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23 Fair Trial under Scrutiny

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Abstract
The right to a fair trial has an eminent position in the Fundamental Law of Hungary both because of the importance of the right and the great number of applications and jurisprudence it has been the subject of. This study presents the legal background of fair trial and its place in the Hungarian legal system, analyzing the jurisprudence of the Hungarian Constitutional Court on the right to fair trial, and in particular, the obligation to adjudicate within a reasonable time. While the Constitutional Court has developed a consistent practice in this regard, there are nevertheless new issues that may make the amendment of certain pieces of legislation necessary. This paper presents a case-study on a new development in the Constitutional Court's practice on the issue of deciding the case within a reasonable time.

23.1 Introduction

Defining the concept of the fair trial is not an easy task, notwithstanding the vast volume of scholarly work dedicated to this concept. László Sólyom, former president of the Hungarian Constitutional Court wrote that the fair trial principle is a complex term. That is the reason why the Constitutional Court accepted as a methodological approach that the fair trial must be considered as a whole, because in spite of the fairness of the detailed rules, the procedure as a whole may still prove to be unfair.[1]

The substance and the elements of this principle already appeared in various international legal documents in the middle of the last century. In 1948 the Universal Declaration of Human Rights set out the principle of fair trial in its Articles 10 and 11. According to the Protocol II of the Geneva Conventions of 1949 adopted in 1977, fair trial must be

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1 László Sólyom, *Az alkotmánybíráskodás kezdetei Magyarországon*, Osiris, Budapest, 2011, p. 554.

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afforded even in armed conflicts. The ICCPR, which was adopted in 1966 and entered into force in 1976, declares in Article 14 that

> "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

23.2 Fair Trial in Hungarian Law

Article 6 ECHR lays down the substance of a fair trial when it states that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The right to a fair trial is particularly prominent in the ECHR, both because of the importance of the right and the great number of applications and jurisprudence is has attracted.[2]

The statutory guarantees of a fair criminal procedure examined by the Constitutional Court of Hungary (and analyzed in detail in this paper) are regulated by Act XIX of 1998 on criminal proceedings (Code of Criminal Procedure) till 30 June 1998,[3] but the introductory provisions of Act XXXIII of 1896 on the Penal Procedure already provided for the right to a fair trial.[4] The constitutional requirement of fair trial was formulated by Article 57(1) of the former Constitution, which was in force until 31 December 2011. It stated that

> "Everyone is equal before the law and has the right to have the accusations brought against him, as well as his rights and duties in legal proceedings, judged in a just, public trial by an independent and impartial court established by law."

As regards the substantive content of the constitutional provision of the fair trial, Article XXVIII(1) of the Fundamental Law of Hungary that entered into force on January 1, 2012, is identical to Article 57(1) of the former Constitution. It stipulates that

2 David Harris *et al.*, *Harris, O'Boyle and Warwick: Law of the European Court of Human Rights*, Oxford University Press, Oxford, 2014, p. 370.

3 The New Code of Criminal Procedure (Act XC of 2017) entered into force on 1 July 2018. The Constitutional Court has no case-law concerning the new Code yet, and for this reason in this paper I examine the case-law concerning the former Code of Criminal Procedure (Act XIX of 1998).

4 Nándor Bernolák, *A bűnvádi perrendtartás és novellái*, Büntetőjogi Törvénytár, Budapest, 1928, pp. VII-VIII.

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> "Everyone shall have the right to have any charge against him or her, or his or her rights and obligations in any litigation, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an act."

According to the scholarly approach cited above, in case of the former Constitution, the source of the right to a fair trial was the right to human dignity and the right is closely connected to the right to equal treatment. Yet from this right flow several other requirements that are to be applied not only in the judicial process, but in other type of procedures as well.[5]

The Constitutional Court summarized in its Decision No. 6/1998. (III. 1.) AB[6] the main elements of the right to fair trial. Based on the relevant international documents – in particular, the ECHR – the Constitutional Court elaborated an open-ended list, because the fair trial concept also contains further elements, such as the equality of arms that was not included in the text of the ECHR. This solution is similar to the approach followed by the ECtHR, because in contrast with other guarantees, the right to a fair hearing provides an opportunity for adding other particular rights not listed in Article 6 ECHR that are considered to be essential to a fair hearing.[7]

The relevant excerpts of the Fundamental Law and the former Constitution seem to be identical. In my opinion that, however, there is an enormous change in regulation and the difference can be discerned from the substance of the right to a fair trial. This change arises on the one hand, from the spirit of the Fundamental Law and, on the other hand, the shift of emphasis brought about by the legal institution of constitutional complaint. The jurisprudence of the Constitutional Court also shows that the assessment of the right to a fair hearing within a reasonable time – as an element of a right to a fair trial – is particularly different from the former concept of the right.

For the first time after the entry into force of the Fundamental Law, the Constitutional Court compared in its decision the content of the relevant provisions of the former Constitution and the Fundamental Law.[8] The result of this comparison was that there was no obstacle to the applicability of the arguments and findings developed in earlier Constitutional Court decisions. Consequently, the Constitutional Court considered the former constitutional jurisprudence elaborated in connection with the fundamental right to a fair trial to be applicable also for future cases.

5 Nóra Chronowski *et al.*, *Magyar alkotmányjog III. Alapjogok*, Dialóg Campus, Budapest-Pécs, 2008, p. 270.
6 Decision No. 6/1998. (III. 1.) AB, ABH 1998, 91.
7 Harris *et al.* 2014, p. 409.
8 Decision No. 7/2013. (III. 1.) AB, Reasoning [24].

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Following the Fourth Amendment of the Fundamental Law (25 March 2013) – which repealed the Constitutional Court decisions rendered prior to the entry into force of the Fundamental Law – with respect to the aspects laid down in Decision No. 13/2013. (VI. 7.) AB in connection with the applicability of the former Constitutional Court's decisions, the Constitutional Court re-examined whether the case-law related to the right to a fair trial could be applied in future. As a result of its assessment the Constitutional Court found – in its Decision No. 7/2013. (III. 1.) AB – that there is still no obstacle to the rely on the earlier jurisprudence of the Constitutional Court in relation to the fundamental right to a fair trial.[9] The later Constitutional Court decisions connected to Article XXVIII(1) of the Fundamental Law were upheld in this spirit.

The Parliament has placed the right to a fair trial among judicial procedural guarantees regulated by Article XXVIII of the Fundamental Law. A fair procedure as a requirement, however, is set forth under Article XXIV(1) of the Fundamental Law. This latter provision explicitly sets out the requirement of fairness in respect of public administrative procedures. Meanwhile, in respect of court proceedings, the procedural guarantee enshrined in Article XXVIII(1) of the Fundamental Law is the correct reference. When it comes to criminal proceedings, it is worth noting, that the right to a fair trial is not the only provision of Article XXVIII that the Constitutional Court typically examines. Other paragraphs of Article XXVIII provide for other procedural safeguards in such proceedings. These procedural guarantees are *(i)* the presumptions of innocence [Article XXVIII(2)]; *(ii)* the right to defence [Article XXVIII(3)]; *(iii)* the principle of the *nullum crimen sine lege* and *nulla poena sine lege* [Article XXVIII(4)]; *(iv)* the *ne bis in idem* principle [Article XXVIII(6)]; *(v)* the right to legal remedy [Article XXVIII(7)].

The fairness of proceedings in the ordinary sense also includes the enforcement of the judicial procedural guarantees as referred to in Article XXVIII(2) to (7) of the Fundamental Law, fulfilling the requirements set out in Article XXVIII(1) on the right to a fair trial. The significant difference is that while the procedural guarantees set out in paragraphs 2 to 7 are examined by the Constitutional Court on the basis of the general rule of necessity and proportionality, the requirement under paragraph 1 requires a specific assessment.

In the jurisprudence of the Constitutional Court the right to a fair trial is an absolute right over which no other fundamental right or constitutional purpose can be considered, since it is itself the result of discretion and as such, the right to a fair trial cannot be restricted. However, it is possible to examine within the meaning of fair proceedings the necessity and proportionality of restrictions in respect of certain partial rights pertaining to the right to a fair trial. Partial rights can be restricted, which together guarantee the fairness of the procedure in their entirety.

9 *See e.g.* Decision No. 8/2015. (IV. 17.) AB, Reasoning [57].

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The content of the right to a fair trial was formulated by the Decision No. 6/1998. (III. 1.) AB and these elements were confirmed by the Constitutional Court later in a number of decisions.[10] By interpreting Article XXVIII(1) of the Fundamental Law, the partial rights pertaining to the right to fair trial could be formulated. According to the jurisprudence of the Constitutional Court, these are the following: *(i)* the right of access to court; *(ii)* the fairness of the hearing; *(iii)* the requirement of a public hearing and the public announcement of the judicial decision; *(iv)* the court established by law; *(v)* the requirement of judicial independence and impartiality; *(vi)* the requirement that the decision made within reasonable time. *(vii)* The rule is *de facto* not set, but according to the interpretation of the Constitutional Court, it is part of a fair trial to ensure the equality of arms in the proceedings.[11] *(viii)* According to the practice of the Constitutional Court, the right to the reasoned judicial decision must also be regarded as a part of the right to a fair trial.[12]

The Constitutional Court has found in Decision No. 7/2013. (III. 1.) AB that there was no obstacle to applying the arguments and findings laid down in earlier decisions regarding the right to a fair trial, therefore, the Constitutional Court considers them to be applicable also in future cases involving the right to a fair trial. In accordance with its jurisprudence based on the provisions of Article 24(2)(d) and 27 of the Fundamental Law, the Constitutional Court expressly stated that the constitutional requirements arising from the right to a fair trial, as elaborated in its earlier practice, not only flow from the regulatory environment, but also from the individual judgments.[13]

My opinion is that in these cases, when a judicial decision itself is assessed and the final decision can be annulled, the Constitutional Court should exercise this right with particular care and examine whether the petitioner's claim has a relevance from the perspective of fundamental rights. If so, it must be assessed whether the judicial decision constitutes such a serious violation of this right that it can justify the annulment of the judicial decision under scrutiny. Procedural violations emerging in judicial proceedings, may, by way of exception, be of fundamental right nature and this circumstance raises the possibility of a violation of the right to a fair hearing.

The statistical data[14] provided by the Constitutional Court and compiled in Table 23.1 clearly shows the changes that have taken place in respect of references made to allegedly violated substantive provisions.

10 *See* Decision No. 5/1999. (III. 31.) AB, ABH 1999, 75; Decision No. 14/2002. (III. 20.) AB, ABH 2002, 101, 108; Decision No. 15/2002. (III. 29.) AB, ABH 2002, 116, 118-120; Decision No. 35/2002. (VII. 19.) AB, ABH 2002, 199, 211.

11 Decision No. 8/2015. (IV. 17.) AB, Reasoning [63].

12 Decision No. 7/2013. (III. 1.) AB, Reasoning [34].

13 Decision No. 7/2013. (III. 1.) AB, Reasoning [27].

14 *See* https://hunconcourt.hu/statistics/.

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Years	Article B(1) in complaints	Article XXVIII(1) in complaints
2012	294	164
2013	112	117
2014	460	563
2015	1426	1566
2016	288	571
2017	224	1171
2018	157	436
Total	2961	4588

From the data it can be gleaned that, while in 2012 the reference to Article B(1) in constitutional complaints far exceeded references to Article XXVIII(1) of the Fundamental Law, in 2014 references to the violation of the right to a fair trial were much more frequent and in the 2017 the number of references to Article XXVIII(1) was five times more than the number of references made to Article B(1). In my view, this shows that the concept of the right to a fair trial is consolidated and that the content of this fundamental right is consistently applied by the judges and the citizens seeking redress.

It is also worth reviewing how many times further paragraphs of Article XXVIII of the Fundamental Law have been referred to in comparison with Article XXVIII(1) since the Fundamental Law entered into force.

Years	Article XXVIII(2) in complaints	Article XXVIII(3) in complaints	Article XXVIII(4) in complaints	Article XXVIII(5) in complaints	Article XXVIII(6) in complaints	Article XXVIII(7) in complaints
2012	13	16	4	0	1	135
2013	7	7	5	0	0	83
2014	14	14	7	3	3	384
2015	19	15	9	0	0	360
2016	38	14	18	2	5	281
2017	27	35	17	1	7	288
2018	20	16	15	2	4	237
Total	**138**	**117**	**76**	**8**	**20**	**1768**

The statistics provided by the Constitutional Court show that most of the constitutional complaints referred to Article XXVIII(7) of the Fundamental Law, which stipulates the right to a legal remedy. This significantly exceeds the number of references to other fundamental rights, such as the right to defence or the presumption of innocence, but still remains

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firmly under the number of references to the Article XXVIII(1) of the Fundamental Law, which guarantees the right to a fair trial.

23.3 Obligation to Adjudicate within a Reasonable Time

I would like to highlight and explain in detail one case from among a number of the petitions based on a violation of the right to a fair trial and the related constitutional proceedings and decisions. Decision No. 2/2017. (II. 10) AB is of great importance in the practice of the Constitutional Court for the purpose of enforcing the obligation to adjudicate within a reasonable period of time.

The Fundamental Law defines explicitly the right to examine everyone's case within a reasonable time in the meaning of Article XXVIII(1), contrary to Article 57(1) of the former Constitution. Respecting to it the Constitutional Court has held that the right to adjudicate the dispute within a reasonable time is guaranteed by the Fundamental Law, the violation of which constitutes grounds for submitting a constitutional complaint.[15]

Following the entry into force of the Fundamental Law, several complainants have pleaded in their constitutional complaint the delay in the litigation and therefore the violation of their right to adjudicate within a reasonable time. The Constitutional Court mostly rejected complaints based on the breach of these fundamental rights, for example, because of the lack of exhaustion of judicial remedy or lack of competence.[16] However, the Constitutional Court also dealt with well-founded substantive considerations in breach of that partial right of the right to fair trial. In the specific case the prolongation of the main proceedings was largely due to objective reasons independent of the proceedings bodies.[17]

In Decision No. 3024/2016. (II. 23.) AB the Constitutional Court established that it could not effectively perform its fundamental duty as the main body for the protection of the Fundamental Law in respect of the right to a fair trial within a reasonable time. There is no legal consequence available to the Constitutional Court which could be used to remedy the injury occurred.[18] However, in its decisions, the Constitutional Court has usually drawn attention to the fact that the complainant may have a specific claim for damages against the court concerned to enforce his right to a fair trial and to the disposal of his case within a reasonable time.[19]

In its most recent Decision No. 2/2017. (II. 10.) AB on the requirement of deciding the case within a reasonable time the Constitutional Court laid down a constitutional

15 *Cf.* Order No. 3174/2013. (IX. 17.) AB, Reasoning [18].
16 Order No. 3309/2012. (XI. 12.) AB, Reasoning [5], Order No. 3174/2013. (IX. 17.) AB, Reasoning [20]-[21].
17 Decision No. 3115/2013. (VI. 4.) AB, Reasoning [30].
18 Decision No. 3024/2016. (II. 23.) AB, Reasoning [18].
19 *See e.g.* Order No. 3174/2013. (IX. 17.) AB, Reasoning [20]-[21].

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requirement in connection with the application of Section 258(3)(e) of the Code of Criminal Procedure. Accordingly, when applying the provision referred to above, the constitutional requirement stemming from Article XXVIII(1) of the Fundamental Law is that in case the court decreases the sentence due to the prolongation of the proceedings, the reasoning of its decision should determine the fact that proceedings were of extensive length, and it should provide for the mitigation of the punishment and the degree of penal relief.

According to the reasoning of this decision the right to examine the case within a reasonable time is a partial right pertaining to the right to a fair trial. Consequently, when examining this partial right, a constitutional approach must be applied in which the whole of the court proceedings and certain parts of the court proceedings must be assessed simultaneously in order to determine the court's intention to decide the case within a reasonable time.

If it can be inferred from the case and the trial history that the court did not keep in mind the reasonable time requirement, then violation may be found irrespective of the length of the criminal proceedings and of the inactivity of the court concerned.

Accordingly, short-term criminal proceedings may also be extended in case the facts of the criminal proceedings cannot be established, notwithstanding the efforts made by the courts to take the decision as quickly as possible with due regard to the requirements of fair trial. The duration of criminal proceedings, even if the law on criminal proceedings is complied with, violates Article XXVIII(1) of the Fundamental Law if there are unjustified inactive periods attributable to the courts, and the excessive length of the criminal prosecution cannot be justified by the complexity of the case.

According to the standpoint of the Constitutional Court, however, the violation of the Fundamental Law due to the prolonged criminal proceedings can be remedied in the framework of the imposition of the sentence.

If it can be inferred from the reasoning of the judgment that the court has imposed a lenient penalty or measure because of the length of proceedings, the defendant may not refer to the breach of the right to be heard within a reasonable time. In order to be clearly established by the defendant that the purpose of mitigating the sentence was to remedy the violation manifested in the excessive length of the procedure, the Constitutional Court considered it necessary to lay down the above constitutional requirement related to Section 258(3)(e) of the Code of Criminal Procedure.[20] The right to a fair hearing stipulated in Article XXVIII(1) of the Fundamental Law is not covered by the right of defence [Article XXVIII(3)], but the right of defence in criminal proceedings is the cornerstone of a fair trial.

20 Decision No. 2/2017. (II. 10.) AB, Reasoning [82], [88], [99]-[100].

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23.4 RIGHT TO EFFECTIVE DEFENCE

The Constitutional Court established in its Decision No. 15/2016. (IX. 21.) AB the unconstitutionality of Section 344(1) of the Code of Criminal Procedure and the provision was annulled with *pro futuro* effect. The annulment of the provision was based on an infringement of the right of the defence.

In the concrete case, the Constitutional Court examined whether the provision governing the bearing of criminal costs regulated in Section 344(1) of the Code of Criminal Procedure restricts the right to defence of the defendant in a proceeding conducted upon the initiative of a substitute private accuser. Pursuant to Article XXVIII(3) of the Fundamental Law, "a person subject to criminal proceedings shall have the right to defence at all stages of the proceedings. […]." The Constitutional Court stated in its Decision No. 8/2013. (III. 1.) AB that

> "in the course of interpreting the right to defence laid down in Article XXVIII(3) of the Fundamental Law the Court considers those constitutional provisions on defence to be applicable, which were elaborated in its former jurisprudence. […] At the very beginning of its activity, the Constitutional Court ruled that […] the criminal procedure's basic constitutional principle is the right to defence that is manifested in numerous detailed rules governing the proceedings. The right to defence is enforced through those rights of a person subject to criminal proceedings and in those obligations of the public authorities, which ensure that they are aware of the criminal charge against them, to present their point of view, to raise their arguments against the charge, to submit their observations and suggestions concerning the activities of the authorities, as well as assisting the defendant. The essence of the right to defence is captured by the procedural rights of defence and the obligations of public authorities which provided for the defence."[21]

It follows from the right to defence that the method of defence, its strategy and tactics – in compliance with legal provisions – are determined by the interest of the defendant. The free choice of defence includes, in the absence of mandatory protection, the waiver of the right of defence, but also the defence of the defendant in person or by way of an attorney or both. In certain cases defined by law, defence provided by an attorney is mandatory. However, the defendant may decide at his own discretion whether to accept the counsel

21 Decision No. 25/1991. (V. 18.) AB, ABH 1991, 414, 415. For the case-law after 2012 *see* Decision No. 8/2013. (III. 1.) AB, Reasoning [25]-[26].

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appointed by the authority or choose another advocate, provided that they have the necessary financial means.

The detailed rules of criminal proceedings relating to criminal charges are therefore interconnected with the right to an effective defence, since the regulation of the bearing of criminal costs creates the financial condition for exercising that right. Consequently, the principle of the right to defence should also be manifested in the detailed rules governing the enforcement of criminal charges. The expenses and the fee incurred by the legal representative of the defendant are criminal costs, even if such costs had not been advanced by the state.[22] In the event of an acquittal, the fee and verified expenses of the officially appointed counsel for the defence is paid by the state.[23] However, the regulation is controversial with regard to the fee and the expenses of the authorized defence attorney.

Based on a comparison of the relevant provisions of the Code of Criminal Procedure, it was established that the fee and the expenses of the authorized defence attorney were to be reimbursed only in the proceedings initiated by the prosecutor in case the state lost the lawsuit.

According to the general rule, pursuant to Section 344(1) of the Code of Criminal Procedure, if the defendant was dismissed or the proceedings were terminated, the substitute private accuser shall bear the costs of the criminal charges regulated in Section 74(1) since they represented the charge. However, Section 74(1) did not regulate the fee and expenses of the authorized defence attorney. It merely refers to the costs and fee of the officially appointed counsel for the defence. Section 339(3) of the Code of Criminal Procedure states, however, that in case the charge is represented by the prosecutor and the court dismisses the defendant or terminates the proceedings because of the withdrawal of the charge, the state will pay the costs incurred by the accused. This will take place within thirty days from the date on which the decision becomes final, including the payment of their counsel's costs that had not been advanced during the procedure. From the comparison of these provisions, it can be stated that in case the substitute private accuser is unsuccessful, the fee and the expenses of the authorized defence attorney must be borne by the defendant. Sections 74(1) and 339(3) of the Code of Criminal Procedure excluded the authorized counsel for the defence's fees and expenses from the scope of criminal costs from reimbursement when the substitute private accuser does not prevail. This fact significantly restricted the defendant's right of defence in these kinds of criminal proceedings. The contested provision restricted the defendant's right to defence because of the fact that the choice of counsel for the defence as a fundamental right was subject to the financial capacity of the defendant in a proceeding where the nature of the proceedings necessitates an increased need for legal expertise and effective defence.

22 Section 74(1)(c) of the Code of Criminal Procedure.
23 Id. Section 74(3)(c).

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The Constitutional Court has not been able to uncover any constitutional purpose that would justify the necessity of the restriction: it was not justified by the related legislative environment or the related legislative activity.

On the basis of the above connection between the enforcement of the right of defence and the rules governing the bearing of criminal costs, the Constitutional Court concluded that the provision in Section 344(1) of the Code of Criminal Procedure unnecessarily restricts the defendant's right to defence regulated in Article XXVIII(3) of the Fundamental Law. Due to the unnecessary restriction, the Constitutional Court did not continue with the assessment of the proportionality issue. The Constitutional Court held that, for the reasons detailed above, Section 344(1) of the Code of Criminal Procedure was contrary to Article XXVIII(3) of the Fundamental Law. It therefore decided to annul the contested legal provision.

After the announcement of the Constitutional Court's above described decision on 21 September 2016, the Minister of Justice responsible for drafting criminal laws presented the amendment to the Code of Criminal Procedure and the Parliament enacted and promulgated Act CX of 2016 on 4 November 2016 which modified the rules governing criminal costs. The amendment prompted by the Constitutional Court decision was drafted by the Minister of Justice in a way as to introduce the same rules for the prosecution by the state, the private prosecution procedure and the substitute private prosecution procedure in the Code of Criminal Procedure. Therefore, the Parliament amended Sections 344(1) and 514(6) which entered into force on 1 January 2017. The Parliament accepted the position of the Minister that the regulation is controversial and the problem persists in private prosecution procedure, too. The judicial initiative submitted in relation to the criminal costs thus led to the amendment of several provisions of the Code within a short period of time. The new Code of Criminal Procedure, which entered into force on 1 July 2018, already contains the new provisions cited above.[24]

24 Act XC of 2017 on Criminal Procedure, Sections 782 and 813.