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Relative Procedural Errors[1]

I Introductory Thoughts

Through the example of 'relative procedural errors', this study analyses whether Act XC of 2017 on the Criminal Procedure (hereinafter referred to as 'the new CP') ensures that procedural safeguards will be respected, bearing in mind its new provisions that aim to simplify and accelerate the procedure.

After defining the term 'relative procedural errors', I will describe the possible infringements by expounding on the various elements of the definition, taking into account the practice which helps me identify the most common ones. Act XIX of 1998 on Criminal Procedure ('the old CP')[2] imposes different legal consequences on those applying the law than the new CP.

In addition to the fact that the two Acts prescribe different legal consequences for a breach of the law in the specific case, the practice is also divided over whether the procedural error of a similar nature constitutes a relative procedural error at all. In this latter case, the ambiguity lies in the nature and the definition of the infringement itself, whereas the former one presents itself only after the breach has been determined, owing to the divergent sanctions. In conclusion, we can see a dual but mutually reinforcing uncertainty, which makes the situation of judicial authorities more difficult and leads to different outcomes at different courts.

To summarise my hypothesis, the legislator no longer sanctions the formerly unlawful procedural errors, thereby reducing the responsibility of the relevant authorities and the repercussions of these errors to a minimum, or even zero, at the stroke of a pen.

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1 This contribution was prepared for the conference of the Faculty of Law of ELTE Eötvös Loránd University held for the 350th anniversary of the foundation of the Faculty in 2017. It takes as a point of departure the original text of Act XC of 2017 on the Criminal Procedure as in force on 11 July 2018.

2 Act XIX of 1998 on the Criminal Procedure (hereinafter 'the former CP').

II Overview – The Most Common Quashing Grounds

The latest comprehensive and larger research on grounds for quashing verdicts that had been appealed against, including relative procedural errors, was conducted in 2012 by the Curia's jurisprudence-analysing working group.[3] At that time, three defects were identified as leading to them: (1) absolute procedural errors (16.5% of all cases), (2) relative procedural errors (16.5%) and (3) ill-foundedness, which proved to be such a cause in 66% of the cases. By the way, in nearly half of the cases of this last category, a relative procedural error was also identified. As a result, this has been a ground for quashing more than half of the rulings overturned. Indeed, absolute procedural errors, constituting a closed set of cases and being easily identifiable,[4] do not cause a problem; the issue is much more with their relative counterparts.

Although no more recent analysis is available, it can be ascertained through interviews with judges and statistical data that the nature of these grounds did not change; at the most, the change was merely numerical compared with 2012. The national incidence of quashed verdicts at regional courts *(törvényszék)* was 1.22% in 2010, then 1.38% in 2016 and 1.64% in the first half of 2017, with the maximum rate at 4.16% and the minimum at 0.55% per court.

Table 1: National incidence of quashed verdicts of regional courts[5]

Regional Courts	**2010. I.**	**2016. I.**	**2017. I.**
Budapest-Capital Regional Court	0.91%	1.54%	1.77%
Pécs Regional Court	0.59%	1.60%	2.25%
Kecskemét Regional Court	0.94%	0.59%	0.79%
Gyula Regional Court	1.72%	1.58%	1.55%
Miskolc Regional Court	1.65%	2.07%	1.78%
Szeged Regional Court	2.18%	0.85%	2.13%
Székesfehérvár Regional Court	1.46%	2.63%	0.80%
Győr Regional Court	1.62%	0.58%	0.84%
Debrecen Regional Court	0.72%	1.17%	0.73%
Eger Regional Court	1.48%	1.30%	1.74%

[3] Summary report No. 2012.EI.II.E.1/6. on the practice of quashing criminal decisions in 2012. 2012, Curia, College of Penal Law, Jurisprudence-analysing working group (hereinafter 'the Summary report').

[4] Sódor István, 'A kasszáció a magyar büntetőeljárási jogban' (Cassation in Hungarian Criminal Procedure Law) in Vókó György (ed), *Tiszteletkötet dr. Kovács Tamás 75. születésnapjára* (OKRI 2009, Budapest) 257.

[5] Based on: National Office for the Judiciary (NOJ), Figure 185. <http://birosag.hu/sites/default/files/allomanyok/stat-tart-file/a_birosagi_ugyforgalom_2017_i_felev.pdf> accessed 17 March 2018.

Regional Courts	2010. I.	2016. I.	2017. I.
Szolnok Regional Court	0.64%	0.43%	1.66%
Tatabánya Regional Court	3.17%	1.61%	2.24%
Balassagyarmat Regional Court	0.95%	1.20%	0.55%
Budapest Environs Regional Court	1.12%	2.07%	1.79%
Kaposvár Regional Court	1.96%	1.69%	4.16%
Nyíregyháza Regional Court	0.85%	0.87%	1.45%
Szekszárd Regional Court	0.88%	1.01%	1.79%
Szombathely Regional Court	0.66%	1.01%	1.65%
Veszprém Regional Court	2.29%	2.03%	1.87%
Zalaegerszeg Regional Court	0.60%	1.50%	0.74%
National average	**1.22%**	**1.38%**	**1.64%**

At the national average, the number of first instance decisions overturned by the regional courts of appeal *(ítélőtábla)* also increased. Broken down to specific courts, there is no overall trend: the number grew at some and dropped at others.

Table 2: National incidence of quashed verdicts – first instance decisions of regional courts of appeal[6]

Regional Courts of Appeal	2010. I.	2016. I.	2017. I.
Budapest-Capital Regional Court of Appeal	5.2%	4.4%	9.9%
Debrecen Regional Court of Appeal	4.5%	1.9%	3.2%
Győr Regional Court of Appeal	0.0%	4.0%	3.0%
Pécs Regional Court of Appeal	5.0%	7.6%	2.5%
Szeged Regional Court of Appeal	1.0%	4.3%	4.0%
National average	**3.8%**	**4.2%**	**6.0%**

As for the amount of regional courts of appeal decisions overturning the second instance decisions of regional courts, it did not change significantly. In 2010, it was 0.13% of their cases, then 0.12% in 2016 and 0.15% in the first half of 2017. It must be emphasised that there were no such decisions at the Győr Regional Court of Appeal in the first half of either 2010 or 2016, or at the Pécs Regional Court of Appeal in the first half of 2017. (Altogether, eleven first instance judgments were overturned out of 7,476.)

[6] Based on: National Office for the Judiciary (NOJ), Figure 193. <http://birosag.hu/sites/default/files/allomanyok/stat-tart-file/a_birosagi_ugyforgalom_2017_i_felev.pdf> accessed 17 March 2018.

Table 3: National incidence of quashed verdicts – second instance decisions of regional courts of appeal[7]

Regional Courts of Appeal	2010. I.	2016. I.	2017. I.
Budapest-Capital Regional Court of Appeal	0.04%	0.07%	0.16%
Debrecen Regional Court of Appeal	0.33%	0.21%	0.11%
Győr Regional Court of Appeal	0.00%	0.00%	0.20%
Pécs Regional Court of Appeal	0.13%	0.13%	0.00%
Szeged Regional Court of Appeal	0.14%	0.16%	0.23%
National average	**0.03%**	**0.12%**	**0.15%**

Based on these data, either a slight increase or near-stagnation is visible. It is therefore probable that qualitatively, the most common grounds for quashing them did not really change year by year. The specific categories forming the majority of relative procedural errors will be discussed in the following headings, once their definitions have been given.

III Definition of the Term

Categorising them as cassatory decisions,[8] the legislator first identifies relative procedural errors negatively, through their outcome: these faults cannot be identified as grounds that (a) lead to the verdict being quashed and the criminal proceedings being dismissed,[9] or (b) form part of the cassatory decisions enumerated in an exhaustive list.[10] The second defining element is that they cannot be remedied by the second instance court; if it were possible, overturning them would be unnecessary, and the court of appeals ought to be able to correct the error with its reformatory powers. The third element is that the violation should have a substantive effect on the course of the proceedings, the conviction, the classification of the crime, the sentencing or the application of a measure. The 'substantive effect' must be decided on a case-by-case basis. The lack of an objective standard, therefore, leads to the fundamental issue below. A procedural error of a similar nature may be deemed a relative error in case *A*, leading to the decision being overruled, whereas in case *B*, the existence of the infringement may be determined but without the 'substantive effect'. In practice, this means that neither the legislator nor the court will sanction the error.

[7] Based on: National Office for the Judiciary (NOJ), Figure 197. <http://birosag.hu/sites/default/files/allomanyok/stat-tart-file/a_birosagi_ugyforgalom_2017_i_felev.pdf> accessed 17 March 2018.

[8] New CP, s 609 para 1.

[9] New CP, s 607 para 1.

[10] New CP, s 608 para 1.

The new Code of Criminal Procedure gives examples of procedural errors in Section 609 (2). These may belong within the errors defined above, offering some guidelines for the courts. In the following parts, I will describe the new provisions.[11]

1 The Rules of Evidence Were Breached after the Indictment

As regards the law of evidence, the new Code only provides that, throughout the detection, collection, securing and usage of the pieces of evidence, the Code must be followed.[12] In addition, it mentions that it may specify ways of performing and conducting measures of inquiry, as well as the examination and recording of the means of evidence. Naturally, these rules must be respected if encountered.

By the way, this relative procedural error also featured in the former CP. Even so, the phrase 'after indictment' is a novelty. *Prima facie,* it might give rise to worries, since one of the interpretations is that pre-indictment violations of the rules of evidence will be 'forgotten', and it assumes that that the law of evidence may only be breached before the court. Presumably the legislator did not intend this outcome; it sought instead to draw attention to the fact that from now on it becomes the court's responsibility to notice and, if possible, correct these errors. Otherwise, adopting a different interpretation, the list exhausts possible breaches and the absent legal consequences become endless. (Irrespective of this explanation, it not truly plain why this phrase was introduced if the meaning itself has remained the same anyway.)

In practice, the rules of evidence are violated by the use of unlawful evidence in the proceedings. The unlawful usage of the results of covert information-gathering and data collection is notable,[13] but it also includes cases when, despite it being obligatory, the party to the proceedings was not duly advised before the interrogation. This latter will be dealt with in Heading IV, since the new CP has introduced a significant novelty.

2 The Parties to the Proceedings Were Unable to Exercise their Rights or Were Obstructed in Doing so after the Indictment

Analogous to the first point, the novelty here is the introduction of the words 'after indictment'. It might be concluded that if the person was unable to exercise their rights before this

[11] I have previously analysed the solutions offered by the CP for relative procedural errors, along with their practice. I do not wish to write about them in detail. At most, I will refer tangentially back to my statements, for the conclusion of the present study. See also Horváth Georgina, 'A bizonyítás törvényessége – a relatív eljárási szabálysértések következményei' (Legality of proof – Consequences of relevant procedural irregularities) (2016) Jogi Tanulmányok 127–138.

[12] New CP, s 166.

[13] Gácsi Anett Erzsébet, 'Bizonyítási tilalmak a magyar büntetőeljárásban: a törvénysértő (jogellenes) bizonyítékok kizárása' ['Prohibitions on evidence in Hungarian criminal proceedings: exclusion of unlawful (illegal) evidence'] in *Ünnepi kötet Dr. Cséka Ervin professzor 90. születésnapjára* (Szegedi Tudományegyetem Állam- és Jogtudományi Kar 2012, Szeged) 178.

point, or was obstructed in it, it is impossible to conclude that a relative procedural error has occurred. It is probably so, even though other provisions may still be relied upon for some infringements before the indictment. For example, if the defence attorney was not summoned to the interrogation of the suspect and the right to counsel was thus breached, the court has thus reached its peremptory decision based *(inter alia)* on this confession, which means that the error under III.1. may be acknowledged.

At the same time, it is unclear whether, if the right to access to documents, which both the defendant and their counsel enjoy in its entirety, was violated during the investigation phase, it leads to any legal consequence. It must be asked, because it is difficult to interpret the term 'after indictment', parallel to the case in III.1. In some of the breaches here, one would expect in vain for the first instance court to correct the error,[14] and the appeals forum will be unable to refer to another ground; for example, as demonstrated, it cannot invoke the rules of evidence, since it is not a question of evidence. One hopes that this uncertainty will be solved by the open-ended nature of the list in Section 609, (2) of the new Code. Furthermore, the issue is also exciting because the European Court of Human Rights has held in more than one case that Article 6 was violated for the same reason.[15] In this specific case, it is the task of the first instance court to provide the defendant with the documents produced during the investigation.

3 The Public Was Unlawfully Excluded from the Court Trial

The unlawful exclusion of the public from the trial was an absolute ground for quashing in the former CP.[16] Consequently, if the court finds any grounds for the closed session[17] and has ordered the exclusion of the public, whereas the second instance court argues that the circumstance did not serve as such a ground, it does not have any option other than quash the first-instance ruling and order the lower court to repeat its procedure.

The new CP deviates from the provisions above, rendering the unlawful exclusion of the public a relative ground for quashing, which is, in my opinion, misleading. I will introduce two reasons for considering it more rational that this breach of law can only work as an absolute ground for overturning the case. One of them is related to the definition of the reasons for publicity, whereas the other one is the extension of the role of 'the public' and their need for access to an open trial.

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[14] Or, if the court fails to do so, the second instance court may hold that a relative procedural error has occurred. At most, it can supply the documents adduced, and ensures that further violations be avoided.

[15] See *A.B. v. Hungary (Application no. 33292/09, Judgment of 16 April 2013):* <https://helsinki.hu/wp-content/uploads/A.B._kontra_Magyarorszag.pdf> accessed 17 March 2018.

[16] Former CP, s 373 para (1) subpara II item *f).*

[17] The public may be excluded on moral grounds, for the protection of classified information or for the protection of minors and other parties to the proceeding. This does not concern the delivery of the ratio of the judgment, which has to be done publicly. As for the obiter dicta, publicity may only be limited insofar as the relevant circumstance warrants it, thus other parts of the dicta have to be delivered in public.

I will highlight six objectives of publicity. The first is it is society's control mechanism, i.e. the fact that society, including the individual, has no other way to control the judiciary[18] other than via a public trial.[19] Second, it protects the defendant, because openness can prevent the curtailment of their rights. One of the central tenets of a fair trial is that the authorities should not hold closed hearings, not like the practices of secret and inquisitorial proceedings. Third, parallel to the protection of the defendant, publicity defends the authorities as well.[20] In other words, if they convict the defendant in a public trial, they can refute possible accusations of an unfair trial, because they were controllable, and the legality of their procedure can be retraced post-trial as well.

A further (fourth) goal is that through the open hearing, by ensuring publicity, the goal of punishing the guilty may be attained. It contributes to general prevention, since society now sees that crimes do not go unpunished.[21] On an individual level, it also assists special prevention, since the fact that the actions of the defendant are reported to a wide audience guarantees lawful public behaviour (even in addition to other tools). Fifth, publicity can safeguard the discovery of the material truth.[22] Eventually, the sixth objective is faith in the judicial system,[23] which may be the culmination of all the previous points since they are all parts of this one. We cannot expect society to trust the system unless we offer the possibility to view trials directly or to be informed of their work by the authorities (or the press) indirectly.

I opine that by relying on these six objectives, with a view to all the circumstances of the case, we cannot predict *expressis verbis* whether the unlawful exclusion of the public has a substantive impact on the proceedings. For the reason that the goals above are not case-specific and are always the goals of openness, it is not necessary to explore and evaluate them in all of them. This is why I find what the examination will cover, and why the legislator has relaxed the sanctions, bewildering. Let me add that it goes hand in hand with other norms in the CP that allow for bigger sanctions for the defendant, even in proceedings with fewer safeguards. Thus, to put it simply, it seems that whereas the legislator introduces stricter rules for the defendant, it evidently privileges authorities.[24]

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[18] Although the system of lay judges or the introduction of lay elements in the justice system in general does not necessarily function as a control mechanism, the new CP (apart from the proceedings against juveniles and military personnel) eliminated lay judges from the system. As a result, publicity is indeed the last resort for society to exercise its monitoring function.

[19] Navratil Szonja, 'Az igazságszolgáltatás nyilvánossága' (Public access to justice) in Badó Attila (ed), *A bírói függetlenség, a tisztességes eljárás és a politika* (Gondolat 2011, Budapest) 156.

[20] Hack Péter, 'A bűnözők emberi jogai' (Human rights of criminals) (2008) 1 BUKSZ 31.

[21] Nagy Anita, 'Az emberi jogok és a büntetőeljárás kapcsolata I.' (The relationship between human rights and criminal procedure) (2010) 28 Sectio Juridica et Politica, 358.

[22] Angyal Pál, *A magyar büntetőeljárás tankönyve.* I. kötet (*Textbook of Hungarian Criminal Procedure* vol. I.), (Athenaeum Irodalmi és Nyomdai Részvénytársulat 1917, Budapest) 278.

[23] Bárd Károly, *Emberi jogok és büntető igazságszolgáltatás Európában. A tisztességes eljárás büntetőügyekben – emberijog-dogmatikai értekezés (Human rights and criminal justice in Europe. Fair Trial in Criminal Matters – A Dogmatic Dissertation on Human Rights)* (Magyar Hivatalos Közlönykiadó 2007, Budapest) 144–145.

[24] In this case, the provisions affect the judiciary, but the relaxation of the norms on the investigating authorities and the public prosecutor's office is noticeable as well. I will shed light on them later.

My other explanation for why the unlawful exclusion of the public should not be a relative procedural error is that the 'public' is continually expanding. Király Tibor used to write about 'courtroom-sized publicity':[25] in practice, only those who fit in the given courtroom to be able to access and see the trial are capable of monitoring the justice system.

As part of the series of conferences celebrating the 350 years of existence of the ELTE Faculty of Law, the Department of Criminology also organised one.[26] Vig Dávid underlined that the trial of Gulyás Márton and Varga Gergő, accused of public nuisance committed in a gang *(csoportos garázdaság)* was seen by 300,000 people, thanks to live feed. Since then, this number has grown; at the conference *'Our New Procedural Codes, part 3: The New Code for Criminal Procedures'*,[27] related to this study, I spoke about 420,000. This figure has not increased much since then, but at of the time of writing, one of the videos has generated 423,000 views,[28] 10,000 comments and 3,500 shares on personal social media pages. Certainly, these data must be considered with care: there must have been people who clicked on the video more than once. However, it is also certain that if the video was (is) watched by multiple people, the system still counts it as only one person, even though it reached several viewers. In other words, the exact size of the audience is hard to estimate, although it is telling and truly astonishing that hundreds of thousands were interested in the court trial and the case.

This demonstrates that the notion of 'publicity' is constantly widening; the functioning of the justice system is reaching an ever-growing number of people via different channels. The figures above seem to reflect the need for it, not only from the part of lawyers.

In conclusion, it cannot be examined at the appeals level whether the functions of publicity were achieved in the specific cases. Nor can one measure the impact the exclusion of the public may have had on the proceedings. Because of this logic, putting forward the goals, the above does not work in practice. The need for publicity is a pillar of the freedom of information, transparency and accountability, as well as the only way for society to monitor the justice system. Accordingly, having these two aims in mind, I doubt that t 'downgrading' these practices into relative procedural errors is indeed feasible.

4 The Court of First Instance Failed to (Wholly) Fulfil Its Duty to Give Reasons for the Conviction, the Acquittal, the Dismissal of the Proceedings, the Classification of the Act, the Sentencing or the Application of the Measure Pursuant to the Criminal Code

The obligation to give reasons is a limitation on the freedom of judicial discretion and, therefore, judicial arbitrariness, which is another considerable change. As I have elaborated

[25] Király Tibor, *Büntetőeljárási jog (Criminal Procedure Law)* (Osiris Kiadó 2003, Budapest) 408.

[26] The conference was held on 23 May 2017.

[27] The conference took place exactly one month later, on 23 June 2017.

[28] Of the footage made during the trial, the following video achieved the most views: <https://www.facebook.com/slejmpolitika/videos/1803060343355201/> accessed 23 March 2018.

in connection with the exclusion of the public, it is hard to envisage that this provision will be feasible in practice. One may only approach the norm from the other (opposing) side. If the judge failed to fulfil or only partially fulfilled that duty and the procedural error under Section 609 (1) *d)* of the CP cannot be relied upon because the infringement did not have a substantive effect on the proceedings, the court of second instance must substitute or complement the statement of reasons.

In other words, the question is the following: how is it possible to substitute a statement of reasons in the appeals procedure, bearing in mind the tasks and objectives of this forum? The essence of judicial reasoning is in fact that the judge renders an account of why and on the basis of which evidence they made their ruling about, for example, the guilt or innocence of the defendant. Simply said, we can see a logical explanation that cannot be remedied by someone who did not examine the evidence directly at the trial. As a result, in the absence of a proper statement of reasons behind the main question of the proceedings, the classification of the crime or the sanctions applied, it can hardly be rectified in a well-founded manner by the appeals court. Perhaps the reasoning for the sanctions is the only case where the second instance body might be permitted to substitute the lacunae left by the original court,[29] although the independence of judiciary (albeit to a lesser degree) is still affected, since it is not the original judge who explains their choice of a sanction. Nevertheless, in order to ensure the uniformity of the law, the appeals courts currently have a responsibility to strive to substitute the lacunae of the court of first instance through a reformatory decision on matters of law.[30]

Should this case arise, it has to (should) automatically lead to an annulment of the judgment, according to the rules of the former Code. It is so because, if it can be established that the reasoning does not explain (either for matters of fact or law) why the court reached its ruling, the decision must be to quash it.[31] Thus, I consider the balancing, to be performed by the appeals court when deciding on the existence of a relative procedural error, unnecessary. In order to ensure well-founded decisions, it would be much more expedient to define this degree of the breach of the duty to give reasons as absolute grounds for quashing it, the infringement would cover the missing dicta that cannot be remedied by a second instance court, and where it is difficult to imagine that its absence would not have a substantive effect on the proceedings.

[29] Háger Tamás also notes that quashing mostly occurs on the basis of matters of fact. <http://ujbtk.hu/dr-hager-tamas-abszolut-eljarasi-szabalysertesek-az-elsofoku-buntetoperben/> accessed 25 March 2018.

[30] See also the Summary report.

[31] EBH 2010. 2210.

5 The Court of First Instance Granted the Admission of Guilt without the Conditions in Section 504 (2)

If the conditions of the admission of guilt are met, the court does not deliberate but is obliged to accept it, with the possibility of delivering a decision at the preparatory hearing.[32] The conditions are the following: (1) the defendant understood the nature of this statement and the consequences of accepting it, (2) there is no reasonable doubt as to the mental capacity and the voluntary nature of their admission, (3) the confession of the defendant is unambiguous, and it is corroborated by other means of evidence adduced.[33]

Ideally, the balancing activity of the appeals court will only entail that it examines and compares the other means of evidence to determine whether they indeed corroborate the guilt, similarly to the current proceedings without a trial *(tárgyalás mellőzése).* This solution mirrors the Anglo-Saxon system, where the aim is to reach procedural justice, so that the judge can finish many more cases per day than is found in Hungary if a confession was made. However, this solution is uncommon in continental legal systems. Proponents of this latter also criticise the common law emphasis on procedural justice due to wrong judgments.[34] Nevertheless, the new Code, seen in its detailed provisions, is skewed towards a more formal notion of justice, despite its Explanatory Memorandum still being concerned with material justice.[35] At the same time, it only provides for a relative procedural error for the unlawful admission of the confession which makes the proceedings 'top heavy' from the beginning. The legislative intent to accelerate is understandable, but it is questionable why the legislator thinks that the illegal admission of a declaration on the main question of the proceedings does not count as having a 'substantive' impact on the proceeding.

The list of the relative procedural errors is non-exhaustive, while the evaluation of certain elements includes some circumstances that give rise to misunderstandings or otherwise a need for change.[36] These significantly affect legality, as well as whether the violation was correctly categorised by the lawmaker. In the following part, I will discuss the guarantees and the circumstance leading to the most common infringement of the rules of evidence: the failure to advise the defendant and the witnesses before their interrogation.

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[32] New CP, s 504, para 3.

[33] On arrangements, see also Presentation of Gácsi Anett Erzsébet, 'Megjegyzések az új büntetőeljárási törvényben megjelenő terhelti együttműködés szabályaihoz' (Comments on the rules on coercive co-operation in the new Criminal Procedure Act) on Conference of the Faculty of Law of ELTE Eötvös Loránd University held for the 350th anniversary of the foundation of the Faculty in 2017.

[34] The website Innocence Project lists numerous wrong judgments. It is worth considering them as regards admissions of guilt and other means of evidence (e.g. DNA analyses) as well: <https://www.innocenceproject.org> accessed 23 March 2018.

[35] However, the Explanatory Memorandum is not law to be applied.

[36] For example New CP, s 609, para 2, item a or b.

IV Safeguards Versus Simplification and Acceleration

I intend to demonstrate why the existence of safeguards is vital for the proceedings, and why it is imperative that infringements be avoided. In order to do so, I reviewed the rights of defence, including those of the defendant, and I will present two examples from the CP.

One of these is connected with the presence of the defendant during the trial. Pursuant to Sections 428 (1) and 430 (1) of the new Act, the presence of the defendant at the trial is no longer the default provision. Previously, it was only possible for the lawfully summoned defendant to signal his absence in advance if the court drew its attention to it. As a result, when it did not happen (it was within the judge's discretion to do so or not), then it was impossible to make use of this opportunity. However, the new CP changed this rule: it permits the absence of the defendant at any time, enlarging the agency of the accused.[37] The only exception is if the court obliges the defendant to be present (or if they did not waive their right to be present at the hearing).[38]

The court may order the mandatory presence of the defendant if it is necessary to conduct a measure of inquiry, or to hear an expert, or if the defendant's agent for service of process reports, pursuant to Section 430 (5) that the performance of their task as defined in Section 136 para (5) collides with a force majeure.[39] The first situation requires consideration from the judge.

It probably remains an eternal 'if' whether presence at the trial is a duty or a right for the defendant. The Constitutional Court dealt with this issue in some cases, especially its objective: 'Actual sentencing for the crime can only occur in the personal presence of the defendant; therefore, the full application of the *jus puniendi* is impossible in their absence (except for sanctions of a pecuniary nature).'[40]

As regards material justice, it found that 'Should the proceedings occur without the personal contribution of the defendant, or the exercise of their rights, it is an increased risk to finding the truth and unfolding and substantiating the complete and full statement of facts.'[41]

Consequently, the attendance of the defendant is required for special prevention, on the one hand, and discovering the material truth, on the other hand. Moreover, Angyal Pál already highlighted 100 years ago that one cannot set aside the defendant's presence at the trial.[42] Criminological research also demonstrates it; it is only this way to achieve the aim of

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[37] Explanatory Memorandum, General Rules of the Judicial Procedure.

[38] S 430, para 1 of the new Code provides that the defendant can only renounce their right to be present if they have a counsel who has been assigned to perform the tasks of an agent for service of process. A rule from the former CP has also been preserved: the defendant and their counsel may be absent in proceedings against multiple defendants.

[39] New CP, s 428, para 2.

[40] Decision 14/2004. (V. 7.) AB of the Constitutional Court of the Republic of Hungary.

[41] Ibid.

[42] Angyal Pál, *A magyar büntetőeljárás tankönyve.* II. kötet (*Textbook of Hungarian Criminal Procedure* vol. II.) (Athenaeum Irodalmi és Nyomdai Részvénytársulat 1917, Budapest).

the punishment and to communicate the decision externally, and I agree that it is the only way for us to prevent the defendant from committing crimes, or to let them understand why their deed was a crime. For example, the Central District Court of Pest gave a lengthy statement of reasons for the Criminal Code to penalise the act of taking a large loan under someone else's name, because the mere criminal legal relevance of the actions of two out of five defendants had been questioned. Formally, it evidently sounds better if the defendant has a *right* to participate at the trial, but regarding its content and the objective, it should be defined as an obligation, or at least as an obligation first, and a right only as a second notion.[43]

As I noted above, the defendant's presence at the trial is indispensable to ensure special and general prevention, as well as the effectiveness of the criminal proceedings. Both their presence and the fact that the pieces of evidence are reviewed before them help give reasons for the judgments establishing the guilt and make the punishment more acceptable, considering that, ultimately, it is generally the punishment or measure applied that will serve as authoritative for the defendant. With reference to the decision of the Constitutional Court, the highest degree of protection is not the defence attorney's participation but the defendant's personal attendance in proceedings (trial) where they might be convicted and deprived of some fundamental rights.

Approaching the defendant's presence from another point of view, it can be concluded that it is improbable that material justice will be served unless a trial is held. However, if a trial is held, the goal becomes (is) to find material justice. The presence of the defendant not only makes this possible, but it is also significant for reasons of effectiveness.

The other set of problems I wish to pinpoint is related to the warnings preceding the interrogation. Once the new entered into force, it will suffice to advise the witness or the defendant once per segment of the proceedings and include both the warning and their answer in the record. Currently, without a warning, the testimony is inadmissible as evidence. Research shows that the most important warning after the testimony was made is related to the right to remain silent; if other warnings are left out, it is uncommon to exclude the statement on the grounds of a relative procedural error.[44] To use an example, the testimony is not excluded if the authority did not draw the attention of the defendant to the consequences of a false accusation.[45] This is questionable practice in my opinion.

The new law introduces a provision that renders statements by both defendants and the witnesses admissible even if the no warnings were given. Generally, a witness statement cannot be submitted as evidence if the record does not contain the warnings and the re-

[43] See also Bárd (n 23) 199.

[44] Tóth Andrea Noémi, Háger Tamás, 'A terhelt vallomása a büntetőeljárás bírósági szakaszában, egyes eljárási szabálysértések megítélése' (The testimony of the accused at the court stage of the criminal proceedings, the adjudication of certain procedural violations) (2013) (2) Miskolci Jogi Szemle, 87–88.

[45] Háger Tamás, 'A bizonyítás és a terhelti vallomás egyes kérdései' (Some issues of proof and incriminating testimony) in Szilágyiné Karsai Andrea, Elek Balázs (eds), *Tanulmányok a Debreceni Ítélőtábla 10 éves évfordulójára* (Debreceni Ítélőtábla 2016, Debrecen) 164.

sponse from the witness.[46] The exception entails that the testimony can still be admissible if the witness, at a later hearing, maintains their words subsequent to a warning. This declaration cannot be revoked.[47] In practice, another issue is that if the witness exercises their right to refuse to give testimony at trial, the former one (e.g. made during the investigation phase) cannot be used as evidence; as a result, the authority loses evidence that could be valuable for establishing the statement of facts.

This problem is resolved by Section 177 (4) of the new Code because it allows the use of these statements as well. I believe that not only does it constitute an attack on the principle of immediacy, but, when invoking family member privilege, for example, as grounds for refusing to testify, it makes such parties more vulnerable for the sake of securing a guilty verdict. The situation is the same if the witness has been interrogated as a defendant (either in the same or a different case), because their testimony as a defendant will be admissible, irrespective of their potential refusal to give a statement as a witness.[48]

Analogous changes occurred as regards the admissibility of the defendant's statements. Section 185 (3) of the new Code uses the same default rule as for witnesses: unless the defendant's warning and their response appears in the record, the statement cannot be used as evidence. Again, similarly to witnesses, the legislator was lenient, since the testimony can still be adduced if (1) they have already been advised as defendants during the proceedings and they have access to a defence attorney throughout their interrogation, or 2) they maintain their statement even after being advised.[49] This permissive rule or, rather, a rule that is capable of eliminating breaches of law *post hoc*, does not ensure that the rules of evidence will be respected. In fact, it makes the work of the authorities easier just when, as I noted in the earlier heading, this is one of the most common grounds for relative procedural errors. If the authority perceives the consequences of its defects (e.g. that they will not be able to provide lawful evidence), they will be interested in doing everything to perform their tasks without procedural errors. It did not work in the previous system either,[50] because it is one of the most frequent grounds for relative procedural errors. However, if the provisions are looser, just as in the new Code, the authorities will be unlikely to be motivated to work more attentively because their mistakes will be left without consequences.

Elucidating the two amended sets of rules served to highlight that unless the weight of the defendant's presence and the sanctions for the failure to advise before interrogations are safeguarded, it is difficult to simplify and hasten the proceedings in a lawful way.

Several solutions in the new Code introduce reasonable provisions that abolish excessive formalities, although, as regards the provisions mentioned, it is hard to believe that the proceedings remain lawful. 'The Bill argues that the possibility to refuse to testify and

[46] New CP, s 177, para 2.

[47] New CP, s 177, para 3.

[48] New CP, s 177, para 5.

[49] New CP, s 185, para 4.

[50] See also, Elek Balázs, *A vallomás befolyásolása a büntetőeljárásban (Influencing a confession in criminal proceedings)* (Tóth Könyvkereskedés és Kiadó Kft. 2008, Debrecen) 100.

being advised on it is a highly safeguarded value; the consistency and the authority of the proceedings can be guaranteed if the testimony given during the proceedings can be used as a means of evidence irrespective of the latter statements of the defendant or the witness.'[51] Summing up the Explanatory Memorandum and the provisions mentioned: (1) It is enough to advise the witness and the defendant only once during every segment of the (appeals) proceedings. (2) If no advice was given, it may be substituted later (this is an interesting question of legality). (3) Even if the defendant or the witness refuses to give a testimony, their former one(s) can be submitted as evidence.[52] (4) Their statement from any other case will be admissible in trial. The Memorandum is silent on what 'guarantee values exist,' but having such a set of rules is unconvincing when there are no safeguards against the breaches of law; practically none of the infringements would inevitably lead to declaring an unlawful means of evidence or a relative procedural error.

V Remedies against Quashes

Reading studies or listening to presentations on quashes, one constantly hears the term 'the death of the case'. It is to be hoped that its definition will also be also given – in some cases, refuted as well.[53] Personally, I deplore that it has never been said out loud or even considered that quashing proceedings possibly means that there was not a case in the first place, let alone the 'death' of a case, at least cases adjudged according to the 'rule of law', including the fairness of the trial. Instead, quashing creates the lawful framework that should have existed already, from the beginning to the end of the proceedings. It may be a necessary evil, but the adjective here is more essential; I also think that the authorities may be driven to be more careful when they are aware of the consequences of their unlawful behaviour. It is somewhat logical that the judge shall bear responsibility for their own faulty decision; a large number of repeals should impediment their professional advancement. It is their own unlawful behaviour if they failed to recognise the procedural errors in the earlier parts of the proceedings, then admitted and based their peremptory decision on unlawful means of evidence. However, it still not evident why there is not a consequence for either the public prosecutor's office or the investigating authority, since it is their fault that *a)* either the ruling will be quashed, or *b)* the indictment on which it was based was ill-founded. In other words, the court was burdened, I must say, unnecessarily. I think that quashing it is not the death of the case but more the failure of the justice system, for which the investigating authority and the prosecutor should assume the same responsibility as the judge whose judgment was overturned.

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[51] Explanatory Memorandum, 177. §.

[52] The previous testimony of the defendant is admissible in the previous Code as well, whereas that of the witness is not.

[53] See also the Summary report.

The new Code, following the strongly disputed 2/2015 Criminal Law Uniformity Decision, introduces a remedy against decisions overturning the original one and ordering the lesser court to initiate new proceedings.[54] I concur that the legislator, adequately and respecting the principle of the equality of arms, solves the issue that the appeals forum may be inactive and might not proceed in the case despite its reformatory powers.[55] Quashing the decision will be possible on the grounds of absolute and relative procedural errors and the ill-foundedness of the decision, or if the appeals court could not complement or correct the decision based on the adduced evidence and instead made a decision to quash it. In addition, appeal will be available when the repeal itself was affected by an absolute procedural error. In the latter case, the court empowered to adjudicate (which is the ordinary appeals court of the original forum) either upholds the ruling or overturns it and orders the second or third instance court to repeat the proceeding. In the first three cases, upholding the judgment is also possible, whereas the other option is the decision that repeals the original one and orders the second or third instance court to repeat the proceedings. The defendant, the defence attorney (independently from the defendant) and the prosecutor have the right to appeal against the repealing decision, unless it was delivered by the Curia.

Based on the provisions above, it can be concluded that, on the one hand, there was a need to create the possibility to review decisions that overturn lesser court judgments and order them to repeat the proceedings, which results in a more time-consuming case. At the same time, at least one issue was not addressed with this remedy: if there arises a relative procedural error to which the second instance court remains inattentive, or it determines that it did not have an impact on the proceedings, there is no possibility for a further remedy.

VI Conclusion

In conclusion, it may be argued that there is now uncertainty in the system of relative procedural errors. The term 'substantive impact' (i.e. that of the error on the proceedings) is too vague. The court pronounces its judgment decision without a debate. A further problem is that if one of the parties argues for the determination of the substantive impact, but the court disagrees, there is no possibility to question the court's assessment. Having analysed the different examples, it may be ascertained that the Code has solutions that used to be grounds for relative procedural errors, sometimes the most prevalent ones, hence it legalised and no longer sanctions these infringements. A foreseeable and duly working justice system necessitates that overruling decisions and ordering the courts to repeat the proceedings should

[54] New CP, part Seventeen.

[55] One of the provisions of the Uniformity Decision was indeed under crossfire because it only gives the right to appeal the quashing judgment to the Prosecutor General (as part of the so-called *remedy in favour or legality*), but denies the same right to the defence.

only occur in strict and obvious cases.[56] It would ensure the transparency of the procedure and respect for the rights of the participants.

Either in the short or the long run, it is hardly a desirable tendency if the multitude of errors in practice are not dealt with as part of the responsibility and accountability of the authorities but as a matter of legislation, which in turn condones the defects.

The academia of criminal procedural law and the different studies on the provisions of the new Code do not intend to bicker meaninglessly and criticise the lawmaker's efforts at all costs. Their aim is to hold up a mirror, by drawing the legislator's attention to potential problems in the legal dogmatics or the application of the law, thus helping their (further) work in striving towards perfection. Perfection, meaning here that each and every building block is in the right place, has an outstanding significance for a criminal procedural code as well. It must not be allowed that the provisions are used with doubts, let alone by breaching the law in proceedings where the law itself empowers the authorities to interfere with the most important basic rights. However, these building blocks may only be put in their place if the suggestions from scholars, and not only from those in the justice system, are heard – provided that the aim is to create a procedure following the rule of law. Pursuant to this goal, academia will always be able to put these blocks in their places – it is another question whether the lawmaker lets us do so.

[56] Sódor (n 4) 256.