furthermore, any other data regarding the necessary medical treatment, one that is in progress or has been completed, as well as those that have been shared with regard to the medical treatment.[1493]

Based on the secrecy obligation, health care workers, as well as any other persons who have a legal relationship aimed at work with the health care provider are subject to a secrecy obligation regarding any and all data and facts on the health status of the patient, as well as any other data and facts that they have become aware of during the provision of health care services, without any time limitation, irrespective of whether they have become aware of these data directly from the patient, during their examination or medical treatment, or indirectly from the health care documentation or in any other way. The secrecy obligation does not refer to those cases where the patient has given exemption from this, or if the data supply obligation is prescribed by law (for example, in a criminal procedure).[1494]

The health service provider, except for the affected person's elected GP and the forensic medical expert, is also bound by the secrecy obligation towards the health service provider which was not involved in the medical examination, the establishment of the diagnosis, the medical treatment or the performance of the surgery, except if the communication of

1491 170. § (1), Point c)

1492 Marcia A. Lewis, Carol D. Tamparo: *Medical Law, Ethics & Bioethics*. Philadelphia, F.A. Davis Company, 2007. 241. In: Zoltán Lomnici Jr.: *The Basic Features of Medical Law and the Medical Doctor's Legal Relationship*. Doctoral thesis, Pécs, PTE-ÁJK, Doctoral School, 2013. 22.

1493 3. § d)

1494 Getting familiar with the health care documentation. Information on the data managed during the provision of health care services and the rights of the affected persons.

the data was necessary for setting up the diagnosis or the further medical treatment of the affected person.

As long as the health care documentation on the patient also contains data that affect the right of another person to a personal secret, the right of review can only be exercised with regard to the specific part that refers to the patient.

Both the data manager and the data processor are obliged to keep the medical secret, except if the interested party or their statutory representative has given their written consent to the forwarding of the health care data and the personal identification data, with the restrictions specified therein, furthermore, if the obligatory forwarding of the health care data and the personal identification data is required by law.[1495]

Act CLIV of 1997 on Health Care (hereinafter: the Eütv) contains a high number of procedural rules which are directly related to the importance of the (legal) institution of medical privacy. First of all, it should be highlighted that the persons involved in the provision of health care services are only entitled to communicate any and all health care and personal data that they have become aware of during the provision of the health care services to the eligible persons and subsequently they will also be obliged to treat these data confidentially. In my opinion, it is this "patient right" that can be regarded as one of the starting points for medical privacy. The patient is also entitled to make a statement on who they would like to give information on their condition, the expected outcome of their disease, and who they would like to exclude from the partial or complete knowledge of their health care data.

The limitation of the persons who are present in medical situations also belongs to the conceptual scope of the confidentiality regarding medical treatments and patient care. The keeping of medical secrets may be jeopardized in lack of listing this in the law. It is not a coincidence that both the Eütv and the Eüak contain cogent rules regarding the right to be present.

The Eütv, very rightly, specifically provides on the circumstances of conducting the examinations as well: as a general rule, the medical treatments should be performed in such a way that no other person could see or hear these without the patient's consent (except if this is unavoidable in an emergency situation). Thus, according to the law, the patient, as a general rule, is entitled to a situation where only those persons are present during their examination and medical treatment whose participartion is necessary for administering the health care service, or to the presence of whom they have previously given their consent.[1496]

The above rule is also confirmed by the Eüak, based on which, besides the doctor who administers the medical treatment and the other health care provider staff members, it is only those persons whose presence the patient has given their consent to that may be present at the medical treatment.[1497] Without the consent of the affected patient, those

1495 Eüak, 7. § (1)

1496 Eütv, 25. § (5)

1497 By respecting the human rights and dignity of the patient, another person may be present without the consent of the affected party if the regime of the medical treatment requires that several patients be treated at the same time; a professional staff member of the police may be present if the medical treatment is administered to a detainee; a member of the penitentiary institution in a service relationship as long as the medical treatment is administered to a person who is serving his sentence involving imprisonment in the penitantiary institution and this presence is necessary for ensuring the security of the person providing the medical treatment, as well as for preventing the patient's escape; these persons may also be present if

health care data, the lack of being familiar with which may involve the deterioration of the patient's condition, may be communicated to the person who provides further patient care and medical care.

The information that falls within the scope of medical secrets can be used in criminal proceedings whenever the need for this emerges. These data may be related to the accused person, the victim or the witness alike.

Data are usually gathered as early as in the investigation phase: after ordering an investigation, in order to explore the facts of the matter, the prosecutor, or with the prosecutor's approval, the investigation authority, may request data supply on the suspect (on the reported person or the person who can be accused of having committed the act) from the health care organization and the related data management unit, according to the rules on inquiries, if this is made necessary by the nature of the case. Such data supply cannot be refused.[1498]

Pursuant to the provisions set out in the Be, the court, the prosecutor, as well as the investigation authority may contact any and all health care institutions maintained by the state or the municipality for requesting information, data, or asking for documents to be delivered to them. For these, the relevant authority may set a deadline of a minimum eight days and a maximum thirty days. The contacted party will be obliged to restore any data that have been coded or incomprehensible in any other way to their original condition preceding delivery or communication, and to make the content of the data cognizable to the inquiring party. The contacted institution will be obliged to perform the data supply, which includes, especially, the processing, the written or electronic capturing, or the forwarding of the data, free of charge, as well as to perform the task, or to communicate the obstacle to such performance within the prescribed deadline.

If the request refers to the communication of personal data (see medical secrets), this may only concern such and as many items of personal data which are absolutely necessary for fulfilling the purpose of the request. In the request, the exact purpose of the data management and the scope of the requested data should be indicated. If, as a result of such request, an item of data that is unrelated to the purpose of the inquiry becomes known to the requesting party, the data should be deleted.[1499]

The legal obtaining of data that belong to the medical secrets cannot only take place through requests but also, through other official coercive measures. Based on these, a house search may also be conducted at the health care institution, if the statutory conditions defined by the Be exist. However, if such coercive measures are aimed at finding a document that contains health care data, then it is exclusively the court that will be entitled to order such, and the procedural activity can only be performed in the prosecutor's presence.[1500]

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this is made necessary by the patient's personal security from the interest of prosecution and the patient is in a condition that does not allow them to make a statement; those persons who earlier treated the affected person for a medical condition, or who was permitted by the head of the institution or the person responsible for information security to do so for a professional-scientific purpose (except if the affected person has expressly protested against this). In: *Eütv,* 25. § (5)

1498 Getting familiar with the health care documentation. Information on the data managed during the provision of health care services and the rights of the affected persons.

1499 If the organization contacted fails to fulfill the request within the prescribed deadline, or unlawfully refuses to fulfill the request, a disciplinary penalty may be imposed (CPC, 71. §).

1500 CPC 149. § (6)

It is also only the court that can order the seizure of documents containing health care data which are kept at the health care institution.[1501]

9.1.4. Interpreting attorney-client privileged information as personal secret based on CPC, the Act on Attorneys at Law (hereinafter: Ütv.), ethical rules on attorneys' activities and international case law

In Hungary, it is attorney-client privileged information that is governed by the most complex sets of rules. This is not without a reason since ethical rules governing attorneys' activities are of a constitutional significance. Rule 1/2011 (III.21.) on Ethics for Attorneys stipulates that in a society based on respecting the principle of constitutionality, attorneys have a special role.

Their duty goes beyond duly performing their assignment within the legal framework. Attorneys shall serve justice and represent the interests of those whose rights and freedoms they have been mandated to guarantee and protect; their duty is not merely to represent a client in a case but also to act as a consultant for this client. Respecting attorneys' profession is an essential condition of constitutionality and democracy in society.

In the view of Tamás Sulyok, the primary function of regulations on attorney-client privileged information is the protection of public confidence.[1502] By virtue of Ütv., as a general rule, attorneys shall keep confidential any data or facts acquired in the course of exercising their profession. This obligation is irrespective of the existence of the power of attorney relationship and is retained even after the termination of the attorney's activity. The confidentiality obligation also governs other documents made and possessed by the attorney if these include any facts or data in the scope of confidentiality. In the course of the inquiry conducted at the attorney's, the attorney shall not disclose documents or data with reference to their client, but shall not block the inquiry.

The client, client's legal successor as well as client's authorized representative may grant exemption from the confidentiality obligation. At the same time, even in the case of exemption the attorney shall not be interrogated as a witness about facts or data he acquired as a defender.

The confidentiality obligation duly governs attorney-at-law offices and their employees, attorney organs and the officials and employees of the former, as well as natural and legal entities engaged in storing, archiving and guarding electronic or printed documents containing confidential data or processing the data contained therein. To me, from the teleological interpretation of this provision it follows among others that the attorney shall communicate data that are relevant for the essence of the case to his employees only with his client's approval, i.e. in principle the confidentiality obligation is retained also with reference to the employees of the attorney's office until the client gives exemption from this.

The Ütv. allows to end the attorney's confidentiality obligation with reference to disciplinary proceedings only: on the basis of this, in disciplinary, investigative and inspection cases launched by the Chamber of Attorneys, in cases where the access to data in the scope of attorney-client privileged information is essential for the proceedings to be

1501 CPC 151. § (3)

1502 Tamás Sulyok: *The Constitutional Situation of the Profession of Attorneys.* PhD dissertation, University of Szeged, Faculty of Law, 2013. 132.

successful, the attorney shall be exempted from the confidentiality obligation before the administering chamber organs and the court, in relation to the subject of the case.[1503]

Attorney-client privileged information involves not only obligations but entitlements as well. Accordingly, both in criminal and civil proceedings there are legal arrangements established ensuring for the attorney independence in exercising his activity and guarantees for the implementation of certain professional aspects. Consequently, being an attorney is an absolute obstacle for interrogation in the case of defence lawyers (cf. criminal cases)[1504] and a relative obstacle in that of legal representatives (cf. civil cases)[1505]. As was outlined above, the lack of uniform regulations is unfortunate since the Ütv. clearly stipulates a confidentiality obligation for all types of cases and, considering the above regulation, the legislator creates a contradicting situation for the attorney's profession.

In the criminal proceedings specifically identified guarantee aspects must be implemented in the course of the investigation. The most important factor is compliance with the principle of proportionality, the essence of which is that neither interests related to investigation, nor those related to attorney-client privileged information, may be violated. Thus, the Be must specifically and individually stipulate in the case of all legal institutions that may come into question in this context the scope as well as the content of intervention by the authorities. A good example for this is that, when specifying the norms of the execution of a house search, legislators state that with reference to attorney offices this may be ordered by the court and executed in the presence of a prosecutor exclusively.[1506] It raises concerns at the same time that the act restricts the implementation of this rule exclusively to the case where the investigative action concerned aims to locate some document containing professional secrets.

It is a disputed question at the same time if the defender has an information obligation at all and, if he has, ar what point this becomes applicable. I believe that this may be applicable only in extremely exceptional cases to be governed by the law by all means. In this scope, the actual relationship (authorization or delegation) is certainly not relevant. What is much more relevant is the attitude to the attorney's role that at attorney may never assign the role of the defendant's "accomplice" to himself.

The essence with reference to attorney-client privileged information is, I believe, that any information (meaningfully) communicated between the defendant and the defender with reference to the criminal case concerned is strictly confidential. This confidentiality feature must primarily be implemented in the defendant's mind, who should regard the defender not as a part of the official machinery but as his supporter. In order that the above aspects be implemented it is important that the defender commit in the service agreement in writing to keeping attorney-client privileged information confidential. In my opinion, introducing legal provisions for any form of such a written commitment for delegated defenders as well should also be considered.

1503 8. § (1) – (5)

1504 Be stipulates that counsels for the defence may not be heard as witnesses on issues which have come to their cognisance or which they communicated to the defendant in their capacity as a counsel for the defence [81. § (1)].

1505 The Pp. stipulates that the attorney may refuse to be interrogated as a witness if his confidentiality obligation was violated by a witness testimony, except where exempted from this obligation by the interested party [170. § (1)].

1506 149. § (6)

The scope of data constituting attorney-client privileged information is relatively difficult to define; there are no taxative or exemplificative lists in relation to this issue in the Ütv, either. While it is clearly impossible to pass exhaustive provisions in this scope, with reference to the nature of certain kinds of secret certain categories could be introduced (e.g. "attorney-client privileged information constitutes especially information communicated between the defender and the defendant in speaking areas, the contents of electronic communication between the legal representative and his client,", etc.). Beyond these the act should specify that attorney-client privileged information shall only be information that qualifies as meaningful for the consideration of the defendant or the case. It should also be stipulated that the confidentiality obligation does not arise at the moment of signing the service agreement but from that of the first oral communication; what is more, the premises of the latter (e.g. public area, a court building, an attorney's office) are totally irrelevant for the obligation to arise. Whether the power of attorney is free of charge has similarly no significance. From all these it can be concluded that describing the concept of attorney-client privileged information still requires legislative efforts.

As regards the EU case law in relation to interpreting attorney-client privileged information, the number of cases before the Court can be considered significant, and decisions clearly move towards the implementation of the widest possible protection of secrets.

The Court ruled against Germany in a case where authorities seized, on the basis of a judicial decision, various documents at an attorney's office. The decision-maker assigned special siginificance to the personal (confidential) relationship between the attorney and his client as well as to the fact that the execution of the search negatively affected the attorney's professional prestige.[1507] The decision ruled that the intervention implemented was not proportionate to its purpose. Sharing the view of Sándor Papp, I am of the opinion that in Hungarian regulations house search should be prohibited where "the disadvantages involved in the house search exceed the benefits attainable from the measure."[1508]

In the case Domenichini v Italy (1996), the Court ruled that the right to private and family life was violated since the detainee's letters were inspected by the administering authority. Simultanously Article 6 3(b) of the Convention (to have adequate time and facilities for the preparation of the defence) was violated by the fact that the applicant's letter to his lawyer including the justification required for submitting the cassation appeal was opened and returned to him only after the ten-day deadline of submitting it to the Court of Cassation had expired (and the attorney was able to submit it missing the deadline).

In the case Kopp v Switzerland (1998) the Court also established the violation of the Convention because telephone conversations had been tapped at the applicant lawyer's office. The same conclusion was made by the Court in the case Petra v Romania (1998) as well, where the essence of the legal violation was that the detainee's correspondence with the European Court of Human Rights was inspected.[1509]

1507 Viktor Bérces: *Questions of Interpreting the Defender's Role, with special regard to Criminal Court Procedures.* Budapest, Pázmány Press, 2014. 8.
1508 Sándor Papp: Attorney-Client Privileged Information and its Protection. *Ügyvédek Lapja,* 1997/4. 3.
1509 Fenyvesi (2002), ibid. 110.

9.1.5. Closing remarks

The currently effective law lists as many as eleven statutory definitions regarding the violations of confidentiality besides the violation of personal secrets, which may lead to the difficult terrain of "overregulation" in the future: mail fraud, criminal offences with classified information, criminal offences against public records and registers recognized as national assets, violation of confidentiality related to the judiciary, breach of seal, criminal offences related to elections, breach of trade secrecy, breach of business secrecy, illicit access to data, covert information gathering without authorization, unlawful integrity test.[1510]

In my view, the violation of personal secrets may be regarded as the basic statutory definition of all the secrecy-related crimes. In my study, I have made an attempt at analyzing such types of personal secrets regarding which there are no meaningful requirements ser by either the CC or the CCP. It is obvious that confessional, medical secrets, as well as attorney-client privileged information are recognized as personal secrets, however, regarding their content-related features, one can exclusively rely on the requirements set out in other laws, or in the ad hoc decisions that become familiar through judicial practice.

The near future will see the dominance of actions running counter to the law on illicit access to data[1511]. According to the ministerial justification, "the new statutory definition is based on the international laws and its place in the law is justified by its connection to computer-related crime."[1512] This statutory definition is special because of the mode of committing this act, however, it also protects the right to privacy, so the legal policy reasons underlying its introduction are similar to those of the breach of personal secrets.[1513]

As regards the statutory definition of the "Invasion of Privacy", I have the following regulatory proposals: 1. In the statutory definition, it would make more sense to use the expression "occupation" instead of the unnecessary distinction between professions and public mandates. 2. The CC should make references to those types of secrets, as examples, which often occur in everyday life and the exposure of which fits into the offending behavior set out in the above-mentioned statutory definition (e.g. attorney-client privileged information, medical secrets, notary public secrets, etc). 3. The sets of rules set out in the CPC and the Pp. should be integrated with regard to the standardization and legal consequences of the obstacles to hearing witnesses. In my view, the Pp. should follow the system of the CPC, i.e. this quality should be stipulated as an absolute obstacle to witness hearing in the case of clergymen, medical doctors and attorneys as well.

1510 Verebics (2013), ibid. 5.
1511 See crimes against information systems (CC, 422. §).
1512 László, ibid. 25.
1513 The offending behaviors are defined rather broadly: 1. covertly searching the home or other property, or the confines attached to such, of another person, 2. monitoring or recording the events taking place in the home or other property, or the confines attached to such, of another person, by technical means, 3. opening or obtaining the sealed consignment containing communication which belongs to another, and recording such by technical means, 4. captures correspondence forwarded by means of electronic communication networks, including information systems, to another person and records the contents of such by technical means.

9.2. The classification of actions running counter to the statutory definition of harrasment and the questions related to providing evidence

The statutory definition of harassment can be deemed a novel crime in modern legislation. The primary reason for this is that the level of the threat of this crime to society is lower than general, while the weight of the subject of law protected by the statutory definition seems to be lighter as compared to the other values protected by criminal law (e.g. the right to life or property).

Based on Hungarian reglation, (1) any person who engages in conduct intended to intimidate another person, to disturb the privacy of or to upset, or cause emotional distress to another person arbitrarily, or who is engaged in the pestering of another person on a regular basis, is guilty of a misdemeanor punishable by imprisonment not exceeding one year, insofar as the act did not result in a more serious criminal offense. (2) Any person who, for the purpose of intimidation: a) conveys the threat of force or public endangerment intended to inflict harm upon another person, or upon a relative of this person, or b) giving the impression that any threat to the life, physical integrity or health of another person is imminent, is guilty of a misdemeanor punishable by imprisonment not exceeding two years. (3) Any person who commits the act of harassment: a) against his/her spouse or former spouse, or against his/her domestic partner or former domestic partner, b) against a person under his/her care, custody, supervision or treatment, or c) if abuse is made of a recognized position of trust, authority or influence over the victim, shall be punishable by imprisonment not exceeding two years in the case provided for in Subsection (1), or by imprisonment not exceeding three years for a felony in the case provided for in Subsection (2).[1514]

Basically, it is the social interest of the right to privacy that can be defined as the legal subject of harassment. Of course, this right can also be regarded as a "piece" of the fundamental rights, as the Fundamental Law of Hungary itself also contains provisions on such values which can be related to this subject of law (e.g. it is stipulated by Section (1), Article VI of the Fundamental Law of Hungary that everyone is entitled to have respect for their privacy and family life, home, as well as relationships, from others).

In their joint study, Warren and Brandeis urged that the right to privacy be acknowledged as an independent fundamental right in the countries following the system of common law, as early as in the late 19th century.[1515] This fundamental right gained importance in Hungary with a slight delay, to which the effective contributions of the Constitutional Court were also required. In its decision of 1994, the latter body declared that "the right to privacy is not defined by the Constitution as a specific, subjective fundamental right but the right to the freedom of privacy is without doubt such a fundamental right aimed at protecting the autonomy of the individual which arises from the inherent dignity of a human being, of which the general personality right, the right to human dignity, is the subsidiary fundamental right {...}. The right to privacy is the right to personal fulfillment, and the free fulfillment of one's personality and the protection of autonomy require that {...}

1514 CC 222. §
1515 Andrea Noémi Tóth: *Harassment of the Restrainer.* Debrecen, DE-ÁJK, 2014. 99.

the state respect the fundamental rights of a human being, which are inviolable and inalienable."[1516]

It was in the above spirit that the statutory definition of harassment was incorporated into the previous CC with effect of January 1, 2008.[1517] The statutory definition was supplemented by Act LXXIX of 2008 by including harassment appearing as the occurrence of a life-threatening event, while the aggravated cases of the same action were established by Act XCII of 2008 on the Criminal Code and Other Acts Amendment and Act CLXI of 2010 on the Criminal Code and Other Acts Amendment. The criteria for the criminal act remained unchanged in the new CC.

9.2.1. Theoretical pre-questions

It is primarily the phenomena found in the European trends that can be indicated as the contributing factors to "elevating" harassment a crime. In the opinion of BERKES, it became clear that in the majority of the EU member states, the behaviors included in the concept of harassment are intended to be sanctioned by the tools of criminal law.[1518] The questions inevitably asked by legislators, however, were complex and unclear: how can actions that qualify as harassment be formulated on the level of the law, in general terms; whether threats should be a conceptual element of the basic definition of the crime (in the case of violence, obviously, another crime should be established); whether the crime can even be established by a one-time action, according to the type of the offending behavior, or whether a permanent infringement should definitely be assumed; whether it is only a direct intention or also, an eventual intention that can be defined as the form of conviction of the delinquency.

What is certain is that harassment belongs to those crimes which have a lower gravity, which are "attached to a person", i.e. those which can be punished as a consequence of private motions. This is why it comes up as a justified question how such crimes can be handled if the report is made by a person other than the one entitled to file a private motion. The answer to this question can be found in the rules set out in the CPC[1519], which clearly points out that such reports should be rejected by the authority. If, however, it is disputed whether the report has been made by the person entitled to do so, then the report should be supplemented.

If the report is turned down, the decision on such rejection should also be delivered to the offended party pursuant to the provisions set out in the CPC.[1520] In such a decision, the attention of the offended party should be called to the fact that the filing of a private motion is the condition to launching a criminal procedure, or to the calling of the perpetrator to account. This information should also include that 1. the private motion will qualify as legally effective if the entitled party is not aware of the identity of the perpetrator but the former expresses their will to punish the perpetrator for the facts explained in the report

1516 See: Point II. Constitutional Court decision No. 56/1994 (XI. 10.)
1517 I would like to note that the term 'harassment' already came up in Act CXXV of 2003, as an act that can be deemed the violation of the requirement of equal treatment. Based on the Act, harassment is a conduct violating human dignity of a sexual or other nature, with the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment around a particular person.
1518 BERKES: 2008. 16. In: TÓTH, ibid. 103.
1519 174. § (1), Point e)
1520 169. § (4)

within the statutory deadline, and 2. if the entitled party files the private motion with delay, they will be entitled to certify such delay.

Pursuant to Section 222 (1) of the CC, any person who engages in a conduct intended to intimidate another person, to disturb the privacy of or to upset, or cause emotional distress to another person arbitrarily, or who is engaged in the pestering of another person on a regular basis, commits the crime of harassment. The basic definition is subsidiary, i.e. it can only be established if no graver crime is committed. The legislator has indicated disturbance as the offending behavior of Section (1). This basically encompasses all such activities which are suitable for making the everyday life and routine of the passive subject difficult, i.e. influencing it in a negative direction. This may be accomplished both verbally and by action, the point is to challenge the already existing poise and to destroy the personal equilibrium.[1521]

I would like to note that disturbance may even be accomplished in the capacity of an indirect perpetrator. In one of the cases presented by the summary report on the review of prosecutor's practices related to harassment (hereinafter: the Report), "among others, the accused party also disturbed the offended party by having displayed an advertisement in an internet page, according to which the offended party would like to sell their car at a price substantially lower than its market value. The accused party displayed the actual data of the offended party in this advertisement, including their phone number, emphasizing that this number can be called at any time. As consequence of the behavior of the accused party, the persons who thought that the advert was real kept calling the offended party continuously from the time of displaying the advert to the cancellation thereof."[1522]

The possibility of the infringements affecting other persons as well cannot be excluded either, despite the intention of the perpetrator to only harass one or perhaps more persons. Such cases, for example, when the harassing phone calls are taken by the relatives of the target person rather than the victim, or the disturbing messages come in to an e-mail address jointly used by the family members, and this is consciously done by the perpetrator, can be listed in this group. As a general rule of principle, in the judicial practice, it is only the relationship between the perpetrator and the target person that is considered, since in the case of a criminal act, it is exclusively the dolus directus that is accepted as a possible form of conviction. In my opinion, however, with regard to the legal subject of the criminal action, it would be justified to consider the extension of the contents of Section (1) to the level of dolus eventualis. In the case of infringements, the situation is that such a regular or long-term contact between the perpetrator and the persons other than the target persons may also be established whose subject is the regular offending or simple threatening of the passive subject, etc., however, the minute that the relative or partner becomes aware of such acts through direct communication, they will inevitably become the passive subjects of this harassment. In my view, this latter circumstance should also be considered, this is why Section 222 (1) should be regarded as one that is in line with the statutory definition in such cases too.[1523]

1521 judicial decision No. 2014. 169.

1522 http://ugyeszseg.hu/repository/mkudok7747.pdf

1523 "However, it will involve a different judgement if the victim puts the speaker on during their telephone conversation with the accused who is making threats and the accused also threatens the life of the other person who is present, being aware of the fact that they are on the speaker. In such cases, the action will qualify as a harassment of two counts." In: Zsuzsanna MONORI: On Harassment with Dangerous Threats.

Harassment will only fulfill the statutory definition if it is regular or permanent. Thus, the CC does not include occasional infringements under the objective effect of the crime, which I regard as an absolutely logical solution. BERKES thinks that by regularity, we should understand a behavior that is demonstrated by shorter periods of time, one that is repeated, while permanence should mean a longer period of time.[1524] Based on this, for example, the following repeated behaviors can be listed in the scope of the crime: phone calls (irrespective of the time of the day); offending and abusive messages (e.g. on an answering machine, via e-mail, in text messages, in letters, etc.); the observation or stalking of the passive subject, etc.

In order for the criminal action to be considered completed, it is not required that the victim receive the repeated phone calls or read the messages[1525] but only those behaviors will qualify as ones fulfilling the statutory definition which the victim is aware of. It is irrelevant whether the tone of the perpetrator's behavior is positive or negative, or whether the passive subject himself/herself gets in contact with the perpetrator (e.g. out of necessity).[1526]

Being found guilty is not excluded by such circumstances either that the accused and the victim mutually establish contact with each other, or if the victim used to be the earlier perpetrator.[1527] Based on the Report, the following questions should be examined in such cases: who initiates contact more often; at what time the contact tends to be established (e.g. nighttime or daytime hours); whether it can be concluded that the reason for the victim's getting in contact with the accused is exclusively to communicate the intention to break contact with the accused; whether it can be concluded that the victim only gets in contact with the perpetrator on account of the fulfillment of some obligation to the perpetrator (e.g. child maintenance payments), however, the perpetrator's attempts to take up contact point beyond this, etc.[1528]

The Debrecen High Court of Appeal established the criminal liability of an accused party who regularly appeared in front of the victim's apartment or workplace.[1529] However, the motions filed by the defense emphasized that staying in a public area cannot be the subject of a crime in itself. At the same time, the view of the third-instance court was that these actions fulfilled the content criteria of harassment.

According to Section (1), the compliance of an offending behavior with the criteria of the statutory definition requires a separate investigation in those cases when the perpetrator wishes to enforce a right that is realistic or assumed, or wishes to fulfill an obligation. According to the Report, it is primarily after the dissolution of a marriage or the termination of a domestic partnership that it is experienced that "one of the parties tries to establish regular contact with the other party with a justification that is also acknowledged by law. Such reason may be e.g. the visitation of a common child, the availability of joint property, the enforcement of a financial claim against the other party. In these cases, the victim

The Legal Practice of the Second Basic Definition of Harassment, with special regard to Issues of Cumulation and Distinction. *Pro Futuro*, 2016/2. 224.

1524 BERKES (2008): 17. In: TÓTH, ibid. 106.

1525 judicial decision No. 2011. 302.

1526 Based on its ruling No. Bfv. III. 818/2010/5, the Curia does not exclude the establishment of harassment if the passive subject receives the calls and maintains the conversation.

1527 judicial decision No. 2014. 169.

1528 http://ugyeszseg.hu/repository/mkudok7747.pdf (07.03.2024.)

1529 Debrecen High Court of Appeal, judicial decision No. II. 201/2013/5.

may not refrain from the keeping of contact without justification and the accused cannot be expected to break all relations with the other party either. Thus, if the establishment of the contact - however objectionable it is considered by the other party - happens in order to exercise the statutory rights of the perpetrator, or to fulfill his obligations, to a justified extent, no crime is committed."[1530]

In the Report, those cases in which the crime can be established despite the fact that the perpetrator wishes to exercise their (assumed) statutory rights are brought up as counter-examples. The Curia classified as harassment the action committed by a biological father who interfered with the life of the child and the mother voluntarily, purely by making a reference to their being relatives. The highest judicial forum explained that "the voluntary nature of the behavior of the accused can be established irrespective of whether the reasons quoted as the basis for his behavior are realistic or not. It holds no relevance whether or not the accused is in fact the biological father of the victim's child. Their relationship is settled by the rules of family law, the authorizations of the affected parties with regard to the definition of the child's family law status and the possibility to challenge the latter, are defined by law."[1531]

Further questions of legal interpretation are brought up by whether the effect of the private motion extends only to infringements of the past, or also to those of the future. According to the everyday legal approach, the actions included in the scope of the term of harassment in Section (1) can be considered a natural unit in the case of the same offended party, and accordingly, at the time of filing the private motion, the offended party presumably thinks that no further private motions should be filed with regard to the further partial actions of harassment. However, in the Report, the reader's attention is called to the objectionable practice in which in such cases, the investigative authority usually does not warn the offended party any more that new private motions should be filed in the case of new infringements. This practice seems to be rather improper, mainly because in the judicial practice, those principles which are related to the handling of crimes punishable on the basis of private motions of such a nature are already known. Among others, it is also pointed out in judicial decision No. 2014.169 that when a private motion is filed, the criminal claim only becomes enforced with regard to the actionable conduct indicated therein, which means that the criminal claim should be repeatedly enforced for any further repeated behaviors of the same kind. The situation is that for any new partial actions that have been committed after the filing of the private motion, a new private motion should be obtained.[1532]

Pursuant to Section 222 (2) of the CC, any person who, for the purpose of intimidation, conveys the threat of force or public endangerment intended to inflict harm upon another person, or upon a relative of this person /Point (a)/ or gives the impression that any threat to the life, physical integrity or health of another person is imminent /Point (b) /, is guilty of harassment.

Contrary to what is defined by Section (1), the offending behaviors regulated here can be committed by (a) one(phase) action as well. However, as long as the perpetrator demonstrates the same conduct as set out in Points a) or b) several times against the same victim, with a single intention of will, in short intervals, then continual offending behavior

1530 http://ugyeszseg.hu/repository/mkudok7747.pdf (07.03.2024.)
1531 http://ugyeszseg.hu/repository/mkudok7747.pdf (07.03.2024.)
1532 judicial decision No. ÍH 2014.87.

can be established. In the latter case, it is only the factual cases touched upon in the private motion that can be included in the statutory unit of continuality,[1533] and the victim is entitled to file a private motion for each action committed against them.[1534]

The threat defined in Point a), by taking the interpretative provisions of the CC into account, is defined as envisaging such a grave disadvantage which is suitable for generating strong fear in the person who is threatened. The compliance of this turn of phrase with the statutory definition, however, also depends on the content of the threat: a crime can only be established if the threat specifically forecasts the prospect of committing a violent action against a person,[1535] or of committing an action causing public endangerment. This is why the existence of the situation described in Point a) cannot be established in the case of generally formulated statements (e.g. "You will get in trouble!")[1536]; if the threat in question is aimed at channelling the anger accumulated during the assault rather than at intimidation (in such cases, another crime should be established)[1537]; if the perpetrator makes his statements in lack of a serious intention, in order to channel their momentary anger, or perhaps as part of their usual vulgarity[1538]; if the perpetrator seriously threatens another person with disclosing a fact that is suitable for staining the honor of the threatened person or their relatives to the wide public, with the purpose of intimidation (this is the act under the statutory definition of dangerous threat listed in Section 173 of the Minor Offenses Act).[1539]

The use of expressions like "I will kill you", "I will cut your throat", "I will beat you to a pulp", etc. meet the requirements of the statutory definition based on the Btk's grammatical interpretation but I have doubts as to whether the law enforcement practice which establishes the accomplishment of the action defined in Section (2) purely based on such a statement is right. What is more, in some opinions, "a threat realized purely by implied conduct, non-verbal signs, physical hints, gestures and body language can also meet the criteria of the statutory definition. Such cases include, for example, situations where the perpetrator indicates to the victim what awaits them by pulling their hand in front of their throat, or by shaping their hand as a pistol."[1540] Neither MONORI nor myself agree with this viewpoint, in my view, it is only compliance with Section (1) that can be established in such cases at most.

1533 judicial decision No. 2002. 252.
1534 judicial decision No. 1988. 348.
1535 Homicide, kidnapping, sexual violence, robbery, act of terrorism, etc.
1536 However, the Curia thinks that verbal threats that envisage the killing, or cutting the throat of the victim, can be suitable for establishing harassment, judicial decision No. BH+ 2013.5.186 (Curia decision No. Bfv. III. 726/2012).
1537 judicial decision No. 2011. 303.
1538 http://ugyeszseg.hu/repository/mkudok7747.pdf (07.03.2024.)
1539 "The form of an infringment is basically the preparation for defamation committed in front of a wide public. The offended party may experience well-founded fear if someone who is in possession of discrediting information about them threatens to disclose this to the wide public. However, it is important that on the subjective side, the intention may not extend beyond intimidation, as for example, if it is coupled with the purpose of gaining benefits, then the act may qualify as attempted blackmail, which also holds true for the statutory definition of harassment. The level of reality of the fact is indifferent here, however, the seriousness of the threat is relevant, which may be suggested by an earlier threat, or potentially, by a conflict reaching the level of an assult, besides the obligation to examine the general meaning of the statements, as well as the form and content of the threat." In: László BISZTRICZKY – Péter KANTÁS: *Explanation of the Law on Minor Offenses.* Budapest, HVG-ORAC. 2014. 469.
1540 MONORI, ibid. 227.

MONORI thinks that "the prosecutor's office, presumably in order to find evidence more easily {...}, frequently quotes that the statements or communications arising from emotions generally do not reach the limits of the crime of harassment, their level of being realistic can be objectively questioned, they are not suitable for intimidating people."[1541] However, in the author's opinion, "the intent of the action cannot be excluded by building our opinion on the lack of suitability for intimidation{...}, such an argumentation by the prosecutor's office and the reason for examining suitability presumably arise from the general definition of threats, as it is an element of the general statutory definition of threats that the disadvantage envisaged by the threat should be suitable for intimidation. However, such suitability is irrelevant from the aspect of the intent of intimidation and in the scope of analyzing threats as an offending behavior, it should be mentioned on what basis the general term of threat cannot be applied in the consideration of harassments committed with dangerous threats."[1542]

In the case of Point b), committing such an action will meet the statutory definition not only in the case of action against the offended party, or the relative of the latter, but also, in the case of any other person, the danger envisaged should be imminent, which means that the passive subject should count on the occurrence of the disadvantage in question within a short period of time. Belovics thinks that an act in the context of which the perpetrator delivers an envelope with the label "anthrax", which actually contains talcum powder, to the victim, is typically such an act.[1543]

As per Section 222 (3) of the CC, the above actions will qualify as graver offences if they are committed by the perpetrator against a spouse or former spouse, or against a domestic partner or former domestic partner /Point (a)/; against a person under the perpetrator's care, custody, supervision or treatment /Point (b) /, or if abuse is made of a recognized position of trust, authority or influence over the victim /Point (c)/.

With regard to Points a) and b), we are basically talking about the criminological aspects of "domestic violence".[1544] An attempt at including this term in the scope of statutory definitions was made as early as in 2004, in the form of a bill prepared by the Ministry of Justice (IM).[1545] It was in this draft that the very phenomenon was defined for the first time but its manifestation on the statutory level has not even happened to date. What I think the main reason for this is, in agreement with Andrea Tóth[1546], that the term "domestic violence" may also include such actions in the case of which using the tools of criminal law may seem to be a disproportionate solution. I would hereby like to note that among the cases examined by the Report, the aggravated cases of harassment almost always included actions committed against the (former) spouse or the (former) domestic partner.[1547]

In a classical case, Point c) includes improprieties that are manifested in the framework of an employment relationship or another legal agreement to work. I would like to note that the quality of being an employer is not, in itself, a sufficient criterion for establishing compliance with Point c). There is an interesting dogmatical reasoning on this question

1541 MONORI, ibid. 221.
1542 MONORI, ibid. 221.
1543 BELOVICS – MOLNÁR – SINKU, ibid. 280.
1544 I would like to note that in Point a), I am missing the references to registered patner's relationships, which is an independent legal status today.
1545 Bill No. T/9837 on restraining applicable for domestic violence, April 2004
1546 TÓTH, ibid. 87.
1547 http://ugyeszseg.hu/repository/mkudok7747.pdf (07.03.2024.)

in one of the comments on the CC: "If an employee gives their mobile phone number to their boss based on their own decision, on which number the latter regularly calls them after work hours, then the basic definition of harassment will be fulfilled. If, however, the offended party did not give their phone number to their boss, and the accused party became familiar with this phone number through their access to employees' data and this is how they kept calling the victim, this will meet the definition of the aggravated case under Section (3)."[1548]

Pursuant to Section 173 (3) of the CPC, the private motion should be filed within thirty days from the day on which the party entitled to file a private motion becomes aware of the identity of the perpetrator. There are two possible options regarding aggravated cases: 1. the victim knows from the very start who commits the harassment; 2. the victim is not aware of the identity of the perpetrator. If the victim files the private motion before the identity of the perpetrator becomes known but the identity of the perpetrator later becomes familiar, then, according to the position taken by the Report, the offended party does not have to give yet another statement on whether they would like to uphold the motion. I cannot identify with this viewpoint, as it is not certain that after learning about the familial relatedness, the victim would still like the procedure to be conducted. On the other hand, the nature of the crimes punishable as a result of a private motion justifies that the acting authority should only make the launching or the termination of the procedure dependent on the victim's decision, or any other eligible party defined by the CC.

9.2.2. Cumulative issues

The number of instances of harassment is adjusted to the number of passive subjects. In the opinion of Andrea Tóth, in the case of common contact details (e.g. common correspondence addresses / phone numbers), it should always be checked which person the harassing intention of the accused was directed against.[1549] I can only identify with this standpoint to the extent that the examination is aimed at making a distinction between dolus directus and dolus eventualis. In other respects, in my opinion, both actions may fall under the effect of Section (1), as long as the perpetrator is aware of that another person besides the target person (e.g. a relative) may also become aware of their establishing contact, as well as of the content of such contact.

Harassment under Section (1) creates a natural unit, since the individual partial actions result in the regular or permanent harassment of the victim not by themselves but in their totality. However, the Report suggests that the substantive cumulation of Sections (1) and (2) is not excluded either, as long as the multiple statements of the perpetrator concerning the same victim qualify as ones under Section (1) at one time, while under Section (2) at another time.[1550] It is on this basis that the Szeged District Prosecutor's Office qualified the conduct of the accused "as the cumulation of disturbing harassment and continual

1548 Tóth, ibid. 108.
1549 Tóth, ibid. 108.
1550 "One of the district-level prosecutor's offices also deemed that the cumulation of harassment as defined in Sections (1) and (2) can be established in the case when the accused party tried to get in contact with the victim on a regular basis against the latter's will in order to voluntarily intrude on their privacy, then the accused also threatened the victim with battery on the last occasion." http://ugyeszseg.hu/repository/mkudok7747.pdf (07.03.2024.)

dangerous threatening (against his former domestic partner) when he tried to establish contact with the victim on a total of 238 occasions in a period of 20 days (he started 177 calls and sent 61 short text messages) and he provenly visited the offended party in her home on two occasions when he threatened to kill her in a drunken state."[1551]

I do not necessarily agree with the above practice, as Section (2) incorporates the actions defined in Section (1) anyway, and from the aspect of the passive subject, it is mostly the threat running counter to the latter turn of phrase that is suitable for generating well-founded fear or a condition similar to the latter. In such cases, I think that it is unnecessary to conduct the entire evidence procedure with regard to the actions running counter to Section (1).

In such cases, the establishment of continual offending behavior under Section (2) seems to be more realistic. In one case, "the former husband kept going back to the former common real estate property several times a week for several months and he kept shouting to his ex-wife still living in the house from the street in a drunken state, he was swearing, shouting curse words, and on one occasion, he also threatened his ex-wife with violence and killing, to which the neighbors were ear-witnesses. There was no one to witness what was said on the occasion of the earlier personal harassments but the court accepted what was presented in the report, and they conluded, from the continual nature of the action and the embittered relationship of the spouses that such and similar threatening statements must have been communicated earlier too, so this conduct was qualified as continual."[1552] However, in MONORI's opinion, this tendency of law enforcement is highly disputable, as in such cases, the cumulation of Sections (1) and (2) should be established, and also, one (proven) threat cannot serve as the basis for establishing continual offending behavior.[1553]

Related to the cumulative assessment of harassment, I would like to refer back to that an offending behavior qualifying under Section (1) can only be established if no graver crime is committed. Therefore, if e.g. the accused intruded the privacy of the victim on several occasions and these incorporated such partial actions which qualify as disturbance of peace, harassment in a formal type under Section (1) cannot be established, due to its subsidiary nature.[1554]

Coercion, as it is an alternative crime, cannot be cumulative with harassment either. Furthermore, I would also like to note that in the case of coercion, we are not talking about "aggravated threats", what is more, in the case of harassment, the perpetrator does not intend to make the passive subject do, not do or endure something.

"It was qualified by the prosecutor's office as the cumulation of harassment committed by threats and the deprivation of liberty when after a family gathering, the accused party rampaged in the apartment in a drunken state, then he did not let his mother-in-law out of the living room for almost half an hour, he threatened to kill her and in the victim's presence, the accused called his own father on the phone saying that "I am keeping my mother-in-law as a hostage, please, bring some people who will kill her."[1555] In agreement with MONORI and GELLÉR[1556], however, I think that this act runs counter to the statutory

1551 MONORI, ibid. 225.
1552 MONORI, ibid. 225.
1553 MONORI, ibid. 225.
1554 http://ugyeszseg.hu/repository/mkudok7747.pdf (07.03.2024.)
1555 MONORI, ibid. 227.
1556 Balázs GELLÉR: Deprivation of Liberty. In: POLT Péter (ed.): *Commentary on Act C of 2012 on the Criminal Code of Hungary*. Budapest, Opten, 2016. 601.

definition of the deprivation of liberty committed by mortifying the victim. This means that it is not possible to establish the statutory definition set out in Section (2) because this would therefore run counter to the prohibition of double consideration.

Related to the distinction from threatening with public endangerment, we should examine whether the statements made by the perpetrator contained real threats, and whether all this proved to be suitable for disturbing public peace. Thus, e.g. a statement "I am going to light the house on you!" uttered in a family row in the staircase of a prefabricated building in principle makes the appearance of danger, however, in my view, it is not suitable for establishing the statutory definition of threatening with public endangerment even if there is a higher number of persons present when the threat is made. Thus, in such cases, the turn of phrase under Section 222 (2) of the CC should be established.

"In another case, on the other hand, the Szeged District Court established the cumulation of harassment committed by continual dangerous threatening and threats of public endangerment when the accused intimidated his own mother, with whom he shared a household, for several years by having verbally abused her and threatened her with physical abuse on a daily basis {...}, and he threatened several times in front of the neighbors too that he would open the gas tap and would explode the whole condominium. The agreeing position of the Szeged District Court and the prosecutor's office was that these threatening statements of the accused party were made in order to intimidate the offended party but these were heard by several tenants in the staircase of the condominium, and several others also became aware of these threats, so this action of the accused party was suitable for disturbing public peace. The reason for this cumulative standpoint was presumably the difference in the legal subjects and the assessment of the intention to generate fear."[1557]

If the enforcement of a financial claim also appears as one of the intentions of the act, it may come up as a practical problem how harassment and vigilantism, as well as blackmailing can be distinguished from each other. In the case when the accused party threatened the offended party, who was in a hostile relationship with him because of a settlement dispute arising from an earlier car sale, by saying that "by the time you come home, you should have the money, or you will die", a procedure was launched on account of an action under Section 222 (2) of the CC but later the case was redefined by the prosecutor's office as an attempt at vigilantism. Also, the report for harassment was rejected because of attempted vigilantism in a case when the accused party told the victim on the phone, related to the latter's debt, that "someone will go to your place and collect my money from you." In the latter case, the criminal procedure was terminated by the prosecutor's office because in their opinion, a threat should be concrete in the case of vigilantism, and abstract, distant and ambiguous statements do not meet this requirement. However, in my view, the statutory definition of harassment should have been established in this case.

Also, the prosecutor's office classified a case as attempted vigilantism when the accused party picked a fight with the victim because of an earlier debt, then threatened him that he would "do away with him, that he would settle the accounts." When the criminal procedure was launched, the prosecutor's office defined this act as a case under Point b), Section 222 (2) but according to their subsequent position, these statements did not fulfill the statutory

1557 Monori, ibid. 230.

definition of harassment, so eventually, the procedure was terminated with reference to the lack of evidence after changing the classification.[1558]

As compared to the statutory definition of Section (2), the definitions of grave bodily injury, breach of domicile, forced interrogation, assault on a public official and robbery also qualify as aggravated cases. According to the Report, however, as it is a substantive cumulation, the fulfillment of the statutory definition under Section (2) should be established if the threat is made directly after the basic action has been committed, with a view to the future.[1559] I cannot identify with this standpoint, as in my opinion, any subsequent statements should be regarded as unpunished post-actions.

In my view, the basis for distinguishing between an assault on a public official or one fulfilling a public duty, as well as the definition in Section 222 (2) of the CC, is the time of committing the action, as well as the outcome thereof. If the threat of committing a violent action against a person, or a punishable action involving public endangerment is made at the time of the procedure conducted by the public official, or one fulfilling a public duty and the outcome of such action is the hindering of the procedure, or compelling the passive subject to take action, then the action will run counter to the statutory definition of assault on a public official or one fulfilling a public duty. If, however, this conduct of the perpetrator is demonstrated after or because the measures by the above-mentioned passive subjects have been taken, the action will qualify as harassment.

9.2.3. The difficulties of providing evidence. The criticism of restraining

The most common forms of manifestation of the criminal act include those cases where the perpetrator harasses the victim by using an electronic telecommunications device. Phone calls, text messages, skype messages, Facebook messages, e-mail messages, as well as establishing contact through other mobile phone applications should be specifically highlighted. To be able to prove the facts of the matter, all these communications and messages should be documented, which may not cause any problems in the case of internet-based infringements. In the case of instances of disturbance on the phone, however, it causes some difficulty if the passive subject is not in the position to record the conversations in some form or another. In such cases, the acting authorities are not statutorily authorized either to intercept the conversations, since the criteria for obtaining secret data do not exist, as consequence of the sentence of the criminal act.

If the conversation is not recorded, in my opinion, the presentation of the call history before the court cannot qualify as sufficient evidence, not even if the quantity and times of the calls, e.g. several nighttime calls, suggest that the statutory definition can be fulfilled. The court has to be fully convinced of what the purpose of the conversations between the parties was (would have been) but in order to be able to do so, a minimum level knowledge of the content or direction of the conversations would be necessary.[1560]

1558 Monori, ibid. 231.

1559 http://ugyeszseg.hu/repository/mkudok7747.pdf (07.03.2024.)

1560 In the other case examined in the Report, "the accused party threatened the victim, who had launched a labor law procedure against them, with killing on the phone. There was no ear witness to this threat. From the call log obtained in the course of the investigation, the phone conversations between the accused party and the victim could be certified and also, it could be confirmed that the victim called the emergency

It is also a realistic phenomenon when the passive subject requests police support because of the harassing behavior demonstrated by the accused party. In such cases, a police report on this should be obtained, and if necessary, it is justified to hear the acting policemen as witnesses.[1561] Also, evidence should be taken if it is doubtful whether the cohabitation of the accused and the offended parties qualifies as a domestic partnership.

The reason for acquittals due to lack of evidence is frequently the fact that the victim, who is related to the accused party, does not wish the accused to be punished after the indictment has been submitted, so using their right of exemption, they do not testify. As the key to the solution, Andrea TÓTH outlines the possibility of the acting authorities' taking the earlier witness testimonies into account in such cases (see the analogy of the rules for the testimonies to be given by the accused party). However, the author adds that by using this method, "the court would obtain such extra items of evidence which would actually be obtained by evading or disregarding the obstacles of giving a testimony." I have already explained above that due to the "private motion nature" of the crime, I do not think that any similar amendment of the Be would be acceptable.

In one of the cases of a district-level prosecutor's office discussed in the Report, "the accused regularly harassed her husband's parents in order to voluntarily intrude on their privacy. The fact that the accused party was guilty was proven by the call log certifying the number and times of establishing contact, as well as the testmonies given by the victims. After the indictment, the relationship between the accused party and the offended parties was settled, and by using their right of exemption with regard to the familial relatedness, they already refused to give testimony in the court procedure. The list of phone calls, especially in a relationship between relatives, was not sufficient to establish the statutory definition of harassment, so the prosecutor was right when he filed a motion for the acquittal of the accused party due to lack of evidence."[1562]

I find it an unfortunate practice that despite the rightful refusal to give a testimony from the offended party's part, the documents of the text messages, e-mail messages, the correspondence in the internet social media attached by the offended party and containing the threats made by the accused party can still be used as evidence, along with the testimonies given by those witnesses with whom the victim shared what had happened. However, the police report containing the statement made by the offended party cannot be used in the case of the rightful refusal to give a testimony, and the police officer who acted in the on-site investigation or who conducted the hearing of the witness cannot be heard as a witness with regard to the statement given by the offended party.[1563] However, the legal effect of the private motion is not affected by any such circumstance in which the party filing the motion gives no testimony later, using their right of exemption.[1564]

In the cases that were launched exclusively for harassment, court-ordered supervision is usually not used in the investigation phase. In the cases that can be mentioned as exceptions, it is usually only at the victim's motion that restraining is ordered against the accused party.

number 112 on several occasions after the threat had been made, however, no other items of evidence had surfaced. The court did not find the victim's testimony and the data found in the call log sufficient against the denial of the accused, so they acquitted the accused due to lack of evidence." http://ugyeszseg.hu/repository/mkudok7747.pdf (07.03.2024.)

1561 judicial decision No. 1983. 272.

1562 http://ugyeszseg.hu/repository/mkudok7747.pdf (07.03.2024.)

1563 judicial decision No. 1999. 241.

1564 judicial decision No. 2014. 2.

The recent period has seen the emergence of serious doubts about the suitability of such court-ordered supervision: "in the opinion of the civil societies involved in the protection of victims, the situation has only become worse, as the long-awaited institution of restraining orders had been integrated but the operation thereof had proven to be unsatisfactory. One of the key deficiencies manifesting themselves in practice is that this institution did not provide prompt and efficient assistance to the victims of abuse, since in order to be able to issue such a restraining order, a criminal procedure in progress, as well as the communication of the suspicion are the required criteria, which are mostly distant in time from the underlying abuse."[1565]

The above evaluation seems to be right according to the current rules set out in the CPC. The first problem lies in the set of criteria of the CPC, which requires that it is necessary for the issuance of a restraining order that 1. the criminal procedure should be in progress, and 2. the well-grounded suspicion should be communicated to the accused party. However, a longer period of time elapses before these criteria are met, during which the victim has no legal assistance available whatsoever. In the cases examined by Andrea TÓTH, "in appr. one-quarter of the cases, the motion for issuing a restraining order was rejected by the investigative judge because the person against whom such a motion was filed was not in the position of the accused party at the time of the hearing, this is why the motion qualified as unsubstantiated due to its premature nature and it had to be rejected."[1566] The primary reason for the dysfunctionality of court-ordered supervision becomes obvious from the wording of the CPC, based on which it is used primarily in order to ensure the success of providing evidence rather than to protect the rights of the offended party.

The European Court of Human Rights also pointed out the deficiencies of the functioning of the institution of criminal restraining orders when they condemned Hungary for a measure taken in relation to a restraining order. The judicial forum emphasized the necessity of decision-making without delay and they found it concerning that the law does not set a special deadline for decision-making.[1567]

In order to remedy the above deficiencies, Act LXXII of 2009 on Restraining Applicable in case of Violence among Relatives was adopted by the National Assembly, based on Section 1 (1) of which "any action or failure committed by the abuser against the abused party, which seriously and directly jeopardizes dignity, life, the right to sexual self-determination, as well as mental and physical health, will qualify as violence among relatives." Basically, the law introduces the possibility of issuing a so-called preventive or temporary restraining order, the point of which is that the obligor is obliged to keep away from the abused party, from the real estate property where the abused party habitually lives, as well as from another person indicated in the temporary preventive restraining order or in the preventive restraining order during the effect of the restraining order, furthermore, they will be obliged to refrain from establishing contact with the abused party either directly or indirectly.[1568]

It is the local court competent based on the abused party's habitual residence that decides on issuing a preventive restraining order in a non-litigious procedure. The procedure is launched ex officio at the initiative of the police, or at the request of the

1565 TÓTH, ibid. 85.
1566 TÓTH, ibid. 90.
1567 „Kalucza v. Hungary" (2012)
1568 5. § (2)

abused party or a close relative of the abused party. Preventive restraining orders can be ordered for a maximum of 30 days. During the effect of such a restraining order, the abuser will be obliged to keep away from the abused party, from the real estate property where the abused party habitually lives, as well as from another person indicated in the order, furthermore, they will be obliged to refrain from establishing contact with the abused party either directly or indirectly.

While preventive restraining orders are issued in the framework of an administrative procedure, and it takes the provisions set out in the Hungarian Civil Code as a basis for defining the term "relative", the issuance of criminal law restraining orders depends on the launching of a criminal procedure and the relatedness between the victim and the perpetrator is not examined. The criteria of issuing a restraining order are different in the two types of procedures also by the legal title of the use of the real estate property where the abuser lives. No preventive restraining orders can be issued if the victim is a courtesy user of the apartment and there is no child under legal age, common with the abuser, in the household. However, criminal law restraining orders can be issued by the court irrespective of the legal title of the use of the real estate property.[1569]

The possibility to issue a temporary preventive restraining order assigned to the competence of the police is the "entrance gate" to the issuance of a preventive restraining order, which is also regulated by the rules of official administrative procedures. The point of this lies in that in order to prevent a more serious abuse, the police officer could immediately take measures to remove the abuser from the site and should make a decision on keeping the abuser away from the victim for at most 72 hours. A temporary preventive restraining order can be issued ex officio or based on a report. Simultaneously, the police initiate the issuance of a preventive restraining order at the competent local court. The detailed rules of temporary preventive restraining orders are set out in IRM (Ministry of Justice and Law Enforcement) decree No. 52/2009 (IX. 30.), which helps the police arriving on the site make the right conclusions from the circumstances that can be experienced on the site and apply the right measure for the treatment and prevention of domestic violence.[1570]

The possibility of using an intermediation procedure may provide considerable benefits to both parties, and the enforcement of the principle of opportunity is expressly justified in the case of actions which run counter to the statutory definition of harassment, on the basis of exclusivity. The process may be especially highly justified in the case of infringements between relatives. Among the cases examined by the Report, it happened very rarely that an intermediation procedure was conducted unlawfully, despite a reason for exclusion set out in the CC.

"Related to the ordering of an intermediation process, one of the district prosecutor's offices summoned the victim as a witness and made them give a statement on whether they will give their consent to conducting an intermedition procedure. In lack of consent from the victim, conducting the intermediation process became aimless, so an indictment was submitted. The district court held a preparatory hearing on this case, where they heard the accused party and the offended party, who then both gave their consent to conducting the intermediation process, and the prosecutor also proposed the same. This is why the district

1569 Erzsébet Tamási – Orsolya Bolyki: The Circumstances of the Practical Application of Restraining Orders. *Iustum, Aequum, Salutare,* 2014/4. 54.

1570 Tamási – Bolyki, ibid. 56.

court suspended the criminal procedure for six months and ordered that an intermediation process be conducted, which, however, was not successful. In fact, however, the carrying out of an intermediation process was excluded by the law. The situation was that according to the indictment submitted by the district prosecutor's office, the accused party harassed their ex-partner continuously, from the termination of their life as a couple on June 01, 2012, up until July 31, 2013. The personal part of the indictment also contains that the accused party was put on probation for one year in a judgment that took binding effect on April 19, 2013. Thus, the accused party committed some of his acts during the effect of probation, this is why the carrying out of an intermediation process is excluded by Point d), Section 29(3) of the CC."[1571]

The Report suggests that it was only in 9 cases that a second-instance procedure was conducted in the case of convicted persons accused exclusively with harassment, i.e. in 85% of the cases the sentence or measure imposed by the first-instance court was acknowledged by both the prosecutor and the defence lawyer. In the case of accused parties convicted exclusively for harassment, the most commonly applied sanction is putting on probation (36.3%), imposing fines and community work (23.4-23.4%, respectively). 3.6% of the accused were reprimanded, 11% of them were sentenced to suspended detention, while 1.8% of the accused were imposed executable custodial sentences.[1572]

9.2.4. Summary

Related to the analysis of the criminal act that was discussed above, I touched not only upon substantive but also on procedural law issues. The analysis of the procedural law was primarily related to the circumstances of filing a private motion. It was not by coincidence, as in my opinion, the current practice is unlawful in several aspects. First of all, it should be pointed out that harassment is, in most cases, a "process crime", i.e. the offended party should be asked to inform the authorities on a regular basis in the case of all the infringements and that they should use the possibility of filing a private motion in each and every case. The situation is that the effect of the private motion filed for the first time only extends to the unlawful actions committed before this point in time.

In the case of section 222 (1) of the CC, the regular nature of the action does not in itself substantiate criminal liability. In such cases, the authorities should also investigate into what the intention of the perpetrator was. If the actions are neither of an intimidating nature, nor are they aimed at voluntarily intruding privacy, then the offending behavior cannot be regarded as one that fulfills the criteria of the statutory definition. In this scope, the direction and mutuality of, and the reasons for establishing contact should be examined, along with the events directly preceding the infringement. The mutuality of contact between the victim and the accused in itself does not exclude the establishment of the crime of harassment but extra attention should be paid to what exactly the communication from the part of the victim and the accused is aimed at.

Such actions are most frequently committed by electronic telecommunications devices, of which disturbing behavior through e-mail and Facebook messages stands out. In such cases, it is an indispensable condition to providing evidence that the victim should

1571 http://ugyeszseg.hu/repository/mkudok7747.pdf (07.03.2024.)
1572 http://ugyeszseg.hu/repository/mkudok7747.pdf (07.03.2024.)

have the printed copy of the message in question at their disposal, or that the latter should be able to show such statements to the staff members of the investigation authority directly through entering their personal pages.

Finally, I think that the statutory definition of the behavior in Section (2) should be supplemented with a subsidiarity or alternativity clause, as this turn of phrase is often concurrent with other crimes (e.g. deprivation of liberty by mortifying the victim). Thus, in order to avoid the establishment of actions of several counts, it would be desirable to have such a legislator's wording which would only allow the establishment of "harassment committed with dangerous threats" if no graver or other crime is committed.

9.3. Hungarian and international aspects of illegal fishing

Based on Hungarian CC, any person who: 1. is engaged in activities for catching fish without authorization, using fishing nets or other fishing equipment, excluding recreational fishing, 2. is engaged in activities for catching fish using unauthorized fishing equipment and/or methods provided for in specific other legislation, or in restricted fishing areas, is guilty of a misdemeanor punishable by imprisonment not exceeding two years.[1573]

By virtue of the geographical and ethnographical characteristics of Hungary, precise codification of the regulations regarding fish farming is highly desirable which encompasses rules at the fields of both administrative and criminal law. Hungary, based on its small relative geographical area in Europe, is uniquely abundant in freshwater lakes, as well as in rivers, tributaries, and smaller streams, in relation to which it is necessary to set apart the regulatory frameworks regarding sport angling, recreational (hobby) angling, and fishing. For the aforementioned activities, only administrative regulations are required primarily, any violation of the laws in the course of practicing them, however, is a subject of the laws of infractions and criminal law.

The Act CII of 2013 on Fish Farming and the Conservation of Fish (hereinafter: Act) as well as the Decree 133 of 2013 of the Minister of Agriculture on the Specification of Regulations on Fish Farming and Conservation of Fish (hereinafter: Decree) contain the statutory background of administrative regulations for this subject.

The Act draws a basic distinction between the concepts of fish farming and fish catching where the former one is defined as activities related to the conservation, regeneration, and exploitation of fish stocks in natural water bodies, as well as the generic concept of aquaculture and other fish farming activities whereas the latter one is defined as catching, and not releasing back into the water, fish or other useful aquatic animal in the course of fishing or angling. In my essay, exclusively those possible legal responses will be considered which may be given to violations of the laws related to catching.

Before all, it is reasonable to clarify that the two predominant methods of catching fish are angling and net fishing, or simply fishing. Fishing regularly aims at catching animals in larger quantities since its function is first of all the fulfillment of specific economical needs. Angling, in contrast, can be understood basically as a recreational, sport, or hobby activity. The angler, as a general rule, is allowed to angle with a maximum of two fishing rods (with 3 hooks per rod) at one time. The angling methods taking shape during the

1573 CC 246. §

evolution of angling show a diverse picture: float fishing, bottom fishing, spin fishing, fly fishing, downrigging, trolling, or clonking for catfish catch.[1574]

The wording of the Act itself refers to such a distinction according to which angling is catching fish for recreational purpose by means and tool for angling,[1575] allowed by this act and by the decree implementing this act, in fish farming waters, or catching bait fish by lift net not exceeding 1 square meter;[1576] fishing, on the other hand, is selective catching or collecting fish or other useful aquatic animal by allowed means and tool in fish farming waters for recreational or commercial, as well as ecological purpose, except angling. [1577]

For the analysis of the subject, the examination of the following topics is necessary; 1) The criminology of illegal fishing; 2) Sketching the regulatory background; 3) Considering the aspects of the delimitation of offenses requiring interventions by either the administrative or criminal law; 4) The theoretic solutions, and possible shortcomings, in the recent regulations of criminal law.

In my essay, of course, ethical issues are dealt with too. Even the question can be raised about animals in general whether to have moral standing, deserving protection by the regulations of criminal law too, and about different animal species whether to fall under the same category or not in this regard, (i.e. the differences in pain sensitivity and sensory thresholds can be substantial, etc.). "These questions, and the answers given to them, deeply divide people who work in animal protection. Some activists assert that every animal is equal, according to the representatives of the other viewpoint, it is not possible to give an affirmative answer to this question."[1578]

9.3.1. Historic overview. Illegal fishing in the criminological approach

Since the times of Stephen I, first king of Hungary, there had been historical records in relation to the regulations of fishing rights. In the beginning, these regulations were restricted to the definition of the entitled parties (dioceses, barons, and other aristocratic classes). The legal documents of the Middle Ages speak of a highly developed fish farming economy, and fishery had become a professional occupation in those times. It reserved, of course, its monopolistic status though because this activity was still considered to be a royal prerogative, so called jus regale. The relations in regards to the rights of property and use were regulated in acts on the one hand, and by means of consuetude on the other. In the landlord-serf relation, the so called urbarium or a particular contract settled down how much fish, and rent, the fisherman was expected to provide, and pay, in return for the fishing allowance.

The ecological and societal changes from the 19. century necessitated the reorganization of the regulatory framework. By the abolishment of serfdom the acquisition of fishing rights became merely a matter of wealth, and by the same token, the number of the natural waters, and the fish stock, diminished substantially. The Act VI of 1836, however, retained

1574 Tamás Hágер: Constitutional and criminal protection of the environment, with particular regard to the protection of aquatic life. *Büntetőjogi Szemle,* 2006/1-2. 32.
1575 An equipment, for the purpose of angling, appropriate for catching fish, which is made up of at least a fishing rod, fishing line, and is equipped with a maximum of 3 fishing hooks.
1576 2. § (6)
1577 2. § (9)
1578 Adrienn Jámbor: *Legal protection of pets.* Miskolc, PhD dissertation, 2016. 18.

the regulation of fishing as a royal prerogative invariably, and continued to ban the serfs from this activity. The Urbarium Patent of 1853 too upheld the view according to which the reorganization of urbarial relations did not apply to the so called jura regalia.

From the years of the 1870s onwards, a ministerial level, decree type legislation started. In the course of this legislation different seasonal closures were introduced, and specific fishing methods, (e.g., use of poison or dynamite), were prohibited.

The first legislations in this field were the Act XXVIII of 1885 (Water Act), the Act XIX of 1888 (Fisheries Act), and later the Act LXIII of 1925 and the Decree 9500 of 1926 on the implementation of the latter. These legislations declared that "the bed and banks of the bodies of water are the properties of the coastal possessor, and fishing is an indispensable part of the coastal possession."[1579] The declaration of this modern position of the proprietor was at the same time accompanied by obligations for the proprietor to provide the necessary and reasonable services in relation to fisheries management (i.e., establishing fisheries societies, supplying the markets, etc.).

From the end of communism in Hungary, the methods of, and the frequency characterizing, illegal fishing have changed substantially. The two major changes can be identified in the characteristics of the tools used for, and in the ever growing recurrence of the organized character of, the commitment. All these were paired up with such, before all climate related, ecological impacts that necessitated new solutions in the treatment of illegal fishing and angling (henceforth referred to as: fish poaching), as well as the extension, and the increase of the efficiency, of the control exercised by the authorities.

The Act XLI of 1997 on Fishing and Angling, enacted in the year of 1997, already before its commencement, has received many critical acclaims: "the new legislation in its original formulation before its enactment has not served well a sustainable fish economy anymore that should otherwise take into account the aspects of environmental protection, and the societal and economic priorities of Hungary. Such kind of legislation, and a regulatory framework based on it, became necessary which, besides the particular modes of use, supports the natural regeneration of fish stock and prevents illegal catching and trading of fish."[1580]

Also it became a fundamental question whether it would be necessary to rethink the techniques of sanctioning these violations of laws. That kind of common sense argument, however, went against the efforts for the criminalization which looks at the violations of laws related to fishing simply as 'mischief,' tolerable hobbies, and at fish as 'res nullius.' Even so, with effect from 1 July 2013, the poaching of fish became a separate criminal category in the new CC.

Behind the intention of the legislator the following aspects 'lurked;' 1) Besides the 'lone,' occasional offender, (who acted in a 'shoot and run' manner), groups also showed up working with professional equipment,[1581] operating in organized form, striving for regular profit; 2) Poaching, since the 90s, has become a status symbol in certain circles in the course of which catches were often carried out in seasonal closures, and of protected species; 3) The different water areas (e.g., the biggest lakes in Hungary, like Lake Balaton or Lake Velence, or the backwaters of the Danube) were principally out of control, and the

1579 Anikó Bezdán: Basic legal issues of the qualification of fishing organizations with legal personality. Szeged, *Acta Juridica et Politica,* 2005. 5.
1580 Háger, ibid. 32.
1581 E.g., with chemical, pyrotechnical devices.

by that time existing institutional mechanisms of the control exercised by the authorities could be characterized well as meager; 4) By joining the EU, the danger of the widening scope of criminal circles and methods emerged; 5) Also the food security hazards of large-scale illegal fishing surfaced since before handing forward the catch the offenders did not necessarily store the fish in a professional manner, and care about the requirements of hygiene, etc.; 6) By the illegal activities the complete ecosystem was affected, including protected fish species too, etc.

In our times either, of course, the offenders are not looked at by the public opinion as 'definitely antisocial, unscrupulous perpetrators' which is partly due to the fact that many motivations of these illegal conducts can be pinpointed, like the 'beauty of nature walks,' the ecstatic experience of the catch, the guise of a sport activity, financial difficulties, etc. On the other hand, as it is my conviction, the offenders themselves either are not aware of committing a crime, or of the possible ecologic impact of their conduct.

In the essay of Balázs ELEK, an interesting argument can be read according to which "beyond the violations of material, property related interests, before all the creation of dangerous situations has to be mentioned. Since poaching regularly produces dangerous situations in various areas of the country. It can often be heard that fish guards, rural guards, even policemen try to keep off such areas where poachers are active because they lose courage. The poacher can be dangerous also therefore because in fear of discovery, punishment the poacher can exert aggression against that person who catches or debunks the perpetrator {...} there is a close link between poaching and accidents too since this conduct carried out secretly, by violation of professional rules, often leads to an accident. There was example for it that a man was caught in his own illegally thrown net in one of the backwaters of the Tisza. There was no escape from the dragnet, traditionally used in Hungary, now banned; it was in vain for the poaching fisherman to try to cut himself out of captivity.[1582]

According to my opinion, using penal measures in response to the violations of laws is important primarily from the point of view of nature and environmental protection. The regeneration of fish stock is a slow process, stretching many times over several years. This has, of course, economical impacts too as KŐHALMY notes; the goal of fishery management is "to get permanent yields without risking the future existence of the source. In case of renewable sources when we try to estimate their value not only their actual value, expressed in money-price, has to be taken into account but also the indirect damages, caused by their degradation, (the loss in diversity of the ecosystem), or the costs caused by the restoration of them when already degraded."[1583] According to ELEK, the value of the killed fish extends beyond that value which would be otherwise the guiding standard in court (based on expert opinion) in the case of a simple theft.[1584]

According to HÁGER "the protection of fish {...} is an eminent task in environmental protection since the role of human activity in maintaining fish stock is unavoidable. Because of the earlier river engineering practices, as well as the impairment of the general condition of the environment, the fish stock in free waters, left alone, is not capable for renewal anymore."[1585]

1582 Balázs ELEK: Criminal assessment of poaching and poaching.*Pisces Hungaricy,* 2009. 3.
1583 Tamás KŐHALMY: *Encyclopedia of Hunting.* Budapest, Mezőgazdasági, 1994. 71.
1584 ELEK, ibid. 10.
1585 HÁGER, ibid. 29.

9.3.2. Statutory background, principles of international law

The statutory background applicable to illegal fishing is complex and it is, thus, related to many branches of law. Before all, however, it is important to place emphasis on those general legal principles according to nature and environmental protection set forth by international and European Union law which have to be unconditionally effective also in the sovereign national legislation.

As a general rule of international law, the non derogation principle should be emphasized which declares that the already existing level of protection achieved by earlier legislation can never be lessened because it can lead to irremediable environmental damages, as well as to the deterioration of the already existing condition. There is only possibility for 'withdrawal' if it turns out to be indispensable for the implementation of a specific constitutional value.[1586]

At the level of the European law, the 2003/80/JHA Council Framework Decision has to be emphasized the Article 2 of which declares that each member state shall establish specific conducts causing harm to the environment as criminal offenses. Among others, unlawful possession, taking, damaging, killing, etc., of wild fauna or flora species have to be considered as such. This attitude of legislation has to prevail especially in those habitats where the aforementioned species is threatened by extinction. Furthermore, it is important to refer to the 2008/99/EC Directive of the European Union on the Protection of the Environment through Criminal Law.

In relation to the Fundamental Law of Hungary, the country's constitution, the Article P has to be stressed which declares the principle, and requirement, of 'sustainability,' as well as the circle of individuals to whom it is addressed; according to this not only the state but each person is obligated to maintain the integrity of the environment, as well as to prevent the deterioration of the good condition of the environment. The aforementioned Act can be characterized as the 'base law' of the topic which, among the general provisions, declares that the fish stock in the fishing management waters of Hungary is national treasure, natural asset, and economical resource which shall be protected by the society, and the renewal of which shall be aided, and the exploitation of which shall be planned and carried out, only according to the requirements of sustainability (Section 3).

Other relevant acts of protective value; a) Act LIII of 1995 on Environmental Protection which, among others, declares the protection of water, as well as of life; b) Act LIII of 1996 on the Protection of Nature which delivers detailed content to the general provisions of other branches of law, especially those of criminal law; c) The Act XXVIII of 1998 on the Protection of Fauna, as well as the Act LV of 1996 on Hunting, partly deals with issues of the littoral ecology of waters too; d) the Decree 13 of 2011 of the Minister of Environmental Protection.

9.3.3. Approaches on administrative law and the laws about civil infractions

According to the Act II of 2012 on Civil Infractions, Civil Infractions Proceedings, and the Registry System of Civil Infractions (hereinafter: Infractions Code), the primary person of

1586 László Fodor: *Environmental law.* University of Debrecen, 2014. 109 – 110.

authority for controlling infractions is the fish guard[1587] who, according to this regulation, has an authority extending to charge on-the-spot fines. It is a further requirement for this authority that he or she shall be an employee of any public administration body, or a governmental official of local government, or a public employee, or an official of the central government, or an official employed by the state.

The Infraction Code, a bit scantily, does not refer to such as 'fish poaching,' or to any conducts similar, or related, to these violations of law. Only in relation to breaching hunting, fishing, or grazing prohibition,[1588] the Infraction Code makes a reference to it that breaching the general hunting, fishing, or gazing prohibition ordered in relation to the protection against natural disasters constitutes a civil infraction.

In addition, that subtype of the infraction against nature protection can be brought into relation with violations of the laws related to fishery management in the course of which the offender causes damage to, or takes, or kill, the living specimen of the protected spices, as well as when he or she disturbs the specimen of a protected or highly protected species in its habitat to a substantial extent.

The fine ranges between 10.000 and 500.000 forints.[1589] Its exact amount shall be specified based on all circumstances of the case, especially the scope, severity of the infringed interests of the affected individuals, the length of the period of the infringement of rights, and repeated commitment of the conduct, the advantage achieved by the infringement of rights.[1590] If the imposition even of the minimal amount of the fine is unnecessary for terminating the unlawful condition, or preventing from the further infringements of rights, the fishery management authority might give a caution to the person involved in the proceeding.[1591]

The coordinating body for the authority tasks analyzed so far has been the National Fish Guard Service since May 1, 2015 which is constituted of the fish guards employed, or delegated, by the National Food Chain Safety Office (hereinafter: NFCSO).[1592] The national fish guards have jurisdiction for the entire country therefore, compared to the fish guards employed by authorized persons for fishing, they are entitled to act in any fishery management waters of Hungary and, in regards to the Infraction Code, are considered as fish guards. Personally I think, in respect to the prevention, and retribution, related to illegal catching of fish, this centralization of the control exercised by the authorities to be reasonable by all means.

Under the Act, the said authorized person is entitled, among others, to a) restrict, or prohibit, manufacturing, storing, shipping, using, trading, exporting, importing, or, in the area of his or her jurisdiction, transporting fish product, b) order the fish stock or fish product to be seized, withdrawn from trade, recalled, made harmless, destroyed, c)

1587 If the area of fishery management water, or the joint areas of waters, used and registered by the same authorized person for fishery exceeds 50 hectares, the authorized person shall employ fish guard according to the followings, a) for 50-100 hectare fishery management water at least 2 persons, b) for 100-2.000 hectare fishery management water at least 4 persons, c) for 2.000-4.000 hectare fishery management water at least 6 persons, d) for 4.000-6.000 hectare fishery management water at least 8 persons, e) for any fishery management water exceeding 6.000 hectares at least 10 people [Decree, 42. § (3)].

1588 215. §

1589 Infraction Code, 67. § (3)

1590 Infraction Code, 68. § (1)

1591 Infraction Code, 70. §

1592 Source: http://portal.nebih.gov.hu/-/allami-halori-szolgalat (February 16, 2024).

seize, forfeiture, order, at the expenses of the owner, the destruction of, the equipment appropriate for catching fish, d) impose fishery management fine on the person authorized for fishery management if he or she issues territory ticket for a person without national angling ticket, national tourist angling ticket, national fishing ticket, etc.

Besides these, this authorized person is entitled to impose fish protection fine on the person angling or fishing unlawfully; failing to keep catch notebook; angling or fishing in a way, with an equipment, not allowed by the Act or in seasonal closure; accomplishing the catch (collection) of prohibited fish or other useful aquatic animal; carrying out fishing or angling activity disturbing the reproduction and development of fish in a recreational closure area until the revocation of prohibition; trading fish or fish product of uncertified origin; emitting into the fishery management water any organism, food, pollutant appropriate for perturbing the natural equilibrium existing in the habitat of fish; accomplishing the unlawful catch of fish or other useful aquatic animal protected by size or bag limits, or seasonal closure, etc.[1593]

9.3.4. Cases falling under the criminal law

The present Criminal Code, in contrast to the former one, the Act IV of 1978, defines fish poaching as a per se crime, separately from the definition of cruelty to animals. According to Belegi, the reason for this might be that the common sense understanding, and the commitment of the conduct, of fish poaching does not fit into the conception of cruelty to animals.[1594] The motive of fish poaching, as the reasoning goes, basically is not to torture, cause any suffering to, the animal but to catch fish. Purely on theoretical grounds, I cannot agree with this argument since, according to this, not the trivial meaning or the conduct itself but the purpose differentiates between the conducts of the perpetrators. Notwithstanding I do not think the widespread judicial practice to be proper either based on which fish poaching and cruelty to animals cannot be charged in multiple count indictments.

The object of crime is 'fish' which is, according to the Act, any animal belonging to the groups of fishes and Cyclostomes, jawless fishes, in all phases of their ontogeny.[1595]

In most cases, the motive of the perpetrator is to catch native fish species in the given water area, (e.g., carp, zander, catfish, pike, eel, asp, barbel, etc.), but, of course, also in the case of fishes of nonnative origin, (e.g., silver and bighead carp, grass carp), as well as of native but smaller fish species, (rudd, crucian carp, tench), the conduct falls under the definition of this crime. Furthermore, objects of crime are aquatic animals defined as 'useful' by the law too, thus, frogs, crustaceans, mussels, leech, sludge warm, lake fly, and other fish food organisms, in all phases of their ontogeny.[1596]

According to Section 246 (a) of the CC, the perpetrator of the misdemeanor of fish poaching is the person who is engaged in activities for catching fish without authorization. This phrase of the section can be applied only to that case if the perpetrator uses fish net or other fishing tool during his or her activity. Illegal angling alone, however, is not a crime in itself.

1593 Act, Section 67. §
1594 József Belegi: Crimes against the environment and nature. In: *Hungarian Criminal Law, Commentary for Practice, Third Edition.* Budapest, HVG-ORAC, 2013. 1066.
1595 Act, 2. § (5)
1596 Háger, ibid. 34.

According to the categorization by Szilágyi, different methods of fishing have been developed in line with the behavior of the game animals. Using fish net can be considered to be the most frequent method which can be divided into the two subcategories of (active) trawl and (passive) static methods. The net, according to its type, can be lift,[1597] push, bottom trawling, as well as dragnet. Furthermore, catching fish by hands, the noodling, or using some ad hoc tool, (e.g., basket), fall also under the category of fishing.[1598]

The subject of paragraph (a) can be only that person who does not possess license required for any activity for catching fish. In this regard I would like to refer to the regulation according to which the fish stock living in the fishery management waters of Hungary, as a general rule, is state property. To catch fish that person is entitled who is personally authorized for fishery management in the waters of fishery management, or who possess license for catching fish issued by this person.[1599]

The person with fishing right is, therefore, the owner on the one hand, and the usufructuary on the other. The Act also gives a closed enumeration of the persons entitled to usufruct according to which, in the waters for fishery management, activities for catching fish can be carried out either with 1) fishing license, or 2) national fishing ticket, in case of selective fishing for commercial and ecological, or recreational purpose, respectively, or with 3) national angling ticket, or national tourist angling ticket, in case of angling. It is important to note that the person with fishing management right is entitled to give further rights for fishing or angling to the authorized person by issuing territorial ticket.[1600]

The person with fishing management right is obligated, among others, to display the name (company name), address (registered office) by whom the ticket has been issued, the name of the licensee, the fishing management water the ticket is valid for, as well as the period of validity of the territorial ticket too.[1601]

The national fishing ticket is issued by the national fishing management authority and is valid from the date of its issue until January 31 of the next year. The national fishing ticket endows the ticket holder with the right of using simultaneously only 1, maximum 16 m^2 size, active fishing tool and 3, maximum 2 meters diameter, fyke net. The national fisher certificate, requirement for holding state fishing ticket, can be obtained by the successful completion of the subject-to-fee course organized by the fishing management authority.[1602]

The act in paragraph (a) can be committed with either direct or oblique intent. There is no obstacle in the way of the determination of complicity if more persons carry out illegal fishing with knowledge about each other's activities, jointly, and in an active way. Evaluating the activity of a person for abetting, i.e., psychical help, who is merely present and passive, is, in my view, unreasonable, and besides this it can run into difficulties when it is about presenting evidence; by the same time, however, securing the necessary material substrates, (e.g., fish net), in advance or simultaneously makes aiding, i.e., physical help, always demonstrable. In regards to the stages of accomplishing the act in paragraph (a),

1597 In a relevant case in Hungary, the court sentenced a person fishing illegally with lift net in a fishing territory of a main canal to suspended minimum security prison (Judgment 2.B.1016/2014/2 of the District Court of Nyíregyháza).
1598 Miklós Szilágyi: *The fishing of the Hernád*. Miskolc, Ott Hermann Museum, 1980. 34.
1599 Act, 6. § (1) – (2)
1600 Act, 44. § (1)
1601 Decree, 27. §
1602 Decree, 18. §

purchasing the necessary tools for fishing is preparation, taking the fishing tools to the bank is attempt, and letting the tools in the water is accomplished crime.

The poaching of fish as defined in Section 246 (b) can be committed by any person who is engaged in activities for catching fish using unauthorized fishing equipment and/or methods, provided for in specific other legislation, or in restricted fishing areas. In a case in Hungary, the defendant wanted to catch fish by raking on the bottom with a prohibited, destructive technique but after the second attempt was caught in the act by fish guards. The court, relying on Section 246 (b) of the CC, sentenced the perpetrator as recidivist to 30 days in prison.[1603]

The perpetrator of this crime, thus, in contrasts to paragraph (a), can be a person also in possession of a license to carry out any activity in favor of catching fish. By the same token, I would like to note that, because of being an act more seriously harmful to society, as well as the wider scope of the potential perpetrators, I would feel necessary to define this phrase as a felony and at the same time to lift the maximum penalty to 3 years in prison.

In regards to the prohibited tools, as well as methods, the closed definition provided by the Decree gives orientation – the function of which relies on the physiological effect of electricity on fishes; the poisonous and/or stunning materials; explosives; stitching tools; the diving spear and other diving tools appropriate for catching fish; raking; using poacher's noose; practicing the method of dropper loop or single line-hook fishing for bottom fishing; gillnets;[1604] as well as attempting any of these activities.[1605]

In course of raking the perpetrator lets the hook enter into a body part of the fish other than its mouth. This requires special equipment: "regularly a very strong, (3-4 m) long {...}, hard rod, a bigger spinning reel, as well as a strong, thicker than average line is needed. The terminal tackle for raking is a bigger sinker, as well as more triple hooks. The triple hook can be tied to a leader attached to the mainline, or fixed tightly to the sinker, often by molting it to the sinker, this way linking the parts of the tackle together. A fisherman, and especially the fish guard, or a policeman with knowledge about angling, instantaneously recognizes the prohibited tool, as well as the special movements required for exercising this method. Raking is practiced in flowing waters, backwaters, and lakes as well, in both summer and winter. The fisherman casts the line into the water, then, with a characteristic, tugging movement [...], draws the final tackle back. Raking is aimed at catching fish types with greater body size, in the spring/summer usually inhabiting the upper part of the water column, like the silver and bighead carp, the grass carp, specimens of carp schools. In winter, raking the more valuable, bigger catfish from the bottom of the water is more typical. Because huddling together, laying down in groups, especially in winter, during winter rest, is a behavioral trait of this species."[1606]

The territorial closure serves as a water area for the calm, damage and disturbance free winter rest, and reproduction of the fish which is appointed by the fishery management authority.[1607]

1603 Judgment 4.B.602/2013/5 of the District Court of Esztergom
1604 It is such kind of fishing tool the catching mechanism of which is based on wedging the fish in the net, leading to the death of the caught specimen shortly.
1605 Act, 46. § (4)
1606 Ádám Székely: *The catfish and its fishing.* Budapest, Mezőgazdasági, 1980. 15.
1607 Decree, 4. §

According to the Decree, the person authorized for fishery management is obligated to make the regulations in regards to the prohibitions and restrictions applicable to territorial closures public. The person authorized for fishery management provides for making the detailed description of the boundaries of the territorial closure, as well as the temporal scope of the fishing ban applying to the territorial closure in the territorial ticket, or in the printed information leaflet handed over with the territorial ticket public.[1608]

The crime in paragraph (b), too, can be committed with direct or oblique intent. In relation to complicity, as well as aiding and abetting, I find the aforementioned considerations in regards to paragraph (a) authoritative. In regards to the stages of accomplishing – relying also on the considerations regarding paragraph (a) – purchasing the necessary tools for fishing is preparation, taking the fishing tools to the bank is attempt, and dropping the tools in the water is accomplished crime.

I analyze the problem of multiple counts, and the questions regarding their separation, in relation to paragraphs (a) and (b) together. First of all, I would like to emphasize that according to the recent judicial practice which I do not think to be fully correct, however, poaching of fish and cruelty to animals cannot be charged in multiple count indictments even if carrying out the activity (e.g., raking, using of gillnet) causes permanent disability, death, or excessive sense of pain for the fishes. In regards to these results, no concrete references can be found at legislation level, only among the administrative regulations it is prescribed that to torture the caught fishes is prohibited, as well as that the taken and caught fishes should be treated in such a way that the physical impairment caused to them shall not exceed the limit which is minimally required by the fishing, as well as angling method.[1609]

In my opinion, the analysis of the aforementioned questions requires legal philosophical inquiries: in this subject many legal philosophical views are known in relation to the differentiation based on pain and sensory thresholds, and to its relevancy in law. According to the theorists of one view, the line should be drawn by vertebrate animals.[1610] Also that kind of legal solution is known when the legal protection is reserved for only a subset of vertebrates: according to the U.S. Act of 1966 on Animal Welfare the object of crime of cruelty to animals can be only cat, dog, hamster, rabbit, monkey, guinea pig, or other warm-blooded animal, as the secretary of agriculture may determine.[1611]

According to the view I think to be correct the discriminative criterion is the presence or absence of the capacity for the sensation of pain. To determine the answer for this question requires, of course, biological research, I surmise, however, that in case of animals belonging to the group of fishes the application of the crime of cruelty to animals would be undoubtedly reasonable if the unlawful act causes evidently substantial pain to the specimen. The aforementioned raking or the usage of gillnet could fall into this class. In these cases, thus, the conduct described in Section 246 (b) should be considered according to the legal definition of cruelty to animals only, the crime of poaching of fish, however, would not apply. Obviously it would not be any possibility to charge multiple counts in such cases either because this would defy the principle of double jeopardy.

1608 Decree, 5. §
1609 Decree, 28. § (14)
1610 David Degrazia: *Rights of animals.* Budapest, Magyar Világ, 2004. 28.
1611 7 U.S. Code § 2132 (g)

The conduct of poaching of fish, according to my opinion, should therefore be restricted to the activities carried out illegally, as well as in a territorial closure unlawfully. The criminal sanctioning of these conducts is, of course, still necessary from the point of view of both nature protection and fishery management.

Based on the aforementioned considerations, according to the practice I would think to be correct, if the perpetrator carried out the usage of the prohibited tool or method without permission, the conduct would be considered as the multiple count indictment of the crime of cruelty to animals and the crime of poaching of fish as set forth in Section 246 (a), carrying out the same activities in territorial closure, however, would be considered as a multiple count indictment of cruelty to animals and poaching of fish as set forth by Section 246 (b).

By the same time, however, the judicial practice does not seem to be unequivocal in respect that theft and either paragraph (a) or (b) can be alleged in a multiple count indictment.[1612]

In a case in Hungary, the court sentenced the defendant fishing with prohibited fishing tool for misdemeanor of accomplice in theft and misdemeanor of poaching fish to prison without suspension.[1613]

The imposition of this charge might presumably have adhered to the criminal record and other personal circumstances of the perpetrator too, the severity of the retribution, however, could well be considered as a 'precedent.' Above this, according to my view, the multiple count indictment of poaching of fish, theft, and the criminal offenses with explosives or blasting agents will be apply to the commitment if the perpetrator carries out catching fish as described in Section 246 (b) with the aid of explosive or blasting agent and takes the surfaced carcasses of fishes illegally.

Poaching of fish regularly turns up as the underlying offense in crime groupings. Based on this, the activity of that person who, for financial gain or advantage, buys the fish caught and unlawfully taken by fish poachers is considered as fencing. In regards to the determination of criminal liability it is vital that the mens rea of the perpetrator shall encompass the unlawful killing, as well as illegal taking of the game. The court is expected to draw its conclusion by considering all circumstances of the case (e.g., the place and time of trading, the way and extent of compensation, etc.).

Also conducts involving the violation of anti-money laundering provisions turn up at the level of crime groupings. The activity of that person who converts or transfers, or uses in business activity, any asset originating from a criminal offense, punishable by prison, and committed by another person, in order to conceal its origin, is considered as such. According to Elek, "the business activity can be running a restaurant too. In that case if the fish is used in course of this activity in order to conceal its origin, the definition of money laundering can apply to it."[1614]

1612 EBH 2015. B. 24.

1613 Judgment 8.B.133/2012/17 of the District Court of Szarvas, Judgement Bf.340/2013/5 of the Regional Court of Gyula.

1614 Elek, ibid. 13.

9.3.5. Closing remarks

The new Criminal Code – unreasonably – 'devalued' the importance of legal protection of fishes. An important sign of this tendency is the likely discriminative distinction drawn between poaching of game and poaching of fish: the former Criminal Code (Act IV of 1978) regulated the conducts of fish poaching and game poaching together as one misdemeanor punished with the same punishment. The recent code defines poaching of game as a felony, punishable with maximum three years in prison, when poaching of fish is still a misdemeanor with the maximum penalty of two years in prison.

The other fundamental problem is the concurrency of cruelty to animals and poaching of fish by prohibited tools or methods, as defined in Section 246 (b), and the unclear relationship between the legal interests defended by these regulations. For it is not clear whether the legislator created the latter phrase in respect to the exceptional sensation of pain in the animals or the damaging effects caused to nature in such circumstances. This regulation is not unequivocal in respect to the determination of multiple counts either, or in relation to the principle of double jeopardy.

In regards to illegal fishing control exercised by the authorities, in this field creating a coordinating platform between the NFCSO and the National Fish Guard Service in 2015 is doubtlessly a progressive step which, due to its skilled personnel, in the close future is likely to turn out to be an efficient mechanism in filtering out the violations of laws damaging fish stock. For the sake of prevention and redistribution, upholding the possibility for charging on-the-spot fines, raising the limit for fines, as well as exercising regular and ad hoc control by the authorities could serve as a solution in all cases.

Illegal angling has to be handled from illegal fishing separately. The former one could bear touristic relevancies too which first of all, according to my view, could be mended by application of, so to speak, 'marketing instruments.' Angling competitions organized by local governments, various fish festivals, as well as that kind of strategy, based on informing the broader public, which calls the attention of the potential perpetrators to the unlawfulness and other dangers of their activity could have eminent role in this campaign.

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