Efficiency of the Judiciary

Efficiency of the Judiciary

edited by Artur Mezglewski

Wydawnictwo Instytutu Wymiaru Sprawiedliwości **Warszawa 2023**

Polsko-Węgierska Platforma Badawcza 2021
Lengyel-Magyar Kutato Platform 2021
Polish-Hungarian Research Platform 2021

REVIEWERS *dr hab. Paweł Leszczyński, prof. AJZP*
dr hab. Piotr Sowiński, prof. UR

PROOFREADING *Małgorzata Przybyłowicz-Bandeira*

TYPESETTING AND COVER DESIGN *Tomasz Smołka*

ISBN 978-83-67149-28-0

WYDAWNICTWO INSTYTUTU WYMIARU SPRAWIEDLIWOŚCI
ul. Krakowskie Przedmieście 25, 00-071 Warszawa
SEKRETARIAT tel.: (22) 630 94 53, e-mail: wydawnictwo@iws.gov.pl

BOUND AND PRINTED BY *"Elpil", ul. Artyleryjska 11, 08-110 Siedlce*

Table of Contents

Introduction

We present to the reader a monograph summarizing the research conducted in 2021 by an international, Polish-Hungarian research team on the efficiency of the judiciary. The team was established as part of the Polish-Hungarian Research Platform project organized by the Institute of Justice in Warsaw, and it was composed of outstanding Polish and Hungarian lawyers: Emőd Veress, Artur Mezglewski, Erika Csemáné Váradi, Marcin Rau, Anna Tuni and Katarzyna Zombory.

The task of the team was to examine the efficiency of the justice system, including the efficiency, duration and complexity of cases dealt with in courts.

The monograph has been divided into five independent parts on the following topics: Chapter I – Effectiveness of (Civil) Justice, the Human Factor and Supreme Courts: Debates and Implications, Chapter II – Effectiveness of the human factor in justice in the light of research on the application of law, Chapter III – Efficiency of Criminal Justice – a Prevention-focused Approach, Chapter IV – The impact of the human factor on the effectiveness of criminal proceedings. A sociopsychological perspective, Chapter V – Effectiveness of the human factor in justice in the light of dogmatic studies, Chapter VI – The right to an effective remedy: a key element for

ensuring the effectiveness of the ECHR human rights system – the example of Poland and Hungary.

We believe that the monograph will spark a lively discussion in the scientific world and will have a positive impact on the practices of individual countries and European institutions.

PROF. DR. EMŐD VERESS
University of Miskolc

Effectiveness of (Civil) Justice, the Human Factor and Supreme Courts: Debates and Implications

1. Introduction

The effectiveness of justice is of critical importance in every state. This expectation and value require justice that is fair, swift and efficient, convincing, and accurate. This is the result of the interplay of several factors. High quality of legislation, training, salaries, caseload, and cultural environment are all factors contributing to the good administration of justice. Obviously, there are no perfect systems, and the promise of perfection is in itself a sham. However, the highest possible quality standards must be applied. The human factor is significant in this context. This added value makes it possible to state that, except for very simple cases, justice cannot be entrusted to artificial intelligence. Since difficult cases are unique in themselves, they are less likely to be resolved by algorithms as it is precisely their uniqueness that requires to entrust the resolution of disputes to a judge, a human being invested with judicial power. From my ongoing, broader research on the functioning of the higher courts, I would like to highlight two issues in this paper. Both are related to current Hungarian legal and doctrinal debates, triggered by amendments introduced by a reform of law: Act CXXVII of 2019.

The first discussion relates to the fact that Act CXXVII of 2019 basically reformed the Hungarian system of legal sources

as it attributed precedential effects to Curia (*Kúria*, the Hungairan supreme court) judgments. This can be seen as a move closer towards common law, but it is actually a return to the Hungarian legal tradition interrupted by the Soviet-style dictatorship. The Curia judgments, if they contain a new legal norm, practically completing and interpreting the regulations adopted by the legislative and executive branches of the state, have a vertical binding force in relations with lower courts. This precedent system is limited to the decisions of the Curia. The rules enacted by the other branches of the state limit the playground for the supreme court to create general norms. This reform triggered one of the most intense, complex, and interesting recent scholarly debates in Hungary. This article aims to present the outlines of this debate and take a stand on the most sensitive issues in the discussion: whether this new approach limits judicial independence and whether the reform as a whole achieves a higher level of legal security. The system is experimental, but a significant part of the concerns raised in the debate lack a factual basis. Expectedly, the result in the time of the reform will indeed be a strengthening of legal uniformity.

The second issue under discussion is the recruitment of judges to the supreme courts. The mentioned reform paved the way in Hungary for the appointment of constitutional judges, after the expiry of their term of office, as judges of the supreme court. In other words, a new avenue for the recruitment of judges has been opened for the Curia, so that a Constitutional Court judge, coming from "the outside" the judicial career path can become a supreme court judge. This issue needs to be analyzed in the context of comparative law: what is the argument for this reform? Is judicial independence in any way compromised?

In other words, the study deals with the efficiency of the judiciary and the role of the human factor in it, along two problem lines: on the one hand, it examines the supreme court judge as a legislator, and on the other hand, it carries out a comparative law analysis on the composition of the supreme court in order to illustrate the context of the Hungarian reform.

2. "Limited Precedent System" in Hungary

2.1. FUNDAMENTALS

In Montesquieu's model of the state, the creation of laws is the task of the legislature: the judge only applies the law and does not create it; otherwise, the separation of powers between the branches of the state would not prevail, and a concentration of power would take place in the hands of the judge. If the person who makes the law is also the one who does apply it, this may lead to arbitrary acts[1]. Montesquieu's original model is disreputable and inaccurate in many aspects. Its actuality is given more by its theoretical content than by its technical details: prevention of abuse of power, splitting (but not hindering the use of) the power between state bodies (authorities), and a system of checks and balances. The issue detailed by Montesquieu would only arise if a judge, who decides on two parties (*inter partes*) only in the context of a particular case (*in limine litis*), was free to 'shape' the law, for example, to positively amend the law in favor of one of the parties. However, this expectation does not preclude the possibility of judicial legislation, essentially for a precedent-setting decision of a supreme court (in Hungary and hereinafter called Curia) to prevail as a 'law' in the lower courts, since in such a case, the problem that Montesquieu sought to rule out does not arise.

According to positions that approach the principle of separation of powers with dogmatic rigidity, a judge cannot be a legislator; the task of the judiciary, like that of the executive, is the application

[1] According to Montesquieu, "[a]gain, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression". Charles de Secondat Baron de Montesquieu, *The Spirit of the Laws*, Bartoche Books, Kitchener 2001, p. 173. Thus, the judge decides only relating to the case at hand, *in limine litis*. This principle is not contradicted if a (supreme) court decision related to an individual case has a general (*erga omnes*) application as precedent because in a new case. The judge can only deviate from precedent if particular conditions are met.

of the law, namely a specific type in this respect: the settlement of disputes, within the framework of rules established by the legislature and outside the judiciary. However, this approach is not viable. During the application of parliamentary acts, executive power engages in quantitatively more (much more) lawmaking than parliaments do. In a sense, adopting acts and creating legal rules is not synonymous. Adopting acts constitutes a monopoly of parliament, while the creation of the law does not. Parliamentary acts lay down the basic rules, the requirements that should be guaranteed; however, the executive creates the detailed rules and technical regulations. Thus, making acts is the duty of parliament, while normative power is split between the parliament and the executive branch. The Fundamental Law of Hungary establishes in this respect that:

"[l]aws shall be Acts, government decrees, prime ministerial decrees, ministerial decrees, decrees of the Governor of the Hungarian National Bank, decrees of the heads of independent regulatory organs and local government decrees. In addition, decrees of the National Defence Council adopted during a state of national crisis and decrees of the President of the Republic adopted during a state of emergency shall also be laws" (Article T).

However, executive legislation is bound by acts, and a hierarchy of sources of law prevails[2].

In the judiciary context, the same question arises: Can a judge constitute legislation, and if so, what is the relationship of such a norm with the law?

Evidently, the law created by the parliament or the executive cannot cover the full complexity of the matters of life; that is, there are always situations in which the law does not provide a clear solution, so it remains up to the judge to resolve the legal dispute in such cases as well. For example, the French *Code civil* sets out a rule in Article 4 that a judge who refuses to judge the pretext of legislation as silent, obscure, or insufficient may be prosecuted as culpable of

[2] For example, Article 15 of the Fundamental Law states that "[n]o decree of the Government shall conflict with any Law".

a denial of justice[3]. That is, the application of the law in courts in many cases interprets, supplements, or clarifies the text of the law[4]. As it has been stated, "in interpreting the rules of private law enacted by the legislative, the courts not only determine its content, but also construct the law themselves. The creation and application of […] law is not separated: the subordination of judicial application to law does not result in a slave or subordinate role"[5]. The view that the law itself contains the whole of the norm and that the judge does not create law is a mere theoretical construction that is constantly refuted by reality[6].

[3] "Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice".

[4] However, most court decisions do not have such a role. For example, if a seller sues a buyer for not paying the purchase price, the purpose of justice is to overcome the resistance of the debtor: in this case, the application of the law does not constitute an act of legislation.

[5] Cs. Virág, B. Völcsey, *A korlátozott precedensrendszer és a polgári perjog kapcsolata* [*The Relationship between the Limited Precedent System and Civil Procedure*], 3 *Magyar Jog* 2020, pp. 125–135, at p. 125. The cited authors, whose point of view I share, further detail their position: "We believe that lawmaking and enactment in the field of private law cannot be sharply separated: it can be described from a practical point of view by dividing the task between the legislator and the enactor of the law. Courts necessarily carry out private law norm-making through the interpretation of legal texts and general clauses, to which they also attach moral content and social policy goals. Subjecting courts to law in the field of private law means that the written norm is the starting point and constitutes the basic layer of interpretation". *Ibid.*, p. 126.

[6] In 1790, professing the cult of the parliamentary acts, Robespierre argued that the word jurisprudence (in the sense of case law) should be deleted from the language because there is no law other than parliamentary acts ["*la jurisprudence n'est autre que la loi*"]. Montesquieu wrote that judgments ought to be fixed "and to such a degree as to be ever conformable to the letter of the law". Montesquieu, *op. cit.*, note 2, p. 175. However, G. Szászy-Schwarz highlighted the impossibility of such an approach and grasped reality as follows: "However desirable it is for a judge to be only the mouth of the truth, much of the time he is also the head of it. However desirable it is that the judge only applies the law, he also continuously creates it. He does this notwithstanding the imperfection of all human deeds, the fallibility of the legislature, and of himself. The fallibility of the legislature: that all laws are necessarily incomplete; that of himself: because all interpretation includes the perils of misinterpretation. As such and out of necessity or misunderstanding the judge applies such a law that is uncharted to

The basic dilemma is how can this interpretation, supplementation, and clarification become a 'law', i.e. is it possible that the scope of the law established by the judge can go beyond the framework of the given lawsuit and become a generally binding, cognizable, and legitimate rule of conduct? Nevertheless, the relationship between the judge and the law remains one of the most intriguing legal issues today[7].

Another aspect of the matter is the requirement of legal certainty. As the unity of the law ceases if the courts give different decisions in similar disputes based on the same legal norm, the judicial application of the law must be as uniform as possible. Such a 'misdevelopment' in jurisprudence is a problem that arises after the enactment of acts or secondary norms. This can undoubtedly be addressed through repeated changes to the law, but this solution is far from ideal. Regular amendments to the law undermine the trust in the law, weaken legal certainty, and too many such corrections lead to too much control of the legislature over the judiciary, with the particular disadvantage that a judicial misinterpretation of the law can also be turned into law by the legislature. It can easily happen that, if interpreted correctly by the courts, the far from perfect legislation could remain in force for decades and without requiring the intervention of the legislature. Therefore, the question arises as to whether there is an alternative means to serve consistency in applying the law: an instrument that can determine the direction of applying the law uniformly even without amending the law and correct possible deflections.

In Hungarian law, this alternative instrument has so far been the instrument of uniformity decisions, and its role will be retained: "[T]he Curia shall ensure the uniformity of the application of law by courts, and shall make uniformity decisions which are binding on courts" (Article 24 para. (3) of the Fundamental Law of Hungary).

---

the legislature". See G. Szászy-Schwarz, *Jog és döntvényjog I* [*Law and Precedent I*], 22 *Jogtudományi Közlöny* 1890, pp. 169–171, at p. 169.

[7] More generally on this issue, see Zs. Ződi, *Precedenskövetés és jogszabály-értelmezés* [*Following the Precedent and Interpreting the Law*], 3 Állam- és Jogtudomány 2014, pp. 60–85.

The uniformity decision procedure is one of the possible instances of judicial 'tools of legislation'. It has been precisely noted that "it is not a law, because it is not an act of a legislative body"[8]. The correctness of this interpretation is emphasized by Act CXXX of 2010 on Law-Making, which states on the one hand that "laws other than local government decrees shall be promulgated in the *Magyar Közlöny*" (the official gazette of Hungary) (Article 26 para. (1)), and on the other hand, 'certain other legal acts' are also published, including the decisions of the Curia. Those decisions include not only the uniformity decisions, but other decisions the publication of which in the *Magyar Közlöny* is provided for by the Curia on the basis of authorization by an Act (Article 28/A).

However, the uniformity decision takes effect as a law. According to Article 25 (3) of the Fundamental Law, the uniformity decision is binding to the courts; that is, the judge is obliged to apply it in individual cases, and the norm contained in the uniformity decision also affects the behavior of the parties as the legality or illegality of conduct may depend on a uniformity decision. In other words, the uniformity decision is not binding 'just' to the courts, but it is also a generally binding provision, a norm: at least quasi-legislation. However, the distinction between legislation and quasi-legislation is also justified: quasi-legislation cannot downgrade 'real' legislation, which constitutes the framework that can further detail, interpret, even constitute a new legal norm within it, but cannot ultimately oppose it. However, the question goes beyond ensuring the consistency of case law. More generally, it raises the issue of the birth of law.

In addition to the uniformity decision procedure, a new amendment to Hungarian law has resulted in a significant debate among law professionals[9]. Act CLXI of 2011 on the organization and

[8] L. Trócsányi, B. Schanda, *Bevezetés az alkotmányjogba. Az Alaptörvény és Magyarország alkotmányos intézményei* [*Introduction to Constitutional Law. The Fundamental Law and Constitutional Institutions of Hungary*] HVG-ORAC Lap- és Könyvkiadó, Budapest 2012, p. 340.

[9] A. Osztovits, *Törvénymódosítás a bírósági joggyakorlat egységesítése érdekében – jó irányba tett rossz lépés?* [*Amending the Law for the Uniformity of Court Decisions – a Wrong Step in the Right Direction?*], 2 *Magyar Jog* 2020, pp. 72–80; A.Zs. Varga, *Tíz gondolat a jogegységről és a precedenshatásról* [*Ten*

administration of the courts (OAC) was amended by Act CXXVII of 2019[10]. In the following section, with an emphasis on civil judicial proceedings, I will provide some observations on these amendments, also addressing some of the questions and uncertainties that have arisen in the legal literature.

With regards to the prior situation, the reform has reduced the number of complementary instruments serving uniformity (sections 2 and 3 below) but also introduced 'the limited precedent' (section 4 below).

2.2. PROHIBITION OF INFORMAL AND ABSTRACT LEGAL INTERPRETATIONS BY COURTS

The text of the OAC in force, as amended by Law CXXVII of 2019, provides that "resolutions serving interpretations which have not been authorized by the law cannot be published by judicial bodies, court leaders, as well as in the name of judicial councils" (Article 27/A). This provision is a reaction of the legislature to a multitude of resolutions published by the national councils of the heads of civil court chambers (CKOT) and criminal court chambers (BKOT). The OAC does not mention the CKOT and the BKOT, and their resolutions are not mandated by the law; nevertheless, they have become instruments of legal interpretation (especially for interpreting the new Code of Civil Procedure and Code of Criminal Procedure).

These resolutions were a specific tool for interpreting the law. In the absence of a clear legal basis, they do not have, and could

Thoughts on Unity of Court Decisions and on the Precedent Effect], 2 *Magyar Jog* 2020, pp. 81–87; Cs. Virág, B. Völcsey, *op. cit.*, note 6, pp. 125–135; Sz. Tahin, *Korlátozott precedensrendszer – alulnézetből* [*Limited Precedent System – a Bottom View*], 5 *Magyar Jog* 2020, pp. 266–275; Gy. Wellmann, *Kritikai észrevételek a jogegység biztosításának új rendszerével kapcsolatban* [*Critical Remarks on the New System of Ensuring Unity of Court Decisions*], 11 *Magyar Jog* 2020, pp. 648–655.

[10] From a formal point of view, it has rightly been objected that the significant amendments analyzed here were contained in a law, the subject of which, according to the title of the law, was "related to the establishment of unitary district office procedures".

not have had, a binding force. Notwithstanding, the legitimacy and weight of the adopting bodies gave these resolutions at least a soft law character, thus becoming one of the subtypes of judicial quasi-legislation. It must be stated that such a resolution is a joint declaration of the will of the judges in their particular fields of law concerning the correct interpretation of the law. Even if the source of the resolution is informal (heads of court at a national level, therefore requiring recognition for representativeness), these resolutions also become quasi-sources of law.

Moreover, the legislator sought to stop this quasi-legislative process. For groups of case-law analyses, CKOT, BKOT, and other informal councils have stated that "these are legitimate, useful and effective tools for obtaining information and teaching. Moreover, they may be indispensable. However, they do not and cannot have the effect of ensuring the uniformity of interpretation"[11].

The law continues to uphold the summary opinion prepared by groups of case-law analyses for information purposes, as well as the non-binding collegial opinion of the professional chambers of the Curia. However, similar opinions of the panels of regional courts and those of panels of regional courts of appeal have been abolished. In this regard, it was stated that "the fact that an amendment to the law deprives the chambers of these courts, as bodies of sentencing judges, of the right to form a professional opinion, without any justification, can only be assessed as a step contrary to judicial independence"[12]. The statement that "the advantage of a collegiate opinion is its flexibility in content, as the range of issues to be discussed is not limited by any motion or factual element related to a specific case"[13] is in reality a disadvantage and one of the problems with such opinions. The tangible problem with this means of interpretative unification was that in these cases, judges did not create rules in the context of litigation, but as separate bodies unrelated to a specific case, emitting abstract opinions based on strong professional legitimacy that thus

[11] A.Zs. Varga, *op. cit.* note pp. 10, 85.
[12] Gy. Wellmann, *op. cit.* note pp. 10, 650.
[13] *Ibid.*, p. 651.

informally gained validity. This type of rulemaking is fundamentally not the task of the judiciary.

The prohibition applies to the 'publication' of a resolution for the purpose of legal interpretation on behalf of a panel of judges, court leaders, or judges' councils unless authorized to do so by the law. The wording is not precise enough, as a proposal immediately emerged on how to preserve the institution of these resolutions:

"The amendment which provides that, inter alia, the CKOT, BKOT resolutions may not be published, does not terminate such meetings. It is also a fundamental and justifiable expectation on the part of the legal profession and society as a whole to receive adequate information on the legal interpretations agreed upon by those present at these collegial meetings. The only effect of the legislative amendment is that from now on, they cannot be published, so no one will know about them, but the heads of chamber will still enforce these 'secret' resolutions in their respective areas of administration. Litigants and legal representatives may wonder months and years later why a particular legal interpretation was used in their particular case. This strictness of the amendment to the law seems counterproductive because it does not eliminate something but hides information from subjects of law. The conference report is a known genre in the legal literature, which can also be a suitable means for reporting on the most important conclusions of the CKOT or BKOT meetings. The disputed provision of the amendment to the law therefore seems to achieve only that the resolutions cannot be published as numbered thesis statements with a date, but they can appear circumscribed, in a different form"[14].

Another author took the same position: "even if the publication is prohibited by the legislator, the CKOT will still adopt resolutions, so the OAC only results in the interpretation of the law becoming the private affairs of the judges"[15].

The intention of the legislature was not simply to prohibit publication but to ban such a resolution as a technique of legal interpretation. This does not mean that it is not possible to consult on legal

[14] A. Osztovits, *op. cit.* note pp. 10, 75.
[15] Sz. Tahin, *op. cit.* note pp. 10, 269.

uniformity, but forming any unified position cannot happen within the framework of unregulated meetings and deliberations, but only in the manner provided for within the OAC. Under such circumstances, the proposal for publishing CKOT and BKOT positions in the form of conference reports is a *contra legem* interpretation of the legislation. The interpretation of the law can occur in the form of an individual professional opinion (for example, in a scientific article), but this has weight and significance only as a scholarly interpretation, and there is no informal judicial authority attached to it.

In this sense, I can agree with the following statements made in legal literature:

> "There can be no doubt that judging a dispute constitutes the specific form of operation which essentially belongs to the courts and for which their independence is inviolable. Therefore, the constitutional task entrusted to the courts can only be ensured by the act of adjudication. In a constitutional state, all other forms of unification of law are foreign to the courts; therefore, they can only serve an ancillary, information-gathering purpose, but no binding force can be attributed to them in any way. In short, neither administrative nor scholarly methods are suitable for triggering the binding force associated with a judgement. In the public administration, it may be possible to influence operations through orders, instructions, descriptions, and institutional authority (although in this case the legal means of management, supervision, and leadership are also determined by law), but not within the judiciary. The situation is similar to informal deliberations, which are innate tools of scholarly workshops; however, no one attaches any binding force to their outcome"[16].

Regarding CKOT positions (resolutions), it was stated in their defense that these

[16] A.Zs. Varga, *op. cit.* note pp. 10, 83.

"had prestige, their importance has recently increased, as it has made recommendations for a uniform interpretation of the new, and therefore often problematic, procedural provisions. After the entry into force of the new Code of Civil Procedure, the CKOT could adopt recommendations far quicker, because such issues of interpretation could not reach the Curia in such a short time. In addition, these matters reaching the Curia depended on the limits of the review proceedings and the willingness of the parties to initiate such proceedings. The reasoning of the law states that the advantage of a limited system of precedents is that it is quick and efficient. It is not difficult to see that this could be done more efficiently and quickly by the legal interpreting tools of the CKOT"[17].

However, the resolutions that became a source of law were quite problematic when viewed through the lens of the practical significance they acquired:

a) In the system of the separation of powers, the court can undoubtedly create law, but it must do so in its capacity as the judiciary; if it grants meaning to the law using administrative powers, in the course of different informal councils and fills in any gaps in the law, it acts as a kind of parliament, a new legislative chamber, and a legislator without democratic legitimacy. The legitimacy of judges extends to adjudication, and it is right that the framework for 'judge-made law' is provided linked to this activity. The CKOT meetings could have constituted an event providing a "high level of professional experience" if, the in principle non-binding majority positions were, in reality, "an important point of reference for judges in the country due to the professional authority of the heads of chambers"[18].
b) If we classify the CKOT resolutions as 'just' being commentary[19], this does not correspond to reality: given the source of these opinions, they had a kind of underlying

[17] Sz. Tahin, *op. cit.* note pp. 10, 269.
[18] Gy. Wellmann, *op. cit.* note pp. 10, 651.
[19] CKOT resolutions "were closer in nature to commentary-type rather than judgment-type texts". See: S. Tahin, *op. cit.* note pp. 10, 269.

judicial authority; their informal weight was prominent compared to the comments of legal scholars. Therefore, it is appropriate to eliminate the possibility of indirect regulation. It is a strange claim that this situation is "just as if the legislature were to ban the publication of commentaries or legal texts overnight"[20]. The commentary of legal scholars serves not only to formulate consensus opinions but also to formulate competing scholarly positions. However, the CKOT resolutions were a system of criteria established by a majority vote, which sought to serve the goal of legal uniformity through exclusive enforcement and stepped up with such a demand.

c) The CKOT resolution, compared to its role in the interpretation of the law, did not have a legal basis; that is, it stretched the framework of the sources of law in the system. The practice of CKOT resolutions is incompatible with a coherent order of law sources and a mandatory interpretation of the law.
d) The disadvantage of an abstract legal interpretation is that it can only partially reflect the realities of life, while the legal interpretation given in a particular case is linked to reality.
e) In addition to the above, it is also worth highlighting from the explanatory notes to Law CXXVII of 2009 as to why the legislator did not warrant the maintenance of the CKOT resolutions and similar instruments. Namely, the notes describe them as informal (non-adjudicatory) means of securing legal uniformity, in a manner independent of the will of the parties and incompatible with the constitutional position of the Curia; legal uniformity shall be ensured using legal remedies at the request of the litigant parties. In this regard, it was stated that

> "a court may not render a decision binding on the parties without the knowledge and will of the parties. All instruments seeking to ensure legal uniformity to the exclusion

[20] *Ibid.*

> of the parties are either unsuitable (since binding force cannot be associated to it) or arbitrary (if in any case, it is binding)"[21].

2.3. ABOLISHMENT OF THE 'IN PRINCIPLE JUDGMENT' OF THE CURIA AND LOWER COURTS

The 'in principle judgment' of the Curia and lower courts (usually regional courts of appeal)[22] were judgments made in particular cases, which received a special emphasis by the "council for in principle publishing", from which a panel of the Curia could only deviate by initiating the procedure for uniformity decision. The 'in principle judgments' had no vertical precedential effect; however, they did have such an effect informally. It was debated whether the classification of individual court decisions as being 'in principle judgments' and their publishing as such was an administrative decision: "the fact that this was done in an out-of-court proceeding does not mean that the selection was the result of an administrative decision"[23]. In an opposing view, it was stated that "the situation actually is binary: what happens in the courts, with or by judges, is either a judgment (this requires parties, procedure, independent decision and binding force), or administration, for which organizational power is sufficient"[24].

There is no doubt that the publishing council examined a proposal either at the proposition of the Curia panel, which made the decision, or that of the head of the chamber of the lower court. In

[21] A.Zs. Varga, *op. cit.* note pp.10, 83.

[22] As it has been noted, "in 2012, the concept of an 'in principle judgment' was introduced because certain types of cases and legal issues do not reach the Curia due to the rules of the judicial remedies system, so the Curia cannot take a position on them in the form of a judgment. A published in principle judgment by a court (…) has the same effect as an 'in principle judgment' made and published by the Curia: the Curia can only deviate from it by a decision on legal unity". See: A. Osztovits, *op. cit.* note pp. 10, 75.

[23] Gy. Wellmann, *op. cit.* note pp. 10, 651.

[24] A.Zs. Varga, *op. cit.* note pp. 10, 86.

other words, the two-step operation of sorting and highlighting cannot be classified as a judicial procedure.

Act LXVI of 1997 on the Organization and Administration of Courts, Article 29 (1) (b)[25] provided that the Supreme Court (the pre-2012 designation of the Curia) may initiate a proceeding for legal uniformity if a panel of the Supreme Court wished to deviate regarding questions of law from the decision of another judicial panel of the Supreme Court. Regarding this statutory provision, up until 2012, it was acknowledged that "the rule did not apply within the Supreme Court, the civil panels did not make use of this possibility, because any conflict between judicial panels, which were very rare due to their specialization, was resolved in a different way (e.g. by publishing one of the two opposing decisions as an 'in principle judgment')[26]. In such circumstances, it seems that, instead of a uniformity procedure, uniformity was ensured in an administrative-type procedure, by selecting an in principle judgment of the court.

From 2012, only the in-principle judgments of the Curia and the judgments of the lower courts selected by the Curia had precedent effects. With regards to this, it was stated that:

> "The most serious objection is that the publication of in principle judgments is not the result of a judicial decision but of an administrative decision. A decision that is not in line with the task provided for in the Fundamental Law or with European customs, on the other hand, can certainly be said to be the survival of the Soviet uptake on the law. This solution was logical at a time when the division of powers was denied; however, it is completely unacceptable in a constitutional state governed by the rule of law, today, in Hungary […]. The parties were evidently excluded from this procedure, especially from 2012 onwards – they had

[25] It was in force from 1997 to 2012. From 2012 to 2019, the legal uniformity procedure was only necessary in the event of a deviation from an in-principle judgment (Cf. Section 32 (1) (b) of the OAC).

[26] Gy. Wellmann, *op. cit.* note pp. 10, 652.

> no means of redress against decisions which deviated from the thusly published judgments"[27].

The amendment of the OAC by Law CXXVII of 2019 abolished the abovementioned methods of legal uniformization. This step was necessary and stemmed from the introduction of a limited precedent system, as we shall see, a judgment of the Curia published in the Collection of Judgments (*Bírósági Határozatok Gyűjteménye*) becomes precedent, that is, an in-principle judgment, provided it contains a provision capable of producing precedential effects.

2.4. THE 'LIMITED PRECEDENT SYSTEM' AND THE NEW FORM OF JUDICIAL LAW

The Curia, when it ensures the uniformity of the application of legislation according to the Fundamental Law, may do so not only within the framework of the legal uniformity procedure. Ensuring the uniformity of the application of the law is a constitutional task of the Curia. To ensure further the uniformity of the application of law according to the explanatory note of Act CXXVII of 2019, a 'limited precedent system' has been introduced.

Its elements are as follows:

a) The amendment to Article 346 para. (5) of the Code of Civil Procedure (hereinafter CCP), which in essence provides that the legal reasoning of a judgement shall contain, among others "the reasons behind the court deviating in questions of law from the judgments published by the Curia in the Collection of Judgments (hereinafter the published judgment of the Curia)[28], or rejecting the concerning motion".

---

[27] A.Zs. Varga, *op. cit.* note 10, p. 85.

[28] In this context, however, there is no doubt that the application of precedents presupposes significant changes. It is about changing our 'established habits', about rethinking the methods of source research and system of publication (Collection of Judgments), about the effects on legal education, about the method of processing judgments, extracting from and selecting them, about the separation of *ratio decidendi* and *obiter dictum*, and about the necessary change in legal

According to the explanatory note to the law amending the OAC, the judge must consider the rules established in previous judgments (i.e., precedents), and the differing or non-application of such judgments (open review) shall be reasoned. Consequently, the parties may invoke within a lawsuit, but the court is also obliged to apply *ex officio* the published judgments of the Curia. The case must be judged in accordance with the abstract legal rule which results from such judgments. Thus, an individual judgment of the Curia becomes quasi-law, because it is a binding legal act, parts of such judgments become valid outside the framework of the original lawsuit, as law, as legal norms applied abstractly and repeatedly, thus ensuring the legislator's will be concerning a uniform application of the law. Therefore the basic feature of precedent, the separation of *ratio decidendi* (the substantive reason for the decision) and *obiter dictum* (ancillary findings), must also appear with authority in Hungarian

reasoning habits. On issues worth considering, see: Sz. Tahin, *op. cit.* note 10, pp. 270–275. In agreement with the cited author, it is worth noting that the *ratio decidendi* cannot be extracted from a decision with absolute validity: "the full text of the individual judgment must remain in full sight; thus, it cannot be sufficient to mechanically adopt the theoretical contents of judgments". *Ibid.*, 272. Our great predecessors also understood this issue precisely. I refer once more to Gusztáv Szászy-Schwarz: "The appendices of professional journals offer a raw imprint of the judgments of the lawsuits filed at the Curia and above them a large *heading* of words which summarizes the topic well or in a bad way […] These *headings* in the best of instances are at least imperfect, which is inherent: in a judgment, at least ten types of legal issues intersect, and the *heading* can only highlight one or two of them". Szászy-Schwarz, *op. cit.* note 7, p. 170. This approach does not mean that there is no need for summaries; such 'headings' genuinely help with orientation. However, the summary cannot be a substitute for knowing the entirety of a judgment of precedent value because this highlights the internal connection between the factual situation and the law. Before the Soviet-type dictatorship, when the weight of codified law was much less than it is today and the presence of precedents was thus much stronger, the publishing of judgment collections was able to serve the requirements for the application of the law. Today, printed and electronic solutions are sure to emerge as a response to such requirements. Additionally, a critical issue is how the limited system of precedents will fit into the general system of civil procedure. Regarding this, see: Cs. Virág, B. Völcsey, *op. cit.* note 6, pp. 125–135.

> law, as only the *ratio decidendi* contains mandatory legal elements. "While in the case of a judgement, it is true that it is always put in writing, but this does not apply to the precedent itself, but to the decision of the case at hand"[29]. Identifying the *decidendi ratio* is a challenge. A new legal rule in form of a precedent is only laid down by a limited range of judgments, in which a new normative element appears regarding the content of the law or of the legal norm applicable in a particular case. Of the judgments of the Curia, only those that stand out due to their significance will be considered precedent, and as such, will be decisive for the proceedings that will follow in the lower courts[30]. The precise classification of the facts is also important, as the judge determines (*art of distinguishing*) why the facts of the Curia judgement cited as a precedent differ from the facts of the case at hand and why the precedent does not have to be applied in a new case.

If the court wishes to follow a different interpretation of the law from that resulting from the published decision of the Curia, it may do so; that is to say, it can exercise its judicial independence but must expressly justify this difference. If the Curia does not correct the deviation from the precedent during judicial review, the possibility opens for a complaint procedure for legal uniformity[31]. However, the possibility of a derogation exists without doubt, and if justified, the judge must make use of it:

> "it is out of the question, then, that a judge who is aware of his vocation, although I can present him ninety-nine identical judgments: I may press him against the wall. On the contrary, as I stated, the supreme law is justice. And there is nothing more deplorable than, if the chief judge

[29] B. Grosschmid, *Magánjogi előadások. Jogszabálytan* [*Lectures of Private Law. he Theory of Norms*] Athenaeum, Budapest 1905, p. 58.

[30] Cf. J. Illés, *Bevezetés a magyar jog történetébe. A források története* [*Introduction into Hungarian Legal History. The History of Norms*], Rényi Károly Könyvkiadó-Vállalata, Budapest 1919, p. 217.

[31] See subsection b) below.

> in particular, when he must judge, instead of drawing his positions and thus his decisions from the living organ of substantive law; he takes out the so-called judgment collections and its extracts, and from these, without any passion or inquiry, he huddles together all sorts and compiles a judgment. Such a person is a craftsperson whose place is not on the bench but at the planer. Therefore, consistency should not be exaggerated in this area. Neither should relying with automatism solely on precedents, instead of direct objective justification"[32].

In the legal literature, it has been stated: "the cited amendment of the CCP […] does not establish any form of the rule of precedent in Hungary"[33]. Such an un-nuanced statement does not, in my view, correspond to reality: the Curia's judgments have been referred to in cases in the past, but the legislature has now attached these judgments to a specific legal effect beyond informal authority: precedent nature (i.e. legal binding force) from which a deviation is possible, but in such a case, the Curia can modify the legal precedent in the procedure of legal uniformity complaint within the framework of the law. A judgment made within the uniformity complaint procedure also becomes a quasi-source of law because it provides a binding interpretation of the law. According to the OAC, the Curia's decision that establishes justification for a deviation[34] within the uniformity complaint procedure has the effect of a legal uniformity judgment; it must be published in the *Magyar Közlöny*. In my view, a judgment refusing a derogation, 'defending' a right contained in a published judgment of the Curia, would also deserve the same 'attention', because such a judgment establishes that the derogation from the previous law is unjustified, that is to say, it has clarifying power. The reason for the difference in approach is that

[32] B. Grosschmid, *op. cit.* note 30, pp. 765–766.

[33] A. Osztovits, *op. cit.* note 10, p. 75.

[34] The same rule shall apply in the event that the appropriate council of the Curia acknowledges the infringement caused by the derogation but maintains in force the judgment challenged in the complaint. See: subsection bc) below.

a new legal act is only formulated, and it only becomes generally binding if the derogation is justified and confirmed by the panel solving the uniformity complaint.

The limited precedent system was also criticized because

> "by substantially extending the scope of judgments which are binding on the courts, the new system also runs counter to the constitutional principle of judicial independence, ignoring the essence of judicial activity, which carries the possibility of forming a different legal position and interpretation […] In this system, the Curia solely is the one to ensure legal uniformity: all its decisions are binding on the lower courts. This makes judicial independence illusory…"[35].

This statement ignores the fact that the possibility of a derogation is indeed given, and the obligation to justify the derogation is obvious, just as the legislation also establishes the possibility of control over the justification given for the derogation. Thus, the uniformity of the application of the law, as well as the flexible development of the judicial interpretation of the law, becomes feasible. Furthermore, judicial independence does not imply unlimited judicial freedom[36]. Nor has the previously dominant system of abstract and informal guidelines provided substantially greater judicial freedom than the limited precedent system. Regarding issues of law, the Curia's position has been decisive so far, mostly thanks to the institution of judicial review, which is a logical consequence

[35] Gy. Wellmann, *op. cit.* note 10, p. 648.

[36] "If the judge himself does not see any principled weight in his own judgments; if he considers the truth to be square, which he can one day throw on one side and on a different day on another side; if he himself ignores the manifestations of the application of the law and considers himself independent not only of the Supreme Court, not only of the neighboring panel, but also of his own judgment made yesterday, concerning his judgment today: then neither judicial tradition nor judicial authority can develop". G. Szászy-Schwarz, *Jog és döntvényjog II* [*Law and Precedent II*], 28 *Jogtudományi Közlöny*, 1890, p. 217.

of the organization of the judiciary. Regarding the limited precedent system, it has been stated that:

> "only the higher courts are in such a situation which allows them the creation of a permanent jurisprudence. The higher courts, as a matter of fact, can enforce their own sufficiently generalised positions on the judicial practice of lower courts through the system of ordinary and extraordinary remedies, thus making rules permanent, which then become a part of the legal system, because the judicial practice of courts also enforces it among the actors of private autonomy"[37].

In the words of Béni Grosschmid:

> "All judges involuntarily gladly share on questionable issues; when it is before them, with great risk to parties' interest, to side with one party or the other party; and thus making either one or the other party hapless; that, I say, the judge, standing in front of such a situation and feeling the weight of spiritual responsibility; will be happy to share his conscience with the judge who beforehand made a similar judgement in a similar case"[38].

There is no compulsion to follow a precedent classified by the judge as incorrect, and appropriate correction mechanisms are indeed in place.

The basic argument in favor of a limited system of precedents is that judgments of legal uniformity alone cannot achieve adequate coherence of the application of the law. If only judgments of

[37] T. Lábady, *A magánjog általános tana* [*General Theory of Private Law*], Szent István Társulat, Budapest 2018, p. 131.

[38] B. Grosschmid, *op. cit.* note 30, p. 765. One of the greatest Hungarian legal scholars continued his line of thought as follows: "Not to mention what I actually only incidentally touch upon here, that relying on previous judgments also eases the burden of thinking. For I do not want to make a parody of the judicial practice, though not its elegy either; but in any case, to highlight its serious side".

uniformity are binding, "it deprives the ordinary judgment of the higher court of its necessary weight"[39]. The system of limited precedents opened the way for the general legal provisions contained in Curia judgments to prevail.

b) The OAC has been amended with rules related to the judgment on uniformity complaint, which in essence allows complaints to be lodged seeking a judgment on uniformity against certain judgments of the Curia[40]. The uniformity judgment complaint is a new, extraordinary judicial remedy.

In this context, there is a possibility of lodging a uniformity complaint[41] against the judgment of the Curia, which upholds the contested judgment and rejects the requested review, with the condition that the review in question concerns a deviation from the previous jurisprudence of the Curia. A complaint about legal uniformity is also valid if a panel of the Curia deviates from a published judgement of the Curia in a legal matter without initiating legal unity proceedings; in this case the deviation did not take place in the lower court judgement, that is, the Curia itself deviates from its own precedent.

In resolving a uniformity complaint, if it is established that there is indeed a deviation in a question of law[42] from the published judgment of the Curia, the special panel judging the uniformity

[39] G. Szászy-Schwarz, *op. cit.* note 37, p.218.

[40] Complaints seeking uniformity judgments can be lodged against the following judgments of the Curia: a) a judgment upholding the contested decision in the event of a review or of an unfounded appeal under the Administrative Procedure Act; b) a judgment refusing review under the Code of Civil Procedure; and c) a judgment refusing to accept a request for review under the Administrative Procedure Act, provided that the request for review referred to a deviation from a published decision of the Curia. In this context, I do not intend to discuss the procedural rules concerning the uniformity judgment complaint.

[41] A complaint about a uniformity judgment may be filed by a person entitled to file a request for review under the procedural laws or an appeal under the Administrative Procedure Act.

[42] Otherwise, the panel judging the uniformity complaint rejects the complaint. The reasoning of the decision, in addition to indicating the applicable legislation, is sufficient to refer only to the fact that there was no legal difference vis-à-vis the published decision of the Curia.

complaint[43] (hereinafter, the special panel) will issue a binding interpretation to the courts and may decide as follows:

ba) if the deviation was not justified (*per incuriam*), the panel defends the right contained in the published judgment of the Curia (*quieta non-movere*: in such a case, it annuls the decision challenged with the complaint, and the court issuing the decision on which the uniformity complaint is based will be ordered to a retrial).

bb) if the deviation is justified, the panel shall adopt a new interpretation and overrule the legal clause included in the previous judgment of the Curia; in such a case, the panel maintains in force the judgment challenged in the complaint: "the judgment of the Curia from which the deviation was justified shall no longer govern as a precedent"[44].

bc) a third option is to recognize the infringement caused by the deviation but maintain the contested judgment if the complaint is lodged in a case in which a law sets a time limit of up to five days for court proceedings or if another law is provided.

bd) if the uniformity complaint's subject-matter is a judgment rejecting judicial review and the panel finds a discrepancy on a question of law, it shall annul the challenged judgment and instruct the court to conduct the review procedure.

Summarizing the procedure and focusing on its substance, a complaint of legal uniformity is required in the following situation: the lower court deviates from the published judgment of the Curia, and a panel of the Curia rejects the request for review, that is, confirms the deviation. In such a case, a contradiction arises between the two judgments of the Curia, which calls into question the unity of the application of the law, opening the way for complaints about legal uniformity. According to the legal literature,

[43] The panel is chaired by the president or vice-president of the Curia. The panel consists of the president and eight other members; the members are appointed by the president from among the judges serving in the chambers of the Curia, with at least one member appointed from each chamber.

[44] Gy. Wellmann, *op. cit.* note 10, p. 655.

"a high degree of mistrust is suggested by a remedy which is based on the fact that the Curia deviates from its own judicial practice in a particular case without any legitimate reason to do so"[45]. In my opinion, this is not the case. The first judgement was formulated by a panel of the Curia judging in a specific case. Deviation from this is justified by a similar panel. In such a case, the ideal way to resolve the conflict between the legal elements contained in the two judgments is via the complaint for uniformity, where a special panel can decide whether the first or second interpretation is the one that is well-founded[46]. This special procedure ensures the legitimacy of the judgment, which, in resolving the uniformity complaint, will confirm the first (published) or the second (new, overriding) judgment containing case law. Any conflict between the panels acting on a case-by-case basis, thus of equal 'weight', can be settled by a higher, special panel that resolves complaints for legal uniformity. Evidently, in most cases, the Curia will already confirm the previous case law during the ordinary review, so deviations and a complaint procedure will rarely occur, and if so, only in justified cases.

What makes this a precedent system limited? There are a number of reasons. The first is mainly because only the legal norms included in the published judgments of the Curia gain precedent[47]; second, because there may be justified deviations from these judgments, and the Curia may accept and confirm such deviations in the course of the uniformity complaint procedure; and third, because

[45] A. Osztovits, *op. cit.* note 10, p.78.

[46] Therefore, the position that seeks to ensure legal uniformity through judicial review is not correct. Cf. Gy. Wellmann, *op. cit.* note 10, pp. 653–654. Similarly, the already existing procedure of uniformity judgment is not adequate because Article 30 of the OAC expressly provides for the persons who can lodge such a request (the president of the Curia, or its heads of chambers, or their deputies, as well as the presidents of courts of appeal; a judgment panel of the Curia that wishes to deviate from a judgments of the Curia published in the Collection of Judgments; as well as the chief prosecutor). There are fundamental differences between the legal uniformity procedure and the procedure of complaints about legal uniformity pertaining to the petitioners, as well as to the subject of the petition, which justifies a separate legal uniformity complaint procedure.

[47] Court of appeals judgments, for example, also have informal authority: but they cannot be described as precedents.

of the dominance of written law, precedent is expressly only needed when written law is unclear, or there is a lacuna:

> "Arguing with precedent has so far appeared mainly where judicial law has taken over the role of substantive law. Where certain provisions of the Civil Code are so abstract (rules on personal law, compensation, real rights, family law) that these norms do not mean anything (or, on the contrary, they can mean anything), so their specific content must be filled by judicial interpretation. In such cases, the indication of the legal basis in the application initiating judicial proceedings becomes quite formal, since the real content will be determined by the precedent"[48].

What makes this precedent system new? The precedent system introduced by Act CXXVII of 2019 is new and not the precedent system in general. After all, previous court judgments themselves had an informal authority, inherent to the nature of judicial interpretation, to treat such judgments as a minimum point of reference in lawsuits following a particular interpretation in time, even if they had no binding force. There is also no doubt that if an earlier judicial interpretation on which a party relies already exists, it creates tension and is seen by the losing party as a breach of legal certainty when an interpretation contrary to an earlier judgment prevails. Even in such a context, the informal effect of earlier judicial interpretation prevails. It is not precise to classify such a system as a 'soft precedent system'[49], as precedent presupposes binding force,

[48] Sz. Tahin, *op. cit.* note 10, p. 274. Similarly, it was stated that "[e]vidently, if there is a more specific legal norm, narrower and more specific content of the norm (…), than more accurately the court's judgement can be predicted, and is narrower the scope of interpretation by the judge". See Cs. Virág, B. Völcsey, *op. cit.* note 6, p.126.

[49] Cf. Sz. Tahin, *op. cit.* note 10, p. 274. Court of appeals decisions, for example, also have informal authority and can continue to be used as interpretative references in other lawsuits even after the introduction of the 'limited precedent system'. However, these judgments cannot be considered a precedent, they have no binding force beyond the original lawsuit. This is justified because only the

the adjective 'soft', detracts precisely from the binding force, so that the term comes to mean 'non-binding binding', which is not to be regarded as precise. The cited author rightly observes that "the lack of binding force did not necessarily result in the individual decisions of the Curia (Supreme Court) being ignored by the lower courts. The precedent effect of individual judgments forming part of judicial law was forced by informal attitudes and principles"[50].

However, after the regime change at the end of the 1980s, at least for a while, the precedent system was part of the Hungarian legal system. Act LXVI of 1997 on the Organization and Administration of Courts, Article 29, para. (1) letter (b)[51] provided that uniformity proceedings were appropriate if a panel of the Supreme Court wished to deviate in a question of law from the judgment of another judicial panel of the Supreme Court. This means that the deviation from the previous individual judgment should, in principle, have resulted in a legal uniformity procedure; that is, the previous individual decision was given clear horizontal binding force by the law, up until the entry into force of the OAC on 1 January 2012[52]. Thereafter, the uniformity procedure was necessary only in the event of a deviation from the contents of an 'in principle' judgment.

However, the current legislation goes further: it assigns vertical legal force (precedent effect) to the published individual judgments of the Curia laying down a legal norm. Consequently, the concept of judicial law in the Hungarian legal system includes, in addition to legal uniformity judgments, the individual decisions of the Curia of precedential value. Thus, in addition to legal uniformity judgments, a new type of judicial law, the case precedent, has been created.

Curia can implement a uniformly binding legal interpretation throughout the territory of the state.

[50] Sz. Tahin, *op. cit.* note 10, p. 267.

[51] In force between 1997 and 2012. From 2012 until 2019 the uniformity procedure was only necessary in the event of a deviation from an 'in principle judgement' (cf. OAC Article 32 para. (1) letter b)).

[52] In this regard it was stated that the "limited precedent effect (only attached to the judgements of the Curia) is not a new element in the legal system of our country, which can hardly be refuted". Cf. A.Zs. Varga, *op. cit.* note 10, p. 84.

2.5. CONCLUSIONS

The introduction of a limited precedent system does not necessarily constitute innovation. On the one hand, it recognizes the way the law works and is applied. On the other hand, it is recognized that the proper functioning of the judiciary and the fulfillment of the requirement of legal certainty necessitates stability and predictability of the law created by the judge, and thus the establishment of a precedential system, while also reserving the possibility of deviating from judicial law and developing it. For example, a deviation may be justified when

> "a new historical circumstance or knowledge arises in the course of the adjudication of a particular case, which raises doubts as to the applicability of the earlier rule; there are new economic and political conditions which make it impossible to continue to apply the earlier rule; the facts have changed since the previous judgement […]"[53].

According to the reviews of the legal literature, the new regulation

> "formally did not do anything except for reaffirming the inevitable precedent effect of all the Curia's judgments, and entrusted the parties with two procedural means of enforcing this, the review procedure seeking uniformity on the one hand and the institution of the uniformity complaint procedure on the other […]. Of the two, the ones that strengthen the link between review procedures and legal uniformity are more important, if they validate the *stare decisis* effect, an effective legal uniformity complaint procedure can rarely take place"[54].

[53] The explanatory note of Law CXXVII of 2019.
[54] A.Zs. Varga, *op. cit.* note 10, p. 86.

In this context, it cannot be accepted that "the precedent system […] has hundreds of years practice in England, and almost none in Hungary"[55]. Even if we disregard the more distant antecedents of legal history, the period of more than half a century between the adoption of Act LIX of 1881 and the moment when Soviet-type dictatorship was forced upon Hungary, judicial law played an extremely important role. From this period, extremely valuable historical knowledge can be obtained that can be of significant help in applying the limited precedent system.

The transition to a limited precedent system undoubtedly has an experimental element to it, but the aims must be carefully appreciated, and the functioning of the system will be demonstrated or refuted by practice, while the need for and directions of possible fine-tuning will also be determined by practice. Subsequently, a new layer of law will crystallize from the Curia judgments of a precedential nature, and the continuous aggregation of this casuistic judicial law[56] as abstract and accessible rules is a genuine challenge and a new task for legal scholarship[57].

3. The Composition of Supreme Courts: Observations and Comparative Clarifications

3.1. FUNDAMENTALS

Act CXXVII of 2019 also reformed indirectly the composition of the Hungarian supreme court, the Curia[58]. Practically, this Act

[55] See: A. Osztovits, *op. cit.* note 10, p. 80.

[56] "We are beyond the naive notions of the age of Frederick of Prussia, which aimed to foresee every conceivable lawsuit and to anticipate the verdict in a code. The over 19,000 articles of the Prussian Codex, instead of the old confusion it sought to dispel, only created a new one". See: G. Szászy-Schwarz, *op. cit.* note 37, p. 217.

[57] In the words of Gusztáv Szászy-Schwarz, very appropriate again, "The collection and regular grouping of judgements, the screening and selecting of the legal principles inherent in them – this would be the first task of today's Hungarian private law theory", G. Szászy-Schwarz, *op. cit.* note 7, pp. 170–171.

[58] 55. § (2), Act CXXVII of 2019.

completed Act CLI of 2011 on the Constitutional Court with the following text: "A member of the Constitutional Court may apply to the President of the Republic, through the President of the Constitutional Court, for appointment as a judge. The President of the Constitutional Court shall inform the President of the National Office for the Judiciary of the application at the same time as it is forwarded to the President of the Republic"[59]. This change opened a second path to accede to the Curia: beside carrier judges, constitutional court judges can become members of the Curia. Also trough this modification became possible that the judges who are nominated to the Constitutional Court to retain this quality and after the end of their mandate to return to the courts to continue their previous function.

Supreme courts play a vital role in any state, but their function goes beyond the classical judiciary. In the case of the supreme courts, the function of interpreting, unifying, and developing the law predominates. This function's emphasis and social impact are at least as necessary as the specific administration of justice in individual cases since the uniform application of the law, and the predictability that results from the consistent application of the law are fundamental features of the rule of law. Ensuring uniformity in the application of the law is essentially different in nature from the provision of justice in individual cases. Therefore, it is not unimportant who carries out this activity: an examination of the composition of the supreme courts is therefore of particular importance.

Consequently, the question of the career model, criteria, and procedures for selecting and appointing judges to the supreme courts are of particular importance. Comparative legal studies clearly indicate that the composition of a supreme court can be based on several models: there is a supreme court paradigm composed of career judges, and there are forms in which, precisely because of the specific activities of the supreme court, the appointment to the court can also be part of a legal career path other than a classical judicial career (e.g. occupation as a law professor or prosecutor). Both models and their variants are perfectly legitimate and can

[59] 10/A. §, Act CLI of 2011.

meet the rule of law requirements, but, as we shall see, the system of appointments to the supreme courts, which are composed purely of career judges, is not without its critics.

The scope of the study does not allow for a comprehensive analysis, but it is worth examining some of the relevant regulations.

3.2. REGULATIONS AND SCIENTIFIC STATEMENTS IN FRANCE

The highest court in the French constitutional system is the Court of Cassation (*Cour de cassation*).

A leading role in the governance of the courts is also played by the self-administration body, the Supreme Council of the Judiciary. This Council has two bodies: a separate body for judges and a separate body for prosecutors. The panel of judges is chaired by the first president of the Court of Cassation (*premier président*). In addition to the President, the Supreme Council of the Judiciary is composed of five judges, a prosecutor, a state councilor recommended by the Council of State (*Conseil d'État*), a practicing lawyer, and six experts who are not members of Parliament, the judiciary, or the public administration[60]. The six latter shall be appointed by the President of the Republic, the President of the National Assembly and the President of Supreme Senate, each of whom shall appoint two qualified, prominent citizens. The section of the Supreme Council of the Judiciary with jurisdiction over judges shall make recommendations for the appointment of judges to the *Cour de cassation*, the Chief Presidents of Courts of Appeal and the Presidents of the *Tribunaux de grande instance*. Other judges shall be appointed after consultation with this section[61]. The judges of the Court of Cassation include the President, the Presidents of the colleges, the judges, and the deputy judges (*conseillers référendaires*).

[60] A draft amendment tabled in 1998, but not adopted, would have defined the majority of the members of the Supreme Judicial Council having a background outside of the judiciary (21 members, 10 of whom are judges).

[61] French Constitution, articles 65 and 13.

The effective appointment is the prerogative of the Head of State. I will only outline the procedure in this context, but this method also shows that the French Supreme Court is not only open to career judges. Usually, practicing judges are appointed as judges of the court of cassation (counsel for the court of cassation), but it is not excluded that a law professor or a practicing lawyer holding the Council of State or of the Court of Cassation rank is appointed. It is also possible to appoint judges for a maximum of ten or five years in cases where the Court of Cassation needs their specific experience. It is interesting to note that, in the French legal literature, it has been pointed out that the task of the Supreme Court of Cassation (reviewing the legality of individual court decisions) is a specific one.

In many cases, not judges with outstanding judicial experience in case law are best qualified to perform this task, but university professors or codification specialists can more easily grasp the specificities of this role. "Even if one has been a trial judge for more than thirty years, this is not enough to master cassation techniques. This late learning is a real problem for many good judges, and experience shows that a judge who has spent most of his career in administrative and organizational tasks, drafting laws and other rules, or a law professor […] is better adapted to cassation than a judge who has spent many years in the courts. Therefore, it is desirable, if not to break, at least to loosen the link that binds the judge who decides on the merits to the cassation judge…"[62]. In this respect, the Conseil d'État, which also performs the functions of the Supreme Administrative Court, has a specific and distinct career path, with a significant number of external State Councilors with a career as civil servants or other lawyers (appointed by the so-called *tour éxterieur*).

The number of judges has changed several times in history: in 1790 it was 42, increased to 50 in 1795 and reduced to 48 in 1800. After 1945, the number of judges increased further, to 88 in 2002, before the legal provision on the number of judges was abolished by law in 2007. Originally judges were elected, but in 1814 the King was given the power of appointment, and since then the power of

[62] J. Boré, L. Boré, *Organisation de la Cour de cassation*, [in:] *Répertoire de procédure civile*, Dalloz, Paris 2015, side-note 13.

appointment has been the prerogative of the executive. Under the current legislation, adopted in 1958, the President of the Republic appoints the judges of the Court of Cassation on a proposal from the Supreme Council of the Judiciary[63].

A prerequisite for the appointment is that the person concerned must have previously exercised a specific judicial function. The other, external, route of placement is if the person is a member of the State Council; if he or she is the Director of the École *nationale de la magistrature*; if he or she is the Director or Head of Department of the Ministry of Justice; if he or she is a professor at a public law faculty with at least ten years of experience as a professor or associate professor; if he or she is a lawyer with the Council of State or of the Court of Cassation rank. The oath of office is administered only to new Court of Cassation judges with a career other than a judge. Those who have previously been judges must have taken the oath of office earlier. Deputy judges (70) are appointed from lower courts, most for a term of ten years. They usually sit in an advisory capacity, except when they are the reporting judges, in which case they have the right to vote. Otherwise, they carry out research and write drafts and drafts of decisions in preparation for a decision.

3.3. REGULATIONS AND SCIENTIFIC STATEMENTS IN ITALY

In Italy, the Supreme Court of Cassation (*Corte Suprema di Cassazione*) is the highest court under examination. Its functions are laid down in the Decree No. 12 of 30 January 1941 on the administration of justice: to ensure the correct application and uniform interpretation of the law, the unity of the national substantive law, respect for the jurisdiction of the various courts, in accordance with Article 65[64]. According to the Italian Constitution, judges are subject only to the law and their appointment is by competition[65].

---

[63] Ordonnance no 58–1270 du 22 décembre 1958.

[64] Ordinamento giudiziario – Regio decreto del 30 gennaio 1941, n. 12, Gazzetta Ufficiale del 4 febbraio 1941, n. 28.

[65] Italian Constitution, article 101 (2).

The key player in the judicial career is the Supreme Council of the Judiciary (*Consiglio superiore della magistratura*). It decides on the appointment, assignment, transfer[66], promotion and disciplinary proceedings of judges.

The President of the Republic[67] chairs the Supreme Council of the Judiciary[68], and its ex officio members are the First President and the Prosecutor General of the Court of Cassation. The judges from the various groups elect two-thirds of its members, and one-third by a joint sitting of Parliament from among university professors of law and lawyers with at least fifteen years of experience. The Council itself elects the Vice-President from among the members nominated by the Parliament. The elected members of the Council shall serve for a term of four years and shall not be immediately eligible for re-election[69]. During their term of office, they may not be entered on the professional register or be a member of Parliament or a provincial council.

Disciplinary proceedings against judges may be initiated by the Minister for Justice[70]. Without prejudice to the powers of the Supreme Council of the Judiciary, the Minister for Justice shall have responsibility for the organization and functioning of the judiciary[71].

The procedure for appointments to the Supreme Court of Cassation is detailed in Act 831 of 1973[72]. The Supreme Judicial Council

[66] In this context, the Constitution provides that judges are immovable. They may be dismissed or suspended from office, transferred to another court or post, only by decision of the Supreme Council of the Judiciary, based on the grounds provided for in the Law on the Organization of the Judiciary, with the possibility of the defense provided for, or with their own consent.

[67] In Italy, the President of the Republic is elected by the joint session of parliamentary chambers (a two-thirds majority in three rounds, and an absolute majority from the fourth round onwards is required to elect the Head of State).

[68] Italian Constitution, article 104 (2).

[69] That is, they are eligible for re-election after a real break after their mandate.

[70] Italian Constitution, article 107 (2).

[71] Italian Constitution, article 110.

[72] Modifiche dell'ordinamento giudiziario per la nomina a magistrato di Cassazione e per il conferimento degli uffici direttivi superiori – Legge 20 dicembre 1973, n. 831, Gazzetta Ufficiale del 29 dicembre 1973, n. 333.

evaluates the judges of the Courts of Appeals[73] for appointment to the Court of Cassation. The criteria for evaluation are laid down in the law and are competence, professional ability, efficiency and discipline, and the quality of the performance of duties. The law requires reasons to be given for the assessment. The evaluation is communicated to the Ministry of Justice and to the judge evaluated. They are also entitled to make comments. If the evaluation is not favorable, a new evaluation can be initiated after three years[74].

The conditions for the evaluation procedure are:

a) the judge has been a judge in a court of appeal for at least seven years[75];
b) at least ten years of lower-level judicial experience (continuity is not required) at the level required for the judicial position in question[76];
c) has applied for the evaluation procedure.

The judges who are favorably evaluated are appointed as judges of the Supreme Court of Cassation, the priority criterion being the length of judicial practice. As long as the appointment is effective, the judge will have to carry out his/her duties as a judge of the court

[73] A judge of a tribunal may be appointed as a judge of a court of appeals after eleven years of judicial practice. See Disposizioni sulla nomina a magistrato di Corte di appello – Legge 25 luglio 1966, n. 570, 1. cikk., Gazzetta Ufficiale del 28 luglio 1966, n. 186.

[74] Legge 20 dicembre 1973, n. 831, article 6.

[75] Legge 20 dicembre 1973, n. 831, article 4. The Disposizioni per l'aumento degli organici della Magistratura e per le promozioni – Legge 4 gennaio 1963, n. 1, Gazzetta Ufficiale del 8 gennaio 1963, n. 6. allows, as an alternative, judges with at least five years of experience at court of appeals level to be appointed as judges of the supreme court by examination. The topics of the examination are civil law and civil procedure (drafting a judgment of cassation on the basis of a case law provided by the examining board); criminal law and criminal procedure (drafting a judgment of cassation on the basis of a case law provided by the examining board); administrative law (problem-solving). The selection board is appointed by the Supreme Council for the Judiciary, at the request of the Minister for Justice, from among the judges of the supreme court. The head of the examination board is the President of the Court of Cassation. All three examinations are marked out of 70 to 70, with a maximum score of 210. The minimum score required to pass the examination is 168, but no examination may be less than 42.

[76] Legge 20 dicembre 1973, n. 831, article 5.

of appeals. The appointment will be made by the Supreme Council of the Judiciary, either on request or ex officio, depending on the number of vacant judgeships of the Supreme Court of Cassation. Appointment as a judge of the Court of Cassation does not necessarily mean that the judge will actually practice in the highest court. In many cases it is merely a qualification and a salary grade. For example, in the court of appeals, the president of the court or the head of a panel can only be a person who has the qualification of *magistrato di cassazione*.

After the appointment of a judge of the court of nullity, the law provides for a further eight years of practice before the judge can be appointed to a leading position[77].

According to the Constitution, university professors teaching law and lawyers registered in the special register of higher legal services with at least fifteen years' experience may be invited to serve as Supreme Court of Cassation judges based on nomination by the Supreme Council of the Judiciary in recognition of their merits[78]. This procedure is not standard, but it is not a paper option either. However, external recruitment is subject to the discretionary judgment of the Supreme Judicial Council as to whether it wishes to fill a Supreme Court of Cassation judgeship in this way.

3.4. REGULATIONS AND SCIENTIFIC STATEMENTS IN SPAIN

Spain has a mixed type highest court, the Supreme Tribunal (*Tribunal Supremo*)[79]. The Supreme Tribunal has jurisdiction throughout Spain and is the highest judicial body[80].

In Spain, the specific nomination procedure is known as the *quinto turno* (fifth turn). This refers to the fact that lawyers outside the judicial career fill every fifth vacancy in the Supreme Tribunal, i.e.

[77] Legge 20 dicembre 1973, n. 831, article 16.
[78] Italian Constitution, article 106 (3).
[79] Ley Orgánica del Poder Judicial, articles 343–345.
[80] Spanish Constitution, article 123.

lawyers and other legal professionals of professional standing with at least fifteen (previously twenty) years of professional experience.

The appointment is made by the Supreme Council of the Judiciary (*Consejo General del Poder Judicial*) by a three-fifths majority. An appointment does not require an examination, only a subjective check of professional competence. In Spain, eight of the twenty members of the Supreme Council of the Judiciary appointed by the King are lawyers or other legal practitioners with appropriate qualifications and at least fifteen years of professional experience; they are nominated by the Chamber of Deputies and the Senate, with a three-fifths majority. The twenty-first member shall be *ex officio*, the President of the Supreme Tribunal. The qualified majority indicated (12 votes out of 21) has caused problems in practice: in some cases, none of the candidates has obtained the required number of votes. Therefore, the election must also be justified: it is a 'contest' of professional recognition and achievements, and there is no doubt that discretion is involved in the choice.

The purpose of creating this Spanish system was to give the most outstanding lawyers who did not choose a career as a judge the opportunity to become judges of the Supreme Court; to ensure that those who have achieved outstanding professional performance in a relevant legal profession other than that of judges have the opportunity to participate in the jurisprudence of the Supreme Tribunal; and to create a unity between judicial careers and other legal professions that allows for different perspectives, conceptual richness and a multifaceted approach to highest court litigation[81]. A similar system operates in Brazil: but there, the head of state chooses from three candidates, one of whom he will appoint for every fifth supreme court vacancy.

[81] Exposición de Motivos de la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial (VII, párrafo segundo): "oportunidad de acceso a la Judicatura por su cúspide para juristas ajenos a la Carrera Judicial".

3.5. COMPARATIVE CONCLUSIONS

Spain has an interesting solution, with a mandatory mechanism to ensure that one-fifth of the supreme court judges come from "outside" the judicial career path. In France and Italy, the system is also open, and lawyers with a career path other than that of a judge can be appointed to the supreme courts. In France, the relevant literature has concluded that the appointment of cassation judges should be opened up even more widely to lawyers from non-classical judicial backgrounds, who are obviously highly qualified and professionally recognized.

The above indicates that it is difficult to define an ideal model for recruiting judges to the supreme courts, as several different models may exist. All of them can be considered legitimate in the respective state and ensure the proper performance of the Supreme Court's functions. It is clear that there are several arguments to be considered in favor of a supreme court organization that is not exclusively made up of career judges: in particular, the specific nature of the unification of the law, which may reflect value choices, and the diversity of professional experience and perspectives in the judiciary, which are both different but equally valuable.

These few models show that there are many examples in comparative law of special recruitment of judges in higher courts, so the new Hungarian solution opening the Curia to former judges of the Constitutional Court is not exceptional or unusual.

Not discussed because of the European focus of the present analysis – but one of the objectives of possible future research – the Supreme Court of Japan is also interesting in this respect, where supreme court judges are appointed by the Prime Minister among career judges, law professors, prosecutors, practicing lawyers[82]. Having in mind this appointment procedure, it was stated that on the

[82] M.J. Ramseyer, N. Minoru, *Japanese Law: An Economic Approach*, University of Chicago Press, Chicago 1999, p. 17.

whole, Japanese judges are among the most politically independent and individually honest and trustworthy in the world[83].

According to the Hungarian Constitution, judges shall be independent and only subordinated to Acts; they shall not be instructed in relation to their judicial activities. Also judges may not be members of political parties or engage in political activities. Only persons having reached the age of thirty years may be appointed[84]. Similarly, members of the Constitutional Court may not be members of political parties or engage in political activities[85]. According to the Act CLI of 2011 on the Constitutional Court, can be nominated as judge of the Constitutional Court a person who is over 45 years of age, who is an outstanding theoretical lawyer (university professor or doctor of the Hungarian Academy of Sciences[86]) or have at least 20 years of professional experience in the field of law[87]. No person may be a member of the Constitutional Court who has been a member of the Government, a leading official of a political party or a senior political or professional official within four years before the date of his election[88]. In other words, in the case of the Hungarian reform, there are guarantees of objectivity and professionalism.

4. Final Remarks

There are many alternative models for the organization of an effective and fair justice mechanism. Each legal system has to find its way of administering justice effectively in its particular context to deal with its particular problems. What is clear is that there is no

[83] J.O. Haley, *Litigation in Japan: A New Look at Old Problems*, "Willamette Journal of International Law and Dispute Resolution", 2002, vol. 10, pp. 121–142, at. 139.

[84] Hungarian Fundamental Law, article 26.

[85] Hungarian Fundamental Law, article 25 (8).

[86] A specific scientific title which is attributed in a particular procedure by the Hungarian Academy of Sciences in case of outstanding scientific activity. Ph.D. is just one of the many requirements of this title.

[87] Article 6 (1).

[88] Article 6 (4).

single beneficial solution but that there can be many equally legitimate means, all of which meet the criteria of a 'good justice'. There are areas of law where unification is possible, but civil procedure and organization of courts is not one of them. Efficiency can be improved by drawing on the experience of competing national models. A single, ubiquitous system of (civil) justice identical in every state immeasurably limits the scope for improvement. Multiple competing models and interactions inducing organic development are the best environment for legal innovation. In this context, the Hungarian reforms are truly interesting. These reforms recognize the precedential character of the supreme court decisions and thus serve the unity of the application of the law. The changes also opened up the supreme court career in Hungary for constitutional court judges who otherwise meet the classical criteria of high professionalism and independence. This element of the reform channels new insights and experiences into the justice system.

Finally, all these measures can be perceived as contributions to an effective system of (civil) justice, the success of which time can confirm. If practice should prove the expectations wrong, the possibility of a correction is open in justified cases. This is also a feature of genuinely innovative legal systems.

REFERENCES

Boré J., Boré L., *Organisation de la Cour de cassation*, [in:] *Répertoire de procédure civile*, Dalloz, Paris 2015.

Grosschmid B., Magánjogi előadások. Jogszabálytan [Lectures of Private Law. he Theory of Norms] Athenaeum, Budapest 1905.

Haley J.O., *Litigation in Japan: A New Look at Old Problems*, "Willamette Journal of International Law and Dispute Resolution" 2002, vol. 10.

Illés J., *Bevezetés a magyar jog történetébe. A források története* [*Introduction into Hungarian Legal History. The History of Norms*], Rényi Károly Könyvkiadó-Vállalata, Budapest 1919.

Lábady T., *A magánjog általános tana* [*General Theory of Private Law*], Szent István Társulat, Budapest 2018.

Montesquieu Ch., *The Spirit of the Laws*, Bartoche Books, Kitchener 2001.

Osztovits A., *Törvénymódosítás a bírósági joggyakorlat egységesítése* érdekében – *jó irányba tett rossz lépés?* [*Amending the Law for the Uniformity of Court Decisions – a Wrong Step in the Right Direction?*], 2 *Magyar Jog* 2020.

Ramseyer M.J., Minoru N., *Japanese Law: An Economic Approach*, University of Chicago Press, Chicago 1999.

Szászy-Schwarz G., *Jog* és *döntvényjog I* [*Law and Precedent I*], 22 *Jogtudományi Közlöny*, 1890.

Szászy-Schwarz G., *Jog* és *döntvényjog II* [*Law and Precedent II*], 28 *Jogtudományi Közlöny*, 1890.

Tahin Sz., *Korlátozott precedensrendszer – alulnézetből* [*Limited Precedent System – a Bottom View*], 5 *Magyar Jog* 2020.

Trócsányi L., Schanda B., *Bevezetés az alkotmányjogba. Az Alaptörvény* és *Magyarország alkotmányos intézményei* [*Introduction to Constitutional Law. The Fundamental Law and Constitutional Institutions of Hungary*] HVG-ORAC Lap- és Könyvkiadó, Budapest 2012.

Varga Zs.A., *Tíz gondolat a jogegységről* és *a precedenshatásról* [*Ten Thoughts on Unity of Court Decisions and on the Precedent Effect*], 2 *Magyar Jog* 2020.

Virág Cs., Völcsey B., *A korlátozott precedensrendszer* és *a polgári perjog kapcsolata* [*The Relationship between the Limited Precedent System and Civil Procedure*], 3 *Magyar Jog* 2020.

Wellmann Gy., *Kritikai* észrevételek *a jogegység biztosításának* új *rendszerével kapcsolatban* [*Critical Remarks on the New System of Ensuring Unity of Court Decisions*], 11 *Magyar Jog* 2020.

Ződi Zs., *Precedenskövetés* és *jogszabály-értelmezés* [*Following the Precedent and Interpreting the Law*], 3 Állam- és *Jogtudomány*, 2014.

PROF. DR HAB. ARTUR MEZGLEWSKI
War Studies University

Effectiveness of the human factor in justice in the light of research on the application of law

Assessment of the effectiveness of proceedings cannot be limited only to their efficient course. According to Art. 6 of the Convention on Human Rights and Fundamental Freedoms[1], the duty of authorities is a reliable examination of a case within a reasonable time. And only these two elements – appearing simultaneously – exhaust the meaning of the discussed issue.

The goal of this chapter will be a publication of analyses of the files of court proceedings conducted in terms of their reliability and effectiveness[2]. The research particularly concerned the assessment of the influence of human factor on a reliable and efficient course of criminal proceedings. Perceived critical moments inhibiting the case or distorting the result will be diagnosed to determine whether the entity is responsible for particular defects or whether the procedures are imperfect.

The chapter structure will include subchapters on effectiveness of preparatory proceedings, accuracy of proceedings at the

[1] Convention on human rights and fundamental freedoms, drawn up in Rome on 4 November 1950, later changed by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, item 284).

[2] A query and analysis of criminal and petty offence cases were conducted by district courts and regional courts from the area of all appeals in Poland.

jurisdictional stage and the impact of the human factor on the efficiency of proceedings. The last one will consider the assessment of both those factors that slow down the proper course of proceedings, as well those that lead to the statute of limitation on the criminality of an act.

1. Efficiency of preparatory proceedings

In the Polish legal system, there are two criminal procedural acts: the Code of Criminal Procedure (hereinafter referred to as: CCP)[3] and the Code of Procedure in cases of Petty Offences (hereinafter referred to as: CPPO)[4]. The first one is used in prosecution of crimes, the second – in prosecution of petty offences i.e., forbidden acts of less social harm. Penal preparatory proceedings are conducted or supervised by the prosecutor, and within the scope provided for in the Act they are conducted by the Police. In the cases provided for in the Act, the entitlements of the Police are vested in other authorities (Art. 298 § 1 of the CCP). Preparatory proceedings in cases of petty offences are referred to as explanatory actions. As a rule, they are run by the Police. They can also be conducted by other authorities such as Border Guard, Military Police, city guards and other formations and bodies (Art. 17 § 1–5 of the CCP)[5].

[3] Act of 6 June 1997 r. – Code of Criminal Procedure (i.e., Journal of Laws of 2021, item 534).

[4] Act of 24 August 2001 r. – Code of Procedure in cases of Petty Offences (i.e., Journal of Laws of 2021, item 457).

[5] In the CCP the scope of the term: public prosecutor is limited to the prosecutor who is an organ of the state, whose primary or secondary task is to bring and support accusations in court. In cases of petty offences, public prosecutors are not only state bodies, but also local government and social bodies. Although R.A. Stefański has noticed that 'precise reading of the content of the provisions contained therein leads to the unequivocal conclusion that the Code of Civil Procedure considers public prosecutors to be state bodies i.e., the Police (Article 17 § 1), labour inspector (Article 18 § 1) and other bodies and institutions are only granted the powers of a public prosecutor (Article 17 § 3 and 4). While it clearly states that the former are "public prosecutors", in relation to the latter it *expresis verbis* states that they are entitled to "the powers of a public prosecutor". In the context of these provisions, therefore, one can speak of a public prosecutor in

Both preparatory proceedings play a similar role in their procedures. They differ mainly in the degree of formality. Explanatory actions are a specific – saturated with inquisitive elements – preparatory stage for fully adversarial proceedings before a court. A characteristic feature is their optionality and relatively large potential diversity. The initiation of explanatory actions (as well as their completion) takes place by actual act – and not by issuing a decision, as is the case with a criminal investigation. Whereas, criminal investigation is managed by the principle of legalism and a high degree of formality.

Therefore, when examining the files of preparatory proceedings – criminal and petty offence – the focus was on the analysis of their effectiveness in the context of the statutory goals set by individual procedural acts. In particular, the research enquired:

- is the principle of economics and purposefulness of prosecution applied in the petty offence procedure?
- is the principle of legalism sufficiently applicable in the criminal procedure?
- what are the threats to the principle of substantive law at the preparatory stages of criminal and petty offence proceedings?

The above-mentioned goals also imply the structure of this subchapter.

1.1. EFFECTIVENESS OF EXPLANATORY ACTIONS IN PETTY OFFENCE CASES

According to the wording of Art. 54 § 1 of the Code of Procedure in cases of Petty Offences:

---

the *strict sense*, including bodies that the Code expressly refers to as a public prosecutor(prosecutor's office, the Police and a labour inspector) and a public prosecutor in the *largo sense*, whose conceptual scope includes bodies and institutions with the powers of the public prosecutor (government and local government administration bodies, state control and local government control bodies as well as municipal and city guards and other state, local government or social institutions. See: R.A. Stefański, *Oskarżyciel publiczny w sprawach o wykroczenia*, "Prokuratura i Prawo" 2002, vol. 1, pp. 51 nn.

> "In order to determine whether there are grounds to submit a motion for punishment and to collect data necessary to prepare the application, the Police ex officio carry out explanatory actions. These actions, if possible, should be taken at the place of the commission of the act immediately after its disclosure. They should be completed within one month since the day of taking them".

The above process standard is easy to understand and logical. Its execution should not pose any major obstacles – especially when the offence is revealed by the Police or other authorized body, all the necessary personal sources are usually present at the scene: the potential perpetrator of the offence, witnesses, and the victim (if disclosed). It is enough to establish the personal data of these persons, to interview witnesses and to interview a person for whom there is a reasonable basis for drawing up a motion for punishment to the court[6].

However, the practice differs significantly from the above model. At the scene of the incident – most often – police officers only determine the data of the participants of incidents and instruct them about the obligation to inform about changes in the address of residence – without carrying out any evidentiary activities. In particular, the officers do not interview the perpetrators or witnesses of the event. They also do not prepare photographic documentation. Moreover, these interventions are rushed – especially in the case of road traffic offences. The tasks that the policemen set for themselves are limited to punishing the largest possible number of perpetrators with fines, as this is what they are held accountable for. Therefore, other activities that could be performed at the scene of an incident are usually carried out by organizational units of the police located in the places of residence of the participants

[6] More on personal identification data processed in petty offence proceedings: A Mezglewski, *Przetwarzanie danych osobowych w sprawach o naruszenia przepisów ruchu drogowego, ujawnionych przy użyciu urządzeń rejestrujących*, [in:] *Ruch drogowy – ochrona danych osobowych, kontrola, prawno karne następstwa*, A. Mezglewski, A. Tunia, M. Skwarzyński (eds.), Lublin 2015, pp. 15–48.

of the incident and witnesses – in the form of legal assistance. As a result of this approach, interrogations of the participants of the incident last many weeks or even months, and the interrogations themselves, conducted by random officers who do not know the reality of a given case, do not contribute to clarifying the case to the extent that they should.

Analysing the files of the explanatory actions, we come to the conclusion that, practically without too many exceptions the proceedings are only aimed at achieving one goal: collecting personal identification data, which are required to draw up a motion for punishment. As a rule, they do not explain the circumstances of the event which is the subject of the petty offence proceedings. It should be noted that the regulations specifying the formal requirements of the motion for punishment are archaic and pointless. Their implementation obliges the authorities conducting the proceedings to carry out a whole series of activities that are unnecessary. The above remarks relate to the scope of personal identification data collected by prosecutors and by courts[7]. Statutory regulations relating to the material scope of personal data processed in pre-litigation and judicial misconduct proceedings are characterized by excessive casuistry, consisting in excessive, unnecessary interference in the personal rights of participants in the proceedings (and not only participants) through the processing of such data as detailed

[7] The code of procedure in cases of petty offences contains provisions imposing on entities carrying out explanatory actions the obligation to establish the following personal identification data of the suspect (accused): name and surname, address, as well as other data necessary to establish his identity, place of employment, data on material and family conditions and personal data of the accused, details of a previous conviction for a similar crime or petty offence (Article 57 § 2–3) of CPPO). In addition, the amendment of 16 September 2011 amending the Act – Executive Penal Code and certain other acts (Journal of Laws, No. 240, item 1431) on the basis of § 57 § 8 of the CPPO – to be properly applied – the provision of Art. 213 § CCP, introduced the requirement to establish the PESEL number of the potentially accused person, and if the person does not have it – the number of the document confirming their identity and the name of the authority that issued it, as well as the age of the person, their family and property relations, education, profession and sources of income and data on criminal records, and possibly also the tax identification number.

information on the property status of the accused and his spouse, personal conditions of the accused, his PESEL number. It also seems that the processing of certain data by the procedural authorities does not fall within the adequacy of data processing or perhaps even the purpose limitation principle. In the proceedings in petty offences, which regulate the principles of the perpetrators' liability for acts with a low level of social harmfulness, it would be quite sufficient to establish the identity of the accused and their address of residence. Such a change in practice would contribute to a significant acceleration of the proceedings – given that the query of detailed information on the accused generates most of the time devoted to investigations and constitutes the main activity of public prosecutors, not courts. Courts usually book one date of hearings to establish personal identification data of the accused.

A separate issue is the implementation by the procedural authorities of the obligation to interview a person for whom there is a reasonable basis for drawing up a motion for punishment. The Code provides that the person should be immediately interviewed (Article 54 § 6 of the CCP). The formulation of such an obligation in the act is unnecessary – given that, after all, this person has the right to refuse to provide explanations[8]. Therefore, if the suspect wishes to exercise the right to remain silent, a statement on this subject should be accepted, the traces of the incident (if any) should be secured and based on these findings a motion for punishment may be submitted to the court. Moreover, it should be added that

[8] Examples of such situations: The District Police Headquarters in Stalowa Wola in a case for an act committed on 24 April 2016, submitted a motion for punishment to the court on 1 August 2016 (RSOW 725/16); The District Police Headquarters in Dębica, in the case of an act committed on 14 October 2017, submitted a motion for punishment to the court on 28 December 2017 (RSOW 256/17); The County Police Headquarters in Ropczyce in a case for an act committed on 31 March 2018, submitted a motion for punishment to the court on 14 November 2018 (RSOW 230/18); The County Police Headquarters in Ropczyce in a case for an act committed on 4 December 2010, submitted a motion for punishment to the court on 8 March 2021 (RSOW 6065/20); The Provincial Police Headquarters in Wrocław in a case for an act committed on 15 January 2020, submitted a motion for punishment to the court on 4 August 2020 (RSOW 1091/20).

the petty offence procedure does not contain a provision constituting the legal basis for summoning a person to be interviewed for whom there is a justified basis for drawing up a motion for punishment – if he was not interviewed at the scene (Art. 54 § 6a of the CCP – *a contrario*).

1.2. FAILURES OF THE PRINCIPLE OF LEGALITY IN CRIMINAL PREPARATORY PROCEEDINGS

Pursuant to Art. 10 § 1 of the CCP, the authority established to prosecute crimes, is obliged to initiate and conduct preparatory proceedings and the public prosecutor also to bring and support the accusation – for an act prosecuted *ex officio*. The principle of legality formulated in this way imposes an obligation on each law enforcement authority to investigate whether the conduct of proceedings is legally permissible, imposes an obligation to examine the evidence base and imposes an obligation on the public prosecutor to initiate jurisdictional proceedings[9].

As shown by the file research, this principle of legality turns into a pure principle of opportunism – in each case when the notification about the possibility of committing a crime concerns a public officer associated with law enforcement agencies (a policeman, an expert, relatives, or friends of a police officer, etc.) or with judicial authorities. Actions under such a notification end at various stages of the preparatory proceedings – however, the charges are never brought to a potential suspect. In addition, these actions are strongly stretched over time – which is probably intended to discourage the aggrieved. We will point out and discuss two examples here:

- an example of a Police officer who testified untruthfully as a witness,
- an example of an expert who prepared an unreliable opinion.

[9] See: M. Kurowski, commentary to Art. 10 CCP, w: *Kodeks postępowania karnego. T. 1. Komentarz aktualizowany*, D. Świecki (ed.), Lex 2021.

1.2.1. The example of an officer who testified untruthfully while being questioned as a witness

On November 3, 2020, a notification was sent to the prosecutor's office about the suspicion of the crime of making false testimony by an officer of the County Police Headquarters in Ropczyce, who, being questioned as a witness before the Court, testified that while measuring the speed of the vehicle, driven by the aggrieved party "[…] *no vehicle was going in the opposite direction or in the direction of what the accused was driving*". The notification was accompanied by a recording made with a car recorder, which clearly shows that during the measurement by the officer, two cars were driving: one in the opposite direction and one in the same direction as the vehicle driven by the victim. A recording of the trial during which the testimony was given was also attached.

The District Prosecutor's Office in Dębica was appointed to handle this case. The prosecutor in Dębica read the files of the petty offence case, questioned the aggrieved party, and questioned the police officer – not as a suspect but as a witness. The officer testified that the speed measurement he took had been taken before the vehicle shown on the video drove into the measurement area. This version was also adopted by the prosecutor's office and discontinued the investigation pursuant to Art. 17 § 1 of the CCP.

Even if we assume that the above findings of the prosecutor's office regarding the vehicle travelling from the opposite direction are correct – despite the fact that the prosecutor uncritically accepted the facts provided by the officer and did not even attempt to establish this fact with the use of material evidence, it is important and significant that the prosecutor did not refer at all to the fact that the officer testified that no vehicle was going in the direction of the injured party – and therefore he did not even attempt to make a criminal-law assessment of this act. It should be emphasized here that the fact that while measuring the speed, another car is moving directly behind the measured vehicle is an extremely important circumstance for determining the correctness of the measurement.

According to the jurisprudence of Polish courts, this vehicle could disturb the measurement[10].

It is significant in this case not only that the prosecutor's office did not even try to explain the circumstances relevant to the case, but also the pace at which these activities are carried out. The activities described above lasted four months. But it is not the end. Submitted by the aggrieved party, it was sent to the wrong court (instead of the District Court in Ropczyce, it was sent to the District Court in Dębica). To date, the court in Dębica has not set the date of the hearing to consider the complaint[11]. So far, it has not examined its jurisdiction and has not sent the appeal to the competent court.

1.2.2. The example of an expert who prepared an unreliable opinion

On April 2, 2021, a notification was sent to the prosecutor's office that Z.J., acting as a court expert, presented a false opinion before the court to serve as evidence in the above-mentioned proceedings i.e., for an act under Art. 233 § 4 of the CC.

Z.J. is a person entered on the list of experts kept by the president of the regional court, however, his opinion concerned a different speciality than the entry on the list of experts[12]. The notification showed that according to Z.J.'s opinion, he didn't show not only expert but any knowledge in the field of vehicle speed measurement technology: he did not present any methodology in the assumptions to this opinion, nor did he include a report on the research carried out in it. He limited himself only to citing extensive excerpts from

[10] See: legally valid judgment of the District Court in Kraśnik of 16 July 2020, file ref. II W 357/18; judgment of the District Court in Zamość of 23 January 2014, file ref. No. II Ka 779/13; judgment of the District Court in Zamość of 4 December 2015, file ref. II Ka 448/15.

[11] See: Letter from the President of the District Court in Dębica of 19 August 2021, responding to the inquiry under the public information procedure (ref. A-0300-32 / 21).

[12] The entry on the list of experts concerned special knowledge in the field of road accident reconstruction – and therefore a discipline in the field of forensics, while his opinion concerned the issue of speed measurements in road traffic – i.e., a discipline in the field of measurement metrology.

the manual for the measuring device in the case file and other documents in the legal acts and to giving the results of his experiments without giving a description of their course. His categorical statement in the conclusion of the opinion that "the [speed] measurement was made correctly" does not result from any technical data that appear in the files[13].

The District Prosecutor's Office in Leżajsk, which was entrusted with the case, "held the case" for several months – without taking any evidence, and then, by a decision of July 20, 2021, refused to initiate an investigation into the case. The whole effort of the District Prosecutor was concentrated solely on discrediting the content of the offence report – which he tried to do through wrong dogmatic considerations[14].

1.3. IMPLEMENTATION OF THE PRINCIPLE OF OBJECTIVE TRUTH IN PREPARATORY PENAL AND PETTY OFFENCE PROCEEDINGS

Conducting reliable actions regarding the circumstances of the event is of particular importance when it is not obvious who the

[13] See: the files of the preparatory proceedings with reference number act PR Ds 468.2021, kept by the District Prosecutor's Office in Leżajsk.

[14] While interpreting the provisions of the Ordinance of the Minister of Justice of 24 January 2005 on court experts, the District Prosecutor concluded that "it is the expert who decides whether he has special knowledge in a particular case, whether he feels able to issue an opinion, whether he has the right technical, material and organizational background". See decision of the Deputy Prosecutor of the District Prosecutor's Office in Leżajsk of 20 July 2021 in the case No. act PR Ds 468.2021. This wrong view cannot be accepted. According to the literal wording of § 2 of the above-mentioned Regulation, experts are appointed for individual branches of science, technology, art, and craftsmanship – and it is not the expert who decides on which branch he can give his opinion, but the president of the district court – by making an entry on the list of experts within a specific branch of science or technology. In order to demonstrate that a specific candidate for an expert witness has qualifications in the area of a specific science or technology – he/she attaches to the application for entry on the list of experts' documentation confirming these skills, including the opinion of the workplace, the opinion of the professional organization (§ 3 of the Regulation) as well as other documents confirming possession of qualifications in a given field, referred to in Art. § 12 sec. 2 of the Regulation.

perpetrator of the act is. Such situations occur frequently in road incidents involving more than one participant, or when the perpetrator has to be identified from among a specific group of suspects. Therefore, a detailed examination was carried out on the files of the proceedings in which the determination of the perpetrator of the act required taking appropriate actions at the scene of the incident. Access to the case files of five such cases was obtained:

1) a criminal case, the subject of which was a fatal run over by an unidentified perpetrator of a drunk man lying on a road (Prosecutor's Office in Radzyń Podlaski, reference number PR Ds. 1421.2020 / Spc);
2) a criminal case, which the subject of the proceedings was hitting a man crossing a pedestrian crossing (due to the driver's distraction) (District Prosecutor's Office in Kraśnik, file reference number 2 Ds. 684.2019.D);
3) a criminal case, which the subject of the proceedings was a road accident with a fatal result, consisting in a head-on collision of two cars (District Prosecutor's Office in Mogilno, ref. No. 2 Ds. 684 / 2019.D);
4) a petty offence case, which the subject of the proceedings was an event in which a tractor driver drove to a county road and ran into the way of a passenger car, which, as a result, fell out of the track and crashed against a fence (District Police Headquarters in Kraśnik, RSOW 505 / 2018);
5) a petty offence case, the subject of which was a minor collision of two vehicles in a car park beyond the public road (Municipal Police Headquarters in Lublin, RSOW 2878/2019).

After an in-depth analysis of the above files, it should be stated that in all five cases, the perpetrator of the event was wrongly identified.

In the case from Radzyń Podlaski, the indictment was against an innocent person. No traces of contact with the human body were found on the car of the accused[15]. And determining the perpetrator

[15] The perpetration of the act of the accused was unequivocally questioned in the expert opinion issued at the stage of the jurisdictional proceedings. The

was not difficult as all vehicles passing this road were recorded by the camera. The police did not include the data of one of the passing cars in the case files. Our guess is that it was the perpetrator's vehicle.

In the case of hitting a passer-by on the zebra crossing, the prosecutor's office wrongly concluded that the passer-by was to blame and not the driver of the car, who was distracted and started the braking manoeuvre too late[16]. This case is legally discontinued.

In the case, the subject of which was a road accident, a person who – at most – should be liable on the basis of contributing to the guilt, and not for the perpetration of the offence was finally convicted. The basis of this ruling was the evidence manipulated by the prosecution[17].

---

expert showed that the damage to the vehicle, which was referred to by the District Prosecutor in Radzyń Podlaski, did not arise on the day of the incident and is not evidence of a suspect running over the pedestrian lying on the edge of the road. See the expert's opinion in the field of analysis of road incidents of 12 March 2021 – in the files of case II K 577/20 pending before the District Court in Radzyń Podlaski.

[16] This proceeding was discontinued even though the materials of the investigation could hardly be considered unequivocal. There was also no critical assessment of the evidence. In particular it was not investigated whether the accused driver had the possibility of avoiding the incident if, while driving the vehicle, he observed the foreland and the vicinity of the pedestrian crossing, and if he had taken appropriate defensive responses already at the moment of noticing that a pedestrian was approaching the crossing. The pedestrian had noticed the car in motion but assessed that a slow-moving vehicle manages to stop before the crossing, but he did not assume that the driver of that vehicle was not watching the crossing and seeing no pedestrian crossing the street. Although the expert opinion was called in the case, the expert in his opinion calculated the reaction time of the accused driver only from the moment when the 3rd injured pedestrian was already in the lane, and not from the moment when he could see him and when he was approaching the crossing. The case file also contains a whole range of information about the evidence, which would indicate that the accused – instead of observing the foreground, including the pedestrian crossing - simply stared at something and did not take the appropriate defensive reactions. The above issue was, *inter alia*, extensively raised in the complaint of the attorney of the subsidiary prosecutor against the decision of the District Court in Kraśnik of 26 November 2019 in the case file ref. No. II K 890/19 on discontinuation of the proceedings.

[17] Officers of the authority conducting the activities (District Police Headquarters in Mogilno) destroyed the recording from the driving recorder installed in

In the case of a road accident involving a drunk tractor driver, the Police sent a motion for punishment against the driver of a passenger vehicle who was driving correctly. However, the conviction did not take place. Thanks to the interventions of journalists and a social organization, the evidentiary proceedings took the right course, and the driver was acquitted[18]. On the other hand, the tractor driver remained innocent because the case was time-barred[19].

In the case of a collision of two vehicles in a car park, the motion for punishment was directed against the driver of the vehicle which was not moving at all. Nobody found the real perpetrator[20].

In four of the analysed cases, false determinations were made because appropriate actions were not taken at the scene. In one case (hitting a passer-by at the crossing) the actions at the scene were carried out correctly, however, at some point something happened that made the prosecutor's office change its view on the perpetration of the act. Most likely, there were corrupt activities in this case. The National Prosecutor's Office was notified of this, but it showed no interest in the case[21].

---

the vehicle of the accused; they destroyed the electronic records from the victim's vehicle (there was damage to the electronic systems, which made it impossible to download the data for the opinion), they did not secure the traces at the scene (the traces were covered with sorbent before securing them), the fact that the victim did not have his seat belts fastened, although the seat belt was hanging and was easily visible at the pillar, and it was also removable; parts of the vehicle were moved before it was described in the protocol; failure to determine the speed of the vehicle on speedometer, no thorough examination of the vehicle, etc. See: files of case II K 149/19 conducted by the District Court in Mogilno (including, in particular, an appeal by the defender of the accused).

[18] See: case files No. II W 210/18 conducted by the District Court in Kraśnik, including the judgment of the same Court of September 24, 2018.

[19] See: files of case II W 1192/18 conducted by the District Court in Kraśnik.

[20] See: files of case II W 75/20 conducted by the District Court Lublin-East in Lublin with its seat in Świdnik. The case is pending.

[21] This notification took the form of an application to resume validly discontinued preparatory proceedings. The National Public Prosecutor's Office did not consider this request but sent it to the organizational unit of the prosecutor's office which activities were challenged. In addition, the National Public Prosecutor's Office refuses to disclose the name of the public prosecutor who sent the request back without considering it. See the judgment of the Provincial Administrative Court in Warsaw of 16 November 2020 (file reference number II SAB/WA

2. The influence of the human factor on the accuracy of proceedings at the jurisdictional stage

The following procedural functions are performed in criminal proceedings as well as in petty offence proceedings: indictment (incrimination[22]), defence and adjudication. The adjudication function belongs to the court. The functions of accusation (incriminating) and defence belong to the litigants. The active party is the public prosecutor and the aggrieved party who performs the function of accusing (incriminating); the passive party is the accused (defendant) who has the right to defence. In order to achieve the correct result of the proceedings, all these functions of guilt should be performed correctly – in particular, however, the functions of accusation and adjudication.

Research on the files on the application of law has shown that the practice significantly differs from the theoretical model. Public prosecutors participate in the trial not very actively – and without understanding their role – and the courts replace the prosecutors in the performance of the function of accusing (incriminating), discharging themselves from the obligation to find the material truth and engaging in evidence initiatives that raise doubts as to the impartiality of the court adjudicating.

2.1. ASSESSMENT OF THE HUMAN FACTOR IN THE ACTIVITIES OF PUBLIC PROSECUTORS

The public prosecutor in criminal cases is not only the performer of the prosecution function, but also acts as an advocate of public interest and advocate for the rule of law. At the jurisdictional stage, in fact, he is acting as a party to the proceedings, but he is also obliged to

415/20) and the files of the proceedings by the Supreme Administrative Court initiated by the cassation appeal of the National Public Prosecutor's Office of 2 February 2021.

[22] In petty offence proceedings, the passive party to the proceedings is referred to as the "defendant", hence the function of incriminating, which is analogous (or actually identical) with the function of accusing.

seek a fair and lawful settlement[23]. Therefore – according to Art. 425 § 4 of the CCP – he has the right to bring an appeal also in favour of the accused and may also withdraw from the accusation. The above-mentioned prerogatives also apply to the petty offence procedure.

The analysis of the files of criminal and petty offence proceedings leads to the conclusion that public prosecutors – especially in petty offence cases – neglect their duties both in terms of the performance of the prosecution and, even more so, the function of the spokesman for justice.

2.1.1. Manifestations of inactivity of the prosecution in the performance of the prosecution function

When examining the activities of public prosecutors as part of their prosecution function, the focus was primarily on assessing the following activities:

- in the field of justifying indictments (motions for punishment),
- in terms of the initiative of evidence,
- in the field of correct formulation of evidence motions,
- with regard to participation of the prosecutor in hearings.

It was found that in practice, in cases of petty offences, motions for punishment submitted to the courts never contained a justification. This applies to both organizational units of the Police[24] and municipal (city) guards[25]. These motions are limited only to indicat-

[23] Compare R. Olszewski, *Role prokuratora w postępowaniu karnym*, "Prokuratura i Prawo" 2014, No. 1, pp. 43–59.

[24] E.g. Motion for punishing Municipal Police Headquarters in Zamość of 23 April 2019, RSOW 506/19; Motion for punishing Municipal Police Headquarters in Lublin of 5 December 2019 RSOW 2878/19; Motion for punishing County Police Headquarters in Lublin of 1 March 2021, RSOW 179/20; Motion for punishing County Police Headquarters in Siemiatycze of 15 January 2019, RSOW 747/21; Motion for punishing County Police Headquarters in Sucha Beskidzka of 10 July 2021, RSOW 273/20; Motion for punishing County Police Headquarters in Łęczna of 8 December 2020, RSOW 51/21.

[25] E.g., Motion for punishing City Guards in Gdańsk of 28 July 2020, SM.W.522.144.2020.IDF.3065.5193; Motion for punishing City Guards in the capital city of Warsaw of 16 June 2021, SM-OT3-4086-16235/20.

ing the alleged act of the accused and providing information about the evidence – e.g., names and surnames of witnesses who should be summoned to the hearing. The motions for evidence submitted by the public prosecutors also did not contain any justification. They were also not formulated with the thesis of the reasons. The motions for punishment were accompanied by materials of explanatory actions, the contents of which usually included: official note, information about previous criminal record for similar offences or crimes, explanations of the accused submitted during the explanatory actions. As for the indictments, most of the criminal cases included in the query also did not contain any justification, however, the number of analysed criminal cases was too small to be able to objectively assess the trends[26].

The activity of public prosecutors in terms of their participation in court proceedings should be considered low. In petty offence cases, prosecutors usually did not come to the hearings at all, or they did not come to the selected dates of the hearings (e.g., when a prosecution witness is examined or when the trial is closed). It was noticed that the prosecutors of the municipal guards appeared more often in the courtroom than the prosecutors of the organizational units of the Police. It should also be noted that judges hearing cases are a great substitute for public prosecutors in the performance of the prosecution function. However, can it be said that the court playing the role of prosecutor is impartial?

In criminal cases, public prosecutors, as a rule, attended hearings. However, another phenomenon is significant: hearings were often attended not by those prosecutors who dealt with a given case but by others (on duty) who were usually not aware of the subject of the proceedings.

[26] E.g., The indictment of the District Prosecutor's Office in Zambrów of 26 October 2015 (Ds. 572/15 contained a justification as well as the theses of evidence, while the indictments of the District Prosecutor's Office in Kraśnik of 14 December 2017 (PR 2 DS. 861.2017.D) and the indictment of 22 May 2016 approved by the District Prosecutor's Office in Tarnów (3 Ds. 578/16) did not contain such justifications.

2.1.2. Performing the duties of public interest spokesman by public prosecutors

In practice, police officers acting as public prosecutors in the courts are not able to make decisions in favour of the accused during the trial. The commanders of organizational units reduce their tasks only to supporting the motion for punishment. The author of this study, while analysing the files of petty offence proceedings, encountered only one case where the public prosecutor spontaneously abandoned his support of the motion for punishment (District Court in Kalisz). However, for this kind of "disloyalty", the Kalisz Municipal Police Commander brought him disciplinary proceedings. Formally, the officer was not accused of having filed a motion for acquittal of the perpetrator of the offence, but of the fact that being appointed as a public prosecutor to represent the police in Kalisz in court proceedings he had not drawn up and submitted, by official means, in a timely manner, the documentation in the form of an official memo regarding statement and disclosure of new circumstances prior to trial.

The above case is quite significant since the disciplinary decision of the Provincial Police Commander in Poznań upholding the decision of the Municipal Police Commander in Kalisz was annulled by the Provincial Administrative Court in Poznań[27]. The administrative court did not share the arguments presented by the police authorities, and the issued judgment creates a chance for the formation of a jurisprudence that will have an impact on changing inappropriate and unlawful practices limiting the autonomy of the public prosecutor in making appropriate procedural decisions. In the present case, however, it is important not only what the subject of disciplinary proceedings was and of court and administrative proceedings, but also and above all, what the real reason was for the decision by the police authorities to institute a disciplinary case and remove an officer from performing the function of a public prosecutor. Referring to the described event, the spokesman of the Provincial Police Headquarters in Poznań stated unequivocally that

[27] See: Verdict PAC in Poznan of 11 May 2016, ref. No. II SA/Po 127/16.

"the public prosecutor cannot arbitrarily submit such statements in court"[28]. In a moment of unrestrained emotion, one of the most prominent police decision-makers in the Greater Poland garrison revealed what we all guessed…

There are no similar prohibitions in the case of prosecutors. However, no case of these prosecutors making procedural decisions in favour of the accused has been found.

2.2. INFLUENCE OF THE HUMAN FACTOR ON THE RELIABILITY OF PROCEEDINGS

The issue of reliability of proceedings is closely related to respecting the principle of substantive truth. This principle – proclaimed, among others, in Art. 2 § 2 of the CCP – the directive is worded as follows: all decisions should be based on genuine findings of fact[29]. And it does not matter here whether we treat this principle as a principal superior to other procedural principles[30] or whether we treat it as equal to other principles[31]. But the canon is the assertion that true findings of fact are reached by a court only under the conditions of a fair trial[32]. A feature of the procedural principle

---

[28] The Spokesman's statement was recorded in the film material produced by Fakty TVN/x-news and published on 26 August 2015 on the website of "Głos Wielkopolski" in the material entitled "Policeman stood up for the driver. Now he's in trouble" See: A. Kurzyński, *Policjant stanął w obronie kierowcy. Teraz ma kłopoty*, https://gloswielkopolski.pl/policjant-stanal-w-obronie-kierowcy-teraz-ma-klopoty-wideo/ar/6362158 [accessed: 6 November 2022].

[29] See: J. Skorupka, *Kodeks postępowania karnego. Komentarz*, J. Skorupka (ed.), Legalis, Warszawa 2019, commentary to Art. 2.

[30] See: A. Murzynowski, *Refleksje na temat przestrzegania zasady prawdy materialnej a zachowania sprawności procesu karnego*, "Gdańskie Studia Prawnicze" 2003, vol. 11, pp. 107–117; S. Waltoś, *Proces karny. Zarys systemu*, Warszawa 1998, p. 218; K. Marszał, *Proces karny. Przebieg postępowania*, Katowice 2012, pp. 89–90.

[31] See: A. Sakowicz, *Zasada prawdy materialnej a prawo do milczenia*, [in:] *Węzłowe problemy procesu karnego,* P. Hofmański (ed.), Warszawa 2010, pp. 645–646.

[32] Supporters of the second view – justifying its rightness – refer primarily to several limitations in pursuing the substantive truth, which result from the

of material truth is its roots in the Constitution[33]. It is, foremost, closely related to the principle of the right to a fair trial (Article 45 sec.1), which in turn implies the right to a fair and factually correct decision by a court. As the Constitutional Tribunal has repeatedly pointed out, the right to a fair trial – and thus the principle of substantive truth – is realized, among others, by "appropriate and proper shaping of the judicial procedure in accordance with the requirements of fairness and openness"[34]. Moreover, the Tribunal indicated that "the order under Art. 45 sec. 1 of the Constitution is one of the procedural guarantees of special importance for an individual", and it is realized in the right to "obtain a correct decision, conforming to the norms of substantive law, and a fair court procedure should provide the parties with procedural rights appropriate to the subject of the proceedings being conducted"[35]. "As required by a fair trial, participants in the proceedings must have a realistic opportunity to present their arguments, and the court must consider them"[36].

The principle of substantive truth constitutes the aim of criminal proceedings, which is expressed primarily in the appropriate response to the accusation brought to the court – so that "the innocent is not held responsible and the guilty is always held liable, but also that the guilty person bears no less responsibility than what he deserved and no more than what he should bear, so that it

provisions of the procedure (e.g., Articles 171 § 7, 178, 180, 182 of the CCP), and which result in the fact that fully true about the event is not an absolute value in terms of processes. In fact, the point is not to limit the investigation of the truth in any way, but to enable it. A fair one, which means characterized by a set of features that "ensure respect for the fundamental rights of its participants, especially the defendant, and at the same time create appropriate conditions for a fair judgment". The concept of "fair trial" was introduced into the doctrine of criminal law by A. Murzynowski. See: *ib.*, *Essota and Principles of the Criminal Process*, Warsaw 1994, p. 65.

[33] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws, No. 78, item 484).

[34] See: Verdicts of the Constitutional Tribunal (hereinafter: CT) of 10 July 2000 (ref. No. SK 12/99, of 24 October 2007 (ref. no. SK 7/06), of 18 February 2009 (ref. Kp 3/08).

[35] CT Verdict of 10 July 2000.

[36] CT Verdict of 24 October 2007.

would be a fair response"[37]. And precisely since its implementation determines the achievement of the goal of the criminal trial in the form of resolving the issue of criminal liability – the doctrine of the criminal trial recognizes its superior position[38]. And *contrario* one can formulate an imperative that the court cannot intentionally and consciously fail to explain the actual course of the event – although in the procedural reality there may be obstacles to achieve this goal[39].

The above indications of the doctrine are not reflected in the jurisprudence. The jurisprudence has developed its own rules of adjudication which are in contradiction with the principle of substantive truth as well as with the rules of adjudication referred to in Art. 7 of the CCP. We pay attention here in particular to two negative phenomena that distort the sense of the existence of the state administration of justice, and which – due to their prevalence – characterize the Polish model of the judiciary in criminal and petty offence cases as completely detached from the principle of substantive truth:

- making key findings on the basis of the testimony of the persons imposing a fine;
- usurping by the courts the right to consider any evidence merit to be credible.

2.2.1. Hearings of the person who was imposing a fine as a witness

In a significant number of petty offence cases, the defendants become the accused because of the fact that they did not agree with the assessment of the situation made by the person imposing a fine and refused to accept the penalty notice. Although the petty offence trial is a criminal trial – and therefore its subject is a specific act described in the allegation included in the motion for

[37] T. Grzegorczyk, *Commentary to Art. 2 of CCP*, Lex 2014.

[38] See: D. Kaczmarska, *Zasada prawdy materialnej po nowelizacji k.p.k. na tle innych zasad procesowego prawa karnego*, "Studia Iuridica Lublinensia" 2016, vol. 24, No. 1, p. 231.

[39] See: Ł. Chojniak, *O zasadzie prawdy materialnej w procesie karnym w świetle Konstytucji RP*, "Państwo i Prawo" 2013, vol. 1, p. 25.

punishment, in the public mind this trial is treated as some form of dispute between a citizen and a state official. The citizen does not agree with the assessment of the facts (or the legal assessment) made by the officer and expects the "dispute" to be resolved by an independent court.

So how are these disputes resolved? The analysis of the files of the petty offence proceedings leads to the conclusion that in all cases the court resolves the dispute in favour of the officer. And it does it most often only on the basis of the testimony of the officer who is being questioned in the trial as a witness. The content of these testimonies is basically irrelevant, as the courts do not go into their analysis. It is important that an officer appeared in court and confirmed the content of the allegation with his testimony.

By reason of such a model of adjudication, which is common, two fundamental questions arise:

- should the court not settle this type of dispute using other objective means of evidence?
- can an officer who performed the functions of a body imposing a fine apply for the same act as a witness in the case?

The second question has a dogmatic character. It should be noted that the penalty notice is a type of settlement used in the petty offence procedure[40]. Therefore, if the authority's guardian (and a later witness) has once spoken on a specific matter, he will not change his mind – even if in the meantime he realizes that he has made a mistake. An officer will never admit a mistake, if only for this reason, so as not to be disciplined or officially responsible for making an incorrect decision. Therefore, appointing an officer who has previously issued a fine decision in the same case to perform the role of a witness and then making key factual findings based on his testimony is simply unfair and proves the lack of impartiality of the court.

[40] As results from Art. 32 § 1 of the CCP.

2.2.2. The "right of a court" to find certain evidence merit to be credible

The right of a court to find certain evidence merit to be credible is organically linked to the right of the court to decline to believe any other personal source that contradicts the credible evidence. This type of law is – of course – a usurpation since the court does not exercise any of its rights in determining the material truth. It is the responsibility of the court to make true findings of fact.

Most of judgments of the courts of first instance, which are the subject of the conducted query, are based on *a priori* belief in certain evidence – it is a rule that this belief is given to evidence requested by the public prosecutor[41].

It should be strongly emphasized that the process of crediting individual evidence by the court is usually not a necessity. Usually, other evidence can be obtained, but the court does not take it, arguing that it is not relevant to the consideration of the case.

Such judgments cannot be overturned in the instance proceedings, as almost every appeal court will state that "situations where the court indicates which evidence and to what extent was the basis of its findings of fact are considered sufficient for the proper assessment of evidence" and that "the evaluation of the evidence belongs to the *meriti* (trial) court because it is the one, which after directly questioning the witnesses and receiving explanations from the accused, has the right to consider one of these personal evidence worthy of credibility and deny credibility with others provided that its position is duly justified in this regard". The databases of common

[41] Examples of judgments: the judgment of the District Court in Zambrów of 4 May 2017, file ref. II W 708/16; judgment of the District Court in Rzeszów of 9 May 2011, file ref. II W 1519/10: judgment of the District Court in Stalowa Wola of 17 March 2017, file ref. II W 566/16; judgment of the District Court in Nidzica of 6 December 2018, file ref. II W 319/17; judgment of the District Court for Kraków-Podgórze in Kraków of 31 March 2015, file ref. XI W 736//214/P; judgment of the District Court in Kozienice of 20 March 2017, file ref. II W 736/16; judgment of the District Court in Lubartów of 28 July 2016, file ref. II W 256/16.

courts' judgments are filled with the above-mentioned maxims, repeated over and over again[42].

The alleged right to recognize certain evidence as credible, respected by the courts, is in fact the respect of the court's right to create any factual findings – most often for the needs of the public prosecutor. This is a contradiction to the principle of objective truth and a contradiction to the idea of justice that the courts should advocate. The judgments made on the basis of the usurpation of this right are inherently incorrect. The following examples will demonstrate that not only in principle but also *de facto.*

It is well known that officers of the District Police Headquarters in Kraśnik earn extra money by framing innocent people into allegedly committing crimes against public officials, and then – taking advantage of the status of a victim in these proceedings procured by them – they demand compensatory damages on their behalf. The court believes their testimony and condemns innocent people. But sometimes things get complicated, and the truth comes out. There is currently a pending case in which a man was accused of forcing police officers to refrain from legal service activity, an attempt to remove a service weapon from the officer's holster, hitting the officer's head and causing a head injury, etc.[43] In the case files, there is also a motion of the officer to order the defendant to pay compensatory damages of PLN 20,000. Meanwhile, a recording from the monitoring of a petrol station was added to the case file, where an event was to take place that belies all these allegations. The recorded video shows that it is a policeman who approaches an inebriated but calmly behaving man and for no reason treats him straight in the eyes with a gas thrower and then comes from behind to the gassed man, who wipes his eyes with the hem of his sweater, grabs him, knocks him to the ground and strikes with a police baton. Thanks to this accidental recording, it may be possible to save one innocent[44].

[42] See: judgment of the District Court in Lublin of 11 August 2020, file ref. act XI Ka 467/20; judgment of the District Court in Lublin of 12 March 2020, file ref. act. XI Ka 80/20.

[43] See: the files of the case pending before the District Court in Kraśnik file reference number II K 133/21.

[44] Recording in the files of the above-mentioned case.

Next, on September 11, 2017, a marked official vehicle of the District Police Headquarters from Kraśnik entered a private property in Trzydnik Duży Kolonia. Two minutes earlier, the property owner's son had entered the property in his vehicle. One of the policemen got out of the police car, went to the car in which the owner's son was and without giving any reason, shouting "get the fuck out", pulled the man out of the car and holding him brutally by the sweatshirt, pushed him into the police car – shouting "fuck, fuck". Then he shouted to the second officer: "sit down, let's go". However, before they left, the driver's mother approached the police car. Then the policeman – without a word of warning – attacked her with a gas thrower. The driver's father – convinced that he was dealing with attackers disguised as policemen – closed the entrance gate for them, preventing them from leaving, and notified the police by phone about the incident. More police patrols arrived at the property. Ultimately, the driver was not taken outside the property. At the end, the driver was identified and the alcohol content in the exhaled air was tested. Only now the participants of the incident learned that the intervention undertaken by the police was a traffic control and that the control was caused by alleged offences and the suspicion that the driver was drunk[45].

In the end, the driver was released (later a motion for punishment was filed with the court with four charges of violation of traffic regulations) but the indictment was brought against his mother. She was accused of committing a crime under Art. 224 § of the CC by using violence against a Police officer in order to force him to refrain from a legal official activity consisting in performing an activity involving a person suspected of committing an offence.

By a judgment of August 7, 2018 (file reference number II K 827), the District Court in Kraśnik found Beata C. guilty of the alleged act and sentenced her to a fine and compensatory damages in favour of the injured officer Jarosław K. in the amount of PLN 1,000 – as compensation for the harm suffered. The District Court established the following facts:

[45] Actual state was established on the basis of the analysis of the criminal case with the number II K 827/17 and the petty offence case with the number II W 1222/17 – both conducted by the District Court in Krasnik.

"On 11 September 2017 at approx. 6.00 p.m. in Trzydnik Duży, officers of the Road Traffic Department of the County Police Headquarters noticed a silver BMW, the driver of which – Ignacy C. was to drive in a manner that did not ensure control of the vehicle and exceeded the speed limit. Due to the suspicion that he might be under the influence of alcohol, they chased him using sound and light signals. The officers followed Ignacy C. onto the property and ran to his car to inspect it. Ignacy C. replied that they did not have the right to control him on his property and that he would not provide any personal data, nor would he present his own documents or his car. Ignacy C. did not want to leave his car and therefore he was forcefully led to the police car, where the officers intended to test him for blood alcohol content and establish his personal data. In the meantime, Ignacy C.'s parents, his brother and his mother's brother appeared on the property. When the officers wanted to leave the plot to carry out the intended activities with Ignacy C.[46], Andrzej C. went to the gate and closed it, thus preventing them from leaving the property. At that time, officer Jarosław K. was standing at the rear door of the police car, from the driver's side, where Ignacy C. was sitting. Beata C. ran to the police car and tried to open the door and get inside, saying that there would be no control and that the officers probably intend to take her son to the woods and give him a hard time, and she hit Jarosław K. with that door. Jarosław K. pushed her away and closed the door.

[46] The District Court uncritically accepted that the officers' actions were official activities. Meanwhile, the regulations in force on the day of the incident – both the universally applicable and the intra-police – did not provide for the possibility of taking the vehicle driver to an unknown place for the purpose of carrying out an activity. See order of the Police Commander in Chief Order No. 497 of the Police Commander in Chief of 25 May 2004 on the performance of service by policemen using control and measurement devices used to register the behaviour of road users (Journal of Laws of KGP item 41, of 2007, item 53 and of 2010, item 27).

Beata C. made another attempt to open the door. Then he used a measure of direct coercion against her in the form of MGT – a manual gas thrower. Beata C. walked away from the police car.

Beata C. did not admit to committing the act at any stage of the proceedings. She approached the police car to make sure that her son was okay and alive. She only wanted to peek through the ajar front door on the driver's side, she didn't want to hit anyone or prevent the officers from doing anything. She only managed to slightly open the door, she did not even touch the officer with a finger, next officer Jarosław K. treated her with gas for no reason and without a warning and afterwards none of them helped her.

The court only partially believed the defendant, in so far as it had confirmed that the officers had followed her son onto the property and that she had approached the police car. In the remaining part, the court found her explanations unreliable, as they contradicted the other credible evidence, in particular the testimonies of witnesses (police officers) Michał K. and Jarosław K. The court did not believe her claims that the officers did not have any signals activated and that they dragged her son to the police car for no reason and very aggressively, as they were contradicted by the credible testimony of the officers of Jarosław K. and Michał K. In addition, the accused, as the mother of Ignacy C., accused in another case pending before the local court for committing a number of offences, had an interest in presenting this stage of the incident in a way that would be most advantageous for her son. The court also did not believe that she was only out of motherly concern when she approached the police car. The officers arrived at the plot in a marked police car, they were uniformed, there was no reason to assume that they would take him to the forest and beat him.

The court found the testimonies of the witnesses Jarosław K. and Michał K. completely reliable. The

> testimonies of the witnesses are logical, consistent, and correspond to each other. The witnesses reported their routine intervention in detail and impartially. It should be emphasized that they are strangers to the accused and her son, so they had no reason to lie about Ignacy C.'s suspicion of committing a number of offences".

The above judgment was appealed to the District Court in Lublin. The appeal court considered the assessment of the evidence made by the court of first instance as "comprehensive, objective, logically and factually correct". Moreover, the District Court stated that the Court of First Instance "correctly found Beata C.'s explanations credible in the part in which she confirmed that the officers had entered the property after her son and that she had approached the police car". In the remaining scope, it considered them unreliable, because "they contradict the evidence considered to be credible". Moreover, in the justification of the judgment, the Court of Appeal instructed the appellant that "the evaluation of the evidence belongs to the Meriti Court, because it is the one which, after a direct hearing of witnesses and receiving explanations from the accused, has the right to consider one of these personal evidence deserving to be credited and to refuse credibility for the others, provided that its position in this respect is duly justified and that is what the District Court was able to cope with"[47].

After the above judgment became final and binding, evidence proceedings were conducted in the case of the offences committed by Ignacy C. In this case, a witness – a fire-fighter, was questioned, who testified that the police car on 11 September 2017 at approx. 6.00 p.m. was driving towards Trzydnik Duży Kolonia without the light and sound signals on. In the case, the opinion of an expert in the field of speed measurements in road traffic and driving technique was also called, and it was clearly favourable for Ignacy C. As a result, Ignacy C. was acquitted in respect of all four charges brought against him by the District Police Headquarters in

[47] See: verdict of the District Court in Lublin of 2 April 2019., ref. No. act XI Ka 84/19.

Kraśnik[48]. The judgment is final and binding. The findings made in these proceedings undermine the credibility of the testimonies of officers Michał K. and Jarosław K., on which the final judgment attributing the crime to Beata C. was based.

3. Influence of the human factor on the efficiency of proceedings

3.1. REASONS FOR THE DELAY DURING THE PROCEEDINGS

3.1.1. Unnecessary activation of the prescriptive mode

The regulations of the petty offence proceedings include the principle of preferential adjudication in the prescriptive mode. It results from the provision of Art. 2 sec. 1a, which states that adjudication in ordinary proceedings takes place when there are no grounds to hear the case in accelerated or prescriptive proceedings. However, the jurisprudence emphasizes that this preference is only updated when the conditions set out in Art. 93 of the CCP appear i.e., when the circumstances and guilt of the accused do not raise doubts, and at the same time when it is sufficient to reprimand him, issue a fine or the penalty of restriction of liberty, but in practice, cases in the field of offences is "automatically" directed to the session in order to issue a prescriptive judgment. Thus, the injunction procedure is also used in cases where it is known that the party is contesting the guilt and appealing against it.

Without questioning *in genere* the legitimacy of the application of the prescriptive procedure, it should be stated that the extensive use of this mode causes much more loss than good – primarily from the point of view of the correctness of the course of the proceedings. When analysing the files of court proceedings, it is difficult not to pay attention to the fact that the wording of the circumstances and guilt of the accused do not raise any doubts and are used irresponsibly by the courts – like a magic spell. Of course, the view whether the

[48] See: verdict of Regional Court in Krasnik of 20 July 2020, ref. No. II W 1222/17.

guilt raises doubts or not is judgmental, and it is difficult to argue with the decisions of individual courts in this respect. However, a pragmatic question can be asked – seemingly detached from the literal interpretation of Art. 2 sec. 1a of the CCP: what is the point of referring cases to the injunction proceedings in which the accused questioned the guilt, e.g., by refusing to accept a penalty notice? After all, in such a situation, it is obvious that the accused will challenge (and thus set aside) the injunction with an objection. In such cases, referring cases to injunction proceedings extends the course of the proceedings by an average of 3–4 months.

3.1.2. The requirement to indicate the scope of the judgment's justification

By the Act of 27 September 2013 amending the Act – Penal Code and some other acts[49], Art. 422 § 2 of the CCP was amended by introducing a formal requirement to indicate in the application the statement of reasons for the judgment of the first instance whether the motion concerns the entire judgment or certain acts, which the prosecutor accused the defendant of committing or only decisions about the penalty and other legal consequences of the act, and the motion not coming from the accused should also indicate the defendant it concerns. The provisions – under the amended Art. 82 § 1 of the CCP – have also been recruited for the petty offence procedure. In the statement expressed by the Supreme Court in its decision on February 25, 2016 (file reference no. V Kz 6/16), the opinion was expressed that "the change made on July 1, 2015, consistently implements the intention to simplify and accelerate the actions of the court related to the preparation of justifications, however, it cannot be interpreted by the courts in a completely clichéd, rigidly detached from individual circumstances of each case". The conducted file research, however, does not prove this fact – and even proves the opposite. As it was noted – especially in petty offence proceedings, where applications for justification of the judgment of

[49] Journal of Laws, item 1247.

the first instance court are usually made by non-professional entities – in each case after submitting such an application, the court was forced to summon the unaware applicant to supplement the formal deficiency in the form of indicating the scope of the justification. Therefore, in each case – considering the time needed to exchange correspondence between the applicant and the court and the designated time limit for supplementing the formal deficiency – the course of the proceedings was extended by an average of three weeks. In some cases, this elongation was much longer[50].

The idea itself of the possibility of shortening the statement of reasons for the judgment was good, but it was unnecessarily made a formal requirement. It could have been regulated in such a way that, by operation of law, the court is obliged to prepare a justification only within the limits of the appeal.

3.1.3. Failure to appear at hearings

Both in the criminal procedure and in the petty offence procedure, it is a rule that the appearance of a witness called to the hearing is obligatory. On the other hand, the defendants are summoned by the court to a hearing or only informed about the set date – without the obligatory summons.

Based on the conducted analyses, it was found that in 121 cases examined (which constitutes 82% of cases) at least one hearing date was postponed due to the failure to appear of a properly summoned person or a request to adjourn the hearing submitted by the

[50] In the case No. II W 118/16, conducted by the District Court in Łobez, the court called on the defendant to supplement the formal deficiency by indicating whether the justification should concern part or all of the judgment. In response to that order, the accused replied within the time limit that he was requesting "a copy of the judgment in its entirety". The District Court decided that the above statement did not constitute the implementation of the order supplementing the formal requirement and, as a consequence, issued a decision refusing to accept the request to justify the judgment. But this decision was successfully appealed, and the case was moved immediately. However, the course of the proceedings was delayed by about four months.

accused who was informed about the hearing. In 11 cases, those summoned did not appear without any excuse. Whereas the rest justified their absence with the following reasons: sickness, holiday leave, professional duties, the necessity to participate in the sessions held by other courts, the inconvenience of travelling to the court due to too big distance, the defendant's protest in connection with the participation of a witness-policeman in the trial, who had entered the courtroom armed. There were also 9 cases of adjournment of the hearing due to the inability of participation of a defence lawyer of choice, who at the same time had to participate in activities carried out by another court or was on holiday.

A significant problem is also the failure to appear at the Police's call by persons suspected of committing an offence. The problem, however, is complex – both legally and factually. In legal terms, because there are no legal grounds to apply any rigors to those suspects who were not interviewed at the scene. In factual terms, because the police – probably out of savings – do not send properly formalized calls to suspects but "summon them" e.g., by phone or through a neighbour…

Failure of participants to appear in the proceedings is a very serious problem in practice, as it interferes with the proper course of proceedings and extends their course. It should be noted that the witnesses of the event should be heard at one hearing and in such a way that they cannot contact each other. On the other hand, it is also difficult to underestimate any obstacles in the participation in the trial of the accused or their defenders – due to the scope of the right to defence. However, at least one issue could be solved by legislation. The wording of Article 54 § 6 and 7 of the CPPO should be remodelled – in such a way that the hearing of a person suspected of committing an offence ceases to be obligatory – provided that the person was instructed to submit written explanations within 7 days.

3.2. REASONS WHY CASES FALL UNDER THE STATUTE OF LIMITATIONS

As part of the file query, three petty offence cases were disclosed, which were discontinued in 2021 by a final court decision (in all cases these were decisions of the court of appeal). These are cases with the following reference numbers: case II W 1083/17, which was conducted by the District Court in Dębica, case II W 1192/18, which was conducted by the District Court in Kraśnik and case II W 450/18, which was conducted by the Court District Court in Ropczyce. Moreover, a significant number of cases were found in which the petty offence proceedings are ongoing but should be discontinued – since within a year since the accused had committed the act, the order to initiate the proceedings was not properly issued. The reasons for the statute of limitations on discontinued cases will be discussed below, as well as the problem related to the statute of limitations on cases that are still pending but should be discontinued.

3.2.1. Case II W 1083/17

By the judgment of the District Court in Rzeszów of January 13, 2021, the case No. III Ka 222/20 was discontinued. The District Court in Rzeszów acted here as the court of appeal hearing the appeal against the judgment of the District Court in Dębica of November 5, 2019 (file reference number II W 1083/17). Based on the analysis of the above-mentioned files, it was found that there were several reasons for the limitation of this case:

a) random cases:
   - two hearings were cancelled due to the judge's illness;
   - the smooth procedure was also hindered by the pandemic
b) irregularities in the operation of court secretariats:
   - the case files, after filing the appeal, waited in the registry of the first instance court to be sent to the higher instance for about 4 months;

- the registry of the District Court sent the notices of the hearing to the participants of the proceedings too late, which resulted in the fact that the accused and his defence lawyer received the notification after the date of the hearing;

c) formal issues:
   - the course of the case was significantly prolonged due to the submission by the reporting judge in the first instance of a motion to exclude him from the case due to his acquaintance with the defendant's sister (the motion was rejected by the court of second instance).

d) indolence of the judge:
   - the court of second instance should have – for a case threatened with the statute of limitations – set a date for a hearing out of sequence (and it did not do so);

e) obstruction of the accused:
   - the accused effectively adjourned the date of the first hearing, citing the fact that his lawyer was unable to appear on that date.

To sum up: the statute of limitations in this case was due to several reasons, however, the decisive factor was the negligence of the court secretariat, which delayed sending the files to the second instance for too long.

3.2.2. Case II W 1192/18

By the judgment of the District Court in Lublin of March 26, 2021, the case No. XI Ka 170/21 was discontinued. The District Court in Lublin acted here as a court of appeal hearing the appeal against the judgment of the District Court in Kraśnik of December 29, 2020 (file reference number II W 1192/18).

The responsibility for the statute of limitations in this case should be assigned to the pre-trial body and judges adjudicating in the first instance, who committed several serious procedural errors.

a) Obstruction of the public prosecutor:
   – the public prosecutor applied to the court for punishment 10 months after the act had been committed;
b) Obstruction of the Court of I instance:
   – petty offence proceedings were initiated, and a court hearing was conducted on the basis of a complaint by an unauthorized prosecutor – as a result of which the judgment of the first instance was quashed by the District Court;
   – a decision was issued to discontinue the proceedings initiated (correctly) on the basis of a complaint by the public prosecutor (police);
   – the aggrieved parties were not notified of the decision to discontinue the proceedings – as a result, a complaint against this decision was received by the court one year after the above decision.

3.2.3. Case II W 450/18

The present case was discontinued by the judgment of the District Court in Rzeszów of 27 July 2021 (reference number III Ka 379/21). In the first instance, the case was examined by the District Court in Ropczyce. In this case, the court clearly contributed to the statute of limitations. The judge conducting the case – without giving any reason – cancelled the hearings by phone, delayed more than a year with considering the evidence motions, conducted the hearings in a very incompetent manner, appointed an expert who had no qualifications in the subject of giving opinions, etc.

3.2.4. Time-barred cases due to improper initiation of proceedings

In the petty offence procedure, the mere filing of the indictment (hereinafter referred to as a motion for punishment) by an authorized prosecutor does not automatically initiate proceedings. In the matter of initiating or refusing to initiate proceedings, a separate

procedural decision is issued, which is taken by the president of the court. The president of the court may – obviously – authorize any judge to make these decisions on his behalf. The problem, however, is that in many courts, presidents do not comply with their obligation to prepare written authorizations for judges who issue orders to initiate proceedings.

However, even where such authorizations are issued, another mistake is made. Namely – after a new petty offence case is submitted to the court, the case number is assigned, and then the reporting judge is selected. And this reporting judge (not the president of court) initiates the proceedings. However, this reporting judge acts not on behalf of the president of court, but on behalf of the court. In other words – he is the court. Meanwhile, the court may only issue decisions during the case, but it is not authorized to institute proceedings. Therefore, the decisions made by the reporting judge to initiate the proceedings are irrelevant, and the cases are time-barred because within a specified period (12 months since the commission of the act) the competent authority (i.e., the president of the court) did not decide to initiate the proceedings[51].

4. Conclusions

The efficient and reliable course of criminal and petty offence proceedings is disrupted both due to the human factor and due to imperfect procedures. The human factor is primarily responsible for:

- extending the preparatory proceedings in petty offence cases by not taking appropriate steps at the scene of the event, immediately after its commission,
- multiplying trial dates for trivial reasons;

[51] Examples of cases in which orders to initiate proceedings were unsuccessfully issued by reporting judges appointed to consider the case and – additionally – without written authorizations from the president of the court to issue such orders: case number II W 1325/20, conducted by the District Court of Gdańsk – North in Gdańsk, case No. XII W 359/20, conducted by the District Court for Wrocław-Fabryczna in Wrocław, case no. II W 248/20, conducted by the District Court in Sucha Beskidzka.

– conducting both preparatory and main proceedings without the expected concern for reaching the true factual findings.

Whereas extending the duration of proceedings for reasons independent of the human factor has its source, *inter alia*, in:

– the need to determine, for the purposes of preparing an application for punishment in cases of offences, a number of data, the processing of which does not fall within the adequacy principle;
– an unnecessary categorical obligation to immediately interview a person for whom there is a reasonable basis for drawing up a motion for punishment – given that this person has the right to refuse to provide explanations;
– unnecessary activation of the injunction procedure in those cases where it is known that the party challenging the guilt will challenge the injunction;
– improperly shaped provisions concerning the scope of the statement of reasons for the judgment of the court of first instance.

The following solutions could contribute to accelerate the course of cases:

a) the obligation to interview a person suspected of committing an offence should be absolute – provided that the person expresses the will to submit to such an interview – the person must be obligatorily instructed about the right to submit written explanations within 7 days;
b) as personal identification data sufficient to draw up a motion for punishment should only be considered: name and surname of the defendant, his PESEL number – if given, address of residence and address for service, information on previous criminal record for similar offences or crimes;
c) cases in which the perpetrator challenges the commission of the act should not be referred to the proceedings by writ of payment;
d) the obligation to indicate the scope of the justification of the judgment of the first instance should be abolished.

REFERENCES

Chojniak Ł., *O zasadzie prawdy materialnej w procesie karnym w świetle Konstytucji RP*, "Państwo i Prawo" 2013, vol. 1.

Grzegorczyk T., *Kodeks postępowania karnego. Komentarz*, t. III, Zakamycze 2003.

Kaczmarska D., Za*sada prawdy materialnej po nowelizacji k.p.k. na tle innych zasad procesowego prawa karnego*, "Studia Iuridica Lublinensia" 2016, vol. 24, No. 1.

Kurzyński A., *Policjant stanął w obronie kierowcy. Teraz ma kłopoty*, https://gloswielkopolski.pl/policjant-stanal-w-obronie--kierowcy-teraz-ma-klopoty-wideo/ar/6362158 [accessed on: 6 November 2022].

Marszał K., *Proces karny. Przebieg postępowania*, Katowice 2012.

Mezglewski A., *Przetwarzanie danych osobowych w sprawach o naruszenia przepisów ruchu drogowego, ujawnionych przy użyciu urządzeń rejestrujących*, [in:] *Ruch drogowy – ochrona danych osobowych, kontrola, prawno karne następstwa*, Mezglewski A., Tunia A., Skwarzyński M. (eds.), Lublin 2015.

Murzynowski A., *Refleksje na temat przestrzegania zasady prawdy materialnej a zachowania sprawności procesu karnego*, "Gdańskie Studia Prawnicze" 2003, vol. 11.

Olszewski R., *Role prokuratora w postępowaniu karnym*, "Prokuratura i Prawo" 2014, No. 1.

Sakowicz A., *Zasada prawdy materialnej a prawo do milczenia*, [in:] *Węzłowe problemy procesu karnego*, Hofmański P. (ed.), Warsaw 2010.

Skorupka J., *Kodeks postępowania karnego. Komentarz*, Warsaw 2019.

Stefański R.A., *Oskarżyciel publiczny w sprawach o wykroczenia*, "Prokuratura i Prawo" 2002, vol. 1.

Świecki D. (ed.), Augustyniak B., Eichstaedt K., *Kodeks postępowania karnego. T. 1. Komentarz aktualizowany*, LEX/el. 2023, https://https-sip-lex-pl.pulpit.uksw.edu.pl/#/commentary/587748265/709047?keyword=Kurowski%20Kodeks%20post%C4%99powania%20karnego&tocHit=1&cm=SFIRST [accessed on: 1 December 2021].

Waltoś S., *Proces karny. Zarys systemu*, Warsaw 1998.

DR. ERIKA VARADI-CSEMA[1]
Faculty of Law at University of Miskolc

Efficiency of Criminal Justice – a Prevention-focused Approach

"*in temporis curriculo veritas deficit*"
Edmond Locard[2]

"*Nec unquam in judiciis tantum imminet periculam quantum parit processus festinatus*"
John Fortescue[3]

The dilemmas over the issue of the efficiency of criminal justice are well exemplified by the above two quotations. On the one hand, as a result of the passage of time, the discovery of the truth may be delayed or the memories may be so obscured or the evidence so worn that it is no longer possible to reconstruct it accurately. Thus, the judiciary is not able to fulfill its social function, to exercise the criminal power of the state on its merits. The other quote, on the other hand, suggests that speeding up formal proceedings may also lead to distortions of the truth and thus to the disruption of the administration of justice. That is, the social function is also undermined here – even if for other reasons. Inadequate disclosure of the relevant facts and insufficient depth of their assessment affect not

[1] The author would like to express her gratitude for the opportunity to participate in this fruitful and valuable research, to the leaders of institution, of the research group and to the editors of the book for their special support, and to Roland Lindt for his technical linguistic assistance.

[2] Edmond Locardot quoted by J. Pradel, *La célérité et les temps du procès pénal, Comparaison entre quelques législations européennes*, [in:] *Champ pénal – Mélanges en l'honneur du professeur Reynald Ottenhof*, ed. M. Delmas-Marty, Paris 2006, p. 251.

[3] John Fortescue quoted by J.R. Spencer, *La célérité de la procédure pénale, séminaire organisé a Syracuse* (*Italie*), 11–14 septembre 1995 RIDP, p. 431.

only the reality and legal quality of the decision made in this way, but also its validity. With these two warnings in mind, the judiciary must work in such a way that it can fulfill its social function.

How can ***the social function of criminal justice*** be grasped? The dynamic and static approaches can be examined with different emphases. In the former case, the criminal justice system is a process that can be divided into several stages, which provides a framework for the state to react to such conducts that it considers to be dangerous to society and thus to be prosecuted, using the citizen's authority to exercise criminal power. The process is an ever-changing, pulsating "organism" that activates the operation of different elements/actors in response to the particularities of the specific violations and their perpetrators. If we focus not on the process but on the institutions behind them, we can define justice as a subsystem of society.

In case of a *dynamic approach*, the function of the judiciary is to express the disapproval of society (the state) in the form of an adequate and proportionate criminal response. This presupposes the discovery of all relevant elements of the specific case, prosecution under the guarantee rules and, if necessary, the imposition of sanctions. Attention is focused on the perpetrator and his/her act, and accordingly the specific appearance and characteristics of the process are constantly changing: the tactics chosen by the investigator, the means of reconnaissance, the use of diversion options by the prosecutor may vary from case to case, or specific communication system.

At the heart of the *static approach* are the institutions of the police, the prosecutor's office, the court and the penitentiary system – more precisely, the units relevant to them in criminal matters (e.g. the criminal court). Opinions are divided[45] on whether other actors, such as the lawyer providing criminal protection and representation

[4] Á. Farkas, *A büntető-igazságszolgáltatási rendszer hatékonyságának korlátai*, [in:] *Kriminológia*, eds. A. Borbíró, K. Gönczöl, K. Kerezsi, M. Lévay, Budapest 2016, p. 898.

[5] See more G. Mesko, M. Pagon, B. Dobovsek, *Some Dilemmas of Contemporary Criminal Justice*, [in:] *Policing in Central and Eastern Europe: Dilemmas of Contemporary Criminal Justice*, eds. G. Mesko, M. Pagon, B. Dobovsek, Ljubljana 2004, pp. 17–37.

for the victim, or the circle of probation officers performing decisive tasks in the event of diversion or conditional conviction, are included. In this case, the social function is primarily to enforce criminal law in order to protect the society, thus preventing, controlling and repressing crime. The functioning of the institutional system is confined to a strict framework, its structure is rigid due to its nature, and its response to social changes is slow and indirect. This is especially true when we consider how quickly crime can change in its tendency, structure and quality, adapting to current economic, social and cultural changes and necessities.

Although the process and system-focused approaches address the concept of successful operation differently, *this difference is apparent*. In case of expressing the disapproval of society (the state) in the form of a proportionate criminal reaction which exposes extensively and in its entirety the circumstances and facts relevant to the commission of the accused and the commission of a specific criminal offense, and is able to adequately express society's disapproval, it also serves to prevent re-offending. This overlaps with the success criterion of the systems approach. The latter is achieved in case of more effective protection of society from acts violating the law / norms; that is, if the enforcement of criminal law, thus the prevention, control and suppression of crime, is able to achieve even greater efficiency.

In addition to the different approaches, there is another possibility of interpretation when fixing the *concept of efficiency*[6]. According to this, we can talk about the efficiency of criminal justice:

- on cost-effectiveness – focusing on the costs of maintaining and operating an organizational unit;
- procedural efficiency, as determined by the effectiveness of criminal proceedings (e.g. proportion of cases closed, etc.);
- on economic efficiency, the ability of criminal justice as a productive unit of society to ensure the functioning of a single market based on European law by creating a business- and citizen-friendly environment, creating an environment

[6] Á. Farkas, *A büntető-igazságszolgáltatási…*, p. 993.

conducive to investment, a more predictable regulatory environment and ensuring sustainable economic growth;
– as a system efficiency – i.e. ensuring the efficiency of the functioning of the judiciary as a system.

The issue of the efficient functioning of the judiciary is also of paramount importance at the EU level. The essential role of the judiciary in economic growth complements its fundamental role in upholding the values on which the Union is founded. Access to an efficient judiciary is a fundamental right that underpins European democracies and is part of the common constitutional traditions of the Member States. The importance of the right to an effective remedy before a court is also emphasized in the Charter of Fundamental Rights of the European Union[7]. The document sets out the EU's position that "shortcomings in national justice hinder the functioning of the single market, the proper functioning of the European area of justice and the effective implementation of the EU acquis", and the effectiveness of national practices are subjects of regular reviews. The European Commission for the Efficiency of Justice (CEPEJ), being an establishment of the Council of Europe, with which the EU Commission has contracted to carry out a specific annual study, provides most of the quantitative data.

The Scoreboard uses a number of sources of information provided by Member States according to the CEPEJ methodology. For example, the data provided by the CEPEJ on the length of proceedings show the so-called "disposition time", which is the calculated duration of court proceedings (based on the ratio of pending and closed cases). Data on the effectiveness of the application of the EU law in certain areas show the average length of proceedings, which results from the actual length of court cases. Note that the length of court proceedings can vary significantly in areas within a Member

[7] See Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions the 2015 EU Justice Scoreboard /*COM/2015/0116 final*/ EUR-Lex Document 52015DC0116, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015DC0116 [accessed on: 12 July 2021].

State, especially in urban centers, where commercial activities can lead to a higher workload.

The scoreboards are focusing on the issues related to "rules of law" too, including the independence of justice institution. The public opinion about these questions is not the best. For example, in 2020, at the international level, it can be stated in general terms that "public perceptions of the independence of the judiciary in the Member States have fallen by a fifth compared to last year. The most widespread reason given by the public for the independence and perceived lack of independence of the judiciary and judges is the interference of the government and politicians and the pressure on the judiciary"[8].

The sources of findings[9] covering the period 2012–2020 include, in addition to liaison officers on national judicial systems, the National Judicial Liaison Officers Group, the European Network of Judicial Councils (ENCJ), the Network of Presidents of the EU Supreme Courts (NPSJC), Network of Councils of State and Supreme Administrative Jurisdictions of the European Union (NPSJC) (12), Association of Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA-Europe), European Competition Network (ECN), Communications Committee (COCOM), Intellectual Property Infringements European Observatory, the Group of Experts on Money Laundering and Terrorist Financing, Eurostat, the European Judicial Training Network (EJTN) and the World Economic Forum.

The 2021 scoreboard highlights[10] the issue of digitization. "The scoreboard, which has been a tool of the rule of law mechanism since 2013, will focus not only on the digital development of judicial

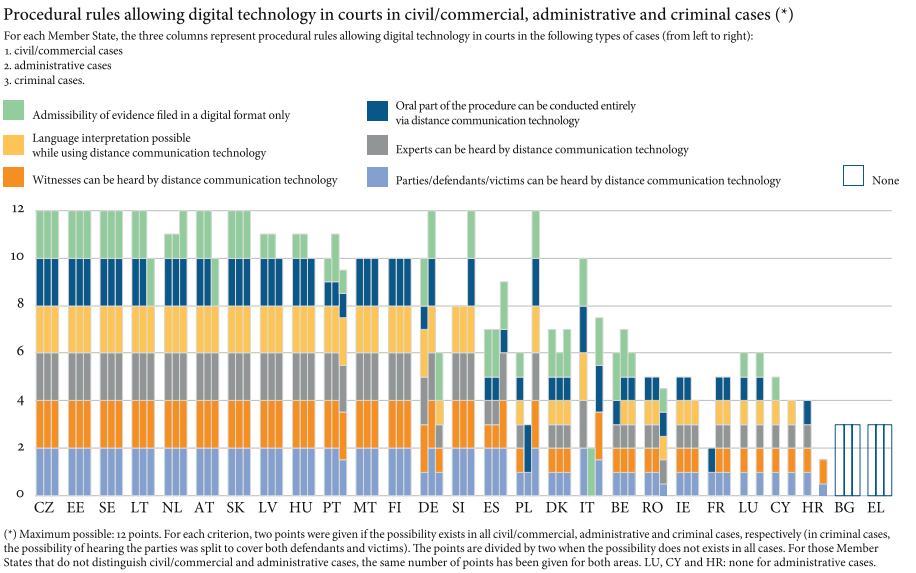
[8] V.L. Pató, *Magyarország igazságügyi rendszerének digitális fejlettsége: tanúságok a 2021-es Uniós igazságügyi eredménytábla mutatóiból*, available at: https://eustrat.uni-nke.hu/hirek/2021/07/12/magyarorszag-igazsagugyi-rendszerenek--digitalis-fejlettsege-tanulsagok-a-2021-es-unios-igazsagugyi-eredmenytabla--mutatoibol [accessed on: 12 July 2021].

[9] Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, *The 2019 EU Justice Scoreboard* 2019.4.26. Com(2019) 198 Final, pp. 4–5.

[10] European Commission, *2021 EU Justice Scoreboard*, Publications Office of the European Union, Luxembourg 2021.

systems this year, but also on the independence of the judiciary, and its findings will be part of the Commission's forthcoming report on the rule of law".

Figure 1. Digital Digital technology in courts in civil/commercial, administrative and criminal cases



(*) Maximum possible: 12 points. For each criterion, two points were given if the possibility exists in all civil/commercial, administrative and criminal cases, respectively (in criminal cases, the possibility of hearing the parties was split to cover both defendants and victims). The points are divided by two when the possibility does not exists in all cases. For those Member States that do not distinguish civil/commercial and administrative cases, the same number of points has been given for both areas. LU, CY and HR: none for administrative cases.

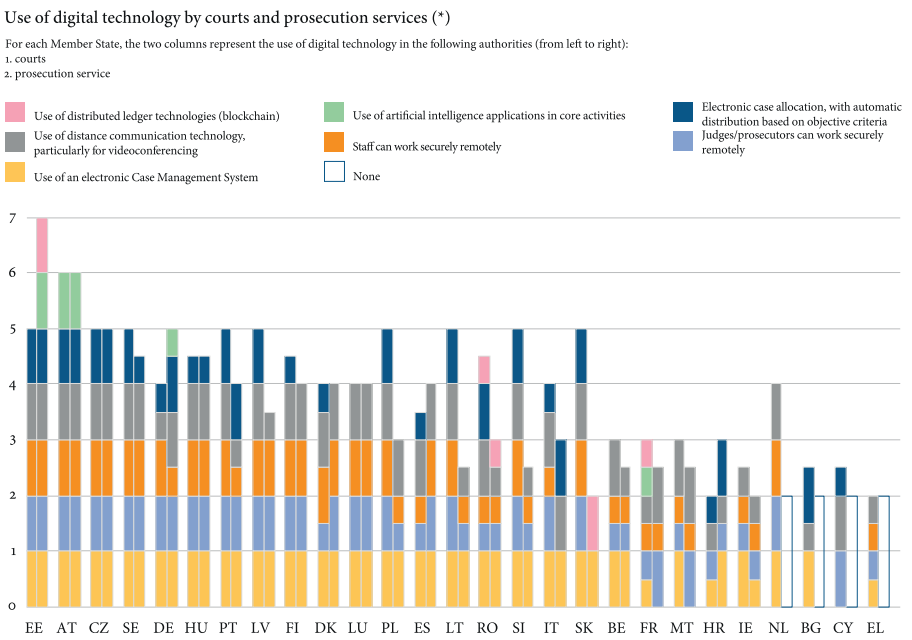
Source: *2021 EU Justice Scoreboard*, p. 32.

The scoreboard partly monitors *judicial reforms in the EU* Member States and partly examines the effectiveness, independence and quality of services. The latter includes digital development, as the quality of customer-centric services clearly increases by providing electronic access and the possibility of administration. The latest survey, 2021, is also special because it includes data from two Eurobarometer surveys, which were primarily interested in how public and economic actors perceive the independence of the judiciary. According to the scoreboard, there have been progress at international level towards the digitization of justice.

In this respect, Hungary received a high score. There is only one area that needs to be addressed, and that is the question of the

admissibility of evidence submitted in digital form only. In Hungary, according to the Criminal Procedure Act, evidence of a criminal proceeding cannot be submitted exclusively in a digital form. This is mainly due to guarantee aspects, as a significant part of the defendants do not have the skills or objective conditions to ensure that they are able to exercise their rights in full in this form of proof. In addition to the lack of digital literacy, in many cases there are also problems with reading comprehension and interpretation. These can be clarified in a F2F encounter, but as the problem transcends the digital space, is it a concern that it does not raise the risk of e-exclusion?

Figure 2. Use of digital technology by courts and prosecution services



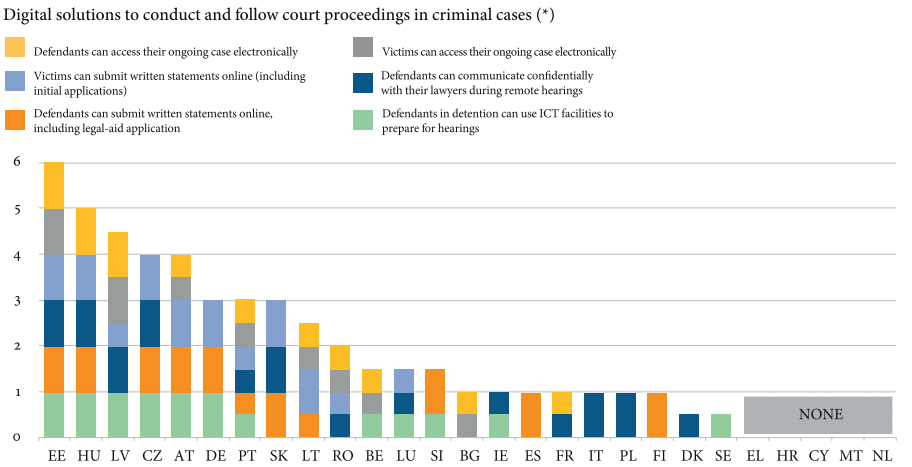
(*) Maximum possible: 7 points. For each criterion, one point was given if courts and prosecution services, respectively, use a given technology and 0.5 point was awarded when the technology is not always used by them.

Source: *2021 EU Justice Scoreboard*, p. 33.

Although Hungary has performed well in terms of indicators based on the 2021 scoreboard, the area of electronic case allocation and the strengthening of the application of block-chain and artificial intelligence technology in procedural processes can be further

developed. However, it is important to point out that criminal proceedings have special features compared to civil and administrative proceedings. Hungary has received a good assessment both in providing a reliable remote connection and in enabling lawyers to prepare detainees in custody for a hearing, and in supporting victims in avoiding re-victimization. However, victims do not currently have electronic access to their cases, so ensuring this will be the next step. The current obstacle to machine-readable judgments is the need to standardize the standards used by each authority. Otherwise, in contrast to most countries, there is no significant difference in digital development in Hungary in terms of individual rights and customer groups.

Figure 3. Digital solutions to conduct and follow court proceedings in criminal cases



(*) Maximum possible: 6 points. For each criterion, one point was given if the possibility exists in all criminal cases. 0.5 point was awarded when the possibility does not exists in all cases.

Source: *2021 EU Justice Scoreboard*, p. 36.

Measuring the effectiveness of the criminal justice system offers other options than the approach taken by the Union. In this respect, it is particularly important to include the prevention aspect. In our opinion, this may be the focal point along which the issue of efficiency can be examined in a broader aspect and with greater social relevance.

The criminal justice system itself has large potential for conflict. This is due, on the one hand, to the fact that the ***criminal justice*** system appears as a ***quasi-alliance of several institutions***, which have their own sub-purpose and related interests. One of the most important of these is the determining role of the statistical approach. For example, it is not in the investigative authority's interest to admit cases where experience has shown that detection efficiency is low. This worsens the statistical classification of the institution. Similarly, the prosecutor's office is reluctant to accept cases where the verifiability of the prosecution as a result of the investigative work is questionable, so while the investigating authority wants to hand over the proceedings to the prosecutor's office as soon as possible so that cases do not become congested increase and the procedures should not be too long, the interests on the part of the prosecutor's office are contrary to this, as an improperly prepared case impairs the prosecutor's prosecution, which in turn is one of the metrics of this institution's statistical evaluation. Thus, while all institutional actors have a specific interest in criminal justice, the common great goal, under which they can be included as a single umbrella, is to guarantee public security by enforcing the goal of crime prevention. Thus, in our view, *crime prevention can be the goal that appears in all institutions*, partly in the laws that determine their operation, directly or indirectly, and through this ensures the wider social usefulness and significance of justice.

Focusing on the crime prevention goal is also justified by ***other reasons***. The basis of the operation of criminal justice in the modern sense, the existence of state penal power, is the ***social contract*** by which people renounce part of their natural freedom in favor of the state to protect the remainder of their natural freedom from both external attacks and internal violations. However, under the *ius puniendi*, a penalty can be imposed only within certain limits, since "a penalty which goes beyond the need to safeguard the common good is inherently unfair"[11].

[11] C. Beccaria, *A bűnökről és büntetésekről*, Budapest 2012.

However, ***the punishment is never self-imposed. Absolute theories of punishment***, based on free will, that is, indeterminism, based on the individual responsibility of the perpetrator, fix the purpose of punishment. For example, according to *Aristotle*, the punishment can be used to restore the violated legal order. In his view, "most people obey coercion rather than the fine word, and punishment rather than moral duty. That is why […] the legislature must call on the citizens to virtue and encourage them to follow morals, but against the disobedient […] punish and retaliate, and even exclude the incorrigible; for […] the wicked man […] shall be chastened with pain, as well as the beast of prey"[12]. The amount of the penalty applied is based on the principle of arithmetic justice.

Other proponents of absolute punishment theories do not focus on the identity of the perpetrator or potential perpetrators. According to *Carrara*[13], for example, "the purpose of punishment is not to bring justice, to avenge the victim, to compensate the victim, to intimidate citizens, or to improve the perpetrator. All of these can be side effects of punishment, one of which we may wish for; but the punishment would be unappealable even in the absence of all these results. The main purpose of punishment is to restore public order in society"[14].

In contrast to absolute theories of crime, prevention is at the heart of the idea of *relative theories*. There is a difference of opinion among individual theorists as to what the specific way should be: deterrence, an utilitarian approach (Bentham), the practice of psychological coercion (Feuerbach), or even a reference to biological determinism (Lombroso).

Although we consider Cesare Beccaria to be the 'father' of the crime prevention idea assigned to criminal law in the modern sense, elements of his approach can be found in the works of Protagor,

---

[12] Aristoteles named by J.Z. Tóth, *Beccaria a halálbüntetésről: valóban előzmények nélküli-e az abolíció gondolata*, [in:] *Dei delitti e delle pene – Tanulmányok Cesare Beccariáról*, ed. J.Z. Tóth, Budapest 2015, p. 59.

[13] About Francesco Carrara's theory see more M.C. Materni, *The 100-plus Year old Case for a Minimalist Criminal Law* (*Sketch of a General Theory of Substantive Criminal Law*), "New Criminal Law Review", 2015/18/3, pp. 331–368.

[14] F. Carrara, *A büntető jogtudomány programja I–II*, Budapest 1878, II. kötet, p. 74.

Plato and Seneca. According to *Protagor*[15], who represents the Sophist philosophy, when imposing a punishment, one should look not to the past, to the direction of the crime, but to the future; that is, "punishment is not necessary because a crime has been committed, but so that it cannot occur or recur in the future".

Plato similarly argued, "it is not because of the evil that has already been committed that [the criminal] should pay the punishment – for what has happened cannot be undone anyway – but because in the future or at all he should hate the sin himself and all those who have seen the punishment, or at least greatly cease to be such mourning acts"[16]. However, there are incorrigible criminals[17], for whom the only solution is to remove them from society, be it through exile or the death penalty.

Seneca, who also influenced the concept of crime prevention in Beccaria's work, says the purpose of punishment includes repairing the perpetrator, deterring others from committing crimes, and protecting society by "removing" the perpetrator. The death penalty can be used as a last resort to protect either society or as a way of deterrence[18].

According to *Cesare Beccaria*, "[T]he aim of can therefore be to prevent the culprit from causing further harm to his fellow citizens and to deter others from causing similar harm"[19]. "The purpose of punishment is not to torture or torment a sentient being, nor it is to make a crime not done"[20]. The former is not justified – and mere cruelty to the perpetrator alone cannot promote public welfare – and the latter is objectively excluded. Beccaria saw crime not as a legal but a social phenomenon. And since all social phenomena

[15] (Πρωταγόρας), [in:] J.Z. Tóth, *Beccaria*…, p. 58.

[16] Platón, *Törvények* (Timaios) (translated by D. Kövendi), [in:] *Platón összes művei Harmadik kötet*, Budapest 1984, p. 957.

[17] He views this category of offenders as a disease that has infected the organization, i.e. society, and will continue to spread without its elimination.

[18] See more: L.A. Seneca, *A haragról* (translated by M. Kovács), Pécs 1992, pp. 27–29.

[19] C. Beccaria, *Bűntett és büntetés* (translated by P. Sebestyén), Budapest 1967, p. 84.

[20] C. Beccaria, *Bűntett* …, p. 84.

are caused by causes and can be influenced by the actors, he believed that the fight against crime could also be effective. The tool for this is prevention. It is no longer possible to change the past, but it can also be prevented by human means from further delicacies. On the one hand, so that the perpetrator does not make a bad decision next time and does not re-enter the path of sin, and on the other hand, so that any member of society, seeing the consequences of the crime, does not commit an offense. The means of *general prevention* can be deterrence in connection with the punishment of the perpetrator, and on the other hand, encouragement to comply with the law by learning about the law. He believed that instead of deterrence, rewarding virtue on the one hand and perfecting education on the other was the best solution. With proportionality in mind, therefore, such punishments should be applied that "have the deepest and most lasting effect on the souls of men and cause the least torment to the body of the sinner"[21]. Effective prevention can only be achieved if penalties are immediate and unavoidable. Under these conditions, a milder sanction can also deter potential perpetrators. If this is not what the law enforcement chooses, it will act unnecessarily. But what is unnecessary is also unjust. Nevertheless, no one should refrain from injustice better than the state itself.

The defining tenet of Beccaria's theory is that "the strongest brake on crime is not the cruelty of punishment but its inevitability… A more moderate but sure punishment will always have a greater impact than another fear of a more frightening punishment, for which punishment there is hope to avoid…".

Of the three elements of ***the system of criteria*** described in 1764 – *the certain, rapid, and proportionate punishment* – the requirement of prompt prosecution is important for the development of a psychological connection between sin and punishment in the offender, while certainty is intended to strengthen deterrence. By ***formulating these theorems, Beccaria touched on several aspects of effective justice in the sense of the 21st century***.

[21] Beccaria quoted by É. Inzelt, *A kriminológiai gondolkodás kezdetei*, [in:] *Kriminológia*, eds. A. Borbíró, K. Gönczöl, K. Kerezsi, M. Lévay, Budapest 2016, p. 61.

A crime prevention-focused approach to the efficiency of the judiciary can be supported in several ways – although ***the conditions for the efficiency of justice seem to differ*** in their dynamic and static approach to justice. In the dynamic model, criminal justice is a multi-stage process that provides a framework for exercising state criminal power against the perpetrator of a specific offense. In contrast, the static approach does not focus on the process but on the institutions behind them. (In this case, justice can be defined as a subsystem of society).

If the expression of disapproval of the society (state) takes the form of a proportionate criminal reaction which exposes extensively and in its entirety the circumstances and facts relevant to the commission of the accused and the commission of the specific crime and is able to adequately express the society's disapproval, it also serves to prevent re-offending. *With this, the efficiency elements of the process-focused approach overlap with the success criterion of the systems-based approach.* The latter is achieved in the case of more effective protection of society from acts violating the law / norms; that is, if the enforcement of criminal law, thus the prevention, control and suppression of crime, is able to achieve even greater efficiency.

The focus on crime prevention is also justified by the specific nature of the criminal justice system mentioned earlier. This is because the system-wide approach recognizes the relative constraints arising from the conflicting nature of the judicial system and its occasional malfunctioning. Institutions of justice[22]:

- bodies with different structures and governance result differences in connection with their own traditions, socialization mechanisms, values and interests (they operate different systems of dependency);
- at the same time, they themselves are interdependent, in a broad sense of subordination; it means, that the performance of each body or its change affects the effectiveness of the judiciary as a whole;

[22] See more Á. Farkas, *A büntető-igazságszolgáltatási….*, p. 898.

– the quality of their relationship and cooperation depends on the quality and speed of the interactions between them.

The systemic consequence of this is the priority of ensuring the organizational self-interest and institutional effectiveness of each body. (For example, they prefer not to allow cases that could jeopardize statistical effectiveness indicators.)

The goal of crime prevention appears as a strong common element along many conflicting interests. Ensuring public safety is a declared goal of each institution and the laws that govern their operation. So if we want to find a ***common element***, a solid foundation that connects the organs of the justice system, that is ***the purpose of prevention***. This is true even if its specific way of achieving is sometimes seen to be implemented along different focal points.

The issue of guaranteeing public security and preventing crime has become particularly important in recent decades. In the background of this appreciation, there are also social, economic and socio-psychological changes, but it is a fact that ***the social contract has been rewritten***, one of the classic elements of which is the increasingly strong (voluntary) renunciation of civil liberties. At the same time, a *new element* is that the other side of the contract is no longer necessarily the state, but – through it and on its behalf – *private companies from the security market*.

In the second half of the 20th century[23], after a short period of social, economic, and political consolidation that seemed to be settling after World War II, significant changes began in both American and European societies. However, these changes were of very different directions and magnitudes; while in Western Europe economic issues and possible frameworks for co-operation were at the forefront, ongoing, fundamentally political tensions in Central and Eastern Europe generated new and significant events: revolutions (1956, 1968), grassroots movements (Polish Solidarity), "brotherly war" (former Yugoslavia), the effects of changes within the Soviet

[23] This material was used in E. Csemáné Váradi, *"Rossz tettekért büntető …" – avagy a szabadságvesztés-büntetés kihívásai*, available at: https://cdn-62235fc2c1ac18ed281of1ef.closte.com/wp-content/uploads/csemane-varadi-erika-rossz-tettekert-bunteto.pdf [accessed on: 10 May 2021].

Union. Although the Cold War periods and hostile rhetoric swept across Europe, the everyday lives of its citizens, over a long period of time, were relatively unchanged and (even if not loved,) along well-known systems of values and norms. This life framework system included a clear definition of "good" and "bad" as well as exemplary life strategies and behaviors to follow. Among these were clear answers about becoming a criminal, its explanations, and through that, his relationship with them.

As the Industrial Revolution pounded and people were able to live better and more comfortably, by the 1980s, characteristics had already materialized in seemingly more peaceful Western European countries (and the United States) that together created the so-called ***risk or risk society*** category. Ulrich Beck published his work[24] in 1986 with this title, which articulated the sense of life that had already been tangible in Western society during this period.

The rapidly changing world around the individual has set in motion a conceptual and attitudinal framework in almost all areas: although the general increase in living standards has not reduced disparities between social strata, they have spread to a wide range of individual life paths; success was further undermined by education, settlement type, or the new labor market. ***These effects have disintegrated the previous class- or stratum-based culture of social identity***. People have moved out of their traditional attachment system, and the norms, habits, problem-solving techniques, and values that have so far been defining and secure points of reference in a given community (e.g. factory workers) have lost their strength along with bonds. New lifestyles, coexistence forms, cultures, gender roles, etc. were created that were unthinkable until then.

All this led to the ***individualization of*** each ***person***[25], as industrial societies made him the only "*reproductive unit*"[26] of soci-

[24] U. Beck, *Risikogesellschaft*, Frankfurt a. M. 1986.

[25] For a more detailed analysis of the concept, see also U. Beck, E. Beck-Gernsheim, *Nicht Autonomie, sondern Bastelbiographie. Anmerkungen zur Individualisierungsdiskussion am Beispiel des Aufsatzes von Günter Burkart*, "Zeitschrift für Soziologie" 1993/(22)3, pp. 178–187.

[26] "…die den einzelnen zur alleinigen "Reproduktionseinheit des Sozialen" machten", [in:] U. Beck, *Risikogesellschaft*, p. 119.

ety; and although due to the massive nature of change and the socio-economic problems affecting a wide range of society (e.g. unemployment, mining, difficulties in heavy industry, polluting investment by large companies), many millions in Europe have experienced the same, with lots of doubts they had to face alone; as a personal destiny (plague of fate) hidden behind their own four walls[27]. Moreover, the external conditions that trigger unemployment are often transformed into individual error or personal failure by experiencing the loss of a job. Belonging to a type of consumer style that can be described with increased income, education, consumption, or even mobility did not provide an opportunity to connect with another community. "(a) **people have broken out of their traditional attachments and care relationships by breaking the historical tradition**, and **must rely solely on themselves** and their own individual (labor market) destiny"[28]. Yet the 1980s were characterized by a negative upheaval that led to a significant increase in social disparities due to mass unemployment, which society, however, was able to hide due to its individuality. "The need is hierarchical, the smog is democratic"[29], the author pointed out, that the negative effects generated by the risk society, such as pollution, affected everyone equally, while the disadvantages of industrialization became more tangible, especially in case of the more vulnerable.

According to Beck, the background of the processes is not the capitalist system per se, but the modern industrial society, the technical and economic development that moves it, becomes arbitrary and self-serving. This poses an outstanding risk to the individual in two forms: due to the side effects associated with industrialization (e.g. pollution, industrial disasters, recovery of energy reserves) and the self-threatening directions of modernization (e.g. cloning – genetic hazards, nuclear engineering – radioactive radiation). The

[27] "…müssten diese individuell aushalten – als persönliches Schicksal, das sie „hinter den eigenen vier Wände versteckten", [in:] U. Beck, *Risikogesellschaft,* p. 148.

[28] Beck's thoughts quoted by B. Kapitány, *A rizikótársadalom másfél évtizede*, "Szociológiai Szemle" 2002/1, pp. 123–133.

[29] "Not ist hierarchisch, Smog ist demokratisch", [in:] U. Beck, *Risikogesellschaft*, p. 48.

name itself – a society at risk – is named after precisely these risks associated with industrial development, which, regardless of social status, affect all citizens equally, while they are often invisible and generally irresponsible.

In this individualized new world, the ***individual*** has become lost, without holding on, without a stable framework of values and comparisons, ***confronting himself with the labyrinth of his own insecurity*** ("Labyrinth der Selbstverunsicherung") while becoming more and more compelled to manage his own life independently and coping with the risks of individual existence.

The citizens of Central and Eastern Europe also had to face these effects, albeit later in time, much more brutally. With the withdrawal of Soviet / Russian interests, the opening of borders, and the unification of the two Germany – which "ended the 45-year division of the German state and symbolically ended the Cold War"[30] – they soon fell back into reality for moments joyful to the majority. (For example, in Hungary, the desired freedom was followed by a deep economic crisis, living standards decreased, social disparities increased, the unemployed and the homeless appeared earlier, and by the beginning of 1993 the number of registered unemployed was around 700,000[31]. The majority of the population (80%) suffered an economic loss[32], 77% thought that the new system was worse (26%: much worse) than the previous one[33].

[30] T.M. Tarján, *1990. október 3. Németország újraegyesítése*, "RUBICONline", available at: http://www.rubicon.hu/magyar/oldalak/1990_oktober_3_nemetorszag_ujraegyesitese/ [accessed on: 01 May 2020].

[31] By the way, this is an European record for Hungary, [in:] I. Csehné Papp, *Foglalkoztatáspolitika*, Szent István Egyetem, Gödöllő, 2011, available at: https://regi.tankonyvtar.hu/hu/tartalom/tamop412A/2010-0019_foglalkoztataspolitika/ch04.html [accessed on: 07 September 2021].

[32] T. Kolosi, P. Róbert, *A rendszerváltás társadalmi hatásai*, [in:] *Társadalmi riport 1992*, eds. R. Andorka, T. Kolosi, Gy. Vukovich, Budapest 1992, p. 37.

[33] "…. the most pessimistic position at regional level was the Hungarian one. The main explanation for the disappointment with the change of regime is the change in income levels on the one hand, and the deterioration in living conditions on the other. … The negative perception of the regime change in Hungarian society is therefore mainly due to the increasing unemployment and the increased social mobility, the growing social differences and the decrease

These anomalous conditions caused loss of value and norm, frustration, bitterness, insecurity in the majority of citizens; this was particularly evident in ***the drastic decline in trust in the judiciary***.

The 20th century man was hit by the ***IT revolution*** in this situation. The IT revolution, which has directly and indirectly significantly strengthened the already existing sense of civic insecurity, loss and fear. The impact of globalization, i.e. the complex social and economic process that creates interdependencies between culture, economy, society and politics, has been further enhanced by digitalization. Industry 4.0[34] has brought society 5.0 to life. The ***information society***[35], which, because of its specific nature, poses a serious risk to disadvantaged people, especially women, the elderly and the young. They, or those who are out of the process (even voluntarily), make up the 4th world. "The new logical organizing principle of society is network organization: whoever is in the network exists, and who is not in it is not"[36]. The circle of the digitally excluded has few opportunities in a medium where the ability to possess or produce information is the basis of power.

The *effects of the information society are as present in the US as in European countries*: the globalized network economy, the temporary nature of knowledge, the speed of change in the labor market[37], the rise of digital competencies, the decline in predictability and the loss of foresight, the experience of social inequalities, which are often magnified and "*pushed into the faces*" of citizens, the omnipotence

in social security", [in:] A. Bíró-Nagy, *Rendszerváltás, demokrácia és a magyar társadalom*, Budapest 2016, pp. 19–20.

[34] J. Smit, S. Kreutzer, C. Moeller, M. Carlberg, *Industry 4.0 Directorate General for Internal Policies. Policy Department A: Economic And Scientific Policy*, European Union, Brussels 2016.

[35] For information society models, see R. Pintér, *A magyar információs társadalom fejlődése és fejlettsége a fejlesztők szempontjából*, PhD-thesis, Budapest 2004, pp. 32–50.

[36] R. Pintér, *Úton az információs társadalom megismerése felé*, [in:] *Az információs társadalom. Az elmélettől a politikai gyakorlatig*, eds. T. Pintér, Budapest 2007, p. 25.

[37] Á.P. Turzó, *A ma ismert világot totálisan elsöpri a negyedik ipari forradalom*, "Portfolió", available at: http://www.portfolio.hu/vallalatok/it/a-ma-ismert-vilagot--totalisan-elsopri-a-negyedik-ipari-forradalom.237125.html [accessed on: 23 April 2021].

of information and communication technologies, the opposition of the network and the individual[38].

All this, regardless of belonging to a generation[39], creates a social insecurity that causes an unprecedented increase of ***anxiety*** and ***loneliness***[40] – which is only exacerbated by the new forms of crime that come with digitalization. An individual is no longer protected if he does not go out to have fun at night, if he is careful about his relationships, if he closes his values properly. ***Crime comes into your room***, your everyday (virtual) living space, and without knowing the pitfalls of this platform, you become vulnerable to computer fraud, cyberbullying, credit card misuse, and other previously unknown forms of crime.

Thus, at the end of the 20th century and the beginning of the 21st century, several processes with a generating effect took place (and still do today), which, although at different times and with different effects, have reached all over the world. What they have in common is that they have ***greatly increased insecurity and fear of crime*** across borders. Uncertainty, since everything is true – and the opposite is true. The glasses through which the man of the era saw – and sees – the world are the ***media and the internet***.

Since the mid-1900s, it has become increasingly accepted that the media is the "fourth branch of power" alongside the legislature, the executive power, and the judiciary. But here is also the fifth branch of power, the "power of rumor" (or "Word of Mouth" (WOM)) – that is, the active (media) society itself, which implements it with its own system of tools (e.g. blogs, chat, forums) and social participation[41].

---

[38] „Net" vs. „Self".

[39] „*They are growing up in a world where there are 5.1 billion Google searches per day, 4 billion YouTube views, over one billion active Facebook accounts and over one million applications in the iTunes App Store*", [in:] M. McCrindle, *The ABC of XYZ. Understanding the global generations*, Bella Vista 2014, pp. 15–16.

[40] In Europe, 30% of the population reported anxiety and 40% reported loneliness as a result of an international survey. Among children aged 7–14 years, the proportion of children in our country with depressive symptoms was also high: 34.4%, [in:] *Európai iskolavizsgálat az alkohol – és egyéb drogfogyasztási szokásokról – 2015. Magyarországi eredmények,* ed. Zs. Elekes, Budapest 2016.

[41] A. Törőcsik, *Az Ötödik*, [in:] *Közép-Európai Civil Kutató Intézet. Médiaműhely*, available at: http://www.civilkutato.hu/modules.php?name=News&file=article&sid=23 [accessed on: 01 September 2021].

This has innumerable dangers (e.g. controllability, lack of or inadequate guarantee elements), as well as a ***huge lack of credibility***[42] and ***distortive effects***, however, by looking through these glasses at the outside world, especially crime, ***the individual demands harsher punishments and more determined action***.

The development of fear of crime and the change in the perception of crime – and no less the "perpetrator" – have significantly influenced the prevailing criminal policy directions and priorities in the countries, and last but not least, ***the place and role of the "sanction stone"***[43] ***in the system***. At the heart of these mutually reinforcing, interacting processes is the perpetrator.

Until the 1960s, society received clear responses to crime insofar as various theories traced it back to causes within or outside the individual. According to them, it is not only the perpetrator who could have made him a "criminal", because in that society, the economy, the narrower and wider community – even genetic, biological etc. features – also played a major role. So the responsibility is shared. "This **'non-blame' approach to crime** has allowed the responsibility for crime 'to spread' in the society and become a collective responsibility that the state employs professionals to tackle"[44].

In the second half of the 20th century, however, this approach changed constantly, ***devoting an increasing role to individual responsibility*** and the decision associated with it. It appeared the fastest and most markedly in the US.

As early as the 1970s, neo-conservative theories emerged, partly emphasizing the role of moral responsibility and partly criticizing the system of welfare and positive discrimination that characterized

[42] For more on Thomas's Theorem, the Agenda-Setting Effect and the Silence Spiral, see E. Csemáné Váradi, *Média-értés*, Digitális Közösségi Program, Miskolc 2015.

[43] András Szabó considered the criminal law as the sanctioning keystone of the legal system, whose aim is to guarantee and maintain the integrity of legal norms, [in:] A. Szabó, *Megelőzés és arányos büntetés. Megjegyzések a büntetéstan újabb fejleményeihez Európában és az Egyesült Államokban*, "Magyar Jog" 1993/11, pp. 879–911.

[44] K. Kerezsi quoted by A. Borbíró, *Kriminálpolitika és bűnmegelőzés a késő-modernitásban*, PhD-thesis, Budapest 2011, p. 68.

the country. This phenomenon has been blamed for the emergence of the so-called 'underclass' in terms of crime; "(T)his approach has turned many of the Americans who worked hard before into parasites"[45]. At the heart of social processes is an active person who is able to make his own decisions freely, but who acts in accordance with moral values, who can and wants to take responsibility for his life and his own actions. The effects so far have been defined as just the opposite. "The biggest cause of poverty today", writes Mead, "is simply that the attempts at equal opportunities in recent decades have failed to convince many blacks and Hispanics that it is worth working for"[46].

Not only the right, but also the left has been the subject of numerous criticisms of the former system of "understanding" regarding the division of responsibilities for crime. Although the new left-wing realism differed from the right-wing criminological approaches in a number of respects, it agreed with them that this could not mean acquitting the perpetrator, accepting the crime. According to their approach, crime is nothing more than a "selfish response"[47] to deprivation generated by social injustice. However, crime cannot be justified in this respect either, as perpetrators overrepresented by lower social strata typically face a range of victims who are similarly affected by social injustice.

Fact: the information explosion has further increased citizens' insecurity and ambivalence towards the existing institutions; for all that has hitherto served as a starting point for everyday decisions, which has served as a sure point of reference – be it the family, the school, the newspapers, the radio, the television, the government, the judiciary… – lost that role; the vacuum of distrust has nestled everywhere, as the aforementioned mediation transfers often

[45] B. Ehrenreich, *Az új jobboldal támadása az állami jóléti politika ellen*, [in:] *Az új jobboldal és a jóléti állam,* eds. I. Bujalos, M. Nyilas, Budapest 1996, pp. 327–353. B. Ehrenreich quoted by A. Borbíró, *Kriminálpolitika*…, p. 70.

[46] "The greatest cause of today's poverty may simply be that the attempts in recent decades to equalize opportunity have failed to persuade many blacks and Hispanics that it is worth working". L.M. Mead, *The New Politics of the New Poverty*, "The Public Interest" 1991/103, p. 6.

[47] Young and Lea quoted by A. Borbíró, *Kriminálpolitika*…, p. 74.

conveyed opposite content. And the changes that have taken place in society, in particular the increase in opportunities for crime, the entry of younger and younger people, and the rise of career crime, have raised doubts as to whether it is possible to take effective action against offenders with proven means of social control. Moreover, do they need to pay attention to their individual problems, life paths, difficulties? "**It has suddenly become doubtful**," writes Andrea Borbíró[48], "**that the efforts to improve society** and to make great strides in correcting the sources and symptoms of deviance **are indeed appropriate to alleviate the problem of crime**".

This critical approach has been strengthened, now with the involvement of new actors such as the community, as a result of which it has become possible to define the emergence and treatment of crime and the related social problems from new perspectives. By the turn of the 20th and 21st century, the ***issue of individual responsibility*** and the problems of social responsibility appeared even more strongly. To come up with several suggestions that view "**the criminal as an exploiter and parasite** […] since **the offender is personally responsible for his actions**, we are no longer treated but punished"[49]. The issue of the personal responsibility of perpetrators has come to the fore again, hundreds of years after the birth of the classical trend and modern criminal law.

Although the advance of neo-conservatism in European countries, with the exception of Great Britain, has not been felt to such an extent, in addition to the strengthening of moralization in late modernity, a ***stricter criminal policy*** can also be observed.

By the 21st century, ***the issue of public safety and crime has become strongly politicized***, and to that extent, states have sought not only to strengthen their control over crime but also to win over potential voters through public security.

The *strength of fear of crime* among the population can be measured by various studies. The fact is, however, that this feeling typically *does not depend* on the crime statistics of a given society or the *actual crime situation*, as can be seen in the multitude of

[48] A. Borbíró, *Kriminálpolitika*…, p. 41.
[49] Tham quoted by A. Borbíró, *Kriminálpolitika*…, p. 77.

examples, both American and European. For example, in Britain, when the number of known crimes fell by almost 40%, a quarter of the population did not notice it at all; moreover, in Germany, for example, a similar decline was explicitly observed[50]! These social psychological features of citizens had lead later to an 'insurance concept of crime control'[51]. The key features of this new criminal policy could be written by which hazard reduction strategies such as zero tolerance, hard targeting, surveillance, selective incapacitation and exclusion.

In response to the citizens' fear, states have typically responded with increasingly strong criminal policy that strongly support or raise the profile of punishment; "(T)he appreciation of the fear of crime in criminal policy can thus really easily lead to distortions in criminal policy indicated in the 'catastrophe narrative', above all the spread of punitive populism"[52]. Election periods in recent decades, such as those in Germany, Italy and France, have shown that "the dramatization of the public security situation and the incitement of fear of crime" constantly accompany these terms, so the issue of ***public security*** is becoming an ***extremely important aspect*** of everyday life for citizens, ***the solution of which is basically expected from those exercising state criminal power***. To this end, ***they are increasingly willing to relinquish the protection of their privacy and certain aspects of their human rights*** (for example, relying on the preventive effect of strengthening technical control, contributing to increasing control over their room for maneuver through the installation of camera systems or mobile applications).

All this meant that the revenue of private security companies, for example, reached $ 202 billion by 2010, according to a report by the Council of Europe. As the state is neither able nor willing to take responsibility for crime prevention alone, the private sector is becoming increasingly involved in the process; however, this also means that although more and more forms of so-called situational

[50] A. Borbíró, *Kriminálpolitika*…, p. 84.
[51] H. Kemshall, *Understanding Risk in Criminal Justice,* Glasgow 2003, p. 1.
[52] A. Borbíró, *Kriminálpolitika* …, p. 88.

prevention are emerging in practice, ***the renunciation of acquired civil / human rights affects an ever-widening range of areas***.

The *escalation of the so-called risk management constraint* can be recorded as a new direction, which partly ***generates the previous tightening of penal***ties and partly leads to ***the spread of so-called risk-oriented risk management tools***. In this way, people are given access to their own homes, living spaces and workplaces, as well as the individual rights of people deemed to be at risk, with a strong emphasis on the legitimate interest of the community in public safety. A good example of this is the online registration system[53], which makes public, for example, the city address and certain details of people who have previously committed a sexual crime. "Nor should the stigmatizing, isolating, and exclusionary effects of regulation and criminalization themselves be overlooked – perhaps the most extreme example of which is the profound social isolation suffered by those placed on sexual offender registers or subject to control orders (to say nothing of their spouses and children)"[54].

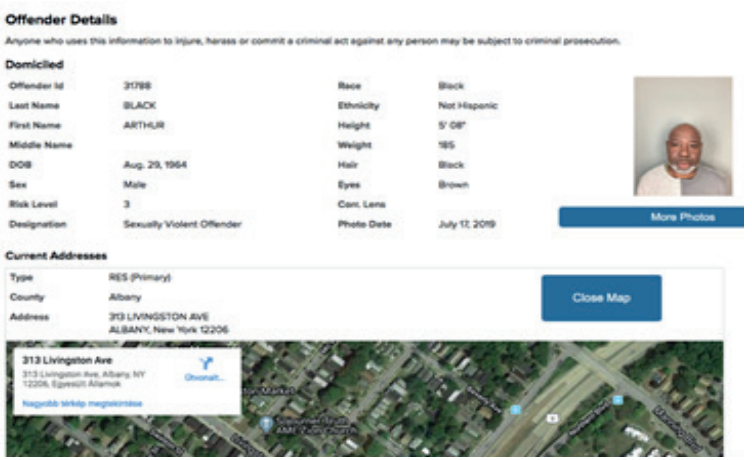
The deterrent or repressive nature of criminal policy approaches alone should not imply any value judgment; moreover, it is not really identifiable with political right or left. While in the second half of the 20th century the right divided mainly the findings of preventive criminal policy, this was significantly changed in the 21st century. Behind the changes, the rise of public security to a political topic and, in part, the imagined needs of citizens (potential voters) played a role. In this respect, Hungary is also a good example of the possible subordination of special policy to current general political direction. In her work, Klára Kerezsi showed by countless examples that while criminal policy direction were changed in Hungary with the changes of governments in power after the change of regime, until then, in the period between 2002–2010, the left-liberal government

[53] See for example: The Chicago Police Department – Sex Offender Database, available at: https://home.chicagopolice.org/services/sex-offender-database-search/ [accessed on: 01 May 2020].

[54] L. Zedner, *Security, the State, and the Citizen: The Changing Architecture of Crime Control*, "New Criminal Law Review" 2010/(13)2, p. 397.

significantly changed its criminal policy convictions due to the activity of Fidesz-Hungarian Civic Alliance, as an opposition party[55].

Figure 4. Offender detail of CLEARMap (Citizen Law Enforcement Analysis and Reporting)



Source: Registered Sex and Gun Offenders. Chicago Police Department; Office of Public Safety Administration.

While the preventive strategy approaches the issue of criminal justice from a preventive point of view, the repressive strategy that has gained ground, primarily builds the widest possible range of state criminal claims by activating social, individual and

[55] 1990–1994: conservative government, liberal crime policy; 1994–1998: socialist-liberal government, drifting crime policy; 1998–2002: centre-right government, hardline crime policy; 2002–2006: socialist-liberal government, double-track crime policy; 2006–2010: socialist-liberal government, social justice, but later tightening ("light and shadow") See in more detail: K. Kerezsi, *Crime policy aspirations and reforms*, [in:] *A rendszerváltás húsz éve: állam, jog, társadalom*, "Jogtörténeti Szemle" 2010/2, pp. 57–60.

For more in connection with the political reasons behind this change of criminal policy see E. Csemáné Váradi, *A Janus-arcú kriminálpolitika – avagy a fiatalkori bűnözéssel szembeni fellépés aktuális kérdései*, [in:] *Collegium Doctorum Konferencia*, ed. I. Stipta, Miskolc 2012, pp. 2–3.

community forms of collective self-defense[56] and security market participants too. "He blames **the overemphasise of human rights** on the right to criminal proceedings and **calls for these to be increasingly restricted. Only law-abiding citizens have the right**". – writes Géza Finszter[57].

Examples of these trends can be found in many Western European countries. Thus, in France, it was possible to confiscate vehicles in the event that driving crime appeared to be involved. Additional space surveillance systems and security equipment have been installed and developed. Behind the processes is strong public support and the assumption that in the absence of this rigorous action, effective preventive work is not expected. But we can cite similar examples from England in the early 1990s, where the left-wing Labor Prime Minister emphasized the importance of individual responsibility and the ***need to focus on victims rather than criminal guarantees to protect the perpetrator***. "We need to build a strong and just society […] that can show strength to offenders and is fair in supporting the underprivileged, the poor and the downtrodden"[58].

Preventive and repressive criminal policy cannot therefore be combined with a single political side, as its elements, although to varying degrees and at different times, are used by both. At the same time, "it is also not true that one is scientifically grounded, in accordance with the ideal of constitutionality and has a humanist commitment, while the other is voluntarist, denying the theory, populist, dictatorial and inhuman", underlines Géza Finszter[59].

With regards to the purpose of crime prevention, is it also ***important to determine the means by which public safety is guaranteed***.

[56] Collective self-defence vs. personal rights of the offender. The details of the person who has already served his sentence, his criminal career, his level of danger, his photo and even his address (with a map) are publicly available; see for example: New York State Division of Criminal Justice Services, available at: https://www.criminaljustice.ny.gov/SomsSUBDirectory/offenderDetails.jsp?offenderid=31788&lang=EN [accessed on: 01 May 2020].

[57] G. Finszter, *A bűnmegelőzés hivatalai*, [in:] *Tanulmányok a "Határőrség szerepe a bűnmegelőzésben" című tudományos konferenciáról*, ed. Z. Hautzinger, Pécsi Határőr Tudományos Közlemények II., Pécs 2003, p. 39.

[58] G. Finszter, *A bűnmegelőzés…*, pp. 41–42.

[59] G. Finszter, *A bűnmegelőzés…*, p. 40.

The role that is meant for imprisonment in many 21st century countries is in stark contrast to its initial characteristics. The names found in connection with the first domestic institutions – "improving", "destined for improvement", "correcting", "royal repairing" – refer[60] to a completely different function of punishment. It is a fact, however, that the term repair was identifiable with healing until 1803 in Hungary and was first used in this sense by István Sándor, writes Barna Mezei[61]. This content has become difficult to use in the 'everyday' vocabulary of the Reformation, but it has gained ground in the professional language, precisely in connection with deprivation of liberty as a corrective or legal consequence of the possibility of education / correction.

Although the initial designation of imprisonment is best served by the purpose of 3R – say reintegration, resocialization and rehabilitation – it seems to be pushed into the background by citizens as an expectation.

"And I'm scared of what I'll find
What's inside my mind
And I can't breathe anymore
And I can't see in the dark
But I can feel my heart
Jump around inside my bones"[62]

The quote is a good symbol of the constant fear and anxiety of the 21st century. It characterizes the man of the 20th century more strongly than before. The desire for security arising from this anxiety became more and more intense, and through criminal policy

[60] Imprisonment as a punishment first appeared in the Corpus Juris Hungarici, Article XXII of 1723, in connection with the crime of incest.

[61] B. Mezey, *A börtönügy a 17–19. században. A börtön európai útja*, Budapest 2018, p. 365.

[62] "*And I'm scared of what I'll find / What's inside my mind / And I can't breathe anymore / And I can't see in the dark / But I can feel my heart / Jump around inside my bones*", [in:] *The Farewell Friend: Bones*, Songwriter Sam Tabor. This part of the lyrics was translated by Ernő Ákos Csema.

decisions ***the strictest sanction, the applicability, purpose and function of the custodial sentence were also reflected***.

From the 1980s onwards, the so-called neutralization approach was aimed at ***making it impossible to commit another crime within a criminal justice system***. The simplest means of doing so was deprivation of liberty or the introduction of strict sentencing procedures such as the so-called "3 Strikes" Laws. An important element of these approaches is the victim's right to the knowledge to feel safe as the perpetrator "withdraws" from society for a long period of time. In fact, this kind of ***isolation*** is actually "**the primary purpose** of keeping **the perpetrator safe away from society** …. neutralization does not want to change the perpetrator or the likelihood of committing a crime, but rather simply reduce the possibility of committing the crime"[63].

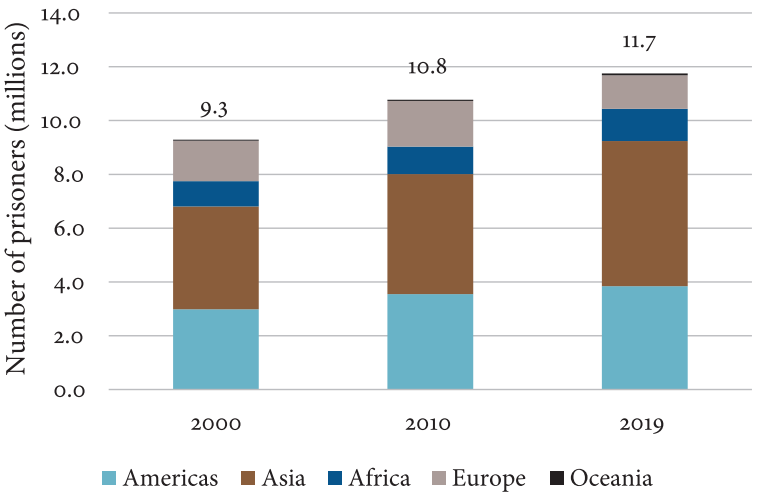
The creation of public safety, as the interest of the community, is in this case opposed to the individual interest of the offender and the protection of his human rights. In several countries, the interest of the community emerges victorious from conflict. So, for example, the most important holding of the US Supreme Court was in the case of Ewing v. California[64] was, that the "(T)hree strikes laws do not violate the constitutional prohibition against punishment that is grossly disproportionate to the crime because there is a reasonable basis for believing that these laws would further the legitimate goal of deterring and incapacitating repeat offenders." In connection with this opinion the 'narrow proportionality principle' of Eighth

[63] A. Borbíró, *Kriminálpolitika* …, p. 149.

[64] Gary Ewing took three golf clubs priced at $399 each from a golf pro shop, concealing them in his pants leg. He was on parole from a nine-year prison term at the time, having been convicted of four serious or violent felonies based on three burglaries and a robbery. After his theft of the golf clubs, Ewing was convicted of felony grand theft of personal property. This gave him two or more serious or violent felony convictions, which meant that he was sentenced to 25 years to life under California's three strikes law. He appealed based on the Eighth Amendment's prohibition against cruel and unusual punishment, pointing out that the sentence was grossly disproportionate to the crime, [in:] No. 01-6978 Ewing v. California [Ewing v. California, 538 U.S. 11 (2003); Argued November 5, 2002-Decided March 5, 2003]; Justicia US Supreme Court, available at: https://supreme.justia.com/cases/federal/us/538/11/ [accessed on: 18 September 2021].

Amendment (that applies to noncapital sentences) has a special relevance. The Eighth Amendment of the Constitution of the United States provides, that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"[65]. What constitutes cruel or unusual punishment is worked out by judicial practice. In the case of Harmelin v. Michigan it was stated, that "Eighth Amendment does not require strict proportionality between crime and sentence [but] forbids only extreme sentences that are 'grossly disproportionate' to the crime"[66].

Figure 5. Global prison population by regions (2000, 2010, 2019)



Source: UNODC: Data matters, Vienna 2021, p. 1.

What constitutes cruel punishment is determined by judicial practice. This has led, in part, to the inclusion of risk considerations in the scope of penalties and, in part, to the imposition of penalties

[65] Constitution of the United States, available at: https://constitution.congress.gov/constitution/amendment-8/ [accessed on: 20 November 2021].

[66] No. 89-7272 Harmelin v. Michigan; Justicia US Supreme Court available at: https://supreme.justia.com/cases/federal/us/501/957/ [accessed on: 18 September 2021].

that appear to be disproportionately severe. The U.S. Supreme Court has ruled in a specific case[67] that "we are not punishing what appears to be an insignificant crime, as you know, stealing a videotape. We punish you for not learning the lesson from your previous cases"[68]. As a result of this approach, the number of people sentenced to prison has increased drastically in some countries.

Although this concept is not followed in such a crude form in Europe, there are numerous examples of ***deprivation of liberty for preventive purposes***[69].

Thus, in ***Switzerland***, for example, the risk approach has taken the form that the dangerousness of perpetrator or his/her future behavior alone allow the authority to order security custody. Although it can be demonstrated with the help of a committee of experts that there is scope for intervention that can reduce the degree of danger to the offender's society, detention ordered in this context can last up to life[70].

Perhaps the most striking example of this approach is the ***English*** practice[71], which provides for the possibility of indefinite imprisonment in several forms. Imprisonment in this context is a preventive measure insofar as it deters and incapacitates (i.e. makes the

[67] California charged respondent Andrade with two felony counts of petty theft with a prior conviction after he stole approximately $150 worth of videotapes from two different stores. Under California's three strikes law, any felony can constitute the third strike subjecting a defendant to a prison term of 25 years to life. The jury found Andrade guilty and then found that he had three prior convictions that qualified as serious or violent felonies under the three strikes regime. Because each of his petty theft convictions thus triggered a separate application of the three strikes law, the judge sentenced him to two consecutive terms of 25 years to life. In affirming, the California Court of Appeal rejected his claim that his sentence violated the constitutional prohibition against cruel and unusual punishment, [in:] No. 01-1127. Lockyer v. Andrade; Justicia US Supreme Court, available at: https://supreme.justia.com/cases/federal/us/538/63/ [accessed on: 18 September 2021].

[68] No. 01–1127 Atty. Gen. Lockyer v. Andrade; the case is referred to by A. Borbíró, *Kriminálpolitika*…, pp. 150–151.

[69] D. Vig, *Izoláció a társadalomvédelem bűvöletében: határozatlan ideig tartó szabadságmegvonás Európában* "Kriminológiai Tanulmányok" 2009/46, p. 38.

[70] D. Vig, *Izoláció*…, pp. 44–45.

[71] D. Vig, *Izoláció*…, p. 41.

perpetrator incapable of re-offending – at least outside the prison walls). The intentional homicide of offenders over the age of 21 is punishable by life imprisonment, while the same applies to detainees aged 10–18 ('detention during Her Majesty's Pleasure'[72] (HMP)). Although the juvenile is not in a penitentiary institution until the age of 18, he/she is in a closed social institution, from the age of 18 he/she is placed in a juvenile detention facility and is imprisoned after the age of 21. It is also possible to impose indefinite imprisonment on minors if the offense is a serious, violent or sexual offense punishable by a term of imprisonment of at least 10 years and the court considers that the release of the juvenile would pose a significant threat to society ('detention for public protection' (DPP)). All this means that a minor can be said to be significantly dangerous at the age of adolescence on the basis of a court risk assessment, which is not an objective category, but which plays a significant role in sentencing as a potential future factor.

In addition to ***the appreciation of public safety***, other changes can be observed in each country. Many talk about a ***crisis of values*** as society's former core values, such as the rule of law, erode. Other authors suggest that compliance with the law, as well as public service, tolerance, or civic friendship, are the ideals of citizenship. These have traditionally played a significant role in controlling people's behavior and attitudes and in developing common parameters of social order. In the increasingly fragmented and globalizing world of the 21st century, these are becoming less and less relevant. Increasingly, instead of states, global economic actors from the outside and the lords of information and communication technologies, without being elected, are not subject to either traditional civic control or other guarantee rules. The philosopher Ludwig Wittgenstein testified that by our time, "morality has ceased to be a codex for society as a whole. Instead, we have outsourced it to the market and the state"[73].

[72] See more details: Powers of Criminal Courts (Sentencing) Act 2000 (2020.05.15.), available at: http://www.legislation.gov.uk/ukpga/2000/6/part/V/chapter/II/crossheading/detention-at-her-majestys-pleasure-or-for-specified-period [accessed on: 11 September 2021].

[73] Morality ceased to be a society-wide code. Instead, we outsourced it to the market and the state, [in:] Rabbi Lord Jonathan Sacks, *Five Things I Learned*

Another blow is the ***moral, religious and political tensions within a society***. It is related to these and to the peculiarities of consumer society that ***trust*** in institutions is constantly declining. It becomes difficult to process and evaluate the huge amount of information that appears on the Internet and social media, and to filter out reliable sources from it. (In the USA the confidence in companies and governments has plummeted. Today, only 6 percent of young people trust companies to do the right thing, up from 60 percent a generation ago[74]).

Successful orienteering in the information society is not possible without "4C"[75]: that is, critical thinking and problem solving, communication, collaboration, and creativity and innovation. Critical thinking in itself inspires the questioning of previously accepted norms, frames, and solutions.

In addition to the transformation of values, ***the individualistic approach to life*** has also gained more and more ground. It is not the community but the individual that is the focus of the approach. For example, in Britain and America, we have moved from a "We" society – "We are all together" – to an "I" society: "I am free to choose anything". The bad news is that this leaves people vulnerable and alone, which is only further reinforced by the internet and social media. Yet certain values – such as selflessness, integrity, freedom, justice, honesty, responsibility, compassion – must exist as a general moral proposition.

The values should reflect all the norms that people develop during coexistence. *The vacuum of trust in the authorities and the*

---

about Morality in the 21st Century, BBC Radio4 series: Morality in the 21st Century, available at: https://www.rabbisacks.org/archive/five-things-i-have--learned-about-morality-in-the-21st-century/ [accessed on: 08 August 2021].

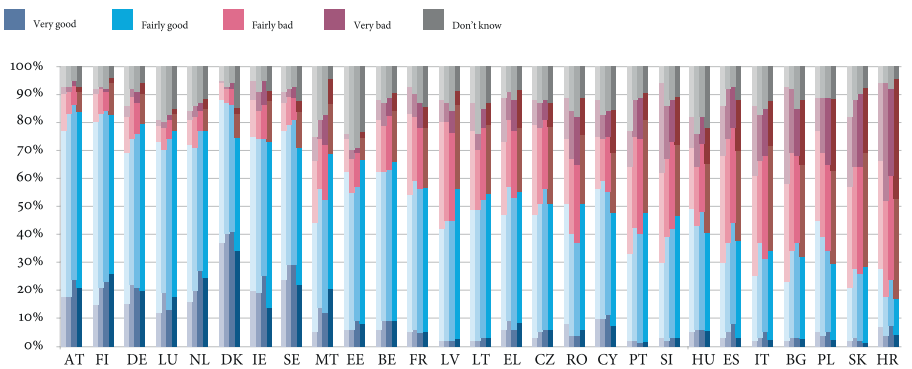
[74] Trust in corporations and governments has plummeted. Only 6 percent of young people today trust corporations to do the right thing, down from 60 percent a generation ago, [in:] Rabbi Lord Jonathan Sacks, *Five Things…*

[75] The Ethics of Citizenship in the 21st Century. Institute for Culture and Society – Religion & Civil Society Project. Universidad de Navarra, Pamplona, 2014, available at: http://webcache.googleusercontent.com/search?q=cache:z9_ujmGSgNcJ:www.unav.edu/documents/2832169/0f414efd-ca50-4953-b178-67d94e1bc6ea+&cd=15&hl=hu&ct=clnk&gl=hu [accessed on: 10 September 2021].

prominence of self-interests further reduce the ***willingness to comply with the law****.*

Figure 6. *Perceived independence of courts and judges among the general public*

Perceived independence of courts and judges among the general public (*) (source: Eurobarometer – light colours: 2016, 2019 and 2020, dark colours: 2021)



(*) Member States are ordered first by the percentage of respondents who stated that the independence of courts and judges is very good or fairly good (total good); if some Member States have the same percentage of total good, then they are ordered by the percentage of respondents who stated that the independence of courts and judges is fairly bad or very bad (total bad); if some Member States have the same percentage of total good and total bad, then they are ordered by the percentage of respondents who stated that the independence of courts and judges is very good; if some Member States have the same percentage of total good, total bad and of very good, then they are ordered by the percentage of respondents who stated that the independence of courts and judges is very bad.

Source: 2021 EU Justice Scoreboard, p. 41.

Criminal justice operates in this changed social environment – along essentially the same structures and principles that date back to the 18th century. As long as the institution and the laws it represented had inherent respect, the values it contained were an integral part of the fabric of society, and it was time for everything. However, the 21st century dictates a different pace, thus formulating new challenges and expectations.

According to the ***information society's new socialization platform***, the characteristics of the process and the importance of the parents were changed. In 2021, on average, all people spent

155 minutes (2.5 hours) a day online[76]. Including[77] that 3.96 billion people use social media today, which accounts for roughly half (51%) of the global population. The total number of global social media users has surged by more than 10% over the past 12 months. It means, that the social media welcomes more than 1 million new users every single day.

On average, global internet users spent 144 minutes on social media sites every day. (When it comes to countries with the most time spent on social media per day, the Philippines is at the top with users spending an average of 3 hours and 53 minutes on social media per day.) People aged 16–29 spend the most time (3 hours daily) on social networking platforms, while aged adults between 45 and 54 spend 1 hour and 39 minutes every day. Millennials spend around 2 hours and 30 minutes on social media. The pattern indicates that younger people spend the most time on social media channels. For the new generations life is unimaginable without the internet. These stats seem more exciting when we consider the restriction that only those aged 13 and above can use most social media platforms. If we take kids (under 13) out of the equation, 65% of the world's eligible population has a presence on social media.

New generations grow up in an ***environment*** where ***everything happens with incredible speed and volume***. And a significant proportion of adult citizens visit here regularly for extended periods of time. In a medium, where in every single minute of 2021[78] nearly

[76] This statistic presents the average daily time spent online by internet users worldwide from 2011 to 2021, sorted by device. According to Zenith Optimedia, in 2018, the average daily minutes of desktop internet consumption per capita amounted to 39 minutes and is projected to slowly decline until 2020. However, daily mobile internet consumption is set to increase to 155 minutes in 2021, [in:] A. Petrosyan, *Daily internet usage per capita worldwide 2011–2021, by device*, statista available at: https://www.statista.com/statistics/319732/daily-time-spent-online-device/ [accessed: 27 October 2021].

[77] G. Henderson, *How Much Time Does The Average Person Spend On Social Media?*, Aug 24, 2020. Digitalmarketing.org, available at: https://www.digitalmarketing.org/blog/how-much-time-does-the-average-person-spend-on-social-media [accessed on: 10 October 2021].

[78] C. Jenik, *Here's what happens every minute on the internet in 2021. World Economic Forum, 05 August, 2021*, available at: https://www.weforum.org/

70 million messages were sent via WhatsApp and Facebook Messenger, more than 500 hours of content were uploaded on YouTube, 695.000 stories were shared on Instagram, there were two million swipes on Tinder and 1.6 million U.S. dollars was spent online[79]. Extremely intensive use every minute, constantly changing information environment, great variety.

The online space is not only a place to relax, have fun, listen to music, keep in touch, but also, especially in the context of a pandemic period, to do shopping that is one of the most popular activities in consumer society.

For example, in 2021, over 2.14 billion people worldwide are expected to buy goods and services online, up from 1.66 billion global digital buyers in 2016[80].

In 2021, people created an incredible amount of new data too[81]. Every day, 306.4 billion emails were sent, and 500 million Tweets were made. Thanks to the fact, that in 2020, people created 1.7 MB of data every second, by the end of the year, 44 zettabytes was made up the entire digital universe. By 2025, 200+ zettabytes[82] of data will be in cloud storage around the globe.

A man of the 21st century turns in this medium every day – especially the ***Y and Z generation***s[83]; that is, the young people who ***are most active in crime and their parents***.

---

agenda/2021/08/one-minute-internet-web-social-media-technology-online/ [accessed on: 12 October 2021].

[79] C. Jenik, *A Minute on the Internet in 2021*. Jul 30, 2021, available at: https://www.statista.com/statistics/319732/daily-time-spent-online-device/ [accessed on: 12 October 2021]; https://www.statista.com/chart/25443/estimated-amount-of-data-created-on-the-internet-in-one-minute/ [accessed on: 12 October 2021].

[80] D. Coppola, *Global number of digital buyers 2014–2021*, Oct 13, 2021, available at: https://www.statista.com/statistics/251666/number-of-digital-buyers-worldwide/ [accessed on: 12 October 2021].

[81] J. Bulao, *How Much Data Is Created Every Day in 2021?*, December 7, 2021, available at: https://techjury.net/blog/how-much-data-is-created-every-day/#gref [accessed on: 12 October 2021].

[82] Facebook generated four petabytes of data every day in 2020 (equals one million gigabytes).

[83] *Generációk – X, Y, Z, Alfa*, available at: https://www.kemi.hu/hirek/hazai-hirek/generaciok-x-y-z-alfa.html [accessed on: 17 April 2019].

The breakdown of each generation is as follows: Baby boomers: born between 1965–1980, Marvel generation (Y / Millennium): born between 1980–1995, digital natives (Z/screenagers): born between 1995–2010. The youngest, the alphas, were born after 2010. Which also means that ***alpha generation will soon enter*** the potential "clientele" of ***criminal justice*** for which the ***institutional system is not prepared at all***. The startling power and nature of the change is well illustrated by the fact that, according to a Commonsense Media survey[84], the first word for 10% of alpha children in the U.S. was not 'mother' or 'father' but 'tablet'.

These ***changes are independent of social situation***: according to our own research[85] EFOP 3.6.2.[86], young people in the poorest region of the country, in small settlements, also have a mobile phone. The time spent on social media reaches 4–6 hours / day! The communication style is different, they lack the ability of expressing themselves in a face-to-face situation (emojis do not help in the court room)[87]. They communicate little, they chat more. At the same time, they have a hard time coping with words. However, it is very difficult to tell - talk about their problems at all. Partly with the spread of information and communication technology, the communication of the Z-generation has become special due to the socialization process taking place there. It is typical to use short, targeted messages, be they net-specific acronyms, abbreviations

[84] See more details: *The Common Sense Census: 2017 Media Use By Kids Age Zero To Eight*, Common Sense Media Inc., 2017.

[85] E. Varadi-Csema, E. Vinnai, L. Lengyel, *Young people in the Digital Space – primary results of a research in Borsod County*, [in:] *The impacts of digitalization, social innovations and conflicts*, eds. Z. Musinszki, E. Horváthné Csolák, D. Szendi, K. Szűcsné Markovics, Miskolc 2021, pp. 239–250.

[86] *Aspects of the Development of Intelligent, Sustainable and Inclusive Society: Social, Technological, Innovative Networks in Employment and the Digital Economy* (EFOP-3.6.2-16-2017-00007) (Supported by EU (Széchenyi 2020 Program)) [Subproject professional leader: Erika Varadi-Csema].

[87] E. Varadi-Csema, *21. századi kihívások, 20. századi válaszok? Interdiszciplináris gondolatok a "más elbánás" elve apropóján*, [in:] *Kriminológia és kriminálpolitika a jogállam szolgálatában* (Tanulmányok Lévay Miklós tiszteletére), eds. P. Bárd, A. Borbíró, K. Gönczöl, Budapest 2019, pp. 108–117.

(netlingo) or emoticons[88]. Moreover, 53% of those who use emoji or emoticons in their digital text messages say they can express their feelings better than they do in a real encounter[89].

But how does the i-Generation, which socializes in digital communication and rejects linear thinking, understand the language of a court / authority (and thus criminal) proceedings? International researches[90] have indicated a very high rate of lack of language competences (e.g. 90% in the Netherlands, 73.3% in England) among juvenile offenders. This is often embodied in one-word answers, in silence, giving the appearance[91] of avoiding responsibility and refusing to cooperate. This "***invisible disability***" ***may*** already ***violate principles enshrined in the New York Convention***, such as the right to a ***fair trial***.

The issue of the ***efficiency of criminal justice*** has perhaps never been such a ***complex problem*** and a factor so important for the purpose of crime prevention. It is a fact that the impact of criminal justice on crime is limited, and crime is the result of a combination of many other economic, social, etc. factors. At the same time, it is important to emphasize that it plays ***a significant role in relation to a particular person***, both directly and indirectly. A properly prosecuted criminal procedure that can provide an adequate and proportionate criminal response to a particular offender can have a significant impact on preventing recidivism. This is well exemplified by the follow-up studies that make the effectiveness of each sanction comparable to another offense. If the conditions already written by Beccaria are met – that is, the judiciary can react quickly to the crime – it can also have a serious message and deterrent effect

[88] K. Subrahmanyam, P.M. Greenfield, *Online communication and adolescent relationships*, "Children and Electronic Media" 2008/(18)1, pp. 119–203.

[89] *Sprachliche Kommunikation in der digitalen Welt. Eine repräsentative Umfrage, durchgeführt von forsa*. NET.WORX80, eds. P. Schlobinski, S. Torsten, Aachen 2018, p. 9.

[90] *The ABCs of fair trials: language in the juvenile justice system*, available at: https://www.fairtrials.org/news/abcs-fair-trials-language-juvenile-justice--system#_ftn1 [accessed on: 18 September 2017].

[91] The importance of this was highlighted by, among others, A. Vaskuti, *A fiatalkorúak büntető igazságszolgáltatásának aktuális kérdései*, "OKRI Szemle" 2012/2, pp. 164–175.

on society. At the same time, there is clear evidence from research that ***the experience of first encounter with justice is decisive***!

In the light of the factors described earlier, the ***examination of the effectiveness of criminal justice requires*** not only the ***characteristics of*** the information society and the ***people of the 21st century***, but also an overview of the ***legal background***. These provide the framework for the operation of criminal justice and influence the input and output side. These factors affect the development of ***public opinion*** in the country, the ***demand for punishment of citizens***, as well as the formation of the ***position of political actors on*** crime and ***criminal justice***. These closely interact to ***influence the criminal policy*** of the given era, and the specific regulatory framework and the specifics of the operation of the institution. In addition, individual examination of certain ***sub-elements*** is required. Thus, when entering the institutional system, the assessment of the ***issue of latency***, the practice of the operation of the police and the established selection inclusions play an equally important role. If we are already entering the criminal justice system, there are so-called ***cross-cutting issues*** that are gaining ground at all stages. An example is ***access to justice***. In my reading, this means, not narrowly, entry, but, for example, the formal or substantive operation of *compulsory protection* during the proceedings, the adequacy of *communication techniques*, and the support of the citizens concerned to understand the issues around them, the questions asked and to live with their rights guaranteed by law. The same is the case for all stages, such as ***digitization*** or the ***issue of personal competencies***, which are relevant to the procedure at all stages. However, there are also focal points that only play a role in certain sections or are more important there. Examples are the range of ***informal means***, i.e. the *possibility of diversion* and the practical application of *mediation* in the prosecution. While, for example, the ***nature of the sanctioning system*** and the ***practice of sentencing*** in the judiciary and in the ***penitentiary phase***, there are special programs and tools and the provision of aftercare or reintegration in terms of output. In this sense, the research has examined criminal justice in both a dynamic and a static sense, as a number of features can be identified in both approaches.

In terms of legal background, we have three key sources: the Criminal Code, the Criminal Procedure Act and our Penitentiary Act. The ***Criminal Code*** called the ***Act C of 2012*** for the purpose of punishment. Under Section 79 "(T)he ***aim of a punishment*** is to prevent – in the interest of the protection of society – the perpetrator or any other person from committing an act of crime".

Different rules apply to minors. In their case, social prevention is of no significance, at least at the level of legal regulation, the attention of the authority should be focused on the *special prevention* of juveniles. The most important means of this is *education* and *protection*. Section 106 (1) of the Hungarian Criminal Code: "The principal objective of any penalty or measure imposed upon a juvenile is to positively influence the juvenile's development to become a useful member of society, and such penalty or measure should therefore have as a primary consideration the juvenile's guidance, education and protection".

Our ***Procedural Law***, the ***Act XC of 2017***, intends to ensure the achievement of this goal and the achievement of public safety in two ways by ***bringing the perpetrator to justice*** and strengthening the ***protection of the victim***. Many of the detailed rules of the Procedural Law serve to achieve these goals in a complex way.

The ***Act CCXL of 2013*** regulates the operation of the ***penitentiary institution***. § 1 of the penitentiary code is aimed at individual prevention. "§ 1. (1) The task of the execution of a sentence is to enforce the aims of the sentence through the execution of the sentence or measure, with the aim that the aspects of individualization must be ensured during the execution in order to properly serve the attainment of ***individual prevention goals***".

The conditions for ***achieving the common goal are different*** in each legal environment. Thus, the *Criminal Code* guarantees the principles of legal certainty, equality before the law and the rule of law in several ways, such as: rule of law; equality before the law; humanity; legality (substantive legality); liability based on act; liability based on guilt; proportionality; prohibition of double assessment (*ne bis idem*); subsidiarity of criminal law (*ultima ratio nature*).

The *Code of Criminal Procedure* also lays down several principles, such as the principle of *in dubio pro reo*, but the following rules of

the law also help to achieve the goal of crime prevention: presumption of innocence (in a narrower sense); protection of basic rights (in particular the right to human dignity, freedom and personal security); the right of defense; foundation and obstacles of criminal procedure; division of procedural duties; ex officio proceedings; prohibition of self-incrimination (*nemo tenetur*); the requirement of substantive and free evaluation and independent assessment of criminal liability; language of the criminal procedure and the right to use language; foundation of adjudication and commitment to indictment; burden of proof; publicity of the trial.

The *Penitentiary Act* also sets out relevant principles, such as the respect for human dignity; humane and appropriate treatment, prohibition of torture; property and personal rights (protection of private secrets and personal data, inviolability of private dwellings) [but limited!]; prohibition of abuse of rights; individualization; principle of responsibility (integration); principle of harm reduction (elimination of isolation, deprivation, prisonization and other material and health disadvantages); principle of least intervention.

At the level of legal regulation, therefore, ***all the principles that ensure the success of individual and social prevention are enforced directly or indirectly*** – more precisely, all its conditions related to criminal justice are theoretically created.

However, the ***practical implementation of the principles*** does not always support the achievement of the goal of crime prevention. The *first such weakness* is the effectiveness of access to criminal proceedings, i.e. *access to justice*. This is because many behaviors will not appear in crime statistics, making it impossible for the authorities to take action against them. ***All this leads to a weakening of the effectiveness of criminal justice*** in crime prevention.

As a result of domestic research[92], it can be stated that ***two filters*** are in operation in the process, which prevent the information about the committed crime from appearing in the official register of the investigating authority. The first, the *so-called 'public'* (*external*) *filter*, does not "allow" all of the offenses in breach of the Criminal Code;

[92] L. Korinek, *Félelem a bűnözéstől, rejtett bűnözés*, [in:] *Kriminológia*, eds. A. Borbíró, K. Gönczöl, K. Kerezsi, M. Lévay, Budapest 2019, pp. 375–398.

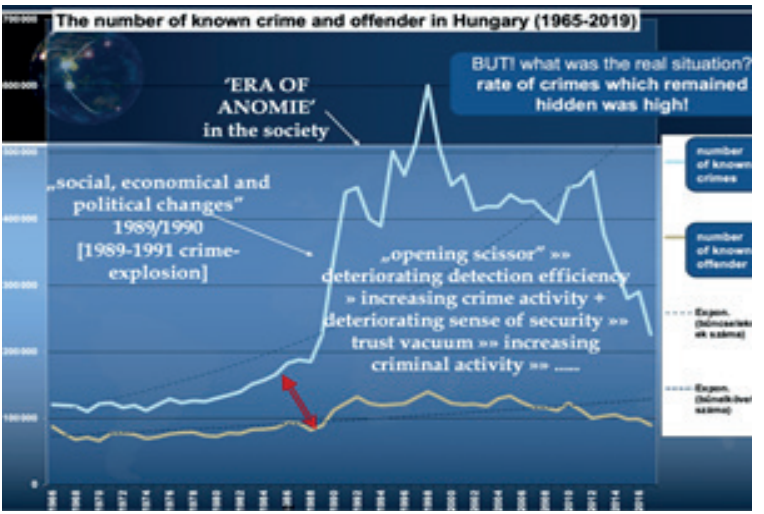
that is, in the case of a significant part of the infringing conduct, the person who becomes aware of it does not get to the point where he or she formally notifies the investigating authority of this fact. The second filter is the *so-called 'official'* (*internal*) *filter*. The official filter is crucially linked to the investigative authority's statistics-oriented operating mechanism, which aims to keep certain offenses, concerning which there is a very low detection efficiency in their experience, out of the official statistics.

The offending behavior that passes through the two filters becomes officially known to the investigating authorities and is thus included in the ***criminal statistics***. However, this range of crimes is not the same as the detected crimes, as in the case of the latter the person of the perpetrator can be identified. Among the acts that remain undiscovered, the proportion of crimes that are little/less dangerous to society is relatively high. *Detection efficiency* declined to a very large extent during and immediately after the regime change.

The reason for this can be determined in a complex way. In the years 1989–1990, a very decisive political change took place in the country, which brought with it an economic and a social change. The *change in the social system* is the transformation of political power, the opening of national borders, and so on. *New forms of criminality* came from abroad. It generated *significant processes in the economy*, which, due to their unregulated nature, in themselves increased the number of morally questionable behaviors, which multiplied at the same time. Other indirect effects have also led to *risk factors* that have clearly resulted in an unprecedented increase in crime activity. More than 80% of the Hungarian population emerged as a loser from this period, both economically and socially, which in itself may have led to an increase in crimes against minor property[93]. At the same time, the *vulnerable economic situation*, *unprecedented social disparities*, have also indirectly emerged as a risk factor for crime, especially with regard to violent, harassing, conflict-resolving behaviors.

[93] T. Kolosi, P. Róbert, *A rendszerváltás…*, p. 37.

Figure 7. *The number of known crime and offenders in Hungary 1965–2019*



Source: criminal statistic.

Society has experienced an *anomalous period in the Dürkheim sense*, which is already a good breeding ground for the increase in crime activity. At the same time, *confidence in institutional systems, including the judiciary, has declined*. The work of the investigative authority has come to the attention of both the *media* and thus the *public* in an unprecedented way. The *increased emphasis on human rights* has sometimes provoked reactions and procedures that have made police officers, who had to fight increased and increasingly violent crime but were *losing their social prestige and respect*, intervene and act less in the favor of the public security. After a while, the ***processes became self-exciting***. The steady decline in intelligence efficiency has led to a *decline in trust in the police*, which in turn has further *increased criminal activity while reducing the willingness to report*.

Thus, the two legs of the scissors were significantly separated from each other, despite the fact that the crimes against minor property and, in part, the violence and violent conduct in the public domain were not brought to light by the investigating authority in all

cases. Taking into account the fact that criminal statistics have been provided in Hungary since 1964, the criminal statistics of the period before and after the change of regime will become comparable. It is clear from this that in the past, almost the same proportion of crimes appeared and became detectable every year. In comparison, ***this new situation affected society and the institutional system as a shock***.

Today, we are witnessing a ***decline in crime activity***. The *reasons* for this are complex: on the one hand, the crimes against lower--weighted assets with the highest latency have been removed from the system by significantly increasing their breach thresholds. The emergence of new legal institutions such as mediation can also be recorded as an objective condition. Diversion options and alternatives are much more effective than formal sanctions and can therefore be a major deterrent for some offenders.

It is also important to point out that, although the proportion of career criminals is small compared to all offenders, due to *strict regulations* (such as the three strikes principle), this group of offenders is excluded from society for a longer period of time (placed in a penitentiary institution).

The recent period has been characterized by the fact that the government has developed a number of forms of support instead of just financial aid. These are conditional on *active participation* and have created the possibility for people without experience in the labor market to gradually enter and have *legal employment opportunities*. In some regions of the country, such as Northern Hungary, this in ***itself is a realistic alternative to abstaining from crime***. Last but not least, ***demographic trends*** are also generating declining crime activity. It is true that the most active age group in this respect, the proportion of minors within society has decreased significantly. Although the same level of reduction in their criminal activity cannot be measured, with such a significant change in headcount, the number of crimes they commit will decrease even if it is otherwise higher than it would be expected.

The ***concept of latency*** can be grasped in a broader and narrower sense. In a broader sense, it covers any crime that has not come to the knowledge of either the perpetrator or the victim or another third party. In a narrower sense, it refers only to those crimes that do

not come to the attention of the authority. This *narrower approach was used in the study*.

The ***causes of latency*** differ depending on whether we examine the residential (external filter) or the official (internal filter) filter. The reasons explaining the existence of the population filter can be basically divided into three groups according to the results of Hungarian research. The first group includes ***lack of trust***, the second the ***fear***, and the third the ***sense of shame***.

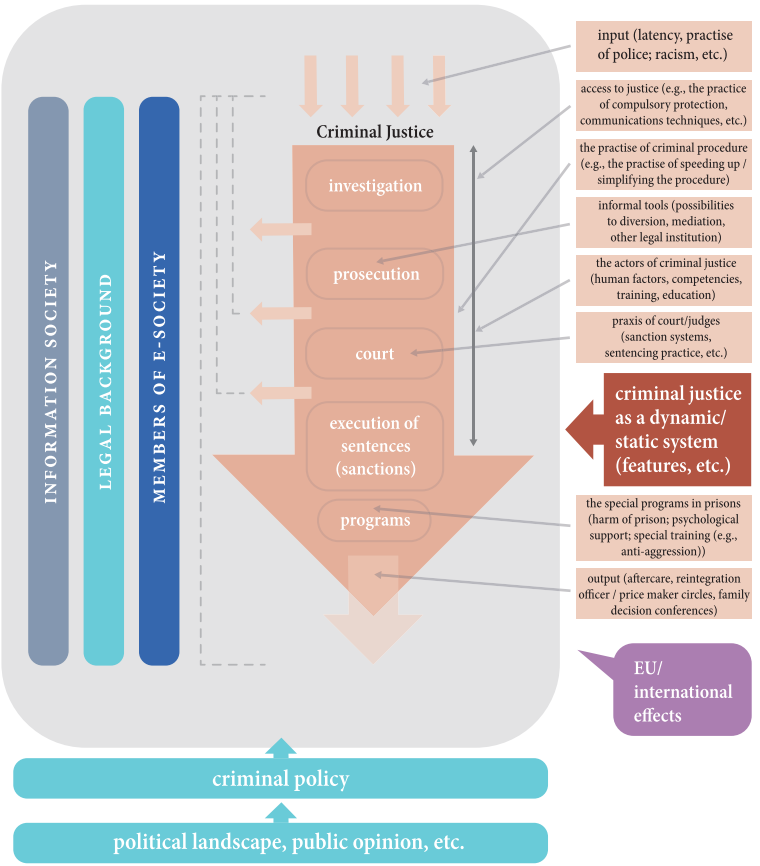
Lack of trust is a typical cause of *property crimes or other violations of minor criminal law norms*. The process of criminal proceedings also involves several obligations for the victim. However, given the lower efficiency of detection for these very crimes, citizens often do not trust that the police will be able to identify the perpetrator or that the prosecution itself will be successful and the victim may receive some form of compensation from the perpetrator. Thus, the burden of criminal proceedings is not balanced by anything on the other hand, which is why in many cases no report is made.

In *case of domestic violence* or in *cases* where *the perpetrator and the victim live in a direct social environment*, i.e. know each other in some way, fear of the perpetrator or his or her relatives may be a deterrent, or if the perpetrator was previously unknown to the victim, confrontation can also be a concern for the victim.

The third typical group of reasons belongs to *shame*. While in domestic violence cases, the shame felt in relation to the true nature of the family situation is what can deter a report, for example, in the case of sexual offenses, shame for condemning the immediate environment can have such an effect. Occasionally, victims of property crimes also want to keep their victim status hidden if, for example, the act was committed by a child or juvenile offender (e.g. robbery of a drunk victim) or if the victim's carelessness/greed/desire for money has hurt him.

The *explanation for official selection*, as already mentioned, stems from the dominant nature of the *statistical approach*. The investigating authority occurs in the case of offenses of lower danger to society (for example, theft of bicycles, theft from the garden or weekend house, pickpocketing, defamation or light bodily harm,

harassment). In such cases, in practice, the victim is tried to be persuaded to make a complaint.



Based on the above figure, the ***following main shortcomings, characteristics, problems*** and ***answers*** can be identified in the examination of the efficiency issues of criminal justice:

RESEARCH ASPECTS	PROBLEMS, CONCLUSIONS	SUGGESTIONS, RECOMMENDATIONS
INTERDISCIPLINARY RESEARCH FRAMEWORKS		
Peculiarities of the information society	special role of ICT, new characteristics of the process of socialization, intercultural conflicts, e-exclusion, value crisis, vacuum of trust; decreased willingness to use public authorities etc.	further support of the digitization of justice; continuation of the "open courtroom program"; wider communication of court decisions and operational features of the criminal justice system in order to reduce the lack of trust (especially in cases with a high priority or a change in the content of the decision (legal qualification) at first, second and third instance)
Peculiarities of a 21st century citizenship	Consequences of ICT as a social arena: comprehension problems, need for quick solutions, lack of communication skills (e.g. expressing emotions, difficulties in F2F/open communication); growing demand for public safety	continuation of the digitization of the judiciary; improvement of the communication skills of professionals, especially taking into account the communication specificities of Generations Y and Z; dissemination of the tasks and activities performed among its judicial institutions in an ICT-compliant manner
Public opinion, political, social aspects	the presumed stricter severity of the civil penalty claim; civic reactions are due to the distorting effect of the media on the image of crime[94]; the politicization of professional issues at the time of elections, with a markedly different or overlapping policy approach in this context;	the increased demand for punishment from citizens is only apparent (due to the distorting effect of the media); strengthening of the flow of information in order to better present the real picture and the causes, life situations and functioning of criminal justice; the creation of documentaries and other information media that, as an authentic source, are able to counterbalance the distorting effect in an informative way (e.g. prison blog of Gergely Fliegauf, prison psychologist); stronger representation of the results of science on possible politicized issues;
EU and other international environmental impacts	EU and other international environmental impacts taking into account the EU requirements, compliance with codification and adaptation obligations; acceptance or ratification of the majority of international documents (but political, cultural, legal history, etc. reasons may be dissuasive)	

[94] Gy. Virág, *Bűnözés és media*, [in:] *Kriminológia*, Borbíró Andrea, Gönczöl Katalin, Kerezsi Klára, Lévay Miklós (eds.), Wolters Kluwer, Budapest, 2019, pp. 399–421.

Criminal policy	dual-track criminal policy (action against repeat offenders and perpetrators of serious violent crimes; diversion of first offenders and perpetrators of minor offenses from formal proceedings; enforcement of restorative aspects)	opening up the possibility of mediation in trial stage; prioritizing mediation over other diversification options in the prosecution; opening a conciliation circuit in the prosecution service; introduction of other alternative conflict management techniques in the context of sentence enforcement;
Legal framework	meets EU and international requirements; taking into account guarantees, human rights aspects; extensive and detailed regulation;	opening up the possibility of mediation in the judiciary; prioritizing mediation over other diversification options in the prosecution; creating the applicability of other techniques in addition to mediation (e.g., opening conciliation in the prosecutor's office); introduction of other alternative conflict management techniques in the context of prison enforcement;
Static approach	peculiarities of the institutional system, internal conflicts of interest (the reason is mainly due to the different interests, especially the dominant nature of the statistical approach)	intensified contacts between the various institutions; organizing mixed-person trainings in order to create team cohesion and get to know each other's work and needs (e.g. cooperative planning, conference models, World Café method); expanding the range of evaluation criteria in addition to evaluation criteria based on cadence performance and similarly plastic statistical metrics;
PROCESS-FOCUSED RESEARCH ASPECTS		
Input	relatively high rates of latency for crimes that are less dangerous to society (causes such as lack of trust); based on the operational practice of the investigating authority, stronger action can be taken in some cases against staff with low advocacy capacity; the possible increased incidence of racist/discriminatory attitudes in the police force has not been confirmed on the basis of domestic research	the official filter can work in cases where the report is made in person (or the citizen arrives with the intention of doing so); reporting electronically, such as by e-mail, is automatically accepted; therefore, the scope of these possibilities should be further expanded and additional information should be shared more widely; continuous training and sensitization of the police staff; easing the priority of the statistical approach by including qualification and evaluation aspects other than detection efficiency; conducting latency research on a regular basis (a good example is the German or US practice: National Crime Victimization Survey (NCVS) of the Bureau of Statistics)

Informal tools	the possibility of mediation is excluded in the trial stage; although the possibility of mediation is widely guaranteed by law, in practice, despite its outstanding effectiveness, it seems to be relegated to the background (the latter should be supported, but due to the lack of a restorative element, the other diversion methods do not cause such an important positive change in the actor's attitude – not only on the victim's side but also on the perpetrator too);	opening up the possibility of mediation in the trial stage; prioritizing mediation over other diversification options in the prosecution; training and sensitization of professionals in the field of restorative justice (primarily psychological programs; understanding the psychological significance of the victim's forgiveness; experiencing the processes affecting the perpetrator); continuous training and supervision of mediators; new technics (like peace-maker circles, decision-making conferences); expanding the offer of rules of conduct and trainings that can be included, competence strengthening and development trainings; strengthening of the enforcement of penalties and other compensatory consequences for work in the public interest;
Practice of court/judges	different regional investigative, prosecuting and sentencing practices as institutions; different weighting of evaluation and qualification aspects (for example, different arrest practices); obstruction of the performance of work in the public interest; in connection with the length of proceedings, especially in the case of juveniles, there is a lack of other active preventive interventions in addition to the institution of preventive counseling (the risk factors leading to the commission of the offending still affect the young person);	further support for the implementation of work in the public interest, support for the employability of employers, facilitation of the implementation of community tasks (e.g. rehabilitation of parks, streets, support of institutions), supporting the organizing work of probation officers, involving volunteers in organizational tasks; more scientific research in connection with different operational and sentencing (evaluation) practices; against this background, further strengthen the legal unification work of the Curia (Supreme Court) and expand the range of judicial training in support of sentencing competencies and decision-making mechanisms; in relation to the length of proceedings, the inclusion of child protection and other low-threshold services strengthening social competences at this stage, if appropriate, with the possibility of preventive guardianship (if appropriate, with the opinion of the probation officer, possibly on a voluntary basis); creating the legal possibility for them;

Special programs in prison	labor market and other skills development training for penitentiary institutions has been reduced; prison effects (e.g. prisonization, stigma), especially in the case of juveniles, are dangerous; psychological support is provided in principle, there are psychologists in the institutions, but their number is small compared to the prison population, so effective access to psychological support is limited; in this context, the situation of the victim and other psychological problems are not perceived in a timely or widespread manner; exceptionally high risk of relapse;	expanding the range of labor market and other skills development trainings in penitentiary institutions, introducing new methods (e.g. family setting, psychodrama); support for training (it is often difficult to escort convicts to the training room due to the limited number of staff, especially during trial days or round trips) support for participation in training (e.g. rewards); further expanding the range of electronic contacts; providing tighter control; creating and strengthening the possibility of aggression management and team sports sessions; further strengthening the possibility of psychological support, expanding the number of employees if necessary; development of anonymous signaling protocols (however, this is limited due to its special microenvironment);
Output	effects of prison overcrowding; the negative effects of prison make it difficult for individuals to become independent in the outside world (or their abilities are reduced); it is difficult to deal with bullying, violence and other negative effects suffered from peers within the institution; the conflict with the family due to the crime has not yet been resolved, which may generate further problematic situations and make reintegration more difficult; exceptionally high risk of relapse	further reduce prison overcrowding; where possible, reorganize the operating structure of certain districts in order to increase their independence and ability to work in a group (e.g., adoption of German/Austrian practice); reducing the harmful effects of prison by providing more intensive programs (e.g., treatment of aggression, sports activities); new techniques where possible (e.g., family reunification); increase trust in order to ameliorate or expose the situation of victims within prisons as soon as possible (e.g. anonymous reporting processes); increase intracellular control capabilities as needed; the possibility of psychological support if necessary; inclusion of conciliation circles and family decision-making conferences as necessary prior to release; strengthening reintegration activities and aftercare, increasing the number of professionals, supporting competence training,

CROSS-CUTTING RESEARCH ASPECTS		
Access to justice	mandatory protection is guaranteed by law, but its effectiveness in practice is often in doubt (in some cases it is more of a formal presence of a lawyer, it covers little substantive activity); due to reading comprehension problems, the accused (and partly the victims) are not able to accurately interpret their situation, give appropriate answers, i.e. exercise their legal rights;	strengthening of the communication techniques of professionals in criminal matters; intercultural sensitization; psychological reinforcement (for example, in order to properly interpret meta-communication messages); production of additional information materials, transmission of already made videos to a mobile platform; strengthening legal practice in the field of legal training; strengthening of the control of secondment practices concerning compulsory protection (involvement of other means if necessary, e.g.: increase of lawyer's fees, emphasis on ethical responsibility)
Practice of criminal procedure	in recent years, legal institutions have been set up in a number of ways to speed up and simplify the procedure; however, these were typically formal solutions; the duration of criminal proceedings varies and a number of other circumstances play a major role as a factor in increasing procedural time (e.g. forensic activity is usually time-consuming and there is a waiting period of several months for some offenders or groups of criminals)	further extension of the scope for diversion (for example, in Germany, it is possible to use a mediation-type technique for educational purposes, regardless of the consent of the victim in the case of minors); support forensic work as needed to increase the number of forensic experts
Actors of criminal justice	the level of training of professionals in criminal justice institutions varies; organized training is the widest available in the courts	training opportunities need to be expanded at all stages (for example, in the investigative phase, the first offender gains first-hand experience of criminal justice, which also influences the risk factor for re-offending); there is a need to further strengthen communication techniques, to preserve well-functioning international practices in relation to non-verbal communication, to strengthen questioning techniques, to support the understanding and improvement of decision-making mechanisms and to strengthen the ability to maintain impartiality and neutrality; the use of forms of training that provide personal experience is essential; if necessary, make competence development training compulsory and / or provide stronger support

Improving the efficiency of criminal justice in the 21st century, in view of the numerous features of the 20th century, is an essential condition for preserving the social status and role of criminal justice. Today, the simplest approach, i.e. the simplification of the formal procedure at regulatory level, is no longer enough. In Hungary, the term increasing the efficiency of the criminal justice system has meant the latter in the recent period. However, at several points, the present research has undertaken to ***support the need for a broader increase in efficiency*** that goes hand in hand with the ***need to adapt criminal justice to the circumstances of the 21st century***.

REFERENCES

Beccaria C., *A bűnökről és büntetésekről*, Budapest 2012.

Beccaria C., *Bűntett és büntetés* (translated by P. Sebestyén), Budapest 1967.

Beck U., Beck-Gernsheim E., *Nicht Autonomie, sondern Bastelbiographie. Anmerkungen zur Individualisierungsdiskussion am Beispiel des Aufsatzes von Günter Burkart*, "Zeitschrift für Soziologie" 1993, 22(3).

Beck U., *Risikogesellschaft*, Frankfurt a. M. 1986.

Bíró-Nagy A., *Rendszerváltás, demokrácia és a magyar társadalom*, Budapest 2016.

Borbíró A., *Kriminálpolitika és bűnmegelőzés a késő-modernitásban*, PhD-thesis, Budapest 2011.

Bulao J., *How Much Data Is Created Every Day in 2021?*, available at: https://techjury.net/blog/how-much-data-is-created-every-day/#gref.

Carrara F., *A büntető jogtudomány programja I–II.* Budapest 1878, II. Kötet.

Coppola D., *Global number of digital buyers 2014–2021*, available at: https://www.statista.com/statistics/251666/number-of-digital-buyers-worldwide/.

Csehné Papp I., *Foglalkoztatáspolitika*, Szent István Egyetem, Gödöllő 2011, available at: https://regi.tankonyvtar.hu/hu/tartalom/tamop412A/2010-0019_foglalkoztataspolitika/ch04.html.

Csemáné Váradi E., *A Janus-arcú kriminálpolitika – avagy a fiatalkori bűnözéssel szembeni fellépés aktuális kérdései*, [in:] *Collegium Doctorum Konferencia*, ed. I. Stipta, Miskolc 2012.

Csemáné Váradi E., *Média-értés*, Digitális Közösségi Program, Miskolc 2015.

Csemáné Váradi E., *"Rossz tettekért büntető …" – avagy a szabadságvesztés-büntetés kihívásai*, available at: https://cdn-62235fc2c1ac18ed2810f1ef.closte.com/wp-content/uploads/csemane-varadi-erika-rossz-tettekert-bunteto.pdf.

Ehrenreich B., *Az új jobboldal támadása az állami jóléti politika ellen*, [in:] *Az új jobboldal és a jóléti állam*, eds. I. Bujalos, M. Nyilas, Budapest 1996.

Farkas J.Á., *A büntető-igazságszolgáltatási rendszer hatékonyságának korlátai*, [in:] *Kriminológia*, eds. A. Borbíró, K. Gönczöl, K. Kerezsi, M. Lévay, Budapest 2016.

Finszter G., *A bűnmegelőzés hivatalai*, [in:] *Tanulmányok a "Határőrség szerepe a bűnmegelőzésben" című tudományos konferenciáról*, ed. Z. Hautzinger, Pécsi Határőr Tudományos Közlemények II., Pécs 2003.

Generációk – X, Y, Z, Alfa, available at: https://www.kemi.hu/hirek/hazai-hirek/generaciok-x-y-z-alfa.html.

Henderson G., *How Much Time Does The Average Person Spend On Social Media?*, available at: https://www.digitalmarketing.org/blog/how-much-time-does-the-average-person-spend-on-social-media.

Inzelt É., *A kriminológiai gondolkodás kezdetei*, [in:] *Kriminológia*, eds. A. Borbíró, K. Gönczöl, K. Kerezsi, M. Lévay, Budapest 2016.

Jenik C., *A Minute on the Internet in 2021*, available at: https://www.statista.com/statistics/319732/daily-time-spent-online-device/, https://www.statista.com/chart/25443/estimated-amount-of-data-created-on-the-internet-in-one-minute/.

Jenik C., *Here's what happens every minute on the internet in 2021. World Economic Forum, 05 August, 2021*, available at: https://www.weforum.org/agenda/2021/08/one-minute-internet-web-social-media-technology-online/.

Kapitány B., *A rizikótársadalom másfél évtizede*, "Szociológiai Szemle" 2002, 1.

Kemshall H., *Understanding Risk in Criminal Justice*, Glasgow 2003.

Kerezsi K., *Crime policy aspirations and reforms*, [in:] *A rendszerváltás húsz éve: állam, jog, társadalom,* "Jogtörténeti Szemle" 2010, 2.

Kolosi T., Róbert P., *A rendszerváltás társadalmi hatásai*, [in:] *Társadalmi riport 1992.*, eds. R. Andorka, T. Kolosi, Gy. Vukovich, Budapest 1992.

Korinek L., *Félelem a bűnözéstől, rejtett bűnözés*, [in:] *Kriminológia*, eds. A. Borbíró, K. Gönczöl, K. Kerezsi, M. Lévay, Budapest 2019.

Materni M.C., *The 100-plus Year old Case for a Minimalist Criminal Law* (*Sketch of a General Theory of Substantive Criminal Law*), "New Criminal Law Review" 2015, 18(3).

McCrindle M., *The ABC of XYZ. Understanding the global generations*, Bella Vista 2014.

Mead L.M., *The New Politics of the New Poverty*, "The Public Interest" 1991, 103.

Mesko G., Pagon M., Dobovsek B., *Some Dilemmas of Contemporary Criminal Justice*, [in:] *Policing in Central and Eastern Europe: Dilemmas of Contemporary Criminal Justice*, eds. G. Mesko, M. Pagon, B. Dobovsek, Ljubljana 2004.

Mezey B., *A börtönügy a 17–19. században. A börtön európai útja*, Budapest 2018.

Pató V.L., *Magyarország igazságügyi rendszerének digitális fejlettsége: tanúságok a 2021-es Uniós igazságügyi eredménytábla mutatóiból*, available at: https://eustrat.uni-nke.hu/hirek/2021/07/12/magyarorszag-igazsagugyi-rendszerenek--digitalis-fejlettsege-tanulsagok-a-2021-es-unios-igazsagugyi--eredmenytabla-mutatoibol.

Petrosyan A., *Daily internet usage per capita worldwide 2011–2021*, available at: https://www.statista.com/statistics/319732/daily-time-spent-online-device.

Pintér R., *A magyar információs társadalom fejlődése és fejlettsége a fejlesztők szempontjából*, PhD-thesis, Budapest 2004.

Pintér R., *Úton az információs társadalom megismerése felé*, [in:] *Az információs társadalom. Az elmélettől a politikai gyakorlatig*, ed. T. Pintér, Budapest 2007.

Platón, *Törvények* (Timaios) (translated by D. Kövendi), [in:] *Platón összes művei Harmadik kötet*, Budapest 1984.

Pradel J., *La célérité et les temps du procès pénal, Comparaison entre quelques législations européennes*, [in:] *Champ pénal – Mélanges en l'honneur du professeur Reynald Ottenhof*, ed. M. Delmas-Marty, Paris 2006.

Seneca L.A., *A haragról* (translated by M. Kovács), Pécs 1992.

Smit J., Kreutzer S., Moeller C., Carlberg M., *Industry 4.0 Directorate General for Internal Policies. Policy Department A: Economic And Scientific Policy*, European Union, Brussels 2016.

Spencer J.R., *La célérité de la procédure pénale, séminaire organisé a Syracuse* (*Italie*), 11–14 septembre 1995 RIDP.

Sprachliche Kommunikation in der digitalen Welt. Eine repräsentative Umfrage, durchgeführt von forsa. NET.WORX80, eds. P. Schlobinski, S. Torsten, Aachen 2018.

Subrahmanyam K., Greenfield P.M., *Online communication and adolescent relationships*, "Children and Electronic Media" 2008, 18(1).

Szabó A., *Megelőzés és arányos büntetés. Megjegyzések a büntetéstan újabb fejleményeihez Európában és az Egyesült Államokban*, "Magyar Jog" 1993, 11.

Tarján T.M., *1990. október 3. Németország újraegyesítése*, "RUBICONline", available at: http://www.rubicon.hu/magyar/oldalak/1990_oktober_3_nemetorszag_ujraegyesitese/.

The ABCs of fair trials: language in the juvenile justice system, available at: https://www.fairtrials.org/news/abcs-fair-trials-language-juvenile-justice-system#_ftn1.

The Common Sense Census: 2017 Media Use By Kids Age Zero To Eight, Common Sense Media Inc., 2017.

Törőcsik A., *Az Ötödik*, [in:] *Közép-Európai Civil Kutató Intézet. Médiaműhely*, available at: http://www.civilkutato.hu/modules.php?name=News&file=article&sid=23.

Tóth J.Z., *Beccaria a halálbüntetésről: valóban előzmények nélküli-e az abolíció gondolata*, [in:] *Dei delitti e delle pene – Tanulmányok Cesare Beccariáról*, ed. J.Z. Tóth, Budapest 2015.

Turzó Á.P., *A ma ismert világot totálisan elsöpri a negyedik ipari forradalom*, "Portfolió" available at: http://www.portfolio.hu/

vallalatok/it/a-ma-ismert-vilagot-totalisan-elsopri-a-negyedik--ipari-forradalom.237125.html.

Varadi-Csema E., *21. századi kihívások, 20. századi válaszok? Interdiszciplináris gondolatok a "más elbánás" elve apropóján*, [in:] *Kriminológia és kriminálpolitika a jogállam szolgálatában* (Tanulmányok Lévay Miklós tiszteletére), eds. P. Bárd, A. Borbíró, K. Gönczöl, Budapest 2019.

Varadi-Csema E., Vinnai E., Lengyel L., *Young people in the Digital Space – primary results of a research in Borsod County*, [in:] *The impacts of digitalization, social innovations and conflicts*, eds. Z. Musinszki, E. Horváthné Csolák, D. Szendi, K. Szűcsné Markovics, Miskolc 2021.

Vaskuti A., *A fiatalkorúak büntető igazságszolgáltatásának aktuális kérdései*, "OKRI Szemle" 2012, 2.

Vig D., *Izoláció a társadalomvédelem bűvöletében: határozatlan ideig tartó szabadságmegvonás Európában*, "Kriminológiai Tanulmányok" 2009, 46.

Virág Gy., *Bűnözés és media*, [in:] *Kriminológia*, Borbíró Andrea, Gönczöl Katalin, Kerezsi Klára, Lévay Miklós (eds.), Wolters Kluwer, Budapest 2019.

Zedner L., *Security, the State, and the Citizen: The Changing Architecture of Crime Control*, "New Criminal Law Review" 2010, 13(2).

DR MARCIN RAU

Cardinal Stefan Wyszyński University in Warsaw

The impact of the human factor on the effectiveness of criminal proceedings. A socio-psychological perspective

1. The importance of intellectual capital in the context of efficiency

This is a research chapter. The aim of the study is to identify the role and influence of psychological and sociological factors on the effectiveness of criminal proceedings in Poland. However, as one can easily guess, even mere attempt to define the concept of "judicial efficiency" can be quite a challenge. The first problem arises due to the difficulty in setting a simple and specific goal of the judiciary, as well as in unequivocally assessing its implementation. Secondly, the non-commercial nature of the judiciary means that there have been no common expectations of the public regarding the economic rationalization of this sector. At worst, the very nature of the proceedings (classified or non-transparent) often deprives us of the information necessary for a comprehensive assessment of the effectiveness of actions in this area.

Therefore, in order to fully understand the importance and the role of human factor in the context of the judiciary's efficiency, it will be necessary to use a range of concepts that are present in management sciences but not sufficiently known in legal sciences. This brief introduction is essential to fully understand the scale and purpose of this study. The first of the key concepts is intellectual

capital. According to the definition proposed by one of the precursors of this concept – Leif Edvinsson – it is a combination of a given organization's structural aspects (structural capital) with its human factors (human capital). With the general definition outlined, we can now move on to the details. What is human capital? In the literature on the subject, it is most often recognized that these are people permanently associated with the company and its mission. They are employees characterized by the ability to cooperate, possess creativity and high qualifications, and who are the engine and the heart of the organization, without which its further development becomes impossible. Another concept that needs to be discussed here is structural capital. Generally speaking, it is the organizational structure, intellectual property and all other factors supporting the effectiveness of human capital. So we see that the main ingredient in any definition of intellectual capital is knowledge. Thanks to it, all employees can collectively multiply the company's value and build its reputation.

It should be noted that the development of intellectual capital may be blocked by managers reluctant to share their power and knowledge. This is due to the lack of identification with the company (the career model is less and less associated with promotions in the company), preferring to work in teams with a loose hierarchy and leadership, and the organization's inability to ensure a secure future for its employees. Managing intellectual capital comes down to identifying, measuring and properly developing the potential of employees. Definitely the most important, but also the most problematic issue that covers the management of intellectual capital is its measurement, because thanks to it you can get a general picture of all the elements operating in its scope and redefine them in the event of dissatisfaction with their functioning. This brings us to the key question: how do we measure the intellectual capital of the judiciary and what is its impact on the effectiveness of criminal proceedings?

The answer to the above questions is at the heart of our study, as no similar research projects have been carried out in this area before. In these circumstances, filling this gap in the Polish literature on the subject will only be possible with the use of interdisciplinary research instruments across the borders from social, psychological

and management sciences. Thus, the aim of the first part of the study will be to explore human capital, i.e. people involved in criminal proceedings (prosecutors, judges, attorneys). For this purpose, a psychological profile of each of the above-mentioned professional groups will be built and on this basis it will be possible to formulate more detailed research hypotheses. The second part of the study will concern structural capital, i.e. the impact of workplace management, leadership, digitization and models of legal education on the effectiveness of proceedings. The obtained results will allow us to formulate recommendations regarding the optimal management of human capital in the criminal justice and indicate possible directions for further research.

2. The role of psychology in the study of human capital

Psychology's four primary goals boil down to describe, explain, predict, and change behavior. Through describing the human's behavior, we are able to understand it better and gain a better perspective on our actions. Representatives of trait theory, one of the most popular approaches to personality structure in psychology today, believe that our traits are the basic elements of personality and they can be used to describe, predict, and explain human behavior[1]. Once we understand more about what happens and why it happens, we can use that information to make predictions about when, why, and how it might happen again in the future. Successfully predicting behavior is also one of the best ways to know if we understand the underlying causes of our actions. In this work, we will not detail research and concepts within the framework of human trait theory, as knowledge on the subject is readily available in dozens of studies in many languages. Let us only emphasize that the most popular and useful working hypothesis on the universal structure of traits

[1] D.J. Ozer, V. Benet-Martinez, *Personality and the prediction of consequential outcomes*, "Annual Review of Psychology" 2006, vol. 57, https://doi.org/10.1146/annurev.psych.57.102904.190127; L.A. Pervin, O.P. John, *Personality: theory and research*, John Wiley & Sons, 2002, p. 4.

is considered to be the framework of the five-factor personality model called the "Big Five"[2]. In this model, the human personality is divided into five factors: neuroticism, extraversion, conscientiousness, openness to experience, and agreeableness[3]. The framework of the five-factor model of personality assumes that these human traits constitute the cross-cultural and cross-demographic and structurally most general dimensions allowing for the full and comprehensive characterization of the personality[4]. It is important to note that each of the five personality factors represents a continuum, with the majority of being living between its two extremes. Below, following the above authors, we present the characteristics of the extreme poles of each feature.

I. Openness to experience describes the tendency to seek and positively evaluate new life experiences, tolerance to novelty and cognitive curiosity. High openness to experience usually means curiosity, creativity, imagination, unconventionality, as well as independence in expressing one's own opinion. On the other hand, low openness to experience usually means conventionality, conservativeness, adherence

[2] R.B. Cattell, H.W. Eber, M.M. Tatsuoka, *Handbook for the Sixteen Personality Factor Questionnaire* (*16PF*), Institute for Personality and Ability Testing, Champaign 1970; R.R. McCrae, Jr. P.T. Costa, *Personality Trait Structure as a Human Universal*, "American Psychologist" 1997, No. 52(5), http://dx.doi.org/10.1037/0003-066X.52.5.509.

[3] B. D Raad, M. Perugini, M. Hrebickova, P. Szarota, *Lingua Franca of Personality: Taxonomies and Structures Based on the Psycholexical Approach*, "Journal of Cross-Cultural Psychology" 1998, vol. 29(1), https://doi.org/10.1177/0022022198291011; R.R. McCrae, Jr. P.T. Costa, *A Five-Factor Theory of Personality*, [in:] *Handbook of Personality Psychology*, Guilford, New York 1999; L.A. Pervin, O.P. John, *Personality: theory and research*, John Wiley & Sons, 2002.

[4] R. Blackburn, S.J.D. Renwick, J.P. Donnelly, C. Logan, *Convergent and discriminative validity of interview and questionnaire measures of personality disorder in mentally disordered offenders: A multitrait-multimethod analysis using confirmatory factor analysis*, "Journal of Personality Disorders" 2004, vol. 18(2), doi: 10.1521/pedi.18.2.129.32779. PMID: 15176753; J.P. Rushton, P. Irwing, *A General Factor of Personality* (*GFP*) *from two meta-analyses of the Big Five: Digman* (*1997*) *and Mount, Barrick, Scullen, and Rounds* (*2005*), "Personality and Individual Differences" 2008, vol. 45(7).

to traditional values, pragmatic interests and preferences for socially recognized methods of action.

II. Conscientiousness describes a person's attitude towards goal-oriented action and is related to the level of organization, motivation and perseverance. High conscientiousness usually means a strong will to achieve, motivation to act and persistence in pursuing your own goals. Conscientiousness is usually associated with scrupulousness, dutifulness, prudence and honesty, but also with workaholism, a tendency to maintain order and perfectionism. On the other hand, low conscientiousness usually means little precision in life goals, low meticulousness and achievement motivation. It involves behaviors such as impulsiveness in making decisions, as well as spontaneity in action.

III. Extraversion describes the tendency to social interactions, as well as energy and activity, and to experience positive emotions. A high rate means enjoying being the center of attention, having a wide social circle of friends and feeling energized when around other people. High extraversion usually goes hand in hand with such qualities as affection, friendliness, activeness, optimism, sociability, talkativeness, playfulness and seeking out stimulation. On the other hand, low extraversion (introversion) usually means reserve in social contacts with other people, shyness, lack of optimism, or a preference for being alone.

IV. Agreeableness describes the tendency to be positive towards other people and is related to altruism. It is associated with such features as sensitivity (versus indifference) to the matters of others, trust (versus lack of trust) or a cooperative attitude (versus competition). High agreeableness may indicate sympathy, helpfulness, straightforwardness, honesty and gentleness, as well as modesty towards other people. Low agreeableness usually means self-centeredness, a competitive attitude, and sometimes even aggressiveness and dryness in dealing with other people.

V. Neuroticism describes the susceptibility to feeling negative emotions, e.g. dissatisfaction, confusion, guilt, fear, anger.

> Low neuroticism usually means emotional adaptation, the ability to deal with stress without experiencing tension, irritation, or anxiety. On the other hand, high neuroticism is associated with a lower ability to control one's urges, a tendency to worry, and a feeling of confusion in the presence of others. Individuals with high scores for neuroticism are more likely than average to be moody and to experience such feelings as anxiety, worry, fear, anger, frustration, envy, jealousy, guilt, depressed mood, and loneliness. Such people are thought to respond worse to stressors and are more likely to interpret ordinary situations, such as minor frustrations, as appearing hopelessly difficult.

3. Research methodology

The study was carried out using both a digital method (using the Internet and Google Forms) and the paper-and-pencil method. The focus group consisted of 80 prosecutors, attorneys and judges from all over Poland, aged 30–65. Exactly 50% of respondents were women. The respondents came from all over Poland, the majority of whom were residents of the Mazowieckie and Łódzkie voivodships.

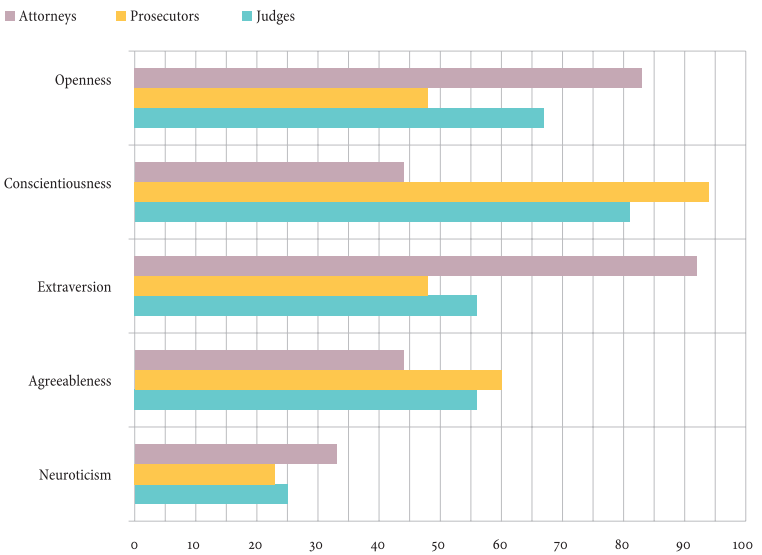
The focus group was asked to assume an attitude to each affirmative sentence on a 5-point Likert scale (strongly agree, rather agree, no opinion, rather disagree, strongly disagree). Each questionnaire contained the same set of questions. The first part of the study consisted of 30 sentences aimed at building a five-factor model of personality according to P. Costa and R. McCrae. The second part – built in the same formula – concerned the respondent's attitude to leadership in the workplace, techniques of exerting influence, work atmosphere and environment, digitization, education and the causes of excessive length of proceedings.

At this point, it is necessary to note that measuring a complicated construct of the human personality with the use of short scales (containing a limited number of questions) does not allow for a very precise set of the characteristics of a given person. In an ideal scenario, researchers who incorporate personality in their

projects would have the time and resources to thoroughly analyze the characteristics of the subjects and use extensive methods with excellent psychometric properties in each of their research. Unfortunately, conditions are not always so favorable, and scientists are often faced with a choice whether to use the very short method or not to use any personality test at all. The increasing pace of life, as well as specific research conditions related to lockdown and the coronavirus pandemic during data collection, require scientists to work on ever shorter measurement tools. The most common way of constructing abbreviated measurement methods is to select those items which, according to psychometric criteria, best describe a given psychological construct from long questionnaires. The model of personality obtained in this way will not be good enough for the purposes of an extensive psychological diagnosis, however, such a scale of precision is absolutely sufficient for further scientific applications and the formulation of accurate hypotheses.

4. Research results and obtained personality profiles

General results of the Big Five Personality Test



The results show that there are significant differences in the personality profiles of attorneys and prosecutors. In all five categories, the mean ranks for each personality dimension show that these two groups represent two completely different personality models. We are dealing here with two poles of the same feature. Moreover, moderate correlations between judges' positions were found. As a rule, judges in each category achieve results exactly between the two extremes, but in three cases (openness, extraversion, neuroticism) the judges are much closer to the personality profile of attorneys, and only in two cases (conscientiousness, agreeableness) do they correspond with the prosecutors' results. The six detailed questions from the questionnaire will be described in detail later in the paper. Let us now move on to discussing each of the five main traits.

4.1. OPENNESS

The above-average intensity of this feature among attorneys is striking. High scorers tend to be creative, adventurous, and intellectual. They enjoy playing with ideas and discovering novel experiences. This should not come as a surprise as the work of an attorney, unlike judges or prosecutors, is much more about finding alternative solutions, analyzing different situations and being very creative. And for prosecutors – quite the opposite: they tend to be practical, conventional, focused on the concrete, avoid the unknown and follow traditional ways. Of course, they cannot be accused of lacking creativity or reluctance to learn new skills, but the intensity of this feature is much lower than in the case of attorneys or judges.

4.2. CONSCIENTIOUSNESS

In the case of conscientiousness, the situation is completely different. It is prosecutors who represent an extremely high intensity of this character trait (94%), followed by judges with a score of around 80%. Conscientiousness describes a person's ability to exercise self-discipline and control in order to pursue their goals. High scorers

are organized and determined, and are able to forego immediate gratification for the sake of long-term achievement. This means that both judges and prosecutors perform their tasks on an ongoing basis, do not feel comfortable with having arrears and strive to follow their work schedule at all costs. At the other extreme there are attorneys. Research has shown that they like to improvise or delay getting started. This does not mean, however, that there are no attorneys who meticulously plan their schedules and do not hand over all their work at the last minute. The results of the research only confirmed that on average such behaviors do not characterize the majority of respondents. The concept of conscientiousness also focuses on a dilemma we all face: shall I do what feels good now, or instead do what is less enjoyable but will pay off in the future? Some people are more likely to choose fun in the moment, and thus are low in conscientiousness. Others are more likely to work doggedly toward their goals, and thus are high in this trait.

4.3. EXTRAVERSION

Turning to extraversion, we can observe a high saturation of this feature among attorneys. Extraversion describes a person's inclination to seek stimulation from the outside world, especially in the form of attention from other people. Extraverts engage actively with others to earn friendship, admiration, power, status, and excitement. Extraversion seems to be related to the emotional payoff that a person gets from achieving a goal. While everyone experiences victories in life, it seems that extroverts are especially thrilled by these victories, especially when they earn the attention of others. Such a result should not come as a surprise either, because the nature of their work is based on building a network of contacts, soft selling or negotiating with the client. People with a high level of this feature find themselves in such professional situations much easier than the respondents who are more introverted and prefer being alone. Interestingly, while judges and prosecutors prefer to work in silence and solitude, attorneys do not mind working in a team with other colleagues. In contrast, introverts do not experience as much

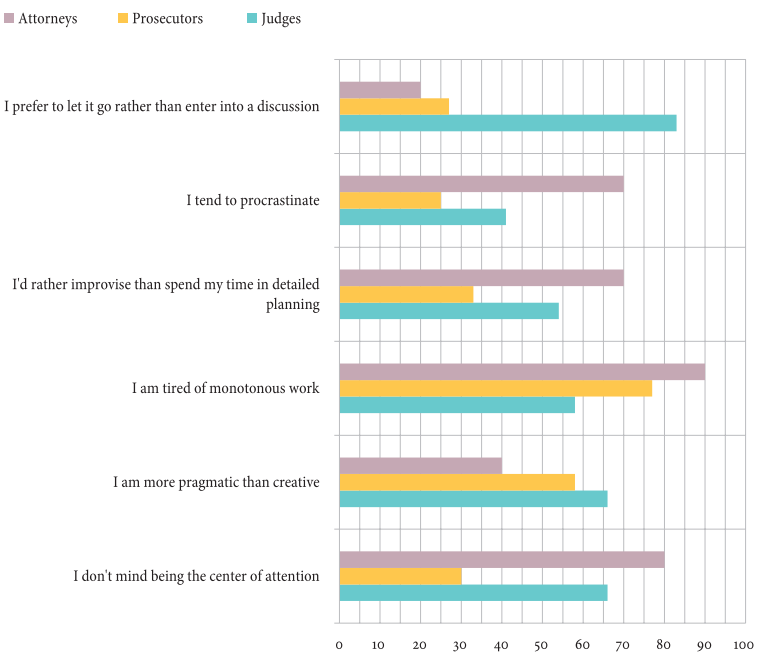
of a "high" from social achievements. They tend to be more content with simple, quiet lives, and rarely seek attention from others.

4.4. AGREEABLENESS

Agreeableness describes a person's tendency to put others' needs ahead of their own, and to cooperate rather than compete with others. In the case of this trait, there is no such clear differentiation. This is due to the fact that all three surveyed groups have highly developed social competences, and thus – a sense of empathy and taking care of others. The lower index of this trait (compared to other respondents) among attorneys reflects their tendency to compete and achieve goals.

4.5. NEUROTICISM

Extreme and minimum in selected questions

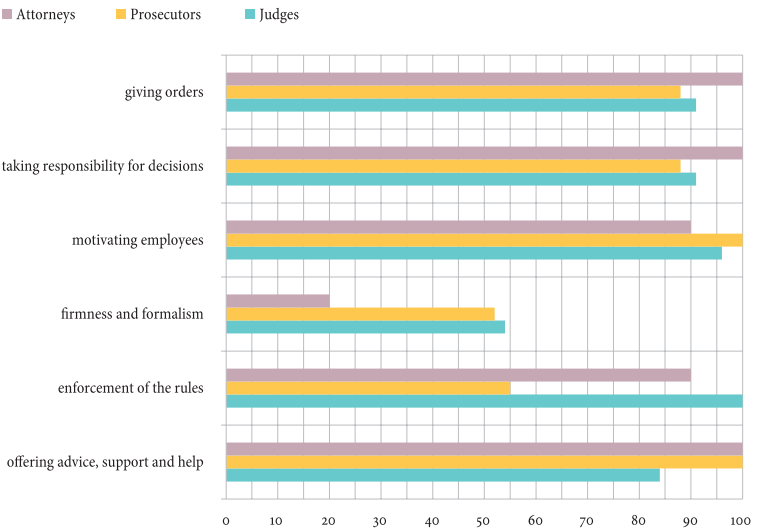


Neuroticism describes a person's tendency to experience negative emotions, including fear, sadness, anxiety, guilt, and shame. While everyone experiences these emotions from time to time, some people are more prone to them than others. Low Neuroticism scorers are more likely to brush off their misfortune and move on. All three groups of respondents show very similar results for this personality component and it is at a relatively low level. Undoubtedly, this means that they can deal with stressful situations and control their emotions.

In this part of the study, 6 out of 30 questions from the questionnaire were selected that best illustrate the differences in the characters of the respondents. To help the reader properly interpret the psychometric data, quantitative data are presented in all graphs. They represent the percentage of respondents who answered a given question in the affirmative (i.e. rather agree or strongly agree). The same interpretative logic also applies to all other plots in the study. In case of the 6 selected questions, the highly developed social competences of attorneys, combined with features characteristic of an extroverted personality, are particularly noticeable. This is a professional group that does not like monotonous work, therefore, when it occurs, it tends to procrastinate. In addition, lawyers are much more likely to enter into discussions, they like to improvise or be the center of attention, which best confirms all stereotypes related to this profession. Summing up, the results of the conducted studies can be considered satisfactory, however, it is recommended to exercise particular caution when interpreting them on a larger scale. It is to be remembered that the focus group consisted of judges, prosecutors and lawyers participating in criminal proceedings. The resulting personality models should not be identified in any way with lawyers dealing with civil or commercial proceedings on a daily basis. Of course, it cannot be ruled out that the obtained response trends or personality models may be applied to a wider group of lawyers.

5. Models of leadership and techniques of influencing employees

I equate effective leadership at work with:



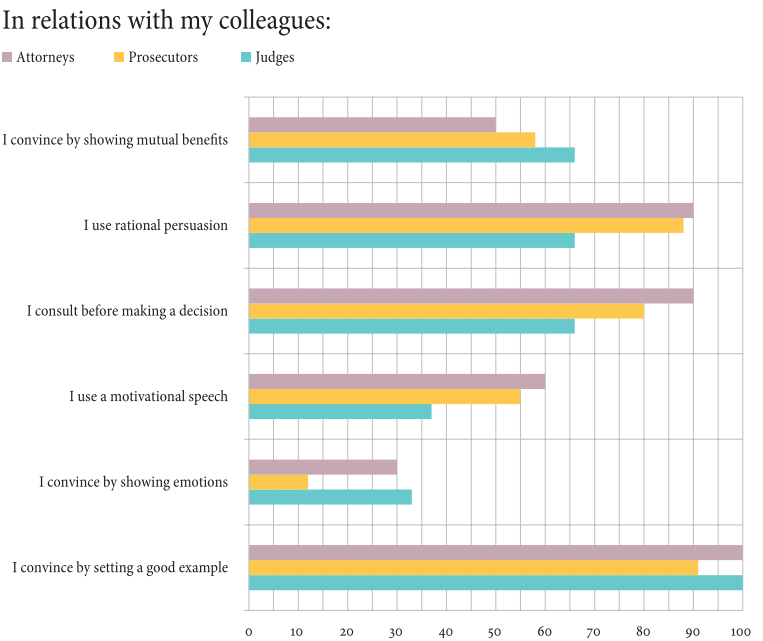
Leadership is defined in different ways as it is a term that does not have a single definition. In a broad sense, leadership can be understood as the ability to influence individuals or a group in order to achieve specific results. In management, it should be understood as the ability to influence the behavior of employees in order to achieve specific goals. It's about setting the direction, developing a vision for the future of the organization, as well as giving direction to people's actions. It is based primarily on the authority of the person, as well as authority that others voluntarily accept. It cannot be forgotten that leadership is also about motivating, inspiring and releasing energy in people. However, what is applicable to profit-generating organizations will not necessarily hold true in the prosecutor's office or in the court. Research has shown that for all surveyed groups, determining the course of action, in effective leadership, behaviors such as providing inspiration, setting an example, showing respect, work management and taking responsibility for decisions made are important. The least attractive form of leadership can be considered

the one related to firmness and formalism. Half of the surveyed prosecutors and judges considered it effective, while only every fifth surveyed attorney did. This illustrates well that it is much more effective to manage with cordiality, openness and helpfulness than by issuing orders and enforcing rules. The next question also concerned the ability to convince co-workers to do specific undertakings. In this example, one can see the tendency that both attorneys and prosecutors – despite the personality differences mentioned earlier – use the same methods of exerting influence. Using rational persuasion, consulting before making a decision, but most importantly – setting a good example are the most effective forms of action.

It is recognized that the ideal leader is one who does not use coercive measures or manipulation, but one who can influence the behavior of others by creating lasting and good relationships. The leader can outline the overall picture of the situation but needs other leaders to translate this mental picture into reality. No government, no company, no education system has ever gone higher than the level of leadership skills[5]. This is illustrated by Maxwell's "The Law of the Lid", which states that leadership ability is the lid that determines a person's level of effectiveness. If a person's leadership is strong, the organization's lid is high. But if it's not, then the organization is limited[6]. Often, leadership is wrongly identified with management. The main difference between these concepts is that leadership is about influencing people, while management is focused on maintaining systems and processes. The manager knows how to keep his direction but cannot change it. It takes influence to move people in a new direction. To be a leader, man must not only be at the forefront of the crowd but also have people who consciously follow him, accepting his leadership and realizing his vision. Being a leader is also the ability to influence. The leader's primary task is to motivate people, not to use them for his own purposes. As an example, the people of Africa have a very negative image of leaders, because they combine leadership with exploitation, violence and manipulation. They did

[5] J.C. Maxwell, *The 21 irrefutable laws of leadership: Follow them and people will follow you*, Harper Collins Leadership, 2007.

[6] *Ibidem*.



not meet with positive leadership. According to Maxwell[7], a good leader should respect people, think about their needs, add value to them and encourage others to cooperate and mutual respect. We follow those leaders who care about our needs, are trustworthy and, above all, like the people around them.

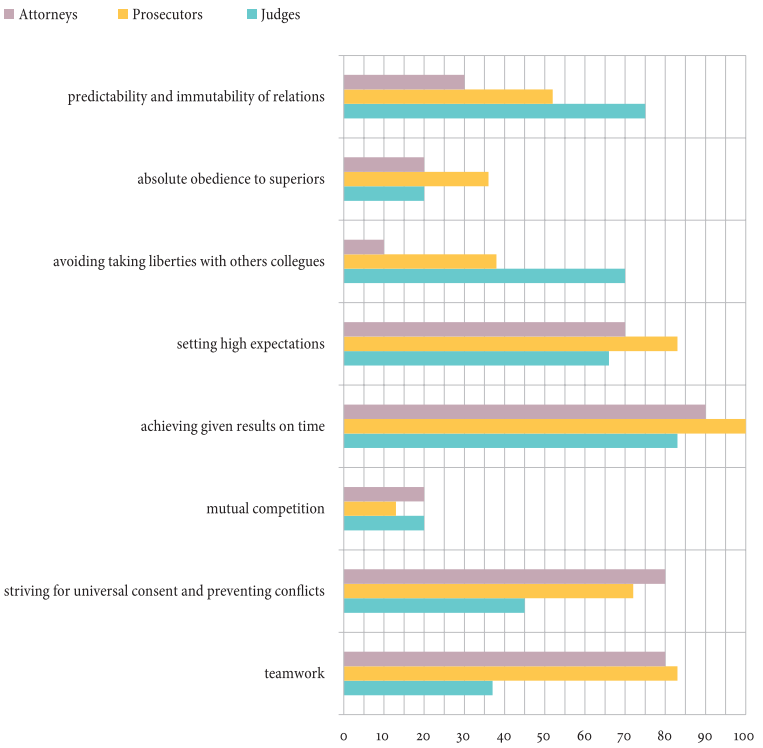
6. Atmosphere at work

How can the atmosphere at work translate into work efficiency? First of all, it should be noted that good relations with colleagues and kindness in the work environment are of great importance for shaping the level of organizational culture and affect the achievement of good work results. If an atmosphere is created in the institution in which the employee feels comfortable, it will positively affect the

[7] J.C. Maxwell, *Developing the Leader Within You*, Thomas Nelson 1993.

results of his work and reduce the likelihood of the willingness to find another job.

In my workplace, the following are preferred:

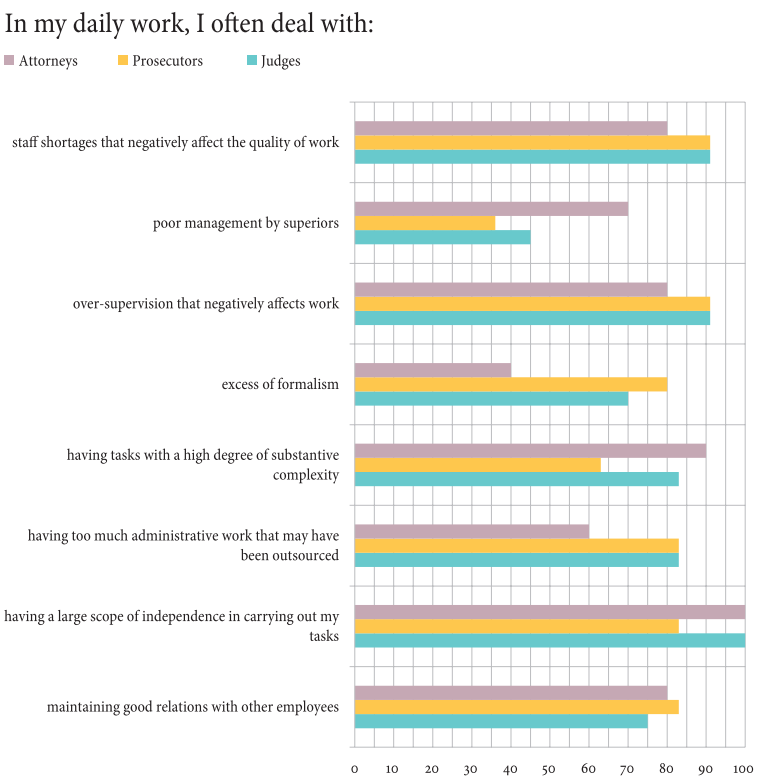


Research has shown that each of the groups differently perceives the factors that translate into creating pleasant working conditions. What matters most for judges is the predictability and stability of relations. This means that any organizational changes, delegations to other courts or personnel changes have a negative impact on the assessment of the workplace. For attorneys conflict prevention and seeking universal consent in the workplace are their paramount goal. Taking into account their personality profile and high level of extraversion, it can be concluded that misunderstandings and bad communication can have the greatest negative impact on everyday work. As for the prosecutors, the most important thing for them is to set high

requirements and complete all tasks within a specified time. Missing deadlines is a stressful situation that should be avoided. An interesting conclusion is the popularity of teamwork with both attorneys and prosecutors. Although both groups have different work strategies on a daily basis, they indicate that cooperation with others is welcome.

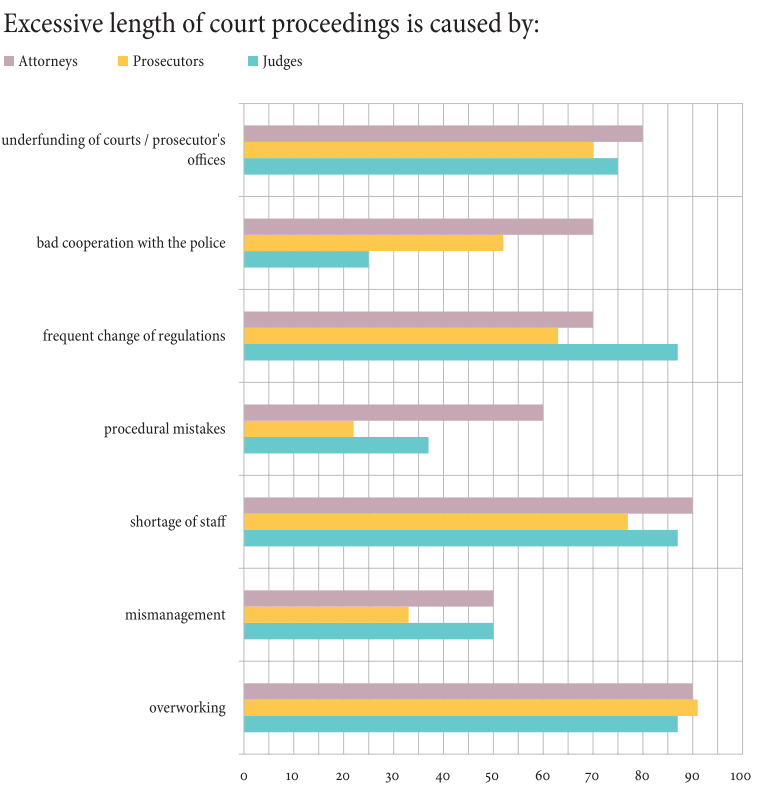
7. Organization, environment and job satisfaction

Job satisfaction describes the degree to which an employee feels happy in the work environment. Satisfaction relates to both your emotional reactions and the way you think about your own workplace. At the cognitive level, the level of satisfaction results from the difference between the expectations and needs of the employee and the real situation. The smaller the difference, the higher the level of satisfaction. Employee expectations relate to many different aspects of the work environment. They are related to the method of management and remuneration, as well as the atmosphere in the company. Job satisfaction is not the same as self-commitment or intrinsic motivation, but it is closely related to them. Satisfaction is considered to be part of a wider system that includes factors such as commitment and a sense of belonging. The aforementioned dissatisfaction with work may result in leaving your job. Then there is a shortage of employees, which means that the others have to take over additional duties, and this directly translates into the quality and speed of the proceedings. The study shows that staff shortages are the most serious problem of the judiciary, which will appear in several more places. This opinion is shared by 80% of attorneys and over 90% of prosecutors and judges. In second place, excessive supervision, which, according to 90% of all three groups surveyed, is unnecessary and has a negative impact on daily work. Another problem that makes work difficult is the excess of formalism in prosecutor's offices and courts (respectively 70% and 80% of respondents agree with this statement). Over 80% of prosecutors and judges complain about too much work, but also point to an excess of administrative tasks that could be delegated to others.



8. Reasons for excessive length of proceedings

Let us now move on to the main point of this study, namely the attempt to define the main causes of excessive length of criminal proceedings from the point of view of the human factor. In the first place, we can see two factors indicated by as many as 90% of respondents from all groups and which are directly related to each other. These are staff shortages and overwork. However, while lawyers may hire new employees as they see fit, the case is much more complicated in the case of judges and prosecutors. The source of the problem can be found both in the formal regulations on filling new jobs and in individual decisions on leaving the profession and joining advocates or legal advisers. As indicated by reports prepared by associations of both prosecutors and judges, a general downward trend in the



number of judges in district courts can be observed in the last 5 years (2015–2020). Combined with the increasing impact of cases, they illustrate one of the important causes of the justice crisis. The result of staffing problems are the lengthening dates of setting the first hearing and the increasingly longer duration of the entire proceedings. In the analyzed period of 2015–2020, there was a decrease in the total number of judges and shifts of judges between individual divisions (an increase in the number of judges in the civil division and a decrease in the number of judges in the criminal division)[8]. In the period 2016–2018, there was a decrease in the total number

[8] A. Begier, R. Cebula, Ł. Małecki-Tepicht, M. Plaskacz, *Obietnice a rzeczywistość – statystyki sądów rejonowych po pięciu latach "reform"* (*2015–2020*), "Kwartalnik Stowarzyszenia Sędziów Polskich IUSTITIA" 2021, 3(45), p. 7.

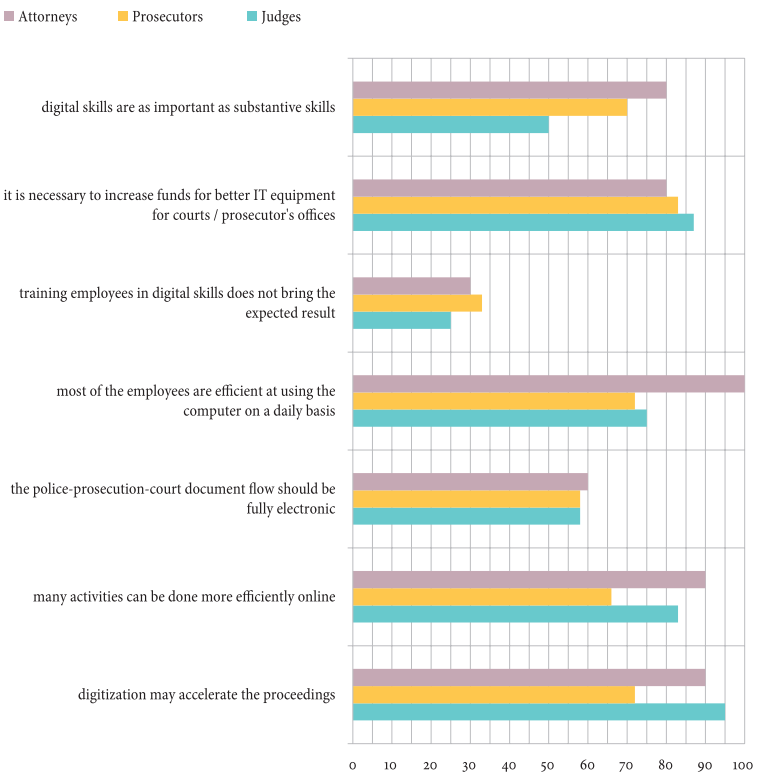
of judges by 2.04%, including a decrease in the number of judges of common courts by 5.78%[9]. The above data indicate a general downward trend in the number of district courts, and taking into account the increasing impact of cases, they illustrate one of the important causes of the crisis in the judiciary. The result of staffing problems are the lengthening dates of setting the first hearing and the duration of the entire procedure[10]. The discussed problem does not only concern the courts. Staff shortages in district and district public prosecutor's offices as well as the growing number of long-term proceedings constitute more and more reasons for concerns. It should only be remembered that over 99% of cases are handled in these units, and the statistical results in the years 2016–2020 compared to 2014 in terms of the number of long-term cases have significantly worsened. The number of cases lasting more than 6 months increased by approximately 270% to 370–390% in the case of older cases, with a comparable number of cases[11].

Over 70% of prosecutors and judges as well as 80% of attorneys also point to the problem of under-financing the justice system. Not having enough money can have a negative impact on the quality of everyday work and indirectly affect the atmosphere and job satisfaction. Contrary to the other groups, attorneys are the most expressive in their views and they see the causes of delay in poor cooperation with the police, changing regulations and procedural errors.

It all clearly shows that in all of the above-mentioned elements, the human factor plays a key role and it should start any discussion about possible changes in the justice system.

[9] *Ibidem*, pp. 45–46.
[10] *Ibidem*, p. 53.
[11] *Prokuratura w pandemii, czy pandemia w prokuraturze?* Raport Stowarzyszenia Prokuratorów Lex Super Omnia, Warszawa 2020, p. 43.

9. The impact of digitization on the effectiveness of proceedings



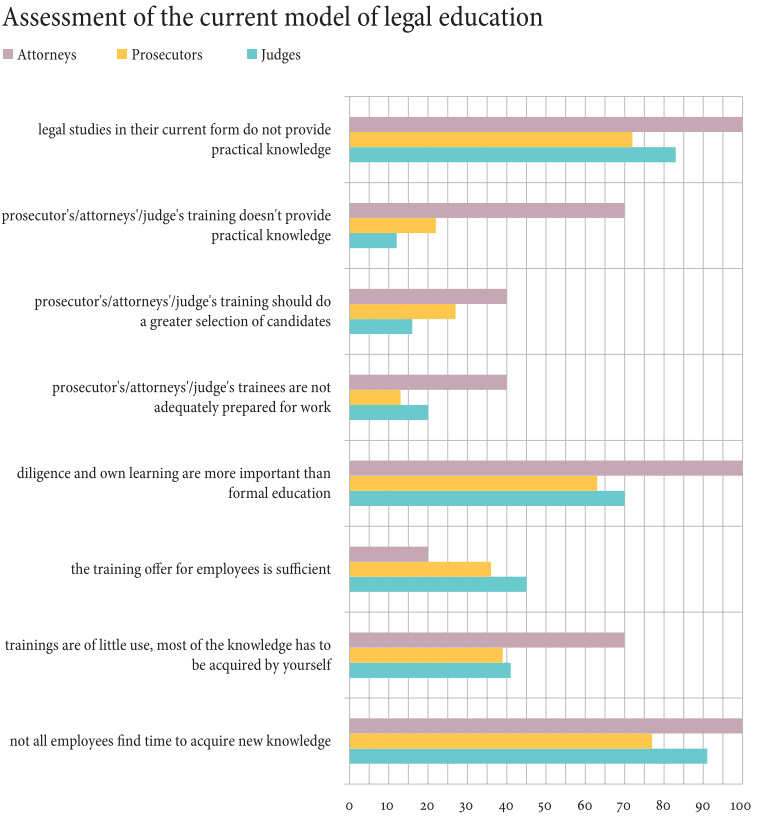
The coronavirus pandemic has fundamentally revolutionized the way lawyers work. Personal contacts turned into relationships via phone, e-mail, and social media. Classic files have been replaced by electronic documentation. Even the circulation of procedural correspondence is largely done via the Internet. Before the pandemic, lawyers were largely conservative, distrusting the opportunities offered by modern information technology. Incentives to use the Internet to a large extent were received reluctantly, and many treated the solutions imposed by the legislator as an additional obstacle.

The perception of digital technologies and the use of the Internet has truly evolved during the pandemic, which is confirmed by

research results. 70% of prosecutors, 90% of attorneys and 95% of judges now believe that digitalization can speed up criminal proceedings and almost the same percentage of respondents believe that many activities can be done more efficiently and faster online. When it comes to the circulation of documents, there is also a change in the way of thinking. More than half of all respondents do not mind the circulation of documents on the police-prosecutor's office-court line being fully electronic. In addition, more than three-fourths of all respondents unanimously stated that training in digital skills brings the desired results, and 70% of prosecutors and judges and 100% of attorneys assessed their knowledge of IT as fully sufficient for everyday work. It is also worth noting that as many as 80% of lawyers and 70% of prosecutors believe that digital skills are as important as substantive skills. This opinion is absolutely positive, because it takes into account the changing world and sees new directions of development. Equally positive is the conclusion that on average 8 out of 10 respondents from all groups call for an increase in expenditure on better computer equipment for courts and prosecutor's offices. These data clearly show that not only the young generations are ready for the widespread digitization of the justice system, but also more experienced lawyers do not have any major objections to it.

10. The impact of the legal education model on the effectiveness of proceedings

The attorneys are the most critical of the legal education model. This professional group claims that not only does legal studies in its current form not provide practical knowledge (100% of respondents), but even the attorney apprenticeship did not meet their expectations in terms of acquiring new skills (70%). They are equally negative about all kinds of training and courses. More than 2/3 of the respondents suggest that they are of little use. As a result, there is a perception among attorneys that formal education is useless because most things have to be learned by yourself. The collected data show that all surveyed attorneys take the position that their



own diligence and willingness to learn (100%) are of key importance, despite the fact that not all of them have time to do so due to the sheer volume of work and daily duties. Prosecutors and judges are less critical of education issues. While 70% and 80% of them say that law studies do not convey practical knowledge, they cannot say the same about judicial or prosecutor training. Only every fourth and every fifth respondent is of the opinion that the level of knowledge provided there is insufficient. In addition, the majority of prosecutors and judges (60%) have a positive opinion of the training and courses offered, taking the position that they are quite useful from a substantive point of view (60%). Nevertheless, 7 out of 10 prosecutors and 9 out of 10 judges believe that they do not all have time to acquire new knowledge and new skills. Most likely, this can be

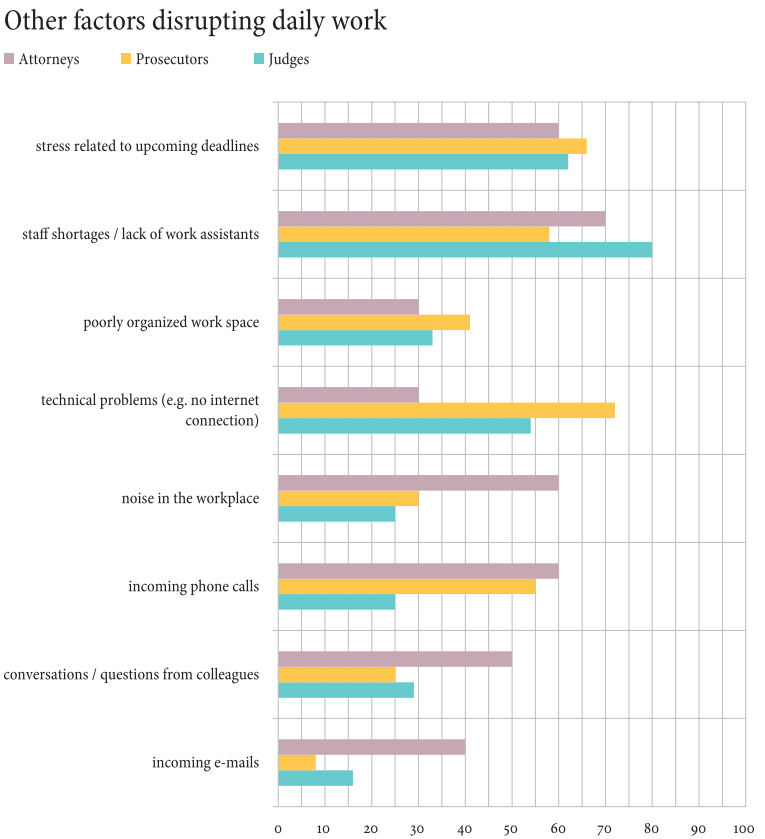
explained by fatigue with excess work and reluctance to devote free time to work-related matters. These results give an unambiguous answer that legal studies in its current form do not meet the hopes placed on them, and therefore require a thorough redefinition of priorities. The situation in which 5 years of study does not prepare for the profession and forces you to acquire knowledge on your own is unacceptable. All surveyed groups admit that during the studies there is a lack of activities such as frequent visits to the courts, writing pleadings, workshops on negotiating with the client, working with a psychologist on the functioning of the human psyche and decision-making mechanisms. All surveyed groups also believe that in the era of universal access to the Internet, the law teaching model should be better suited to the changing world and new challenges (e.g. the use of artificial intelligence).

11. Other factors disrupting daily work

As for the remaining technical and organizational factors that may interfere with daily work, studies have shown that their importance is much lower than those related to the human factor. Although the respondents indicated that incoming calls, e-mails and technical problems may hinder their work in some way, the two most important of these relate to the human factor. The lack of people to help means that attorneys, judges and prosecutors have to deal with the excess work on their own, and the thought of impending deadlines makes them even more stressful, which has a negative impact on the quality of work.

12. Conclusions from the study and suggested directions of changes

The aim of the study was to draw attention to the fact that even the best-designed rules of conduct will not have much in practice if the human factor fails. The conducted research clearly proved the truth of this claim, providing arguments from both the structural capital



and human capital. All these elements that constitute intellectual capital should be given special attention from the point of view of implementing leadership models, as well as ensuring a proper atmosphere at work. When an employee feels under-appreciated, unmotivated, or de-empowered, they will most likely leave their job and move to another one. As a result, the remaining employees will be given more responsibilities and the time to act will be further increased, causing a vicious circle. Taking the above into account, it is recommended to conduct further research on "soft" (i.e. non--material) aspects of the functioning of the judiciary. They should answer a number of sensitive questions related to further reforms in the sector. Some of the research strands within the development of the intellectual capital of the judiciary may include the following:

- Migration of staff between the judiciary and business – an important dilemma in improving the quality of judiciary functioning is the development of knowledge, skills and social competences of its staff (also through practical experience in cooperation with the commercial sector). Such experiences, however, carry the risk of too close formal and informal links with the parties to the proceedings
- Motivational instruments – on the one hand, one should distance oneself from aggressive forms of financial motivation straight from the business sector, on the other hand, ignoring the importance of these factors (related to qualitative variables) will inhibit the improvement of the quality of proceedings (lack of employee involvement, their search for additional sources of income).
- Leadership training in courts and prosecution offices – A good way is to leave the employee free to act, i.e. the leader determines what the employee is to do, but how to do it. Thanks to this, the employee feels responsible for the performance of the task. It requires commitment on the part of the employee and trust on both sides.
- Redefining the model of legal education – 5 years of studies must focus on practice and be a kind of introduction to the profession of a lawyer, prosecutor or judge. Graduates must have a greater legal skill set in order to be able to fill the labor market demand for young, ambitious lawyers.
- Further research directions – The conducted research was a pioneering research of this type in Poland and did not fully exhaust the scope of this issue. The influence of the human factor on the justice system should be further explored, in particular on a larger scale. In addition, it is worth exploring new generations of attorneys, judges and prosecutors to determine what work, leadership and management models are characteristic of Generation Y, Millennials and Generation Z. It would be interesting to conduct the same study, but in different countries of the European Union, to check as the above-discussed issues related to human capital are presented abroad.

REFERENCES

Begier A., Cebula R., Małecki-Tepicht Ł., Plaskacz M., Wypych-Knieć A., Żółtak U., *Obietnice a rzeczywistość – statystyki sądów rejonowych po pięciu latach "reform"* (*2015–2020*), "Kwartalnik Stowarzyszenia Sędziów Polskich IUSTITIA" 2021, 3(45), https://www.kwartalnikiustitia.pl/obietnice-a-rzeczywistosc-statystyki-sadow-rejonowych-po-pieciu-latach-reform-2015-2020,11583 [accessed on: 1 December 2021].

Blackburn R., Donnelly J.P., Logan C., Renwick S.J.D., *Convergent and discriminative validity of interview and questionnaire measures of personality disorder in mentally disordered offenders: A multitrait-multimethod analysis using confirmatory factor analysis*, "Journal of Personality Disorders" 2004, 18(2), doi: 10.1521/pedi.18.2.129.32779. PMID: 15176753.

Cattell R.B., Eber H.W., Tatsuoka M.M., *Handbook for the Sixteen Personality Factor Questionnaire* (*16PF*), Institute for Personality and Ability Testing, Champaign 1970.

Maxwell J.C., *Developing the Leader Within You*, Thomas Nelson, Nashville 1993.

Maxwell J.C., *The 21 irrefutable laws of leadership: Follow them and people will follow you*, Thomas Nelson, Nashville 2007.

McCrae R.R., Costa Jr. P.T., *Personality Trait Structure as a Human Universal*, "American Psychologist" 1997, 52, http://dx.doi.org/10.1037/0003-066X.52.5.509.

McCrae, R.R., Costa Jr. P.T., *A Five-Factor Theory of Personality*, [in:] L.A. Pervin O.P. John (eds.), *Handbook of Personality Psychology*, Guilford, New York 1999.

Ozer D.J., Benet-Martínez V., *Personality and the prediction of consequential outcomes*, "Annual Review of Psychology" 2006, 57, https://doi.org/10.1146/annurev.psych.57.102904.190127.

Pervin L.A., John O.P., *Personality: theory and research*, John Wiley & Sons, 2002.

Prokuratura w pandemii, czy pandemia w prokuraturze? Raport Stowarzyszenia Prokuratorów Lex Super Omnia, Warszawa 2020, https://lexso.org.pl/2020/10/05/prokuratura-w-pandemii-czy-pandemia-w-prokuraturze-raport-

-stowarzyszenia-prokuratorow-lex-super-omnia/ [accessed on: 1 December 2021].

Raad B.D., Perugini M., Hrebícková M., Szarota P., *Lingua Franca of Personality: Taxonomies and Structures Based on the Psycholexical Approach*, "Journal of Cross-Cultural Psychology" 1998, 29(1), https://doi.org/10.1177/0022022198291011.

Rushton J.P., Irwing P., *A General Factor of Personality* (*GFP*) *from two meta-analyses of the Big Five: Digman* (*1997*) *and Mount, Barrick, Scullen, and Rounds* (*2005*), "Personality and Individual Differences" 2008, vol. 45(7).

DR HAB. ANNA TUNIA, PROF. KUL
Catholic University of Lublin

Effectiveness of the human factor in justice in the light of dogmatic studies

1. Preface

The concept of the efficiency of the judiciary includes an element of the participation of the human factor, which active or passive role may be determined by the course and outcome of court proceedings. The effectiveness of proceedings is one of the basic assumptions of court proceedings and a necessary condition for a fair trial. The purpose of each court trial is to issue a fair judgment – without undue delay, by a competent, independent and impartial court, which is consistent with the constitutional norm set out in Art. 45 sec. 1 of the Constitution of the Republic of Poland[1], as well as the conventional norm specified in Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms[2], according to which it is the duty of public authorities to hear a court case fairly and within a reasonable time. Therefore, it is up to the court to ensure effective court proceedings, but the outcome of the

[1] Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws No. 78, item 483, of 2001, No. 28, item 319, of 2006, No. 200, item 1471, of 2009, No. 114, item 946).

[2] Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on November 4, 1950 (Journal of Laws of 1993, No. 61, item 284).

proceedings in the form of the issued ruling may also be influenced by other entities participating in the trial.

This chapter will analyse the applicable legal regulations in the field of criminal law and the law of petty offences in terms of the reliable and effective implementation of tasks incumbent on – above all – the court (judges) and the public prosecutor, and – to a lesser extent – on other participants in the proceedings, i.e., the accused (defendants) and the private (auxiliary) prosecutor and their trial representatives. An analysis will also be made of the impact of the participation of the public and representatives of the mass media on the effectiveness of the work of the judicial authorities.

The research method used in this chapter will be based on the analysis of the applicable legal provisions and court cases relating to the issues being the subject of research in the following subchapters of this study and then on formulating conclusions by interpreting the analysed legal regulations and studied court sources and assessing them in terms of effectiveness of the operation of the justice system in Poland.

As indicated, subject analyses will be conducted at the level of procedural norms of criminal law and the law of petty offences, which, as belonging to the sphere of public law, are characterized by an element of public authority expressed in the possibility of unilaterally determining the rights and obligations of another entity, which is revealed in their role (i.e. superiority) of the judicial organs and the organs of preparatory proceedings in relation to the passive party of the trial, which is the accused (defendant). It is also revealed (as shown by the research) in the superiority of the active party in the criminal and petty offence process, which is the public prosecutor (prosecutor, the Police or other authorized state or local government body) over the former (i.e., the passive party). In some part of this chapter, the analyses will be focused only on petty offence proceedings, because the petty offence procedure – although it has something in common with the criminal procedure – contains characteristic differences that do not occur in the criminal trial, the analysis of which leads to interesting conclusions. This chapter also attempts to assess the impact of this "human factor" on the efficiency of the justice system, which determines the outcome of

the pending court proceedings. The *de lege ferenda* postulates will also be expressed on this subject.

2. The impact of the human factor on the effectiveness of initiating court proceedings

In this subchapter, the issue of the role of the human factor in the initiation of criminal and petty offence proceedings and its impact on the efficiency of the judiciary will be discussed. Speaking of the "human factor" we mean the group of entities (persons) initiating court proceedings in cases of petty offences and criminal cases such as:

- a public prosecutor who is responsible for initiating a court trial in cases of petty offences by submitting a motion for punishment to the court, and in criminal cases by instituting criminal proceedings as a result of lodging an indictment with the court;
- the aggrieved party (auxiliary prosecutor, private prosecutor) who may initiate court proceedings by submitting a motion for punishment to the court in cases of petty offences prosecuted by private prosecution or – under certain conditions – also in cases prosecuted by public prosecution, and in criminal cases by bringing to the court private indictment;
- the president of the court, who is an entity (body) authorized to initiate court proceedings in cases of petty offences by issuing an appropriate order, as required by Art. 57 § 2 of the CPPO[3].

Therefore, the activity (initiative) of the above-mentioned entities is necessary to initiate court proceedings.

[3] Act of August 24, 2001 – Code of Procedure in cases of Petty Offenses (consolidated text: Journal of Laws of 2021, item 457 as amended) – hereinafter: the CPPO.

2.1. SUBMISSION OF A MOTION FOR PUNISHMENT TO THE COURT BY A PROSECUTOR AS THE INITIATION OF COURT PETTY OFFENCE PROCEEDINGS

The petty offence procedure – at the stage of initiating the proceedings – has its own specificity. This is because, unlike in criminal proceedings which are initiated as a result of bringing an indictment – petty offence proceedings are not initiated by the mere submission of a motion for punishment to the court by an authorized prosecutor, but it occurs only upon issuing an appropriate order to initiate it. Therefore, when analysing the influence of the human factor at the stage of initiating the petty offence proceedings, this specificity should be emphasized. In practice, there are many cases of incorrectly instituting petty offence proceedings that should not have taken place[4].

Therefore, the commencement of the proceedings for petty offence requires the submission of a motion for punishment to the court by the authorized public prosecutor or the aggrieved party (auxiliary prosecutor). It means, therefore, that these proceedings cannot be initiated ex officio – as in criminal cases, where (as indicated) criminal proceedings are initiated by the mere fact of bringing an indictment to the court. In petty offence cases, a motion for punishment will be required to drive a trial. In the procedural law of petty offences there are no offences prosecuted *ex officio*, as it occurs in criminal cases, where the principle of legality applies, and which is expressed in the obligation to initiate proceedings in cases prosecuted by public prosecution[5]. This does not mean, however, that in the petty offence procedure a different one applies – the

[4] Such phenomena take place in several court appeals in Poland. Among the examined cases, such irregularities were noted e.g., in the Wrocław appeal: in the District Court for Wrocław-Fabryczna (case number II W 359/20), in the Gdańsk appeal: in the District Court Gdańsk-Północ (case number II W 1325/20), in the Rzeszów appeal: in the District Court in Ropczyce (e.g. case with file number II W 450/18), in the Kraków appeal: in the District Court in Sucha Beskidzka (e.g. case with reference number II W248.20).

[5] See: A. Tunia, *Stosowanie środków niepenalnych jako sposób reagowania na wykroczenia*, "Studia Prawnicze KUL" 2020, vol. 3, pp. 335–354.

principle of opportunism. The principle of the purposefulness of punishment (prosecuting the perpetrators of offences) is applied here, which allows the entity authorized to file a motion for punishment to consider whether it is justified due to the type and significance of the act, the way the perpetrator acts or the lack of social harmfulness of the act. The element of the lack of social harmfulness of an act distinguishes the legitimacy of instituting petty offences from criminal cases. In order for an act (crime) to occur, the Penal Code[6] requires more than negligible social harmfulness of the act (Article 115 § 1 and 2 of the PC), while in the case of offences, it is considered whether there is social harmfulness (Article 1 § 1 of the CPO[7]. If it is missing in a particular behaviour of the perpetrator, then there is no act and there are no grounds to file a motion for punishment and initiate court proceedings[8]. The motion for punishment is therefore the basis that initiates court petty offence proceedings. It is a request to initiate court proceedings and determine the responsibility of a designated person for the alleged offence, provided that the conditions (evidence) for its initiation and conduct are verified[9].

One of these conditions is that the motion must come from a qualified prosecutor (public or private). The motion for punishment is effective only when a given entity is entitled to act as a public prosecutor in a case for a given offence[10]. In most cases, the public prosecutor in petty offence cases is the Police, which is the basic prosecuting body in the petty offence procedure (in criminal cases it is the prosecutor's office), but the law also authorizes other security and public order authorities[11], the labour inspector (Art. 17

[6] Act of 6 June 1997 – Penal Code (uniform text: Journal of Laws of 2021, item 408, as amended) – hereinafter: the PC.

[7] The Act of May 20, 1974 – Code of Petty Offences (uniform text: Journal of Laws of 2021, item 281 – hereinafter: the CPO).

[8] See: decision of the District Court Lublin-East in Lublin with its seat in Świdnik of May 25, 2021 (file reference number II W 122/21).

[9] These conditions result from Art. 5 § 1 of the CPPO.

[10] A. Tunia, *Reakcja organu kontroli ruchu drogowego na wykroczenie*, [in:] *Ruch drogowy – ochrona danych osobowych, kontrola, prawnokarne następstwa*, A. Mezglewski, A. Tunia, M. Skwarzyński (eds.), Lublin 2015, pp. 183–226.

[11] This role may be performed – in a specific scope of cases by: 1) government and local government administration bodies, 2) state control bodies and local

§ 2 of the CPPO)[12] and the public prosecutor (Art. 18 of the CPPO). It should also be added that only the Police and the prosecutor may submit a motion in any case. Whereas other authorities (listed in Article 17 § 2–4 of the CPPO) may do so only if they have revealed a petty offence within the scope of their actions or in the scope of cases expressly assigned to them for prosecution[13].

The aggrieved party is also the entity authorized to file a motion for punishment. Pursuant to the provisions of the CPPO, it is a person whose legal interest has been directly violated or threatened as a result of an offence (Article 25 of the CPPO). The aggrieved party may be a natural person as well as a legal person and a state or social institution without legal personality[14].

---

government control bodies, 3) municipal (city) guards, but only if, within the scope of their activities, they have revealed an offence and occurred with a motion for punishment. In addition, the Council of Ministers may, by regulation, grant the powers of a public prosecutor to other state, local government and social institutions, which, as part of their activities, may apply for punishment for acts disclosed in the course of their activities (Article 17 § 4 of the CPPO). In addition, the status of a public prosecutor may be held by other entities authorized to do so under the provisions of specific laws.

[12] Labour inspector, who is a public prosecutor in cases of: offences against employee rights specified in the Labour Code; for offences specified in the Act of 9 July 2003 on the employment of temporary workers (Journal of Laws of 2019, item 1563); on offences specified in the Act of 20 April 2004 on employment promotion and labour market institutions (Journal of Laws of 2020, item 1409, as amended); for offences specified in the Act of 10 June 2016 on the posting of workers as part of the provision of services (Journal of Laws of 2018, item 2206, as amended); for offences specified in the Act of 10 October 2002 on the minimum remuneration for work (Journal of Laws of 2020, item 2207); on offences specified in the Act of Restricting Trade on Sundays and Public Holidays and on Certain Other Days (Journal of Laws of 2019, item 466, as amended), as well as other offences related to the performance of gainful employment, if the Act it provides so (see Art. 17 § 2 of the CPPO). For more on the role of the public prosecutor see e.g.: R.A. Stefański, *Public Prosecutor in misdemeanor cases*, "Prokuratura i Prawo" 2002, No. 1; H. Skwarczyński, *Glosa to the decision of the Supreme Court of March* 1, 2004, file ref. V KK 385/03, OSNKW 2004, No. 6, item 62.

[13] See: T. Grzegorczyk, *Kodeks postępowania w sprawach o wykroczenia. Komentarz*, Warszawa 2012, Lex/el.

[14] See: A. Marek-Ossowska, A. Marek, *Prawo wykroczeń* (*materialne i procesowe*), Warszawa 2019.

Moreover, the motion for punishment must meet certain formal requirements specified in Art. 57 § 2 and 3 of the CPPO[15] and in addition – when it comes from a public prosecutor – it should be accompanied by materials of explanatory activities[16] or preparatory proceedings, which results from Art. 57 § 4 of the CPPO.

Regarding these requirements, it should be noted that the public prosecutor should also justify the motion for punishment he submitted and justify the legitimacy of appointing and carrying out the evidence specified in the motion, indicating the evidence thesis which he wants to prove in the course of the proceedings. Although this obligation was not specified among the formal conditions listed in Art. 57 § 3 of the CPPO, but it can be derived from general procedural norms i.e., the principle of equality of parties to proceedings, according to which both parties to the proceedings are entitled to the same procedural tools (means) (the principle of equality of arms). In practice, the inequality of the parties to the proceedings is visible, firstly fact is noted in the courtroom, where the accused

[15] These include: 1) the name and address of the accused, as well as other data necessary to establish his identity; 2) specification of the act of the accused with an indication of the place, time, manner and circumstances of its commission; 3) indication of evidence; 4) name, surname and signature of the person drawing up the motion, as well as the address, if the motion comes from the victim. And when it comes from the public prosecutor, submitted by the public prosecutor should also include an indication of: 1) the provisions under which the alleged act falls; 2) the place of employment of the accused and, as far as possible, data on his material, family and personal conditions; 3) victims, if such disclosed; 4) the amount of the damage caused; 5) position of the person drawing up the motion; 6) the court competent to hear the case; 7) data on the previous conviction of the accused for a similar crime or petty offence, if the prosecutor relies on this circumstance.

[16] Investigation activities in cases of petty offences constitute the preparatory stage of the trial. Their purpose is to determine whether there are grounds for submitting a motion for punishment to the court and to collect the data necessary to draw up such a motion (Article 54 § 1 of the CPPO). More on this: A. Tunia, *Reakcja organu kontroli ruchu drogowego na wykroczenie*, [in:] *Ruch drogowy – ochrona danych osobowych, kontrola, prawnokarne następstwa*, A. Mezglewski, A. Tunia, M. Skwarzyński (eds.), Lublin 2015, p. 223; A. Tunia, *Przesłuchanie w trybie art. 54 § 6 of CPPO*, [in:] *Prawo dowodowe w postępowaniu sprawach o wykroczenia w ruchu drogowym*, A. Mezglewski, M. Skwarzyński (eds.), Lublin 2018, pp. 11–24.

(defendant) is required to justify each evidence requested, and the same obligation is not required for the prosecutor. As it results from the research of court files, which analysed several dozen motions for punishment filed by the public prosecutor in petty offence cases, only in a single case it was noticed that the prosecutor justified the motion, or the evidence attached to the application.

2.2. ORDER OF THE PRESIDENT OF THE COURT TO INITIATE PETTY OFFENCE PROCEEDINGS

Thus, as indicated above, the mere submission of a motion for punishment to the court in a petty offence case does not initiate proceedings. This motion only prompts the president of the court to determine the admissibility of proceeding with a petty offence case and requires from him appropriate steps to initiate court proceedings. First, the submitted motion is subject to formal control in terms of its completeness and admissibility, which results from Art. 59 § 1 of the CPPO. If any formal defects are found, the motion for punishment is returned to the prosecutor to remove them within 7 days.

Pursuant to Art. 59 § 2 of the CPPO if the application meets the formal conditions specified in Art. 57 § 2–4 of the CPPO the president of the court by order initiates the proceedings and refers the case to a hearing or meeting[17]. Therefore, the initiation of proceedings in petty offence cases requires the fulfilment of two conditions:

1) issuing an appropriate document i.e., an order to initiate the procedure, and
2) that the order is issued by an authorized body i.e., the president of the court.

Both of these conditions determine the proper initiation of the procedure, and their failure may have serious consequences.

It should be emphasized, however, that the above conditions for the proper initiation of proceedings will also be met if the order to initiate proceedings is issued by an authorized body different from

[17] The circumstances of referring the case to the meetings are specified in Art. 60 § 1 of the CPPO.

the president of the court. According to § 304 of the Regulation of the Minister of Justice of June 18, 2019 – Rules of the operation of common courts[18] – the president of the court may authorize another official or judge to issue an order to initiate proceedings for petty offence. However, to make an order issued by an authority other than the president of the court be valid and effective, the president of the court must authorize that person in a specific way i.e., it must be a written authorization issued for a specific person.

Therefore, after deciding that the motion for punishment is admissible – the president of the court or a person authorized by him should issue an order to initiate the proceedings and refer the case to the electronic system of random allocation of cases in order to appoint (draw) the adjudicating bench. In petty offence cases the court is composed of one person (Article 13 § 1 of the CPPO), which means that the duties of the presiding judge of this composition are performed by a reporting judge.

When assessing the procedure for initiating the petty offence proceedings, it should be stated – on the basis of the analysis of the files of several court cases – that in practice there are often deficiencies in the correct manner of its initiation. In the analysed cases, the irregularities consisted in the fact that the order to initiate the proceedings was issued not by the president of the court or a person authorized by him but by the reporting judge appointed to conduct a given case. Thus, in these cases, the judge acted beyond the scope of his jurisdiction. This means that – *de facto* – the proceedings conducted by him have not been initiated. The consequence of such actions is, *inter alia,* the fact that in a situation where one year has elapsed from the date of the offence committed, the act is statute-barred, and it is no longer possible to effectively initiate and conduct proceedings against the person deemed to be the perpetrator of the offence. The Code of Petty Offences provides for a one-year limitation period for offences, and if proceedings are instituted during this year, this period is 3 years (Article 45 § 1). In case of a breach of the limitation period, the proceedings must be discontinued because, according to Art. 5 § 1 item 4 of the CPPO

[18] Journal of Laws of 2019, item 1141 as amended.

the proceedings are not instituted, and the instituted proceedings are discontinued, if there has been a limitation. This is negative evidence in court proceedings which must be taken into account by the court at every stage of the proceedings and which the failure to comply with constitutes a serious appeal and cassation violation.

To conclude the argument made in this part of the study, it should be stated that the participation of the human factor, which at the stage of initiating the offence proceedings, is realized in the person of the public prosecutor or the aggrieved party and is activated from the moment they decide to prepare and submit a motion for punishment to the court, whereas at the stage of the initiation of proceedings this activity is shifted to the president of the court, who, as an authorized body in the light of the norm resulting from Art. 59 § 2 of the CPPO, can delegate his jurisdiction in this respect – by virtue of executive regulations – to another appointed judge or judicial body (chairman of a court division).

3. Summons and notifications as means of activating participants of court proceedings and their impact on the efficiency of the judiciary

The subject of this subchapter is the problem of summons and notifications made by procedural authorities to participants in court and preparatory proceedings, as well as the assessment of the correctness of these actions in the context of their impact on the efficiency of the judiciary. The studies carried out in this section relate to petty offence cases and are based on the analysis of the regulations of the Code of Procedure in cases of Petty Offences and the adequately formulated rules of the Code of Criminal Procedure[19].

[19] Act of June 7, 1997 – Code of Criminal Procedure (uniform text: Journal of Laws of 2021, item 534, as amended) – hereinafter: the CCP.

3.1. SUMMONS VERSUS NOTIFICATION

Summons and notifications are procedural means by which the procedural authority (court or pre-trial authority) calls or notifies a specific person about a procedural act that will take place at a specific place and time. However, summons and notifications differ in terms of their effects, so it should be remembered that they cannot be equated.

The notification is an informative and legal measure in which the authority informs a party or another participant in the proceedings about the intended activities in the course of the proceedings. The addressee of the notification is not obliged to participate in these activities; therefore it is also not allowed to use coercive measures against a person who, despite the notification, did not take part in a given activity. The purpose of the notification is only to inform. It should be added, however, that the authority is obliged to make such a notification. This is because, according to the procedural information principle guaranteed by the CPPO, the authorities conducting the petty offence proceedings are obliged to inform the parties about the course of the proceedings and about the actions taken in its course.

Whereas, a summons is a measure that includes the obligation of its addressee to behave in the manner specified therein, that is: to appear at a designated place and time or/and to perform any other requested action (testimony, presentation or issuance of the subject of inspection or material evidence) and a person who fails to fulfil the obligation specified in the summons may be subject to coercive measures in the form of: compulsory escorting by the police, confiscating items or imposing a disciplinary penalty, which in cases of petty offences ranges from PLN 50 to PLN 1,000, and in case of repeated failure to comply with the summons – from PLN 100 to PLN 1,500 (Article 49 § 1 of the CPPO).

3.2. THE MANNER AND TIME LIMIT FOR MAKING NOTIFICATIONS AND SUMMONS

Pursuant to Art. 65 § 1 of the CPPO the president of the court, referring the case to a hearing, orders notification of its place and date. This notification should be sent to the public prosecutor, the aggrieved party, the accused, as well as the attorney of the aggrieved party and the defence counsel of the accused, if appointed. Notification of a hearing (or other procedural act) – as mentioned – is addressed to persons whose participation in the case was not deemed necessary by the court. Whereas the summons is addressed to witnesses and may also be addressed to the defendant if the court considers his presence necessary. Then, when ordering notification of the place and date of the hearing (or session), it orders the defendant to appear in person, under pain of compulsory escorting (Article 65 § 3 of the CPPO).

It is important that the notification about the date of the hearing (or meeting) is given at least 7 days in advance. This means that at least 7 days should elapse between the date of delivery of the notice (summons) and the date of the hearing. In the event of failure to observe this deadline in relation to the accused or his defence counsel, the trial at their request submitted before the commencement of the trial is postponed (Article 353 of the CCP in conjunction with Article 69 of the CPPO).

As for the method of making summons and notifications, in accordance with Art. 65 § 2 of the CPPO the public prosecutor is notified of the hearing (and the session) by delivering to him the list of cases to be examined on a given day, so he is served with the so-called cause list[20]. The defendant as well as the aggrieved party and the auxiliary prosecutor are notified of the date of the first hearing by sending them a letter, which should be delivered by the postal operator designated within the meaning of the Postal Law Act, by registered mail with acknowledgment of receipt. The

[20] A. Mezglewski, *Wokanda jako źródło informacji o sprawie*, [in:] *Informacja w postępowaniach sądowych i administracyjnych*, P. Fajgielski, A. Tunia (eds.), Lublin 2018, pp. 77–88.

notification about the date of the first hearing sent to the accused shall be accompanied by a copy of the motion for punishment and an instruction on his rights and obligations (Article 67 § 1 and 2 of the CPPO).

Similarly, the defendant's defence counsel and the auxiliary prosecutor's representative are notified. However, it should be added that letters to litigants may also be delivered through an employee of the sending authority, and if necessary, by the Police (Article 131 § 1 of the CCP and Article 38 § 1 of the CPPO).

3.3. ASSESSMENT OF THE PROCEDURE FOR MAKING SUMMONS AND NOTIFICATIONS

When assessing the procedure for submitting summons or notifications to the parties by the authorities carrying out procedural activities, one should firstly attention to the requirements for keeping the deadline for delivering court documents, such as the form (manner) of their delivery. The effectiveness of certain procedural steps depends on the effective delivery of the summons or notifications. The summons (notification) is effective when the authority has evidence of its service in the case files. In case of the absence of such proof – the action should be postponed. This, in turn, extends the time of the proceedings, creates new obligations, and generates new costs. And considering the statute of limitations on petty offences, this raises concerns about the lack of a substantive resolution of the case within the statutory deadline, which may further affect the effectiveness of the judiciary bodies.

Therefore, it should be propounded that the authorities conducting the proceedings show greater diligence and predictability, so that when setting the date of the procedural action they take into account the time during which the summons (notification) may be effectively delivered, i.e., both the period in which the delivery will actually be sent the addressee and the period of so-called notification of this delivery.

When analysing the files of several court cases in which the criminal liability of an act was time-barred and as a result the proceedings

were discontinued, it was possible to notice cases of setting dates for a hearing or performing other procedural activities (apart from the hearing) without considering the time necessary to effectively notify the party about their date. There have also been cases of unjustified prolongation of the duration of proceedings of a given case, consisting in postponing subsequent dates of hearings without any reason or setting subsequent dates at an extremely distant time[21].

4. Disciplinary penalty and compulsory escorting as a tool for the mobilization of participants in court proceedings and an instrument to improve the efficiency of the judiciary

The subject of the subchapter is the issue of using disciplinary penalties and other coercive measures as tools for the mobilization of participants in court proceedings and for improving the effectiveness of the judiciary bodies. These instruments are intended to enforce from the proceedings' participants the procedural obligations incumbent on them, which fulfilment is necessary to achieve the goal set by the authority.

This research is focused on petty offences, in which, due to the short limitation period, failure to fulfil the procedural obligations of participants in the proceedings may not only result in delays in the efficient completion of the case but also constitute a violation of one of the rules characteristics of the offence proceedings, i.e., the principle of speed and procedural economy, and consequently may affect the efficiency of the judiciary.

[21] Such cases were recorded e.g.: in courts of appeal in Lublin, e.g: District Court in Kraśnik (file number II W 357/18), District Court Lublin-East (file number II W 75/20); courts of Rzeszów appeal, e.g.: District Court in Ropczyce (reference number II W 450/18), District Court in Dębica (reference number II W 1083/17), District Court in Rzeszów (reference number III Ka 222/20).

4.1. DISCIPLINARY PENALTY

The basic instrument for reacting by a judicial authority to a person's failure to meet the obligation to appear on summons or to perform another procedural obligation (handing over or presenting things) is a disciplinary penalty. This penalty is pecuniary. Its ruling is connected with imposing pecuniary ailments on a specific person. The code of procedure in cases of petty offences in Art. 49 § 1 provides that a disciplinary penalty may be imposed on a witness, expert, interpreter, specialist as well as a person who, being obliged to show or issue the subject of inspection or material evidence, refused to do it.

A disciplinary penalty may be imposed if a person:

a) did not appear at the summons of the authorized body, without justification,
b) wilfully left the place of the action before its completion without the permission of this authority,
c) unjustifiably refused to testify or perform the activities of an expert, interpreter, or specialist.

The Code, specifying the amount of this penalty, states that it may be imposed in the amount of PLN 50 to PLN 1000, and in the event of repeated failure to comply with the summons, in the amount of PLN 100 to PLN 1500. Therefore, the legislator introduces so-called scale (brackets) within the limits where the authority may impose this penalty. The amount of the penalty in the given case is left to the discretion of the authority, while the authority determining its amount generally takes into account the personal, family and property conditions of the offender and his earning capacity.

A person punished with a disciplinary penalty may apply (submit an application) for its annulment. The Code of Procedure in cases of Petty Offences provides for the possibility of waiving this penalty, if the punished person duly justifies the failure to fulfil his obligation i.e., his failure to appear on summons, arbitrary withdrawal from the place of the procedural act, refusal to testify or perform another obligation. Such justification should be submitted within 7 days from the date of delivery or announcement of the order imposing a disciplinary penalty. A motion to revoke this penalty should be

submitted to the authority that imposed it. After its submission, the authority assesses the circumstances for which the failure occurred, as well as whether the application was submitted by the authorized person within the statutory deadline. The disciplinary penalty is repealed, respectively, by the court or authority superior to the authority that imposed the penalty. The repeal is made by way of a decision. The aggrieved person is entitled to a complaint against the decision refusing to revoke the disciplinary penalty.

4.2. COMPULSORY ESCORTING

Compulsory escorting is a repressive measure, which application causes a temporary restriction of the freedom of movement of a person against whom a court order has been issued. It is used in conjunction with detention. The CPPO stipulates that the court (and during explanatory proceedings – the prosecutor) may order the detention of a person and their compulsory escorting if he or she did not appear at the summons without justification. It is therefore necessary to distinguish this measure of coercion (detention for the purpose of compulsory escorting) from the detention referred to in Art. 45 of the CPPO (i.e., capturing a person), which concerns arresting the perpetrator of a minor offence red-handed immediately after committing the act. The arrest and compulsory escorting are carried out by the police on the basis of an order of the court (or prosecutor[22]) and the compulsory escorting may be applied to a witness (regardless of the imposition of a disciplinary penalty) (Art. 50 § 1 of the CPPO) as well as to the accused whose presence at the trial (or the session) the court found necessary (Art. 65 § 3 of the CPPO). As a rule, the parties and their

[22] If explanatory activities are carried out by an authority other than the prosecutor, such an order is issued by the court competent to hear the case at the request of the authority carrying out these activities (Article 51 § 1 of the CPPO). See: T. Grzegorczyk, *Kodeks postępowania w sprawach o wykroczenia. Komentarz*, Lex 2012; P. Gensikowski, *Kodeks postępowania w sprawach o wykroczenia. Komentarz*, Warsaw 2016, Legalis.

representatives are informed about the date of the hearing, but they are not summoned[23].

4.3. PRACTICE WITHIN THE USE OF DISCIPLINARY PENALTIES AND COMPULSORY ESCORTING

Analysing the problem of the practical application of disciplinary penalties and compulsory escorting as a way of reacting by the authorities to failure to fulfil procedural obligations imposed on participants in the proceedings, several court cases were examined in which such tools (disciplinary penalties) were (or could have been) used. In some of the examined cases, the courts quite consistently used the solutions provided for in Art. 49 of the CPPO i.e., in situations of failure to appear at the summons of a witness without justification – they imposed disciplinary penalties[24]. The amount of the imposed disciplinary penalties ranged from PLN 300 to PLN 500 for failure to appear at the first summons and in one case – PLN 1,000 for failure to appear at the next summons. Moreover, in one case, the court ordered – apart from a disciplinary penalty – the compulsory escorting of a witness to the date of the hearing.

In 90% of the examined cases, the penalties were repealed by the court as a result of submitting a justification by the penalized. The circumstances for which the disciplinary penalty was repealed were generally justified by the performance of professional duties by the witness or sick leave. In one of the examined cases, the court enforced a disciplinary penalty, and in another, except the penalty, also a measure in the form of compulsory escorting.

Therefore, when assessing the impact of the use of coercive measures, and most of all disciplinary penalties, it should be stated that they constitute an effective instrument in enforcing the fulfilment of

[23] D. Świecki, *Metodyka pracy sędziego w sprawach o wykroczenia*, Warsaw 2012, Lex/el.

[24] Such cases were noted in cases of petty offences proceeded by SR Warszawa Praga-Północ (file reference number IV W 828/20), SR Kraków-Podgórze (reference number 1467/20), SR Lublin-Wschód (reference number II W 75/20).

procedural obligations by participants in court proceedings. However, it should be noted that it is not without significance that in recent years the number of disciplinary penalties in cases for petty offences has been significantly increased.

5. The procedural activity of the parties and their attorneys and its impact on the effectiveness of the judiciary

The subject of this subchapter is the issue concerning the role of litigants in criminal and petty offence proceedings and its assessment in terms of the proper fulfilment of their procedural obligations. In particular attention will be paid to the actual level of activity of individual entities participating in the trial, i.e., the public prosecutor (auxiliary) and the accused (defendant) as well as the activity of the court itself.

5.1. THE PRINCIPLE OF THE PRESUMPTION OF INNOCENCE AND ITS CONSEQUENCES IN TERMS OF THE PARTIES' PROCEDURAL ACTIVITY

In a criminal and petty offence trial, it is a rule that the prosecutor is the active party of the trial, and it is his responsibility to prove the guilt to the accused (defendant). For that purpose, he should actively participate in the trial, presenting and arguing his evidence for the circumstances which, in his opinion, justify attributing the guilt to the accused for the committed act. The prosecutor as an active party is therefore obliged to act in the trial. Whereas the accused (defendant) as a passive party has no such obligation. The above results from the provisions enacting the principle of the presumption of innocence of the accused (defendant) expressed in Art. 42 of the Constitution and in Art. 5 of the CCP, respectively adopted for the petty offence procedure by Art. 8 of the CPPO. In the light of these regulations, the accused (defendant) is considered innocent until proven guilty and confirmed by a final and binding judgment.

Moreover, irremovable doubts are resolved in favour of the accused (defendant). The accused (defendant) is under no obligation to prove his innocence. According to this principle (*in dubio pro reo*), the burden of proving rests on the prosecutor (public and auxiliary/private). It is the prosecutor who must prove his guilt. The accused has the right to fight the charges, which does not mean that he is completely passive in the trial. Pursuant to Art. 6 of the Code of Criminal Procedure and Art. 4 of the Code of Procedure in cases of Petty Offences the principle of the right to defence, he has the right to actively participate in the trial, combating the accusations and citing circumstances favourable to him, and in accordance with the principle of equality of the parties to the proceedings, he has the same legal means (as the prosecutor) in protecting his rights. Besides, the accused (defendant) may act alone in the trial or use the help of a defence lawyer, about which he should be instructed by the procedural authority. In a criminal trial, he can use the assistance of three defence lawyers (Article 77 of the CCP), while in a petty offence trial he has the right to use the assistance of one defence lawyer (Article 4 of the CPPO), who may be an advocate or legal advisor (Article 82 of the CCP, Article 24 of the CPPO). The defence lawyer may act only in favour of the accused (defendant) and his participation in the trial does not exclude the possibility of personal action in the trial of the accused himself (defendant) (Article 86 of the CCP, Article 24 § 2 of the CPPO). Whereas in the case of an auxiliary (private) prosecutor, an appointed attorney can act on his behalf and whose role is to protect the rights of this prosecutor.

5.2. THE INTENSITY OF THE PROCEDURAL ROLE OF THE PROSECUTOR AND THE ACCUSED (DEFENDANT) IN PRACTICE VERSUS THE LEGAL REALITY

The regulations laid down by the Polish legislator specifying the type (direction) and intensity of procedural actions of the prosecutor and the accused (defendant) – in practice (as shown by the research) – are often in opposition to the literal wording of these provisions. The fact that the prosecutor as an active party is to search, collect and

present evidence indicating the guilt of the perpetrator of the crime (offence) – in practice – often has little in common with his duties resulting from these regulations. This is particularly evident in the context of proceedings in petty offences, where from the very beginning – that is already within preliminary rulings – the activity of the public prosecutor is basically limited to drawing up and submitting to the court a motion for punishment and attaching illusory evidence to prove to guilt of the offender. Above all, it is wrong practice that these motions are not substantiated. Unfortunately, this requirement does not arise from the regulations of the CPPO – which should be regarded as a significant drawback of the petty offence procedure – considering that the legislator, among the formal elements of the motion for punishment, which is submitted by the public prosecutor listed in Art. 57 § 2 and 3 of the CPPO, requires, e.g., providing data on the material, family and personal conditions of the perpetrator of the offence, which are undoubtedly superfluous from the point of view of the person's responsibility for the alleged act. The authorities conducting explanatory activities focus on collecting those personal data instead of presenting the arguments supporting this motion.

At the judicial stage, the limitations of the public prosecutor's procedural activity are manifested in his failure to participate in the trial dates set by the court. As the research (conducted in petty offence cases) shows, the public prosecutor is usually present at the first hearing, during which his activity consists in reading the motion for punishment – without arguing the articulation and evidence theses for the circumstances supporting the commission of the act by the accused, and is present at the hearing, during which the court proceedings are closed and where his activity consists in delivering a laconic closing speech, which often comes down to uttering one sentence that the prosecutor is applying for punishment of the accused and awarding him a specific penalty. It is very rare in petty offence cases that the public prosecutor participates in the evidentiary proceedings, submits evidence motions, indicates evidence theses and circumstances justifying the examination of specific evidence. In practice, the materials from explanatory activities or preparatory proceedings attached by him to the motion for punishment are the only means of evidence

that are subject to the court's assessment. The prosecutor's activity in this field is very low.

Whereas the conducted research allowed observing that the trial activity – the burden of proof – rests with the accused and his defence lawyer. That passive party in the proceedings is obliged to seek arguments for the innocence of the accused to demonstrate this innocence. Each motion for evidence of defence requires justification. Any absence at the date of the trial (in a situation where the defendant is summoned) requires an excuse. The courts are extremely vigilant over this, not expecting adequate behaviour from the prosecutors. The above motions regarding the transferring of the burden of procedural (evidence) activity from the accusation to the defence have been observed in many petty offence cases[25].

Therefore, having the analyses made in this subchapter, first *de lege ferenda* rules are proposed for appropriate changes to be made in the regulations specifying the formal requirements of the motion for punishment in the case of a petty offence consisting in supplementing the provision of Art. 57 § 2 of the CPPO with the requirement to justify this motion, both when it is submitted by the public prosecutor and the aggrieved party.

6. Participation of the audience and representatives of the mass media in court proceedings as an element determining the effectiveness of the judiciary

The subject of this subchapter is the issue concerning participation of the audience and representatives of the mass media in the court proceedings and the assessment of the impact of their presence in the courtroom on the quality of the case proceeded by the court

[25] For example: the case before the District Court in Ropczyce (file number II W 450/18), the case before the DC in Dębica (file number II W 1083/17), the case before the DC Warszawa-Praga Północ (file number IV W 828/20); case before the District Court of Kraków-Krowodrza (reference number II W 2804/17); the case before the DC in Nidzica (case no. II W 319/17), the case before the DC in Kraśnik (case no. II W 357/18); case before the DC in Radom (file reference number II W 168/19).

and, consequently, on the effectiveness of activity of the judicial authorities. The research will be carried out at the level of procedural criminal law and the law of petty offences.

6.1. THE PRINCIPLE OF OPENNESS (THE PUBLIC) IN COURT PROCEEDINGS

The regulations of Polish law determine the principle of openness of both criminal and petty offence proceedings. This principle – also known as the principle of the public – is grounded primarily in Art. 45 sec. 1 of the Constitution, which states that everyone has the right to a fair and public hearing of a case. It is also included in the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6 sec.1) and in the International Covenant on Civil and Political Rights (Article 14 sec.1)[26], which emphasize the right of everyone to a fair and public hearing. This principle is also guaranteed at the statutory level. The provision of Art. 355 of the Code of Criminal Procedure stipulates that "the trial is held in public" and the Code of Procedure in cases of Petty Offences in Art. 70 § 1 provides that "the hearing is held openly and orally". This is so called: external openness, which means that everyone has the right to participate in a court hearing as long as it has not been excluded from openness. The legislator provides for situations in which the court may limit the implementation of the audience principle by excluding the public from all or part of the hearing.

This may occur when the public hearing could:

1) offend good manners,
2) disturb the public peace, or
3) when important private interest requires it.

Moreover, the court shall exclude the public from the hearing in whole or in part, when the law states so. It refers to situations where the interviewed person is required to maintain a specific secrecy

[26] Journal of Laws of 1977, No. 38, item 167.

(i.e., to keep secret information classified as "secret" or "top secret", "restricted" or "confidential")[27].

The public hearing is excluded *ex officio* or at the request of a party or another person who raises a legitimate demand to protect their legal interest, public peace, or good manners (e.g., a witness). It is up to the court to verify the above premises, and the court is obliged to be impartial in this respect. In practice, however, there are cases of the lack of objectivity of the court, which, without providing any grounds justifying the issuance of its (non-actionable) decision, excluded the public hearing due to the private interest of the prosecuting party and despite the opposite position of the defendant, who demanded that the hearing should be kept open[28].

However, in case of exclusion of a hearing openness, certain partial elements of its public are realized[29]. At a trial held with exclusion of the public there may be present – apart from the parties, their defence lawyers, attorneys, statutory representatives, and personal evidence sources – also so-called "persons of trust", that is, one person appointed by each of the parties (Article 70 § 3 of the CPPO)[30]. In addition, the court may allow other (individual) persons to be present at a hearing held *in camera* (e.g., court trainees). Therefore,

[27] The competent superior body releases the obligation to keep the first two secrets, for the next two it is released by the court, and unless specific laws provide otherwise (Article 41 § 2 and 3 of the CPPO). This exemption does not mean that the secret may be disclosed to an unlimited group of people, but only for the purposes of a specific proceeding. See: T. Grzegorczyk, *Kodeks postępowania sprawach o wykroczenia. Komentarz*, Warszawa 2012, Lex/el.

[28] Such a situation took place in the District Court in Wałcz, where a road traffic offence proceeding was pending, the background of which was a long-standing neighbour dispute between the parties to the proceedings. The defendant was charged with committing an act consisting in the fact that while driving a car, he repeatedly slowed down and accelerated without just cause, thus obstructing the movement of the car driven by the victim. The court ruled out the publicity of this hearing, previously not allowing media representatives to participate in it. See: A. Mezglewski, *Decyzje sądów nie są transparentne*, available at: www.prawonadrodze.org.pl [accessed on: 7 December 2021].

[29] Complete secrecy of a trial would be impractical, as would its absolute publicity. S. Waltoś, *Proces karny. Zarys systemu*, Warsaw 2020, p. 312.

[30] This does not apply to cases where there is a fear of disclosing information classified as "secret" or "top secret".

the exclusion (narrowing) of the principle of external openness boils down to allowing only a specific group of people with a legal interest in the resolution of a given case or directly interested in it to participate in a hearing due to a specific factual interest. Such persons should, however, be warned by the court about the obligation to keep secret the circumstances disclosed at a hearing conducted as non-public, under pain of criminal liability (Article 362 of the CCP in connection with Article 70 § 5 of the CPPO)[31].

Apart from the above-mentioned cases of excluding the public – hearings in petty offence cases – are of a public nature, which means that the participation of the public in them should not be limited in any way. Everyone has the right to enter the courtroom, except for armed persons, minors, and those whose condition is inconsistent with the dignity of the court. However, the presiding judge may allow minors and persons obliged to carry arms to participate in the trial (Article 356 of the CCP). The code of procedure in petty offence cases did not acquire the provision of Art. 356 of the CCP which sets out these rules but however it would be difficult to imagine that these rules would not apply in petty offence cases[32]. Regardless of this, it is necessary to postulate *de lege ferenda* introduction of the provision acquiring the Art. 356 of the CCP into the CPPO since also in petty offence cases it is necessary to maintain the above standards resulting from the CCP, which implementation will allow for a more complete fulfilment of the guaranteed function of the law of petty offences.

6.2. CONDITIONS FOR THE PARTICIPATION OF THE PUBLIC AND REPRESENTATIVES OF THE MEDIA IN COURT PROCEEDINGS

Pursuant to Art. 71 § 1 of the CPPO, the court (chairman) commencing the examination of the petty offence case makes so-called personal balance sheet, that is, it checks the presence of persons

[31] T. Grzegorczyk, *Kodeks postępowania w sprawach o wykroczenia,* Lex/el.
[32] A. Skowron, *Kodeks postępowania w sprawach o wykroczenia. Komentarz*, Warsaw 2010, Lex/el.

summoned and notified of the date of the hearing. Their identity and the nature of their participation in the case are checked. The court requires the persons summoned and notified to provide their name and surname and to present an identity document. These data are registered in the record of the hearing. Regarding persons wishing to participate in the hearing as an audience, the task of the court is only to establish the nature of their presence. This is related to the need to determine whether a specific person will not appear in the case as a witness, because in such a case he cannot be present in the courtroom until he is questioned (about which the court should instruct him). Determining the nature of the presence of people acting as an audience does not require the court to obtain their personal data and register these data in the record of the hearing. In practice, however, the courts very often (in more than half of the analysed cases) do not stop at obtaining information on the nature of the participation of a specific person in the hearing as an audience but demand that personal data should be provided i.e., the name and surname orally or a document confirming identity (so the courts check identity of such persons). It is also quite common practice to request indication of the purpose of presence at a hearing[33]. Meanwhile, such actions have no legal basis.

Also, representatives of the mass media can participate in a public hearing. Pursuant to Art. 357 of the CCP (which for the purposes of the petty offence procedure acquired the Art. 70 § 5 of the CPPO), representatives of the media can record sound and vision from the course of the trial with the use of equipment (§ 1). For this purpose, a motion for a permit for this registration must be submitted to the court, and the court cannot refuse to grant it. It results from the literal wording of the currently binding Art. 357 § 1 of the CCP, which is "the court permits" – and not "the court may permit" as this

[33] Such a case occurred for example, in the District Court in Kościan, where the chairwoman in charge of the case made the participation of the audience dependent on the provision of personal data by them in the form of their first and last names or otherwise leaving the courtroom. See A. Tunia, *Przetwarzanie danych osobowych publiczności w postępowaniu w sprawach o wykroczenia*, [in:] *Informacja w postępowaniach sądowych i administracyjnych*, P. Fajgielski, A. Tunia (eds.), Lublin 2018, pp. 89–99.

provision sounded before its amendment made in 2016[34]. Hence, the principle is now the unconditional possibility for media representatives to record the course of the trial by means of video and sound recording devices. In a situation where the case is examined openly, it is not possible to refuse a permission for the media representatives to record video and sound. This is the structure of Art. 357 § 1 of the CCP, which indicates that no circumstances have been foreseen that would preclude the court from granting permission to register the course of a hearing by representatives of the mass media[35]. However, the court may determine the conditions for the participation of representatives of the mass media in the hearing. It may also, for technical and organizational reasons, limit the number of representatives of the media at the hearing, in a situation where their large number would hinder the course of the hearing (Article 357 § 2 and 3 of the CCP).

6.3. ASSESSMENT OF THE IMPACT OF THE PRESENCE OF THE AUDIENCE AND THE MEDIA IN THE TRIAL PROCEDURE ON THE QUALITY OF COURT OPERATION

The presence of third parties at the hearing i.e., the audience is becoming more and more common. Undoubtedly, this contributes to the quality of the hearings and there is no doubt that participation of the public in the hearings, especially representatives of the mass media, is an element that motivates the court to implement procedural principles more diligently, including seeking to discover the objective truth and thus to implement the most important principle of each trial. The analysis of cases (i.e., the court cases examined in terms of the implementation of the principle of open trial) allows us to conclude that, in most cases, the participation

[34] See Art. 1 item 4 of the Act of June 10, 2016 amending the Act – Code of Criminal Procedure, the Act on the Professions of Doctor and Dentist and the Act on Patient Rights and Patient's Rights Ombudsman (Journal of Laws of 2016, item 1070).

[35] S. Brzozowski, *Rejestracja rozprawy głównej przez przedstawicieli środków masowego przekazu* (*art. 357 k.p.k.*), "Palestra" 2018, No. 3 (on-line edition).

of media representatives in the case resulted in an increase in the court's activity and commitment towards careful and fair proceeding of the case. In the studied cases it was manifested in the substantive preparation of the judge for the trial (reviewing the files), not dismissing the motions for evidence submitted by the parties (mainly the accused and his defence counsel) and then their substantive examination or the evidentiary activity of the court itself aimed at excluding or confirming the circumstances of the offence (crime) committed by a given person[36]. An example of an increase in the activity of a court (judge) in the implementation of its procedural tasks were, for example, situations in which only after reporting participation of the media in a case months-long evidence motions were considered[37] or the adversarial nature of the proceedings had a chance to be implemented[38].

7. Statute of limitations as an antithesis of effective operation of the judiciary and the influence of the human factor on this phenomenon

The subject of this subchapter is the institution of limitation in law and the assessment of its impact on the effectiveness of courts in Poland. We will mainly refer to the statute of limitations in the petty offence law and the importance of this phenomenon for the effectiveness of the courts dealing with petty offences.

7.1. TERMINOLOGICAL ISSUES

The word "limitation" comes from the adjective "limited", which – according to the *Dictionary of the Polish language* – means "one

[36] E.g., in a case conducted by: the District Court for Kraków-Podgórze (file No. II W 1467/20); District Court Lublin-West (file No. IV W 818/20); District Court in Radzyń Podlaski (reference number II K 577/20).

[37] See e.g.: the case conducted by District Court in Ropczyce (reference number II W 450/18).

[38] District Court in Radzyn Podlaski (file ref. No. II K 577/20).

that has lost its validity", "one that has expired due to the passage of time"[39]. The passage of time is therefore the basic determinant in the formulation of the concept of limitation. It is related to the arrival of a specific "term", which in turn is understood as a "future and certain event", which occurrence is associated with specific legal consequences.

Limitation is an institution appropriate to many areas of law including civil, administrative, criminal, and petty offence law. Generally speaking, "statute of limitations in law" means that after the expiry of the time specified in the act, it is not possible to implement the order or prohibition indicated in it or to implement certain rights and obligations by legal entities resulting from the applicable legal regulations.

Limitation is an institution derived from civil law and in this law, it means a change in the legal relationship consisting in limiting the possibility of pursuing a claim, if it was not implemented within the time specified by the act[40]. In criminal law and in the law of petty offences, the statute of limitations is a legal principle, which means that after the expiry of the time specified in the act the criminality of the prohibited act or the enforceability of the sentence is revoked[41]. Limitation, therefore, means that it is not possible to hold the perpetrator of a crime or petty offence liable, and it is not possible to execute the sentence imposed on him. From the perspective of procedural law, the statute of limitations on criminality means that the prosecution and adjudication in a case for a prohibited act is time-barred.

---

[39] *Słownik języka polskiego PWN*, avalable at: www.slownik.pwn.pl [accessed on: 7 December 2021].

[40] See e.g.: J. Kuźmicka-Sulikowska, *Idea przedawnienia i jej realizacji w polskim kodeksie cywilnym*, Wrocław 2015; J. Ignatowicz, K. Stefaniuk, A. Wolter, *Prawo cywilne. Zarys części ogólnej*, Warsaw 2020, pp. 456 and next.

[41] See e.g: *Kodeks karny. Komentarz*, T. Bojarski (ed.), Warszawa 2009, p. 184; L. Gardocki, *Prawo karne*, Warsaw 2008, pp. 208 –209; K. Marszał, *Przedawnienie w prawie karnym*, Warsaw 1972, p. 13; *Kodeks wykroczeń, Komentarz aktualizowany*, T. Bojarski (ed.), Warsaw 2021, Lex/el; *Kodeks wykroczeń. Komentarz*, M. Mozgawa (ed.), Warsaw 2009, Lex/el.

7.2. LIMITATION IN THE LAW OF PETTY OFFENCES

The Polish Code of Petty Offences in Art. 45 § 1 stipulates that the punishability of an offence ceases if one year has elapsed since its commission. However, if the proceedings were initiated during this period, the punishability of the offence ceases after 2 years from the end of this period. It means that if no proceedings are instituted for the offence within one year from the date of committing the offence, its punishability ceases after one year from the date on which it was committed. Whereas, if court proceedings are instituted during this year, the penality for the act is extended by 2 years. It means *de facto* that the statute of limitations for the criminality of this act in the event of initiation of proceedings will take place after 3 years from the date of its commission. Amendment of Art. 45 § 1, made by the Act of 2017[42] caused the extension of the limitation period in the law of petty offences. The current wording of this regulation indicates that the additional two-year period runs from the end of the annual period[43].

For the assessment of the moment of limitation of the punishability of the offence it is important whether proceedings for this act have been initiated. It is about the initiation of court proceedings, not preliminary ruling proceedings, which in the event of a petty offence are investigative activities carried out by a preparatory body (law enforcement authority).

It should be clarified that the proceedings in petty offence cases are initiated not at the moment of submitting the motion for punishing the perpetrator to the court, and not even at the moment of initiating the preparatory proceedings (since the proceedings are not formal and are not initiated by any formal decision of the preparatory body) but upon issuing by the president of the court to which the motion for punishment has been submitted, an order to initiate proceedings for an offence against a designated person and to refer

[42] Act of 23 March 2017 amending the Act – Penal Code and certain other acts (Journal of Laws of 2017, item 966).

[43] See: Z. Leciak, *Przedawnienie orzekania, wykonania kary i zatarcie skazania*, [in:] P. Danikuk (ed.), *Kodeks wykroczeń. Komentarz*, Warsaw 2019, p. 258.

the case to a hearing or meeting. It is a different regulation than in the case when a crime has been committed, where the decision to initiate the investigation or prosecution is the document initiating the proceedings in the case.

The statute of limitations in the law of petty offences also applies to the statute of limitations for the execution of a penalty. Article 45 § 3 of the Code of Petty Offences stipulates that the imposed penalty (or penal measure) is not enforceable if 3 years have elapsed from the date the decision became final and binding[44]. This means that if the penalty has been imposed and the execution stage has not yet taken place, the expiry of the 3-year limitation period causes that the perpetrator of the offence will not be subjected to this penalty. Whereas in the case of serving a sentence, the statute of limitations results in an order to stop serving it. It is worth adding that the penalties in the law of petty offences are arrest, restriction of liberty, fine and reprimand (Article 18 of the CPO). So, the first is an isolation penalty and consists in placing a case of an offence in a prison, which may be for a period of 5 to 30 days (Article 19 of the CPO). While the remaining ones are of a non-isolating nature (Articles 20, 24, and 36 of the CPO).

7.3. IMPACT OF LIMITATION OF THE PUNISHABILITY OF AN OFFENCE ON THE EFFICIENCY OF THE COURTS

The limitation periods specified by the petty offence legislator are to serve, *inter alia*, implementation of the guaranteed function of the law of petty offences. It shows that after a certain period, the legislator guarantees entities that they will not be held responsible for a specific act. But also, on the other hand it guarantees that the perpetrator of the act, who by his behaviour violated the applicable legal order, will bear responsibility for it.

When assessing the effectiveness of the courts' operation in terms of the regulations concerning the statute of limitations on the punishment of offences, firstly it should be pointed out that the

[44] See *Kodeks wykroczeń*, T. Bojarski (ed.), Lex/el.

rule specifying the limitation period for the punishability of offences (Article 45 § 1 of the CPO) – as noted above – was changed under the amendment of the CPO made by the Act of March 23, 2017. The legislator extended the statute of limitations for criminal offences – with regard to the initiation of proceedings – from 2 years to 3 years. This extension was to contribute to increasing the efficiency of the judiciary bodies, as it was in fact aimed at ensuring that more cases would end with the issuance of a final decision. In practice, however, this solution did not have the same effect as assumed by the legislator because although the limitation period was extended, the judicial pragmatics did not change. The operation of many Polish courts dealing with petty offence cases (i.e., deeds of a minor nature) is characterized by great slowness of action.

Summing up, therefore, it should be stated that although the limitation period is to protect the effectiveness of the justice system, in practice it is the antithesis of this effectiveness. This phenomenon is undoubtedly influenced by the title human factor i.e., both the court (judges) dealing with petty offence cases and the litigants. On the part of the court, the accusation of ineffectiveness may be raised due to excessive "delaying" the examination of the case, setting very distant next dates of the trial, failure to execute evidence motions and failure to consider motions for discontinuation of proceedings due to negative procedural premises. The latter two behaviours enforce appropriate counter-reactions on the defendant side, which extends the trial. This practice is therefore a clear antithesis of the efficient operation of the courts.

8. Summary and *de lege ferenda* conclusions

Undoubtedly, the effectiveness of the judiciary's operation depends on the active role of the human factor in it. This human factor, manifesting itself in the actions of both the judicial authorities (the president of the court, courts/judges) and the litigants, may significantly stimulate the achievement of a fair and issued without undue delay ruling ending the court case.

The research undertaken in this chapter has been focused on cases conducted by criminal and petty offence courts. In these cases, this human factor consists – apart from the court (judges) – of the public prosecutor, auxiliary (private) and the accused (defendant) as well as their trial representatives. It is their active or passive role that may affect the efficiency of the court case.

In the light of the analyses of legal regulations, this activity should equally rest on the criminal court and the trial parties. The court should efficiently organize its work in connection with the preparation of the hearing, conducting the evidentiary proceedings and passing the judgment. Unacceptable are situations of "delaying" cases for minor acts, such as petty offences, by setting very distant subsequent dates of the trial or no court preparation (ignorance of the files). The parties: the public prosecutor and the accused (defendant) – building on procedural equality of the parties – should exercise statutory rights and obligations, while the public prosecutor should always have a more active role as an active party to the trial, whose task is to prove that the accused (defendant) is guilty of the alleged act. This trail should also be followed by the auxiliary (private) prosecutor. The accused himself (defendant) should only take actions aimed at protecting him against unfounded accusation, acting in the case on his own or with the help of his defence counsel.

Regarding *de lege ferenda* postulates, a proposal is made to amend the regulations specifying the formal requirements of a motion for punishment in a petty offence case consisting in supplementing the provision of Art. 57 § 2 of the CPPO with the requirement to justify this motion, both when it is submitted by the public prosecutor and the aggrieved party. Its aim is to activate the role of the prosecuting party to prove the legitimacy of motions for punishment submitted to the court, and as a result to ensure the effectiveness of the trial. Whereas to increase the guaranteed function of the law of petty offences, there is de *lege ferenda* proposal to implement into the CPPO the provision acquiring the Art. 356 of the CCP. Moreover, to increase the efficiency of the courts' operation, it should be postulated that the authorities conducting the proceedings should show greater diligence and predictability when setting the dates of procedural activities (hearings, meetings) to take into account the

time during which the summons (notification) may be effectively served on the parties and their representatives.

REFERENCES

Bojarski T. (ed.), Michalska-Warias A., Piórkowska-Flieger J., Szwarczyk M., *Kodeks karny. Komentarz*, Warsaw 2009.

Brzozowski S., *Rejestracja rozprawy głównej przez przedstawicieli środków masowego przekazu* (*art. 357 k.p.k.*), "Palestra" 2018, No. 3, available at: https://palestra.pl/pl/czasopismo/wydanie/3-2018/artykul/rejestracja-rozprawy-glownej-przez--przedstawicieli-srodkow-masowego-przekazu-art.-357-k.p.k [accessed on: 31 December 2021].

Budyn-Kulik M., Kozłowska-Kalisz P., Kulik M., Mozgawa M., *Kodeks wykroczeń. Komentarz*, Warsaw 2009.

Gardocki L., *Prawo karne*, Warsaw 2008.

Grzegorczyk T., *Kodeks postępowania w sprawach o wykroczenia. Komentarz*, Warsaw 2012.

Ignatowicz J., Stefaniuk K., Wolter A., *Prawo cywilne. Zarys części ogólnej*, Warsaw 2002.

Kuźmicka-Sulikowska J., *Idea przedawnienia i jej realizacji w polskim kodeksie cywilnym*, Wrocław 2015.

Leciak Z., *Przedawnienie orzekania, wykonania kary i zatarcie skazania*, [in:] *Kodeks wykroczeń. Komentarz*, Danikuk P. (ed.), Warsaw 2019.

Marek-Ossowska A., Marek A., *Prawo wykroczeń* (*materialne i procesowe*), Warsaw 2019.

Marszał K., *Przedawnienie w prawie karnym*, Warsaw 1972.

Mezglewski A., *Decyzje sądów nie są transparentne*, available at: www.prawonadrodze.org.pl. [accessed on: 31 December 2021].

Mezglewski A., *Wokanda jako źródło informacji o sprawie*, [in:] *Informacja w postępowaniach sądowych i administracyjnych*, Fajgielski P., Tunia A. (eds.), Lublin 2018.

Skowron A., *Kodeks postępowania w sprawach o wykroczenia. Komentarz*, Warsaw 2010.

Skwarczyński H., *Glosa to the decision of the Supreme Court of March 1*, 2004, file ref. V KK 385/03, OSNKW 2004, No. 6, item 62.

Stefański R.A., *Public Prosecutor in misdemeanor cases*, "Prokuratura i Prawo" 2002, No. 1.

Świecki D., *Metodyka pracy sędziego w sprawach o wykroczenia*, Warsaw 2012.

Tunia A., *Przesłuchanie w trybie art. 54 § 6 of CPPO*, [in:] *Prawo dowodowe w postępowaniu sprawach o wykroczenia w ruchu drogowym*, Mezglewski A., Skwarzyński M. (eds.), Lublin 2018.

Tunia A., *Przetwarzanie danych osobowych publiczności w postępowaniu w sprawach o wykroczenia*, [in:] *Informacja w postępowaniach sądowych i administracyjnych*, Fajgielski P., Tunia A. (eds.), Lublin 2018.

Tunia A., *Reakcja organu kontroli ruchu drogowego na wykroczenie*, [in:] *Ruch drogowy – ochrona danych osobowych, kontrola, prawnokarne następstwa*, Mezglewski A., Tunia A., Skwarzyński M. (eds.), Lublin 2015.

Tunia A., *Stosowanie środków niepenalnych jako sposób reagowania na wykroczenia*, "Studia Prawnicze KUL" 2020, vol. 3.

Waltoś S., *Proces karny. Zarys systemu*, Warsaw 2020.

DR KATARZYNA ZOMBORY
University of Miskolc – Central European Academy

The right to an effective remedy: a key element for ensuring the effectiveness of the ECHR human rights system – the example of Poland and Hungary

1. Introduction

The right to an effective remedy, albeit not a 'celebrity' among the human rights, is nevertheless one of the most important guarantees within the European human rights system. Simply put, it secures the existence of an effective remedy before *national authorities* to everyone whose rights and freedoms guaranteed in the European Convention on Human Rights (ECHR)[1] have been violated. Along with the obligation of states parties to respect human rights, and their obligation to execute judgements of the European Court of Human Rights (ECtHR), the right to an effective remedy is one of the key elements designed to ensure the practical effectiveness of the human rights protection system based upon the ECHR. It gives effect to the principle of subsidiarity, which requires that the rights secured in the ECHR be protected in the first place at national level and applied by national authorities, before individuals may have recourse to the ECtHR. As the Council of Europe's (CoE)

[1] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR), adopted under the auspices of Council of Europe in Rome on 4 November 1950, came into force on 3 September 1953.

Committee of Ministers has pointed out, the availability of effective domestic remedies is particularly important within the context of an ever-increasing number of applications which the ECtHR is confronted with, and which jeopardises the long-term effectiveness of the system[2].

In the present chapter, the right to an effective remedy is examined first from the perspective of the ECHR framework, and further on within a national context. Thus, the first part of this chapter outlines the meaning and the scope of application of the right to an effective remedy under the ECHR. The second part focuses on the implementation of the right to an effective remedy in Hungary and in Poland, with particular regard to the remedies against excessive length of proceedings. The ECtHR's recent case law concerning Poland and Hungary illustrates the continuing dialogue between the CoE institutions and the national authorities, with the view of strengthening the role of the right to an effective remedy and ensuring the long-term effectiveness of the entire ECHR machinery.

2. The right to an effective remedy under ECHR

2.1. THE MEANING OF AN *EFFECTIVE REMEDY*

The right to an effective remedy is laid down in Article 13 ECHR, which states that "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

The ECHR does not provide for a definition of a 'remedy' or an 'effective remedy'. According to Shelton, the term "remedies" embraces two different aspects, the first being procedural, and the

[2] Recommendation Rec(2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies, adopted on 12 May 2004, Appendix, para. 3. See also: Recommendation CM/Rec(2010)3 of the Committee of Ministers to member states on effective remedies for excessive length of proceedings, adopted on 24 February 2010.

other substantial[3]. In the procedural sense, remedies are processes by which arguable claims of human rights are heard and decided, while the substantial meaning of "remedies" refers to the outcome of such proceedings, and the relief afforded to the claimant. The ECtHR referred to both procedural and substantive aspect when it clarified the meaning of the right to effective remedy under the ECHR:

> "Article 13 requires that where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority *in order both to have his claim decided and, if appropriate, to obtain redress*"[4].

It has been reiterated numerous times in the ECtHR's case law that the effectiveness of a domestic remedy does not require a favourable outcome for the applicant. According to the ECtHR, the word "remedy" within the meaning of Article 13 does not mean a remedy which is bound to succeed, but simply an accessible remedy before an authority competent to examine the merits of a complaint[5]. The effectiveness of a remedy manifests itself in the sense of preventing the alleged violation of law or its continuation, or in providing adequate redress for any violation that had already occurred[6].

As the ECtHR has explained repeatedly, Article 13 provides for a subjective procedural right to enforce at the national level of the substance of the rights and freedoms set out in the ECHR, in whatever form they might be secured in the domestic legal order[7]. It gives a direct expression to the states' obligation to protect human

---

[3] D. Shelton, *Remedies in International Human Rights Law*, Oxford 2015, p. 7.

[4] See e.g.: ECtHR, Case *Klass and others v. Germany*, judgement of 6 September 1978, Application No. 5029/71, para. 64.

[5] ECtHR, Case *Derda v. Poland*, judgement of 1 June 2010, Application No. 58154/08, para. 58.

[6] See e.g.: ECtHR, Case *Sürmeli v. Germany*, judgement of 8 June 2006, Application No. 75529/01, para. 99.

[7] See e.g.: ECtHR, Case *Rotaru v. Romania*, judgement of 4 May 2000, Application No. 28341/95, para. 67; ECHR, Case *Kudła v. Poland*, judgement of 26 October 2000, Application No. 30210/96, para. 157.

rights primarily within their own legal systems, which stems from Article 1 ECHR and the principle of subsidiarity. The subsidiary character of the ECHR human rights framework is reflected not only in Article 13 and Article 1 ECHR, but also in Article 35 para. 1 ECHR, which sets out the rule on exhaustion of domestic remedies among the admissibility criteria for a claim to be lodged before the ECtHR[8]. It is based on the assumption that there is an effective domestic remedy available in respect of the alleged breach of the ECHR rights[9]. If Article 13 does not have full application, individuals will systematically be compelled to refer to the ECtHR complaints that would otherwise have to be addressed within the national legal system. In further perspective this could weaken the functioning of the entire mechanism of human rights protection set up by the ECHR, on both national and international level[10].

Although the role of the right to an effective remedy in the entire European human rights protection system cannot be underestimated, Article 13 ECHR did not receive much attention from the conventional bodies in their early case law. It was considered to be "the most obscure provision' of the ECHR[11]. The European Commission on Human Rights and the ECtHR would often refrain from examining the case under Article 13 if they had found a violation under other provisions of the ECHR, notably under Article 6, providing for the right to a fair trial[12]. Over the years, however, the

[8] The purpose of Article 35 para. 1 is to afford the states the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the ECtHR, see: ECtHR, Case *Selmouni v. France*, judgement of 38 July 1999, Application No. 25803/94, para. 74.

[9] See e.g.: *Kudła v. Poland*, para. 152.

[10] See e.g.: *Kudła v. Poland,* para. 155; ECtHR, Case *McFarlane v. Ireland*, judgement of 10 September 2010, Application No. 31333/06, para. 112.

[11] C. Teleki, *Due Process and Fair Trial in EU Competition Law*, Leiden–Boston 2021, p. 279.

[12] See e.g.: ECtHR, Case *Airey v. Ireland*, judgement of 9 October 1979, Application No. 6289/73. The Commission was of the opinion that, in view of its conclusion concerning Article 6 para. 1, there was no need for it to consider the application under Article 13. Also the ECtHR held that there was a breach of Article 6 para. 1 ECHR, taken alone, and that it was not necessary to also examine the case under Article 13.

ECtHR has changed its approach to recognize the autonomous importance of the right to an effective remedy laid down in Article 13 ECHR. The landmark judgement that brought a sea change was issued by ECtHR in 2000 in the case *Kudła v. Poland*, in which the ECtHR recognized that the right to an effective remedy under Article 13 ECHR is separate from the reasonable time requirement under Article 6 ECHR[13]. By re-interpreting the relation between Article 6 para. 1 and Article 13 ECHR, the ECtHR highlighted the obligation of the states parties to establish an effective remedy within the meaning of Article 13 against excessive length of proceedings. As Kuijer noted, the 'upgrading' of Article 13 ECHR in the case law of ECtHR was a direct result of the increasing number of cases related to excessive delays[14]. Indeed, according to the CoE's Committee of Ministers, the excessive length of proceedings has for years been the most common issue raised in applications to the ECtHR[15]. It seems that the ECtHR consequently attempts to preserve its efficiency and forestall the collapse of the ECHR legal order by enforcing the role

[13] In *Kudła v. Poland* the ECtHR found a violation of Article 6 para. 1 of the ECHR on account of excessive lenght of proceedings, and of Article 13 of the ECHR on account of the absence of domestic remedy against such lenght. The proceedings in Mr Kudła's case lasted over nine years, including seven years and five months from the date of Poland's recognition of the right of petition. During that period the applicant was several times detained on remand, released and arrested, while showing persistent suicidal tendencies. Throughout the years the proceedings in the applicant's case were heard by several courts, the cassation appeal being still pending before the Supreme Court at the time the ECtHR was hearing the case. In *Kudła v. Poland* the ECtHR recognized that the violation of Article 6 concerns the length of proceedings, this being a separate issue from the question of the availability of an effective remedy to complain about such length.

[14] M. Kuijer, *The Right to a Fair Trial and the Council of Europe's Efforts to Ensure Effective Remedies on a Domestic Level for Excessively Lengthy Proceedings*, "Human Rights Law Review", 13, No. 4 (2013), p. 786.

[15] Recommendation CM/Rec(2010)3 of the Committee of Ministers to member states on effective remedies for excessive length of proceedings, 24 February 2010. To use the ECtHR's own words, the reason it has been led to rule on so many length-of-proceedings cases is because certain state-parties to the ECHR have for years failed to comply with the 'reasonable time' requirement and have not provided a domestic remedy for this type of complaints, see: ECtHR, Case *Scordino v. Italy* (*No.1*), judgement of 29 March 2006, Application No. 36813/97, para. 174.

of Article 13, especially in relation to remedies against unreasonable length of proceedings[16].

At this point the Polish and Hungarian translation of the term "the right to an effective remedy" deserves a brief comment. Both the Polish expression *prawo do skutecznego* środka *odwoławczego*, and the Hungarian term *jogorvoslathoz való jog* can be interpreted twofold. On the one hand, these expressions translate as the right to assert a claim and enforce rights. However, they may as well refer to the right to challenge a court decision or an administrative decision before a higher authority (right to a second-instance judgement). The right to assert a claim corresponds better to the idea of the right to an effective remedy under the international law than the right to second-instance judgement (nonetheless, they both are important elements of access to justice)[17].

2.2. REQUIREMENTS OF AN EFFECTIVE REMEDY UNDER ARTICLE 13 ECHR

The effectiveness of the remedy under Article 13 ECHR has several elements, substantial and procedural in nature[18]. According to the

[16] For an in-depth analysis on this interrelation, see: E. Morawska, *The Principles of Subsidiarity and Effectiveness: Two Pillars of an Effective Remedy for Excessive Length of Proceedings within the Meaning of Article 13 ECHR*, "Polish Yearbook of International Law", vol. 39 (2019), pp. 159–185.

[17] For more remarks on different linguistic aspects of the term "the right to an effective remedy", see: M. Balcerzak, *Konstrukcja prawa do skutecznego* środka *odwoławczego* (*right to an effective remedy*) *w uniwersalnym i regionalnych systemach ochrony praw człowieka*, [in:] *Księga Pamiątkowa Profesora Tadeusza Jasudowicza*, eds. J. Białocerkiewicz, M. Balcerzak, Toruń 2004, p. 53; Á. Balázs, *Problémák a jogorvoslathoz való jog köréből*, ELTE Állam-és Jogtudományi Kar Alkotmányjogi Tanszék. pp. 86–87; D. Shelton, *op. cit.*, pp. 7–8.

[18] According to C. Teleki, the effectiveness of a remedy required under Article 13 of ECHR has four elements: 1) institutional, requiring that the decision-maker fulfils a minimum standard of independence from the authority allegedly responsible for the breach of the ECHR; 2) substantive, establishing that where a Member State incorporates the ECHR into the domestic law, ECHR rights can be directly invoked before the domestic courts; 3) remedial, granting remedies for applicants whose claims are accepted by the domestic courts; 4) material,

ECtHR, the effect of Article 13 requires the domestic remedy to deal with the substance of an arguable complaint under the ECHR, and to grant appropriate relief[19]. It leads to the conclusion that Article 13 ECHR can only be applied in combination with one or more substantial articles of the ECHR or its protocols[20]. The notion of *arguable claim* has been widely discussed by the scholars, especially since the case law of ECtHR does not provide for any general definition of arguability[21]. The ECtHR has taken the view that it shall be determined in the light of the particular facts and the nature of the legal issue raised, whether each claim of violation forming the basis of a complaint under Article 13 is arguable[22]. The European Commission on Human Rights provided for some indications as to the criteria of arguability, by identifying three elements of a claim which was considered arguable: (i) the claim should concern a right or freedom guaranteed by the ECHR; (ii) the claim should not be wholly unsubstantiated on the facts; and (iii) the claim should give

implying that the applicant must be able to take advantage of the remedy at her disposal. See: C. Teleki, *op. cit.*, pp. 279–280.

[19] *Kudła v. Poland*, para. 157.

[20] *'L'article 13 n'a pas d'existence indépendante; il ne fait que compléter les autres clauses normatives de la Convention et de ses Protocoles'*, see: ECtHR, Case *Zavoloka v. Latvia*, judgement of 7 July 2009, Application No. 58447/00, para. 35 (a).

[21] See e.g.: W.A. Schabas, *The European Convention on Human Rights. A Commentary*, Oxford 2015, p. 551; M. Balcerzak, *op. cit.*, pp. 49–50. There is no exact Polish or Hungarian translation for the term 'arguable claim'. Some Polish scholars (M. Balcerzak) suggest the term '*sporne roszczenie*', others (M.A. Nowicki) instead of a word-for-word translation chose a descriptive method, which allows for a better grasp of the idea of an arguable claim: "Każda osoba domagająca się, w sposób dający się uzasadnić, uznania za pokrzywdzoną naruszeniem Konwencji powinna mieć do dyspozycji środek odwoławczy…" M.A. Nowicki, *Komentarz do Konwencji o ochronie praw człowieka i podstawowych wolności*, [in:] *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, ed. M.A. Nowicki, Warszawa 2017. As for the Hungarian translation, the Case Law Analysing Group of the Hungarian Supreme Court also resorts to a descriptive translation of 'arguable claim': '*védhető módon* állított *jogsértés*', see: Joggyakolrat-elemző csoport a gyülekezési jog gyakorlásával kapcsolatos bírói eljárások elemzésére, *A gyülekezéshez való jog a közigazgatási bírósági gyakorlatban*, Budapest 2015, p. 125.

[22] See e.g.: ECtHR, Case *Boyle and Rice v. the United Kingdom*, judgement of 27 April 1988, Application No. 9659/82; 9658/82, para. 55.

rise to a *prima facie* issue under the ECHR[23]. The arguable claim test plays a crucial importance during the application of Article 13[24]. Article 13 does not apply if the applicant cannot be said to have had any arguable claim of a violation of the ECHR; the practice shows that such complaint shall be ruled incompatible *ratione materiae* with the provisions of the Convention, within the meaning of Article 35 para. 3(a), and be rejected[25].

The requirement of an arguable complaint does not mean that the right to an effective remedy can apply only after a violation of rights has been demonstrated, as Article 13 may seem to suggest if read literally. The finding of a violation of an ECHR provision is not a prerequisite for the application of Article 13, which was clearly established by the ECtHR[26]. The ECtHR logically assumed that a person cannot establish a violation before a national authority unless he or she is first able to lodge with a national authority a complaint to that effect.

The overriding requirement for a domestic remedy within the meaning of Article 13 is to be effective *in practice as well* as *in law*, as the ECtHR continues to emphasize[27]. This suggests that domestic remedies shall be accessible, capable of providing redress in respect of the applicants' complaints, and offer reasonable prospects of success[28]. It also implies that the exercise of rights shall not be unjustifiably hindered by the acts or omissions of the state authorities[29]. The criteria of effectiveness, allowing a remedy to be considered effective in practice as well as in law may be subject to change. As Morawska observes, the principle of effectivity, understood as the practical

[23] European Commission on Human Rights, *Price v. the United Kingdom*, decision of 14 July 1988, Application No. 12402/86.

[24] M. Balcerzak, *op. cit.*, p. 50.

[25] See e.g.: ECtHR, Case *Sakskoburggotski and Chrobok v. Bulgaria*, judgement of 7 September 2021, Application No. 38948/10, para. 195; ECtHR, Case *Walter v. Italy*, decision of 11 July 2006, Application No. 18059/06.

[26] See e.g.: *Klass and others v. Germany*, para. 64.

[27] See e.g.: *Kudła v. Poland*, para. 157; ECtHR, Case *Nicolae Virgiliu Tănase v. Romania*, judgement of 25 June 2019, Application No. 41720/13, para. 218.

[28] ECtHR, Case *Sejdovic v. Italy*, judgement of 1 March 2006, Application No. 56581/00, para. 46. See also W.A. Shabas, *op. cit.*, pp. 765–766.

[29] *Nicolae Virgiliu Tănase v. Romania*, para. 218.

effectiveness of the ECHR, requires evolutionary interpretation of its provisions in the light of present-day conditions, in line with the living instrument doctrine[30].

As for the *domestic authority* referred to in Article 13 is concerned, it may be, but does not necessarily have to be in all instances a court[31]. It is believed, however, that judicial remedies give strong guarantees of independence, access to justice for victims of human rights violations, and of enforceability of judgements[32]. While determining whether a remedy is effective in law and in practice, the ECtHR takes into account the powers and procedural guarantees of a domestic authority, including its independence, as well as the facts of the case and the nature of the right at issue[33].

2.3. TYPES OF REMEDIES REQUIRED UNDER ECHR

Article 13 ECHR does not require any particular type or form of remedy. It is accepted that *a remedy* may refer to a single remedy, or to a total of remedies provided for under domestic law[34]. Although state-parties are given certain margin of appreciation as to means of

[30] E. Morawska, *op. cit*., pp. 172–174.

[31] See e.g.: *Klass and others v. Germany*, para. 67.

[32] See e.g.: ECtHR, Case *Z and Others v. the United Kingdom*, judgement of 10 May 2001, Application No. 29392/95, para. 110.

[33] ECtHR, Case *De Souza Ribeiro v. France*, judgement of 13 December 2012, Application No. 22689/07, para. 79. For example, an effective remedy before a judicial body was found to be essential in case *Ramirez Sanchez v. France*, judgement of 4 July 2006, Application No. 59450/00. The applicant was sentenced to life imprisonment for terrorist attacks in Frances, and he was detained in solitary confinement for several years. The applicant appealed to domestic authorities against the decision placing him in solitary confinement, but the adminsitrative court dismissed the application on the grounds that it was an internal measure that could not be referred to the courts. The ECtHR found a violation of the right to effective remedy, on account of the absence of a remedy in French law that would have enabled the applicant to contest the decision to prolong his detention in solitary confienement. According to the ECtHR, effective remedy before a judicial body was required given the serious repercussions of solitary confinement. See *Ramirez Sanchez v. France*, para. 165.

[34] See e.g.: *De Souza Ribeiro v. France*, para. 79.

fulfilling the requirements under Article 13 ECHR, the nature of the right has implications for the type of remedy states are required to provide. For example, in cases concerning the violation of Article 6 ECHR as regards the excessive length of proceedings, the ECtHR's preferred form of redress is prevention. However, depending on the circumstances of the case, the compensation or a combination of a preventive and a compensatory remedy may also be considered effective redress:

> 'Where the judicial system is deficient with regard to the reasonable-time requirement in Article 6 § 1 of the Convention, a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy is the most effective solution. Such a remedy offers an undeniable advantage over a remedy affording only compensation since it also prevents a finding of successive violations in respect of the same set of proceedings and does not merely repair the breach *a posteriori*, as does a compensatory remedy. Some States have understood the situation perfectly by choosing to combine two types of remedy, one designed to expedite the proceedings and the other to afford compensation. […] Article 13 also allows a State to choose between a remedy which can expedite pending proceedings or a remedy post factum in damages for delay that has already occurred. While the former is preferred as it is preventative of delay, a compensatory remedy may be regarded as effective when the proceedings have already been excessively long and a preventative remedy did not exist"[35].

Apart from the so called *specific remedies*, which have been designed to offer redress for a particular type of violation of the ECHR, the state-parties may also provide for *general remedies* (e.g. constitutional complaints). Such remedies can be used with regard

[35] ECtHR, Case *Gazsó v. Hungary*, judgement of 16 July 2015, Application No. 48322/12, para. 39.

to complaints which cannot be dealt with through the specific remedies available. The requirements under Article 13 ECHR are the same with respect to special and to general remedies, which generally need to be effective, sufficient and accessible[36]. As the CoE's Committee of Ministers have observed, states which have general remedies tend to have fewer cases before the ECtHR[37]. However, a proper implementation of specific remedies can also be very efficient in terms of the number of applications to the ECtHR and the volume of examination needed. Regardless of the type of remedy, the ECtHR points out that particular attention should be paid to the speediness of the remedial action itself, since even the adequate nature of the remedy can be undermined by its excessive duration[38].

2.4. THE RIGHT TO AN EFFECTIVE REMEDY UNDER ECHR AND UNDER EU CHARTER

While the ECHR remains the centrepiece and essential reference point for the human rights protection in Europe[39], it is worthwhile examining how the right to an effective remedy is regulated within the EU legal framework. The right to an effective remedy is provided for in Article 47 of the EU Charter of Fundamental Rights[40], together with the right to a fair trial and its components (e.g. the right of access to court, the principle of equality of arms, or the right to be advised, defended and represented, the right to legal aid)[41]. According to the official Explanations to the EU Charter, the first paragraph of Article 47 is directly based on Article 13 of

[36] *Sürmeli v. Germany*, para. 101. See also: CoE, *Guide to Good Practice in Respect of Domestic Remedies*, adopted by the Committee of Ministers on 18 September 2013, p. 45.

[37] Recommendation Rec(2004)6, Appendix, paras. 9–10.

[38] *De Souza Ribeiro v. France*, para. 81.

[39] Recommendation Rec(2004)6.

[40] Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000, Official Journal of the European Union C 326/391.

[41] On the essence of the right to an effective remedy under the EU Charter of Fundamental Rights, see: K. Gutman, *The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice*

the ECHR[42]. Although the EU regulation draws on the ECHR, it nevertheless shows several essential differences, which make the protection of the right to effective remedy under the EU law more extensive then under the ECHR.

First, Article 47 of the Charter applies to all rights and freedoms guaranteed in the EU law, while the right to judicial protection under the Article 13 of the ECHR applies only to rights explicitly recognized in the ECHR. The right to effective remedy in the EU Charter of Fundamental Rights has thus autonomous character, in the sense that it is not subsidiary to other rights in the EU Charter, contrary to the respective regulation in the ECHR.

Second, while the ECHR guarantees a right to an effective domestic remedy before *a national authority*, which does not necessarily have to be a court, the EU Charter explicitly provides for a right to a remedy before a tribunal. Such tribunal shall be independent and impartial and previously established by law, and the right to domestic remedy needs to be exercised in a fair and public hearing within a reasonable time (these guarantees, laid down in Article 47 para. 2 of the EU Charter, correspond directly to the right to a fair trial provided for in Article 6 para. 1 of the ECHR). The case law of the Court of Justice shows that whether a domestic authority can be considered a tribunal depends on a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent[43].

It deserves mentioning that the right to an effective remedy had been an important element of the EU law long before the adoption of the Charter of Fundamental Rights of the European Union in 2000. In 1986 the Court of Justice of the European Communities recognized the right to an effective remedy as a general principle

of the European Union: The Best Is Yet to Come?, "German Law Journal", vol. 20, Special Issue 6, 2019, pp. 887–888.

[42] Explanations relating to the Charter of Fundamental Rights, Official Journal of the European Union C 303/17.

[43] CJEU, *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH*, judgement of 17 September 1997, Case C-54/96, para. 23.

of the Community law, and stated that the principle of effective judicial control, laid down in Articles 6 and 13 ECHR, is a principle which underlies the constitutional traditions common to the Member States[44]. In its more recent case law, the Court of Justice reasserted that 'the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECRH and has also been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union'[45]. It should not be forgotten that the fundamental rights guaranteed by the ECHR were recognized as general principles of Community law in the Treaty of Maastricht[46], as well as in the Treaty of Lisbon[47].

3. The right to an effective remedy within national contexts

3.1. HUNGARY

3.1.1. Constitutional framework

In Hungary, the right to an effective remedy is anchored both in the country's obligations under international law[48] and in its constitutional framework. The Fundamental Law of Hungary[49] adopted on

[44] CJEC, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, judgment of 15 May 1986, Case 222/84.

[45] CJEU, *Sofiane Fahas v. Council of the European Union*, judgement of 7 December 2010, Case T-49/07, para. 3.

[46] Treaty on European Union, signed on 7 February 1992 in Maastricht, Official Journal C 191, see Article F para. 2.

[47] Treaty Of Lisbon Amending The Treaty On European Union And The Treaty Establishing The European Community (2007/C 306/01), signed at Lisbon, 13 December 2007, Official Journal of The European Union C 306/1, see Article 6 paras. 2 and 3.

[48] Hungary is a state-party to the ICCPR (since 1974) and to the ECHR (since 1992), as well as a Member State of the EU (since 2004), all of which provide for the obligation to establish effective domestic remedies.

[49] The Fundamental Law of Hungary (*Magyarország Alaptörvénye*), adopted on 25 April 2011, entered into force on 1 January 2012.

25 April 2011 explicitly provides for the right to a legal remedy in Article XXVIII para. 7, according to which:

> "Everyone shall have the right to seek a legal remedy against any court, authority or other administrative decision which violates his or her rights or legitimate interests".

Article XXVIII houses several guarantees and principles, which include, apart from the right to a legal remedy, also the right to a fair trial and its components (the right to access to a court, the right to a hearing within a reasonable time by an independent and impartial tribunal), the right to the presumption of innocence, the right to be defended, and the *nullum crimen sine lege* principle[50]. These safeguards, which can be jointly referred to as "the procedural rights", form an integral part of the fundamental rights framework enshrined in the Hungarian Constitution within the chapter entitled "Freedom and Responsibility".

The content and the scope of application of the right to a legal remedy under Article XXVIII para. 7 has been clarified in the case law of the Hungarian Constitutional Court (CC). The Hungarian CC holds that the right to a legal remedy is a fundamental constitutional right which, in terms of its scope of application, covers all judicial and administrative decisions. It requires that every decision on the merits of the case which has a substantial impact on the rights or legitimate interests (situation) of the person concerned may be reviewed by another body or by a higher forum of the same body[51]. According to the Hungarian CC, the Fundamental Law requires that the legal protection afforded by the right to a legal remedy be *effective*, meaning that it must be actually enforceable and capable of redressing the harm caused by the respective judicial or administrative decision. The CC has highlighted that the actual possibility of obtaining redress is an essential and immanent element of a legal

[50] See e.g.: L. Csink, I. Marosi, *Eljárási jogok*, [in:] *Alkotmányjog–Alapjogok*, eds. B. Schanda, Zs. Balogh, Budapest 2019, pp. 273–275; P. Váczi, *Eljárási jogok*, [in:] *Alkotmányjog III. Alapjogok*, ed. P. Smuk, Győr 2015, pp. 246–277.

[51] Constitutional Court, decision No. 9/2017. (IV. 18.), Reasoning [20].

remedy under Article XXVIII para. 7 of the Fundamental Law[52]. Such interpretation of effectiveness corresponds to this adopted by the ECtHR, which in its settled case law consequently emphasizes that a legal remedy needs to be effective in law as well as in practice. Also, similarly to the views expressed by the ECtHR, the Hungarian CC holds that the requirement of an effective legal remedy does not imply that the second-instance authority is bound to rule in favour of the applicant. Instead, it is essential that the judicial review or appeal proceedings be conducted in line with the procedural rules, and that the merits of the application be examined in accordance with the law in force[53]. The CC finds that the actual infringement of the rights of the person concerned by the judicial or administrative decision is not a prerequisite for the exercise of the right to a legal remedy; it suffices that the person concerned considers that his or her right or legitimate interest has been infringed by the contested decision[54].

3.1.2. Examples of domestic remedies under Hungarian law

3.1.2.1. General remedies

The Hungarian law provides for a general remedy exercised before the Constitutional Court, as well as for specific domestic remedies that have more targeted scope of application. The constitutional complaint, being the general remedy, is regulated in the 2011 Fundamental Law and in the Act of 2011 on the Constitutional Court

[52] Constitutional Court, decision No. 9/2017. (IV. 18.), Reasoning [20]. The CC has observed that the effectiveness of the right to a legal remedy may be negatively affected by several factors, for example the extent of the possibility of judicial review, the deadline for exercising a remedy, or the rules governing the service of judicial or administrative decisions, see: Constitutional Court, decision No. 9/2017. (IV. 18.), Reasoning [20], Constitutional Court, decision No. 22/2013. (VII. 19.), Reasoning [26]

[53] Constitutional Court, decision No. 9/2017. (IV. 18.), Reasoning [21].

[54] Constitutional Court, decision No. 9/2017. (IV. 18.), Reasoning [21].

(hereinafter: Constitutional Court Act or CCA)[55], both of which entered into force on 1 January 2012. The new legal environment brought significant changes to the competencies of the CC in general, and in particular to the rules on the constitutional complaint[56]. The Hungarian legislation which was in force until 31 December 2011 allowed for two types of norm control procedures in constitutional complaint: the *ex post* abstract review based on *actio popularis,* and the concrete norm control, meaning constitutional review of the legislation on which individual decision was based (in case-by-case disputes). However, even in the concrete norm control proceedings against legislation applied in an individual case, the Constitutional Court did not have the power to annul the challenged decision. For this reason, the former Hungarian model of constitutional complaint did not constitute an effective remedy in the view of the Council of Europe's bodies, since it did not provide sufficient guarantees of redress[57].

The entry into force in 2012 of the Fundamental Law and the Constitutional Court Act has significantly changed the Hungarian model of constitutional complaint. Since 1 January 2012, the *ex post* abstract review of norms based on *actio popularis* is no longer possible, instead, three other types of constitutional complaint are available: the direct, the indirect and the real constitutional complaint. The indirect constitution complaint, which allows for

[55] Act CLI of 2011 on the Constitutional Court (*2011. évi CLI. Törvény az Alkotmánybíróságról*), adopted on 14 November 2011, in effect from 1 January 2012.

[56] See more: F. Gárdos-Orosz, *The Hungarian Constitutional Court in Transition – from Actio Popularis to Constitutional Complaint*, "Acta Juridica Hungarica", 53, No. 4, 2012, pp. 302–315; A. Pátyi, *A tisztességes eljáráshoz* és ügyintézéshez *való jog. Az eljárási alapjogok* és *az eljárási alkotmányosság főbb kérdései*, [in:] *Alapjogok. Az emberi jogok alkotmányos védelme Magyarországon*, eds. S. Bódi, G. Schweitzer, Budapest 2021, pp. 166–167.

[57] European Commission of Human Rights, Case *Vén v. Hungary*, decision of 30 June 1993, Application No. 21495/93, the Commission was of the view that the Constitutional Court under the rules then in place could not "quash or modify specific disciplinary measures taken against an individual by State officials"; see also ECtHR, Case *Csikós v. Hungary*, judgement of 5 December 2006, Application No. 37251/04, paras. 17–19.

the constitutional review of legislation applied in an individual case, is possible under Article 26 (1) of the CCA[58]. The direct (also known as exceptional) constitutional complaint is regulated in Article 26 (2) of the CCA. This type of constitutional complaint can be lodged if the violation of rights has occurred as a result of the application of legislation, without a judicial decision. In addition to the above-mentioned two types of norm control review, on 1 January 2012 the institution of real constitutional complaint was introduced, with the aim to provide more direct protection of fundamental rights. This type of constitutional review is envisaged in Article 27 (1) of the Constitutional Court Act, which allows to lodge a constitutional complaint against a judicial decision itself. The Constitutional Court has the obligation to annul the decision which has been successfully challenged by a real constitutional complaint[59].

The reformed constitutional complaint has been subject to the ECtHR's scrutiny in cases *Mendrei v. Hungary* (2018)[60] and *Szalontay v. Hungary* (2019), in which the ECtHR examined the new legislation in the light of the requirements of effective domestic remedy under Article 13 and 35 para. 1 ECHR.

In *Mendrei v. Hungary,* the ECtHR scrutinized the constitutional complaint under Article 26 para. 2 of the 2011 CCA, allowing to challenge the constitutionality of legislation (as opposed to individual judicial decisions). The applicant, a teacher at a public educational institution, complained that he had become *ipso iure* a member of the National Teachers' Chamber, which had been introduced by the National Public Education Act in 2013. According to the applicant, the compulsory membership to the professional association infringed his rights under Articles 10 and 14 of the ECHR; nonetheless, he had not tried to challenge the impugned regulation before the Constitutional Court, which he had not considered an

[58] This type of constitutional complaint was also known to the previous regulation, in force until 31 December 2011.

[59] According to Article 43 para. 1 of the CCA.

[60] ECtHR, Case *Mendrei v. Hungary*, judgement of 19 June 2018, Application No. 54927/15; ECtHR, Case *Szalontay v. Hungary*, judgement of 12 March 2019, Application No. 71327/13.

effective remedy. As a consequence of the government's objection of non-exhaustion of domestic remedies, the ECtHR was called on to examine whether a constitutional complaint under Article 26 para. 2 of the 2011 CCA was accessible, effective and capable of offering sufficient redress. According to the ECtHR, a successful constitutional complaint would have been capable of putting an end to the grievance (i.e. mandatory membership), because the removal of the impugned provisions would have terminated the membership complained of. Taking this into account, the ECtHR considered Article 26 para. 2 of the 2011 CCA an effective remedy, regardless the fact that it offers no possibility of compensation[61]. The applicant's complaint to the ECtHR was declared inadmissible for the reason of non-exhaustion of domestic remedies; the impugned legislation should had been first challenged before the Constitutional Court, as the constitutional complaint Article 26 para. 2 of the 2011 CCA was an accessible remedy offering reasonable prospects of success[62].

In *Szalontay v. Hungary,* the ECtHR examined the effectiveness of constitutional complaint allowing to challenge individual judicial decisions under Article 26 para. 1 or Article 27 of the CCA. The judicial decision complained of was issued within a criminal procedure, as a result of which the applicant was found guilty of the crime of danger caused by negligent professional misconduct leading to fatal mass casualties. The tragic event, which lead to the accusation, received enormous media attention in Hungary[63]. The applicant complained that his right to a fair trial had been violated, in particular, that the principle of equality of arms had not been observed during criminal proceedings against him, and that the courts had not been impartial. The ECtHR found that the grievances concerned (i) the application of a provision of the Code of Criminal Procedure barring the applicant from submitting a challenge for bias in an effective manner; and (ii) his conviction and sentence resulting

[61] *Mendrei v. Hungary*, para. 35.

[62] *Mendrei v. Hungary*, para. 42.

[63] The Applicant was the managing director of company which leased and sub-leased the premises of a shopping mall in Budapest to hold music events. In 2011, during one of the events panic broke out in the crowded stairway of the mall, and as the result stamped three people were crushed to death.

from the first- and second-instance judgments that demonstrated a lack of impartiality on the part of the courts[64]. The first of these issues related to the constitutionality of the relevant provision, and could be challenged under Article 26 para. 1 of the CAA; whereas the second issue related to the constitutionality of the application of the law by the courts, and as such could be challenged under Article 27 of the CAA. As a consequence, the ECtHR rejected the application for not exhausting domestic remedies, having been of the opinion that the Hungarian constitutional complaint procedures are effective remedies to be exhausted before seizing the EtCHR[65].

In *Mendrei v. Hungary* and *Szalontay v. Hungary* all three types of constitutional complaints were considered by the ECtHR as fulfilling the requirement of an effective domestic remedy in the light of the circumstances of the case. At the same time the ECtHR emphasized that it was ready to change its approach as to the potential effectiveness of the remedies in question, should the practice of the Hungarian authorities indicate the contrary[66]. In one of its most recent decisions concerning Hungary (*Sándor Varga v. Hungary*), the ECtHR pointed out that a constitutional complaint does not constitute an effective remedy for the alleged grievances if the applicant cannot claim the *unconstitutionality* of the judicial decision or the underlying legal provisions[67]. Given that the CCA provides

[64] *Szalontay v. Hungary*, para. 33.

[65] *Szalontay v. Hungary*, para. 40. The ECtHR observed that although neither Article 26 para. 1 of the CCA allowing for striking down of an impugned legal provision, nor Article 27 of the CAA allowing the quashing of a court decision if they were in breach of the Fundamental Law provided for the possibility of compensation, they would have nevertheless resulted in new proceedings before the competent criminal court. Therefore, either a constitutional complaint under Article 27 of the CCA against the judgments given in allegedly unfair proceedings, or a constitutional complaint under the combination of Article 26 para. 1 and Article 27 of the CCA against the impugned legislation were accessible remedies offering reasonable prospects of success, see C*ase Szalontay v. Hungary*, para. 35.

[66] *Szalontay v. Hungary*, para. 39.

[67] ECtHR, Case *Sándor Varga and Others v. Hungary*, judgement of 17 June 2021, Application No. 39734/15, 35530/16, and 26804/18. The applicants complained that, under the new mandatory pardon procedure (*kötelező kegyelmi eljárás*) in force as of 2015, their whole life sentences remained de facto irreducible, in breach of Article 3 of the ECHR. The ECtHR noted that life imprisonment

for a right to lodge a constitutional complaint only when a legal provision or a judicial decision is allegedly incompatible with the Fundamental Law, when the grievance concernes such provision of law or a judicial decision that constitutes a legitimate part of the constitutional order, the constitutional complaint is not an accessible legal avenue within the meaning of Articles 13 and 35 para. 1 ECHR.

3.1.2.2. Specific remedies against excessive length of proceedings

In Hungary, a common denominator for the civil, criminal and administrative proceedings is the reasonable time requirement, which stems directly from the Fundamental Law[68]. Despite the all-permeating nature of the reasonable time requirement, the excessive length of proceedings remains one of the most tangible challenges for the Hungarian justice system. According to the statistics presented by the ECtHR, during the period 1992–2020 the total number of judgments concerning Hungary was 581, of which 335 judgements involved the finding of a violation by Hungary concerning the excessive length of proceedings[69]. Next in line was the infringement of Article 5 ECHR (the right to liberty and security), found "only" in 56 cases, the violation of Article 1 of Protocol No. 1 (right to the protection of property) found in 55 cases, and the

without the possibility of release on parole is explicitly provided for by the Hungarian Fundamental Law, and that the possibility of exclusion of eligibility for parole is part of the constitutional legal order. Consequently, it cannot be said that any issues of "constitutionality" or compatibility with the Fundamental Law of the court judgments or the provisions of the Criminal Code arise, therefore the ECtHR considered that the constitutional complaint did not constitute an effective remedy for the applicants' grievances, see: *Sándor Varga and Others v. Hungary*, para. 34.

[68] See Article XXIV para. 1 and Article XXVIII para. 1 of the Fundamental Law.

[69] ECtHR, *Statistics of the ECHR, Violations by Article and by State 1959–2020*, available at: https://www.echr.coe.int/Documents/Stats_violation_1959_2020_ENG.pdf [accessed on: 23 September 2021]. Hungary accessed the ECHR system in 1992, therefore, with respect to Hungary these statistics concern the period 1992–2020.

breach of Article 13 ECHR (right to effective remedy), declared in 53 cases during the period concerned.

The ECtHR took note of the large volume of length of proceedings cases concerning Hungary, which indicated a systemic problem, and against that background resorted to a pilot-judgement procedure in the case *Gazsó v. Hungary*[70]. The applicant alleged that litigation in his labour dispute had lasted an unreasonably long time (from 2006 to 2012), and that there had been no effective remedy available to him. In the light of the circumstances, the ECtHR held that there had been a violation of Article 6 para. 1 ECHR, and that there was no effective domestic remedy available in respect of the protraction of civil proceedings, which amounted to the violation of Article 13 ECHR. In the ECtHR's view, the violations found in the case were neither prompted by an isolated incident nor attributable to a particular turn of events, but were the consequence of shortcomings of the state, and the government did not present any convincing argument capable of persuading the ECtHR to reach a different conclusion[71]. The ECtHR recalled that it had already frequently found violations of Article 6 para. 1 ECHR in cases concerning length of civil proceedings in Hungary, and the lack of effective domestic remedies in the Hungarian legal system still remained unresolved; therefore the situation was qualified as resulting from a practice incompatible with the ECHR[72]. For this reason, Hungary was required to introduce within one year from the date on which the judgment became final, a remedy or a combination of remedies in the national legal system in respect of the problem of the length of civil proceedings[73]. In order to

[70] ECtHR, Case *Gazsó v. Hungary*, judgement of 16 July 2015, Application No. 48322/12. The ECtHR considered it appropriate to resort to a pilot-judgement procedure, given notably the recurrent and persistent nature of the underlying problems, the number of people affected and the need to grant speedy and appropriate redress at the domestic level, see *Gazsó v. Hungary*, para. 29.

[71] *Gazsó v. Hungary*, paras. 17 and 37.

[72] *Gazsó v. Hungary*, paras. 34–37. For the earlier case law concerning Hungary, see e.g. ECtHR, Case *Bartha v. Hungary*, judgement 25 March 2014, Application No. 33486/07; or European Commission on Human Rights, Case *Mr T.K. and Mrs T.K. v. Hungary*, decision of 21 May 1997, Application No. 26209/95.

[73] *Gazsó v. Hungary*, para. 39.

comply with the requirements of Article 46 ECHR, which imposes a legal obligation to put an end to the breach and make reparation for its consequences, such remedy or remedies shall comply, both in theory and in practice with the key criteria of effectiveness set by the ECtHR case law[74]. Preventive measures were preferred by the ECtHR however, compensatory remedies could be regarded as effective when the proceedings have already been excessively long and a preventative remedy did not exist.

The judgement in *Gazsó v. Hungary* became final on 16 October 2015. In accordance with Article 46 para. 2 of ECHR, it was transmitted to the Committee of Ministers, which supervises its execution. The pilot-judgement in *Gazsó v. Hungary* is under enhanced supervision, together with several other cases concerning the structural problem of excessive length of civil, criminal and administrative proceedings and the lack of effective domestic remedies (*Gazsó group against Hungary*)[75].

Since the ECtHR judgement in *Gazsó v. Hungary*, new codes of civil, administrative and criminal procedure have been adopted in Hungary, all of which entered into force in 2018, and all of which provide for preventive measures against excessively long proceedings[76]. The Code of Civil Procedure in Articles 157–158 lays down the institution of complaint about the length of the procedure (*kifogás az eljárás elhúzódása miatt*), such complaint is equally

[74] *Gazsó v. Hungary*, para. 39.

[75] The Gazsó group of cases concerns the excessive length of judicial proceedings in civil, criminal and administrative matters, and the lack of an effective remedy in this respect (violations of Articles 6 paras. 1 and 13). The Committee of Ministers has been supervising the group of cases since 2003, when the first judgment in this group (ECtHR, Case *Tímár v. Hungary*, judgement of 25 February 2003, Application No. 36186/97) was delivered by the ECtHR. In March 2012 the Committee transfered the group to the enhanced procedure, given the structural nature of the problem and the fact that, despite certain measures taken by the authorities, the situation did not appear to have improved.

[76] Act No. CXXX of 2016 on the Code of Civil Procedure (*2016.* évi *CXXX. törvény a polgári perrendtartásról*), Act No. I of 2017 on the Code of Administrative Procedure (*2017.* évi *I. törvény a közigazgatási perrendtartásról*), Act No. XC of 2017 on the Code of Criminal Procedure (*2017.* évi *XC. törvény a büntetőeljárásról*).

envisaged in the Code of Criminal Procedure (Articles 143–144) and in the Code of Administrative Procedure (Article 36 para. 2). According to the CoE's Committee of Ministers, all the new codes contain a number of amendments tackling the root causes of the problem of excessive length of judicial proceedings and also provide for acceleratory complaint mechanisms to prevent protraction, although their practical impact is yet to be assessed[77].

As far as the compensatory remedies are concerned, the Code of Civil Procedure in force from 2018 does not contain any liability mechanism allowing for pecuniary compensation in respect of lengthy civil proceedings[78]. An action in damages against the competent courts may be brought under the provisions of the Hungarian Civil Code[79] providing for the compensation for damage caused in the exercise of judicial functions (Article 6:549). In addition to this, a civil action may be brought to seek compensation for the infringement of personal rights, providing that in the course of the violation of a person's fair trial rights his or her personal rights have also been violated (under Articles 2:42–2:43 and 2:52 of the Civil Code).

In June 2021, Hungary adopted a new regulation that lays ground for claiming compensatory remedies for excessively long civil proceedings, independently from the possibility to seek compensation under the Civil Code. The Act No. XCIV of 2021 on a compensatory remedy for excessively long civil proceedings (hereinafter: Act No. XCIV of 2021), which will enter into force on 1 January 2022, provides for a possibility to claim pecuniary compensation in case of the infringement of a person's right to a hearing within a reasonable

[77] CoE, Committee of Ministers, *Supervision of the execution of the European Court's judgments, H46-13 Gazsó group v. Hungary*, 1406th meeting, 7–9 June 2021 (DH), CM/Notes/1406/H46-13 available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168oa29afd#_ftn4 [accessed on: 23 September 2021].

[78] The previous Hungarian Code of Civil Procedure of 1952 (*1952.* évi *III. törvény a polgári perrendtartásról*) provided for a clause of state liability for protracted judicial proceedings in Article 2 para. 3.

[79] Act No. V of 2013 on the Civil Code (*2013.* évi *V. törvény a Polgári Törvénykönyvről*).

time[80]. According to the explanatory memorandum, the reason for the adoption of the new legislation were the ECtHR's findings in *Gazsó v. Hungary*, and the obligation imposed upon Hungary to adopt targeted remedies against excessive length of proceedings[81].

The Act No. XCIV of 2021 sets out a general rule, according to which the overall length of the court proceedings is to be considered reasonable if the proceedings do not exceed sixty months (i.e. five years) from the date of commencement of the proceedings in the first instance until the date of notification of the final decision[82]. For the purpose of calculating the length of the court proceedings, the final decision ending the proceedings shall mean the decision ending the proceedings at first instance or at second instance, depending on which level the proceedings have been finally terminated with a conclusive decision. Where an application for review is lodge before the Supreme Court, the final decision shall be understood to include the judgment in the review proceedings[83]. In case of special categories of civil proceedings, e.g. in cases concerning child maintenance or in labour disputes, the reasonable length of proceedings is regulated differently, and the timeframe is shorter[84]. The court that hears the compensation claim may assess the reasonable time of proceedings differently, in the light of the circumstances of the case[85]. Apart from the overall timeframe concerning the entirety of the proceedings, the Act No. XCIV of 2021 also specifies what timeframe can be considered reasonable with respect to particular stages of court proceedings: a) for the proceedings at first instance: thirty months, (b) for the proceedings at first instance in the order for payment procedure: thirty-six months, (c) for the proceedings

[80] Act No. XCIV of 2021 on a compensatory remedy for excessively long civil proceedings (*2021. évi XCIV törvény a polgári peres eljárás elhúzódásával kapcsolatos vagyoni elégtétel* érvényesítéséről), see Article 1 and Article 7 para. 1.

[81] Draft bill No. T/16218 on the introduction of a compensatory remedy for excessively long civil proceedings (*A polgári peres eljárás elhúzódásával kapcsolatos vagyoni elégtétel* érvényesítéséről szóló *törvényjavaslat*), submitted to Hungarian Parliament on 11 May 2021.

[82] Article 6 para. 1 of the Act No. XCIV of 2021.

[83] Article 2 para. 4 of the Act No. XCIV of 2021.

[84] Article 6 paras. 3 and 4 of the Act No. XCIV of 2021.

[85] Article 6 paras. 5 and 6 of the Act No. XCIV of 2021.

at second instance: eighteen months, (d) for the review procedure before the Supreme Court: twelve months[86].

The compensation claim under Act No. XCIV of 2021 is decided in non-contentious proceedings by the court that heard the case in the first instance[87]. The complainant party is entitled to compensation if the length of the court proceedings or the duration of a particular stage of proceedings exceeds the period of time which is deemed reasonable; if that is the case, the party may claim pecuniary compensation in the amount specified in a governmental decree[88].

3.2. POLAND

3.2.1. Constitutional framework

The Constitution of the Republic of Poland, adopted on 2 April 1997[89], does not provide explicitly for the right to an effective legal remedy. However, such right is implicitly recognized and protected by the Polish Constitution; what is more, it can be directly derived from the international obligations of Poland in the area of human rights protection[90]. Several elements of the right to an effective remedy can be found in other constitutional guarantees, such as:

(i) the right to a court, laid down in Article 45 para. 1 of the Constitution, according to which "Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court", as well as in Article 77 para. 2 of the Constitution,

[86] Article 6 para. 2 of the Act No. XCIV of 2021.

[87] Article 9 paras. 1 and 2 of the Act No. XCIV of 2021.

[88] Article 7 of the Act No. XCIV of 2021.

[89] The Constitution of the Republic of Poland adopted on 2 April 1997, Journal of Laws of 1997, No. 78, item 483, as amended.

[90] For an in-depth analysis, see: K. Wojtyczek, *Prawo do skutecznego środka prawnego w Konstytucji RP*, "Przegląd Konstytucyjny", 1/2017, pp. 67–91. Poland is a state-party to the ICCPR (since 1977) and to the ECHR (since 1993), as well as a member state of the EU (since 2004), all of which provide for the obligation to establish effective domestic remedies.

which says that "Statutes [primary legislation – K. Z] shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights.";

(ii) the right to compensation for any harm caused by any action of public authorities, laid down in Article 77 para. 1 of the Constitution;

(iii) the right to appeal from a first-instance judgement or decision, provided for in Article 78 of the Constitution;

(iv) the right to a constitutional complaint, set out in Article 79 of the Constitution;

(v) the right to a review of a court judgement or an administrative decision delivered on the basis of a legislation which was subsequently ruled unconstitutional or non-compliant with international agreements by the Polish Constitutional Court, guaranteed under Article 190 para. 4 of the Constitution.

The effective domestic remedies required by Article 13 ECHR in the Polish Constitution take the form of judicial remedies, exercised before national courts with all the procedural safeguards prescribed for court proceedings[91]. Therefore, the Polish constitutional framework provides for more extensive protection of the right to an effective remedy, in its institutional aspect, than Article 13 ECHR.

3.2.2. Examples of domestic remedies under Polish law

3.2.2.1. General remedies

The Polish law provides for a general remedy before the Constitutional Court, namely the constitutional complaint, which is regulated in the 1997 Polish Constitution and in the Act on Organisation and Procedure before the Constitutional Court[92] (hereinafter: Act on the Constitutional Court or ACC).

[91] K. Wojtyczek, *op. cit.,* p. 83.

[92] Act of 30 november 2016 on Organisation and Procedure before the Constitutional Court, Journal of Laws of 2016, item 2072, as amended.

Article 79 para. 1 of the Polish Constitution provides for the right to challenge the constitutionality of a statute or other normative act which constituted the legal grounds for a final individual decision, whereby a court or an administrative authority determined constitutional rights and obligations[93]. The right to a constitutional complaint is located in the sub-chapter "Means for the protection of freedoms and rights" of Chapter II of the Constitution entitled "The freedoms, rights and obligations of persons and citizens", next to the right to compensation (Article 77 para. 1), the right to a court (Article 77 para. 2) or the right to appeal (Article 78). The case law of the Polish Constitutional Court reaffirms that the primary function of the constitutional complaint is to guarantee the constitutional freedoms and rights of individuals[94]. Under certain circumstances, not only individuals, but also legal persons are entitled to seize the Constitutional Court with a constitutional complaint[95].

The Polish model of constitutional complaint was examined by the ECtHR in the case *Szott-Medyńska v. Poland* (2003)[96], in order to determine whether it can be considered as effective remedy within the meaning of Articles 13 and 35 para. 1 ECHR. In *Szott-Medyńska v. Poland*, the applicants were engaged in a family business, in the course of which they were found guilty of a fiscal offence, and fined by the Polish authorities for non-payment of income-tax advance on wages. In their appeal, the applicants contested the legal classification of the act, which affected the jurisdiction of the competent authorities and the access to court. The administrative authority at second instance dismissed the appeal and upheld the contested

[93] Article 79 para. 1 of the Constitution states that "In accordance with the principles specified by statute, anyone whose constitutional freedoms or rights have been infringed shall have the right to appeal to the Constitutional Court for a judgment on the conformity with the Constitution of a statute or other normative act on the basis of which a court or an administrative authority has issued a final decision on his freedoms or rights or on his obligations specified in the Constitution".

[94] Constitutional Court, judgement of 16 November 2011, Case No. SK 45/09.

[95] See e.g.: Constitutional Court, decision of 21 March 2000, Case No. SK 6/99; Constitutional Court, judgement of 8 June 1999, Case No. SK 12/98.

[96] ECtHR, Case *Szott-Medyńska v. Poland*, decision of 9 October 2003, Application No. 47414/99.

decision, against which the applicants had no further appeal. In their complaint to the ECtHR, the applicants claimed the violation by Poland of the right to a court guaranteed by Article 6 para. 1 ECHR, in that the administrative decision could not be challenged in court. The Polish Government raised the objection of non-exhaustion of domestic remedies on the ground that the applicants had not brought a constitutional complaint before the Constitutional Court. The ECtHR examined the Polish model of constitutional complaint and noted that the Polish constitutional review procedure does not provide for an immediate redress, as the successful appellant will have to go through another step, by requesting the reopening of his or her individual case or the quashing of the decision. However, since in the renewed examination of the case the authorities will have to disregard the law declared unconstitutional in the proceedings before the Constitutional Court and apply the law – as interpreted in its judgment – to the particular facts of the individual case, the two-step remedy envisaged under Polish law can provide effective redress. Therefore, according to the ECtHR, the Polish constitutional complaint is in principle a remedy to be exhausted under Article 35 para. 1 of the ECHR.

In *Szott-Medyńska v. Poland*, the ECtHR considered that the Polish model of constitutional complaint has significant limitations, as to its scope and as to the form of redress it provides, and will meet the requirements for an effective remedy under certain conditions. The first limitation is that constitutional complaint can only be lodged against a statutory provision and not against a judicial or an administrative decision as such. Therefore, recourse to the constitutional complaint is possible only in a situation in which the alleged violation of the ECHR resulted from the application of a statutory provision which can reasonably be questioned as unconstitutional. Furthermore, such statutory provision had to constitute the direct legal basis for the individual decision in respect to which the violation is alleged. The second limitation of the Polish constitutional complaint, according to the ECtHR, concerns the redress the constitutional complaint provides to the individual, in that the judgement of the Constitutional Court does not automatically quash an individual decision in relation to which the constitutional complaint

was lodged. Further steps are needed for the decision to be annulled, pursuant to Article 190 para. 4 of the Constitution, which grants to the author of a successful constitutional complaint the right to request that the procedure in their case be reopened or otherwise revised. Therefore, in the ECtHR's view, the Polish constitutional complaint can be recognised as an effective remedy within the meaning of the ECHR only where: (i) the individual decision, which allegedly violated the ECHR, had been adopted in direct application of an unconstitutional provision of national legislation; and (ii) procedural regulations applicable for revision of such type of individual decisions provide for the reopening of the case or quashing the final decision upon the judgement of the Constitutional Court in which unconstitutionality had been found.

The considerations expressed by the ECtHR in *Szott-Medyńska v. Poland* case in 2003 have not lost their relevance and were confirmed almost unchanged by the ECtHR in 2021, in the case *Xero Flor w Polsce sp. z o.o. v. Poland*[97]. Nonetheless, in the latter case, the ECtHR's decision was adopted primarily in the context of the right to a fair trial and the right to a tribunal established by law, secured under Article 6 para. 1 ECHR, and did not focus explicitly on the constitutional complaint.

3.2.2.2. Specific remedies against excessive length of proceedings

According to the statistics presented by the ECtHR, during the period 1993–2020 the total number of judgments concerning Poland was 1197, of which 443 judgements involved the finding of a violation by Poland concerning the excessive length of proceedings[98]. The problem of excessive length of proceedings concerns

[97] ECtHR, Case *Xero Flor w Polsce sp. z o.o. v. Poland*, judgement of 7 May 2021, Application No. 4907/18.

[98] ECtHR, *Statistics of the ECHR, Violations by Article and by State 1959–2020*, available at: https://www.echr.coe.int/Documents/Stats_violation_1959_2020_ENG.pdf [accessed on: 23 September 2021]. Poland accessed the ECHR system in 1993, therefore, with respect to Poland these statistics concern the period 1993–2020.

nearly all areas of justice in Poland, including civil and criminal proceedings, as well as the proceedings before administrative bodies.

The ECtHR has long been in a vivid judicial dialogue with the Polish authorities on the reasonable time requirement and effective remedies against undue delays in court proceedings. One of the leading length-of-proceedings judgements in the ECtHR's case law concerning Poland was delivered in *Kudła v. Poland* case in 2000, and its implementation was supervised by the CoE's Committee of Ministers for 15 years[99]. The ECtHR's findings in *Kudła v. Poland* showed that there had been a violation of Article 13 ECHR in that there had been no domestic remedy in Polish law whereby the right to a "hearing within a reasonable time" as guaranteed by Article 6 para. 1 ECHR could have been enforced. Since the judgement in *Kudła v. Poland,* Poland has made several legislative changes to comply with the requirements of an effective remedy under Article 13 ECHR. These changes have been reviewed and evaluated by the ECtHR in subsequent length-of-proceedings cases concerning Poland, and they are also being monitored by the CoE's Committee of Ministers within the supervision procedure under Article 46 para. 2 ECHR. The continuing dialogue between the CoE's bodies and Poland has revealed the existence of a complex, multifaceted situation that is at the root of the country's problem with unreasonable length of proceedings. It is caused by a wide range of factors, not only of a legal, but also of an administrative or logistical nature. Those underlying factors include *inter alia* an insufficient number of judges, inadequate court premises, overly complex or cumbersome procedures, procedural loopholes allowing unjustified adjournments, belated submission of expert reports and inefficiency in collecting expert evidence, lack of the proper case-management and adequate organisation of the trial, including the defective service of process

[99] As it has been already mentioned, this judgement brought a paradigm shift in the ECtHR's interpretation of the relation between Article 6 and Article 13 ECHR, in terms of confirming the autonomous position of Article 13 regarding the excessive lenght of proceedings. For a detailed analysis of *Kudła v. Poland* case and its significance for Poland, see: *Polska przed Europejskim Trybunałem Praw Człowieka. Sprawy wiodące: sprawa Kudła przeciwko Polsce z 2000 r.*, ed. E.H. Morawska, Warszawa 2019.

and lengthy intervals between hearings, as well as the repetition of remittals ordered on appeal[100]. Such systemic problem requires comprehensive, large-scale legislative and administrative actions, the adoption and implementation of which is regularly reported by Poland to the CoE's Committee of Ministers[101]. Several Polish length-of-proceedings judgements are currently pending before the Committee of Ministers under enhanced supervision, concerning excessive length of civil and criminal proceedings (*Majewski group v. Poland*[102], *Bąk group v. Poland*[103], pilot-judgement *Rutkowski and Others v. Poland*), as well as the excessive length of proceedings before administrative bodies and courts (*Beller group v. Poland*[104]).

The main remedy under Polish law against unreasonable time of proceedings is the complaint against excessive length of proceedings (*skarga na przewlekłość postępowania*), which is designed both to expedite proceedings, and as a compensatory remedy. It is regulated in the Act of 17 June 2004 on complaint about breach of the right to have a case examined in an investigation conducted or supervised by a prosecutor and in judicial proceedings without undue delay (hereinafter: Act on complaint)[105], that was adopted following the ECtHR's judgment in *Kudła v. Poland*. Since its enactment in 2004, the law has been amended several times, as both the ECtHR and

[100] ECtHR, Case *Rutkowski and Others v. Poland*, judgement of 7 July 2015, Applications No. 72287/10, 3927/11 and 46187/11 and 591 other applications (ruled upon in a pilot-judgement procedure), para. 207.

[101] See e.g. CoE, *Communication from Poland concerning the MAJEWSKI, RUTKOWSKI and BAK groups of cases v. Poland* (*Applications No. 52690/99, 72287/10, 7870/04*), Action Plan, 24 April 2020, DH-DD(2020)359; CoE, *Communication from Poland concerning the case of BELLER v. Poland* (*Application No. 51837/99*), Action plan, 9 June 2020, DH-DD(2020)495.

[102] ECtHR, Case *Majewski and Others v. Poland*, judgement of 8 November 2005, Application No. 64204/01.

[103] ECtHR, Case *Bąk v. Poland*, judgement of 16 January 2007, Application No. 7870/04.

[104] ECtHR, Case *Beller v. Poland*, judgement of 1 February 2005, Application No. 51837/99.

[105] Act of 17 June 2004 on complaint about breach of the right to have a case examined in an investigation conducted or supervised by a prosecutor and in judicial proceedings without undue delay, Journal of Laws of 2004, No. 179, item 1843, as amended.

the Polish Supreme Court identified significant shortcomings in the functioning of the complaint mechanism in its initial shape[106].

The Act on complaint lays down in Article 2 para. 1 the right to lodge a complaint about a breach of the right to have a hearing without undue delay. Its scope of application is not limited to a particular type of proceedings; hence the complaint can be lodged in criminal and in civil cases, as well as in proceedings before administrative courts, in misdemeanour proceedings or with respect to the length of enforcment proceedings. The infringement of the right to have a hearing without undue delay occurs if proceedings in a case have lasted longer than it is necessary in order to examine the factual and legal circumstances of the case that are essential for its determination, or in case of enforcement proceedings – longer than it is necessary for the conclusion of such proceedings or other proceedings concerning the execution of a court decision[107]. The Act does not provide for a precise timeframe, the exceeding of which would entitle to lodge a claim. Whether the length of proceedings in a case has been excessive shall be determined *ad casum*, having regard to the promptness of the actions taken by the authorities dealing with the case, to the total length of proceedings up to date, the nature of the case, its factual and legal complexity, what is at stake for the party who has lodged the complaint, the issues examined and the conduct of the parties[108]. A complaint about the excessive length of the proceedings to which the complaint relates shall be lodged in the course of

[106] These were (i) the practice of "fragmentation", according to which each stage of proceedings (before the first-instance court and on appeal) was examined separately for the purpose of assessing the compliance with the reasonable time requirement, (ii) the excessively low amount of compensation awarded, see: *Rutkowski v. Poland*, paras. 183, 211–213. The practice of "fragmentation" was eliminated through legislative amendments in 2017, following the judgement in *Rutkowski v. Poland*. Earlier the problem of fragmentated assessment had also been addressed by the Polish Supreme Court, which had found that a complaint under the 2004 Act, if it were to be limited only to the current stage of proceedings, was not an "effective remedy" within the meaning of Article 13 ECHR, see Supreme Court resolution of 28 March 2013, Case No. III SPZP 1/13.

[107] Article 2 para. 1 of the Act on the complaint.

[108] Article 2 para. 2 of the Act on the complaint.

the proceedings in the case, and it will be examined by the court immediately above the court in which the impugned proceedings are pending[109]. Allowing a complaint, the court makes a finding that the length of the impugned proceedings has been excessive.[110]

The successful complaint on the excessive length of the proceedings has twofold consequences. The *acceleratory effect* of such remedy manifests itself in the fact that the court that declared unreasonable length of proceedings instructs the court dealing with the case to take appropriate actions within a fixed time-limit[111]. The *compensatory aspect* of the remedy lies in the fact that allowing a complaint the court may, at the complainant's request grant just satisfaction[112]. The amounts of the compensation to be awarded are determined by the provisions of the Act on the complaint. Although after the judgement in *Rutkowski v. Poland* (2015) the law has been amended to allow for a higher compensation, it still does not provide the applicant with appropriate and sufficient redress in terms of adequate compensation[113]. As the ECtHR's recent case law shows, in its compensatory aspect, the Polish complaint on the excessive length of proceedings is still not considered effective remedy under

[109] Articles 4 para. 1 and 5 para. 1 of the Act on the complaint.

[110] Article 12 para. 2 of the Act on the complaint.

[111] To the extent that it does not interfere with the factual and legal assessment of the case, see Article 12 para. 3 of the Act on the complaint.

[112] Article 12 para. 4 of the Act on the complaint.

[113] The case of Rutkowski and two other applicants v. Poland concerned the applicants' complaints that the length of the proceedings before the Polish courts in their respective cases (criminal proceedings, civil proceedings) had been excessive and that the operation of the domestic remedy for the excessive length of court proceedings was defective.While their respective proceedings were pending, all three applicants lodged complaints about the length of the proceedings under the 2004 Act on the complaint. Mr Rutkowski was awarded the equivalent of 500 EUR in compensation. Mr Orlikowski's and Ms Grabowska's complaints were dismissed. As regards the assessment of the length of the proceedings, in both Mr Rutkowski's and Ms Grabowska's case, the courts took into account only the period starting from the date on which 2004 Act on the complaint had entered into force. In Mr Orlikowski's case, they took into account only the period after the appeal court had quashed the judgment of the first instance court.

Article 13 ECtHR[114]. It should be noted, however, that the Polish law provides for additional compensatory remedy in Article 417 para. 1 of the Civil Code, under the rules of the state's liability for a tort[115]. It provides for a possibility of lodging a compensation claim for damage resulting from the excessive length of proceedings to the persons who have previously lodged a complaint under the 2004 Act on the complaint, as well as to those who have not resorted to such remedy[116].

While the 2004 Act on the complaint provides for a remedy against excessive length of court proceedings, complaints against the length of proceedings before administrative bodies *other than courts* are examined on a different legal basis. Remedies designed to expedite administrative proceedings are provided for in the Code of Administrative Procedure of 14 June 1960[117], and in the Act of 30 August 2002 on the procedure before administrative courts[118]. Compensation for damage resulting from the unreasonable length of administrative proceedings may be claimed under Article 417 para. 1 of the Civil Code, as well as under specific provisions of the Act on the procedure before administrative courts.[119] The combination of remedies available under Polish law to accelerate lengthy administrative proceedings used to be considered by the ECtHR as compliant with the requirements of Article 13 ECHR.[120] Nevertheless, in its more recent case law the ECtHR's has reconsidered its previous position. In case *Wcisło and Cabaj v. Poland* (2018) the

[114] See: ECtHR, Case *Lewandowski v. Poland*, judgement of 18 March 2021, Application No. 29848/17, para. 36; ECtHR, Case *Sławiński v. Poland*, judgement of 15 April 2021, Application No. 61039/16, para. 44.

[115] Act of 23 April 1964 on the Civil Code, Journal of Laws of 1964, No. 16, item 93, as amended.

[116] See Articles: 15 and 16 of the Act on the complaint.

[117] Act of 14 June 1960 on the Code of Adminsitrative Procedure, Journal of Laws of 1960, No. 30, item 168, as amended. See: Article 37.

[118] Act of 30 August 2002 on the procedure before administrative courts, Journal of Laws of 2002, No. 153, item 1270, as amended. See: Article 149.

[119] Articles 149 para. 2 and 154 para. 7 of the Act on the procedure before administrative courts.

[120] See e.g.: ECtHR, Case *Bukowski v. Poland*, decision of 11 June 2002, Application No. 38665/97; *Derda v. Poland*, para. 58.

ECtHR observed that none of the remedies, either individually or in combination, resulted in the acceleration of the administrative proceedings or offered proper redress, as required under Article 13 ECHR[121]. While the aggregate remedies available under Polish law are not considered effective remedy for excessively lengthy proceedings before administrative bodies, with respect to judicial administrative proceedings before courts the ECtHR finds that the solutions provided for under 2004 Act on complaint by itself appear to be an effective, sufficient and accessible remedy[122].

4. Conclusions and *de lege ferenda* recommendations

The human rights protection system based upon the ECHR is meant to be fully viable, "practical and effective", and definitely not "theoretical or illusory". For this end it is endowed with an enforcement mechanism, in which the right to an effective remedy is of paramount importance, along with the principle of subsidiarity it embodies. Under this scheme it is the national authorities, and not the ECtHR, who play first fiddle in protecting the rights and freedoms guaranteed by the ECHR. The obligations of states under Article 13 ECHR vary depending on the right at stake and the nature of complaint, however, the ECtHR's case law shows that the effectivity of national remedies needs to be evaluated in the light of the circumstances of the case, in line with the living instrument approach that aims at ensuring the ECHR provisions their full practical effectiveness. The CoE bodies are in constant dialogue with the national authorities as to the availability and effectiveness of domestic remedies, which takes place primarily within the complaint procedure (ECtHR), but also during the supervision of execution of judgements (Committee of Ministers). The availability of national remedies is examined by the ECtHR on every occasion, irrespective of the allegations of the complaint, in accordance with

[121] ECtHR, Case *Wcisło and Cabaj v. Poland*, judgement of 8 November 2018, Application No. 49725/11 and 79950/13, paras. 165–167.
[122] *Wcisło and Cabaj v. Poland*, para. 164.

Article 35 para. 1 ECHR, which requires the exhaustion of domestic remedies before lodging a petition.

In Hungary, the right to a legal remedy is explicitly provided for by the Fundamental Law, together with other procedural guarantees stemming from the right to a fair trial. The Hungarian Constitutional Court, similarly to the ECtHR, holds that the protection afforded by the right to a legal remedy needs to be actually enforceable and capable of redressing the harm. In Poland, the right to an effective remedy can only indirectly be derived from other constitutional guarantees. The overall interpretation leads to the conclusion that in the Polish Constitution the effective domestic remedy takes the form of a judicial remedy, exercised before domestic courts.

Both Hungary and Poland have introduced a general remedy, namely the constitutional complaint, although both countries have regulated it differently. Since 2012, the Hungarian constitutional law provides for three types of constitutional complaint, which allow for the possibility to challenge legislation, as well as individual judicial decisions. By contrast, the Polish constitutional complaint allows for challenging unconstitutional legislation, but not individual judicial decisions. The ECtHR has found that both Hungarian and Polish constitutional complaint can be considered effective remedy within the meaning of Article 13 and 35 para. 1 ECHR (*Mendrei v. Hungary*, *Szalontay v. Hungary, Szott-Medyńska v. Poland*, *Xero Flor w Polsce sp. z o.o. v. Poland*). However, it has also identified significant shortcomings of the constitutional complaint in both countries (*Sándor Varga v. Hungary*, *Xero Flor w Polsce sp. z o.o. v. Poland*).

One of the most demanding challenges for Hungarian and Polish justice systems is the problem of excessive length of proceedings in civil, criminal and in administrative cases. Several Polish and Hungarian judgements concerning the structural problem of excessive length of proceedings and the lack of effective domestic remedies are currently pending under enhanced supervision before the Committee of Ministers, including the two cases ruled upon in a pilot-judgement procedure (*Gazsó v. Hungary*, *Rutkowski v. Poland*). In Hungary, new codes of civil, criminal and administrative procedure, which entered into force in 2018, provide for acceleratory complaint mechanisms to prevent protraction of proceedings. Their practical

impact has not been determined yet. Following the pilot judgement *Gazsó v. Hungary*, Hungary has introduced compensatory remedies for excessively long civil proceedings, which can be exercised under a new law in effect from 1 January 2022. The main Polish remedy against excessive length of proceedings, adopted after the judgement in *Kudła v. Poland* and amended after *Rutkowski v. Poland*, is designed to have both acceleratory and compensatory effect. In its compensatory aspect, it is not considered by the ECtHR as effective remedy under Article 13 ECHR. Unlike the new Hungarian law (Act no. XCIV of 2021), which specifies the timeframe which can be considered reasonable length of proceedings, the Polish law does not provide for any specific deadlines, the non-compliance with which would result in a breach of the right to have a hearing within a reasonable time.

The case of Poland and Hungary is a good example of shared responsibility in protecting human rights and ensuring the practical effectiveness of the ECHR. The dialogue between the CoE's bodies and national authorities led to noteworthy attempts to improve the countries' compliance with the ECHR. However, to entirely comply with the requirements of an effective legal remedy under Article 13 ECHR, the Polish legislator should reconsider the scope of application of the constitutional complaint to include the possibility to challenge individual judicial decisions. Article 190 para. 4 of the Polish Constitution requires revision to allow for automatic quashing of the decision in relation to which the constitutional complaint has been lodged and the unconstitutionality demonstrated. Also, the compensatory effect of the complaint under 2004 Act on complaint should be reviewed to meet the standards set by the ECtHR. The Hungarian legislator shall put in place compensatory remedies with respect to excessive length of criminal and administrative proceedings, similarly to the remedy for protracted civil cases available under Act No. XCIV of 2021.

REFERENCES

Books

Balcerzak M., *Konstrukcja prawa do skutecznego środka odwoławczego* (*right to an effective remedy*) *w uniwersalnym i regionalnych systemach ochrony praw człowieka*, [in:] *Księga Pamiątkowa Profesora Tadeusza Jasudowicza*, eds. J. Białocerkiewicz, M. Balcerzak, Toruń 2004.

Csink L., Marosi I., *Eljárási jogok*, [in:] *Alkotmányjog–Alapjogok*, eds. B. Schanda, Zs. Balogh, Budapest 2019.

Morawska E.H., *Polska przed Europejskim Trybunałem Praw Człowieka. Sprawy wiodące: sprawa Kudła przeciwko Polsce z 2000 r.*, Warszawa 2019.

Nowicki M.A., *Komentarz do Konwencji o ochronie praw człowieka i podstawowych wolności*, [in:] *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, ed. M.A. Nowicki, Warszawa 2017.

Pátyi A., *A tisztességes eljáráshoz és ügyintézéshez való jog. Az eljárási alapjogok és az eljárási alkotmányosság főbb kérdései*, [in:] *Alapjogok. Az emberi jogok alkotmányos védelme Magyarországon*, eds. S. Bódi, G. Schweitzer, Budapest 2021.

Schabas W.A., *The European Convention on Human Rights. A Commentary*, Oxford 2015.

Shelton D., *Remedies in International Human Rights Law*, Oxford 2015.

Teleki C., *Due Process and Fair Trial in EU Competition Law*, Leiden–Boston 2021.

Váczi P., *Eljárási jogok*, [in:] *Alkotmányjog III. Alapjogok*, ed. P. Smuk, Győr 2015.

Periodicals

Gárdos-Orosz F., *The Hungarian Constitutional Court in Transition – from Actio Popularis to Constitutional Complaint*, "Acta Juridica Hungarica" 2012, 53, No. 4.

Gutman K., *The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?*, "German Law Journal" 2019, vol. 20, Special Issue 6.

Kuijer M., *The Right to a Fair Trial and the Council of Europe's Efforts to Ensure Effective Remedies on a Domestic Level for Excessively Lengthy Proceedings*, "Human Rights Law Review" 2013, 13, No. 4.

Morawska E., *The Principles of Subsidiarity and Effectiveness: Two Pillars of an Effective Remedy for Excessive Length of Proceedings within the Meaning of Article 13 ECHR*, "Polish Yearbook of International Law" 2019, vol. 39.

Wojtyczek K., *Prawo do skutecznego środka prawnego w Konstytucji RP*, "Przegląd Konstytucyjny" 2017, 1.

Online sources

Balázs Á., *Problémák a jogorvoslathoz való jog köréből*, ELTE Állam--és Jogtudományi Kar Alkotmányjogi Tanszék, http://epa.oszk.hu/02600/02687/00006/pdf/EPA02687_jogi_tanulmanyok_2014_086-092.pdf.

CoE, Communication from Poland concerning the MAJEWSKI, RUTKOWSKI and BAK groups of cases v. Poland (Applications No. 52690/99, 72287/10, 7870/04), Action Plan, 24 April 2020, DH-DD(2020)359, https://rm.coe.int/090000168o9e3b75.

CoE, Communication from Poland concerning the case of BELLER v. Poland (Application No. 51837/99), Action plan, 9 June 2020, DH-DD(2020)495, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680ea444.

CoE, Committee of Ministers, *Supervision of the execution of the European Court's judgments, H46-13 Gazsó group v. Hungary*, 1406th meeting, 7–9 June 2021 (DH), CM/Notes/1406/H46-13, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168oa29afd#_ftn4.

CoE, *Guide to Good Practice in Respect of Domestic Remedies*, 18 September 2013, https://rm.coe.int/

guide-to-good-practice-in-respect-of-domestic-remedies/1680695a9f.

ECtHR, *Statistics of the ECHR, Violations by Article and by State 1959–2020*, https://www.echr.coe.int/Documents/Stats_violation_1959_2020_ENG.pdf.

Joggyakolrat-elemző csoport a gyülekezési jog gyakorlásával kapcsolatos bírói eljárások elemzésére, *A gyülekezéshez való jog a közigazgatási bírósági gyakorlatban*, Budapest 2015, https://kuria-birosag.hu/sites/default/files/joggyak/gyulekezesi_jog_joggyakorlat-elemzo_csoport_osszefoglalo_velemenye.pdf.