

Introduction to the New Hungarian Criminal Procedure (Part II)³

1. The investigation

1.1. General Provisions

1.1.1. Definition, tasks and phases of the investigation

Investigation (with the exception of private prosecution cases) is the first phase of the criminal procedure, that aims to provide the prosecutor with sufficient information to determine, whether a criminal offense has been committed, and if so, who the perpetrator was, furthermore, what are the evidentiary means to prove so, and to decide whether it is reasonable to initiate a court procedure, namely, to press charges.⁴ (The accusation is still part of the investigating phase.) Therefore, investigation is a *preparatory phase* of the criminal procedure that targets the cognizance of past events in order to prepare the prosecutor's decision over the issue of accusation.⁵

Tasks of the investigation can be summarised as the course of investigating the criminal offense (has a criminal act been committed at all), the identification of the perpetrator (who has committed the offense), furthermore, the phase of uncovering and securing the means of evidence (what evidentiary means can be discovered in relation to either the criminal act or the perpetrator). By these means, investigation assumes multiple professional efforts aiming to *uncover issues unknown* to the authorities (cognizance), whereas the conduct of the criminal offense, the concrete process (the reconstruction of which is indispensable for the legal characterisation of facts), moreover, the identity of the perpetrator can be proved upon the gathered evidence.⁶

Regarding the issue of adequate level of detail at which events of the past (state of facts) should be investigated, we may conclude, that the state of facts should be elaborated to the extent that is sufficient to establish and support certainty of the prosecutor's office's conviction that the criminal offense has been committed by the defendant. Failing this – with regards to the guarantees of the rules of law as well – no charges can be raised.⁷

Be. eliminates two main phases of the investigation, namely, the *preliminary investigation* and the *inspection*, however, accusation (or other actions/decision of the prosecutor's office) are also part of the investigation. The dividing point between the two phases of the investigation is the moment when the defendant joins the procedure, that is the announcement of the reasonable suspicion addressed and personalised to the defendant. Nonetheless, general

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⁴ Fantoly Zsanett – Budaházi Árpád: *Büntető eljárásjogi ismeretek. II. Dinamikus rész*. Dialóg Campus Kiadó, Budapest, 2019. p. 19 (hereinafter referred to as the „Fantoly – Budaházi 2019 (B)”)

⁵ Bócz Endre: Vádfunkció, közvád, ügyész. In: *Állam- és Jogtudomány*, 52. évf. 1. sz., 2011. p. 23

⁶ Katona Géza: *A kriminalisztika és a bünygyi tudományok*. BM Kiadó, Budapest, 2002. p. 199

⁷ Bócz Endre: *A nyomozás fogalma, helye és szerepe a büntetőeljárásban*. In: Bócz Endre (Ed.): *Kriminalisztika 1*. Budapest, BM Kiadó, 2004. p. 89

investigation of a (an unknown) criminal act demands other efforts than the examination tasks required to establish criminal culpability of a reasonably suspected individual.

1.1.2. Preliminary investigation and inspection: relation of the prosecutor's office and the investigating authority

In the course of the *preliminary investigation* the investigating authority shall concentrate on gathering data – and not evidence in particular – in a rather informal manner. This sequence of the procedure can be described by the (unlimited) autonomy of the investigating authority, whereas the investigating body shall be entitled to conduct any and all procedural measures and conclude decisions, except for those falling into the exclusive authority of the court or the prosecutor's office. The prosecutor's office is entitled to pursue legal supervision over independent investigative actions of the investigating authority, including the power to delegate certain duties, to give certain permissions, to conduct reviews of judicial focus, furthermore, by all means as a posterior act, the right of intervention –either on the grounds of an eventual legal remedy or as the result of the prosecutor's office's inspection. Measures of legal supervision are: assignment of complaint or the amendment of the complaint into the independent procedure of the investigating authority in the scope of delegating powers;

- permission of a procedural act or conclusion of decision within the frame of permitting;
- as part of its powers to control, general judicial supervision over the proceedings of the investigating authority, whereas, for example the prosecutor may be present at the investigative actions and may demand presentation of the documents of the investigation;
- as part of its posterior intervention rights, it may decide over complaints and objections, and may repeal the unlawful decisions of the investigating authority.

Nevertheless, should the prosecutor's office find the instruments of legal supervision insufficient to ensure effective conclusion of the preliminary investigation, the prosecutor's office may gain exhaustive control and take over the investigation even at the sequence of preliminary investigation.

Inspection, the second main phase of the investigation is pursued under substantive control of the prosecution, and projects the analysis and decision over the accusation against a certain individual (or over other measures / decisions of the prosecutor's office), while focusing on the acquaintance of the necessary evidentiary means as well.⁸ Due to the control authorities of the prosecutor, the procedural instruments of supervision are expanding and met by other active and problem determination measures of prosecution's engagement in this procedural phase of the investigation. Such active actions of the prosecution, for example are demanding reports from the investigating authority; instructing certain procedural actions or decisions; prohibition of procedural acts; allocating procedural measures or decisions under the prosecutor's preliminary consent; furthermore, ordering investigating authorities to prepare the decisions of the prosecutor's office.

1.1.3. Minutes, report, decision

The minutes

⁸ Hack Péter: A büntetőeljárás újításának esélyei. In: Belügyi Szemle 2018/3. p. 80

According to the principal statutory rule, *minutes* must be taken on investigatory actions, either by the keeper of the minutes or by the member of the proceeding investigating authority. [Section 358(1) Be.]. Due to late technical developments, minutes may not only be concluded in a written form, but also by continuous audio recordings or via both video and audio recordings. Nevertheless, such recording shall not substitute the minutes.

The report

As for both formal and substantive aspects of requirements, the *report* is a much simpler form of keeping tracks of criminal proceedings than the minutes, and it may be taken by the prosecutor or the member of the investigating authority on his own procedural measure. [Section 361 (1) Be.].

The decision

Section 362(1) of the Act expressly stipulates the measures that must be concluded in the *form of a decision*. Among other cases, for example, a decision must be concluded on the exclusion of the prosecutor or the investigating authority, the refusal of intermediary proceedings, or on the termination of the investigation. However, the above statutory classification is not exhaustive, as above the enlisted cases, both the prosecutor and the investigating authority shall be entitled to pursue its actions in the form of a decision. The decision shall be recorded in the minutes or *put in writing in another manner*, and must be announced and communicated to the party directly affected by the decision or any of its part thereto. Decisions shall be served accordingly, and also communicated verbally to those present.

2. Initiation of the criminal procedure by the investigation

2.1. Grounds of starting the investigation, ordering the investigation

2.1.1. Grounds of starting the investigation

Criminal proceedings, therefore, also the investigation may only be initiated upon the *suspicion of a criminal offense*.⁹ The latter may only be established if the criminal offense is likely to have been conducted. However, this sort of probability shall only mean that the commission of the criminal act can not be eliminated upon clear certainty.¹⁰

2.1.2. Ordering the investigation

⁹ Erdei Árpád: Tanok és tévtanok a büntető eljárásjog tudományában. ELTE Eötvös Kiadó, Budapest, 2011. p. 23

¹⁰ Bócz 2011, p. 5

In accordance with the provisions of Section 375 of the Act, investigation may start either *ex officio*, based on data coming to the cognizance of the prosecutor's office or the investigating authority within its official competence (capacity),¹¹ or upon a *complaint* (in this latter case, investigation must be ordered within 3 working days accounted from the delivery of the complaint). Ordering investigation is pursued in the form of a *report*. In case of urgent (high priority) investigatory actions (namely, if failure of the immediate investigative measure would involve difficulties in the later gathering of certain means of evidence) *the investigatory action may be implemented without a decision*, whereas posterior conclusion of the report may be sufficient – but without any further delay.

2.2. *The complaint, amendment of the complaint*

2.2.1. *The complaint*

The complaint is an announcement addressed either to the investigating authority or to the prosecutor with content referring to a criminal act and aims for the initiation of a criminal procedure. Anyone shall be entitled to file a complaint – regardless of his/her/its capacity under civil law –, moreover, the complaint is compulsory, if failure to file a complaint is deemed as a criminal offense in accordance with the provisions of Btk. (for example, failure to report a terrorist act). Furthermore, filing a complaint is also mandatory for members of the authority, official persons, and in certain cases, public bodies shall be obliged to file a complaint concerning the criminal offense that came into their cognizance within the scope of their competence. [Section 376 (2) Be.]. The complaint may be filed at any authority, verbally, in writing or in other manner (e.g., by phone).¹²

2.2.2. *Amendment of the complaint*

If the complaint is *insufficient for implementing a satisfactory decision* on ordering the investigation, or on the refusal of the complaint, the complaint may be amended. In the course of the amendment of the complaint, the authority conducting the amendment may pursue data gathering activities in accordance with the statutory provisions of law, (for example, it may access law enforcement databases provided to detect means of evidence; it may order the disposal of documents, data; it may survey the crime scene, etc.), or may interview the complainant, and shall conclude its observations taken at the amendment of the complaint in a report. The deadline for the amendment of the complaint is 1 month.

2.2.3. *The private motion*

In case of certain criminal offenses (e.g., in cases of assault, defamation, slander, invasion of privacy, general case of sexual harassment, etc.) criminal procedure may only be instituted, if

¹¹ Farkas Ákos – Róth Erika: A büntetőeljárás. Complex Kiadó, Budapest, 2012. p. 236

¹² Láng László: A nyomozás. In: Belegi József – Berkes György (Eds.): Büntetőeljárás jog I-III. Kommentár a gyakorlat számára, 2007–2013. HVG-ORAC, Budapest, 2014.

the entitled party (typically the victim) files a private motion. Any and all statement of the entitled party requesting the offender to be held liable under criminal law shall be deemed as a private motion. [Section 378(2) Be.]. The deadline to forward to private motion is 1 month accounted from gaining cognizance of the crime.

A clear and emphatic distinction must be made between private motion and the legal institution of *private accusation*, whereas the latter refers prosecution shall represented by a private accuser instead of the prosecutor in private accusation procedures.

2.2.4. *Rejection of the complaint*

In accordance with the provisions of Sections 381 of the Act, the prosecutor's office and the investigating authority shall *reject the complaint* coming to its cognizance in a decision, in case the following may be established from the complaint itself:

- the action does not constitute a criminal offense;
- the suspicion of the criminal offense is missing;
- a ground of the exemption from criminal responsibility;
- the procedure may not be instituted due to death, statutory limitation, clemency;
- the private motion, request or the order of the public prosecutor is missing;
- the action has already been adjudicated by a final decision (*res iudicata*);
- the reported action is not subject to public prosecution;
- the case is not governed by the Hungarian law.

3. *The rules of investigation*

3.1. *Presence at procedural actions in the course of the preliminary investigation*

Unlikely to the court procedure, the investigation is not public, therefore, besides the prosecutor, the member of the investigating authority and the keeper of the minutes, only those may be present at certain investigatory actions whose presence is expressly permitted by the Act. [Sections 383-384(1) Be.]. The right of being present at certain procedural actions is granted to the defense counsel, the defendant, the victim, law students, students of faculty of law enforcement (under permission), the officer at the consulate of a foreign state, etc. The defense counsel shall be entitled to address questions at certain investigatory actions, furthermore, the counsel is granted the right to file motions, make observations, and also, the defense counsel may gain access to and make copies of the documents. Those permitted to be present at the investigatory action shall have the right to inspect the minutes taken there and then.

3.2. *Questioning the suspect*

If based on the available date, there is a reasonable ground to suspect that a specific person has committed the criminal offense, the prosecutor or the investigating authority shall *interrogate* the suspect in accordance with the provision of Sections 385-389 of the Act. Detained suspects shall be interrogated within 24 hours accounted from the commencement of the detainment. [Section 385(2) Be.] During the interrogation, the *suspect* shall be informed on the gist of the suspicion as well as the applicable statutory regulations, furthermore, the suspect

shall be granted the right to consult with a defense counsel.¹³ During the interrogation, the suspect may not be asked any questions containing the answer, or a statement of a yet unproven fact, or a promise violating the law. (e.g. the suspect can not be informed that he shall be released in case of admission without explicit statutory authorisation, etc.). Furthermore, polygraph examination of the testimony ('lie detection') is not allowed without the consent of the suspect.

3.3. Decisions of the prosecutor's office during the investigation

3.3.1. Envisaging the measure or decision of the prosecutor's office

Generally, the possibilities of terminating the procedure granted to the prosecutor's office (intermediary procedure, the prosecutor's conditional suspension, choosing the manner of accusation) are based on the admission of the defendant. Consequently, in case of the defendant's admission – i.e. even right after the suspicion is announced, but before the defendant's testimony, or at any time during the investigation -, the prosecutor's office shall advise the defendant on the possibilities of the prospected measure or decision; so the defendant may make a testimony to merit, in the knowledge of the prosecutor's office's information. Besides the prosecutor's office, defense shall also have the right of initiation. The measure or decision effected by the procedure may project:

- suspension of the procedure provided to pursue an intermediary procedure, or – following an efficient intermediary procedure – termination of the procedure;
- conditional suspension by the prosecutor (and later on, termination of the procedure);
- rejection of the complaint with regards to the cooperation of the suspect;
- initiation of a simplified trial (accelerated procedure) or initiation of a separate procedure concluded with (extrajudicial) criminal law decision.

3.3.2. Initiation of a settlement

While the state benefits from the defendant's cooperation and by the related consensual criminal procedure with a time and money consuming closure, the defendant is also interested in the conclusion of a settlement due to less severe sanctioning. Nonetheless, a settlement means assured reparation for the victim, and through that, society satisfaction can also be encouraged with reference to the fact that the perpetrator shall surely be held liable for his act. Consequently, this legal institution can not be interpreted to the benefit of victim alone, it is also a possible way to accelerate the procedure, still appreciating the interests of both the injured and of law enforcement. As of the criminal offense committed by the defendant, the settlement may concern *the admission of culpability and its consequences*. The settlement shall be made and concluded between *the defendant, his defense counsel and the prosecutor's office*. In

¹³ Bócz Endre – Finszter Géza: Kriminálisztika joghallgatóknak. Magyar Közlöny Lap- és Könyvkiadó, Budapest, 2008. p. 171.; Tremmel Flórián – Fenyvesi Csaba – Herke Csongor: Kriminálisztika. Dialóg Campus Kiadó, Budapest–Pécs, 2012. p. 338; Lakatos János: A kihallgatás. In: Bócz Endre (Ed.): Kriminálisztika 2. BM Kiadó, Budapest, 2004. p. 773

accordance with the provision of Be. a settlement may be concluded in any case and in relation to any criminal offense.

We shall refer to detailed stipulations of the procedure based on an agreement at the related separate procedure, under title 'Procedure in case of settlement'.

3.3.3. Suspension of the procedure for the purpose of intermediary procedure

Nowadays, the increasingly growing caseloads of our courts demand a legal possibility allowing diversion of cases from criminal law's path, namely, for relatively minor criminal offenses, whereas the perpetrator and the victim manage to settle an agreement.¹⁴ The legal institution of intermediary procedure introduced to the Hungarian criminal procedural law in 2007 gives an opportunity, setting up the legal frames of the agreement between the perpetrator and the victim to find remedy for the injustice caused by the criminal offense. Thus, amongst its other authorities, the prosecutor shall also be entitled to direct the case to an intermediary procedure (Chapter LXVI Be.) for conflict management, ideally resulting in the agreement of the perpetrator and the victim, along with the reparation of damages caused by the criminal act. The aim of the intermediary procedure is to conclude an *agreement between the suspect and the victim* with the assistance and cooperation of a third party, the so called mediator.

Intermediary procedure means a proceeding that aims to advance the agreement of the suspect and the victim, assisting the reparation of the consequences of the criminal offense and facilitating future law-abiding conduct of the suspect, instituted to the motion of either suspect or the victim on the one hand, or pursued upon their voluntary consent. [Section 412(1) Be.] Due to the compensatory and reparatory nature of the intermediary procedure, the victim may regain a state as if the criminal offense has never happened (so called restorative jurisdiction). Aims of the procedure are to provide remedy for consequences of the criminal act and to facilitate law-abiding behaviour of the suspect in the future. Detailed statutory regulations of intermediary procedure are set forth in Act CXXIII of 2006.

3.3.4. Conditional suspension by the prosecutor

Under certain statutory conditions, and usually in relation with criminal offenses of minor gravity, the prosecutor is shall be entitled to postpone the accusation instead of filing the indictment,¹⁵ within the legal frames of conditional suspension by the prosecutor. *The prosecutor may decide to suspend the procedure in a decision if termination of the process can be expected upon the future conduct of the suspect.* [Section 416(1) Be.] Essentially, under the statutory provisions of this legal institution, the prosecutor may grant a probation period to the indictment: in case the suspect complies with the rules of conduct set by the prosecutor and pursues law-abiding behaviour during the term, the prosecutor shall not file the indictment and shall terminate the criminal procedure against the suspect. Otherwise, the prosecutor shall file the indictment.

¹⁴ Cséka Ervin – Fantoly Zsanett – Károlyi Judit – Lőrinczy György – Vida Mihály: *A büntetőeljárás jog alapvonalai*. Bába és Társai Kiadó, Szeged, 2006. p. 400

¹⁵ Pápai-Tar Ágnes: *A büntetőeljárás gyorsításáról*. Gondolat Kiadó, Budapest, 2012. p. 105

3.3.5. *Suspension of the investigation*

Suspension of the investigation means temporary hindrance in pursuing the procedure. It may be instituted if certain circumstances would obstruct continuance of the procedure, however, passing a final and binding decision that would terminate the procedure is not possible. [Section 394 Be.]

The prosecutor's office or the investigating authority shall be entitled to suspend the investigation if, for example, the identity of the perpetrator can not be established during the investigation; or if the perpetrator can not participate in the procedure due to a permanent and grave illness, or due to mental incapacitation occurred after the commission of the criminal offense. In case of suspension of the investigation, the procedure shall be resumed if the cause of its suspension has ceased to exist.

3.3.6. *Termination of the procedure due to other reasons*

The investigation may be terminated if further continuance of the procedure encounters hindrances. [Section 398 Be.]

The prosecutor's office and the investigating authority shall terminate the investigation, if e.g. the action does not constitute a criminal offense; or the criminal offense was not committed by the suspect; further if based on the means of evidence, commission of a criminal offense can not be established. Likewise, causes of exemption from criminal culpability (for example, justified defense, mistake) may also ground a terminating decision, or if the action has already been adjudicated by a final and binding decision. However, it must be emphasised in relation to the termination of the investigation that by these means the conduct subject to the criminal procedure shall not become *res iudicata*, subsequently, the case might be resumable at any time.

4. *Accusation*

Accusation is a certain significant momentum and action of the procedure by which criminal procedure moves from the investigation sequence to the phase of the trial. Namely, the court procedure shall only be pursued upon (legitimate) accusation, and only against an individual who has been accused, furthermore, only and exclusively for actions stipulated in the indictment.¹⁶ Condition of the accusation is that the evidence gathered in the course of the investigation shall confirm culpability of the defendant beyond reasonable doubt, *id est*, the prosecutor may only file an indictment against an individual upon conviction of guiltiness.¹⁷

The prosecutor shall press charges by filing an indictment. The indictment shall contain [Section 422 (1) Be.]:

- the personal data of the accused;
- the exact description of the act subject to the indictment;
- the classification of the action subject to the indictment in accordance with the provisions of Btk.;
- the proposal of the prosecutor's office imposing a punishment or applying a measure (eventually, a proposal for acquittal of the defendant exempted from criminal culpability due to insanity);

¹⁶ Fantoly – Budaházi 2019 (B) p. 81

¹⁷ Király Tibor: Magyar büntető eljárási jog. Tankönyvkiadó, Budapest, 1978. p. 75; Gellér Balázs: A vád törvényességének egyes aspektusai. In: Jogtudományi Közlöny, 66. évf. 9. sz., 2011. pp. 459–466

- the description of the means of evidence;
- the prosecution's proposal for the order to take evidence to the hearing;
- references to the regulations concerning competence;
- other motions of the prosecutor's office.

5. Preparatory procedure

5.1. Definition, objective and principal criterion of covert preliminary investigation

Prior to ordering the investigation, but already within the legal frames of criminal procedure, the provisions of Be. allow a preliminary investigation of a short term, whereas both overt and covert criminal measures can be used, in order to establish or eliminate the suspicion of a criminal offense.¹⁸ Thus, in several cases, covert (operative) activities conducted without the subject's knowledge may be necessary in order to secure effective detection of criminal offenses. Legislation has created the legal grounds of such data gathering by implementing the statutory rules of using covert measures in the Act on criminal proceedings. On the one hand, the objective of using covert measure may be the determination of the perpetrator's identity, place of stay, or the arrest of the perpetrator, furthermore, detection of evidence on the other hand. Primarily, the authorised organisation (e.g. National Security Service) institutes covert measures and techniques against the suspect, exceptionally against other persons (namely, in specific cases, against the defense counsel of the suspect)

The so-called preparatory phase ('information-confirming procedural sequence') shall be initiated upon only basic information, while the investigation is indicated upon suspicion. Nevertheless, in other than the preparatory procedure, covert measures can also be adopted in the two actual phases of the investigation (preliminary investigation, inspection), whereas the conduct of such measures represent special actions implemented by the authorised bodies without the knowledge of the subjects, however, the conduct of such measures shall limit the fundamental rights of home inviolability, right of privacy or privacy of letters, and the right related to the protection of personal data. [Section 214 (1) Be.]

6. General rules of the court procedure

General rules of the court procedure collect the statutory provisions that are applicable at every phase of the court procedure unless otherwise provided by law, thus, in the trial of the court of first instance, in the procedures of the appeal courts, specific procedures, and in certain special procedures.

6.1. Forms of court procedures

Forms of the court procedures are the manners in which courts proceed and pass final judgements or non-final decisions.

¹⁸ Tóth Mihály: Néhány megjegyzés az új büntetőeljárás törvényhez. In: Belügyi Szemle 2018/3. p. 61

The general procedural form is the trial. *The court shall hold a trial when obtaining evidence to establish criminal liability of the accused* [Section 425 (1) Be.]. The fact that the ground of the court's decision is the information gathered during the trial, thus, the core of the procedure of the first instance court is constituted of the evidence obtained by the court is actually a manifestation of the general processual principles (verbality, publicity, immediacy). According to the principal rule, the court shall hold a public session, therefore, anyone can be present at the trial, unless the chairperson of the court decides to exclude the public from the entirety or part of the trial.

Compared to the trial the following are *secondary procedural forms*: *the public session, the session and the panel session*. Their common peculiarity – with only a few exceptions – is that no evidentiary procedure is allowed at either one of them.

Unless otherwise provided in the Act, *public session* shall be governed by the statutory provisions applicable to trials. Public session is the general form of the appeal court both at second and third instance.

Session – as a form of the court procedure – is a procedural measure of preparatory nature. The Act stipulates two specific cases of the session: the preparatory session and the personal hearing (whereas the latter is related to the specific procedure of the private accuser). In general, session is opened to all parties of the procedure, since sessions shall be attended by the members of the court, the keeper of the minutes, the parties (the accuser, the defendant and the defense counsel), and in addition those summoned or notified by the court on the session. The principle to be opened for the parties shall not apply for the *panel session*, where only the members of the court and the keeper of the minutes may be present. There are two types of the panel session, one is the procedural form passing the final judgement of the court, while the other sort decides over simpler cases, not involving judicial determination (e.g. exclusion of a judge).

6.2. *The publicity of the trial*

The general processual principal of publicity has an outstanding importance in the court procedure. Consequently, according to the general rule, *the trial of the court shall be public*. [Section 436(1) Be.] However, certain situations demand the alteration from this general rule, so we may distinguish between cases where publicity is limited or excluded (the latter is referred to as in-camera trial). In-camera trial may be held for ethical reasons (of either individual or social nature), or in protection of the interests of a person who requires special treatment. The disposition of the decision, furthermore, the part of the justification that does not harm the order of the in-camera trial, shall be announced by the court in public.

6.3. *Conducting and Preventing the Dignity of the Trial, Maintaining the Order of the Trial*

Upon the statutory delegation of the Act, the conduct and prevention of dignity of the trial shall be the responsibilities of the single judge or the chairperson. The quality of conducting the trial has a significant impact on the strict emergence of procedural principles, the practice of rights and fulfilment of the obligation by the participants of the procedure.

Amongst the general rules of court procedures Be. expressly stipulates the tasks of the both the presiding single judge or the chairperson conducting the trial. Therefore, the single judge or the chairperson shall establish the order of the actions to be performed (in accordance with the provisions of the Act), furthermore, the presiding judge shall ensure the compliance with law,

and shall also make sure that the participants of the procedure may practice their rights (of which they are dully advised).

Conducting the trial, the chairperson of the panel must ensure that the dignity of the court is preserved. Nevertheless, above this general clause, the Act emphasises that the chairperson shall be entitled to remove anyone from the courtroom who insult the dignity of the court due to their inappropriate condition (e.g. drunk or delirious) or appearance (e.g. wearing flip-flops or tight-low cut shirts).

As for *maintaining the order of the trial*, the Act stipulates that prevention shall prevail, and all efforts must be taken to avoid disorderly conduct at the trial. However, in case of disorderly conduct the presiding single judge or the chairperson of the panel shall be entitled to call the person disturbing the trial to order; to impose a disciplinary penalty; or in case of repeated or grave disorderly conduct such person may be ordered to leave or may be removed. In case of disturbance of the order of the trial, the audience may be excluded from the trial.¹⁹

6.4. Minutes

The keeper of the minutes shall take *minutes* on the court procedure. Taking minutes is mandatory during the trials of the first and second instance courts, the trial held in the repeated procedure, during the second and third decree procedures and in the public sessions held during the extraordinary procedures for legal remedy. Minutes should only be taken at the sessions if expressly stipulated in the Be. (e.g. at the preparatory session or at personal hearings), or if deemed necessary by the court. Furthermore, it is statutory to take minutes at the panel session held in order to pass the final judgement, in case the decision is not unanimous.

6.5. Decisions

We may classify the expressions-of-will of the court as the two groups of decisions and orders. Decision may be classified upon their titles and content. *According to their titles we may refer to decisions and verdicts.* In court procedures, the general form is the decision, since the court shall only deliver a verdict in cases expressly ordered by the law. Likely, for example, the court shall deliver a verdict on the issue of culpability or acquittal; the court of second instance shall change the verdict of the court of first instance in a new verdict; the court of third instance shall change the verdict of the court of second instance; etc. *With regards to the content,* we can differentiate between *conclusive and non-conclusive decisions.* In the conclusive decision, the court shall decide over the charges raised, thus it either adjudicates the issue of culpability (verdict), or does not deliver a judgment over the issue, but shall conclude the procedure in a final manner (decision ordering the termination of the procedure). *In its non-conclusive decisions, the court shall not decide over the accusation but only regarding certain partial issues* (e.g. the so-called, interlocutory decision referring to technical issues not involving judicial determination).²⁰

¹⁹ Dobrocsi Szilvia: Büntetőeljárás jog II. Szemináriumi jegyzet. Wesselényi-sorozat. Patrocinium Kft., Budapest, 2011. p. 12

²⁰ Fantoly Zsanett – Gácsi Anett Erzsébet: Eljárás büntetőjog. Dinamikus rész. Iurisperitus Bt., Szeged, 2014. pp. 98-99

7. Preparation of the Trial of the Court of First Instance

7.1. Tasks and System of the Preparation of the Trial in the Applicable Law

Preparation of the trial is the procedural phase just preceding the trial of the court of first instance, whereas the court shall examine compliance with the procedural requirements and evaluates the necessity of further proceedings. *In our country*, preparation of the trial is conducted by the *judgment* court itself, whereas, within a month accounted from the delivery of the case to the court, the presiding single judge or the chairperson of the panel shall examine, whether:

- transfer;
- consolidation or severance of the cases;
- suspension of the procedure;
- termination of the procedure;
- contact the prosecutor in order to complete insufficient indictment;
- decision on coercive measure;
- reclassification of the charges;
- transfer the case to the panel of the court; or
- indicating (an extrajudicial) procedure to deliver a *criminal law decision* should be conducted.

If the court has no competence or jurisdiction to adjudicate the case, it shall transfer the case to court of competence or jurisdiction. [Section 485 Be.] Examination of the transfer is the *ex officio* obligation of the court.

Usually, a decision over consolidation or severance of the case is necessary upon commencement of another procedure against the person on probation, due to another criminal offense committed during the probation period, or upon commencement of another procedure against such person during the probation period, due to another criminal offense committed prior to the probation period. In such cases the court of competence and jurisdiction for the new case shall proceed.

In compliance with the statutory conditions, the court shall also be authorised to temporarily block the case (*suspension of the procedure*). Be. classifies certain mandatory and possible causes of suspension [Sections 487 – 488 Be.] For example, it is statutory to suspend the procedure if the perpetrator is not able to practice his rights due to a permanent and grave illness, or due to mental incapacitation occurred after the commission of the criminal offense. On the contrary, suspension is not mandatory, but only a possible procedural measure (thus it is subject to the court's discretion), e.g. the suspect is absconding or abroad; in response of a legal aid, the action of a foreign authority is required.

Termination of the procedure is not a temporary but a final obstacle to the procedure, therefore, the explicitly stipulated statutory stipulations on the causes of the termination of the procedure are defined in a manner that does not require any further evaluation, or assembly of facts or law, and can be determined beyond doubt. For example, the procedure shall be terminated, if the action charged in the indictment does not constitute a criminal offense; the

accused is a minor; furthermore, due to the death of the accused, to statutory limitation, clemency, or due to any other reason of exemption from criminal liability.

In case the indictment does not or only partially contains the mandatory measures, *the court shall order the prosecutor to supply the deficiencies of the insufficient indictment*. Should the prosecutor fail to supply the elements necessary to continue the procedure in two months the court shall terminate the procedure.

The court shall be entitled to decide on the maintenance, order or termination of the coercive measures subject to court approval effecting personal freedom (e.g. restraining, criminal custody, detention) during the preparation of the trial. Such decisions may be delivered ex officio or upon the motion of the prosecutor.

In the course of the preparation of the trial, the court may establish that *the action subject to charges might be classified otherwise than stipulated in the indictment* (e.g. it may establish that the action might be deemed as robbery instead of theft). It shall make its conclusions upon the facts stipulated in the documents of the investigation and the indictment, whereas such facts seem to be beyond reasonable doubt. The decision passed on reclassification of charges must always be delivered to the accused, the defense counsel and to the prosecutor as well. There is a legal possibility that the single judge may order that the criminal case shall be tried by a panel of three professional judges. Typically, such decision is delivered due to the dimensions of the case or to the number of persons participating in the procedure.

The criminal law decision is a conclusive decision delivered by the court without a trial, upon the documents of the investigation, in a separate procedure [Chapter C Be.].

7.2. *Communication of the indictment; setting the trial; summons and notifications*

One month after the receipt of the files the latest, the court shall send the indictment to the accused and the defense counsel without delay, requesting both of them to make their motions. Sending the indictment does have a great significance, since the defense gains knowledge on the fact that the case has reached the phase of the court procedure through the delivery of the indictment on the one hand, and also gains knowledge about the state of facts upon which the charges were pressed against the accused.

Subsequently, the chairperson of the panel shall set the *date of the preparatory session* to the closest day possible, taking into consideration the order of arrival of the cases and the order set forth to handle the priority of the cases.

7.3. *Preparatory Hearing*

The court shall hold a preparatory hearing in three months accounted from the delivery of the indictment. The preparatory hearing is a public hearing held in order to prepare for the trial, at which the accused, the defense counsel shall have the opportunity to interpret their opinion regarding the charges, prior to the trial, and may cooperate in shaping the course of the criminal procedure. [Section 499 (1) Be.] Besides offering procedural grounds for different forms of the defendant's cooperation (typically, engagement in a settlement), preparatory hearing is also a special scene of concentrating the means of the trial, whereas the parties have the opportunity to settle the basic directions of the evidentiary procedure under judicial supervision.

In case of admission is made by the accused at the preparatory hearing, and the accused simultaneously waives his right to trial, *the court shall be entitled to pass a final and conclusive decision (verdict) at the preparatory hearing*. If the case cannot be concluded at the preparatory

hearing, but there are no obstacles or hindrances to hold a trial, the court shall hold the trial at once.

8. Trial of the court of first instance

The (main) trial of the court of the first instance is one of the most significant phases of the criminal procedure, since this is time and place when and where the main question of the criminal procedure, namely the of criminal liability of the accused shall be adjudicated, and - in case the decision confirms the culpability of the accused – criminal sanction is determined. Due to the contradictory nature of the trial, the principles of verballity, immediacy and publicity shall prevail.

The ‘core’ of the trial of the court of the first decree is the evidentiary procedure conducted by the court of first instance, whereas the court shall determine the fact upon the evidence examined by the court directly. According to the general rule, the state of facts determined by the court of first instance shall be binding to the court of the second instance.

The trial of the first instance court can be divided to the following *course of events*.

8.1. Opening the trial

The court shall open the trial with the *enumeration of the case*. In accordance with the legal classification of the indictment, it shall enumerate the charges and declare the opening of the trial. (e.g. ‘The court is summoned today to discuss the criminal case initiated against Mr. X.Y. on the misdemeanour of theft; I hereby declare the trial opened.’)

Following the enumeration of the case, the chairperson of the panel shall *request the audience* to maintain silence and order, and shall *warn* them to the legal consequences of the disturbance of order. Warning the audience is followed by the introduction of the members of the court, the keeper of the minutes, the prosecutor and the defense counsel by communicating their names. Such verbal communication shall be recorded in the minutes.

The court shall discuss the case on the merit if those summoned to the trial are present. Therefore, the court *records those attending* to the trial and shall determine, whether those summoned or notified are present. With regards to those absent from the trial, the court shall examine, whether they were dully summoned, and subsequently, whether the dully summoned participant who have failed to attend to the trial have previously given proper excuse of their absence.²¹ In the absence of a person whose presence is mandatory by law (e.g. members of the panel, keeper of the minutes, prosecutor, defense counsel) the trial must be postponed. The trial held in the absence of any of these persons, it shall constitute an absolute procedural default that results in the abrogation of the conclusive decision of the first decree.

The chairperson of the panel must make all efforts provided that the trial can be held. Thus, if the dully summoned accused or witness fails to attend, as much as possible, the chairperson shall arrange that they are taken to court without delay, and shall request the absent prosecutor or expert to appear at the trial.

Subsequently to the enumeration of those present, the chairperson of the panel shall request the present persons to leave the court room, and shall warn them to the consequences of

²¹ Dobrocsi 2011. p. 25

unjustified leave. With the exception of the victim, witnesses must leave the court room so statements of the accused person(s) and (the) other witness(es) questioned earlier may not influence their testimonies. The expert may be present at the trial from its commencement thereof. The procedural sequence of opening the trial shall be concluded by the *motions of the prosecutor, the defense counsel and the accused.* Such motions are, for example, presentations related to the initiation of transfer, consolidation or severance of the case, or reference to any other circumstances that could hinder the trial (e.g. the act of the accused has already been subject to final adjudication). The court shall not be bound by the motions of the parties.

8.2. Commencement of the Trial

Commencement of the trial means substantive engagement in the case. First, *the prosecutor shall present the charge if it has been introduced at the preparatory hearing; then the victim and his present representative shall state whether they intend to enforce a civil law claim.* Following such declaration, *the victim* to be heard as a witness later on *shall leave court room.* If possible, the court shall not interrupt the commenced trial until the closure of the case, thus, the commenced trial should possibly be finished within a day. In case it's impossible, the court may interrupt (for maximum eight days, e.g. pause or break), or may postpone the trial (to complement evidence or for other significant reason, e.g. further evidentiary measure requiring more than eight days – for example, appointment of an expert – is needed).

8.3. Admission of Evidence

In continental law, chairperson of the panel has a rather active role in admission of evidence. Within the legal frames of statutory provision, he shall be entitled to determine the order of evidentiary measures; he shall conduct interrogations, hearings and other evidentiary actions (e.g. demonstration of physical evidence); furthermore, he shall secure the enforcement of the rights of the participants. In the course of the admission of evidence, the prosecutor's office, the accused, the defense counsel, the victim, the private party, and in the issues of his concern, the other party of pecuniary interest and the other party may make motions and observations, however, such actions shall not be binding to the court.

Questioning the accused

In accordance with the provisions of the law, the evidentiary procedure shall start with the *questioning of the accused.* In case the accused has already testified at the preparatory hearing, his questioning may not be necessary. In criminal cases of more than one accused, the chairperson of the panel shall determine the order of questioning, nevertheless, always according to the general rule, under which the accused shall be questioned in the absence of the other accused who have not been questioned yet.

The testimonies made earlier by the accused may be read at the trial (e.g. testimony taken a preparatory hearing) or interpreted (if the testimony of the accused differs from his earlier testimonies).

Questioning the witness

Usually, the victim is the first *witness* to be questioned. The witness shall be questioned in the absence of the other witnesses who have not been questioned yet.

Questioning the witness shall start with recording personal data, and afterwards, the interest and bias of the witness must be examined (whether the witness is the relative of the defendant or the victim, or if he is interested or partial in the case for other reasons). At commencement of the examination it must be cleared if there are any obstacles to the testimony as a witness. Should there be no obstacles, the witness shall be warned on the legal consequences of giving a false testimony and about his obligation to tell the truth to his best knowledge and self-conscience. In the course of detailed (substantive) questioning of the witness it must be ensured that he may present his testimony as a comprehensive whole, and then the witness shall answer to the questions. Should the witness's testimony differ from his testimony made earlier, the reason of the alteration must be clarified. Likely, should the witness's testimony contradict to the testimony of another witness or the accused, such contradiction should be clarified by confrontation.

The testimonies of the witness made earlier in the procedure may be read at the trial (e.g. if the witness unlawfully refuses to give a testimony) or interpreted (if further questioning of witness at the trial is deemed unnecessary by the court).

Questioning the expert

Questioning the expert shall be conducted in accordance with rules applicable to the questioning of the witness. In the course of the hearing, the expert shall be entitled to use his written expert opinion submitted previously, as well as his notes or may use audio-visual aid. [Section 529Be.] The expert opinion might be read or interpreted at the trial (e.g. in case the expert has failed to attend the trial despite a notification). Should the assignment of an expert become necessary at the trial, the single judge or the chairperson of the panel shall summon the expert immediately, or in case it's impossible, the court shall adjourn the trial and set a deadline for preparing the expert opinion. [Section 530 Be.]

Interpretation and reading of documents, judicial inspection

The court shall decide over *introduction of the documents* constituting means of evidence at the trial. The court may present the *video, audio or audio-video recordings taken at procedural actions* at the trial (using audio and video recordings taken at the procedural action). The single judge or the chairperson of the panel shall *exhibit physical evidence*. If it's impossible, the photo of the physical evidence is shown and its description is to be given. [Section 533(1) Be.]

Amendment the charge, dropping the charge

Results of the evidentiary procedure may not prepare and advance the court's judgement, but also, the prosecutor must continuously attend to the accuracy of the indicated charges in comparison and relation to the conducted evidentiary procedure. In case the facts upon which

the legal classification of the criminal offense is based have changed compared to those stipulated in the indictment (change of charges); or new facts have been disclosed at the trial referring to the culpability of the accused in another criminal offense (extension of charges); or eventually, the prosecutor may find that less criminal offense can be adjudicated than set forth in the previous charges (deduction of charges), the prosecutor shall amend the charges.

The case of *dropping charges* must be separated from the amendment of charges, since in this case the prosecutor shall withdraw charges. The ‘collapse’ of charges shall lead to the termination of the court procedure.

Conclusion of the evidentiary procedure

After conducting the evidentiary procedure, if no motion for evidence has been submitted or it has been rejected by the court, the single judge or the chairperson of the court shall declare the evidentiary procedure concluded and request those entitled to make their argument in the case and address. [Section 540 Be.]

8.4. Closing arguments and addresses, the right to the last say

Closing arguments (closing arguments of the prosecution and defense) and addresses (addresses of the accused, the victim and the other party of pecuniary interest) are the motions of the parties targeting to orient the court’s decision, whereas the parties may assemble all elements of facts and law, and address them to the court verbally, without any limitation of content or time. Actually, this is the only admissible method to influence the court.

The accused shall be entitled to practice *the right to the last word*. Accordingly, the accused may address the court directly prior to the adoption of the conclusive decision, demonstrating, for example, repentance for committing the crime and his request for a fair decision, or his consent to the presentations of the defense counsel.

8.5. The Decision

After hearing the closing argument, addresses and the last words of the accused, the court shall resign to adopt a decision at a panel session. At the panel session the preview of the decision shall be recorded (‘little verdict’) and signed by the members of the court. [Section 549 (1) Be.]

In the *conclusive decision* the court shall decide over the culpability of the accused (condemning judgement or verdict of acquittal), or it shall permanently terminate the procedure (ruling terminating the procedure). In the *judgement condemning the accused*, the court shall convict the accused, if it ascertains that the accused has committed a criminal offense and may be punished. In the *verdict of acquittal*, the court shall acquit the accused of the charges, for example, if the act does not constitute a criminal offense. In the *ruling terminating the procedure*, the court shall permanently terminate the procedure acknowledging a ground for exemption of criminal culpability (e.g. death, statutory limitation, clemency, *res iudicata*, etc.).

8.6. *Announcement of the decision*

The conclusive decision *shall be announced immediately* after its adoption. The purview of the conclusive decision ('little verdict') shall be read by the chairperson of the panel and heard by those present standing (however, the chairperson of the panel may exempt the person present owing to the state of health from this obligation). Thereafter, chairperson of the panel shall present the gist of the justification sitting, and those present shall listen to the presentation in the same manner. Subsequent to the announcement, the court shall deliver the disposition of the decision to those entitled to appeal present.

8.7. *Statements on legal remedy*

After delivery of the disposition of the decision, the single judge or the chairperson of the panel shall *address those entitled to appeal whether they intend to appeal* or they comply with the verdict. However, three working days may also be available for the consideration of the response. Should the conclusive decision not become legally binding at the announcement, the court shall rule over the *coercive measures subject to court approval effecting personal freedom* immediately. Finally, the court shall close the trial.

9. *Procedure of the court of second instance*

Ultimate demand against the decisions adopted in criminal procedures that they must be legitimate and just, moreover, they must be based upon proven facts.²² However, due to the ever-so-often occurring complexity of jurisdiction, at times, it is unavoidable that unlawful, unjust or unfounded decisions are being adopted. The *right to legal remedy* also declared in the Fundamental Law of Hungary shall serve to eliminate such deficiencies. Legal remedy is an umbrella term that is used as a collective term of phrase referring to all kinds of judicial remedies stipulated for any and every phase of the procedure. The predominant form of legal remedy of the criminal procedure is the *appeal*, which, according to the general rule, is implemented to indicate the procedure of the court of appeal.

For the segment of court procedures, the criminal procedural act implements a redress system of two stages of regular legal remedies, thus, it allows appeal against the decisions of the court of second instance as well. Nevertheless, alongside regular legal remedies, our criminal legal recourse system acknowledges the institution of *extraordinary legal remedies* as well, however, in accordance with the principle of legal certainty, they are only available in a much smaller scale, given the applicable statutory conditions.

9.1. *General Rules*

The right to appeal

The judgement of the court of first instance *may be appealed* at the court of appeal. [Section 579 (1) Be.] The decision of the county court proceeding as the court of first instance may be

²² Elek Balázs: A jogerő a büntetőeljárásban. DE ÁJK, Debrecen, 2012. p. 102

appealed at the regional court, the decision of the regional court proceeding as the court of first instance may be appealed at regional court of appeal. Thus, in comparison, the procedure of the first decree court is based on (legitimate) charges, the legal recourse system may only be indicated upon a legally valid and effective appeal.

According to the general rule, detrimental legal effects of the decision of the court of first instance effected by the appeal *can not be executed* (thus, for example, the execution of imprisonment adjudicated at the first decree shall not commence, etc.)

The scope of the review

The court of appeal shall review the judgment contested by the appeal together with the preceding court procedure (that is the *so called comprehensive reviewing authority*). Therefore, it shall conduct the *review ex officio* (regardless of the person of the appellant or the reason of the appeal), for example, the dispositions of the judgement concerning substantial facts of the case; the classification of the criminal act; the imposition of punishment and the application of measures; furthermore, the auxiliary issues related to the above (i.e. for example, the dispositions concerning the civil law claim or the costs of the criminal proceedings).

Restrictions related to the state of facts determined in the judgement of the court of first instance

According to the general rule applicable in our legal recourse system, the court of appeal is bounded by the facts of the case set forth in the judgement of the court of first instance, thus, the court of appeal shall decide on the basis of the state of facts established by the court of first instance,²³ in other words, the facts determined by the court of first instance shall prevail in the procedure of the court of appeal [Section 591 (1) Be.].

Nevertheless, there are two statutory exceptions, namely, if the judgement of the court of first instance is not substantiated (thus, for example, the state of facts is not elucidated or they are in contradiction with the content of the documents); or if the appeal refers to new facts of new means of evidence, and so, the appeal court shall conduct a new evidentiary procedure.²⁴

Restriction of severity

Essentially, the restriction against severity is a *prohibitive legal term*,²⁵ according to which adjudication of culpability of the accused acquitted by the court of the first instance, or, the punishment or measure imposed on the accused may only be increased if *an appeal has been lodged to the detriment of the accused*. In principal, the restriction against severity is implemented to criminal procedure to secure that the accused and the defense counsel may

²³ Kónya István: A másodfokú bírósági eljárás. In: Belegi József – Berkes György (Eds.): Büntetőeljárás jog I–III. Kommentár a gyakorlat számára, 2007–2013. HVG-ORAC, Budapest, 2014.

²⁴ Belovics Ervin – Tóth Mihály: Büntető eljárásjog. HVG-ORAC, Budapest, 2013. p. 443

²⁵ Herke Csongor – Fenyvesi Csaba – Tremmel Flórián: A büntető eljárásjog elmélete, Dialóg Campus Kiadó, Budapest–Pécs, 2012. p. 329

practice their right of appeal without a risk, that is, if there is no appeal to the detriment of the accused, it shall not be possible that the accused would have to face a more severe judgement concerning either one of the two major issues of criminal law (culpability and the measure of sanctions), thus, for example, the accused can not be condemned to imprisonment for a longer term than the term he's been convicted on the first decree.

9.2. *The Appeal Process*

Panel session of the court may conclude appeal cases that do not require further oral or so called, contradictory procedures, thus, they can be adjudicated without the admission of further evidence, only upon the documents. Therefore, in accordance with the statutory provisions, amongst others, the court of appeal shall decide on the issues of rejection of the appeal, transfer, consolidation or severance of the cases, suspension of the procedure; etc. [Section 598 (1) Be.]

Public session can be considered as *the general form of appeal court procedures*, whereas it is held if the case can not be concluded at a panel session, or otherwise, if there is no need to hold a trial. [Section 599 (1) Be.]. Therefore, public session of the appeal court may be summoned if for example, in case of a partially non-substantiated judgement of the first instance court it is necessary to establish the entirety of or correct facts, or if hearing of the accused is needed in order to further clarify the circumstances of the imposition of the imprisonment. The court of second instance shall be obliged to hold a trial if

- the issues otherwise falling into the competence of the panel session can not be arranged;
- admission of evidence is needed;
- the case otherwise falling into the authority of the panel or public session has been set for trial by the chairperson of the panel [Section 600 (2) Be.].

9.3. *Decisions of the Court of Appeal*

The court of appeal shall uphold, change or repeal the judgment of the court of first instance, or it shall reject the appeal.

Approval of the judgment of the court of first instance (affirmative power)

The court of appeal shall uphold the judgement of the court of first instance if it finds that the appeal is not substantiated and there is no need to repeal the judgment, or otherwise it is not necessary or possible to modify the judgement, for example, pursuant to the restriction of severity.

Changing the judgment of the court of first instance (reformatory power)

Changing the judgment of the court of first instance is generally conducted for reparatory purposes, pursuant to the breach of the provisions of criminal material law, exceptionally in case of breach of criminal procedural or the provisions of other material law. Implicitly, it is condition to the fact that there is no need to repeal the verdict of the court of first instance.

In the course of changing the judgment of the court of first instance, the court of appeal may adjudicate the culpability of the accused previously acquitted by the court of first instance and may impose punishment or measures on the accused; it may acquit the accused convicted; it

may modify the classification of the offense, the determined punishment or measure; and furthermore, it may also eliminate the unsubstantiated judgement of the first decree court.²⁶ When changing the verdict, the court of appeal shall adopt a decision *in compliance with the law* regarding any and all issues that should be adjudicated by the court of first instance.

Repealing the judgment of the court of first instance (power of cassation)

Repealing the judgment of the court of first instance may be conducted *simultaneously with the termination of the procedure*, e.g. in cases of death of the accused, statutory limitation, clemency, or in case if the case has already been adjudicated by a final and binding decision (*res iudicata*) [Section 607(1) Be.].

Eventually, the court of appeal may also be entitled to repeal the judgement of the court of first instance and *order the court to conduct a new (repeated) procedure*. Such cases, for example, if the court was not lawfully formed or if the members of the panel have not been present all along the trial; if the trial was held in the absence of a person whose presence is statutory by law (e.g. prosecutor or defense counsel). In such cases the court of first instance shall be obliged to conduct a new (repeated) procedure upon the order of the appeal court.

Nevertheless, the court of appeal may also repeal the judgement and order the court of first instance to pursue a new procedure also if the first decree verdict is unsubstantiated in a large measure, or in other words, if it is unexplored: thus it does not include sufficient references to the state of facts; it is contradictory to the documents; or if the judgment of the court of first instance has drawn substantive conclusions upon false logical derivations.

10. Procedure of the court of third instance

Implementation of the court of third instance to the system of regular judicial remedies has imposed the institution of a double level legal remedy system, namely, the statutory provisions allow two appeals in the same case, whereas one of them can be lodged against the judgement of the court of first instance, while the other one may be submitted against the decision of the court of appeal. In other words, the trial of the court of third instance may be conducted if those permitted by law file an appeal to the court of third instance against the decision of the court of appeal.

As of the general rules of the procedure before the court of third instance, general rules of the criminal procedure shall prevail (Part Eleven of Be.), furthermore, the provisions of Part Fifteen of Be. on the procedure of the court of appeal shall also be applicable accordingly, with the deviations stipulated for the procedure of the court of third instance. Detailed rules of the procedure of the court of third instance are *similar* to those applicable in the procedure of the court of appeal (namely, on the right to appeal, the scope of the review, the restrictions related to the state of facts, the restriction of severity, certain rules of conducting the redress against the judgment of the court of appeal, moreover, concerning the adoptable judgments (decisions of approval, change or repeal), however, there is a rather significant difference between the of the trials of the appeal court and of the court of first instance regarding the legal grounds of the procedures.

²⁶ Herke – Fenyvesi – Tremmel 2012. p. 343

In accordance with the provisions of Section 615 (1) of Be., the decision of the court of appeal may only be redressed *on limited legal grounds*, stating that the decision of the court of appeal may be redressed to the court of third instance, *in case the decision of the court of appeal is contradictory to the court of first instance's judgement*. In this very case, contradiction means conviction or ordering the involuntary treatment of the accused in a mental institution, who was previously acquitted by the court of first instance, or against who the procedure has been terminated, or, in the contrary, the accused adjudicated at the first instance has been acquitted by the second instance, or if the court of appeal has terminated the procedure against him.

11. Extraordinary legal remedies

There is a wide range of regular judicial remedies available to cure erroneous or wrongful procedural actions and decisions adopted in the legal procedure, before their entering into legal force. Nevertheless, more occasionally, even final and binding decisions of the court might be wrongful and need to be corrected. Defaults of the *final and binding court decisions* may be repaired through *extraordinary legal remedies*. These are the re-trial, the judicial review, the constitutional complaint, the appeal on legal grounds, the harmonisation procedure, and the simplified judicial review. With regards to the great significance of the institution of legal force, extraordinary legal remedies may only be available in case of major judicial errors, provided to secure requirements of legality and justice of the criminal procedure.

11.1. Re-Trial

Re-trial is meant to repair material error of facts of the final and binding court decisions that break surface only later, whereas it aims to repair the wrongful or insufficient state of facts contained in the final decision, and to determine the criminal consequences upon the modified (or eventually, upon the newly established) state of facts. Re-trial may only be initiated against the conclusive decision adopted on the issue of criminal culpability (in case the act is adjudicated by a final judgement of the court), or against the final order of the court terminating the procedure or adopted with the omission of a trial.

Re-trial has time limits and restrictions of other sorts as well, such as, re-trial shall only apply in the life of the defendant and within the time frame of the statutory limitation. The fact that the defendant's punishment has been executed shall not be an obstacle to re-trial, moreover, re-trial to the benefit of the defendant shall not be precluded because the defendant's culpability is terminated.

The Act *explicitly stipulates* the causes of re-trial. Such legal ground, for example, if *new evidence* is raised which assumes that the defendant shall be acquitted (or the sentence imposed is to be significantly commuted), or on the contrary, culpability of defendant shall be determined (or the punishment imposed shall be significantly aggravated).

11.2. Judicial Review

Judicial review is another type of extraordinary legal remedies, a *special procedural measure meant to repair the legal mistakes of final and binding court decisions*. The Act consequently follows the concept that judicial supervision may not confront the final decisions of the court

regarding material errors of fact, but only regarding the most significant issues of material or procedural law (practiced as a fundamental right with a motion for review), at the Curia, by the prosecutor and other authorised participant of the procedure. For example, one of the possible causes of a motion for judicial review, if the defendant's criminal liability was established, the defendant was acquitted, or if the procedure against him has been terminated in *violation of the provisions of material law*. On the other hand, for example, the lack of jurisdiction of the court, or in case the procedure was conducted upon charges raised by an unauthorised person, furthermore, in case the court has adopted its decision by breaching the restriction of severity are *violations of procedural regulations* that shall establish legal grounds for judicial review. Furthermore, the Supreme Court shall also be authorised to order the review of the criminal procedure concluded with a final conclusive decision. A motion for judicial review may only be submitted to the detriment of the defendant within six months accounted from the communication of the final conclusive decision. Motion to the benefit of the defendant may be submitted without a deadline or time limitation.

11.3. Procedure in Case of Constitutional Complaint

In case a constitutional complaint is submitted, the court proceeded at first instance shall suspend the execution of the punishment or measure imposed in the final conclusive decision, upon the provisions of the Supreme Court's judgement.

11.4. Appeal on legal grounds

In the course of this extraordinary legal remedy, *the public prosecutor shall be entitled to address judicial remedy against the unlawful and final conclusive decision, and against the final and non-conclusive order of the court, in order to support legality* [Section 666 Be.], whereas the appeal on legal grounds shall be adjudicated by the panel of the Curia at a public session. No legal remedy may be lodged on legal grounds, if the decision to be contested is delivered by the Curia, or if the breach of law is redressable through an extraordinary judicial remedy of other sort (re-trial, judicial review or simplified judicial review).

11.5. Harmonisation Procedure

Harmonisation is an extra-trial criminal procedure, on the subject of interpretation of law, as in, its objective is not to adjudicate charges, but to decide over theoretical issues of criminal material or procedural law, or to facilitate harmonisation of law. Harmonisation procedure is conducted by the harmonisation panel of the Curia.

Harmonisation procedure shall be applicable, if, in order to facilitate legal practice, or provided to develop uniform sentencing policies the adoption of a harmonisation decision is required, or, in case a panel of the Curia intends to deviate from the decision of another judiciary panel of the Curia.

11.7. Simplified Judicial Review

The court shall conduct a simplified judicial review if there is no need for a decision in relation with any major criminal issues (e.g. classification, punishment), but for a judgement in an associated issue becoming apparent later. Thus, the possible basis of such procedure is that the final conclusive judgment of the court adopted in the base procedure proves to be insufficient in an ancillary issue (the court has failed to fulfil its obligation to adjudicate the issue), or the decision proves to be unlawful (the court's judgement violates the law). However, it is not possible to break through the legal force in the simplified procedure, only the legality of accessory issues may be restored. Be. expressly stipulates the subjects of the later corrections, e.g., later determination of the degree of incarceration, or exact stipulation of the tasks to be conducted as community service work.

12. Specific Procedures

We shall refer to certain forms of criminal procedures as *specific procedures* that must be conducted in accordance with partially different organisational and procedural regulations than those pursued in compliance with the general rules. Statutory regulations of some of the specific procedures rely on the special scope of perpetrators, requiring the application of partially altering provisions of criminal material law (likely, in criminal procedure conducted against juvenile offenders or servicemen). On the other hand, other specific procedures may be conducted in relation with criminal offenses of minor (or at least, of relatively minor) gravity, for which faster adjudication of the case is the issue of state's and of social interests, that can be adequately ensured by the constitution of simpler procedural regulations (like the procedures of arraignment or the omission of the trial). Since Be. tends to enhance and facilitate the cooperation of the defendant, the institutions of admission and settlement have both required the implementation of a specific procedure, called the settlement procedure, that has gained a rather significant importance in criminal practices.

Principally, the provisions applicable in general procedures shall also prevail in specific proceedings, unless otherwise provided by the Act for the given procedure. Moreover, in the lack of the conditions required to pursue the specific procedure, the general procedure shall be conducted accordingly.

12.1. Criminal Procedures Against Juvenile Offenders

In accordance with the provisions of the Act on criminal proceedings, the procedure against juvenile offenders must always be conducted in a manner to promote social integration of the juvenile person through education, and his physical, intellectual, moral and emotional development, and also in order to prevent the juvenile offender to commit another offense [Section 677 Be.].

In the course of the criminal procedure, the authorities shall continuously examine, if there are any circumstances that would establish the obligations of either reporting or initiating the procedure of the authority defined in the Act on the Protection of Children and the Administration of Guardianship.

Rules define, that the so-called juvenile court and prosecutor for juvenile offenses shall proceed in criminal procedure pending against juvenile offenders, whereas participation of a defense counsel is mandatory.

The scope of evidentiary means is also extended (for example, with the misology and the probation officer's /presentence/ report regarding the individual evaluation of the juvenile person), furthermore, even in case the general conditions of such measure are determined, the detention of a juvenile offender may only be ordered, in case it is necessary upon specific gravity of the criminal offence (e.g. homicide cases).²⁷

12.2. Military Criminal Proceedings

Section 696 of Be. stipulates the personal effects of the military criminal procedures, according to which a military criminal procedure shall be conducted, for example, in case of a military criminal act committed by a soldier during the period his actual military service (e.g. desertion, mutiny); or in case of any criminal offenses committed by the members of the regular force of the Hungarian Armed Forces.

Military criminal trials shall be conducted by the *military panels* of the county court designated in a separate Act [Section 697(1) Be.], whereas the professional judge shall be a *military judge*. Tasks of prosecution shall be performed by the *military prosecutor* [Section 700(1) Be.]. In case the prosecutor's office (military prosecutor) is not responsible for the investigation, the commanding officer in charge shall proceed [Section 700(1) Be.].

In cases of military misdemeanour, the military prosecutor may find that the measure of *disciplinary castigation* is sufficient enough to attain the goals of punishment without conducting a criminal procedure.²⁸ In such cases, the military prosecutor shall reject the complaint or terminate the investigation, and shall order the conduct of the disciplinary procedure [Section 710(1) Be.]

12.3. Procedure against Persons Enjoying Immunity

The Act on criminal procedures classifies two groups of the *persons enjoying immunity*. On the one hand, it regulates the procedure against persons enjoying *immunity due to holding a public office*, and those enjoying *immunity under international law*.

Persons enjoying immunity due to holding a public office may be heard as suspects only after the suspension of their immunity, and also, before the suspension, no coercive measures may be applied against such individuals, unless being caught in the act.

Should any data assuming that the defendant is a person enjoying immunity be revealed during the criminal procedure, in addition to the suspension of the proceedings, a motion shall be filed for the decision of person authorised to suspend the immunity. Prior to filing the indictment, such motion shall be filed by the public prosecutor, and thereafter, or in cases subject to private accusation, by the court. If the person authorised to suspend the immunity has rejected the motion, the procedure shall be terminated.

Against *persons enjoying immunity under international law*, no criminal procedural actions may be conducted before the suspension of their immunity, not even in the case of being caught [Section 720(3) Be.]. The motion for suspending the immunity shall be submitted by the court through the minister responsible for justice, and the public prosecutor to the minister responsible for foreign policies [Section 720(4) Be.].

²⁷ Fantoly– Gácsi 2014. p. 250

²⁸ Hautzinger Zoltán *A magyar katonai büntetőeljárás fejlesztési irányai*. Dialóg Campus Kiadó, Budapest-Pécs, 2011. p. 183

12.4. Arraignment

The fundamental ground of this specific procedure is the social interest in establishing criminal liability, whereas in cases expressly stipulated by law, or otherwise, in cases of simple adjudication, arraignment allows relatively faster judgement of criminal culpability compared to the general criminal procedure.

The prosecutor's office may arraign the defendant to court within fifteen days accounted from the commission of the criminal offense, if

- the criminal offense is punishable by a maximum of 10 years' imprisonment by law;
- the adjudication of the case is simple;
- the means of evidence are available; and
- the defendant was caught in the act of committing the criminal offense.

If the defendant was not caught in the act, but all other statutory conditions are met, and the defendant has admitted the commission of the criminal act, the prosecutor's office may arraign the defendant to court within one month accounted from the questioning the defendant as a suspect.

12.5. Procedure in Case of Settlement

Be. classifies two different procedures based on a settlement. It is beneficial, if a settlement is concluded during the course of the investigation, so, such legal institution is acknowledged and regulated in Chapter LXV. titled '*Settlement of on the admission of criminal culpability*'. For such form of the defendant's cooperation (*type 1 of the defendant's cooperation*) the prosecutor's office, the defendant and – under the mandatory participation of – the defense counsel shall be entitled to conclude a formal settlement on the admission of the defendant's criminal culpability, independently from the court.

The settlement procedure shall consist of three phases during the investigation, namely, the initiation of the settlement (1), conducting the settlement (2), and finally, the conclusion of the settlement (3). In case a written agreement, a settlement is concluded in the course of the investigation, further procedural regulations shall alter accordingly. In case of *accusation upon a settlement* [Section 424 Be.], thus if the defendant and the prosecutor's office has concluded a settlement, the prosecutor's office shall, upon the same state of facts and classification of the offense, raise charges, and shall, alongside with the indictment, submit the minutes including the settlement to the court. In this case, the prosecutor's office shall file three motions to the court: once, a motion for the approval of the settlement, second, a request for imposing the same punishment (or the same measure) as agreed in the settlement, and at last, a motion for the conduct of further measures as stipulated in the settlement. The *procedure in case of settlement* is a specific form of procedure, stipulating the regulatory provisions applicable in the court procedure after the special accusation. In this unique procedure, the court shall examine legality and decide on the issue of approval of the settlement at its preparatory hearing.

Furthermore, in case of a statement of admission, the defendant's cooperation may also be acknowledged after the accusation, at the preparatory hearing (*type 2 of the defendant's cooperation*). However, the rules of this procedure are not specified among the provisions on the specific procedure, but they are stipulated as part of the regulations on the preparatory hearing referred on the rules of general procedure.

12.6. Procedure of Adopting a Criminal Law Ruling

The procedure of adopting a criminal law ruling is a legal institution targeting the fast conclusion of simpler cases of lesser gravity, whereas, in principal, the court shall establish the legal consequences of criminal law *in a ruling, without holding a trial*. The criminal ruling shall have the legal effect of the verdict.

At the motion of the prosecutor or ex officio, the court may adopt a ruling against the accused at liberty (or detained for another offense), upon a criminal offense punishable by a maximum three years' imprisonment by law, if the objective of the punishment can be attained without a trial [Section 740(1) Be.]. More than 2 years' of imprisonment can not be imposed in a criminal order.

The ruling on the omission of the trial may be adopted within *one month* period of time accounted from the arrival of the case to court [Section 741(1) Be.].

In case the statutory conditions of the omission of the trial are met, the court may deliver a ruling on the suspension of the execution of imprisonment, public community service, financial penalty, or it may imply suspension of the licence to practice, suspension of driving licence, prohibition to visit sport events, demotion (or in case of soldiers, further punishments), or as other coercive measure, it may order reparatory work, probation or the measure of reprimand.

The ruling delivered with the omission of a trial *shall not be subject to an appeal*, instead, on a general basis the prosecutor, the private accuser, the accused, the defense counsel, while the private party, the party of pecuniary interest and the person of other interest in respect of their affect shall be entitled to *request for a trial to be held* [Section 742(1) Be.]. Upon such request, the court shall hold a trial.

12.7. Procedure Against the Absent Defendant

Provided to secure the enforcement of the procedural principles, generally, the criminal procedure shall be conducted against defendants whose location is known to the authorities. Nonetheless, the fact that the quest for the defendant is not successful should not obstruct the state's interest to enforce its criminal law claims, therefore, the implementation of the statutory regulations on the procedure against the absent defendants was unavoidably necessary.

In case the criminal procedure is pending upon a criminal offense punishable with imprisonment against an absconding defendant, a so-called *warrant of arrest* shall be issued in the course of the investigation, and simultaneously, a defense counsel shall be appointed for the defendant. In its decision, the prosecutor's office shall declare that the defendant is absconding, and – if its conditions are otherwise met – press charges. In this case, the indictment must include the motion addressed to the court, to order the conduct of the investigation against the absent defendant.

The court shall proceed against the absconding defendant upon the prosecutor's motion to this effect. Participation of the defense counsel is mandatory at the trial held in the absence of the accused.

12.8. Procedure in the absence of the defendant staying abroad

If the defendant is staying abroad at a location known to the authorities, and there are no legal grounds to issue a European or international warrant of arrest, or the extradition or transfer of

the defendant has been rejected, the prosecutor may motion to hold the trial in the absence of the defendant.

12.9. Procedure conducted under the deposition of security

Security is a sum (of money) deposited by the defendant at the proceeding authority in order to ensure his participation in the criminal procedure. Following the deposition of the security, the procedural measures may be conducted and the trial may be held in the absence of the defendant as well.

Deposition of the security shall be admissible upon a criminal offense punishable by a maximum 5 years of imprisonment by law, also, it is presumable that the defendant shall be imposed financial penalty, furthermore, the absence of the defendant from the procedural measures and trial shall not conflict the interests of the procedure, and the defendant shall assign his defense counsel to perform the duties of the delivery agent.

12.10. Procedure Based on Private Accusation

Principally, the rights of raising charges and proceeding as counsel of prosecution shall fall into the competence of the prosecutor. The legal institution of the private accuser is an exception from this general clause, whereas the *victim shall have the right to represent the prosecution* in the procedure based on private accusation, for 7 criminal offenses stipulated in the Criminal Code, such as assault, defamation, slander, desecration, invasion of privacy, violation of secrecy of correspondence, or in case of making false audio- or visual recordings tending to harm a person's reputation.

The position of the private accuser is of a dual nature, whereas in addition to the rights of the victim, the *private accuser* shall be entitled to press charges and represent the prosecution as well. The burden of proving the criminal culpability of the defendant shall fall on the private accuser. However, it is a significant legal guarantee, that the prosecutor shall be entitled to take over the representation of the prosecution from the private accuser at any stage of the procedure, in such case the private accuser may only practice the rights of the victim. Should the prosecutor waive the rights to represent the prosecution later, this role shall be taken over by the private accuser once again.

In cases of mutually committed assault, slender or defamation, the defendant shall be entitled to raise charges against the private accuser (that is the so-called counter-charge) [Section 763 (1) Be.]. Speciality of the procedure based on private accusation is the so-called personal hearing, whereas the court shall endeavour to reconcile the complainant and the reported person before entering into the substantial discussion of the case.

12.11. Procedure upon Substitute Private Accusation

The objective of the legal institution of the substitute private accuser is to ensure the enforcement of the victim's rights on the one hand, and also to serve as a correction factor to the monopoly of prosecution on the other hand, especially in cases when wrongful measures of the prosecutor may hinder the initiation of the court procedure. The victim may act as substitute private accuser if

- the prosecutor's office or the investigating authority has rejected the complaint,
- the prosecutor's office or the investigating authority has terminated the procedure (investigation),
- the prosecutor's office has dropped the charges.

12.12. Procedure conducted for the deprivation of assets or property, or for rendering data inaccessible

Such specific procedure shall be conducted if certain measures of criminal law (confiscation, forfeiture of property, rendering of electronic data inaccessible) can not be conducted during the ordinary (general) procedure due to certain procedural obstacles, or they could not have been performed until the conclusion of the procedure, however, the constitution of the criminal measures can not be omitted in order to terminate the unlawful circumstances (for example, forfeiture of the property must be ordered and executed).

12.13. Procedures based upon criminal offenses related to the physical barrier of the state

The statutory regulations of this procedure specify the provisions applicable during the adjudication of the criminal offenses of illegal crossing physical barrier of the state, damaging the physical barrier of the state or hindering the construction work related to the physical barrier of the state, furthermore, the criminal procedures pending upon other criminal offenses committed in relation with such criminal acts shall be conducted in accordance with such specific provisions as well. According to the principal rule, a single judge shall proceed, under the exclusive competence of the county court located at the seat of the regional court.