CZÚCZ OTTÓ ÜNNEPI KÖTET

ACTA UNIVERSITATIS SZEGEDIENSIS

ACTA JURIDICA ET POLITICA

Tomus LXXIX.

# ÜNNEPI KÖTET

## DR. CZÚCZ OTTÓ
## EGYETEMI TANÁR

## 70. SZÜLETÉSNAPJÁRA

SZEGED
2016

Edit

Comissio Scientiae Studiorum Facultatis Scientiarum Politicarum et Juridicarum Universitatis Szegediensis

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Redigit
MÁRIA HOMOKI-NAGY

Nota
*Acta Jur. et Pol. Szeged*

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Szerkesztőbizottság

a Szegedi Tudományegyetem Állam- és Jogtudományi Karának tudományos bizottsága

BADÓ ATTILA, BALOGH ELEMÉR, BLUTMAN LÁSZLÓ, HAJDÚ JÓZSEF, HOMOKI-NAGY MÁRIA, JAKAB ÉVA, KARSAI KRISZTINA, NAGY FERENC, PACZOLAY PÉTER, SZABÓ IMRE

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MARVANEK JUDIT

Felelős kiadó: HAJDÚ JÓZSEF dékán

Kiadványunk rövidítése
*Acta Jur. et Pol. Szeged*
ISBN 978-963-306-479-5
ISSN 0324–6523 Acta Univ.

# *TARTALOM*

**ZSANETT FANTOLY** [*]

# About the Duration of Custody and the Possibilities of its Legislation

Coercive measures (coercive actions) are procedural actions ensuring the successful execution of criminal proceedings, conducted against the will of the concerned person and violating or restricting certain civil rights. The coercive measures are executed by the authorities participating in the criminal proceedings in the interest of the criminal proceeding, primarily against the defendant.[1]

An evergreen dilemma is whether the rule-of-law state can undertake during the investigation and proving of serious crimes to set aside certain principles, or even to violate fundamental human rights in the interest of reaching a 'higher' aim, which we might call, for example, a world against terrorism,[2] but we can also think about other types of crimes shocking the public opinion.[3]

According to *Erika Róth*: "one of the 'ultimate cases', when human rights can be restricted – although with the provision of proper guarantees –, is the criminal proceeding itself. In this field there are two interests conflicting: the interest of the state to enforce its criminal law claims with the interest of the individual to enforce his or her human rights."[4] To ensure human rights "the state undertakes obligations in international conventions and in its Constitution, while the former one is also its obligation; since private revenge had been taken over by the so called collective law enforcement, the institution providing this task – for a very long time in history it being the state – not only has this as its rights, but it is also its obligation to enforce criminal law claims."[5]

It follows from this that the criminal proceeding can restrict human rights within the frame of law, but it has to be taken into account, that restriction should only be as it's strictly necessary, thus the requirement of proportionality has to be fulfilled in this case as well.[6]

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[1] FANTOLY, ZSANETT – GÁCSI, ANETT: *Eljárási büntetőjog.* [The Law of Criminal Procedure. Static Part] Statikus Rész. Iurisperitus Bt., Szeged, 2013. p. 269.

[2] KORINEK, LÁSZLÓ: *Kriminológia II.* Magyar Közlöny-és lapkiadó Kft. Budapest, 2010. p. 431. [Criminology II.]

[3] BUDAHÁZI, ÁRPÁD*: A műszeres vallomásellenőrzés, különös tekintettel a poligráfos vizsgálatra.* PhD értekezés. [Technical Examination of Testimony, with special regard to the Polygraph; PhD dissertation] Pécs, 2013. p. 97.

[4] RÓTH, ERIKA: *Az elítélés előtti fogvatartás dilemmái.* [Dilemmas of custody prior to judgment] Osiris Kiadó. Budapest, 2000. p. 17.

[5] RÓTH, ERIKA 2000, pp. 17–18.

[6] BUDAHÁZI, ÁRPÁD 2013, p.98.

Coercive measures can be applied in the *cases and ways defined by law* (conditions of application are regulated by the CPA): the 4 requirements of legality are (1) the authority applying it, (2) the decision ordering it, (3) the ordered time period, and (4) the execution. During their execution the *human rights* of the concerned person shall be respected [CPA Section 60 (1)] and the *principle of proportionality (gradualism)* – the latter one concerns substitutability and necessity: coercive measures should only be applied until when and to the extent which it is justified. The concerned person shall be *humanely treated* during the proceedings.[7]

The Constitutional Court has examined in several of its resolutions the constitutionality of coercive measures concerning personal freedom. In Decision No. 5/1999 it described the essential characteristics of constitutional restriction of personal freedom, which is a fundamental right: only under law, only by the decision of an independent court, within the frame of necessity and proportionality.

The Hungarian Criminal Procedure Act [Act XIX of 1998 about criminal proceedings –hereinafter CPA] regulates custody as the first legal institution among coercive measures. *Taking the defendant into custody means a temporary deprivation of the defendant of his freedom* [CPA Section 126 (1)]. *Its general case*: may be ordered upon a reasonable suspicion that the defendant has committed a criminal offence subject to imprisonment – thus, in particular, if the defendant is caught in the act – provided that a probable cause exists to believe that the pre-trial detention of the defendant is to follow.

All criminal authorities are entitled *to order it*, with the rule that if it is ordered by the investigating authorities they are obliged to inform the prosecutor about it within twenty-four hours. Generally taking into custody occurs during the investigation, but it can also be executed as an urgent investigative action, if the delay entails danger. Formal decision orders it, which contains the starting date of custody: with the indication of the day, hour and minute.

Custody shall not exceed *seventy-two hours*. After the lapse of this period, the defendant shall be released, unless the court has ordered his pre-trial detention. Into the maximum seventy-two hours' duration the time of previous detention by the authorities and the time of apprehension, bringing to court shall be counted; and all commenced hour counts as full. There's no possibility to prolong it. Within the available seventy-two hours the prosecutor examines whether the special conditions of pre-trial detention exist and if yes, then it motions for its ordering. The decision on ordering pre-trial detention falls under the competence of the court.

*Execution* of the custody occurs in a police detention room. The person taken into custody shall be interrogated within twenty-four hours and access to his or her lawyer shall be provided. During the execution of coercive measures the requirement of humane treatment appears in the requirement of notice (a relative or other person indicated by the defendant shall be notified by the authorities about the measure and the place of detention); as well as in the duty to act (the authorities must provide for the care of children of minor age of the defendant remaining without supervision, or any other person being looked after by the defendant; as well as it is the obligation of the authorities to secure the property and home of the defendant left unattended, if it's necessary).

[7] FANTOLY, ZSANETT – GÁCSI, ANETT ERZSÉBET 2013, p. 271.

*Termination* of the custody may be ordered by any of the authorities (investigating authority, the prosecutor or the court.) Cases of termination: (1) if the cause of its order ceases to exist; (2) the passing of the time of seventy-two hours; (3) immediately before the passing of the seventy-two hours, if the court has not ordered pre-trial detention, even though it was motioned for by the prosecutor.

Against the decision ordering custody *legal remedy* may be initiated, however it does not have suspensory effect.

Act LXXXIX of 2011 on the amendment of certain acts concerning procedural law and the justice system modified Section 555/G of the CPA[8] so as to provide separate rules for the time period of custody in the cases of prominent significance.[9] In accordance with the amendment in the cases of prominent significance custody can last much longer than seventy-two hours, it can be even as much as one hundred and twenty hours. Besides this, the amendment concerned the possibilities of contact between the defendant and his or her defence counsel,[10] since it made it possible that contact between the defendant and the defence counsel during the first forty-eight hours of custody could be prohibited by the prosecutor based on the unique circumstances of the specific case. As the justification of this modification the legislator cited the aim of efficiency and processing the case within reasonable time.

The special provisions on taking into custody and the interrogation of the suspect were constitutionally problematic in several regards. First of all *the possibility of the prohibition of contacting the defence counsel violates the fundamental right to defence*: the defendant is entitled to the right to defence in every segment of the criminal proceedings.[11] (The Constitutional Court has expressed in several of its decisions that the right to defence can only be restricted if it is indispensably required and only to the proportionate extent, while its material content cannot be restricted at all.[12]) Furthermore, Article 6, paragraph 3 (b) of the European Convention on Human Rights (ECHR) declares that everyone charged with a criminal offence has the right to "to have adequate time and facilities for the preparation of his defence", and point c) of paragraph 3, Article 6 defines the right of the suspect "to defend himself in person or through legal assistance".

Nevertheless, the case-law of the European Court of Human Rights (ECtHR) allows certain derogations from Articles 3, 4 (paras.1-3), as well as Articles 5 and 6 in a restricted manner to the commencing part of the criminal proceedings. The Strasbourg

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[8] Section 554/G "Custody ordered in a case of prominent significance shall last for a maximum of one hundred and twenty hours. In the first forty-eight hours of the custody the defendant shall not meet his or her defence counsel."

[9] As a consequence of the amendment, the CPA [CPA Chapter XXVIII/A, Sections 554/A-554/N] declares certain crimes to have prominent significance and defines special procedural rules to be applicable to them. In the list of crimes of prominent significance [CPA Section 554/B], one can find crimes related to office, crimes against the purity of public life, crimes related to organized crime, economic crimes, crimes against property, as well as crimes without statutory limitation.

[10] Section 554/L "A suspect held in custody in a case of prominent significance shall be interrogated within seventy-two hours. If the interrogation takes place during the first forty-eight hours of the custody, the defence counsel shall not be present at the interrogation of the suspect. In this case the investigation shall not be concluded without the continued interrogation of the suspect."

[11] Fundamental Law, Section XXVIII, paragraph 3.

[12] Constitutional Court Decision No 8/1990. (IV. 23.); ABH [Decisions of the Constitutional Court] 1990, p. 42, 44; Constitutional Court Decision No 22/1994. (IX.8.); ABH [Decisions of the Constitutional Court] 1994. p. 127, 130.; Constitutional Court Decision No 6/1998. (III.11.); ABH [Decisions of the Constitutional Court] 1998, p. 91.

Court stated that – even though the right of the accused person to effective defence by a lawyer is not absolute – any exception from the practice of this right shall be clearly defined and strictly restricted in time, furthermore with respect to the whole procedure the accused cannot be deprived of his right to fair trial.[13] The 2011 amendment of the Hungarian Criminal Procedure Act did not provide any constitutional justification for such restriction of the right to defence of the defendant.[14]

As a result, the Constitutional Court declared with respect to the 2011 amendment[15] that the second sentence of Section 554/G is unconstitutional since it fully renders the right to defence into the discretionary power of the prosecutor, the decision restricts the fundamental right to defence and the exclusion of the right to remedy against the decision prejudices the material content of the right to defence. Thus it annulled the mentioned provision. The Constitutional Court cited the case-law of the European Court of Human Rights in its decision and highlighted the extremely important Strasbourg decision delivered in the *Salduz*-case[16]. In that case the Court found that "in order for the right to a fair trial to remain sufficiently 'practical and effective', Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction." Furthermore: "Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination." The Constitutional Court also summarized the relevant statements of the *Sebalj v. Croatia*[17] judgement: with regard to paragraph 3 (c) of Article 6 of the ECHR it is already problematic, if the defence counsel is not present during the first interrogation, but the question of the violation of the Convention can only be decided after the examination of all the circumstances of the concrete proceedings. During which it is of determinant significance what the subsequent fate of the statements made without the lawyer is, whether the defendant later confirmed or withdrew them, and what effect did the statements have to the outcome of the criminal proceedings. It is also of importance whether other procedural actions were conducted in the absence of the defence counsel, and it is not irrelevant whether the defendant evaluates the characteristics of certain parts of the criminal proceedings as a layman or as a lawyer.

However, the list of these cited court decisions is not comprehensive. It is important to highlight here the *Murray v. the United Kingdom* judgement, in which the Court accepted the position that it is in contravention of the Convention if the defendant is not allowed to

[13] *Salduz v. Turkey* (Application no.36391/02.), ECtHR, Judgement of 27 November 2008. Para. 55.
[14] KUPECZKI, NÓRA: *Az őrizetbe vétel.* [Custody. Manuscript] Kézirat.
[15] Constitutional Court Decision No 166/2011. (XII. 20.), ABH [Decisions of the Constitutional Court] 2011/12. p. 1329.
[16] *Salduz v. Turkey,* (Application no.36391/02), ECtHR, Judgement of 27 November 2008. Para. 55.
[17] *Sebalj v. Croatia*, (Application no. 4429/09), ECtHR, Judgement of 28 June 2011.

have access to a lawyer in the first forty-eight hours of custody.[18] In the *Lanz v. Austria* case the Court stated that: "If a lawyer were unable to confer with his client and receive confidential instructions from him without surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective."[19]

The other constitutional problem in relation to the 2011 amendment of the Hungarian Criminal Procedure Act is that the prolongation of the duration of custody was not in harmony either with Section IV (3) of the Fundamental Law, or with Article 5 (3) of the European Convention on Human Rights, according to which everyone arrested or detained "shall be brought promptly before a judge or other officer authorised by law to exercise judicial power." Thus the constitutionally guaranteed human right of the person brought under the criminal proceeding was violated by not providing for him the judicial decision about the maintenance of the restriction of his personal freedom or about placing him at liberty.

The Strasbourg Court has not defined exactly to the day and hour the maximum length of keeping one detained without judicial decision which still does not breach the requirement of promptness. Nevertheless, in the *Brogan v. the United Kingdom* case[20] the Court declared the four-day-and-6-hour (102 hours) long detainment without judicial decision to be in contravention of the Convention, notwithstanding that in that case the applicants' custody took place in the frame of an investigation based on the suspicion of terrorism (thus a more serious crime than the ones listed above). Subsequently the Strasbourg Court expressed in the *McKay-case*[21] that custody without judicial decision which is longer than four days, that is 96 hours, cannot even be accepted in cases related to terrorism. Furthermore, the Court highlighted that the strict time constraint imposed by the requirement of promptness leaves little flexibility in interpretation.[22] The Court declared in the *Schwabe and M.G. v. Germany* case that the duration of custody for five and a half days – for the violation of the freedom of assembly – is unjustified.[23] Based on all the above-mentioned it can be concluded that the limit is approximately 3–4 days, in which case the Court would refrain from finding violation of the Convention.[24]

In accordance with the international requirements and the case-law of the Court the Constitutional Court declared in its Decision No. 166/2011. (XII. 20.)[25] that the provision prescribing the duration of custody in one hundred and twenty hours is not in harmony with the requirements posed either by the ECHR, or by the case-law of the ECtHR, as well as it does not comply with Section 55 (2) of the Constitution. Furthermore, since the extremely

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[18] *Murray v. the United Kingdom*, (Application no. 14310/88, Series A 300-A), ECtHR, Judgement of 28 October 1994. Cited by: TÓTH, MIHÁLY: Az Alkotmánybíróság határozata a kiemelt jelentőségű ügyek egyes büntetőeljárási szabályairól. Jogesetek Magyarázata. [The decision of the Constitutional Court about certain criminal procedural rules relating to the cases of special prominence] 2012/2, p. 16.

[19] *Lanz v. Austria*, (Application no. 24430/94), ECtHR, Judgement of 20 January 2002. Para. 50.

[20] *Brogan and Others v. the United Kingdom*, (Series A no. 145-B, 11209/84.), ECtHR, Judgement of 29 November 1988. Para 62.

[21] *McKay v. the United Kingdom*, (Application no. 543/03), ECtHR, Judgement of 3 October 2006.

[22] *Brogan and Others v. the United Kingdom*, (Series A no. 145-B, 11209/84.), ECtHR, Judgement of 29 November 1988.

[23] *Schwabe and M.G. v. Germany*, (Application Nos 8080/08 and 8577/08), ECtHR, Judgement of 1 December 2011.

[24] GRÁD, ANDRÁS: *A strassbourgi emberi jogi bíráskodás kézikönyve.* [The Manual of the Human Rights Case-law of Strasbourg] Strassbourg Bt. Budapest, 2005. p. 179. Cited by: TÓTH, MIHÁLY: Az Alkotmánybíróság határozata a kiemelt jelentőségű ügyek egyes büntetőeljárási szabályairól. Jogesetek Magyarázata. 2/2012., p. 16. [The decision of the Constitutional Court about certain criminal procedural rules relating to the cases of special prominence]

[25] Constitutional Court Decision No 166/2011. (XII. 20.), ABH [Decisions of the Constitutional Court] 2011/12. p. 1329.

long custody was solely and fully based upon the decision of the prosecutor, no guarantee or safeguard was secured against its ordering. Taking into account all the above, the Constitutional Court declared the legal institution of one-hundred-and-twenty-hour long custody unconstitutional and expressed the obvious extension of the meaning of promptness to be unacceptable.

Since the freedom of the defendant is taken away without judicial decision, also foreign laws allow for custody only up to a short time period, defined in hours. In accordance with the above-mentioned and based on the case-law of the European Court of Human Rights the length of custody cannot exceed 96 hours, since this can be regarded as the upper limit of the arraignment of the defendant, in which case the violation of the Convention cannot be declared.[26] For example, in England and Wales custody can last for 24 hours, which can be prolonged up to the maximum of 36 hours. It is also a general rule in France that the defendant can be held without judicial decision for 24 hours, which can be prolonged by another 24 hours.[27]

*As a summary*, it can be stated that the restriction of the rights of the defendant in order to increase the efficiency of the criminal proceedings cannot entail the violation of basic human rights. The unconditional safeguarding of the right to defence and the application of the test of necessity and proportionality in relation to the restriction of personal freedom shall constantly be taken into account when regulating custody.

## FANTOLY ZSANETT

## AZ ŐRIZETBE VÉTEL IDŐTARTAMÁRÓL ÉS ANNAK SZABÁLYOZÁSI LEHETŐSÉGEIRŐL

## (Összefoglalás)

A kényszerintézkedések a büntetőeljárás eredményes lefolytatását biztosító eljárási cselekmények, melyeket az érintett személy akarata ellenére foganatosítanak és bizonyos állampolgári jogokat sértenek vagy korlátoznak. A kényszercselekményeket bűnügyekben eljáró hatóságok foganatosítják a büntetőeljárás célja érdekében, elsősorban a terhelttel szemben.

A tanulmány az egyik leggyakrabban foganatosított és a személyi szabadság elvonásával járó kényszerintézkedés, az őrizetbe vétel lehetséges időtartamáról szól, a folyamatban lévő Büntetőeljárási törvény kodifikációja során jelentkező kérdések felvázolásával. Vizsgálja a személyi szabadság elvonásával járó kényszerintézkedések alkotmányosságának problematikáját csakúgy, mint a nemzetközi dokumentumokban lefektetett kötelezettségeket a személyi szabadság büntetőeljárásban történő elvonása során.

[26] *Brogan and Others v. the United Kingdom*, (Series A no. 145-B, 11209/84.), ECtHR, Judgement of 29 November 1988.; *Mironenko and Martenko v. Ukraine*, (Application No. 4785/02), ECtHR, Judgement of 10 December 2009.; In: Szabó, Győző – Nagy, Gábor (ed.): Tanulmányok az Emberi Jogok Európai Egyezménye legfontosabb rendelkezéseihez kapcsolódó strasbourgi esetjogról. [Studies about the case-law of the Strasbourg Court related to the most important articles of the European Convention on Human Rights] Hvg Orac Kiadó. Budapest, 1999. p. 59.

[27] FARKAS, ÁKOS – RÓTH, ERIKA: *A büntetőeljárás.* [The criminal procedure] Complex Kiadó, Budapest, 2007. p. 153.