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DETENTION IN THE CRIMINAL PROCEDURE LEGISLATION OF HUNGARY

Abstract

The paper presents the situation of detention in Hungary. The legal institution of detention is the deprivation of personal liberty without a final court decision, i.e., a final decision. The Hungarian Criminal Procedure Act, which entered into force on 1 July 2018, aims to renew the practice of detention. According to the new regulation, detention can be applied only if the intended purpose of the proceedings cannot be ensured by less coercive measures (criminal supervision, bail). The paper describes the legal reasons for the detention, the statistics, and the previous problems in the case law that characterized the legal institution.

Keywords: *detention, criminal supervision, bail, deprivation of liberty*

1. Introductory Considerations

More than a hundred thousand people are currently being held without trial in the European Union. Detention plays an important role in some criminal proceedings, ensuring that defendants are brought to justice, while its use is excessive, which imposes significant costs on individual states (Bieber, Iványi & Kádár, 2019). Unjustified and prolonged detention obviously affects the exercise of the right of defendants to liberty and the presumption of innocence. With effect from 1 July 2018, Act XIX of 1998 on Criminal Procedure (Criminal procedure code of Hungary, 1998) was repealed by Act XC of 2017 on Criminal Procedure (Criminal Procedure Code of Hungary-Be., 2017). The new law and its regulations have introduced basically up-to-date regulations in Hungary that meet international and human rights standards. The new Be. therefore, introduced an important

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and positive change in the field of coercive measures: its explicit aim is to ensure that the principles of gradation, necessity and proportionality apply, i.e. detention can only be ordered if the aim pursued cannot be achieved by a lesser measure (Budaházi & Fantoly, 2019). It follows from the *ultima ratio* nature of criminal law that it cannot interfere in any area of social coexistence, its task is merely to protect the social order and fundamental values. Such basic values are essentially the basic and inalienable human rights, which are enshrined in Arts. 1-31 of the Fundamental Law of Hungary under the heading "Freedom and Responsibility", itemized in its Article. These include, *inter alia*, the fundamental right to human life and dignity, the right to personal liberty and security (Fundamental Law of Hungary- FLH, 2011, Art. 18, par.1). "A lawful deprivation of personal liberty can also cause unjustified harm. Certain restrictive provisions may be accepted as constitutional only if the restriction is necessary and proportionate to the aim pursued and constitutionally recognized." (Constitutional Court decision- CCD, 66/1991. (XII. 21). The principle of subsidiarity, which is one of the basic provisions, justifies the development of a prosecution practice and approach in the case of coercive measures affecting personal liberty, according to which deprivation of liberty or stricter coercive measures may take place only in the last case (Attorney General's Office- AGO LFNIGA//142/2019. 271.§).

2. The Concept and Principles of Detention in Hungarian Criminal Procedure Law

Herke (2014, p. 184) defines the concept of coercive measures as "measures of coercive content which may be used by the authorities in criminal proceedings for procedural purposes, primarily against the accused, in order to ensure the success of the criminal proceedings, and which necessarily entail various degrees of restriction of fundamental constitutional rights, the so-called human rights". Coercive measures in criminal proceedings can be classified according to several criteria - their procedural purpose, the fundamental human right restricted, their subject, their deed-binding nature, etc. - which is carried out by current Criminal Procedure Act. According to the Act's provisions, there is a distinction between coercive measures affecting personal liberty and coercive measures affecting property (Be, 2017, Art. 272). The detention with other word the arrest is classified in the category of coercive measures affecting personal liberty, and within that category, in the category of coercive measures authorized by a judge affecting personal liberty. The arrest is the most severe coercive measure that deprives a person of his fundamental constitutional human right to personal liberty.

It is defined in the Be. as "Arrest is the judicial deprivation of the personal liberty of the accused person before a final decision on the case has been taken". (Be, 2017, Art. 296). It follows from the statutory definition that arrest can only be ordered against the accused. It is also clear that it is the most severe coercive measure since the fundamental right concerned, personal liberty, is deprived in its entirety in such a way that the court has not yet made a final decision on the guilt of the accused. At first glance, it is very similar to a custodial sentence, but the two have several differences. As a procedural measure, arrest deprives the accused of his liberty, but only temporarily, since it can only last until a final court decision has been taken. Its purpose is to ensure that criminal proceedings are conducted. In contrast, the purpose of imprisonment is to prevent the perpetrator or others from committing a crime to protect society.

The Constitutional Court has defined pre-trial detention as "the deprivation by a court of the personal liberty of an individual suspected of having committed a criminal offense and who is presumed innocent before a final decision has been taken, is the most serious coercive measure restricting personal liberty". (Constitutional Court decision- CCD, 19/1991. (VI. 25).

According to the European Convention on Human Rights (European Convention on Human Rights- EC, Act. XXXI. 1993, Art. 5), everyone has the right to liberty and security. No one shall be deprived of his or her liberty. The Convention lists lawful detention and arrest as exceptions to the right to liberty:

- lawful detention after conviction by a competent court;
- the arrest or detention of a person who does not comply with a lawful order of the court or the arrest or detention to secure the performance of an obligation imposed by law;
- lawful arrest or detention to bring him or her before the competent authority on reasonable suspicion of having committed a criminal offense or when reasonably necessary to prevent him or her from committing or absconding after having committed a criminal offense;
- lawful arrest or detention to prevent unlawful entry into the country or lawful arrest or detention of a person against whom action is pending for expulsion or extradition.

Constitution declares the Convention as follows. As for the restriction of fundamental rights, Constitution provides that a fundamental right may be restricted to the extent strictly necessary and proportionate to the aim pursued to ensure the exercise of another fundamental right or to protect a constitutional value while respecting the essential content of the fundamental right. (Foundamental Law of Hungary- FLH, 2011, Art. 1).

The Be., in Part I, Chapter I, guarantees, among its fundamental provisions, the protection of fundamental rights already protected at the primary constitutional level. Article 2 of the Be. provides for the protection of fundamental rights, and these provisions constitute the general rules for the use of coercive measures. The fundamental provisions contain the basic principles with which coercive measures restricting personal liberty must comply to be effective.

In order to be lawful, the following principles must apply to the ordering and maintenance of arrest:

- The principle of proportionality;
- The principle of fairness;
- The principle of the presumption of innocence;
- The principle of contradiction.

2.1 The Proportionality Principle

The principle of proportionality must be a key consideration for the court when ordering an arrest. Under this principle, the court may restrict the liberty of the accused only if and to the extent that this is necessary to achieve the purpose of the criminal proceedings. In this case, the court has to examine the conflict of two interests, the interest of the State in the prosecution of the offense and the interest of the accused in his liberty (Bíró, 2019).

The Hungarian Helsinki Committee, in its proposal on the current Criminal Procedure Code issued on 20 June 2016, welcomed the fact that the draft law contains an element aimed at ensuring the sanctity of some restrictions on liberty. Among these elements, it mentions the prominent inclusion of the proportionality requirement in the text and the extension of the range of coercive measures as an alternative to detention (Opinion of the Hungarian Helsinki Committee, 2016).

According to the Recommendation of the Committee of Ministers of the Council of Europe, an arrest warrant should not be issued if the deprivation of liberty would be disproportionate to the nature of the alleged offense and its penalty. In making the order, the nature and seriousness of the offense being prosecuted, the seriousness of the offense, the person's sexuality, his or her criminal record, his or her conduct during the proceedings or after the offense, and the seriousness of the suspicion must be taken into account by the judge. The duration of the detention must be proportionate to the sentence the person is likely to serve if convicted (Council of Europe Committee of Ministers Recommendation, 1980, R (80) 11).

2.2. The Principle of Fairness

The principle of fairness is not a question of the relationship between the fundamental right being restricted and the aim pursued by the coercive measure. However, the suspect should be detained before the final court decision, i.e., only for the period for which he would have been detained if the final decision had been expected. The investigating judge cannot assess the exact nature of the offense or the level of the penalty imposed when imposing a coercive measure. However, an appropriate decision can be taken based on previous judicial practice. This principle is enforced by several provisions in Be., including the section on the maximum duration of arrest, in which the legislator determines the maximum duration of arrest in relation to the punishment for the offense (Be, 2017, Art. 298). The maximum period for which arrest may be extended increases in proportion to the seriousness of the offense committed. Mention should also be made here of the provision on criminal procedure, which states that criminal proceedings must be conducted without an order if the suspect is subject to a compulsory measure involving personal liability authorized by a court (Be, 2017, Art. 79, par. 1).

2.3. The Principle of the Presumption of Innocence

The principle of the presumption of innocence is enshrined in the Code of Criminal Procedure in force, which states that no one is presumed guilty until a final court decision has established his or her guilt (Be, 2017, Art. 1).

This principle is protected internationally, as declared by the EC: "Every person suspected of a criminal offense shall be presumed innocent until proven guilty according to law." (EC, 1993. Art. 6, par. 2)

The presumption of innocence applies throughout the criminal proceedings, and its positive effects on the accused last until the final decision on the case becomes final. The accused, regardless of his or her attitude, whether passively defending himself or herself (refusing to confess) or actively participating in the proceedings, is entitled to be treated as innocent by the prosecuting authority. A suspected person must be treated as innocent even if he or she has been in custody for an extended period for the offense for which he or she is a well-founded suspect and must be afforded all the rights and facilities necessary to promote his/her innocence to facilitate his/her defense. At all stages of the proceedings, it is necessary to consider whether the conditions for arrest exist based on the evidence available. As regards the relationship between arrest and the presumption of innocence, the Constitutional Court stated in its Decision 19/1999 (25.6.1999) AB that if the legal conditions for the order of provisional arrest are met, it is not limited by the presumption of innocence.

2.4. The Principle of Contradiction

The prosecution, defense, and judgment are separate in criminal proceedings (Be, 2017, Art. 5). The division of procedural tasks, i.e., the division of functions, is a fundamental principle throughout criminal proceedings. Even the most severe coercive measures may only be imposed or maintained based on the principle of contradictory jurisdiction. The court decides on the order of arrest, or the extension of arrest before indictment, on the prosecution's motion. The prosecution's motion must contain a brief description of the facts of the case and the classification of the offense under the Criminal Code (Criminal Code- BtK, 2012), and the existence of the general and special grounds for arrest. When the arrest is ordered and, in the cases, provided for by the law, the suspect must be heard at a hearing held by the investigating judge on the subject of the coercive measure authorized by the judge, and the accused and the defense counsel acting on his behalf may present their defense on the merits. The presiding judge shall give his decision after hearing the arguments of the prosecution and the defense; he may not consider the evidence supporting the suspect's guilt and shall decide at the hearing only whether there are general and special grounds for arrest.

3. The System and Rules of the Detention in the Hungarian Criminal Procedure Act

In addition to detention, the new regulation renamed and consolidated the former law on disqualification and house custody, instead of uniformly called criminal supervision. The regulation of bail and absenteeism has also changed significantly. The change in concept was emphasized by the law in particular through the development of the general part. After all, the imposition of coercive measures restricting personal liberties does not require a decision on a possible derogation from the detention, as opposed to the essentially detention approach of the former Be.

Coercive measures can be categorized according to several criteria: their purpose, their orientation, their passive subjects, the persons entitled to impose them, and the fundamental right concerned. Grouped according to these criteria, we can say that arrest is a coercive measure that, in terms of its purpose:

- ensures the presence of the participants in criminal proceedings;
- the success of the evidence and
- the prevention of a repetition of the offense.

These goals are personal, can be used only against the person charged, can be ordered only by a court and is a coercive measure restricting personal liberty.

The Be. in force lists the purpose and conditions of arrest among the purposes and conditions of coercive measures involving personal liberty authorized by the court. It follows from the legal provisions that there are general and specific conditions for arrest. The general conditions for arrest are conjunctive, i.e., all must be met for an arrest to be ordered. The general conditions:

- if the accused has been reasonably suspected of or has been charged with the offense and
- this is necessary to achieve the objective of the coercive measure affecting the personal liberty of the judge, and the objective pursued cannot be achieved in any other way. (Be, 2017, Art. 276, par. 1)

In contrast, the specific conditions are subordinate to each other, but at least one must be met in addition to the general conditions for an arrest to be ordered. It follows that the existence of the general conditions together with at least one specific condition may already constitute grounds for an arrest warrant, but this also requires the absence of the so-called obstacles to prosecution, which are listed as negative conditions. In other words, the absence of obstacles to prosecution is also a general condition for an arrest to be ordered. Thus, if the offender is subject to the provisions of the Btk. 16., if the offender was a child at the time of the offense - an arrest cannot be ordered (Karprinay, 2017).

Coercive measures subject to judicial authorization affecting personal liberty may be ordered only after a well-founded suspicion (or indictment) and only if this is absolutely necessary to achieve this goal. Their special (positive) conditions pursuant to article 276 of Be. can be summarized as follows:

	To ensure the presence of the accused (Be. 2017, Art. 276, par. 1) a.	**In the event of a collision and its danger** (Be. 2017, Art. 276, par. 1b.)	**In order to prevent crime** (Be. 2017, Art. 276, par. 1c.)
Restraining order		X	X (in relation to the victim)
Criminal supervision (house custody with technical equipment)	X	X	X
Bail	X		
Detention	X	X	X
Preliminary compulsory medical treatment			X

Source: Herke, 2018, p. 55

Prior to each of the more coercive measures involving deprivation of liberty lasting at least one month, the purpose and rules of police detention for 72 hours remained essentially unchanged. In the first place, pending the decision necessary to order such longer-term coercive measures, this shorter detention ensures a shorter, temporary deprivation of liberty of the suspect, without a separate judicial decision.[1]

If we look at the nature of detention, we can see that it also carries procedural and substantive law elements. It deprives the accused of his or her personal liberty - without a court judgment - while not using punishment as a goal and reason – i.e. not a category of substantive law - but clearly naming a system of expediency of criminal proceedings (Vári, 2012). Among the principles applicable and enforceable in the institution, we consider it important to mention the principle of proportionality, because this is of the greatest importance from the point of view of material weight. When taking somebody in custody, the court must always keep in mind the principles of necessity and proportionality. According to the principle of proportionality, the personal liberty of the accused may be restricted only if and to the extent that it is necessary for the purpose of criminal proceedings or the prevention of further criminal offenses (Herke, 2002a, p. 21). R (80) 11 issued by the Committee of Ministers of the Council of Europe on 27 June 1980 recommends that, when ordering detention, account be taken of the type of offense, the seriousness of the suspicion, the identity of the suspect, his/her conduct during the proceedings or after his/her act. The court must always weigh the public interest in the criminal proceedings against the private interest in the defendant's personal liberty by the ordering of the detention. It can be stated the detention may be ordered only if a less severe coercive measure is not sufficient to achieve the aim.

During the most coercive criminal measure involving deprivation of liberty, all authorities, and even the counsel for the defense, have a special requirement, as only as a result of the effective work of all procedural stakeholders can detention become a truly *ultima ratio* tool (Fazekas, Kádár & Novoszádek, 2015). At the initial stage of the investigation, the police make a proposal to the prosecutor,[2] who initiates its order, and then the investigating judge may order a coercive measure

[1] This is in line with Art. 5 (1) (c) of the EC, which states that a person may be deprived of his liberty if the deprivation of liberty is "lawful arrest or detention for the purpose of inciting a serious suspicion of having committed a criminal offense to the competent authority or when it is necessary for a reasonable reason to prevent the commission of an offense or the escape after it has been committed".

[2] See more about the role of the police in Hungarian criminal proceedings (Čvorović & Vary, 2021, pp. 23- 38).

affecting the most serious personal liberty or decide on a less coercive measure. Which could be criminal supervision, restraing order or even bail. The emphasis is on the counsel for the defense because, citing European standards, he/she can argue for a lesser coercive measure, helping to bring a number of mitigating circumstances to the attention of the investigating judge against a motion prepared by the police and submitted by the prosecutor. Due to the adversarial nature of the proceedings, the statement of reasons must address all the grounds for detention established by the investigating judge. What factual data is available should also be addressed in the factual and legal reasoning of the defense counsel against the prosecutor's motion and the position of the investigating judge in relation to it, which can also be based only on facts (Decision Hungarian Supreme Court-HSC, BH. 2009.7). This is consistent with article 5 of Be. (Right of defense), and thus the decision may become fully substantiated, can be challenged on the merits with a legal remedy and may be overruled on the merits in the second instance proceedings (Opinion of the Mansion Criminal Chamber- OMCC, BKv 93). It is clear that the investigating judge does not have the opportunity to conduct an all-encompassing investigation when ordering a detention. However, as the Hungarian Supreme Court (Kúria) pointed out in its summary opinion based on the analysis of case law: the investigating judge must also act carefully before deciding on coercive measures restricting or depriving him or her of his/her personal liberty and may not ignore the defendant's and defense's arguments. In order to eliminate the errors of the previous practice, it is appropriate to examine in each case whether the application of a less coercive measure is not sufficient to achieve the objective pursued. Detention or maintenance should be ordered only if the court does not see the possibility in addition to less severe deprivation of liberty measures, as well as ordering house detention only if the prohibition on leaving the home does not ensure this purpose (Summary Opinion of the Hungarian Supreme Court- Kúria, 2016. El.II.JGY.B.2)

In Nikolovna v. Bulgaria, the Court of Justice stated that the proceedings in pre-trial detention must be adversarial and ensure the equality of arms between the prosecutor and the accused. The principle of equality of arms is not guaranteed if the defense does not have access to the investigation documents, knowledge of which is indispensable to refute the fact that his/her client is being detained (Nikolova v Bulgaria, Case 31195/96).

It follows from the adversarial nature of the court hearing that the suspect and his/her lawyer may put forward defense to the charges brought by the prosecutor, which may be directed against the general or particular grounds for arrest or the necessity of the arrest, pointing out that the use of a less coercive measure than arrest may ensure the successful conduct of the criminal proceedings

(Németi, 2013). The investigating judge is heavily exposed to the investigative documents placed at his/her disposal; he or she cannot take evidence and can only assess the evidence in so far as there is a reasonable suspicion of a criminal offense. The same is also stated in the case law of the Supreme Court, according to which, in reviewing the justification for pre-trial detention, evidence indicating or refuting the guilt of the accused cannot be assessed - cannot be taken into account - only the ascertain ability of the legal grounds justifying the coercive measure can be examined. The decision can only be based on that (Decision Hungarian Supreme Court- HSC, BH. 2008.9.934).

The investigating judge does not rule on the merits of the case at a hearing on the adoption or extension of a coercive measure involving personal liberty, nor does he or she exercise a judicial function; the purpose of the hearing is to examine the applicability of the coercive measure based on the evidence presented. At the hearing, the judge shall inform the accused of the warnings, draw his/her attention to his/her right to remain silent, and inform himor her of his/her circumstances, which may significantly influence the decision to order his/her arrest (Be. Art. 185). Notwithstanding the fact that the investigating judge does not take evidence, the accused may also make a statement on the case's merits following his/her circumstances, which may be used as evidence in subsequent proceedings.

The investigating judge will decide on the motion by a reasoned order granting, partially granting, or dismissing the motion. The reasons for the order shall contain

- the substance of the motion,
- a brief description and qualification of the offense on which the proceedings are based, and
- an indication of the existence or otherwise of the legal conditions for the motion.

The statement of reasons shall not only refer to the facts set out in the prosecutor's motion. However, it shall also state what the investigating judge considers to be the reasonable suspicion of the suspect or the specific reason(s) for the provisional detention and the facts based on which they consider that the motion is well founded, or what reasonable doubt has been raised as to the merits of the motion. In this context, it should also be stated which personal circumstances of the suspect have been examined and what conclusions have been drawn from them (Opinion No 93 of the Curia).

The reasoning of the investigating magistrates' orders is often criticized by defense lawyers and suspects, who usually claim that the reasoning of the orders is formalistic and that the court merely repeats the relevant provisions of the Be. in its reasoning without supporting it with evidence. One of the research showed that judges, in their reasoning, fulfill the general grounds of the existence of reasonable suspicion by listing the means of proof that support the existence of reasonable suspicion and that reasonable suspicion exists against the accused. In the case of special reasons, the judges generally see in their reasoning not one but several reasons as being established. Similar reasons support each special ground; the risk of absconding is preferably supported by the material gravity of the offense and by certain special circumstances of the accused, such as foreign ties and family living abroad. The investigating authority would have to look at some circumstances that would argue for or against the risk of absconding (Faragó, 2000). The justification for the delay in providing evidence is usually that the investigation is still ongoing and that the procedural steps still to be taken are being delayed. The risk of recidivism is generally considered to be established if the suspect is a repeat offender or has been prosecuted in the past and is confirmed by the suspect's criminal record (Farkas, 2014).

4. Statistics on Detention and Inconsistencies in Case Law

Thus, coercive measures, in particular when applying detention, must meet two conditions: on the one hand, the protection of universal human rights must be met, and on the other hand, the needs of state law enforcement must be met and the desired effectiveness criteria must be achieved. The problem lies in the tense contradiction between these expectations, and the dilemma also appears in the clash of the two approaches. In essence, the imposition of coercive measures on the imposition of coercive measures involving deprivation of liberty has been introduced as a legislative step to resolve this difference. However, the question is whether this eliminated or just added an additional adaptive element to the system and also made the judge a server for formal outcome-oriented law enforcement. Examining the figures, it can be seen that the total number of detentions has decreased year by year since 2014, similar to the total number of crimes, criminals and defendants in Hungary: in 2014 there were 3,052 detentions, while in 2017 there were 2,333. In 2013, 28% of the prison population had been detained, and in November 2018, 19%. This is partly due to the fact that the number of prosecutor's motions for detention has been steadily declining during the investigation period, similar to the number of police referrals.

Year	Inmates	They have been detained (proportion within detainees)
2008	14 782	4403 (30%)
2009	15 373	4502 (29%)
2010	16 203	4780 (29%)
2011	17 195	4875 (28%)
2012	17 517	4888 (28%)
2013	18 146	5053 (28%)
2014	18 042	4400 (24%)
2015	17 792	3978 (22%)
2016	18 023	3572 (20%)
2017	17 944	3416 (19%)
2018	14 632	2780 (19%)

Source: Tóth, 2018

If the courts did indeed order detention in actually justified cases, the number of prosecution and police motions would certainly be reduced, so that case law could also significantly shape official proceedings. Prosecutor motions in over 90% (2015) referred to the weight of the expected sentence as a factor underlying this reason. Judicial decisions also often established the danger of absconding and concealment solely on the basis of the outstanding material weight of the crime and the high penalty.[3] The material weight of the criminal offense, manifested in a sentence, can only play a role together with the special characteristics of the specific case, and provides a basis for such a conclusion. With regard to the material weight, the legislative assessment alone (according to the General and Special Part of the Btk) cannot provide an independent basis for concluding a detention (Decision Hungarian Supreme- HSC, BH 2007. 403)

5. Problems Related to Detention

The European Court of Human Rights (ECoHR) examines the lawfulness of detention as a deprivation of liberty in the context of the right to liberty and security guaranteed by art. 5 of the EC. Of course, not only coercive measures in criminal proceedings fall within its material scope, but also, for example, compulsory medical treatment or detention by the police. The Court has already condemned Hungary in a number of cases, citing in particular the length of detention, the schematic justification of the courts and the lack of consideration of alternative coercive measures.

[3] The notion that arrest should be ordered without consideration in the case of a crime of outstanding material gravity cannot be accepted at all (Herke, 2002b, p. 19).

In two areas of the conditions for ordering detention, we find an unregulated, immature issue that allows for the abuse of power, the unresolved nature of which adversely affects the practice of applying this coercive measure. The problem with both stems from the simple principle that the burden of proof rests on the authority, while being overwhelmed by the increased expectation of a mission of effectiveness and procedural efficiency, while being given the discretion to initiate an detention warrant, for example. One such problematic issue is the well-founded suspicion, while the other of the order conditions is the scope of the order conditions depending on the defendant's future conduct.

In establishing a well-founded suspicion, it is problematic that the adversarial principle does not apply, it is only a claim of a criminal authority.[4] There must be a well-founded suspicion that the crime has been committed and that the crime has been committed by the accused (Stepuleac v. Moldova, Case 8207/06). If two forms of suspicion meet, i.e. both the offender and the perpetrator are thoroughly prosecuted, i.e. criminal proceedings have been instituted against the person, he or she is already the defendant, as the serious suspicion was communicated to him or her and the suspect was first questioned, may be a place to order a detention (Bánáti *et al*., 2009, p. 202). Of the various interpretations of probability, statistical probability can sometimes be used in criminal proceedings, but the perception of logical probability may prevail in the examination of suspicion. In examining the thoroughness of the suspicion, the court decides whether the act that is the subject of the suspicion is a criminal offense and whether the evidence presented is suitable to prove that the offense was committed by the accused (Bócz, 1990).

A cardinal issue for the application of the legal institution is the existence of grounds for detention depending on the future development of the defendant's behavior and the practice of their application. It is not enough to justify the judicial decisions related to detention with a legal text, but they require the collision of specific arguments and counter-arguments and their indication in the order (Folta, 2017, p. 3).

As a starting point for the judicial conclusion necessary for the existence of the reasons for detention (Be, 2017, Art. 276, par. 1), the age, personal and financial circumstances of the accused must always be assessed in addition to the danger of the crime to society (Neumeister v Austria, Case 1936/63). A severe punishment is not in itself a reason for detention if the accused's personal circumstances

[4] The European Court of Human Rights has made it clear that the examination of the existence of a well-founded suspicion cannot be dispensed with when ordering an arrest. This is also in line with Opinion BK 93, which confirms that, in accordance with the adversarial nature of the proceedings, the evidence submitted by both parties must be assessed by the investigating judge.

do not make the escape likely (Vámbéry, 1916, p. 170). Taking all these circumstances into account, it is therefore possible to draw the right conclusion - a well-founded assumption - about the danger of escaping and hiding. If the starting point of the conclusion is not complete, the conclusion cannot be logically correct either. Thus, for example, an order ordering the risk of absconding merely by reference to the homelessness of the perpetrator may not be a sufficient ground for prolonging the deprivation of liberty. On the other hand, the assumption is based on the risk of absconding, concealment, if the accused moves from his/her known place of residence at the beginning of the proceedings to an unknown place of residence and the investigating authority can only reach him or her on the basis of an detention warrant (Elek, 2016). One of the special conditions of the law was the punishment, i.e. the seriousness, of the crime committed. Thus, the situation, as exemplified in judicial practice to this day, is that the court orders the detention of the suspect merely on the grounds of the serious nature of the act committed, and the personal circumstances of the perpetrator are completely disregarded (Köpf, 2000, p. 15). This reason for the strictest coercive measure involving prior deprivation of liberty is the most controversial in the application of law (Holhós, 2010). The unfoundedness of the reference to material weight was already pointed out in a judgment of the European Court of Justice in 1991 (Letellier v France, Case 12369/86). On the basis of another characteristic ground, it is clear that an order for failure to give evidence is justified where the defendant has in fact sought to influence the means of personal and material evidence to his/her own advantage (W v Switzerland, Case 14379/8). However, this special condition is often used unjustifiably as a reason in cases where the accused has been in custody for several years and there is almost no evidence left by the authority (Szeloch v Poland, Case 33079/96, Imre v Hungary, Case 53129/99). And although the former Be. no longer included the threat of a sentence as a separate special condition for ordering detention,yet we find that this principle is applied with preference by investigative judges and, so to speak, with a predictable frequency. Unfortunately, in most cases, judicial decisions are characterized by procedures without investigation based on stereotypical and rough submissions and motions (Yankov v Bulgari, Case 39084/97). The legitimacy of orders - the presumption of innocence and the principle of in *dubio pro reo* - is established by criminal convictions, often erroneous, made after the evidence has been collected, evaluated and the entire evidentiary process has been conducted (Nehéz-Pozsony, 2004).

6. Conclusion

Detention is increasingly falling victim to a tightening penal policy and, forgetting its original procedural purpose, is mistakenly treated by law enforcers as a punishment, a sanctioning legal institution. In many cases, it is still wrong to decide, on the basis of the material gravity of the offense, whether or not there is a possibility of escape or hiding, even though it must always be specifically examined in order to terminate the detention (Decision Hungarian Supreme- HSC, BH. 2007. 216). The pre-emptive nature of detention clearly distorts the practice of sentencing and leads law enforcement authorities to use the custodial sentence to be enforced, even if the subject matter and material circumstances of the offense may be suspended or reduced to a principal sentence. If the offender has already spent all or part of his/her sentence in custody, the final custodial sentence will be adjusted to that period. Therefore, the right to free discretion in the imposition of a sentence does not apply, as the trial judge is greatly influenced by the extent of the previous deprivation of liberty in custody. Fortunately, the rate of detentions in Hungary has been declining recently, and law enforcement is taking the Kúria's guidelines and European legal standards more seriously as regards the substantive issues of justifying orders.

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PRITVOR U KRIVIČNOM PROCESNOM ZAKONODAVSTVU MAĐARSKE

Sažetak

U radu je prikazano stanje pritvora u Mađarskoj. Pravni institut pritvora predstavlja lišenje lične slobode bez pravnosnažne sudske odluke, odnosno pravnosnažne odluke. Mađarski Zakon o krivičnom postupku, koji je stupio na snagu 1. jula 2018. godine, ima za cilj da revidira praksu pritvora. Prema novom propisu, pritvor se može primeniti samo ako se svrha postupka ne može obezbediti blažim merama prinude (krivičnim nadzorom, jemstvom). U radu su opisani pravni razlozi pritvora, statistika i dosadašnji problemi u sudskoj praksi koji su karakterisali ovaj pravni institut.

Ključne reči: pritvor, krivični nadzor, jemstvo, lišenje slobode.

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