

Introduction to the New Hungarian Criminal Procedure³ (Part I.)

I. Preamble

I.1. Criminal procedure and criminal procedural law

Criminal procedure is the rules and laws governing the mechanism under which criminal liability is established and adjudicated. It starts with the initial investigation of the criminal case and concludes with the final and binding decision of the case. Final adjudication is in the competence of the court, concluded in the decision on the merits, either in the form of final judgement or a final order. In case of extraordinary remedies, exceptionally, criminal procedure shall continue, despite the final conclusion, in principle final adjudication of the court means the end of criminal procedure. However, sometimes criminal procedure does not reach the court proceeding, i.e. it is concluded in the main course of the investigation before the prosecution necessary to conduct the criminal trial. During the period of the investigation, the order of both the investigating authority and the public prosecutor's office may terminate the procedure, but as a general rule, it does not mean the final completion of the criminal case, whereas if there is any information about conducting the criminal offence known to the competent authority, they may proceed with the investigation.⁴

Criminal procedure can not stand without the definition of criminal procedural law: the framework of laws and rules that define the administration of criminal liability, govern procedural measures and relationships of the rules of procedure. Criminal procedural law forms part of criminal sciences, as an integral part of public sciences thereto. There are two large subdivisions within the system of criminal sciences, namely the normative and empirical sciences. The science of criminal procedural law is situated within the frame of normative sciences, alongside with criminal law and the rules of law enforcement. The object of the science of criminal procedural law is the understanding, presentation and analysis of the specific statutory provisions of criminal procedural law (e.g., the Act on criminal proceedings). On the other hand, for example, empiric criminal sciences are Criminology and Criminalistics, moreover, there are other criminal sciences of interdisciplinary nature, such as, for example, judicial statistics or criminal psychology.⁵

It is the nature of criminal procedure, that authorities may conduct binding decisions that are enforceable upon public power regarding other participants of the procedure. As for possible compensation, the Act on criminal proceedings safeguards the position of subservient subjects with various guarantees. Such as, for example, the right of appeal, or that the rule, according which the accused is not obliged to testify, nor to tell the truth.

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⁴ Fantoly Zsanett – Budaházi Árpád: *Büntető eljárásjogi ismeretek. I. Statikus rész. Dialóg Campus Kiadó, Budapest, 2019. p. 13* (hereinafter referred to as the „Fantoly – Budaházi 2019 (A)”)

⁵ Balláné Füsztér Erzsébet - Lakatos János: *Kriminalisztika I. - A kriminalisztika egyes elméleti kérdései. Egyetemi jegyzet. NKE RTK, Budapest, 2012. p. 10*

1.2. Tasks of criminal procedure

There are three requirements against criminal proceedings that the authorities acting in criminal cases must follow:

to enforce criminal law,
to ensure the rule of law,
to establish the truth.

Enforcement of criminal law

A penalty or measure of criminal nature may only and exclusively be imposed by the court proceeding in the criminal case, under the rule that the conditions of criminal liability are defined by criminal law. Criminal procedure is not the substantive legal consequence of the act, but its objective is to determine whether the conditions of adjudicating criminal liability and administering a penalty and/or measure are met. If the conditions are met, the court shall find the accused guilty, and shall impose penalty and/or measure.⁶

Ensuring the rule of law

In the course of criminal procedure, authorities shall be obliged to meet all applicable statutory provisions of (both criminal and criminal procedural) law, and must also ensure, that the rules are also met by other subjects of the procedure. Section 3 (5) of Be. states that ‘the accused shall be entitled to defend himself at large’. Further legislative requirements state, that everyone who has committed a criminal offence shall be liable for and must be punished for the criminal offence in accordance with the criminal act and as justified by perpetrator’s threat to society. On the other hand, no one, who did not commit a criminal act, or who is exempt from criminal liability, or who’s punishment is otherwise unnecessary, should not be adjudicated or prosecuted.

Establishment of the truth

Establishment of the truth is the public power and exclusive right of the court. The judgement of the court is legally binding, as if it holds the power of truth, so when the court finds the accused guilty, it shall be deemed as the accused committed the crime and all actions that court imposes against him in its judgement.⁷

1.3. Legislative grounds of criminal procedural law

The legal fundament of criminal procedural law is Act XC of 2017 on criminal proceedings (Be.). Nevertheless, several other statutory regulations govern criminal procedures. The most significant provisions are implemented in the following statutory provisions:

the Fundamental Law of Hungary

⁶Tóth Mihály: A magyar büntetőeljárás az Alkotmánybíróság és az európai emberi jogi ítélkezés tükrében. KJK-KERSZÖV, Budapest, 2001. p. 63

⁷Király Tibor: Büntetőítélet a jog határán. Közgazdasági és Jogi Könyvkiadó, Budapest, 1972. p. 183

Act C of 2012 on the Criminal Code (Btk.)
 Act V of 2013 on the Civil Code (Ptk.)
 Act CXXX of 2016 on the Code of Civil Procedure
 Act II of 2012 on Misdemeanours, the Misdemeanour Procedure and the Misdemeanour Registry System (Sztv.)
 Act I of 2017 on the Code of Administrative Court Procedure
 Act CLXI of 2011 on the Organisation and Administration of Courts (Bsz.)
 Act CLXIII of 2011 on the Prosecution Service of Hungary (Ütv.)
 Act XXXIV of 1994 on the Police (Rtv.)
 Act XI of 1998 on Attorneys (Üt.)
 Act CCXL of 2013 on the Execution of Punishments, Measures, Forced Measures and Detention for Misdemeanours (Bv. tv.)
 Act XXIX of 2016 on Judicial Experts (Szaktv.)
 Act CLV of 2009 on the Protection of Classified Information (Mavtv.)
 Act XXXVIII of 1996 on International Legal Assistance in Criminal Matters (Nbjt.)
 Act CLXXX of 2012 on Cooperation in Criminal Matters with the Member States of the European Union (EU bü. tv.).
 -several international conventions and treaties (e.g., the Convention for the Protection of Human Rights, the International Covenant on Civil and Political Rights)

I.4. Phases of criminal procedure

Criminal procedure can be divided to two main phases: the main phase of investigation and the court procedure. Theoretically, the main phases are consecutively follow each other, nevertheless, there is a statutory chance, that the procedure is limited to either the main investigative or to the court procedure. The procedure is exclusively investigative if the investigating authority or the prosecutor terminates the investigation on certain statutory grounds [Sections 398-399 of Be]. On the other hand, the so called private prosecution cases shall only be conducted in trial, in the court phase [Chapter CIV of Be.].

The main phases of the criminal procedure can be divided to further sequences:

main phase of investigation	court procedure
1. investigation	1. first instance trial
1.1. preliminary investigation	1.1. preparation of the trial
1.2. inspection	1.2. first instance trial
1.2.1. classic inspection	2. second instance court procedure
1.2.2. accusation	3. third instance court procedure
	4. extraordinary remedies

Be. has introduced the legal term of preparatory procedure, which is already a part of the criminal procedure, however, it precedes the main investigative sequence. Should it result in the suspicion of crime, the preparatory procedure is concluded by the initiation of the investigation. Nevertheless, the prosecutor's office or the body conducting the preparatory procedure shall terminate the preparatory procedure, in case it finds, that suspicion of the criminal offence still can not be established, or the continued preparatory procedure is not expected to yield any result, or if the deadline of the preparatory procedure has otherwise elapsed.[Section 346 (1) of Be.] Investigation consists of two phases, namely, the preliminary investigation and the inspection. The investigative authority's procedure conducted against an

unknown perpetrator shall be subject to a preliminary investigation, whereas the authority shall investigate the criminal offence and it shall aim to determine the identity of the suspect as soon as possible. As the identity of the suspected perpetrator is revealed, the investigation shall be followed by the prosecutor's inspection. Target of the inspection is the preparation of the accusation and establishment of criminal liability, through the course of procedural measures conducted in order to determine the state of facts, and to record the evidence relevant regarding the inspection of the offence and the suspects' liability. In accordance with the provisions of Be., the sequence of the accusation is not an individual phase of the criminal procedure, but an integral part of the main phase of the investigation.⁸

II. Fundamental principles of the criminal procedure

Definition of fundamental principles

Fundamental principles are statutory norms (rules) of general content that pervade the entire criminal procedure, defining its system and the significant elements of rights and obligations of the procedure's participants. It is the characteristics of fundamental principles that they generally applicable during both during the investigation and in the court procedure, however, there are certain fundamental principles (e.g., immediacy, verbatim, publicity) that only apply to the court procedure.⁹

Organisational fundamental principles appear both in criminal and civil jurisdiction, typically by securing the personnel and adequate organisational structure of criminal procedures under the rule of law. As of their legislative grounds, the Fundamental Law and various other organisational (court, prosecutor's service, etc.) statutory provisions of law implement fundamental legal principles.

Organisational legal principles:

- principle of exclusive court jurisdiction;
- equality before law;
- joint arbitration;
- participation of people, that is the participation of non-professional individuals in the jurisdiction and
- judicial independence.

The operational principles guide the entirety of the criminal procedure. Partially, Chapter I. of Be. stipulates the operational principles, while the rest of the fundamental procedural measures are spread amongst other provisions of Be. (for example, the principle of freedom of evaluating evidentiary means among the rules on evidentiary procedure). Nonetheless, the law does not expressly refer to the expression of 'fundamental principle', instead, in Chapter I. it stipulates statutory rules under the title of 'General provisions', that serve as guidelines for jurisdiction.

Operational fundamental principles:

- presumption of innocence;
- protection of fundamental rights;
- right of defense;
- fundamentals and obstacles of the criminal procedure;
- division of operational tasks;
- grounds of adjudication, judgement upon accusation;

⁸Fantoly – Budaházi 2019 (A), p. 17

⁹Fantoly Zsanett - Gácsi Anett: Eljárési büntetőjog. Statikus rész. Iurisperitus Bt., Szeged, 2013. p. 51

- evidentiary principles (burden of proof, favordefensionis, prohibition of self accusation, in dubio pro reo, independent adjudication of criminal liability);
- language of the criminal procedure and the right of using a language;
- verbality, immediacy and publicity.¹⁰

III. Effect of the Be.

The last Section of the Chapter titled as ‘General provisions’ of Be. stipulating the fundamental principles regulates the effect of the law. In accordance with the provisions of Section 9 of Be., ‘*In cases governed by Hungarian law, the provisions of this Act shall prevail in criminal proceedings.*’ However, only the rules on the material effect of the law are stipulated among the Fundamental provisions, the regulations related to the temporal effects are placed in the scope of the Interim provisions, implying the measures of applying the provisions of the new code on criminal procedures in pending cases following July 1, 2018.¹¹

IV. Subjects of the criminal procedure

Classification of the subjects

Procedural actions completed during the criminal procedure are connected to subjects, that are authorities on the one hand and private persons on the other hand. Both authorities and private persons may practice rights and have obligations, and they may pursue criminal procedural acts in order to practice such rights and to fulfil obligations. The difference between authorities and private persons is manifested in their relation to the completion of criminal procedural acts (enforcement of criminal law, ensuring legality, verification of justice). The implementation of criminal procedural acts is an official obligation, therefore, the authorities of executive power originating from the state’s legitimacy are subjects of criminal procedures with the widest range of rights and obligations.¹²

Authorities involved in criminal procedures:

- investigating authority,
- prosecutor’s office,
- court.

We shall distinguish between authorities of final judgement and judicial powers. Authorities of final judgement enforce the demands of criminal law, therefore, during the preliminary investigation the authorities of final judgement are the investigating authority and the prosecutor’s office, further, in the investigating sequence it shall be the prosecutor’s office, and finally, during the court procedure it shall be the court exclusively. Stipulating authorities, Be. refers to other entities that may get involved in criminal procedures without investigative powers, such as the body entitled to use covert measures during the preliminary procedure.

Private persons also play an important part in the criminal procedure, namely by forming and constituting the course of the criminal procedure through their reflections and observations, motions, by the practice of their rights and fulfilments of their obligations, etc. Be. distinguishes between participants and assistants amongst the private persons.

¹⁰Fantoly – Budaházi 2019 (A), pp. 20-21

¹¹Justification

¹²Fantoly – Budaházi 2019 (A), p. 39

The participants in criminal procedure:

- defendant,
- counsel for defense,
- victim,
- private accuser,
- substitute private accuser,
- private party,
- other party of pecuniary interest,
- other interested parties,
- legal party subject to procedure.

The assistants represent and protect rights and legal interests, moreover, they assist the practice of rights and obligations, therefore, their actions are not singular, but they are always connected to some other participants of the criminal procedure.

Assistants according to the Be.:

- legal representative,
- major relative of the defendant,
- in case of foreign defendant, victim and witness, the representative of the consulate;
- spouse or companion of the defendant effected by involuntary treatment in a mental institution,
- major person attending the minor or juvenile offender;
- authorised representative,
- supporter,
- major person determined by the victim and the accuser,
- attorney at law proceeding in the interest of the witness,
- proxy effected by the search or other neutral major party present at the search,
- major person determined by the person under body search,
- delivery agent,
- person protecting the party participating in the Defense Program.

There other subjects of the criminal procedure who may only participate through one-on-one procedural measure in the criminal case, promoting the completion of the authorities' and other participants' tasks, similarly to the assistants:

- witness,
- expert,
- interpreter,
- expert counsel,
- official witness,
- keeper of the minutes.

IV.2. Authorities proceeding in criminal cases

IV.2.1. Investigating authority

For reconnaissance of criminal offenses, the investigating authority conducts the preliminary proceedings and the investigation – the latter of the two sequences, namely the preliminary investigation and the inspection. [Section 31. (1) Be.] During the course of the preliminary procedure and the preliminary investigation, the investigating authority's operations are independent, whereas the prosecutor's office's power is limited to legal supervision. In the sequence of preliminary investigation, legal supervision aims to secure that

the investigating authority shall complete its independent investigative actions properly, with respect of legality and human rights, provided that case shall reach to the phase of investigation. In the course of legal supervision, the prosecutor's office may examine and modify the orders and measures of the investigating authority, furthermore, it shall eliminate any eventual infringements without delay, moreover, it shall adjudicate the complaints filed against the motions of the investigating authority's orders, etc.

As soon as there are grounds of reasonable suspicion against a certain person of committing a criminal offense and his interrogation as a suspect has been completed, the phase of inspection shall replace the preliminary investigation under the control of the prosecutor's office. Regardless, the investigating authority continues to take part in the investigation, however, its measures of manoeuvre are narrowed, whereas generally procedural acts may only be conducted upon the prosecutor's office's measures made under its power of control. The prosecutor's office notifies the investigating authority on the duties in the form of command, whereas the head of the investigating authority shall be responsible for the fulfilment of the tasks within the given deadline.

Such investigative measures shall orient the investigating authority's obligations, therefore, it must scout and detect the criminal offense and the perpetrator's identity to the degree sufficient in order to establish reasonable suspicion in the course of the preliminary investigation, furthermore, it must detect and secure the evidentiary measures. Nevertheless, during the phase of inspection, it must acquire other necessary evidentiary measures, proceeding either in its discretionary powers or upon the prosecutor's instructions. [Be. 348. §]

Authorities conducting investigative measures	
police	general investigating authority, investigating all cases, unless referred to the competence of other investigating authority by the Be.
National Tax and Customs Administration of Hungary (hereinafter: NAV)	in case of criminal offenses expressly stipulated in Section 34 (2) of the Be.
prosecutor's office	investigates or conducts legal supervision of the preliminary investigation and controls the inspection
judge advocate, the prosecutor appointed by the public prosecutor to the martial criminal procedure	proceeds in military criminal procedures (Chapter XCVI of Be.)
commander in charge	proceeds in military criminal procedures (Sections 701-703 of Be.)
commanding officer of the commercial vessel of civil aircraft of Hungarian nationality outside Hungary	proceeds in cases related to criminal offenses falling under Hungarian criminal jurisdiction in accordance with the provisions of Section 34 (3) of the Be.
joint task force	according to Section 354 (1) of Be. or Sections 70/A-70/H of the EU bü. tv.

Without conducting any actual investigative measures, other bodies, such as, for example, the

NVSZ (national Protective Service), the TEK (Counter Terrorism Centre) or the body responsible for the management of corpus delicti and criminal assets may also be involved in criminal procedures.

The police

The general investigating authority is the police, in fact, the investigating departments of its body's established for general police tasks, appointed to official investigative measures. [Section 34(1) of Be.] The classification of the general investigating authority means that according to the principal rules, investigation is conducted by the investigative bodies of the police, while other investigating authorities (e.g., the NAV) only if ordered by the Be. accordingly. The police is divided to central, regional and local investing authorities.

Central investigating authority:

-National Police Headquarters (hereinafter referred to as ORFK)

Regional investigating authorities:

-19 county police headquarters and the Budapest Police Headquarters;

-the Intervention Police;

-the Airport Police Department.

Local investigating authorities:

-the police stations,

-the water police departments [Section 1(2) of Decree No 25/2013. (VI. 24.) of the Ministry of Internal Affairs]

There are three water police departments that is the Danube Water Police Department, the Tisza Water Police Department and the Balaton Water Police Department.

IV.2.2. The prosecutor's office

The prosecutor's office is a centralised organisation and apparatus of hierarchical structure, operating under one-man control and command of the public prosecutor. The prosecutor's office is responsible for crime investigation, it acts against other unlawful actions and malpractices, furthermore, it helps the prevention of injurious actions. In accordance with the provisions of Section 29(1) of Be. as a rule, the competence and jurisdiction of the prosecutor's office shall depend on the competence and jurisdiction of the court where it operates.

The prosecutor's office has multifunctional roles during the criminal procedure, whereas it

-conducts legal supervisory tasks of the preliminary investigation,

-controls the inspection,

-conducts investigation in certain cases,

-decides on the issue of accusation after the completion of the investigation,

-presents the case in a criminal trial against the accused.

Legal supervision of the preliminary investigation

The prosecutor's office shall conduct judicial supervision over the preliminary investigation when the investigation is pursued by the investigating authority.

In this view, the prosecutor's office

- may assign the investigation or the amendment of the complaint into the independent power and procedure of the investigating authority;
 - may pursue judicial supervision over the proceedings of the investigating authority;
 - may repeal the unlawful decisions of the investigating authority;
 - may establish that the investigating authority has conducted the procedural act or measure in an unlawful manner;
 - may call on the investigating authority to remedy the injustice determined;
 - in cases expressly specified in the Be., it may authorise the conduct of certain procedural acts or decision making;
 - shall adjudicate complaints against the investigating authority's decisions and motions filed against the suspicion;
 - shall decide over the complaint filed against the investigating authority on the grounds of delay;
 - may be present may be present at the investigative actions, and may demand presentation of the documents of the investigation. [Section 26(2) of Be.]
- In addition to that, the prosecutor's office may pursue certain procedural measures independently, even if the investigation is otherwise conducted by the investigating authority. In accordance with the statutory provisions of Section 26(4) of the Be., such authority does not affect the independence of the investigating authority's proceedings. However, contrary to the above, the prosecutor's office's power to may allocate the proceedings to its own competence during the preliminary investigation does effect such independence.

Controlling the inspection

Following the interrogation of the suspect, the prosecutor's office shall, upon the documents of the investigation examine whether the case qualifies for

- the projection of prosecutor's measures or decision;
- the initiation of settlement;
- the suspension of the procedure provided to pursue an intermediary procedure;
- conditional suspension by the prosecutor's office;
- the termination of the procedure on other legal grounds;
- indictment;
- the conduct of other procedural measures within the frames of inspection;
- severance, consolidation or transfer of the case. [Section 391(1) Be.]

Should the prosecutor's office decide that the conduct of further investigative measures is required, besides its powers stipulated at the preliminary investigation, the prosecutor's office shall also be entitled to

- order the investigating authority to conduct certain procedural measures,
- prohibit the conduct of certain procedural measures,
- modify or repeal the decision of the investigating authority,
- order the investigating authority to adopt a decision,
- order the preparation of the prosecutor's office's decisions by the investigating authority,
- condition the conduct of the procedural measure or adoption of the decision to prior consent,
- request a report from the investigating authority [Section 26 (3) of Be.]

The investigation of the prosecutor's office

Principally, there are three main fields of investigations conducted by the prosecutor's

office:

- in order to determine the conditions of the indictment, the prosecutor's office shall be entitled to conduct the investigation on its own, in case the investigation has been originally initiated by the prosecutor's office or if it has allocated the investigation to its own competence;
- there are certain criminal offenses against which the investigation falls under the exclusive competence of the prosecutor's office (as expressly stipulated in Section 30 of the Be.);
- in accordance with the provisions of Section 32 (6) of the Be., the prosecutor's office shall conduct the investigation if the statutory grounds of exclusion effect the head of the investigating authority of national competence.

Indictment

If the prosecutor's office decides to press charges in the procedural course of the inspection, it shall file the indictment to the court. There is no legal remedy against such motion. [Section 421 of the Be.] Furthermore, the prosecutor's office shall ensure that the documents of the investigation and the evidentiary measures are available for the court, moreover, it shall inform the suspect, the defense counsel, the complainant and the proposer of the private motion about the indictment. [Section 423 of Be.]

In the trial, the prosecutor's office

Participation of the prosecutor's office in the court procedure is mandatory, whereas, with the exception of the private motion and the substitute private motion, it shall press and present charges, during which it may either modify or drop charges. The prosecutor's office is entitled to survey the documents of the case during the court procedure, additionally, it may also make motions and proposals in every issues that otherwise fall into the competence of the court. Moreover, the prosecutor's office shall have the right of legal remedy during the court procedure, whereas it may appeal both against or in favour of the defendant.

IV.2.3. The court

In accordance with the provisions of Section 11 of Be., the court shall be responsible for the administration of justice. In the course of administering justice, the court shall conduct any and all criminal procedural tasks determined in the statutory provisions of the Be., for example, it may decide over pre-trial detention or on the exclusion of the defense counsel. In our country, a four-level judiciary apparatus administers the legal remedy system of dual nature.

Levels of the Hungarian judicial system:

- Curia,
- regional courts of appeal,
- regional courts,
- district courts.

Judicial administration – composition of the court

Typically, district courts and regional courts shall proceed as a single judge,

nevertheless, it is also possible that the court shall proceed in a panel comprising three judges. Different from the previous Be. of 1998, no associate judges, but only professional judges shall proceed in the court procedure (with the exception of military criminal procedures and of criminal procedures against juvenile offenders). The court shall act in a panel consisting of three professional judges if the single judge has forwarded the case to the panel of the court. In such cases, the procedure shall not be readdressed to a single judge. Should the court of first instance proceed in a case of priority economic related offense, mandatorily, the panel shall consist of three professional judges, with the speciality of fact that one of the judges shall be the appointed member of the regional court's economic law department, or in default of that, the appointed judge of the civil law department. [Section 13(3) of Be.] Courts of second and third instance shall act in a panel consisting of three professional judges. Should the court of the second or third instance decide upon the complexity of the case, the volume of the case's documentation, upon the number of participants, or due to other reasons, exceptionally, the court may allocate to criminal case to a panel of five professional judges in procedures regarding priority economic related offenses. [Section 13(5) of Be.] Nevertheless, even in such cases, such right of the court remains discretionary, whereas the court of second or third instance may remain to administer the trial in a panel of three professional judges.

IV.3. Participants of the criminal procedure

IV.3.1. The defendant

The defendant is the person against whom criminal proceedings are instituted. It is a generic term that includes the suspect, the accused and convict as well. The proper term shall be used in different phases of the procedure accordingly. The defendant is called suspect in the course of the investigation, accused in the course of the court procedure and convict after the final imposition of the sentence, or the definitive imposition of the reprimand, probation or corrective education.

Viewing his rights, we may find, that the defendant has all the rights ensued from the principals stipulated among the general terms. First of all, we may refer to the protection of principal rights [Section 2(1) of Be.], for example, obliging the authorities to act in criminal procedures with respect to the human dignity of everyone, that is, on the other hand, the defendant's right to the protection of his human dignity in all and any procedures against him. In accordance with the provisions of Section 8 (3) of the Be. in criminal proceedings all those not knowing the Hungarian language may use their native language.

Moreover, the Be. expressly classifies further rights of the defendant. According to these statutory provisions, the defendant shall be entitled to

- a) receive information on the suspicion, on the charge and any changes therein;
- b) be granted sufficient time and opportunity for preparing his or her defence by the court, the prosecutor's office and the investigating authority;
- c) receive information from the court, the prosecutor's office and the investigating authority concerning his or her rights and obligations during the criminal proceedings;
- d) authorise a defense counsel to conduct his defence or to initiate the appointment of a public defender;
- e) contact his or her defense counsel without control;
- f) make a testimony or to reject making a testimony;
- g) provide evidence, make motions and observations, and to have right to the last words;
- h) be present at the trial and at the hearing of the decision on the coercive measure subject to judicial permission effecting his personal freedom and to initiate questions in accordance with

the statutory provisions of the Be.;

i) have the right to legal remedy;

j) observe the entire documentation of the criminal case with the exceptions expressly stipulated in the Be.;

k) initiate the conclusion of a settlement, and to initiate the prospective measures or decisions of the prosecutor's office [Section 39(1) Be.]

With regards to defendants in custody, the Be. stipulates further statutory rights, for example, his right to be informed about the legal grounds of his custody and the modifications of such reasons; furthermore, he is entitled to request the notification of an appointed person on the custody by the court, the prosecutor's office or the investigating authority.

Rights of the defendant can be classified according as they are connected to the defendant's right to be informed on the case or to his rights to proceed with the criminal case. As for his rights to be informed about the case, the defendant shall be entitled to

be informed on the subject of the procedure,

be present at the procedural measures (limited during the investigation),

gain access to the documents of the procedure (broadens in the court procedure),

ask questions and to inquire information.¹³

IV.3.2. The counsel for the defendant

The counsel for the defendant may be a lawyer acting upon a power of attorney or an official appointment.¹⁴ Prior to the indictment, a legal trainee may also participate in the criminal procedure as a defense counsel (with the defense attorney or as his substitute), furthermore, he shall also be entitled to proceed before the district court or the regional court after the accusation, under the restriction that he may not present the pleading.

The defense counsel may be authorised by the defendant, his legal representative or major relative, or, in the case of foreign citizens, the officer at the consulate of their native country. [Section 45(1) Be.] The defendant may withdraw the power of attorney, regardless of whether the counsel of defence was retained by himself or by his supporter.

Public defender shall act in the criminal procedure if
defence is statutory in the criminal procedure and the defendant has not authorised a counsel for the defence;

defence is not mandatory in the criminal procedure, but the proceeding authority deems the participation of the public defender necessary, provided to secure sufficient defence of the defendant;

the defendant requests the appointment of a public defender on the ground of inability to make arrangements for his defence due to his financial standing.

Legal status of the counsel for the defence

The defense counsel is independent participant of the criminal procedure thereto, consequently, his rights and obligations are not related to those of the defendant, but individually, as subjective rights.

Rights of the defense counsel:

¹³ Fantoly – Budaházi 2019 (A) pp. 50-54

¹⁴ See more detail: Fenyvesi Csaba: A védőügyvéd. A védő büntetőeljárás szerepéről és jogállásáról. Dialóg Campus Kiadó, Budapest-Pécs, 2002.

- unless otherwise stated in the provisions of Be., he shall be entitled to practice the rights of the defendant, except for those of the exclusive privilege of the defendant (for example, he may not make a testimony);
- he may be present at procedural measures where the defendant may be present or where the defendant's presence is mandatory;
- in cases expressly stipulated in the statutory provisions he may also be present at procedural action at which the defendant may not be present or his presence may be limited (for example, he may be present at the interrogation of the defendant, furthermore, at the testimony of witness appointed by the defence);
- he may gather and collect data under specific statutory possibilities and conditions, and may use the services of a private detective;
- he is entitled to be served on the decision otherwise addressed to the defendant by the authority;
- the public defender and the substitute defense counsel shall be entitled to a fee and reimbursement of expenses;
- the appointed defence counsel shall be entitled to a fee¹⁵;
- the defence counsel shall be entitled to make motions.¹⁶

The defence counsel shall be obliged:

- to establish contact with the defendant without delay;
- to use any and all legitimate measures and methods of defence for the benefit of the defendant in due time;
- to inform the defendant about the legal measures of defence, furthermore, to inform the defendant on his rights and obligations;
- to urge the investigating action of the extenuating circumstances and the exploration of other circumstances that could mitigate the defendant's criminal liability thereof;
- to appoint a substitute counsel for the defence in case of hindrance or incapacitation –with the exception of cases of unknown vis maior –, and simultaneously, he shall be obliged to inform the proceeding court, the prosecutor's office or the investigating authority on the fact of hindrance;
- to practice his rights and fulfil his obligations in manner he shall not obstruct timely completion of the criminal procedure. [Section 42 (4) Be.]

IV.3.3. The victim

The victim is the natural or a non-natural person whose right or lawful interest has been violated or jeopardised by the criminal act directly. [Section 50Be.]

Legal status of the victim

Rights of the victim related to the cognizance and advancement of the case

In the course of the inspection sequence of the investigation, the victim shall have the right to be present at the procedural measures whereas the presence of the suspect is allowed by the Be., under the statutory restriction that the procedural measure must related to the

¹⁵ Bérces Viktor László: A védő szerepkör értelmezésének kérdései – különös tekintettel a büntetőbíróság előtti eljárásokra. Pázmány Press, Budapest, 2014. p. 80

¹⁶ Király Tibor: A védelem és a védő a büntető ügyekben. Közgazdasági és Jogi Könyvkiadó, Budapest, 1962. p. 163

criminal act committed against the victim. His right to access the documents of the procedure has the same legal character, since the victim may only gain access to the documents of the investigation in connection with the criminal act committed against him. If the appeal has been rejected or the in case the investigation is terminated and the victim's complaint has been rejected, the victim rights to access the documents is widening, whereas he shall have the opportunity to examine the documents on the criminal action committed against him in the official facility of the prosecutor's office, with the exception of the documents to be handled confidentially. [Section 791(2) Be.] This opportunity is granted to the victim in order to decide whether to act as a substitute private accuser upon the knowledge of the documents. His rights to propose questions and request for information, furthermore, the rights to advance the procedure are similar to those of the defendant, nevertheless, as of the latter, the victim may not appeal against the final and binding order of the court.

Other rights of the victim

For example, the victim shall be entitled to

- submit evidence;
- make motions and observations;
- make addresses during the closing arguments;
- be present at the trial and at the procedural measures stipulated by law and to address questions;
- inspect the documents completed in connection with the criminal act affecting the victim – with the exceptions expressly stipulated in the Be.;
- receive information from the court, the prosecutor's office and the investigating authority concerning his rights and obligations in the criminal procedure;
- file for legal remedy;
- request for the participation of an assistant;
- enforce civil law claims as a private party in the court procedure, and to announce such intention during the investigation;
- act as a private accuser or substitute private accuser, furthermore,
- at any stage of the procedure, the victim shall be entitled to make a statement on the physical or mental assaults and on the eventual pecuniary losses suffered in connection with the criminal act, moreover, he may indicate his will on the determination of the defendant's criminal liability and on his punishment.

Obligations of the victim

The victim shall be obliged to

- be present at the procedural actions (including the expert's inspection) in accordance with the measures of the court, the prosecutor's office and the investigating authority, provided by the statutory provisions of the Be. [Section 51(6) a) Be.];
- report his or her place of residence, address for correspondence, place of stay, postal address and any change therein to the proceeding authority, within three working days after moving or change [Section 51(6) b) Be.];
- make a testimony, if there are no obstacles to proceed as a witness;
- tell the truth;
- deliver the evidentiary measures in his or her possession to authority, and otherwise support successful completion of the proceeding by all means possible.

IV.3.4. The private accuser

In case of criminal acts subject to private accusation prosecution shall be represented by the victim before court, on the supposition that the perpetrator can be prosecuted upon a private motion.¹⁷ Accordingly, the private accuser may act in cases of assault, invasion of privacy, violation of secrecy of correspondence, defamation, slander, desecration, or in case of making false audio- or visual recordings tending to harm a person's reputation, whereas, non-natural persons may also act as private accusers in cases of invasion of privacy, violation of secrecy of correspondence, defamation, slander, or in case of making false audio- or visual recordings tending to harm a person's reputation. [Section 53(1) Be.]

IV.3.5. Substitute private accuser

The substitute private accuser is the victim, who – or in case of non-natural persons, which – may raise and represent charges in accordance with the statutory provisions expressly stipulated in the Be. in cases subject to public prosecution.[Section 54 Be.]The victim may act as substitute private prosecutor if his or her complaint filed against the prosecutor's office's or the investigating authority's decision rejecting the report or terminating the procedure has been rejected, furthermore, if the prosecutor's office has dropped the charges. Section 787 (3) of the Be. specifies the exceptions whereas substitute private accusation is not allowed.

IV.3.6. The private party

The private party is the victim who or which enforces a civil law claim in the criminal procedure, even if the victim has announced such intention before the indictment. [Section 55 (1) Be.]The relevance of the private party's legal institution is shown in the statutory allowance,that the victim suffering pecuniary losses caused by the criminal act may access compensation for damages in the criminal procedure, without having to claim for damages before a civil law court, if the perpetrator is not willing to pay the damages caused. Authorities inform the victim on the possibility to file a civil law claim at the report or at the witness interrogation, in order to clear, whether the victim is willing to seek for compensation or not. The victim may announce the withdrawal of the civil law claim at any time prior to the indictment.

IV.3.7. Other party of pecuniary interest

Other party of pecuniary interest is a natural or non-natural person who or which

- a) is the owner of a property subject to confiscation or forfeiture, or is the beneficiary of any partial possession rights of the ownership right,
- b) has the right of disposal over assets that may be subject to confiscation, or
- c)has the right of disposal over any electronic data, that can be subject to permanent inaccessibility. [Section 57(1) Be.]

¹⁷ Justification

IV.3.8. Other interested parties

Other interested parties are especially

- a) the complainant,
- b) the witness,
- c) the person effected by the inspection or subject of the body search,
- d) the person effected by data gathering,
- e) the person effected by the expert survey, the on-site inspection and reconstruction,
- f) the assistant,
- g) the expert and the expert counsel. [Section 58 (2) Be.]

Other interested parties are any natural or non-natural persons whose rights or lawful interests may be directly affected by the decisions made during the criminal proceedings, furthermore, those who or which are subject to statutory rights and obligations expressly stipulated in the Be. in connection with procedural measures effecting them. [Section 58(1) Be.]

IV.3.9. The assistants

Provided to represent and to protect the rights and lawful interests of the defendant, the victim, the other party of pecuniary interest and of the other interested parties, and for the purpose of helping the practice of rights and fulfilment of obligations set forth in the Be., the following assistants may participate in criminal proceedings:

- legal representative,
- major relative of the defendant,
- in case of foreign defendant, victim and witness, the representative of the consulate;
- spouse or companion of the defendant effected by involuntary treatment in a mental institution,
- major person attending the minor or juvenile offender;
- authorised representative,
- supporter,
- major person determined by the victim and the accuser,
- attorney at law proceeding in the interest of the witness,
- proxy effected by the search or other neutral major party present at the search,
- major person determined by the person under body search,
- delivery agent,
- person protecting the party participating in the Defense Program. [Section 59 (1) Be.]

Evidence

Evidentiary procedure is a specific course of logical operations¹⁸, during which the authorities clarify the state of facts, or in other words, they reconstruct the acts of the past, further, this phase is followed by the analysis of the relevant statutory provisions and legal terms, and finally, by the adjudication. The aim of the evidentiary procedure is gathering the knowledge of the relevant facts necessary to adjudicate criminal liability, and its task is – accordingly to its aims – the clarification of the state of facts related to the conduct of the

¹⁸Alföldi Ágnes Dóra: Gondolatok a büntetőeljárásbeli bizonyítás jelentőségéről és fogalmának elméleti megközelítéséről. Jogelméleti Szemle 2011/2.

criminal act and to the perpetrator's criminal liability. In accordance with the statutory provisions, the purpose of the criminal procedure is the exploration of the truth through and secured by the actions of several participants of the procedure, whereas decisions must be based on realistic facts.¹⁹ As for a more specific approach, evidence can be either direct or indirect evidence. Evidence is direct if the evidentiary measure allows direct and unambiguous inference to the relevant fact(s), (for example, the witness states that he has seen the defendant hitting the victim). While in case of indirect evidence, the evidentiary measures do not directly refer to the provable fact, but to other facts, from which one may deduct to the provable facts upon the rules of logic, scientific principles, practical knowledge and experiences, and using other means of evidence available in the case. Usually, indirect evidences confirm direct evidence, (for example, the witness did not actually see the defendant hitting the victim, but he did see, that only the defendant could approach the victim, and immediately after the defendant has left the scene, the witness discovered wounds on the victim's face that were not there before).²⁰

Evidentiary means are the carriers of evidence (proving facts). They are specific outer sources (statements of persons or items) out of which the authority may explore the evidence referring to the criminal act or to the perpetrator.

Evidentiary means:

- a) the testimony of the witness,
- b) the testimony of the defendant,
- c) the expert opinion,
- d) the opinion of the probation officer,
- e) the physical evidentiary means, including documents and official documents, and
- f) the electronic data.

Ad a) Testimony of the witness

Those persons may be heard as a witness who may have knowledge of the fact to be proven. [Section 168(1) Be.] Witness is the person to be heard by the authority, because he or she might have seen, heard, or otherwise might have sensed (through the sense of smell, touch) a certain act, event (fact) – deemed relevant for the case by the authority -, therefore, he or she might have knowledge of such facts. The interrogation of the witness can be divided to two phases, a non-substantive part, whereas personal data and other general issues are being clarified, and to a substantive sequence, that is the actual interrogation related to the state of facts. Authorities are obliged to advise the witnesses on their right to partially or entirely refuse to testify and the statutory grounds of such rights, and address the question to the witness, whether he or she wants to take this exemption.

Ad b) Testimony of the defendant

The defendant has a binary legal status in the procedure: on the one hand, he is one of the participants of the criminal proceedings, therefore, as such he is subject of a wide range of procedural rights, nevertheless, on the other hand, his testimony is also one of the means of evidence, consequently he might as well be a source of evidence himself, if he wants. Likely

¹⁹Belegi József: A bizonyítás általános szabályai. In: Belegi József-Berkes György (Eds.): Büntetőeljárás jog I-III. - Kommentár a gyakorlat számára, 2007-2013. Budapest, HVG-ORAC, 2014.

²⁰Fantoly – Budaházi 2019 (A), pp. 99-101

to witnesses, defendants are interviewed separately. The interrogation of the defendant starts with the determination and verification of his identity and contact details. In the course of the identification the defendant must provide information on the following data securing the identification and later contact:

- a) name, name of birth (maiden name),
- b) place and date of birth,
- c) mother's name,
- d) nationality,
- e) number of identification card,
- f) place of residence, address for correspondence, place of stay,
- g) postal address, phone number. [Section 184(1)-(2) Be.]

After the verification of his identity, the defendant is advised on his rights, followed by a warning that is addressed to the defendant at the commencement of his first testimony during the investigation and later at the first hearing before the court of first and second instance:

- he is not obliged to testify;
- he may refuse to testify or to respond to any of the questions in the course of the questioning;
- he may freely decide to testify at any time, even if he has previously refused to do so;
- the refusal to testify does not interfere with continuation of the procedure, and does not affect his right to ask questions, to make observations or motions;
- if he testifies, anything he says or provides may be used as evidence;
- he may not falsely accuse others with the commission of a criminal offense, and he may not commit desecration by false statement. [Section 185(1) Be.]

The warning of the defendant and the defendant's response must be included in the records. Should the defendant choose to testify, after the address of the warnings the defendant is first questioned about his

- a) occupation,
- b) place of work,
- c) education,
- d) family conditions,
- e) health conditions,
- f) income,
- g) financial status,
- h) military rank, titular rank and honours. [Section 186 (1) Be.]

Further on, the defendant shall be granted the opportunity to state his testimony as a comprehensive whole, thereafter, the defendant may be questioned and cross-examined.

Ad c) The expert opinion

An expert shall be employed if the establishment or evaluation of a fact to be proven requires special knowledge. [Section 188. (1) Be.] Be. does not specify the definition of *special knowledge*. According to the well-established law enforcement practice, issues – of mostly natural sciences - subject to more thorough analysis shall fall into this scope of facts.

The following may proceed as forensic experts:

- a) natural person (forensic expert),
- b) business organisation and service provider,
- c) forensic expert institution and forensic expert institute;
- d) forensic expert body,
- e) state department, institution, institute or organisation authorised by the provisions of a separate legal act,

f) Expert Department for Completion Certificate regulated by the provisions of a separate legal act.

The court, the prosecutor's office and the investigating authority may assign a forensic expert. The assignment is conducted in writing, in the form of a decision, however, if an urgent partial examination is required to complete the expert opinion, the examination may be completed without a formal assignment decision, upon the verbal order of the prosecutor's office or the investigating authority. Nevertheless, the authority must confirm the assignment in writing, and forward the decision to the expert in 15 days [Section 189 (1)-(2) Be.]

The expert shall either present his opinion in the form of an oral statement, or shall submit it in writing, within the deadline set by the authority.

The expert opinion shall include the following:

- the diagnosis;
- the brief description of the examination method;
- the professional assessment of facts;
- the opinion of the forensic expert;
- if a prior inspection has been concluded and the assignment included such inspection, the evaluation of the data and conclusions of the former inspection;
- reference to the methodological guide, or in case of any alterations from the methodological guide, the reasons of alterations;
- reference to the scientific field of the forensic expert's competence to issue an expert opinion, and further reference if the forensic expert or a third party has proceeded as an ad hoc expert. [Section 47 (4) Be.]

Although the authority does not have the special knowledge required determine or assess the specific facts during its course of interpretation, it does have to evaluate the expert submitted opinion.

If needed, the following order shall apply to the evaluation of the expert opinion by the authority:

- requesting for further information or for complementation of the expert opinion,
- assignment of another expert,
- clarifying the differences between the expert opinions by hearing the experts in the presence of each other,
- employment of a new expert.

The defendant and the counsel for the defendant may motion for the assignment of an expert, whereas they may initiate the appointment of a certain expert. The opinion of the private expert may be suitable for arguments against the facts and assessments of the expert opinion of the forensic expert employed by the authority.

Ad d) The opinion of the probation officer

In accordance with the provisions of Section 202(1) of the Be. the court and the prosecutor's office may order that the opinion of the probation officer shall be obtained:

- before a punishment or measure is imposed,
- prior to the conditional suspension by the prosecutor,
- prior to the assignment of the case to intermediary procedure.

In specific cases obtaining the probation officer's opinion is mandatory according to the provisions of the Be. For example, in procedures pending against juvenile offenders, alongside the study of living conditions the completion of the probation officer's opinion or a summary report of the probation officer shall be required.

Ad e) Physical evidentiary means

According to Section 204 (1) of the Be. physical evidence shall be all objects – including documents and official documents - that are suitable for proving the facts to be proven, thus especially

- a) the objects bearing the marks of the commission of the criminal offense or the marks of the perpetrator in connection with the conduct of the criminal act,
- b) the objects created through the criminal offense,
- c) the objects used as a tool to commit the offense, or
- d) that was the subject of the criminal act.

On the grounds of the above definition, physical means of evidence are, on the one hand:

- the evidence carrier (for example, the cupboard with the defendant's stain of blood on it),
- the product of the criminal offense (e.g., the faked document or the injurious letter of defamation);
- the tool of committing the crime (e.g., the knife);
- the subject of the criminal action (e.g., the stolen bag).

The scope of physical evidentiary means is continuously widening along with the development of technology and sciences, consequently, Section 204 (2) of the Be. extends the definition of physical evidence to documents, thus to physical evidentiary means that record data by way of technical, chemical or other methods, that is especially a paper-based or electronic text, drawing or other image.

Ad f) Electronic data

Electronic data is all kind of appearance of facts, information or definitions suitable for digital processing by an information technology system, including the programs supporting the execution of certain functions of the information system. [Section 205 (1) Be.]

Evidentiary measures

Evidentiary measures serve the task to provide evidence, and by these means, provide the possibility to explore to the provable facts by the authorities. Evidentiary measures are especially the on-site inspection, the on-site interrogation, the reconstruction, the presentation for identification, the confrontation, and the instrumental credibility examination.

Ad a) The on-site inspection

The on-site inspection is an evidentiary measure during which the authorities observe certain objects (things, sites) in order to gain knowledge.²¹

The on-site inspection is ordered and conducted by the court, the prosecutor's office or the investigating authority, if the examination of a person, object or site, or the observation of an object or site is required for the elucidation or establishment of a fact to be proven. [Section 207. (1) Be.] If the object of the inspection can not be transported to the court, to the

²¹See more in detail: Gárdonyi Gergely: A szemle szerepe a hazai büntetőeljárásban. Doktori értekezés. SZE ÁJK, Győr, 2017.

prosecutor or to the investigating authority, or it would result in significant difficulties or costs, the inspection shall be conducted at the scene. [Section 207 (3) Be.]

Ad b) The on-site interrogation

During the on-site interrogation the authority shall question the defendant or the witness, it shall observe the site and grants a possibility to the defendant or to the witness to react and recall the sequences of the criminal offense. Mostly, the on-site interrogation provides that the suspect may interpret the pieces of action he can not or is not willing to clearly speak about by showing the actions at the site.

Ad c) Reconstruction

The court, the prosecutor's office or the investigating authority shall order and stage a reconstruction, if they wish to establish or examine whether an even or occurrence could actually take place at a specific place and time, in a specific manner or under certain circumstances. As much as possible, the reconstruction shall take place under the same or assumed circumstances as the investigated event or occurrence has happened or might have happened. [Section 209 (1)-(2) Be.] Primarily, reconstruction is a measure of credibility examination of testimonies, whereas its results either confirm or confute the presumptions of the authorities.

Ad d) Presentation for identification

The court, the prosecutor's office or the investigating authority shall order and conduct a presentation for identification, if it is required to identify a person or an object. The defendant or the witness is shown at least three persons or object for identification.[Section 210 (1) Be.]

Ad e) Confrontation

Should the testimonies of the defendants, witnesses or the testimonies of the defendant and the witness be contradictory, the court, the prosecutor's office or the investigating authority shall resolve the contradiction by confrontation, if necessary.²² The confronted persons shall present their statements orally, and they may have permission to address questions to each other. [Section 211 (1) Be.]

Ad f) Instrumental credibility examination

In the course of the investigation, the prosecutor's office or the investigating authority may also analyse the testimony of the defendant or the witness by instrumental credibility examination. Approval of the witness or the defendant is required for the examination .The instrumental credibility examination is conducted by the counsel advisor, who can be

²² See more in detail: Fenyvesi Csaba: Szembesítés – szentől szembe a bűnügyekben. Dialóg Campus Kiadó, Budapest – Pécs, 2008.

questioned on his assessments as a witness. [Section 212(1)-(2) Be.]

Both in our country and worldwide polygraph credibility examination is the most widespread and the longest used method, therefore, when the Be. refers to instrumental credibility examinations, it practically means the regulation of polygraph examination, which of course does not mean that other instruments are excluded from criminal proceedings (for example, the layered voice analysis (LVA), the graphometer, the computer graphometric examination, or, in the future, the method of brain fingerprinting).²³

V. Coercive Measures

V.1. General Rules Of Coercive Measures

Coercive measures are procedural action that may be used in certain cases and manner expressly stipulated in the Be. by the authorities proceeding in criminal cases for procedural purposes, provided to secure the success of the criminal procedure, and which inevitably go hand in hand with the restriction of civil rights of different measures.²⁴

V.2. Coercive measures effecting the freedom of the subject

V.2.1. Custody

Custody is the temporary deprivation of the freedom of the defendant and of the person reasonably suspected to have committed a criminal offense. [Section 274 (1) Be.] We may refer to temporary deprivation of freedom because this coercive measure may last only for a short period of time, namely, the defendant may be retained in custody during the investigation, for a period of maximum 72 hours, whereas the place of custody is the detention facility of the police.

According to the stipulations of Section 274(2) of the Be., the court, the prosecutor's office and the investigating authority may order the custody of the defendant or the suspect upon a reasonable suspicion of a criminal offense subject to imprisonment

- a) in case the defendant is caught in the act and his identity can not be confirmed,
- b) a probable cause exists that a pre-trial detention of the defendant subject to court decision is to follow, or
- c) upon disorderly conduct at a court trial.

V.2.2. The general rules of coercive measures subject to court approval effecting personal freedom

In order to secure the emergence of the doctrine of necessity and the proportionality principle, Be. considers the deprivation of freedom or the application of even more rigorous coercive measures as the last resort only. Provided that the court may order a coercive measure subject to court approval that effects personal freedom, or to maintain or extend such

²³ See more in detail: Budaházi Árpád: Polygraph Examinations: Blessing or Curse. Lambert Academic Publishing, Saarbrücken, 2015.

²⁴ Tóth Mihály: Vázlatok és szemelvények a büntető eljárásjog tanulmányozásához. Bibliotheca Cathedrae Juris Universitatis Catholicae de Petro Pázmány Nominata, Budapest, 1999. p. 183

measure, both the so-called 'general' and 'special' conditions of the coercive measures must be met. The general conditions are conjunctive, thus they must exist jointly, while only one of the special conditions is sufficient enough to result in such coercive measure.

The general conditions:

- if the defendant is reasonably suspected to have committed the criminal offense or an indictment has been filed against him,
- and it is necessary to reach the goals of the coercive measure subject to court approval that effects personal freedom, and such goals can not be secured in any other manner. [Section 276 (1) Be.]

Section 276 (2) of the Be. stipulates the special conditions:

A coercive measure subject to court approval may be ordered

- a) in order to secure the presence of the of the defendant, if
 - aa) the defendant has escaped, or has attempted to escape, or absconded from the court, the prosecutor's office or the investigating authority, or
 - ab) there is reasonable cause to believe that the defendant would be beyond reach in the criminal procedure, especially in case of escape or hiding,
- b) in order to prevent obstruction or frustration of the evidentiary procedure, if
 - ba) in order to frustrate the evidentiary procedure, the defendant has intimidated, unlawfully influenced participant of the criminal procedure or any other person, or in case of destruction, falsification or concealment of physical evidence, electronic data or any object subject to confiscation, or
 - bb) there is a reasonable cause to believe that the defendant would obstruct the evidentiary procedure, especially by the means of intimidating, unlawfully influencing the participant of the criminal procedure or any other person, or in case there is a reasonable cause to believe that the defendant would destroy, falsify or conceal physical evidence, electronic data or any object subject to confiscation,
- c) in order to prevent possibilities of reoffending, if
 - ca) following his/her interrogation, the defendant has continued the criminal offense subject to the procedure, or following the defendant's interrogation, the defendant has again been interrogated for committing another deliberate criminal offence punishable by imprisonment, or
 - cb) there is a reasonable cause to believe that the defendant would accomplish the attempted or planned criminal offense, or would continue commitment of the criminal offense subject to the procedure or commit another criminal offense subject punishable by imprisonment.

V.2.3. Restraining

Restraining restricts the defendant's right to free communication, for this purpose, it restricts the defendant's right to free movement and free choice of residence or place of stay. [Section 280 (1) Be.] The aim of restraining is that by the restraining order the court shall prevent the obstruction or frustration of the evidentiary procedure, for example, at risk of intimidation of the witness by the defendant. Another goal and also another reason to order restraining is the prevention of possibility of reoffending, in case, for example, there is a reasonable cause to believe that the defendant would accomplish the attempted or planned criminal offense injuring the victim.

In the restraining order, the court shall set the rules of conduct, ordering that the defendant must not - directly or indirectly – contact certain persons, or must restrain from such person. Also, as rules of conduct, it may order that the defendant must not abandon and restrain from a certain apartment, moreover, it may oblige the defendant to restrain from the

place of stay, place of work of the person effected by the restraining order, also, from institutions or other places regularly visited by such person, especially from institutions visited for the purpose of parenting, parenting-educational- or medical treatment, or from buildings visited for the purpose of religious practice. For the latter, the court must set the rules of conduct providing that they may not eliminate practice of the defendant's rights effected by the ordered rules of conduct. [Section 280(2)-(4) Be.]

V.2.4. Criminal custody

Criminal custody restricts the defendant's right to free movement and free choice of dwelling. [Section 281 (1) Be.]

According to the rules of criminal custody, the defendant may not

- a) leave the specified area, apartment, other premises, institution or the enclosed area attached to it without permission,
- b) visit specific public places, public events or certain public areas. [Section 281(2) a)-b) Be.]

The defendant's obligation to report at the police department established for general tasks at specific intervals and by specific means shall ensure the execution of criminal custody. [Section 281(2) c) Be.] According to the statutory provisions, the court may set further rules of conduct in order to secure the realisation of the goals of criminal custody. [Section 281 (3) Be.] Namely, the enlisted statutory rules are indicative, the scope of obligations and restrictions may be expanded by the court.

Both at ordering restraining and criminal custody technical devices tracking the movement of the defendant are available, to control if the rules of conduct in force are followed. Imposing a bail is also one of the possible procedural measures to ensure the compliance of rules of conduct determined for the term of criminal custody or restraining.

V.2.5. Detention

Detention means judicial deprivation of the defendant's personal freedom prior to the delivery of the final and binding decision. [Section 296Be.]²⁵ Detention is the gravest one of the coercive measures, therefore, Be. stipulates the regulations of detention as the ultimate one of the coercive measures subject to court approval that effect personal freedom, indicating that it is a measure of a last resort. Despite there is no final penalizing decision, detention means substantive and exhaustive deprivation of personal freedom, therefore, the defendant is put in law-enforcement circumstances, namely, it is executed in a law enforcement institution.

V.2.6. Temporary involuntary treatment in a mental institution

Temporary involuntary treatment in a mental institution means judicial deprivation of a mentally disabled of his freedom prior to the final and binding decision. [Section 301 (1) Be.] Likely to detention, temporary involuntary treatment in a mental institution results in substantive deprivation of the defendant's a personal freedom. General conditions of the temporary involuntary treatment in a mental institution are identical to the general conditions

²⁵ See more in detail: Herke Csongor: A letartóztatás. Dialóg Campus Kiadó, Budapest-Pécs, 2002

of detention. Since temporary involuntary treatment in a mental institution is ordered upon the court's reasonable assumption, that involuntary treatment in a mental institution shall replace this coercive measure, the specific conditions of temporary involuntary treatment in a mental institution are the same as the statutory conditions of involuntary treatment in a mental institution expressly stipulated in Be.

Accordingly, temporary involuntary treatment in a mental institution is ordered

- in case of conducting violent criminal offenses against individuals or criminal offenses jeopardizing public safety
- in the lack of the defendant's capacity to understand the nature and consequences of his/her acts,
- in case of suspected reoffending
- and if the defendant would be sentenced to more than one year imprisonment if punishable.

V.3. Coercive measures effecting assets

V.3.1. Search

Search means the search of a house, other premises or an enclosure attached thereto, and the search of vehicles in order to enhance the efficiency of the criminal procedure. Nevertheless, search may also be extended to the search of information systems or data medium. [Section 149 (1) Be.]

There are general and specific statutory conditions of search. General conditions of the search are:

- ordering investigation of suspected crime; and
- the proceeding authority's written decision ordering the search.

Exceptionally, the search may be conducted without meeting the above conditions (thus, without decisions ordering investigation or search) as an inescapable investigating measure, if further delay would jeopardize the efficiency of the procedural act. In such extreme cases necessary formalities are later remedied, namely, the order is made up later on. However, if the court does not order the search, its results shall not be admissible as evidence. Search may be ordered when there is a reasonable cause to believe that it may result in (the *specific* conditions of search):

- apprehending a person having committed a criminal offense (capturing the hiding perpetrator);
- uncovering the traces of a criminal offense;
- finding means of evidence, or property subject confiscation or forfeiture; or
- screening information systems or a data medium.

V.3.2. Body search

Body search means the examination of the clothing and body of the person subject to body search in order to find evidence, or property subject to confiscation or forfeiture. In the course of the body search, any other objects being at the disposal of the person subject to the body search may also be examined. [Section 306 (1) Be.] Not only the suspect, but any other (innocent) person may also be the subject to body search, if there is a reasonable assumption that such person holds evidence. Body search may be ordered if it is reasonably assumed that the given individual holds physical evidence, or any property otherwise subject to confiscation or forfeiture. Likely, for example, if the perpetrator caught in the act is suspected

to hold the stolen asset(s) in his/her clothing or bag.

V.3.3. Seizure

The aim of seizure is to secure means of evidence, or the property subject to confiscation or assets subject to civil forfeiture in order to ensure efficiency of the criminal procedure. Seizure means the limitation of proprietary rights over the subject of seizure. [Section 308 (1) Be.] Nevertheless, only movable tangible properties, scriptural money, electronic money or electronic data may be subject to seizure. Principally, seizure is conducted upon a reasoned order, concluded in writing by the authority proceeding in any criminal procedure. If seizure is ordered by the court or the prosecutor's office, they may request the assistance of the investigating authority for the execution of the measure.

V.3.4. Sequestration

On the one hand, sequestration (writ of sequestration) aims to serve the interests of the victim through seizing the defendant's assets (as guarantee for the satisfaction of the civil law claim), and on the other hand, its target is to ensure the enforcement of pecuniary sanctions (forfeiture). Principally, it means the suspension of the defendant's right of disposal over the sequestered assets, property rights and pecuniary assets, upon the order of the court proceeding in the case.

Sequestration is always subject to judicial discretion, thus, its alternative conditions are the following:

- the proceeding regards a criminal offense, whereas forfeiture of property may be conducted;
- or
- the procedure aims to secure civil law claim,
- and there is a reasonable ground to fear that the execution of the forfeiture or the satisfaction of the civil law claim will be frustrated. [Section 324(3) Be.]

V.3.5. Temporary rendering of electronic data inaccessible

Temporary rendering of electronic data inaccessible is the temporary restriction of the right to dispose over the data published on the electronic communication network (hereinafter electronic data), and the temporary prevention of access to the data. [Section 335 (1) Be.] It is closely related to the legal institution of permanent rendering of electronic data inaccessible, stipulated in the Criminal Code [Section 63(1) g) Criminal Code], that is usually forerun by the order of temporarily rendered inaccessibility. Order of this coercive measure may be conducted in case the criminal procedure is pending against a criminal offense liable to be prosecuted under public prosecution (typically, child pornography, criminal offenses against the state, acts of terrorism), if permanent rendering of electronic data inaccessible is otherwise justified, temporary rendering inaccessible may be ordered in order to seize the conduct, thus to prevent continual commission of the criminal offense. The court shall be entitled to order the conduct of the measure. Temporary rendering of electronic data inaccessible may be conducted by:

- temporary removal of electronic data;
- temporary prevention of access to electronic data.