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REFLECTIONS ON PRACTICE OF PRE-TRIAL DETENTION

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ABSTRACT *The Hungarian criminal procedural law practice is far from the norms at several points, unfortunately, the juristic acts of the European Union, the European Court of Human Rights practices and the Constitutional Court's decree make just as little influence on fixed schematic thinking and decision-making as the Explanation of the Criminal Procedure Act (Holé & Kadlót 2007) and the ad hoc decisions of the Mansion. It is more devastating in the cases of pre-trial detention related procedures, whether it relates to the enactment or the reservation, for the enforcement of the right to effective protection is strongly questionable nowadays. In this treatise - including but not limited to – I am trying to analyze a few parts of this issue, however, they definitely belong to the most frequently encountered problems in Hungary. Changes are not experienced across the equality of arms, or the enforcement of the effective defense in the entrenched practice of criminal procedures, despite the fact the need, reasonableness now can be seen brighter than the sun.*

KEYWORDS*: pre-trial detention; practice; right to effective protection; coercive measure; Hungarian criminal procedural law*
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The Hungarian criminal procedural law practice is far from the norms at several points, unfortunately, the juristic acts of the European Union, the European Court of Human Rights practices and the Constitutional Court's decree have just as little influence on fixed schematic thinking and decision-making as the Explanation of the Criminal Procedure Act (Holé & Kadlót 2007) and the ad hoc decisions of the Mansion. It is more devastating in the cases of pre-trial detention related procedures, whether it relates to the enactment or the reservation, for the enforcement of the right to effective protection is strongly questionable nowadays. In this treatise - including but not limited to – I am trying to analyze some parts of this issue, however, they definitely belong to the most frequently encountered problems in Hungary.

1. SCHEMATIC PUBLIC PROSECUTOR'S MOTIONS, COURT ORDERS

It has already been mentioned in the communique *Some practical issues raised in limiting the personal freedom of coercion* written by the Court of Hajdú-Bihar County's

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Criminal Council leader, issued under number 2001 El. II. C. 6.6. dated 23 May 2001, referring to the public prosecutor's motions in stereotyped repetitive text, *"the conditions in pre-trial detention remain in place"* and the examination of the parol applications become particularly schematic. Unfortunately, since that time not much has changed, vindication the pre-trial detention, the court orders is still often based on the statement "*There is no change in the general and special conditions of the applied coercive measures*" without appointing reasons supported by specific data the public prosecutor's motions and most of the resulting court orders are schematic and remain on general level and defining the reason of the pre-trial detention in abstract ways, not including the supporting evidence of coercive measures and not considering the individual circumstances of the defendant.[1] In most of the cases response received from the courts for the arguments put forward in the defense motions, and in the appeals.[2] Often only months later as result of the literally same public prosecutor's motion take place the maintenance of the pre-trial detention, the soundness, the examination of requirements of extraterritoriality are ignored. The courts usually accept the public prosecutor's motions, without criticism, as such, the legal institution of investigating judge at all, on the basis of investigating authorities' proposals investigating judge ordered the most serious coercive measure in 5334 cases from 5699 public prosecutor's motions ordering for pre-trial detention. This represents 93.59% of the imposition of rates, which was 95.51% in 2011 and 96.79% in the year 2010. (Ügyészségi Statisztikai Tájékoztató 2012) These percentages illustrate the automation, which is objected to, within the confines of this study. Confer to the Explanation of the Criminal Procedure Act: *"The Criminal Procedure Act takes for general and natural that the defendant can plead paroled"* (Holé & Kadlót 2007) the state is not exaggerated at all that *"detention has become the rule rather than the exception."* (Közlemény Helyi Szakértői Csoport (Magyarország) találkozójáról, 2013)

The impropriety of this practice has been pointed out in one of the decree of the Debrecen Regional Court of Appeal[3], according to which *"The special reasons must be individually examined, and must be indicated in the explanatory memorandum what conditions predicate those reasons, regarding also, what reasons may be against them."* In most cases, the court orders do not comply with individualized, detailed discretionary activity deceiving requirements, and do not contain any specific circumstances against pre-trial detention, and do not evaluate. In turn in aspect of the particular reasons explanatory memorandum would not be acceptable, inasmuch merely defines the reason for arrest laid down in the operative part and it is not likely in the particular case. The cited motion of the order by the Debrecen Regional Court of Appeal highlights that, the motion cannot be accepted, neither on behalf the public prosecutor, which is only indicating specified reason in Paragraph of § 129 (2) of the Criminal Procedure Act. That

[1]See details: HOLHÓS-KOVÁCS, Sz 2011, 'Előzetes letartóztatás pro és kontra a bírósági eljárás és végzések tükrében' *Bírák Lapja*, no. 1-2. pp. 130-145.; *Közlemény Helyi Szakértői Csoport (Magyarország) találkozójáról*, 2013, February 21.; KŐSZEG, F 2011, 'Bűnözés, börtönnépesség, előzetes letartóztatás' *Belügyi Szemle*, no. 4, pp. 5-31.

[2] See details: CSOMÓS, T 2014, 'Átlátható kirendelt védői rendszert!' *Ügyvédek Lapja*, no. March-April, pp.28-30.

[3] Decree of the Debrecen Regional Court of Appeal, No. Bnyf.II.394/2008/2.

conclusion is emphatic because in most cases the justification only the literal repetition of the facts contained in the public prosecutor's orders from which the court concludes to the existence of the reasonable suspicion. However, the reasonable suspicion itself is not sufficient to order and maintain pre-trial detention just general condition of that. Obviously, mere presumption itself is not enough for a decision on the basis of the facts in relation the particular reasons. The Committee of Ministers of the Council of Europe, paragraph 8 of Recommendation R (80) No. 11 clearly requires that, the order must include the real grounds as accurately as possible.

In most cases, a substantive examination of data and actual assessment activities are lacking in that regard, referring other, compared to the pre-trial detention, lenient coercive measures. Recurrently we can encounter a one-sentence justification*: "The aim of the criminal proceedings using more lenient coercive measure is not practicable"* however, in most cases there is no any specific reason. This usual practice cannot be considered to be acceptable for the following reasons. The section (2) of § 60 paragraph of Act XIX. of 1998 (the Hungarian Criminal Procedure Act), the clause 9 of the International Covenant on Civil and Political Rights Law promulgated by Decree No. 8 of 1976 and paragraph 2 of the clause 14, the clause 5 and paragraph 2 of clause 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms promulgated by Act XXXI. of 1993, the paragraph 9 of R (80), Recommendation No. 11 of the Committee of Ministers of the Council of Europe, the Explanation of the Criminal Procedure Act (Holé & Kadlót 2007), imposition of constraints limiting the statutory rights of action (including pre-trial detention) even in the case of the conditions laid down by law, can be justified only when the aim of proceedings cannot be guaranteed by other act with less restriction (for example, house arrest, ban reside). In this issue, the individualized decision making is essential to real justification including the defendant's personal circumstances and analyzing the evidences which justifying the special reasons for arrest by the acting authorities as defined in Paragraph (2) of § 129. of Criminal Procedure Act. Our country has been amerced by the European Court of Human Rights in the case of X.Y. versus Hungary[4] precisely because no prosecutor motion or any court order made real consideration to use other, less severe coercive measures, during pre-trial detention of the complainant. Despite, Hungary referred to that the court ordered and maintained pre-trial detention against the complainant based on data and analysis of the personal circumstances of the individual case, the European Court of Human Rights could not see any signs of this in the concerned decisions, only found fact of abstract and schematic statement what is challenged by this study. It is unfortunate those improper practices to legal provisions and international documents are sanctioned by the domestic tribunals and in order to determine these deficiencies considered to be evident the Strasbourg court procedures is required.

2. THE OFFENSE PENALTIES AS CAUSE OF PRE-TRIAL DETENTION

Taking practicality into account, that is highly questionable the special tangible weight of the offense subject to reasonable suspicion alone justifies the imposition or maintenance of the most serious constraint measure. It goes for evidence: *"automatic*

[4] *X.Y. v Hungary,* Judgement of 19 March 2013. (case number 43888/08)

reference to the seriousness of the offense, the expected penalties, as the risk of escape or hiding exclusively underlying factor, and the lack of investigating the defendant's personal circumstances and the applicability of alternative coercive measures are the much-criticized characteristics of the Hungarian judicial practice." (A gyanú árnyékában - Kritikai elemzés a hatékony védelemhez való jog érvényesüléséről, 2009) Nevertheless, contrary to the practice, according to the decision no. BH 2009/7. of the Supreme Court (Supreme Court BKF. I. 172/2007.), the conclusion according to which there is risk of abscond, hiding, should be based on facts. The reference to the risk of abscond also shall be supported by concrete facts relevant only to the particular case.[5] On the basis of individual decision, to draw the conclusion other - primarily related to the person of the accused - circumstances should be examined. The Explanation of the Criminal Procedure Act states that: *"There can be absolutely no broad fiction, the conclusion must be established on facts, and it must be accounted in the order of the implementing of coercive measure."* (Holé & Kadlót 2007) The referred decree of Debrecen Regional Court of Appeal states in connection with this special arrest cause: *"The risk of abscond generally exists , if certain data can prove the high risk of that, the accused withdraw himself from the prosecution. In this case, the pros of abscond and hiding most compare against the cons of abscond and hiding."*

Of course, in that case, the judicial discretion could cover a very wide range of what information and facts taken for underlying assumptions of abscond or hiding, personal circumstances, which seemed advantageous at first, may be easily used against the defendant. We can find example of that the court exactly concluded the risk of abscond and hiding from the fact of the good financial circumstances of the defendant, because his financial possibilities allow him the implementation of abscond and hiding.[6] In another case, during the hearing, which was taken by the investigative judge on the defense side, the annexed community sheet confirmed that the defendant who remained at large for about 10 months, after the apprehension of the co-suspects, regularly shared information and photographs to the public, inter alia from abroad, from where he came back every occasions. From these the acted district court concluded that, later subsequently upheld by a competent tribunal, these data confirm the fact of abscond and hiding, because defendant had been abroad (in another EU Member State). This seems definitely contrary to the rules of logic. In this case, the fact of regular returns from abroad corroborate to (2) b) section of § 129 paragraph of Criminal Procedure Act which is clearly nonsensical and erroneous conclusion

As to ourselves, against the established practice, we definitely believe, seriousness of the offense, which is the matter of reasonable suspicion, cannot justify the so-called *b)* pre-trial detention, no conclusion from this can be taken to danger of abscond or hiding. This follows from the decision no. BH 2009/7. (Supreme Court BCF I 172/2007), which states that: the seriousness of the offense may only be sufficient to other less stringent the use of coercive measures, because the conclusion that there is a risk of absconding or hiding, solely must base on only concrete facts, which are relevant to the particular case.

[5] *Imre v Hungary*, Judgement of 2 December 2003. (case number 53129/99)

[6] Another question that if the defendant lives in unsettled financial conditions, it is justified to *d)* accurate pre-trial detention.

The BK LBI No 2009/28. decision states in conformity with , seriousness of the offense itself does not justify special reason for pre-trial detention, according to section (2) b) of § 129 paragraph of Criminal Procedure Act, the risk of the defendant's behavior must be taken into account. The risk of absconding generally exists when certain data indicate substantial probability of that the defendant would withdraw himself from the prosecution. In practice, the competent authorities usually just assume the reasons of absconding and hiding and the judicial orders do not include the arguments against them. Ignoring the personal circumstances is violation against the statement of the decision no. BH 2005/205. (Fejér County Court Bnyf. 170/2004) that although *"regard to potential legal threat of offenses under the reasonable suspicion, the risk of absconding, hiding arise in the case of A.V., pre-trial detention not required because regard to his private enterprise which are providing regular income, his current life style, he had no criminal records, nevertheless his presence at the procedural actions: That can be ensured by house arrest."*

According to the opposite approach, that is to say, adopting the practice focusing on the severity of criminal offenses without examining the individual circumstances of defendant, of de facto would mean that, the pre-trial detention should be ordered in certain proceedings which confer risk for penalty pursuant to section (2) b) of paragraph § 129 of Criminal Procedure Act. In that case, however, because of warranty considerations statutory regulation would be needed in that area at which severity penalties threatened criminal offenses should be applied, referring to the established judicial practice is insufficient in my view.

3. INFLUENCING THE PROBATIVE PROCEEDINGS AS REASON OF PRE-TRIAL DETENTION

It is also often the case that the pre-trial detention of the defendant took place because the prosecuting authorities assume that the defendant may impede the evidence proceedings, influence witnesses or destroy documents. In most cases, no specific data are available to support this assumption. The referred order of the Debrecen Regional Court of Appeal states in relation to the section (2) c) of § 129 paragraph of Criminal Procedure Act particular reason for arrest is not acceptable for the reference inasmuch *"the court recorded the risk of influencing witnesses as a particular reason for arrest in the order, although it did not give a substantive reason. [...] The particular reason for arrest must be corroborate by facts, it ought to be clear in the Prosecutor's Motion which is that argument that demonstrates this is the reason for the arrest. The mere fact itself, that the investigation has not been completed and it is still proceeding [...]additional interrogation of more witness and more suspect will take place, furthermore, more people expected to be declared suspect, not sufficient enough to establish the cause for the arrest, according to point c)."* This is in conformity with the decision no. BH 2007/41. of Supreme Court (Supreme Court Bkf. II. 838/2006.). The order of pre-trial detention is unlawful, inasmuch reasons specified in the order lacking the factual basis. If no specific data presented itself regarding that in case the release of the suspect would frustrate the success of the process or make it more difficult, so in the absence of it a 'reasonable' assumption cannot be stated.

However, in practice, many times the trial court draws conclusions from the defendant's potential opportunities (for example from the defendant exercises employer's

rights over the potential witnesses) to the so-called *c)* the causes of the existence of pre-trial detention. On the other hand, the Explanation of the Criminal Procedure Act highlights the contrast: the potential situation and the ability of the defendant is insufficient inferential basic to influence the procedure of evidence, to determine that as a reason, there is a need for intention or committed act. (Holé & Kadlót 2007) In accordance with the decision no. BH 2006/280. of Supreme Court (Supreme Court BKF. I.1166/2005.), the section *c)* based pre-trial detention can be ordered only in that case if data incur which can prove that, the accused may have threatened the witnesses, thus the continuation of the procedure of evidence is at risk. The decision no. BH 2005/205. of Supreme Court (Fejér County Court Bnyf. 170/2004.) also need to be emphasized, the reference to *c)* is not well founded if that is based on overwhelming extent on assumptions, taking the available information into account contained in the investigative documents.

In my opinion, against the current practice, the assumption itself is not enough to order or maintain so called *c)* pre-trial detention, that is also a need, the suspect in the current case or earlier in other criminal case exerted such activity pursuant to which well-founded conclusions can be, involving illegal assets, aimed to failure the criminal proceedings. Unfortunately, in most cases, with the absence of specific facts, data, safely can take place the order and maintain of the most serious coercive measures by the courts accordance with the section (2) c) of § 129 paragraph of Criminal Procedure Act.

4. SECTION (1) OF ARTICLE § 211. OF THE CRIMINAL PROCEDURE ACT, MAKING JUSTIFYING EVIDENCE OF THE DETENTION AVAILABLE FOR THE DEFENSE

With effect from 1st of January 2014 the legislator has amended the section (1) of § 211 paragraph of Criminal Proceedings Act with Article 44 of Act CLXXXVI. of 2013 as in the following: if ordering pre-trial detention is the subject of prosecutor's motion, the copy of those investigatory documents, which are justifying the proposal, have to be annexed to the proposal sent for the suspected and the defense attorney. The practice of law ensures this provision on the basis of the lowest levels of interpretation stage, on literal interpretation, only in case of ordainment, not in the maintenance. However, the correctness of this can be rebutted by taxonomical and logical analysis, because the Act CLXXXVI. of 2013 the general part of the explanatory memorandum of the Minister, and the detailed statement appended to § 44 paragraph make unambiguously clear: *"According to (1) section of Article 7 of Directive 2012/13 EU if someone detained during the criminal proceedings, those documents which are possessed by the authorities and required to the review of the legality of detention, must be provided to the defendant or his lawyer. Therefore, the act amends the related rules on the proposition of the pre-trial detention, such way, stipulates that copy of the underlying investigative documents of the pre-trial detention shall be attached to that copies of the proposition for the pre-trial detention that sent to the suspect and the defender attorney"* Ergo, the legislature does not want to distinguish the proposing of decree or maintaining the pre-trial detention. Insofar we accept that the literal interpretation of the Criminal Proceedings Act is correct, the EU

Directive itself can directly referenced at national courts, in that case the trial documents should be made available to the defense on the basis of this.

Considering the Hungarian practice of criminal proceedings, it was almost possible to foresee that the proceeding authorities would interpret the new rule restrictively, or simply ignore that and the true enforcement of the principle of equality of arms would not move forward in reality. We have formulated our negative expectations in this regard in our writing in the collection of essays which was published on the occasion of the 65th anniversary of the birth of Sándor Kardos at the beginning of 2014: *"Of course, if the failure to attach copies not related to any meaningful sanctions in practice, per se the amendment of the Criminal Procedure Act will be ineffective. At the time of completion of this study one can only hope that it will not happen so at last and significant change occurs in domestic practice of the pre-trial detention indeed."* (Szabó 2014) Unfortunately, no breakthrough has happened, not even a minimal change in the daily practice. Neither the changes in legislation nor the EU Directive, nor the series of convictions in Strasbourg helped to achieve that the defense, in relation to pre-trial detentions may present substantive defense knowing the relevant facts. Although, the European Court of Human Rights stated in the case Nikolova versus Bulgaria[167,] according to which the equality of arms cannot be guaranteed, if the defendant attorney does not have access to that investigative records, the knowledge of which is necessary for refuting the legality of his/her client's detention. In the case of X.Y. versus Hungary[8] the European Court of Human Rights ruled against Hungary because of not providing sufficient access during the decisions of pre-trial detention for the libellant to the criminal case files.

The judgment held that in this matter, the equality of arms should be ensured not between the defense and the court, but in respect of the defense and the public prosecutor. This in turn not provided, if the defense cannot know those documents of investigation in accordance with effectively can challenge the detention of the defendant.

In the cases of Hagyó versus Hungary[9,] A.B. versus Hungary[10] and Baksza versus Hungary[11] the European Court of Human Rights also ruled against Hungary because of violation the Article 5 of the Convention. The Constitutional Court explains in the AB justification of 166/2011. (XII.20.) if: *"the investigating judge does not allow the defense attorney to inspect certain substances, which may violate the requirements of the Convention in other aspects in habeas corpus proceedings. As the Court pointed out in the judgment of Nikolova versus Bulgaria published on 25 March 1999: the equality of arm is not guaranteed if the defendant attorney does not have access to that investigative records, which are necessary for refuting the legality of his/her client's detention."* In accordance with the previously referred paragraph (1) of Article 7 of Directive 2012/13 EU if a person detained during a criminal proceedings, the documents which are possessed by the competent authority and necessary to review the legality of detention must be made available for the defendant or defense attorney. The stated case, in the decree of Debrecen Regional Court of Appeal no. Bnyf.II.169/2014/2., according to

[7] *Nikolova v. Bulgaria*, Judgment of 25 March 1999. (case number 31195/96)
[8] *X.Y. v. Hungary*, Judgement of 19 March 2013. (case number 43888/08)
[9] *Hagyó v. Hungary*, Judgement of 23 April 2013. (case number 52624/10)
[10] *A. B. v. Hungary*, Judgement of 16 April 2013. (case number 33292/09)
[11] *Baksza v. Hungary*, Judgement of 23 April 2013. (case number 59196/08)

which, the defense should know the data containing the reasons for the pre-trial detention, not only at the ordain of the pre-trial detention but at the maintenance of that, is still ignored by the lower courts.

Apparently so, despite the legal situation is very clear it is still ignored in legal practice. The inspection into the investigation documents which include the justifying reasons for the pre-trial the still not completely implemented, therefore the granting and maintenance procedures are disagreeable to the norms of the Criminal Procedure law, the Strasbourg decisions, the provisions of the EU Directive, the decision of the Constitutional Court, and ministerial explanatory memorandum of the Act CLXXXVI. of 2013. However, this does not disturb the law enforcement authorities because the omission in this relation counts only as a relative misdemeanor, which does not take any significant impact on the case.

5. FINAL THOUGHTS

Changes are not experienced across the equality of arms, or the enforcement of the effective defense in the entrenched practice of criminal procedures, despite the fact the need, reasonableness now can be seen brighter than the sun. The related laws of the Criminal Procedure Act must be made clear for the general law enforcement practice, because references to EU legal acts and the Strasbourg decisions make no effect on the ad hoc decisions. It is striking that the lower courts besides ignoring the listed above, during the everyday procedures do not intend to comply with the requirements set out in the orders of the Court of Appeal, instead of considering the merits of the arguments, counter-arguments, the schematic and automated decision-making irrefutably rumbles on. Some unanswered questions arise then: Why is the resistance of the authorities against the true and concrete requirement of the reference to the facts arising in the individual cases, and the obligation to listing and weighting the arguments and counter-arguments? Why cannot the defense know the motions and orders substantiating the alleged evidences if they do exist anyway? Perhaps because the current, automated decision-making, which is extremely convenient for the authorities, would become unsustainable and after the realization of equality of arms in a real adversarial proceeding, the detention of the accused persons could take place before final judgment only at truly justified situations?

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