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Contents

Continuity and New Perspectives – Editorial

The first issue of the ELTE Law Journal was published in 2013. Since then, the journal has been through its childhood and reached the age of maturity. Readers could read through fourteen issues of the journal and the ELTE Law Journal became one of the leading English-language journals in Hungary. Everybody can have access to all issues and all articles free of charge through the journal website. The ELTE Law Journal is linked to a Hungarian higher education institution, the Faculty of Law of ELTE Eötvös Loránd University, but it has been characterised since its foundation by its strong international vision. The journal has attracted a worldwide readership and authorship. Excellent legal scholars contributed to the journal on various topics and presented the current international, European and domestic developments. At the same time, the journal also attracted authors from beyond academia who gave insights to the law in action. The ELTE Law Journal has provided a forum to publish the outcomes of individual studies, those of joint research projects and of findings presented at international conferences.

This issue marks one change. The ELTE Law Journal has arrived at a new chapter. The former editor-in-chief, Professor Ádám Fuglinszky has handed over to Tamás Szabados, associate professor of the Faculty of Law of ELTE Eötvös Loránd University. Notwithstanding this personnel change, other things will not alter: the endeavour for quality and the international and comparative focus of the journal. The new editor-in-chief is committed to preserving these values. In this vein, the Editorial Board continues to welcome submissions from authors of high-quality articles on any topic, focusing on international, European law, comparative law and legal theory, that can raise the interest of the international academic community.

The Editorial Board aims to continue to increase the international reputation of the ELTE Law Journal. As a new initiative, the Editorial Board will regularly announce calls for articles on various topical issues with the aim of involving more and more potential authors and will consider the publication of special thematic issues. Of course, this will not exclude submissions on other current topics.

This editorial also provides an opportunity for the Chair of the Editorial Board to thank the former editor-in-chief for his work on behalf of the Editorial Board and the Faculty of

Law of ELTE Eötvös Loránd University. Ádám Fuglinszky played a significant role in launching the journal and his contribution has been indispensable to running the journal over the last seven years and ensuring a smooth transition to the new editor-in-chief.

Miklós Király
Chair of the Editorial Board

Tamás Szabados
Editor-in-chief

Symposium

ELTE Faculty of Law 350th Anniversary Conference Series – Editorial to the Symposium Section

Our Faculty celebrated the 350th anniversary of its establishment on the 23rd February 2017. This anniversary was a landmark in the history of our Faculty, which provided us with the opportunity to remember our roots, to evaluate our achievements and to look into the future. The more than three-and-a-half centuries behind us speak about a past we are proud of. Not because the past and the history are valuable in themselves, but because we survived and made progress throughout the storms of centuries due to our commitment to scientific quality, social responsibility, moral principles, our endeavours to increase the level of education and to build a strong community. Our institution proved its ability to adapt to the changing social and economic environment and renewal. Values such as professional humility, tolerance, respect, openness and solidarity were and are the key to our success. It is also our duty today to keep such values, because we have to build our future on these pillars, too. As the leading law faculty in Hungary, we have a strong consciousness of our responsibility for the education of lawyers in the whole nation. The success of this celebration year could also give us faith and inspiration to remain a research centre for legal studies, recognised as such in Europe, and to educate lawyers with a strong sense of professional responsibility and the highest level of professional skills and knowledge, who are also competitive in an international environment.

This celebration was also a festival of science. We celebrated with a series of conferences that embraced the whole range of legal science. As there is no feast without friends, we also invited colleagues from all of the law faculties and legal research centres in the country. These conferences gave a picture of the contemporary legal problems in which we are engaged, as well as the results we have achieved. They reflect the past as well as the future. We decided to select some of the contributions to the conferences of this anniversary year for the ELTE Law Journal in order to reflect the professional output that was presented there. The selected contributions can be read in the present and the next issue of the ELTE Law Journal.

Attila Menyhárd
Former Dean of the Faculty of Law
ELTE Eötvös Loránd University
Professor and Head of Department of Civil Law
Editor of the ELTE Law Journal

István Ambrus*

The Dispositive and the Cogent in Sentencing: Theoretical Issues and an International Overview

I Introduction

With an *absolutely indeterminate* criminal sanction, the lawmaker intends only to codify which acts should constitute an offence; the determination of the type and degree of penalty is left to the judiciary. At the other end of the spectrum are *absolutely determinate sanctions.* Here, the legislator prescribes, in addition to the punishable behaviour, the precise manner and severity of punishment. The task of those applying the law (mostly, but not always, the courts) in this instance is reduced to determining the applicability of an offence and its classification under criminal law. After this, the exact outcome as outlined by the legislative must be pursued.[1]

Historically speaking, absolutely arbitrary penalties were typical initially. Then – for example, due to the need to counter judicial tyranny, which arose during the enlightenment – mandatory sentencing came to the forefront. The latter was not unknown to the Hungarian criminal law of old. According to László Fayer's posthumous work,

> since the beginning of the 19th century, the development of criminal law went through two distinct stages. First, the punishment decreed by the law and to be applied by the judge went from being absolutely determined to relatively determined. The judge's power triumphed over the generalisation of the lawmaker. Around the middle of the century, these efforts went a step further: not only should the imposable penalty be of a relative character, but the penalty imposed by the judge, too. While in the previous era the judge issued an order for punishment, according to the understanding of the more recent period, he issues permission.[2]

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1 See Földvári József, *A büntetés tana (The Doctrine of Punishment)* (Közgazdasági és Jogi Kiadó 1970, Budapest) 98–99; Rendeki Sándor, *A büntetés kiszabása. Enyhítő és súlyosító körülmények (The Imposition of Sanctions. Mitigating and Aggravating Circumstances)* (Közgazdasági és Jogi Kiadó 1976, Budapest) 39.

2 Fayer László, 'Fayer László irodalmi hagyatékából' (From László Fayer's literature legacy) (1909) (21) Jogtudományi Közlöny 181.

The direction of development was towards softening and relativising absolutely determinate sanctions. Still, it can be highlighted that even Act V of 1878 (the Hungarian penal code on felonies and misdemeanours; colloquially called the Csemegi Codex) in its section 278 contains – though extraordinarily – a provision that precludes judicial discretion: 'He who kills a man with premeditated intent commits murder and shall be punished by death.'

The adjudication of criminal penalty in the modern legal systems of the 20th and 21st centuries is generally conducted through the application of *relatively determinate* sanctions. Under this configuration, the power to sanction is *divided* between the lawmaker and the applier of the law. The former determines, in addition to the punishable acts, the range of applicable sanctions and their severity (length, sum etc.), thereby leaving room for the legal practitioner to apply the penalty (or measure) to the case in question. This solution is usually sufficient to resolve the potential friction between abstract and real-life scenarios. While the lawmaker can only evaluate the general harm a given criminal phenomenon may cause to society, the practitioner may consider unique (aggravating or mitigating) circumstances in a particular case.

Recently, however, our domestic criminal law has seen a resurgence of efforts that serve or served to limit – or at least to better determine – judicial room to manoeuvre. In consideration of this, my study will examine the types of solutions to limit or withdraw a judge's power to deliberate, contained in Act C of 2012 on the Criminal Code (hereinafter referred to as the *Btk.*). This is followed by a jurisprudential evaluation and brief critique of absolutely determinate sanctions. This introduction must also mention that the criminal law of Anglo-Saxon nations has been on a different trajectory, on which mandatory sentencing has been long known and applied.[3] As a short introduction to regulatory models and practice may be beneficial for Hungarian criminal law, the work closes with a review of international practice.

II The Dispositive and the Cogent in Sentencing

The differentiation between dispositive and cogent (also known as categorical or imperative) norms is not at all an exclusive characteristic of criminal law. It features similarly in both private and employment law.

In the terrain of civil law, 'dispositivity *[sic]* is a main rule in contract, which expresses that contracting parties can determine, through consensus, the content of their agreement – that is to say, their rights and responsibilities vis-à-vis each other – as per the principle

[3] See Gary T. Lowenthal, 'Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform' (1993) (1) Law Review 67–69; and Paul J. Hofer, Mark. H Allenbaugh, 'The Reason Behind the Rules: Finding and Using Philosophy of the Federal Sentencing Guidelines' (2003) (1) American Criminal Law Review, 20–26.

of freedom of contract'.[4] The cogent norm signifies the opposite of this: statutory determination. The literature of both employment[5] and company law[6] understand dispositive and cogent norms in similar terms.

1 The Dispositive, Orientative, and Cogent Rule in Hungarian Criminal Law

In terms of the study of legislation, we have no reason to treat dispositive and cogent provisions markedly differently than do other fields of law. Consequently, in addition to considering this treatment as axiomatic, we only need to look to the way their unique aspects manifest in this legal field. Accordingly – *mutatis mutandis* – those legal provisions of the criminal sanction system that allow for judicial (prosecutorial) discretion may be regarded as dispositive. By contrast, provisions that tie the court's (prosecutor's) hands are cogent. These do not offer any deliberative powers or only do so in a limited way.

With regard to the unique aspects of the effective Hungarian criminal law to be detailed below, it is justifiable to interject the so-called *orientative* sanction rule as an intermediate step between dispositive and cogent provisions. The essence of this category is that while it does not bind the judicature's hand in sentencing, it sets a standard, from which deviation is only possible if the duty of special justification is discharged.

2 Examples of Dispositive Rules in the Criminal Code

We may come across several dispositive provisions in the Btk's sanction-related chapters. First, a definitive everyday example may be found in section 33(4). In cases where the minimum punishment for an offence is less than a one-year custodial sentence, the provision's *alternative penalties* allow for the imposition of confinement, community service, fine, a disqualification from professional activity, a disqualification from driving, a ban on entering certain areas, a ban on visiting sporting events or expulsion. These provisions mean that the court, in cases where the criminal offence is punishable with a custodial sentence between three months and five years, is empowered to use softer penalties, either in a standalone or combined configuration. This solution is clearly agreeable, because it may contribute greatly to individualised sentencing, and it has a welcome effect on the size of

[4] Jójárt Eszter, 'Diszpozitivitás a régi és az új Polgári Törvénykönyvben' (Dispositivity in the old and in the new Civil Code) (2014) (12) Magyar Jog 674.

[5] Berke Gyula, 'Kógencia és diszpozitivitás. Eltérő szabályozási lehetőségek az új Munka Törvénykönyvében' (Cogency and Dispositivity. Different Regulation Options in the New Labour Law) (2013) (10) HR & Munkajog 42–43.

[6] See Kisfaludi András, 'Kógencia vagy diszpozitivitás a társasági jogban' (Cogency and Dispositivity in Company Law) (2006) (8) Gazdaság és Jog 3–5.

the prison population.[7] It may also be highlighted that the application of this provision is an unconditional prerogative of the courts – it does not necessitate the predominance of mitigating factors, as is the case in the mitigating rules contained in the Btk's section 82.

The courts have similarly remarkable discretionary powers in relation to *probation.* According to section 65(1) of the 2012 act, 'the court may defer the imposition of a sentence conditionally if it is for an infraction or felony punishable by imprisonment of up to three years if there are reasonable grounds to believe that probation will serve the purpose of punishment'. In examining whether it is reasonably prognosticated that the purpose is met even without exacting the prescribed penalty, the courts have significant discretion. The same is true for the Btk's reparation *work* provision, which is contained in section 67 (1).

3 The Appearance of the Orientative Rule in the Criminal Code

The clearest example of a rule that simply orients judicial deliberation is the duty of *median sentencing*, which has a varied regulatory past. According to section 80(2), 'where a sentence of imprisonment is delivered for a fixed term, the median of the prescribed scale of penalties shall be applicable'. The median serves as a kind of starting point – for example, in the case of a basic robbery, which carries the possibility of two to eight years in prison, the median would be a five-year custodial sentence. The court may choose to impose a longer or shorter period, but it must justify this in its ruling.

It can be highlighted that, according to the Constitutional Court's 13/2002. (III. 20.) AB ruling, the median rule in the then-effective Act IV of 1978 on the Criminal Code did not violate the constitutional principle of judicial independence; therefore, it could not be regarded as unconstitutional. Simultaneously, it must be noted that the concept was criticised by prestigious scholars such as Tibor Király[8] and Kálmán Györgyi[9]. Nonetheless, Balázs Gellér's observation, that the motive for the reintroduction of the median rule was 'not stringency but the uniformity of sentencing and the promotion of appropriate judicial justification', can be supported.[10]

4 Cogent Sanction Rules and Their *De Lege Lata* Categorisation

As we have seen, cogent norms preclude or at least limit the sentencing discretion of the acting authority in a criminal case. Based on the Btk. and relevant practice, cogent catego-

[7] See Nagy Ferenc, 'Az európai börtönnépességről' (About the European Prison Population) (2016) (3) Börtönügyi Szemle 19–21.

[8] Király Tibor, *Büntetőítélet a jog határán (Judgment at the Border of Law)* (Közgazdasági és Jogi Könyvkiadó 1972, Budapest) 292–294.

[9] Györgyi Kálmán, *Büntetések és intézkedések (Penalties and Measures)* (Közgazdasági és Jogi Könyvkiadó 1984, Budapest) 274–280.

[10] Gellér Balázs, 'Büntetéskiszabás Magyarország negyedik Büntető Törvénykönyvében' (Sentencing in the Fourth Hungarian Criminal Code) (2015) (2) Jogtudományi Közlöny 75.

ries may be divided into *four subcategories*. We may distinguish between *true*, *apparent*, or *de facto cogent norms*. A special case of true cogent norms are the *absolutely determinate sanction rules* introduced in the title of this study.

From a grammatical perspective, cogent norms contain imperative language (e.g. 'shall'), but they can also appear in the indicative. In reality, as we shall soon see, the latter category tends to be 'stronger' (e.g. the perpetrator 'is subject to' a given measure). Rules that allow for deliberation typically contain the word 'may' or conditional suffixes. However, a problem of interpretation may arise, because the Btk. – in a somewhat confusing manner – uses the imperative in determining the criteria systems for some penalties, but it chooses to include conditions with a deliberative element among these.

My position is that, in this sense, it is necessary to distinguish between *true and apparent cogent penalties.*

A characteristic of a *true cogent* rule is that there is no place for discretion – once criminal responsibility is established then it must be applied at all times. At most, the court (or prosecutor) may decide on the question of severity.

Grammatically, an *apparent* cogent rule is in the imperative. At the same time, the legislator loosens its criteria regime with discretionary elements. Ultimately in these instances, it depends on the court's (or prosecutor's) discretion whether the sanction type is applied after criminal responsibility is established.

In addition to true and apparent cogent sanction rules, we may also speak of *de facto cogent* rules. Some features of these theoretically do contain discretion, but in practice this discretion is objectively lost beyond a certain level (e.g. sum).

Finally, *absolutely determinate sanction* is the true and 'strongest' variety of a cogent rule, in which the lawmaker not only prescribes a particular sanction if statutory requirements are present, but he also orders its extent precisely.

a) Examples of true cogent sanction rules

Section 69(2) of the Btk. contains a *true cogent* norm in relation to *parole with supervision*. Using the indicative (!), it states that 'probation with supervision shall be ordered: a) for the convicted perpetrator if released on parole from life imprisonment; b) for the recidivist if released on parole or sentenced to a term of imprisonment, the execution of which is conditionally suspended.' The latter rule is repeated – probably redundantly – in the second sentence of section 86(6). Furthermore, as per section 119(1), a minor will remain under supervision, no matter how he is liberated or remains at liberty.

Confiscation is always mandatory in relation to the product of a crime, or an object that is dangerous to the public, or possessing which is illegal. Media products, in which a criminal act is realised, are similarly subject to it [Btk. section 72(1)(b), (d), and (2)]. The same is true for the *confiscation of property* and for *irreversibly rendering electronic information inaccessible* (Btk. section 77).

Section 60(2a) of the Btk., in reference to the special part offences created due to the migration crisis, states – effective from 15 September 2015 as per Act CXL of 2015 – that, in addition to a custodial sentence for illegally crossing the border barrier (Btk. section 352/A), damaging the border barrier (Btk. section 352/B), and obstruction of border barrier-related construction (Btk. section 352/C), and, in the case of the suspended prison sentence of section 82(1a), *expulsion is unavoidable*. This means that the court can only forego expulsion if it does not impose a custodial sentence (including a suspended one), but it issues, for instance, a warning instead (Btk. section 64).

b) Examples of apparent cogent sanction rules

Expulsion is a primary *apparent cogent* norm. As per section 59(1) of the Btk., a non-Hungarian perpetrator whose presence in the country is undesired must be expelled from Hungary. Though the legislation is worded in the imperative, deciding which non-Hungarian citizens' presence is undesirable clearly falls within the courts' discretion.

Similarly, when entertaining the secondary penalty of *exclusion from participation in public affairs* – imposed together with an implementable custodial sentence due to an intentional offence – the courts have the discretionary power to decide who is unworthy to participate in public life [Btk. section 61(1)].[11]

The same can be stated regarding the *loss of military rank* and *military demotion*. The former must be applied when the 'perpetrator becomes unworthy of a rank' [Btk. section 137(1)], while the latter is appropriate where the rank's reputation has been damaged but no need exists for loss of rank [Btk. section 139(2)].

Among preventive measures, *admonition* may serve as an example. The wording of the Btk's section 64(1) suggests mandatory application, but its use nonetheless 'depends on the judge's or the prosecutor's assessment, because the determination of whether the threat to society is absent or minimal requires a careful analysis of unique circumstances.'[12]

By the phrasing of the law, *compulsory psychiatric treatment* also *must be utilised* if its statutory requirements are met but, once these are reviewed, it is clear that several of them (e.g. a prognosis of repetition, presumption of a custodial sentence if the perpetrator were mentally fit) contribute to apparent cogency (Btk. section 78).

c) Examples of *de facto* cogent sanction rules

The *de facto* cogent norm is a special form of the apparent cogent norm, serving as a transitional category towards true cogency. Its identification and definition cannot be satisfacto-

[11] See BH 2007. 3.

[12] Tóth Mihály, 'A büntetőjogi jogkövetkezmények' (Criminal Sanctions) in Belovics Ervin, Nagy Ferenc, Tóth Mihály, *Büntetőjog I. Általános Rész. (Criminal Law. General Part)* (3rd edn, HVG-ORAC 2015, Budapest) 433. Also see BH 1989. 260.

rily undertaken purely based on the Criminal Code's text; it requires exploration of criminal case law. In the underlying case for the decision published as EBH 2016. B.6., the Supreme Court of Hungary (hereinafter *Kúria*) had to decide the relationship between expulsion and the circumstances for the mandatory application of a *fine*.

In this decision, the Kúria ruled that

> the substantive offence of violating the ban on imposing both a fine and expulsion during sentencing must be remedied in consideration of the fact that a penalty that must be imposed by the court by statute cannot be ignored. Therefore, due to the mandatory fine imposed on the economically-motivated perpetrator sentenced to a fixed term of imprisonment and endowed with a sufficient income, expulsion – as the undesirability of him remaining in the country depends on deliberation – cannot be ordained.

Thus, the Kúria implicitly differentiated between true and apparent cogent (though, due to the ban on joint application,[13] inapplicable) criminal sanctions while comparing expulsion and the so-called mandatory fine.

Though the requirements of expulsion are, as we have seen, phrased in the imperative [as according to section 59(1) of the Btk. the non-Hungarian citizen 'shall be expelled'], the determination of whose presence is 'undesirable' in the country *(persona non grata)* requires judicial consideration. Consequently, we are clearly faced with an apparent cogency.

Simultaneously, according to section 50(2) of the Btk., the economically-motivated perpetrator who is sentenced to fixed-term imprisonment and has sufficient income or wealth *must be fined*. Here too, the wording calls upon the judge to impose a sanction, but it retains the possibility of discretion. The presence or absence of an economic motive is not a question of sentencing but of the classification of the charge, and this would still allow for a true cogent rule. In some instances, whether the perpetrator is given a fixed-term imprisonment extends to the area of sentencing. Here – based on the previously-cited section 33(4) of the Btk. – the court may impose an alternative sentence for an offence that is punishable by up to three years' custody. Additionally, the penalty might be mitigated in relation to offences punishable by one to five years' imprisonment by way of resorting to confinement, community service, or a fine [Btk. section 82(2)(d) and (3)]. The court's discretion extends only up to this point. It is clear that if the court established an economically-motivated offence punishable by two to eight years' imprisonment (e.g. robbery), it would have no deliberative power – it must imprison (potentially in addition to other permitted sanctions). Nonetheless, section 50(2) of the Btk. adds a final condition for the mandatory imposition of a fine: the presence of sufficient income or wealth. Fundamentally, this might once again

[13] See Ambrus, István, 'A szankciós szabályok és a büntetéskiszabás néhány dilemmája Magyarországon (2010–2017)' (Some Dilemmas of Sanctioning Rules and Punishment in Hungary (2010–2017) in Homoki-Nagy Mária, Karsai Krisztina, Fantoly Zsanett, Juhász Zsuzsanna, Szomora Zsolt, Gál Andor (eds), *Ünnepi kötet dr. Nagy Ferenc 70. születésnapjára (Festive Volume for Ferenc Nagy's 70. Birthday)* (SZTE ÁJK 2018, Szeged) 16–22.

allow for judicial contemplation. According to an unbroken tradition of sentencing practice, 'considering the goal of the law – in terms of a fine – salary or income is deemed sufficient if the perpetrator is able to pay the fine, even if in instalments. The question of whether the accused's salary is sufficient can only be decided based on a thorough investigation of the given circumstances.'[14]

Based on the above, it appears that both expulsion and the imposition of a mandatory fine contain elements affected by judicial deliberation, and both could be viewed as apparently cogent. At the same time, while in expulsion there exists no further statutory barrier to discretion, the court's options can become quite limited with a fine. On this basis, in addition to true and apparent cogent sanction rules – and basically as a special subcategory of the latter – we may also speak of *de facto* cogent rules, in which some conditions allow for discretion in theory, but in practice the possibility for consideration is often unavailable. The justification for the previously-mentioned document by the Kúria illustrates this well: 'It is true that the court sentenced the perpetrator to fixed-term imprisonment as well, and his €800/month salary – the equivalent of approximately 250,000 forints – qualifies as a sufficient income in Hungarian terms.' Therefore, while there are borderline cases where the judicial prerogative is present, above a certain objective limit, the determination of an appropriate income cannot be neglected. However, we have to mention that three later decisions of the Kúria stated that the cogent imposition of expulsion is a stronger rule than the imposition of a mandatory fine.[15] According to this legally uncertain situation, the Hungarian legislator decided to amend the Btk., thus, from 1 January 2021, if it is mandatory to impose an expulsion (e.g. in the case of human trafficking), the otherwise mandatory fine cannot be imposed simultaneously.[16]

Another entry in the category of *de facto* cogent rules is a special case of *disqualification from driving motor vehicles.* According to the Btk's section 55(2), a driving ban shall be imposed for the criminal offences of driving under the influence of alcohol or driving under the influence of drugs. In cases deserving special appreciation, the disqualification may be forgone. The latter rule, which allows a special waiver of the mandatory imposition of a driving ban, may be applicable if the perpetrator has a clean traffic record and his BAC does not exceed the 0.50 g/l limited prescribed in Btk. section 240(3). If these mitigating factors are absent – e.g. the perpetrator was moderately or severely drunk – the waiver would not be appropriate. A disqualification would consequently be *de facto* obligatory.

The latest example relates to the regime of *disqualification from a profession*. Effective from 1 December 2017 (as per Act CXLIX of 2017), Btk. section 52(4) states that a person guilty of *endangerment of a minor* must be disqualified from the practice of a profession or other activity, in the course of which he may undertake the education, care, custody or medical treatment of a person under the age of eighteen years, or if it involves a position of

[14] See 25. BKv and BH 2012. 112.

[15] See BH 2017. 208., BH 2017. 285., BH 2020. 132.

[16] See 2020. XLIII Act 47. §.

authority or influence over such person. In cases meriting special commendation, disqualification from a profession may be waived.

d) Examples of absolutely determinate penalties

We may also find Hungarian examples that completely remove judicial discretion from sanctioning. As per the Btk's section 52(3), 'in connection with any criminal offence against sexual freedom and sexual morality, if at the time when the crime was committed the victim is under the age of eighteen years, the perpetrator *must be permanently* banned from the exercise of any professional or other activity that involves the responsibility of undertaking the education, care, custody or medical treatment of a person under the age of eighteen years, or if it involves a position of authority or influence over such person'. This special case of *disqualification from a profession* differs from the *endangerment of a minor* offence mentioned in the category of *de facto* cogent rules in two respects. First, here it is not only obligatory to disqualify the perpetrator, but this must exclusively be done permanently. Second, the rule allowing the court to avoid this measure in cases of special commendation is absent. Therefore, the court cannot circumvent disqualification, no matter the preponderance of mitigating circumstances.

A so-called 'three-strikes rule' that tolerates no deliberation applies to violent recidivists.[17] The Btk's section 90(2) states that, in instances of imprisonment, the upper limit of the penalty range for a violent recidivist's primary offence to establish him as such must be doubled. If the thus-inflated sentence exceeds twenty years or may carry a statutory possibility of life imprisonment, the perpetrator *shall be sentenced to life imprisonment*. It is important to note that the mutual presence of the aforementioned conditions would mean that the mandatory life sentence is *without the possibility of parole*, because section 44(2)(a) of the Btk. *precludes the possibility of parole* if the perpetrator is a violent recidivist.

III The Problems of Absolutely Determinate Sanctions

Determinate sanctions and their consequences for the practice of law must be the subject of separate studies. Therefore, in this section, I will simply discuss briefly the reservations which have occurred to me in relation to these sanction rules.

1 The Absence of Individualisation

The argument customarily made in favour of mandatory sentencing is that it promotes legal certainty and predictability, because the lack of judicial discretion means that the accused

[17] See Kónya István, 'A három csapás bírói szemmel' (The 'Three Strikes' from a Judge's Point of View) (2011) (3) Magyar Jog 129–135.

can know precisely the consequences of carrying out a punishable act. On the other hand, a classic counterargument is that a stiff rule that does not allow for weighing the situation can give rise a ludicrous outcome, as it prevents the exploration of the unique circumstances of a given case, which in turn might lead to injustice. The Constitutional Court's 23/2014. (VII. 15.) AB decision, which squashed the three-strikes rule for multiple offences, highlighted that it 'unreasonably restricted courts' constitutional functioning in the field of criminal law by withdrawing judicial discretion, and it therefore does not allow for judicial individualisation.'

2 The Impossibility of Proportionality

The Constitutional Court expressed in several of its decisions that criminal penalisation must be suitable for its goal, and, furthermore, that criminal sanction must be proportionate to the severity of the act (its harm to society). Accordingly, Constitutional Court decision 11/1992. (III. 5.) AB ruled that 'criminalisation and the threat of punishment must be founded on constitutional justification: they must be necessary, proportionate, and, ultimately, utilised.' 30/1992. (V. 26.) AB relied on this same position: 'Criminal law instruments necessarily limiting human rights and civil liberties must only be used in cases of absolute necessity and to a proportionate degree.' Finally, Constitutional Court decision 1214/B/1990. (ABH 1995, 571–578) may be highlighted, according to which 'the function of a legal punishment under the rule of law is proportionate and deserved reciprocation. Proportionate and deserved reciprocation promotes preventive punitive goals.' The European Court of Human Rights and several nations have crafted their own necessity/proportionality tests.[18] Foregoing a detailed description of these, I will only discuss a single issue related to the three-strikes rule. The duty to issue a mandatory life sentence in cases where personal injury might not have occurred but, according to the Btk's section 459(1)(26)(k), the matter is classified as a violent crime against the individual – e.g. an armed robbery for substantial value, as per section 365(4)(b) – is sure to cause a disproportionate result. This is especially true if we consider that if the robbery is undertaken by a 'simple' (but nonviolent!) recidivist who kills five people in its course, his deed, economically-motivated and a homicide against multiple persons, will fall under Btk. section 160(2)(b) and (f), to which issuing a mandatory life sentence is not obligatory. It is simply an option, in addition to a ten to twenty-year fixed term imprisonment.

3 Discrepancy within the Criminal Code

The aforementioned provision on violent recidivists may cause a discrepancy within the criminal code. According to the Btk's section 80(1), '[p]unishment shall be imposed within

[18] See Gellér Balázs, Ambrus István, *A magyar büntetőjog általános tanai I. (The General Part of the Hungarian Criminal Law I.)* (ELTE Eötvös Kiadó 2017, Budapest) 88–90.

the framework provided for in this Act, having in mind its intended objective, as consistent with the severity of the criminal offence, with the degree of culpability, the danger the perpetrator represents to society, and with other aggravating and mitigating circumstances'. But the criteria cited are impossible to fulfil, if section 90(2) simultaneously decrees that the court must disregard all circumstances during sentencing to administer the penalty declared as mandatory by the lawmaker.

4 Alienness to Continental Criminal Law

As already indicated in the introduction, determinate sanctions were not previously unknown in Hungary. With the modernisation of criminal law, however, these solutions gradually disappeared and allowed space for judicial discretion. Therefore, the efforts to preclude judicial discretion appear debatable based on historical experience, too.

It is worth noting that in Anglo-Saxon countries (to be discussed in the international comparison section), the argument that mandatory sanctions *(sentencing guidelines)* promote legal certainty may truly be well-founded. The reason for this is that English (Anglo-Saxon) criminal law is based on common law; its procedural law is developed, but its substantive criminal dogmatics, which would ensure countrywide uniformity of practice, has not really taken shape. If we only take into account legislative regulation, Hungary's German-based, nearly 140-year old dogmatic tradition must ensure that comparable deeds are adjudicated similarly in the courts of Budapest, Szombathely or Debrecen. For this reason, too, the legislative inhibition of judicial discretion cannot be supported.[19]

5 Correct Criminal Classification *Contra* Absolutely Determinate Sanction

Finally, I will highlight a point based on the sociology of law. It is unfortunate to tie the hands of the judge during sentencing, because the adjudicator, who was socialised for a profession of deliberation, will deliberate, if he cannot do so at sentencing, at the last stage where he may still be allowed: at the initial classification of the offence. Absolutely determinate sanction rules are therefore pre-programmed to derail criminal classification. For instance, the judge may regard a legally qualifying homicide as simply battery resulting in death [Btk. section 164(8)]. The penalty for the latter is only two to eight years imprisonment. If the eight years are doubled under the three-strikes rule, they still remain below twenty years, and therefore the judge will not be compelled to issue a mandatory life sentence. It may be even more troubling, of course, if the scenario happens the other way around.

[19] See Békés Imre, *A gondatlanság a büntetőjogban (Negligence in Criminal Law)* (Közgazdasági és Jogi Könyvkiadó 1974, Budapest) 22.

IV International Practice

Through introducing the constitutional experiences of three Anglo-Saxon countries, I briefly examine the degree to which the constitutional configurations of the discussed states allow the maintenance of mandatory sanctions.[20] The section closes with a review of an ECHR case.

1 United States

Historically, the union's states often prescribed mandatory sanctions, many of which could be considered crude (e.g. mandatory death sentence). The US Supreme Court examined relevant cases based on the Eighth Amendment of the Constitution, which forbids cruel and unusual punishment. The practice emerging from this constitutional rule is that the US Supreme Court regards disproportionate punishment as a cruel and unusual result.

In *Solem v Helm,* U.S. 277 (1983), the Court held that the proportionality of punishment must be subject to criteria based on the gravity of the offence, the value involved, and sentences imposed for similar crimes in the same and other jurisdictions. *Roberts v Louisiana* 431 U.S. 633 (1977) was an important decision as well; it declared the mandatory death sentence unconstitutional because it did not allow the court to consider mitigating factors. A recent continuation of this case is *Miller v Alabama* 567 U.S. 460 (2012), in which the Supreme Court quashed mandatory life sentences without the possibility of parole for juveniles.[21]

In contrast, in *Ewing v California* 538 U.S. 11 (2003), the Court did not find California's three-strikes law to be cruel and unusual and accordingly held it constitutional. At the same time, the aforementioned law – especially because in its original version the third offence could have been an insignificant nonviolent act (e.g. theft, possession of drugs), and it still would have resulted in a 25-year minimum prison sentence – was subject to much jurisprudential criticism.[22] The most pragmatic critique highlights the fiscal burden of the prison population's extreme inflation.[23] Considering this argument, it is perhaps not accidental that the California law was amended in the summer of 2016. Today, the third crime can only trigger the three-strikes law if it is a *serious or violent felony*.

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[20] For an overview see Anthony Gray, 'Mandatory Sentencing Around the World and the Need for Reform' (2017) (3) New Criminal Law Review 392–412.

[21] In the Hungarian literature see Lévay Miklós, 'Az Amerikai Egyesült Államok Legfelsőbb Bírósága a fiatalkorúakkal szembeni halálbüntetés és a tényleges életfogytig tartó szabadságvesztés alkotmányellenességéről' (US Supreme Court on the Unconstitutionality of the Death Penalty for Juvenile Offenders and of Life Imprisonment) (2013) (2) Jogtudományi Közlöny 593–600.

[22] Michael Vitiello, 'Three Strikes: Can We Return to Reality' (1997) (2) Journal of Criminal Law and Criminology 395–462. and Franklin E. Zimring, Gordon Hawkins, Sam Kamin, *Three Strikes and You're Out in California. Punishment and Democracy* (Oxford University Press 2001, Oxford – New York).

[23] In the newest literature see Hamish Stewart, 'The Wrong of Mass Punishment' (2018) (1) Criminal Law and Philosophy 45–57.

2 Canada

According to criminal rules that surfaced in Canada in the 1980s, a *mandatory minimum sentence* of seven years' imprisonment had to be issued for drug smuggling. The Canadian Supreme Court, in *Smith v the Queen* [1987] 1 S.C.R. 1045 ruled that the aforementioned provision violates section 12 of the Canadian Charter of Rights and Freedoms, which, similarly to the American Eighth Amendment, states the unconstitutionality of cruel and unusual punishment. The Court found the seven-year minimum sentence to be blatantly disproportionate, and it was held to disregard the severity of the crime and the personal circumstances of the offender. In sum, *it did not fulfil the goals of punishment.*

3 Australia

The Australian starting point for mandatory sanctions differs from the previous case studies in that no constitutional provision exists for cruel and unusual punishment. Perhaps it was due to this that the High Court did not find the country's five-year minimum prison sentence for people smuggling – a provision targeting illegal immigration[24] – to be unconstitutional. The decision's main feature is that while the courts do have discretion in sentencing, this power is not uncontrollable by the legislature. Therefore, the framework created by the lawmaker, unless it is incompatible with the principle of proportionality, must be upheld by the courts.

4 European Court of Human Rights

The ECHR's recent case law on life sentences was the subject of numerous excellent studies, and thus I will limit myself to discussing a single relevant feature. In *Harkins and Edwards v The United Kingdom* (nos. 9146/07 and 32650/07), the ECHR's 2012 ruling stated that a sentence of life imprisonment without parole may violate the European Convention on Human Rights' article 3 concerning the prohibition of inhuman and degrading treatment whether the imposition of a life sentence is mandatory or optional. Simultaneously, it highlighted that the likelihood of a grossly disproportionate punishment is higher in cases where its imposition is obligatory.

V Concluding Thoughts

In this study, I examined the theory of absolutely determinate sanctions – which, as an abstract category in the study of punishment, form an extreme variety of true cogent penal rules. My primary aim was to place this regulatory solution in its proper context. The novel

[24] § 233C of the Migration Act 1958 (Cth).

categorisation concerning the power to sanction is based on the mode of the division of labour between the lawmaker and the applier of the law.

In sum, my view is that the maintenance and potential proliferation of absolutely determinate sanctions does not appear fortunate or supportable. Looking to the future, it is impossible to take a position on the extent of an applicable penalty without knowing its characteristics. Therefore, the generally-prominent understanding of modern continental criminal law is much more preferable. This divides sentencing between the legislative and a judiciary that may assess the specific case at hand. In our dogmatics-based criminal law, it would be similarly worthwhile to avoid the implementation of Anglo-Saxon legal institutions without adaptations, because these are the products of a different legal socialisation and philosophy. Such institutions may lead the classification of offences astray, and thus their existence may prove counterproductive.

Miklós Lévay*

The Driving Forces of the Penal Policy of Hungary in the 2010s with Special Regard to the Preparation of the Criminal Code of 2012

The concept of codification has always meant – and still means – more than a simple act of legislation in the Hungarian jurisprudence and legal culture. In several branches of law, Codes (e.g. Criminal Code, Civil Code) were typically prepared by codification.

This paper will focus essentially on whether the Hungarian Criminal Code of 2012 is a product of codification. The following topics will be addressed within this framework:

– the concept of codification in recent Hungarian legal literature,

– whether the Code of 2012 was based on any penal policy concept or guidelines,

– the role of research findings in preparing the Criminal Code of 2012.

Regarding the topics studied here, the question of whether there was a pressure from codification to create a new code will not be addressed. This is discussed in adequate detail in the legal literature of the Criminal Code of 2012 (henceforward CrC of 2012), from which numerous sources are cited in this paper.

I On the Subject of Codification

1 The Concept of Codification

In the introduction of his monograph presenting codification as a sociohistorical phenomenon, Csaba Varga captures that 'codification is no more than a neutral form in itself, only an instrument to alter the structure or the content of law'.[1]

The author quoted above later points out that, for the rationalisation of law by codification, two great alternatives had developed. One of them – legal objectification – is the objective collection of all legal standard structures: minimal items, characterised by relative independence, which are meaningful by themselves […] However, the second is legal

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[1] Varga Csaba, *A kodifikáció mint társadalmi – történeti jelenség (Codification as a sociohistorical phenomenon)* (Akadémiai Kiadó 2002, Budapest) 10.

objectification as a new quality, organising 'a hierarchically ordered set of elements in a contiguous system'[2].

As Barna Mezey phrases it regarding codification, 'it is not only legislation but a higher, more systematic clearing of the given branch of law, a work uniting regulations and jurisprudence'[3].

Mihály Tóth differentiates the broader and narrower concepts of codification precisely in his study concerning the Criminal Code of 2012:

'In the narrower concept, a collection encompassing the legal regulations regarding similar living conditions within a coherent code is sufficient.' As for the broader concept – as Mihály Tóth wrote – 'codification is the organic unity of compilation, classification and standardisation, the conceptual revision of the binding regulations of a given branch of law and, based on these, the presentation of these regulations in a unified, transparent and coherent system.'[4]

Based on the standpoints of the literature cited above, codification in the narrower sense is the creation of a legal code, which is formally an activity towards the production of a code. However, in its content it is a systematic, conceptual reconsidering, and based on that to some extent, the contextual reforming of an area of law behind the code.

2 The Hungarian Tradition of Codification in Criminal Law

The tradition of codification in modern Hungarian criminal law can be traced back to the bills of 1843, even though they never became law or codes. The policy of preparing bills, their standards, and especially, the domestic and foreign response to these criminal law bills justifies a brief review of the Hungarian tradition of codification in criminal law, starting with the proposals of 1843.

The codification commission started to work in 1841 based on Act V of 1840, then published and presented the substantive criminal law bill to the Parliament in 1843, titled The Criminal Code on criminal acts and penalties. Among others, Ferenc Deák, József Eötvös, Gábor Klauzál, László Szalay and Ferenc Pulszky were members of the commission.[5] Regarding the substantive bill, in his work titled *The Textbook of Hungarian Criminal Law* Ferenc Finkey wrote that it is 'a completely self-reliant construction, far surpassing all European criminal codes of its age, a masterpiece of humane and legal mentality'[6]. According to the German author C. J. A. Mittermaier 'no other legislative work bears the signs of ambi-

[2] Varga (n 1) 375.

[3] Cited by Barna Attila, 'A büntetőjog története' (The history of penal law) in Barna Attila, Horváth Attila, Máthé Gábor, Tóth Zoltán József, *Magyar Állam- és Jogtörténet* (NKE 2014, Budapest) 505–564, 519.

[4] Tóth Mihály, 'Magyarország negyedik Büntető Törvénykönyve' (2014) (10) Jogtudományi Közlöny 439–452.

[5] Barna (n 3) 528.

[6] Cited by: Belovics Ervin, Gellér Balázs, Nagy Ferenc, Tóth Mihály, *Büntetőjog I. Általános Rész. A 2012. évi C. törvény alapján (Penal law I. General Part. Based on Act C of 2012)* (HVG-ORAC 2014, Budapest) 32.

tion to create a code fitting the progress of the era, the requirements of justice and the novel ideas of criminal law as much as the Hungarian bill'[7].

The collection of the Bills of 1843 not only supports the statements of the above authorities; it is also credible evidence of the standards of the bills.[8]

For various reasons, neither the substantive law bill, nor the criminal procedure bill, nor the bill on the prison system were enacted.

Covering the facts relevant to the subject of the present paper, I will review the domestic codifications resulting in the criminal code based on Kálmán Györgyi's presentation titled The History of Codification of the New Criminal Code.[9]

The first Hungarian criminal code was the Codex Csemegi, Act V on criminal acts and offences of 1878. Károly Csemegi, the secretary of state of the Ministry of Justice, was commissioned in 1871 to prepare the Codex. He had developed the first draft by 1873. The draft was proposed to the judicial committee of the house of representatives at the end of October 1873 by Tivadar Pauler. However, the draft was not discussed as the Parliament was dissolved. Following this, Károly Csemegi revised the draft, regarding which the minister of justice at the time (Béla Perczel) called forth a meeting for 'reviewing' it. The draft was discussed in the meeting, between 3 and 15 August 1875, followed by Csemegi's further revision. This second draft was proposed to the chamber of deputies in November 1875.

'Seven hundred pages of ministerial reasoning in two volumes – the first includes the general questions, the general part and the comparative law materials, while the second includes the reasoning regarding the specific section – were sent to the printing-house, all exclusively in Csemegi's handwriting. The judicial committee of the house of deputies discussed the draft from April 1876 to September 1877. The president of the commission was Pauler, while the government was represented by the minister of justice Perczel and secretary of state Csemegi. Csemegi delivered 101 speeches during these discussions.

Two reports were prepared on the commission's work. The discussion of the bill in the chamber of deputies started on 22 November 1877. The first discussion lasted for 13 days while some provisions were returned to the commission. These were discussed in January 1878. The third reading in front of the chamber of deputies occurred on 18 January. The king assented to it on 27 May and it was published in both houses of the parliament on 29 May.'[10] Act V of 1878 entered into force in 1880.

The general part of the Codex Csemegi was in force until 1951 (Act II of 1950: General Part of the Criminal Code) whereas the specific section operated until 1962 (Act V of 1961: the CrC of 1961).

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[7] Cited by: Györgyi Kálmán, *Az új Büntető Törvénykönyv kodifikációjának története.(The history of the codification of the new Criminal Code).* The paper was presented on the conference introducing the new CrC arranged by the publisher company HVG-ORAC on 4 September 2012. <http://ujbtk.hu> accessed 28 February 2018.

[8] Fayer László, *Az 1843-iki büntetőjogi javaslatok anyaggyűjteménye (The collection of penal law proposals of 1842)* (Vol. I–IV, Magyar Tudományos Akadémia 1896–1902, Budapest).

[9] Györgyi (n 7).

[10] Györgyi (n 7).

Kálmán Györgyi wrote the following about Csemegi's work and achievements:

> With the impressive knowledge of the century's notable criminal codes and by processing the specific questions to a monographic depth, Csemegi created a work of such high scientific standards and self-reliance that it cannot be doubted even by the most rigorous critics. […] If we wish to identify his historical role and professional excellence, we should borrow László Fayer's words: Károly Csemegi should be credited for the codification of substantive criminal law in Hungary. It was a landmark event in the history of Hungary, which had numerous effects on both public and private life. It is one single structure, laying the foundations of state life.[11]

The text of the Codex Csemegi, the proposals, the ministerial reasoning, the record of the ministerial meetings and the collection of the discussions in the chamber of deputies and in the house of lords was published in the two-volume work by Tobias Löw (ed), *The Collection of the Hungarian Criminal Code I–II*. (Pest Printing Company 1880, Budapest).

The next full code was the CrC of 1961 with the adoption of Act V of 1961, the first full (including both general and specific sections) criminal code of the socialist era.

The CrC of 1961 was developed slowly and deliberately between 1953 and 1960 with a background of authors long overshadowed or even replaced during domestic political storms.[12]

Regarding the CrC of 1961, Kálmán Györgyi points out that the mechanism of codification had been transformed. The codification of the CrC of 1961 started in 1953 and the government established a government commission to create the code. The commission started its work in January 1954 and involved different government agencies and academic institutions: the Supreme Court, the Supreme Prosecutor, the Ministry of Interior, the Jurisprudence Institute of the Hungarian Academy of Sciences and also the law faculties of Szeged, Pécs and Budapest. The draft of the Criminal Code was presented for public debate in 1960. The debates were organised by the Ministry of Justice and the Hungarian Lawyers' Association.[13] The Code entered into force in 1962.

The CrC of 1961 was replaced by the Criminal Code of 1978 with the adoption of Act IV of 1978. The preparation of the Code started in the autumn of 1974. First, a product titled 'The objectives of the preparation of the new Criminal Code' was completed. Following this, 22 working groups were formed with the aim of issue-based processing of selected topics. The working groups contained 77 members. The proposals of the working groups were discussed by the Codification Committee, which had 19 members and held 102 meetings; however, further professionals – altogether 128 of them – took part in the discussion of specific topics. The Coordination Committee held 26 meetings.[14]

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[11] Györgyi (n 7).

[12] Tóth Mihály, 'Az új Btk. bölcsőjénél' (By the cradle of the new CrC) (2013) (9) Magyar Jog 525–534, 525.

[13] Györgyi (n 7).

[14] Györgyi (n 7).

The draft of the new Criminal Code was widely discussed among both citizens and professionals. Judges, prosecutors, police officers and other practitioners, as well as the academic fora, delivered their opinions on the draft.[15]

The parliament adopted Act IV of 1978 on the Criminal Code at the end of that year, and it. entered into force on 1 July 1979. The Ministry of Justice began publishing the committee's materials in 1984 titled 'The Preparation of Act IV of 1978' edited by Jenő László. The last, eleventh volume of the collection on the Criminal Code of 1978 was published in 1990.

Based on the previously outlined review we can establish that, in view of the Hungarian tradition of criminal codification, the codification leading to a criminal code is a process. Except for the Codex Csemegi, codification usually occurs by committee framework; however, in that case, on one hand Csemegi was an expert with thorough knowledge of European criminal codes and a vast experience in legal practice (he had 22 years of experience as a lawyer), also versed in ministerial work; on the other hand there was a regular, long-lasting debate in the judicial committee of the chamber of deputies about the draft. This shaped the final bill, which was thereafter discussed over several days in the chamber of deputies.

It is characteristic of codification occurring in the context of a committee that different orders, legal professions and representatives of academic sciences play a significant role in the process of codification. At the time of preparing the Codex Csemegi, one of the criticisms was exactly that

> although legal practitioners are adequately represented by the community of attorneys and only the narrow-minded and even shorter-sighted, malcontent people could be shocked by the fact that during the creation of such a momentous systemic code – as the criminal code –, the contribution of the faculties of teachers, judges and prosecutors was neglected.[16]

In the codification based on committee activity the National Assembly played a smaller role, although this can be traced back to the meagre political significance of democratic representation in the contemporary political system (namely at the end of the 50s, the beginning of the 60s and in the second half of the 70s). It can be considered as a part of the tradition that the collection of codification material is published after a shorter or longer period of time allowing the most important questions, documents and progresses of the code to become transparent for those who are interested.

[15] Györgyi (n 7).

[16] Dárdai Sándor, Kőrösi Sándor, Schnierer Aladár (1876) cited by Tóth (n 12) 528.

II Preparing the Criminal Code of 2012

The preparation of Act C of 2012 on the Criminal Code had both a 'hidden' and an open period.

The 'hidden' period can be traced back to 1999, when Mihály Tóth, Zoltán Márki and László Soós worked out the preparatory text 8 at the Ministry of Justice[17] for the concept of the new Criminal Code to replace the CrC of 1978. The discussion material is available in Mihály Tóth's publication from 2012. The introduction of this text could have served as an example to follow for the preparation of the CrC of 2012:

> All codifications must be preceded by a comprehensive analysis that should equally cover the following: the experiences of the evolution of domestic criminal science, the analysis of both short- and long-term trends of criminality in Hungary, research into the composition and criminal characteristics of crime and their changes, the review of case law, the evaluation of prison service experiences and the consideration of the international evolutionary trends in criminality and law enforcement.[18]

However, the discussion paper containing the recommended crime policy concept, organisational framework and scheduling of codification was not followed by codification.

Shortly, Ibolya Dávid, the Minister of Justice, assembled a committee to revise the CrC of 1978 and to create a new code. The chairperson of the commission founded on 14 March 2001 was Kálmán Györgyi while the co-chairperson was Ferenc Nagy. Kálmán Györgyi summarises the work of the committee in his publication quoted earlier as follows:

> The Committee included both theoretical and practicing actors of criminal law: professors, judges, prosecutors, lawyers and the associates of the Ministry of Interior and of the Ministry of Justice as well… Following the start of the work of the Committee, the journal titled Criminal Law Codification was started, which on one hand published the studies conducted to establish the codification process; on the other, it reported on the meetings of the Committee… It is not an overstatement to say that, at the time of codification, the scientific debate on criminal law had gained momentum. Valuable works were published, out of which I should mention professor Ferenc Nagy's paper written for the codification of the General Part of the Criminal Code. Dr Imre A. Wiener completed his book titled *The Theoretical Foundations for the Codification of the General Part of the Criminal Code* (Budapest, 2000) which was published immediately before

[17] Mihály Tóth as the Deputy State Secretary of Justice, Zoltán Márki as the Head of the Department of Criminal Law Codification, while László Soós as Deputy Head took part in the preparations. See: Tóth Mihály, 'A legújabb büntetőjogi kodifikáció kezdetei' (The beginnings of the latest criminal law codification) in Boóc Ádám, Fekete Balázs (eds), *„Il me semblait que j'étais moi-même ce dont parlait l'ouvrage – Liber Amicorum Endre Ferenczy"* (Patrocinium 2012, Budapest) 282–297. See also Tóth (n 12) 527.

[18] Tóth (n 12).

> the Committee started its work and was prepared in connection with the Committee's work and also prepared the draft text concerning the General Part of the Criminal Code (The General Part of the Criminal Code de lege ferenda, Budapest 2003).[19]

In April 2005, József Petrétei, the Minister of Justice and Law Enforcement gave his appreciation for the activities of the committee and informed that 'the preparation of the new Criminal Code is continuing within new organisational settings'[20]. Following this, subsequent committees were formed and multiple proposals were completed for the general part.[21]

A codification committee was formed in the beginning of 2008 supervised by state secretary Katalin Gönczöl.[22] As a result, the plan of Act LXXX of 2009 on the revision of the Criminal Code of 1978 was created.[23] Act LXXX of 2009 significantly altered the General Part of the Criminal Code of 1978, with special regard to the penalties.

With the 2009 reform of the Criminal Code of 1978, the 'hidden' period of the preparation of the new Criminal Code ended and the open period started the following year.

The coalition government of FIDESZ–KDNP, which won the 2010 elections and gained a two-third parliamentary majority – the 'Government of National Cooperation' – followed neither the codification mechanism of 1999–2009 nor the previously detailed codification tradition. In November 2010, a preparation committee was founded in the Ministry of Justice in order to prepare the new Criminal Code. The committee of fifteen was led by Barna Miskolczi, the prosecutor summoned to the Ministry from the Chief Prosecutor's Office.[24] Among other things, Barna Miskolczi publicly commented the following about the activity of the committee:

> In contrast to our predecessors, we did not invoke a codification establishment consisting of well-renowned professionals. When we started preparing the law in November 2010, the first step was to lay down the criminal policy concept. This was synthetised based on the government programme of 2010 and various policy documents. Subsequently, developing the text of the law was started in the codification section of the justice department – which was strengthened by further prosecutors, police officers and judges. With a slight exaggeration, we only codified in our free time in the first eight months, because the department was performing tasks in connection with the EU presidency as well.[25]

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[19] Györgyi (n 7).

[20] József Petrétei cited by Tóth (n 12) 527, footnote 8.

[21] The proposals of Katalin Ligeti, co-authors Endre Bócz and Attila Gál and also the proposal supervised by Katalin Gönczöl as State Secretary with special responsibility. Tóth (n 12) 528.

[22] Practical and theoretical professionals were both involved in the work of the committee.

[23] The preparation documents supporting the proposal were created by Katalin Ligeti and Miklós Ligeti, with the assistance of Ákos Kara and Balázs Rajmond, associates of the Department of Codification of the Ministry of Justice and Law Enforcement.

[24] Györgyi (n 7).

[25] Babus Endre, 'Interjú a főkodifikátorral' (Interview with the Head Codifier) (2012) (28) HVG 19–22.

No professors were involved in the work of the committee. However, four young university associate professors contributed to the work as external experts. They were 'connected' via one strand: all of them were and are practicing lawyers.[26]

By March 2012 – that is to say in 17 months – the draft and the reasoning were completed. This was followed by an appraisal period called 'social reconciliation' during which judges, prosecutors and professors could also study and appraise the text. As Mihály Tóth pointed out, 'in spite of significant conceptual objections followed by more than 200 amendments from MPs, the original version, including only minor changes, was pushed through the machinery of legislation […].'[27]

Act C of 2012 on the Criminal Code was adopted by the National Assembly on 25 June 2012. This means that the fourth criminal code of Hungary was developed in 20 months in terms of the known period of its preparation.

The question is whether we can ignore the 'hidden' period of preparation in considering temporality. My standpoint is that ignoring the 'hidden period' is justified based on the available literature in that there is no available document or unequivocal proof of what was used from the concepts and drafts created between 1999 and 2009 during the preparation of the CrC of 2012, and how.

Still, it is undeniable that there are references regarding this. The most specific one comes from Barna Miskolczi, who stated the following in the previously cited interview: 'We relied on the Györgyi committee's proposals on several points. One of their innovations, mental abuse between people living together was dismissed by the parties forming an ad hoc coalition.'[28] Róbert Répássy, the state secretary responsible for the preparation of the Criminal Code in the Ministry of Public Administration and Justice, mentioned the following at a conference shortly preceding the adoption of the law: 'The codification managed by the Government of National Cooperation […] relied on works prepared in previous periods as well'[29]. However, the presentation did not address the exact meaning of this.

However, Mihály Tóth indicated that the assessment of the 1999 discussion papers is 'seen again' in the reasoning of Act C of 2012.[30] Miklós Hollán pointed out that two innovations in the Criminal Code of 2012 are both based on proposals in the works of Imre A. Wiener and Ferenc Nagy created in the course of the committee operating between 2001

[26] On the composition of the commission see Tóth (n 12) 528, footnote 13.

[27] Tóth (n 12) 528.

[28] Babus (n 25).

[29] Presentation by Répássy Róbert on the conference organised by the Faculty of Political and Legal Science of Károli Gáspár University on 4 May 2012 in Antalóczy Péter, Deres Petronella (eds), 'Magyarország Új Büntető Törvénykönyve' (The New Criminal Code of Hungary) Acta Caroliensia Conventorium Scientiarum Iuridico-Politicarum III. Budapest, 2012. 9–21, 10.

[30] 'I was glad to see the following review word by word here and there in the general reasoning of the new law which also proves that not much have changed in the last ten years in regards of the assessment.' Tóth (n 17) footnote 9.

and 2005.[31] Meanwhile, Ferenc Nagy identified that the penalties of the Criminal Code of 2012 'are basically built on the provisions introduced by Act LXXX of 2009'.[32]

In spite of the previous examples, we can still state that Act C of 2012 was completed in 20 months. Although codification does not have a temporal measure or standard, this time period is still worryingly short to complete a new criminal code by codification. Creating the CrC of 2012 would have already taken a longer time if a preliminary impact assessment, made mandatory by Act CXXX of 2010 on legislation, would have been prepared. Even so, there is no trace of this in the available documents and publications on the CrC of 2012. The efficiency assessment would have been especially reasonable with regard to the penalties (e.g. the expected changes in the prison population, the expected number of those under probation in case of juvenile and adult offenders). A bill consisting of nearly 500 sections, which is, furthermore, the draft of the Criminal Code, the duration of its discussion being less than two months[33] – considering even the mechanism of its preparation – is unusual in a parliamentary democracy.[34]

The frequent modification of the Code can partly be traced back to the haste of creating the CrC of 2012 and to the lack of codification in view of the content. The CrC was amended 33 times between 13th July 2012 and 31 December 2017 (32 times by acts and once by the decree of the constitutional court), the modifications affecting 160 paragraphs.[35]

We can conclude from one part of the statements of reasons of the revising acts that certain corrections could have been avoided with more thorough preparation. It is a recurring reason that the given modification 'contains a clarification of the text', it is 'for the consistency of application' or it is 'made relevant by the resolution of legal interpretation problems'. It is undeniable, however, that a notable part of the modifications are explained by carrying out international legislation obligations.

We can make conclusions on the nature of the preparation of the CrC of 2012 from the comments from politicians and legislators regarding the new Criminal Code and the reasoning of Act C of 2012.

Róbert Répássy said the following, among other things, in his presentation cited previously:

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[31] Hollán Miklós: 'A negyedik magyar büntetőkódex – összegző tanulmány' (The fourth Hungarian Criminal Code – a summary study in Hollán Miklós, Barabás A. Tünde, *A negyedik magyar büntetőkódex régi és újabb vitakérdései (Older and newer discussion points of the fourth Hungarian Criminal Code)* (MTA TK – OKRI 2017, Budapest) 363–380, 375.

[32] Nagy Ferenc, 'A szankciórendszer' (The system of penalties) (2015) 70 (1) Jogtudományi Közlöny 1–15, 1–2.

[33] The Government submitted the bill on the new Criminal Code to the Parliament on 27 April 2012 and – as I mentioned earlier – it was entered into force by the legislature on 25 June 2012.

[34] However it is not unusual in legislation after 2010. See: Gajduschek György, 'Előkészítetlenség és utólagos hatásvizsgálat hiánya' (The lack of preparation and follow-up efficiency assessment) in Jakab András, Gajduschek György, *A magyar jogrendszer állapota (The state of the Hungarian legal system)* (MTA TK JTI 2016, Budapest) acquired: <http://jog.tk.mta.hu> 8 February 2018, pages 796–822, especially: 816–819.

[35] I am grateful to András Vaskuti, assistant university professor (Department of Penal Law, Faculty of State and Legal Science, ELTE), judge of the Supreme Court for the information on the amendments.

> The Government did not wish to change the doctrinal basis of the laws in force, since those worked well […] as it is not the objective of the Government to revise by any means, to change the doctrinal basis developed and adequately applied over decades. […] The codification of the new CrC should not be defined by innovation by any means but the intention to make it consistent, more balanced and easier to apply.[36]

According to Barna Miskolczi, the 'intention of the Ministry of Justice was to finally create a law that is operational; user-friendly, so to say, according to the practitioners of law […] Rather that the text should be comprehensible and the penalties to be free of internal disproportions'[37].

The general reasoning of Act C of 2012 prompts the objective of the Code in agreement with the previous comments:

> The act brings about significant changes in a way that it does not mean a full doctrine shift from the CrC in force as, despite many revisions and additions, the CrC provides adequate legal protection for our fundamental values. However, the problems originating from disrupting the unity of the code can eventually be solved only by a new code.[38]

Based on these, we can state that this preparation of law was basically creating a criminal code similar to the CrC of 1978 in essence while adjusting to the needs of legal practice. Jurisprudence literature identifies this objective in analysing and evaluating the CrC of 2012. In connection with the new aspects, Mihály Tóth points out that 'only the general reasoning of the Code uses the words 'new' and 'novelties' several dozen times and mentions 'significant change' multiple times, but what follows thereafter are mostly corrections of formal and structural wording not affecting substantial questions and are actual novelties only for those in the process of familiarising themselves with penal law'.[39] The standpoint of the author is that 'the new CrC is in fact the modest and inevitable correction of the former CrC'.[40] Miklós Hollán differentiates formal and substantive changes in his paper titled The New Criminal Code. 'Substantive change is that affecting criminal liability and the degree of penalty and demonstrability. In comparison', writes the author, 'I classify changes affecting only the structure of the code and the order of provisions (and not the penalties) as only formal ones.'[41] Comparing it with the CrC of 1978, Hollán concludes, using the typology of Csaba Varga, that 'thus concerning the novelties, the new CrC is rather a codification aimed

[36] Répássy (n 29) 1.
[37] Babus (n 25).
[38] Reasoning of Act C of 2012. Quote from the prologue of point I. Jogtár.
[39] Tóth (n 12) 529.
[40] Tóth (n 12) 534.
[41] Hollán Miklós (2016), 'Az új Büntető Törvénykönyv'(The new Criminal Code) in Jakab, Gajduschek (n 34) 344–384 and 344.

at "summarising the accumulating changes in laws" or at organising (classifying) the laws enacted'.[42]

Based on the previous statements, my point is, based on the content of the CrC, in the view of legal science and the tradition of criminal law codification, we cannot state that Act C of 2012 would have been preceded by codification in its substantive sense. By this, of course, I do not wish to question the efforts and intensive work of those who compiled and worded the CrC of 2012 over 20 months. I am merely stating that this work cannot be classified as codification but 'only' as preparation of a law.

I also do not think it well-founded that the preparation of the CrC of 2012 was based on a criminal policy concept or any penal policy one.

This issue will be discussed in the following section.

III On Criminal Policy

1 Criminal Policy in a Criminological Approach

Criminological literature usually differentiates between criminal policy and penal policy.[43] In the definition by Andrea Borbíró, criminal policy – as policy-making – 'in its most general meaning is the overall objectives and tasks undertaken by the state in connection with crime, offenders and phenomena related to criminality and also establishing and operating the institutions connected to them.'[44]

Criminal policy – accepting Katalin Ligeti's classification[45] – has the following components: law enforcement policy, crime prevention policy, victim protection policy and penal policy. Therefore, penal policy is a subsystem of criminal policy. The components of the subsystem are criminal law policy, criminal justice policy and the policy of corrections.

Regarding my topic, I will only discuss the questions in the scope of criminal law policy. These are in particular the following: the decision of criminalisation-decriminalisation regarding specific acts; stance on the objectives of penalty; decisions regarding restorative justice, options of diversion and the material legal conditions in connection with them; identifying the scope of defences; defining the scope of penalties and the conditions of

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[42] Hollán (n 41) 352.

[43] In Hungarian literature, see Gönczöl Katalin 'A bűnözés társadalmi reprodukciója, devianciakontroll, bűnözéskontroll' (The social reproduction of crime, control of deviance and crime) in Borbíró Andrea, Kerezsi Klára (eds), *A kriminálpolitika és a társadalmi bűnmegelőzés kézikönyve (The textbook of criminal policy and crime prevention)* (IRM 2009, Budapest) 21–36; and Ligeti Katalin, 'Kriminálpolitika' (Criminal policy) in Borbíró, Kerezsi (n 43) 59–85.

[44] Borbíró Andrea, 'Kriminálpolitika' (Criminal policy) in Borbíró Andrea, Gönczöl Katalin, Kerezsi Klára, Lévay Miklós (eds), *Kriminológia (Criminology)* (Wolters Kluwer 2016, Budapest) 711–764, 711.

[45] Ligeti Katalin, 'Kriminálpolitika' (Criminal Policy) in Gönczöl Katalin, Kerezsi Klára, Korinek László, Lévay Miklós (eds), *Kriminológia – Szakkriminológia (Criminology – Applied criminology)* (Complex 2009, Budapest) 599–626.

their application; creating perpetrator typologies and the special rules adjusted to these; and defining the content of exemption rules considering penalty objectives and perpetrator groups.[46]

In my opinion, in the event of a government intent of codification to create a new criminal code, the criminal law policy concept must be formed based on taking a stand on the previous questions or, from another point of view, a criminal law policy concept is defined by the consideration of the previously listed questions. At the same time, the criminal law ambitions of a party or a government do not equate to criminal law policy.

Which factors should be considered when taking a stand on the previously listed questions? The usual formative factors: constitutional limits; previous criminal codes and the experiences in connection with them; international directions and obligations; experiences of jurisprudence; foreign examples based on comparative law; research results and scientific standpoints, conclusions of literature; further subsystems of criminal policy (e.g. crime prevention); and other components of penal policy (e.g. criminal justice policy); apart from these, administrative criminal law; strategies for other deviancies; and financial factors.

2 Penal Policy, Particularly Criminal Law Policy and the Criminal Code of 2012

There was neither a penal law concept in the scientific sense behind the CrC of 2012. nor is such a document available for a broader or a professional audience. It is without doubt that Barna Miskolczi, in charge of the preparation of the CrC of 2012 said the following in the previously quoted interview: 'When we started preparing the law in the November of 2010, the first step was to establish the penal policy concept. This was synthesised based on the government programme of 2010 and various policy documents.'[47]

However, we have no knowledge of the completion of a penal policy concept as the result of the synthesis, unless those preparing the law viewed the direction and content of the action against crime laid out in the Programme of National Cooperation as a penal policy concept and considered the basic professional deliberations of this to be satisfactory. Most likely this was the case, since the relevant text of the document mentioned and the professional requirements stemming from it were included in the reasoning of the CrC of 2012, namely into Point I of the General reasoning titled 'I. The fundamental reasons for creation and substantive directions of the new code'.

[46] On the subject see also Borbíró (n 44) and in the literature of criminal law science for example: Belovics, Gellér, Nagy, Tóth (n 6) 90.

[47] Babus (n 25). It does not become clear which professional political documents these are from, but neither the literature nor the statements of reasons of the CrC. Moreover, two such documents, the National Crime Prevention Strategy and the National Anti-Drug Strategy 2013–2020 were only published in 2013.

According to the referred text

> [The] Programme of National Cooperation phrases that 'The full force of law, longer sentences, the more frequent use of life imprisonment and greater protection for victims will restrain offenders and make it clear to members of society that Hungary is not a paradise for criminals. A strong Hungary can only be born if such laws are created in the Parliament that mean guarantees to the law-abiding'… Therefore, rigour is one of the important expectations regarding the new Criminal Code, which does not necessarily mean increasing the maximum sentences; instead, a more accentuated representation of a crime-proportionate approach. Rigour is primarily manifested in provisions applied to recidivists; in the case of first-time offenders… the new CrC enables the implementation of preventive considerations. The final objective is to create a coherent, consistent and effective code based on this reform so that penal policy regains its role as a last resort in the regulatory system.[48]

Barna Miskolczi emphasises the following concerning the quoted part of the reasoning in his study: 'This text contains the catalogue of codification policies, along which those preparing the law envisaged creating the text. The policies of the catalogue – effectiveness, simplicity, modernity and rigour – are inherent to the penal policy of the Government.'[49] I do not dispute the author's statement; I only dispute that the penal policy of any government and a professional penal policy concept could be equal. My standpoint is that a professional penal policy concept developed according to those outlined in the previous point are needed in the case of codification. However, there is no evidence of such a concept in the published documents regarding the CrC of 2012.

Certainly, we cannot state that there are no identifiable penal policy efforts past the codification policies and also that only the previously mentioned policies would affect the development and content of the CrC of 2012. For example, Ferenc Nagy makes the following point: 'The CrC in force and its penalties do not in fact stand as the basis of a two but as a "three-tyres" penal policy.'[50] Miklós Hollán identifies and evaluates the role of the following factors – 'impulses' in his wording – which played a part in the creation of the new Code: the experiences of previous codes, legal science impulses, jurisprudence impulses, effects of international and EU law and the role of foreign laws.[51] In my opinion, constitutional obligations can be added to these.

The following part of the paper will deal with the degree to which criminal law and criminological theories and research findings affected the contents of the Code.

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[48] Reasoning of Act C of 2012. Quote from point I, (n 38).

[49] Miskolczi Barna, 'Kodifikátori gondolatok az új Btk. Különös részéről de lege lata és de lege ferenda' (Thoughts of Codification on the Special section of the new CrC de lege lata and de lege ferenda) (2015) (5) Jogtudományi Közlöny 281–291.

[50] Nagy (n 32) 1.

[51] Hollán (n 31) 373–378.

IV The Role of Criminal Law and Criminological Theories and Research Findings in the Preparation of the Criminal Code of 2012

Theories and research findings of criminal law, especially in view of the reasoning of the CrC, played a meagre role in its creation. However, it must be added that, as Balázs Elek and Miklós Hollán point out, some concepts of the CrC of 2012 are based on professional literature notions and recommendations even though the reasoning of the specific provision does not suggest it.[52] However, due to the government's and preparers' forbearance of novelties, the discussion of important conceptual questions (for example, the terminology of the criminal offence and penalty,[53] the relation between penal law and administrative offence[54]) was foregone; moreover, specific and elaborated recommendations were neglected during the preparation of the law.[55]

The knowledge and research findings of criminology did not get a role, at least not in the known period of the preparation of the CrC of 2012. If we acknowledge that Act C of 2012 is not a result of codification then this is not surprising. However, it is surprising if we look at the neglect of discipline from the aspect of the subject area of criminology.

In the classic subject definition by Edwin H. Sutherland:

> Criminology is the body of knowledge regarding crime as a social phenomenon. It includes within its scope the processes of making laws, of breaking laws, and of reacting to the breaking of laws. These processes are three aspects of a somewhat unified sequence of interactions.[56]

Based on the definition quoted above, we can state that nowadays criminology is not only a discipline established to study violations of the law and crime but it also covers the process of the formation of law, respectively criminal law and research into the reactions to crime.

In the initial period of preparing the Code, using the criminological knowledge of all three areas would have been beneficial.

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[52] Elek Balázs, 'A jogirodalom által közvetített jogtudomány és a büntető ítélkezés' (Jurisprudence as conveyed in legal literature and criminal case law) in Bódig Mátyás, Ződi Zsolt (eds), *A jogtudomány helye, szerepe és haszna. Tudománymódszertani és tudományelméleti írások (The place, role and use of jurisprudence. Writings in scientific methodology and scientific theory)* (Magyar Tudományos Akadémia Társadalomtudományi Kutatóközpont Jogtudományi Intézete – Opten Informatikai Kft. 2016, Budapest) 152–176, acquired: <www.jog.tk.mta.hu/upoads/files/A_jogtudomány_helye_szerepe_es_haszna.pdf> accessed 10 February 2018; and Hollán (n 31) 375.

[53] See at: Mészáros Ádám, 'Bűncselekmény és büntetés az új Büntető Törvénykönyvben' (Crime and punishment in the new Criminal Code) in Mészáros Ádám (ed), *Fiatal büntetőjogászok az új Büntető törvénykönyvről (Young criminal attorneys on the new Criminal Code)* (Magyar Jog- és Államtudományi Társaság 2014) 9–12, acquired: <www.mjat.hu> 20 February 2018.

[54] Tóth (n 12) 529–530.

[55] See at Hollán (n 31) 375.

[56] E.H. Sutherland, *Principles of Criminology* (3rd edn, J. B. Lippincott Company 1939, Philadelphia) 1.

Its use would have been especially justified by the fact that, due to the interactionist and critical paradigms of criminology, the established understanding of criminal law categories of classical and positivist paradigms had already been called into question. The rules and concepts of criminal law are norms based on consensus but the paradigms mentioned before doubted the consensus behind criminal law norms and pointed out that criminal law is not self-explanatory but an institution dependant on its social and cultural context.[57] For this reason, when evaluating activities subject to diverse social judgement, it is especially important to consider the results of criminological research in order to shape penal policy.

One negative example of this is the assessment of recreational drug use. Until the 1998 modification of the CrC of 1978, drug use was penalised through punishable possession ('obtains', 'keeps'). With the 1998 amendment, 'use' became a separately penalised act. However, with the 2003 amendment of the CrC of 1978, the situation of 1998 returned (to be exact, the one before 1 March 1999). During the preparation of the CrC of 2012, it would have been beneficial to assess the consequences of the specific solutions – along with the changes in the regulation and the practice of diversion. For this, encompassing foreign regulation, a vast literature was and is available.[58] What happened compared to this? Paragraph 178 section 6 of the CrC of 2012 again declared drug use penalised separately. Concerning this, the reasoning of the Code in the section titled 'The revisions of the Specific Part of the new CrC' contains the following: 'Drug use will be a distinct specific conduct (subsidiary offence that falls under the same evaluation as procuring a small amount of a drug)…'[59] However, the quoted text neither contains scientific arguments nor a real argumentation regarding why drug consumption should be punishable *per se*.

I should mention two novelties of the CrC that would have also justified the inclusion of criminological competency in the preparation of the Code. One of them is the regulations regarding juveniles, in particular the lowering of the age-limit of criminal liability; the other is the new rules of self-defence.[60]

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[57] In connection with this see: Győry Csaba, 'Címkézéselmélet' (Labeling theory) in Borbíró, Gönczöl, Kerezsi, Lévay (n 44) 167–176.

[58] See for example at Lévay Miklós, 'A kriminálpolitika szerepe és jellemzői a kábítószerek kínálatának és keresletének csökkentésében az Európai Unióban (The role and characteristics of criminal policy in decreasing the supply and demand of drugs in the European Union) in Gellér Balázs (ed), *Györgyi Kálmán ünnepi kötet (Kálmán Györgyi anniversary volume)* (KJK-Kerszöv 2004, Budapest) 357–371; Rácz József, Takács Ádám (eds), *Drogpolitika, hatalomgyakorlás és társadalmi közeg. Elemzések foucault-i perspektívából (Drug policy, exercising power and the social context. Analysis from a Foucaultian perspective)* (L'Harmattan 2006, Budapest); Ritter Ildikó, *(T)örvény. A kábítószerrel való visszaélés büntetőjog megítélésének hatásvizsgálata – 1999. március 1. után (Law – The impact assessment of the criminal legal evaluation of drug abuse)* (L'Harmattan 2003, Budapest).

[59] Reasoning of Act C of 2012 (n 38) IV. 5.

[60] See the criminological review of the new regulation of justifiable protection in Bolyki Orsolya, 'Dilemmák a jogos védelem új szabályozásával kapcsolatban' (Dilemmas regarding the new regulation of justifiable protection) in Mészáros (n 53) 25–28. Criticism of criminal legal science e.g.: Tóth (n 12) 531–532.

Here I would like to point out a – not necessarily criminological – fact only in relation to the regulations regarding juveniles. This is the 'validity' and 'reasonability' of the regulation. Ervin Belovics said the following at a conference on the 4 May 2012 on 'childhood':

> The draft included a norm consistent with the law currently in force until actually the very last minute, which is that those already 14 years old when committing the criminal act are not punishable. However, by today the draft [the Government handed the draft of the Criminal Code to the National Assembly on 27th April 2012] was supplemented with the entry that the perpetrators of homicide, voluntary manslaughter and the most severe forms of assault are held criminally responsible for it if they were at least 12 years old at the time of the offence and had the required level of discretion to recognise the consequences of the offence.[61]

What happened is still shocking, even considering the rather fast legislation. The need for a formidable change in the view of penal policy, child protection, children's rights and the cultural views regarding children did not emerge in 18 months but did so practically in a week and in fact, even the legislative text was prepared during this time.

The former illustrates that there is no evidence, either in the provisions or in the reasoning of the CrC, that the 'legislative process' would have been affected by the results of either Hungarian criminological thinking or research.

The consideration or the effect of the second component of the area of criminology, research regarding the violations of the law, namely regarding crimes and, along with this, perpetrators is also not detectable. Not even when this is the area of Hungarian criminology with an abundance of research.[62] We also have no knowledge of any analysis of the characteristics of and expected changes in domestic criminal activity or of the criminality of specific crime groups or victimology research carried out during the preparation of the Code.

The area of reactions to offences would have required utilising criminological research results and, most importantly, in the starting phase of the preparation of the code, preliminary impact assessments (e.g. the analysis of the effect of sentencing practice and planned penalties on the prison population). However, these were neglected and only ex-post publications usually address the issues.[63]

For future reference, it is important to note that evidence-based penal policy could apply primarily in the area of reactions (beyond penalties, the institution of diversion could also be classified as such). However, this assumes evaluative research and substantive ef-

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[61] Presentation by Belovics Ervin on the conference organized by the Faculty of Political and Legal Science of Károli Gáspár University on 04 May 2012 in Antalóczy, Deres (n 29) 30–36.

[62] See for example in Borbíró, Gönczöl, Kerezsi, Lévay (n 44) studies before 2012 in chapter III.

[63] Also see, for example, right before the new CrC entering into force: Vókó György's presentation on the previously mentioned conference organised by the Faculty of Political and Legal Science of Károli Gáspár University on 4 May 2012 in Antalóczy, Deres (n 29) 48–55, or, after it e. g. Antal Szilvia, 'A szankciótan változása az új Btk.-ban' (The change of penalties in the new CrC) in Mészáros (n 53) 29–33.

fectiveness tests. In criminology – as Friedrich Lösel notes – such research 'aims to create a consistency between the requirements of science and practice'.[64]

V Conclusions

Based on the issues previously described, the conclusions regarding the three questions examined in my paper are the following.

– From a scientific point of view, and with regard to the Hungarian traditions of codification, the CrC of 2012 is more than a product of legislation yet less that of substantive codification.

– The new CrC is not based on an elaborated, reasoned professional penal policy concept or, if it is, that it hidden from the public sphere.

– The research findings of criminal law affected the CrC of 2012 to only small extent. Moreover, those preparing the CrC of 2012 did not draw on the results of criminological research at all.

[64] Friedrich Lösel quoted by Maxfield, M. G., Babbie, E. R., *Research Methods for Criminal Justice and Criminology* (7th edn, Cengage Learning 2008) 364.

Éva Inzelt*

The Criminal Justice System and Tools of Investigating International Organised Crime

I Introduction

The aim of the research is to assess the presence of international organised crime in Hungary. In our research, we focused on the investigation of crimes classed as priorities by the European Union under EMPACT[1]. The research focused on the exchange of information between law enforcement and judicial bodies participating in the investigation of cross-border crime. As lead researcher Tamás Bezsenyi also points out, '…the most dangerous form of international crime is criminal organisations, which have and operate using international connections'.[2] For this reason, Hungary, as a member of the European Union, and the Hungarian police dedicate special attention to their active participation in the exchange of criminal information in Europe. Europol[3] draws up the so called SOCTA report every year, based on the reports of authorities in the member states.[4] Mapping the characteristics of organised criminal groups and their areas of operation are essential for successfully combating their activities.[5]

This study presents those findings of the research that are related to the structure and operation of the criminal justice system engaged in investigating transnational organised

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1 European Multidisciplinary Platform against Criminal Threats.

2 Bezsenyi Tamás: 'A magyarországi nemzetközi jellegű szervezett bűnözés információáramlásának kutatási lehetőségei' (Research opportunities for the information flow of international organized crime in Hungary) (2016) (9) Belügyi Szemle 36.

3 Europol is the law enforcement agency of the European Union. Europol supports the law enforcement authorities of EU member states in their activities aimed at combating crime and terrorism related to illicit drugs, trafficking in humans, organised illegal immigration, cybercrime, crimes involving intellectual property, cigarette smuggling, euro counterfeiting, fraud, money laundering and tracing assets, mobile (moving) organised criminal groups, banned biker gangs, and terrorism. See also: <https://www.europol.europa.eu/activities-services/main-reports/serious-and-organised-crime-threat-assessment> accessed 26 February 2021.

4 Serious and Organized Crime Threat Assessment.

5 The following study contains the detailed theoretical and practical assumptions of the research: Bezsenyi (n 2) 36–64.

crime. The study focuses particularly on the instruments at the disposal of the public prosecutor's office and the form and framework of its cooperation with investigating authorities.

The methodology of this analysis is aimed at providing the most precise description possible of the work of the authorities using *historical data, the interpretation of legal regulations and also empirical findings*. To this end, the members of the research team conducted *interviews* with staff members of the Rapid Response Police Force, the National Bureau of Investigation, the police headquarters in county seats and Budapest, and also the chief public prosecutor's offices of the county seats and Budapest, and the district prosecutor's offices. The interviewees were all involved in investigating (international) organised crime cases or supervising them.

II The Definition of Organised Crime

It is nearly impossible to give a definition of organised crime because it is a dynamically changing form of crime, which always adjusts to the opportunities determined by supply and demand. These in return are fundamentally determined by the economic and social structures of any given country and its major legislation (suffice it to mention the prohibition of alcoholic beverages introduced in the United States in 1920s). The fact that one of the outstanding researchers in the field, *Klaus von Lampe,* collected more than a hundred different definitions for organised crime[6] clearly illustrates the diversity of approaches.

Valér Dános is of the opinion that 'organised crime is a particular sub-structure of criminality in any given society, consisting of the crimes of career criminals, who commit their crimes as a member (leader) of a criminal group with a strategic division of activities and high levels of conspiracy'[7].

For the purposes of criminology, organised crime can be classified based on three main criteria. The first is geographically determined groups, which can be criminal groups operating within the borders of a country, or an international (transnational) organisation. The second is ethnic differentiation (e.g. mafia, yakuza, triads, 'Chechen mafia', Russian organised crime in the US). The third involves the main area of activities of the criminal groups, such as trafficking in human beings, drug trade, money laundering, crimes against property, or extortion. In terms of the area of activities, organised crime may be targeted at supplying the demand for illegal goods (e.g. drugs) or services (e.g. prostitution), or illegally supplying the demand for legal goods (e.g. art, alcoholic beverages) or services (e.g. lending), or committing traditional ('street') crimes (e.g. crimes against property) in a criminal organisation. More recent literature divides forms of crime into the following three categories: (1)

[6] Klaus von Lampe, *Organized Crime: Analyzing Illegal Activities, Criminal Structures, and Extra-legal Governance* (John Jay College of Criminal Justice, City University of New York 2016) 34–35.

[7] Dános Valér, 'A szervezett bűnözés' (Organized crime) in Gönczöl Katalin, Korinek László, Lévai Miklós (eds), *Kriminológiai ismeretek (Criminological knowledge)* (Corvina 1996, Budapest) 214.

crimes against life, physical integrity, personal freedom; (2) crimes against property and economic crimes; and (3) crimes related to the illegal trafficking and trade in humans, goods and services. The first group includes murder, assault and kidnapping committed as a form of retaliation, the second includes crimes to the detriment of the community or state budget, extortion (for protection money), fraud, money and securities counterfeiting, product counterfeiting, money laundering, car and art theft, and the third group includes trafficking in human beings and organs, drug trafficking, arms trafficking, and the organised trade in endangered plant and animal species.[8]

According to several researchers of organised crime, it is impossible to give a uniform definition of the phenomenon; it is only possible to define its main characteristics. *Ákos Borai*[9] also believes that it is more practical to enumerate the defining and auxiliary features of organised crime. Borai says that the most important features include the lasting collaboration of several (usually at least three) individuals for activities of an at least partly criminal nature, a hierarchical organisational structure, strategic operation and division of activities, usually covering up illegal transactions with legal activities, and an intention to achieve illegal profit or gain.

At the 1999 conference of the *International Association of Penal Law (*AIDP) in Budapest, experts also engaged in lengthy discussions and analyses of the defining features of organised crime. It was also significant because, if we intend to sanction crimes committed by a criminal organisation, we need to lay down a clear definition in the interest of legal certainty, among other things. Experts finally arrived at the following definition at the conference:

> organised crime is typically targeted at gaining power and/or profit in a highly organised manner. It often has characteristic features that result in uncertainty as regards the application of the traditional concepts and instruments of criminal justice. Such characteristics may include the division of activities and lack of clear responsibilities within the organisation, the mutual replaceability of persons, secrecy, ability to neutralise law enforcement (e.g. by threats or corruption), a combination of legal and illegal activities, and the particular ability to keep profits hidden'[10]

Tamás Bezsenyi is of the opinion that the AIDP attempted to give a definition of criminal organisations based on their purpose, '…as organised crime is essentially targeted at gaining power and/or profit in a highly organised manner'.[11] However, no definition of power was given, therefore this definition requires further clarification.

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[8] Tóth Mihály, Kőhalmi László, 'A szervezett bűnözés' (Organized crime) in Borbíró Andrea, Gönczöl Katalin, Kerezsi Klára, Lévay Miklós (eds), *Kriminológia (Criminology)* (Wolters Kluwer 2016, Budapest) 615–616.

[9] Borai Ákos, 'A szervezett bűnözés büntetőjogi kérdései' (Criminal issues in organized crime' (1992) (5) Rendészeti Szemle 12–20.

[10] Cited by Tóth, Kőhalmi (n 8) 611.

[11] Bezsenyi Tamás: 'A szervezett bűnözés elleni nemzetközi együttműködés értelmezései a magyar igazságszolgáltatásban' (Interpretations of international cooperation against organized crime in the Hungarian judiciary) (2015) 11 (1–3) Polgári Szemle.

Mihány Tóth and *László Kőhalmi* make an attempt at giving a multi-level definition (see *Table 1*).[12] Their starting point is determined by the assumption that, in order to be able to describe the complex features of organised crime, we need to distinguish between 'three successive levels, which however can be ranked'.[13]

Table 1: A multi-level definition of organised crime[14]

	Organisational framework and objectives	Characteristics of operation
Necessary (always)	– coordinated, continuous collaboration of at least three persons based on previous planning	– more serious crimes committed
	– an intention to pursue activities prohibited under criminal law	– longer series of actions over an extended period
Characteristic (regularly)	– intention to achieve economic or financial gain	– repeated and/or interrelated and often expanding series of illegal transactions
	– objective of profit optimisation	– conspiracy
	– forming structured groups, 'sub–systems', or potentially networks, with a scope of tasks clearly defined and controlled by the leaders	– international scope
		– using legal forms of operation
		– using the latest technical and logistical solutions
		– rapid adjustment to the changing (legal) environment
		– corruption
		– money laundering
Potential (occasionally)	– paramilitary setup, strong system based on dependence and obligation	– serious violent crimes committed
	– political, ideological motivation	– retaliation against those breaching the conspiracy
	– intimidation	– intention to obstruct justice
	– circle of contributors involved in the crimes (e.g. planners, informants, supporters, whistle-blowers, legalisers)	– ensuring effective legal protection and bail for exposed members of the group, supporting family members

Tóth and Kőhalmi are of the opinion that systematic operation and the fact that they organise/plan the optimal size of the group based on the goals to be achieved fundamentally determine the activities of today's organised criminal groups.[15] They distinguish a leadership

[12] Tóth, Kőhalmi (n 8) 611–613.
[13] Tóth, Kőhalmi (n 8) 611.
[14] Tóth, Kőhalmi (n 8) 612.
[15] Tóth, Kőhalmi (n 8) 613–616.

and an operative level (the latter do not necessarily know each other, and communication with the leaders is also often conducted through proxies), who work in close cooperation.

Based on data from the interviews, we can establish that the organised criminal groups operating in Hungary in the past 10 to 15 years do not in general have a hierarchical structure based on the division of tasks and activities, but rather a network or cell structure, which makes it possible for anyone to join; the levels and tasks to be performed are increasingly interoperable, and the activities of a single person may extend to several different areas. We can however say that there are still groups with pyramid-like structures operating in Hungary today.

Another important trend is that organised crime has in recent times lost its violent character, and rather became a series of white-collar, economic crimes. More complex economic crimes require a group with front men, in whose name the companies are registered, bank accounts opened, houses and flats bought, and there is also need for a collaborating lawyer, accountant, and persons masterminding the activities.

1 The Palermo Convention

On 14 December 2000, the United Nations Convention against Transnational Organized Crime was signed in Palermo, and it is often referred to as 'Palermo Convention'. The Convention was promulgated in Hungary in the form of Act CI of 2006.

The Convention defines organised criminal groups as follows: 'structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit'.[16] Serious crime is defined as 'conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty'.[17]

The Palermo Convention also stipulates what is considered to be of a transnational nature: crimes *a)* committed in more than one state; *b)* committed in a single state, but prepared, planned, masterminded and controlled for the most part in a another state; *c)* committed in one state, but with the participation of an organised criminal group, which conducts its criminal activities in more than one state; or *d)* committed in a single state, but that have a significant impact on another state.[18] The Convention stipulates what actions need to be declared crimes by all signatories. These are participation in an organised criminal group, money laundering, corruption, obstruction of justice. The Convention also stipulates what institutions should assist criminal proceedings in the interest of more effective action against organised crime, such as international cooperation in the interest of confiscation, extradition, transportation of sentenced persons, mutual legal assistance, joint

[16] Act CI of 2006, Article 2, point *a)*.
[17] Act CI of 2006, Article 2, point *b)*.
[18] Act CI of 2006, Article 3, Paragraph (2).

investigative work and measures intended to improve the cooperation between law enforcement authorities, and also the collection, analysis and exchange of information on the characteristics of organised crime. The Convention encourages state parties to enter into bi- or multilateral treaties for the investigation of certain crimes, which help the countries to make the international cooperation stipulated in the Convention, and the prevention, detection and prosecution of international organised crime more efficient.

In 2006, the protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the Palermo Convention, was adopted, and announced in Hungary in the form of Act CII of 2006. The Convention's protocol against the smuggling of migrants by land, sea and air was also adopted in 2006, and entered into force in Hungary as Act CIII of 2006.

Among others, the Palermo Convention is of outstanding importance, because it is the first binding international document that provides a definition of criminal organisations and organised criminal groups, and categorises the forms and cornerstones of joint action against international organised crime.

2 The Definition of Criminal Organisation and Criminal Association under Criminal Law

As we can also conclude from the materials of the 1999 conference of the International Association of Penal Law in Budapest, there was a considerable interest in creating the framework for sanctioning organised criminal groups under criminal law. Hungary was a pioneer in this field, as the *concept of a criminal organisation* was introduced as a definition under Section 9 of Act LXXIII of 1997 – effective as of 15 September 1997 –, which stipulates that 'criminal organisations: [are] criminal associations based on a division of activities created for the continued perpetration of crimes, which are aimed at obtaining benefits on a regular basis'. This definition was criticised by many, and was consequently modified as follows under Act LXXXVII of 1998, Section 35: 'criminal organisation: a criminal association based on a division of tasks, hierarchical system and involvement based on personal relations and created with the intention to obtain a benefit through the regular perpetration of crimes'. The effective wording entered into force under Act CXXI of 2001, Section 19, Paragraph 5: 'criminal association: a group planned for an extended period and operating in concert consisting of three or more persons, the aim of which is the perpetration of intentional crimes punishable by imprisonment of five years or more'. This is the definition applicable to crimes perpetrated after 1 April 2002.

The modification was required partly because of problems with the application of the earlier regulation, and also because of signing the Palermo Convention. The Convention stipulates an obligation of legislative alignment for Hungary, for which reason a new definition of criminal associations had to be found, which was in accordance with international expectations. This definition clearly separates criminal associations from criminal organisations, emphasising the more serious nature of the latter and its threat to society.

According to the reasoning of the competent minister, the cooperation of at least three persons is needed to meet the legal criteria for a criminal organisation. The reference to an extended period wishes to highlight the fact that, in accordance with this definition, the ad-hoc perpetration of two or three crimes does not qualify as perpetration as a criminal organisation.

Tóth Mihály is of the opinion that there are several variations for the creation of a criminal organisation; on the one hand, if the persons active in the criminal organisation are aware of each other's crimes, or commit them in cooperation; and on the other, in a way where the members are not aware of each other's activities, but there is a leading figure who coordinates the activities of the members of the criminal organisation.[19]

In relation to the intentional perpetration of crimes punishable by five or more years of imprisonment as an element of the definition, we need to emphasise that the perpetrator does not necessarily need to be aware of the sanctions, as what matters is rather his awareness of the fact that the goal of the criminal organisation is to commit serious crimes. The perpetrator may be held liable for perpetration as a criminal organisation, even if he is involved in a single crime as a perpetrator or complicit party, provided he is aware of the criteria of the definition of a criminal organisation.[20]

The *Curia* (Kúria; formerly: *Supreme Court / Legfelsőbb Bíróság*) *ruled in their Decision 4/2005. BJE*[21] that perpetration as a criminal organisation[22] also applies to persons who are involved even in a single – one-off – crime as a perpetrator or a complicit party. Only perpetrators may be accused of acts committed as a member of a criminal organisation, who performed their activity within the hierarchical structure based on a division of tasks of the criminal organisation, in full awareness of the organisation, and in continued cooperation with its members. A person outside the criminal organisation does not automatically become its member if they are given an assignment by the organisation as, according to the above decision, this requires actual integration into the organisation, awareness of its internal operation and active participation in it. In the opinion of the review council, a distinction has to be made between the classification under the substantive law of crimes committed as a member of criminal organisation, and crimes committed based on an assignment from a criminal organisation. Perpetration as a member of a criminal organisation only applies if the actions of the defendant fully comply with the criteria of the definition, and the facts of the case allow for these criteria to be applied in full to the activities in question. The perpetrator does not need to be aware of the fact that, according to the criteria stipulated in the legislation, a criminal organisation had been created, but rather that he joins the 'operation'

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[19] Tóth Mihály: 'A bűnszervezeti elkövetés szabályozásának kanyargós útja' (It is a winding path to the regulation of criminal organization) (2015) (1) Magyar Jog 5.

[20] Szomora Zsolt, 'Záró Rész' (Final Part) in Karsai Krisztina (ed), *Kommentár a Büntető Törvénykönyvhöz (Comment on Act C of 2012 on the Criminal Code)* (Complex Kiadó 2013, Budapest) 961–962.

[21] Büntető Jogegységi Határozat, Criminal Justice Unified Resolution.

[22] The decision analyses perpetration in a criminal organisation with reference to the previous Criminal Code, i.e. Act IV of 1978.

of the criminal organisation in awareness of its characteristics in practice and acts as part of the operation. The perpetrator needs to be aware of committing crimes as part of a criminal organisation. The perpetrator needs to be aware of the fact that the intentional crime – stipulated as serious –, in which he is also involved, is perpetrated by a group created for committing several crimes, which complies with the criteria of the definition of a criminal organisation given in the legislation. The criterion of being organised for an extended period does not need to be met by the perpetrator collaborating with the criminal organisation on an ad hoc basis, with involvement in perhaps just a single crime, but rather by the criminal organisation itself.

Establishing *perpetration in a criminal organisation* is important, because, *inter alia*, the effective criminal law stipulates serious legal consequences, such as that the upper limit of the sanction is doubled, but may not exceed 25 years; the imprisonment is implemented in a high-security prison if the perpetrator is sentenced to two years or more; conditional release is not possible; the sentence may not be suspended; compulsory confiscation of assets acquired during the period when the perpetrator was participating in the criminal organisation; and that the perpetrator may not be acquitted of a final and binding ban from exercising his professional activity, if the ban was based on unworthiness, and had final effect. These provisions are included in the General Part of the Criminal Code, and are therefore applicable to all intentional crime, as opposed to perpetration in a criminal association, which, in relation to cases in the Special Part, is stipulated as an aggravating circumstance.[23]

Based on the responses of the interviewees,[24] we can say that if the suspicion arises, the possibility of involvement in a criminal organisation in relation to a crime is always given due consideration. Based on the findings from the interviews however, we can say that actors in the criminal justice system, especially at the beginning of the investigation or during secret intelligence work, do not first observe the elements of the definition of a criminal organisation given in the Criminal Code, but rather the criminological characteristics, such as the different organisational levels (leaders and operatives) and the coordinated and profit-oriented nature of activities.

The definition of a *criminal association* is stipulated under Section 459 (1), (2) of the Criminal Code as follows: 'shall mean when two or more persons are engaged in criminal activities in an organised fashion, or they conspire to do so and attempt to commit a criminal act at least once, without, however, creating a criminal organisation'. This definition is effective as of 1 April 2012.

Decision No. IV in principle regarding criminal law (IV. számú Büntető Elvi Döntés) of the *Curia* (formerly *Supreme Court*) stipulates that the existence of a criminal association

[23] See below.

[24] During the research, the members of the research team conducted *interviews* with staff members of the Rapid Response Police Force, the National Bureau of Investigation, the police headquarters in county seats and Budapest, and also the chief public prosecutor's offices of the county seats and Budapest, and the district prosecutor's offices. The interviewees were all persons involved in the investigation of (international) organised crime cases or supervising them.

can also be established if two or more persons arrive at an agreement in advance about the perpetration of identical or different crimes in a concerted manner and, based on that, they have committed at least one crime or attempted to commit one.

It qualifies as concerted perpetration if the members of the criminal association enter an agreement on the perpetration of several crimes; they divide the roles, plan the circumstances of the perpetration, and look for opportunities to commit the crime. However, it is not necessary for them to plan each crime's perpetration in detail; the emphasis is on organising criminal activity. The agreement of the perpetrators has to involve the concerted perpetration of crimes, i.e. criminality itself or the perpetration of several crimes, but how much time the agreement precedes the crime(s) is irrelevant.

Crimes here are understood to mean several intentionally committed acts. The existence of a criminal association may also be established if the perpetrators decide on, start to commit or complete two or more crimes, but their acts constitute a single crime under criminal law.

Based on their behaviour, the persons involved in a criminal association may be principals, accessories, abetters or aiders.

A criminal association may be established to exist in cases where this criterion is stipulated as an aggravating circumstance in the Special Part of the Criminal Code (Btk.). These include drug trafficking [Sections 176 (2) a) and 177 (2) b) of the Criminal Code]; possession of narcotic drugs [Sections 178 (2) ab) and 179 (2) aa) of the CC]; aiding in the manufacture and production of narcotic drugs [Section 182 (3) a), illegal possession of new psychoactive substances [Section 184 (2) a); trafficking in human beings [Section 192 (3) h)]; active corruption [Section 290 (3) b); robbery [Section 365 (3) d)], plundering [Section 366 (2) c)], extortion [Section 367 (2) a)]; theft [Section 370 (2) ba)], embezzlement [Section 372, (2) ba) and fraud [Section 373 (2) ba)].

Table 2: Elements of the definitions of criminal association and criminal organisation[25]

Criminal association	Criminal organisation
at least two persons	at least three persons
organised	concerted
not necessarily long-term (agreement on committing at least two crimes)	long-term (agreement on committing more than two crimes)
attempt to commit at least one crime	perpetration of an actual crime is not necessary, an agreement on such an intent is sufficient
perpetration of a crime of any gravity	perpetration of an intentional crime punishable by imprisonment of at least five years or more
to be applied only in cases where in cases in the Special Part it was stipulated as an aggravated case, and as a result it is assessed as more serious	the consequences in the General Part apply to perpetration of an intentional crime punishable by imprisonment of at least five years or more

[25] Tóth (n 19) based on the comparison on p. 6.

We can clearly establish that both criminal organisations and criminal associations are concepts closely linked to organised crime and represent an approach that takes into consideration the elements of organised crime identified by criminology. As the two concepts share several elements, a criminal association is considered to exist until a criminal organisation is created.

III Evidencing Criminal Organisations

Following the description of the legislative and theoretical framework, we now wish to discuss what experience the interviewees participating in the research have in relation to evidencing the existence of criminal organisations.

It is important to note here that opportunities for obtaining evidence and establishing that the case complies with the elements of a criminal organisation stipulated in the definition differ with the different types of crimes.

'In my opinion, trafficking in drugs or human beings is not possible without a concerted effort, without a criminal organisation.'[26]

Case scenario: there are three people; they know each other; one gets into a tight spot and he approaches an acquaintance working for a transportation company with an idea. He convinces him that they should steal the goods he is to transport abroad. What they do is that the mastermind and his friend unload the lorry in a parking lot in a foreign country. The third person driving the lorry reports the theft to the police in the given country, and the insurer compensates his company for the damage. The court established that the crimes were committed in a criminal organisation in the above case.

> However, the persons involved in the criminal organisation do not necessarily have to know each other. In cases involving trafficking in human beings, the perpetrators usually collaborate in smaller cells, within which members are independent. They are speaking in code, i.e. they know they are being wiretapped, and that their conspiracy is no longer a secret. The person whose task it is to pick up five or six other persons on Main Road 55 in the middle of the night near the border crossing to Serbia at Röszke, and take them to Budapest or Hegyeshalom (a border crossing to Austria) receives the information from a another person, but he must be aware that the Afghan, Syrian or Pakistani individuals he is transporting arrived at the border crossing at Röszke and then to Km x of Main Road 55 with the help of several other persons.[27]

[26] Excerpt from an interview conducted with a public prosecutor.
[27] Excerpt from an interview conducted with a public prosecutor.

IV Organisational Structure, Scope of Responsibility and Competence of the Public Prosecutor's Office, with a Special Focus on the Law Enforcement Instruments in Organised Crime Cases[28]

Prosecuting bodies include the Prosecutor General's Office (which is a public body managed and operating independently), the chief prosecutors' offices for appeals, the chief prosecutors' offices, and district prosecutors' offices and those at district level (see *Figure 1*).[29]

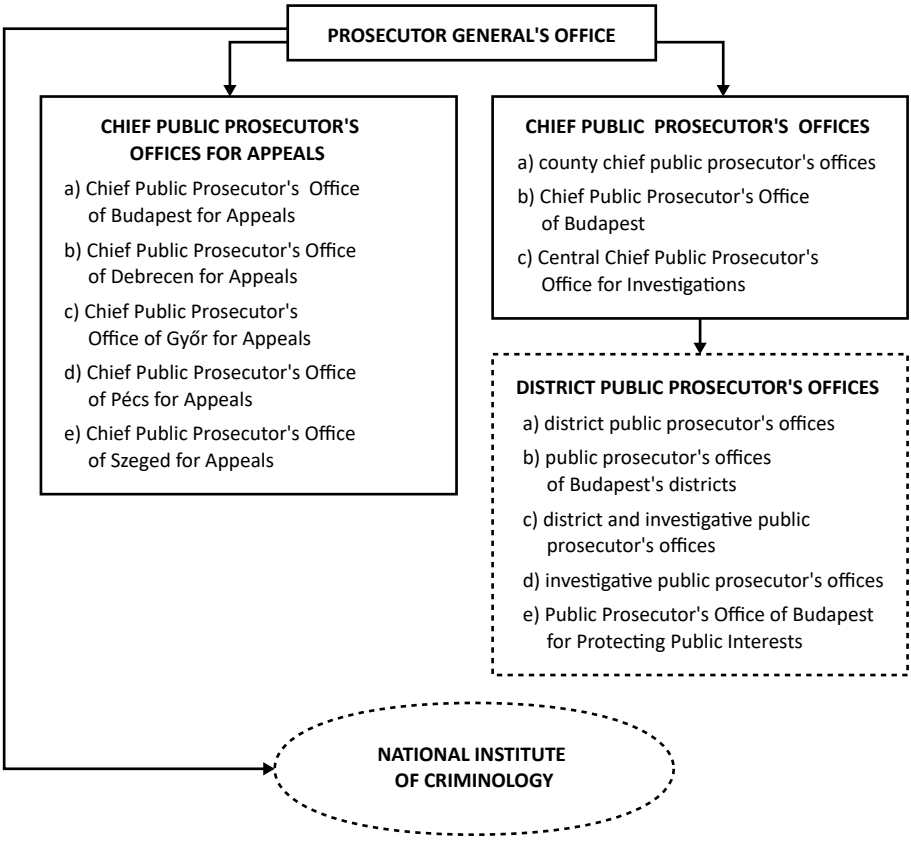


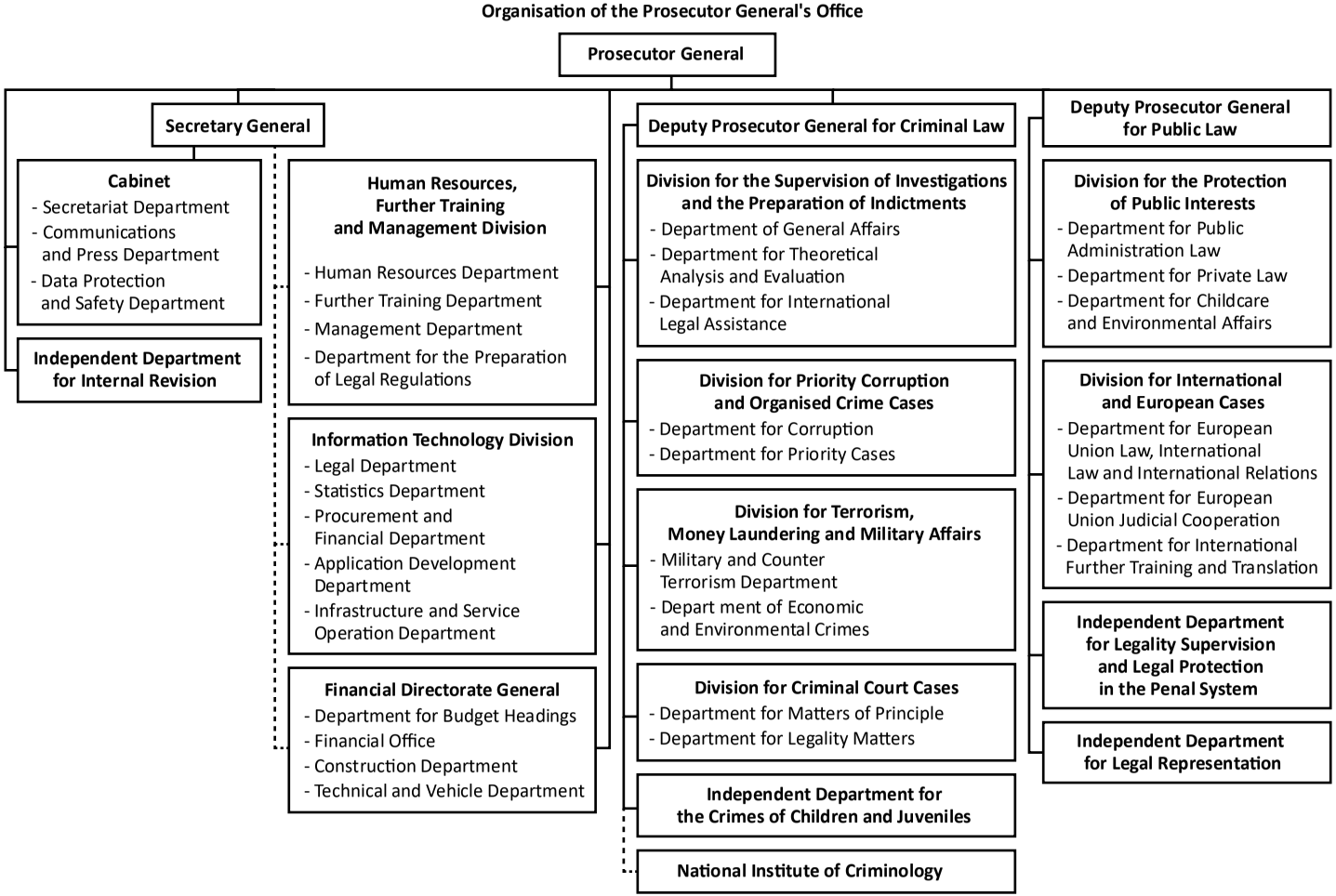
Figure 1: The organisational structure of the public prosecutor's office[30]

[28] In the following chapter, I will give an overview of questions relevant for the research.

[29] Directive 12/2012 (VI. 8.) of the Prosecutor General, Section 1.

[30] See <http://ugyeszseg.hu/fooldal/az-ugyeszseg-szervezete/> accessed 26 February 2021.

Figure 2: The organisational structure of the Chief Public Prosecutor's Office



Source: see <http://ugyeszseg.hu/fooldal/az-ugyeszseg-szervezete/> accessed 26 February 2021.

In accordance with Directive 12/2012. (VI. 8.) of the Prosecutor General on the organisation and operation of the public prosecutor's office, the following affairs *belong under the exclusive competence of the Prosecutor General* based on the act on international legal assistance in criminal cases: *acknowledging a foreign sentence;* stipulating guarantees for providing legal assistance in criminal cases; *accepting conditions* for Hungary's legal assistance; issuing a permit for *the creation of a joint investigative team* [Section 36 (5) of the act on criminal proceedings[31]]; and adopting decisions in relation to international cooperation in criminal cases within its scope of competence.[32]

The division of the Prosecutor General's Office for the supervision of investigations and the preparation of indictments adopts its decisions on transferring criminal proceedings to a foreign authority, on reporting the crime, on taking over the criminal proceedings offered by a foreign authority within its field of expertise[33] based on delegated powers, and conducts the consultation proceedings and adopts the decision in conclusion of them, while at the same time it informs the competent prosecutor of it,[34] and also decides on the *legal assistance* to be provided to or requested from the foreign authority in the given procedure.

The division of the Prosecutor General's Office for priority cases, corruption and organised crimes[35] takes action in cases involving participation in a criminal organisation (Section 321 of the Btk.) and all crimes committed in a criminal organisation [Section 459, (1) of the Btk.], and also all crimes within the scope of competence of the Central Investigative Chief Prosecutor's Office.[36]

Decree 25/2013 (VI. 24.) of the Minister of the Interior brings up an interesting question as regards certain provisions of the act on the *responsibility and competence of the investigative authorities of the Police.* The National Bureau of Investigation of the Rapid Response Police Force (NBI)[37] has competence to investigate, if the suspicion arises that the crime was committed in a criminal organisation and it is of an international character in accordance with Article 3, Paragraph (2) of the Palermo Convention.[38] The NBI has competence in cases

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[31] With the permission of the Prosecutor General, the investigative authorities may, for a single case or a group of cases, create joint investigative teams with the investigative authorities of the member states of the European Union and the European Union Agency for Law Enforcement Cooperation (EUROPOL), if special conditions are met, as stipulated in separate legislation.

[32] Directive 12/2012 (VI. 8.) of the Prosecutor General, Section 3, Paragraph (3) l) and *m).*

[33] Directive 12/2012 (VI. 8.) of the Prosecutor General, Section 16, Paragraph (1) *k).*

[34] If Act CLXXX of 2012 on the cooperation with member states of the European Union in criminal proceedings, and Act CXVI of 2005 on the announcement of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000 and the Additional Protocol of 16 October 2001 to the Convention do not stipulate otherwise.

[35] Directive 12/2012 (VI. 8.) of the Prosecutor General, Section 17 *a).*

[36] Excluding the exceptions stipulated under Directive 12/2012 (VI. 8.) of the Prosecutor General, Section 17/A (1) *a).*

[37] The NBI has nationwide competence, has the legal status of a directorate within the Rapid Response Police, is engaged in investigative and intelligence activities, and operates in the interest of public safety and internal order in accordance with legislation and legal instruments regulating its organisation under public law.

[38] Decree 25/2013 (VI. 24.) of the Minister for the Interior, Section 2 (2) *b).*

involving the crime of participating in a criminal organisation as stipulated under Point 13.6 of Annex 2 of the Decree of the Minister for the Interior and as regulated by Section 321 of the Criminal Code, if it is of an international nature.

The predecessor of the *Central Investigative Chief Prosecutor's Office (Központi Nyomozó Főügyészség),* the Bureau of Investigation of the Central Prosecutor's Office *(Központi Ügyészségi Nyomozó Hivatal)* was created by Prosecutor General Dr. Péter Polt on 1 June 2001 as a part of the Municipal Chief Prosecutor's Office of Budapest. The independent Central Investigative Chief Prosecutor's Office was formed by the decision of the Parliament of 12 January 2006. The next important organisational change entered into force on 1 January 2012, when military prosecutors were integrated into the organisation of prosecutors. The district military prosecutor's offices – which were operating in Budapest, Debrecen, Győr, Kaposvár and Szeged – became regional departments of the Central Investigative Chief Prosecutor's Office. The Central Investigative Chief Prosecutor's Office has nationwide competence, and is responsible for investigating the majority of crimes committed by and against persons with immunity (members of parliament, judges, prosecutors, etc.), military crimes, and crimes delegated to its competence by the Prosecutor General's Office, and if it comes to an indictment, representing the prosecution in court.[39] The Central Investigative Chief Prosecutor's Office conducts investigations in cases delegated to its competence by the Deputy Prosecutor General for Criminal Proceedings, the division of the Prosecutor General's Office for priority cases, corruption and organised crime, and the division of the Prosecutor General's Office for terrorism, money laundering and military affairs.[40]

V Communication and Cooperation between the Police and the Prosecutor's Office

We can say that police officers and prosecutors communicate in person, by phone, fax and e-mail. All official exchange of information happens in writing, in the form of a transcript. There is usually one transcript per month in the cases, but phone or personal communication may even occur on a daily basis in some cases.

> Whatever is the easiest and most efficient: personal contact, phone; rarely e-mail, mostly phone, Viber. WhatsApp, if the exchange is not official. If it is official, we use writing. With trusted partners, communication takes place over the phone as much as necessary. I am always available on my mobile, only a restricted circle know my number (based on mutual trust).'[41]

[39] See <http://ugyeszseg.hu/pdf/sajto/sajto_20131010_knyf_kozlemeny_szekhaz.pdf> accessed 26 February 2021.
[40] Directive 12/2012 (VI. 8.) of the Prosecutor General, Section 42 (1) *a).*
[41] Excerpt from an interview conducted with a prosecutor.

In addition to the relationships between the given police officers and the prosecutor, the frequency of communication also depends on whether the nature of the given case requires continuous discussions.

> …if the policeman is not sure about something, he reaches out and asks me; there is also an element of dodging responsibility in this.'[42]
>
> …if they can't take care of something internally, they often expect the prosecutor to decide, for example, when during wiretapping it turns out that a new drug shipment is arriving. We don't know who is coming, where they are coming to and from, and an arrest would have been premature. If it's about drugs, the attitude of the police is bang-bang and immediate arrest; this is policy with high-ranking policemen. But I think we don't have to cut yet another head off the dragon, but rather stab it through the heart. We have to map out the middle level, the organisers.[43]

VI The Manner and Speed of the Exchange of Information between Foreign and Hungarian Law Enforcement and Judicial Authorities

The efficient exchange of information between different Hungarian bodies and between Hungarian and foreign law enforcement and judicial authorities is of outstanding significance in the investigation of transnational organised crime. We can distinguish several different forms of communication and exchange of information. There is direct contact, which is based on the assumption that the member of the Hungarian investigative authority knows the member of the foreign investigative authority, knows his contacts and can ask him directly for information.

If there is no direct contact, or the information to be obtained cannot be discussed directly, several other forums are available for the authorities to get in contact, such as the International Law Enforcement Cooperation *Centre (Nemzetközi Bűnügyi Együttműködési Központ),* the Hungarian liaison office of Europol,[44] the Hungarian liaison office of Interpol,[45] the SIRENE office, the South-East European Law Enforcement Centre (SELEC), and Joint Contact Service Centres *(Közös Kapcsolattartási Szolgálati Helyek).*[46]

The International Law Enforcement Cooperation Centre is a central public body with nationwide competence created in accordance with Act LIV of 1999 on the cooperation and exchange of information in the law enforcement information system of the European Union and the International Criminal Police Organisation, and is under the direction of

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[42] Ibid.

[43] Ibid.

[44] European Union Agency for Law Enforcement Cooperation.

[45] International Criminal Police Organisation.

[46] International legal assistance in criminal proceedings will be discussed in the following chapter.

the National Police Headquarters *(Országos Rendőr-főkapitányság; ORFK)* in accordance with Government Decree 329/2000. (XII. 13.) on the responsibilities and competence of police bodies, operating as an organ for specific tasks of the body created for general police tasks.[47]

The *Hungarian liaison office of Europol* operates as an external organisational unit of the International Law Enforcement Cooperation Centre at the headquarters of Europol in The Hague, and is charge of direct international communication with other EU member states, and the offices of third countries and international organisations at the headquarters. They are available 24 hours a day in order to support strategic and operational activities in Hungary.[48]

The Office of Interpol in Hungary is an organisational unit with the legal status of a department directly reporting to the Head of the Department for Cooperation in Criminal Proceedings. It is in charge of the international exchange of information, and also cooperates with foreign partner organisations. Main tasks: issuing an international arrest warrant based on international or European arrest warrants in the Interpol Information System; participating in the international search for missing persons; performing notification, information and organisational tasks related to the trial and the resulting decision in relation to persons apprehended for extradition/hand-over; coordinating and participating in the implementation of extraditions, hand-overs, and the transportation of sentenced perpetrators; taking measures for the search for internationally wanted objects and documents; and, in urgent cases, submitting an international request for legal assistance.[49]

The SIRENE Office is an organisational unit under the direction of a head of department with the legal status of a department directly reporting to the Head of the Department for Cooperation in Criminal Proceedings. It participates in the coordination, training, legislative and representational activities related to police cooperation measures in the Schengen area, and coordinates the quality controls of the warning signs put up by Hungarian authorities.

It was found during the analysis of the interviews that a lot of information is obtained directly, based on personal contacts, or relies on the help of liaison officers.

Discussions at the Joint Contact Service Centres, for example regarding the criminal record of a suspect or identifying the owner of a vehicle based on its registration plate, work very efficiently. The option of communication through the International Law Enforcement Cooperation Centre is chosen when the Joint Contact Service Centres are no longer sufficient. Communication with Romanian, Slovak, Austrian, Croatian and Serb authorities

[47] 3/2015. (12. 23.) The measure of the director of the International Law Enforcement Cooperation Centre on the rules for its organisation and operation.

[48] See <http://www.police.hu/hu/a-rendorsegrol/testulet/teruleti-szervek/nemzetkozi-bunugyi-egyuttmukodesi-kozpont> accessed 26 February 2021.

[49] 3/2015. (12. 23.) The measure of the director of the International Law Enforcement Cooperation Centre on the rules for its organisation and operation, points 34–35.

mainly runs through the Joint Contact Service Centres,[50] while British and French authorities are usually approached through the International Law Enforcement Cooperation Centre.

> The local police leaders don't really like it when I'm using the Joint Contact Service Centres. In the interest of mutual communication, we will spend an hour at the centre in Nickelsdorf, Austria, but it is too much for the system. The thinking is namely territorial, which is a narrower interpretation.[51]

VII The Means of Access to Information: Requests and Legal Assistance[52]

Due to the length constraints of this study, I do not wish to give a detailed description of the legislation on requests and legal assistance in criminal proceedings.[53] In the following, I will examine the most important aspects of the implementation of regulations in practice.

In accordance with Section 25 (1) of Act CLXIII of 2011, *the Prosecutor General decides* on *a)* transferring the criminal proceedings to a foreign authority or reporting a crime to a foreign authority; *b)* taking over criminal proceedings offered by a foreign authority; and also *c) legal assistance in relation to proceedings* to be provided to or received from the judicial authorities of another state, if the act on international cooperation in criminal proceedings does not stipulate otherwise.

The investigative authority usually requests legal assistance in proceedings in relation to hearing a foreign witness, to obtaining bank account data and account balance information, to opening accounts, to obtaining corporate data, and to conducting house searches and confiscations abroad. One of the key factors of providing legal assistance is time, i.e. how fast the requested action is taken in the given procedure. The actual process of providing legal assistance to those who need it is in itself a lengthy procedure: the police force submits a proposal, the prosecutor's office translates it, and a duly authorised person within the prosecution system – in many cases the Prosecutor General – decides whether the request for legal assistance can be sent out. After that, the request is sent to the foreign authority, who – if all goes well – take the measures requested. A protocol is taken up on these measures, which is translated then sent back. Experience of receiving legal assistance upon a request greatly varies with different bodies and countries as well. The findings of the research are not based on a large enough sample for us to be able to arrive at representative conclusions,

[50] The Joint Contact Service Centres usually respond within four to five hours.

[51] Excerpt from the interview with a policeman working at a county police headquarters.

[52] I do not wish to discuss data on mirror procedures and Joint Investigation Teams in this study.

[53] The two most decisive pieces of legislation, in addition to the Act on Criminal Proceedings and the Act on the Criminal Code, are Act XXXVIII of 1996 on international legal assistance in criminal proceedings and Act CLXXX of 2012 on the cooperation with member states of the European Union in criminal proceedings.

but several interviewees mentioned that their Italian and Spanish colleagues often do not respond, while Finnish, Norwegian, Dutch, Austrian and Swiss police officers respond more often, although we have to note here that local investigative bodies usually have some interest in providing legal assistance – or they may need the given information themselves –, which lies in the fact that they may count on mutual support from the given country, if it submits a request for legal assistance.

> We asked for a house search and hearing witnesses in a town a few kilometres from the border in Slovakia – a neighbouring country –, which they managed to do in six months.[54]

It is important to stress that law enforcement bodies can only communicate with foreign law enforcement bodies, while judicial bodies with foreign judicial bodies.

> I like it when the police obtains the required information, also because the legal assistance is as limited as possible this way. Wherever possible, the requests are sent through Europol, as Hungarian courts accept such information as evidence. In such a case, the police will ask directly where a given vehicle can be found. Legal assistance is not effective, but in many cases unavoidable. It is the slowest form of information flow, which only arises when time is of no consequence, as the process takes a lot of time.[55]

The excerpt from an interview below also confirms that, wherever possible, the information is not requested in the form of legal assistance.

> We try to sort out the issues among mates, but the situation decides. Whatever I can take care of with an official note, I will. It's simpler. Legal assistance is problematic. For example, if a Hungarian citizen is imprisoned in Austria, and we never get his testimony. He could be released soon, and then we will summon him. The decision between a request and legal assistance is also a matter of practicality. Trafficking in human beings is one of the most serious crimes, but they only deal with it in municipal or district prosecutor's offices. Once again, it shows that there is no migration crisis; the prosecutor's offices don't want to distribute the cases, but try to assign them to the same person, which is quite useful. There are also cases where we should apply for legal assistance, but the prosecutor wants instead to go for normal cooperation.[56]

[54] Excerpt from an interview with a policeman.
[55] Excerpt from an interview conducted with a prosecutor.
[56] Excerpt from an interview conducted with a policeman.

VIII Summary

In my study, I gave an overview of the framework and main actors of investigating international organised crime, and the interpretations of organised crime given in theoretical and international documents. I gave a detailed analysis of the legal definitions of criminal organisations and criminal associations, and the process of establishing the former. I examined the structure, responsibilities and competence of the prosecution system, and its effect on investigating transnational organised crime. I dedicated special attention to the communication and cooperation between police and prosecution bodies, and also the forms of information exchange between Hungarian and foreign authorities.

Based on the interviews conducted as part of our research supported by the Internal Security Fund and findings from processing case files, we can establish that the different forms of information exchange (request, legal assistance, mirror procedure, creating a joint investigative team) are all effective means of investigating international organised crime, but which instrument will be the most suitable and expedient depends on the case. All in all, it also clearly shows that direct and personal contacts within Hungary and abroad have a special significance in the fast and adequate flow of information.

Árpád Erdei*

The Principles of the New Code of Criminal Procedure

Just about two weeks ago, on June 9, 2017, in a lecture delivered at the annual Meeting of the Teachers of Criminal Sciences, I still maintained that the debate in the National Assembly might introduce significant, and hopefully positive, changes to the draft of the new Code of Criminal Procedure. After the lecture, an informed person said the final voting over the draft was scheduled for 13 June and, in his opinion, the law would be passed without any modification of importance. Events have proved him well informed; and capable of making predictions that, unfortunately, come true: Act XC of 2017 on criminal procedure (CCP) was enacted on that date. The same events are also evidence that the number 13 truly deserves its ill fame.

Since the topic of today's lecture is the principles of the CCP, the first thing I did when I had the chance to see the full text of the passed law was to look for the modifications concerning the principles. Naturally, there was none to find. Although not a surprise, it still is a disappointment because, in my opinion, some refinements of the draft's provisions on the principles would have been beneficial. To lay the foundations before the discussion of details, some general remarks, or rather reminders, may be appropriate.

1. The principles of criminal procedure are general propositions that singly show one or another characteristic feature of the procedure having them but, in their totality, they can determine the character of a procedural system as a whole and, by that, the most important features of its operation.

Most of the principles would easily fit into both of the two fundamental procedural systems, namely the accusatorial and the inquisitorial ones. To fit those into the continental mixed system is even easier, for it makes use of the 'trick' of recognising principles that are impossible to reconcile as its own. (To do so, the only thing needed is to consider the investigation and the trial as separate phases of the same process, each having a distinct character determined by its own set of principles.)

Only a few principles can singly determine a procedural system. The accusatorial principle (i.e. that the precondition of initiating the criminal process is a valid accusation) – supplemented by necessity with the division of procedural functions – is the distinguishing

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mark of the accusatorial system. In turn, the inquisitorial system is characterised by the *ex officio* initiation of the process in which the functions of prosecution and judgment (and, in a sense, defence even,) are united and borne by the court.

An illustration to the points just made may be as follows:

The acceptance of the principle of public trial or its opposite, i.e. that of secret proceedings; similarly, that the trial is oral or written; even adherence to the presumption of innocence or that of guilt, would not serve as a clear basis for determining to which of the two fundamental systems a procedure regulated in a particular code belongs. It is, however, a well-known fact that some principles are normally present only in the accusatorial procedure, while others in the inquisitorial one. Since it is almost obligatory to mention the former with praise and the latter with contempt, it is, perhaps, not without some malice when one points out that the principle of seeking the material truth – revered by the Ministerial Motivations of the Bill of the CCP (MM) – is the specificity of the inquisitorial and not of the accusatorial system.

2. The second remark is in connection with the first one, as far as it concerns the fact that the theory of principles, in the sense of the present interpretation of their concept, seems to have attracted less attention before the middle of the 20th century than after that time. The laws of the first half of the century, including the first Hungarian CCP, did not declare their principles. It was possible to infer them from the provisions formulated in their spirit. The declaration of their principles became customary in the codes of the 'socialist' period, when the completeness of the list was visibly more important than their consistent application when forming the provisions.

The idea having come up in the MM, namely that the formulation of principles is a task more for the theory (philosophy) of law than for legislation, in all probability would have been considered as 'sacrilege' in those times. Fortunately, for everyone, nobody professed it. Naming the principles of the code in its first provisions was a definite requirement.

The centres of interest of the scholars of procedural law are not always the same, just as legal terminology keeps changing; however, the propositions called principles in present days have been the focus of study for a long time, but perhaps under different names. I, for one, would leave the definition of the principles to the science of criminal procedural law and not as proposed by the MM, to the general 'theory of law', even if the intensity of the interest of procedural theory in the principles is not permanently high. In this context, one should think in terms of devising propositions to serve as bases for designing criminal procedure thought to be rational in the given period. Some of those propositions may have played a role for a long time in determining certain features of the criminal process; without them the procedure of a country, and the country itself, may be liable to attract unfavorable judgement. (It is well known, however, that the interests of international relations may render the mentioning this type of shortcoming impolite. For example, it happened in the case of the Soviet Union and some European socialist countries where it was normally not judges but prosecutors who ordered the preliminary detention of suspects. The Western countries silently accepted the claim that in the socialist systems, during the investigation,

the prosecutor had a status equal to that of the investigating magistrate – leaving disproving it to scholars, if they were interested.)

So whatever is the given name of the propositions we call principles nowadays, they are present in legal thinking and exert an impact. Their list is not a fixed one – some of them may disappear from it; others may lose their importance and rank lower while new ones may be born. The phenomenon is familiar and one can normally find its causes but, as a rule, only after the event. In fact, usually it is also subsequently that one can realise that what the lawmaker calls a principle is no more than an aim set in general terms and in a worse case a requirement of a technical nature. It is easy to find examples of both.

3. The point of departure for the third remark is the fact that the doctrines of criminal procedural law favour the use of principles to describe procedural systems. For example, many authors profess that following certain principles, such as the division of functions or public trial, is essential for the accusatorial system, whereas the inquisitorial one has never used them. (The opposite is also true: the inquisitorial principle of finding out the material truth *ex officio* does not fit the accusatorial system.) Such observations may be correct, but they include anachronistic elements as well. In all probability, the 'creators' of the systems mentioned did not know what they were doing from the point of view of principles, the concept of which was waiting for discovery in the distant future.

The operational principle of the accusatorial system is a simple and natural one indeed. Accordingly, when two people, unable to agree which one of them is right in a dispute, ask a third one to decide the issue, they actually discover it. As far as the inquisitorial system is concerned, it is more than probable that considerations of expediency played a more important role in its formation than principles contrived in advance.

In our times, the process of codification follows a different path. The codifiers pursue their activities, knowing the principles discovered and systematised by legal science, and they include those institutions and solutions in the code that are expedient as well as being in harmony with the principles intended to rule the procedure. Why should they then not include classic principles, recognised worldwide and the repudiation of which is *improper behaviour,* in the code? It is another story (just as with regard to newly discovered or invented principles) how closely the provisions follow them.

At this point, the series of remarks must end and the attempt at surveying the system of principles of the CCP should start.

The new Code, similarly to the one in force, opens the (unprecedentedly, one may say frighteningly, long) series of Section with so-called fundamental provisions. Among them, one finds principles and provisions that do not qualify as such, similarly, again, to the 'old' CCP about going out of force. As far as the latter class is concerned, the use of plural is, perhaps, unjustified, since only the provision concerning jurisdiction [Section 9] belongs to it. All the other fundamental provisions are principles or rules of detail relating to them.

The CCP's tendency to follow patterns adopted by its predecessor is also manifested in the phenomenon that the classic principles and some rules originating directly from them appear far removed from each other, once in the sphere of influence of another, other times

independently as a separate principle. The example of the presumption of innocence may illustrate the consequences of this original method of editorship. It is noteworthy, however, that one could find also positive features of the editorial activity within the Chapter, which deserve a mention first.

Clearly, the CCP – in accordance with its Preamble – goes far in the efforts dedicated to paying due attention to the principle of the division of procedural functions. The Preamble only refers to it, but Section 5 declares that the procedural functions are separate from each other. Section 6 – as if building on the foundations laid by the previous one – regulates the accusatory principle, the acceptance of which follows from the recognition of the division of functions.

When laying down that the burden of proving the accusation should be borne by the prosecutor, Section 7 paragraph (1) follows the same path. Even if the provision does not fit very well into that Section, it is of great importance. By its enactment, the lawmaker intended to establish grounds for the elimination of the infamous anomaly created by Section 75 paragraph (1) of the CCP in force. The basis of its manifestation is the interrelationship between the duty of the prosecutor to represent his case during the trial and the obligation of the court to find out the *material* truth. [The essence of the anomaly is as follows: Section 75 paragraph (1) includes a contradiction. According to it, the court shall strive to determine the real facts of the case. The same paragraph, however, also provides that the court, without a motion by the prosecutor to that effect, is *not obliged* to take steps to obtain and evaluate evidence supporting the accusation. As such, there is a conflict between the requirement of establishing the truth and the principle of the division of procedural functions. As a practical consequence of this situation, if the court takes steps to obtain evidence supporting the accusation without a motion by the prosecutor, it is done clearly in violation of the principle mentioned. If, however, it refrains from doing so, the appellate court, on the appeal by the prosecutor (in default!), may remand the judgment as unfounded.] The CCP, in Section164 paragraphs (1) and (2), has provisions aimed at satisfying the requirements of the principle of the division of procedural functions, which is a highly commendable development. Unfortunately, paragraph (3), as Mihály Tóth has pointed out, recreates all the uncertainties that caused the anomaly described by using imprecise language.

After the detour, let us return to the presumption of innocence, as promised. No one can exaggerate the significance of that presumption for modern criminal procedure: by replacing the presumption of guilt ruling the inquisitorial criminal process, it irrevocably placed the defendant in the position of an actor in, instead of the mere object of, the procedure. The new situation is the consequence of the rules that follow from that presumption, such as the burden of proving the guilt of the defendant being on the prosecutor and the defendant enjoys the benefit of doubt. True, the original formulae of the presumption itself and of the mentioned rules have gone through some modifications in Hungarian legislation. As a result, the CCP does not require the defendant to be considered innocent but prohibits considering him guilty (before the judgment obtains legal force). As far as the benefit of doubt is concerned, the original command to interpret the doubts to favour the defendant

has been replaced by a prohibition from interpreting them to his detriment. All considered, the essence of the matter has remained the same.

The CCP, still in force at the time of this conference and disregarding the close connection between the presumption and the two evidence-related rules, separates them. Whereas one finds the presumption itself in Section 8, the two rules appear in Section 4. The attraction of this indubitably 'original' solution has clearly proved irresistible for the codifiers of the CCP. They declared the principle of the presumption of innocence in Section 1, but they found the proper place for the two evidentiary rules at an even greater distance from it, in Section 7, which, by the way, has the fascinating but ungrammatical title of 'Foundation-layings (*sic!*) to evidence'.

Section 7 is remarkable anyway. The logic of putting the various provisions included in it in the same Section may be difficult to follow but most of them relate, at least, to evidentiary issues.

The MM claims that the Section summarises the evidentiary consequences of the acceptance of the presumption of innocence. The provision in paragraph (1) says that proving the accusation is the prosecutor's duty. Under duress, one might perhaps find a way to tie the provision to the presumption of innocence, particularly with the use of the 'everything is connected to everything else' theorem. However, materially, it is in a much closer connection with the division of procedural functions (Section 5) or with the principle that the court only passes judgement oin issues submitted to it in the accusation (Section 6). Evidently, these remarks only concern the context the legislator placed the provision in paragraph (1), and do not express any criticism of its substance.

In paragraph (5) of Section 7, one may read a more confusing and more problematic issue of the placement of provisions than those mentioned previously. In essence, the paragraph provides that criminal courts, public prosecutors and investigative authorities are not bound by the observations and determinations made in other type of proceedings. The provision clearly goes beyond the realm of evidence, since it expresses the singularity of the administration of criminal justice and its independence of the decisions of other organs judging the same facts from a different perspective. Due to its importance, the regulation deserved to receive a more prominent place, even a full Section, than the last paragraph of Section 7, which is a miscellanea of more or less evidence-related provisions.

The twenty-minute time limit the conference organisers set for this contribution frustrates any attempt at a systematic analysis of the principles of the newly enacted code. Such a short time allows little more than a general evaluation of the provisions of the CCP that are relevant for the topic, and the explanations in the MM. Beyond that, the discussion of some details is only possible in the case of a few principles, if at all. Striving for a judicious use of the time still available thus seems advisable

The first observation concerning the provisions of the nature of principle is that the list of named principles is rather short. It is true, even if one admits that certain provisions, considered traditionally to be principles although not mentioned now among the fundamental provisions, may still be found in other parts of the CCP. For example, one may mention the

provisions declaring the freedom of the use of the means, and the evaluation, of evidence in Section 167. (Interestingly, when the CCP in force first used the same technique, the general opinion was negative. This time nothing like that can be detected. It is possible that the legal community has meanwhile become accustomed to the method.)

The MM tries to explain the relatively low number of listed principles. According to it, the reason for omitting the declaration of the organisational principles is that the Fundamental Law declares them. In addition, they do not have specifically criminal procedural features. Owing partly to their declaration in the Fundamental Law and partly to their not being valid for the whole procedure, or because there are many exceptions to them, it is also unnecessary to name some of the operational principles in the CCP, the MM claims. For these reasons, the Bill did not list a number of generally recognised principles: the right to court proceedings and the right to legal remedies; further on, the right to oral and public hearing and the principle of *directness,*[1] among them.

(A passing remark: It is difficult to see why the MM mentions the directness principle, since the CCP in force has already eliminated it. It is a different story that the reappearance of what the principle originally meant would be a welcome development, but there is no hope of that. According to that classic formula, the judgment has to be based on facts established by evidence taken and examined directly by the court in the presence of the parties. Unfortunately, this version had to be modified and its last element left out because, in the period of the rule of 'socialist' law, the public prosecutor was not obliged to be present at the trial in the majority of cases. Now the prosecutor's presence at the trial is once more mandatory. However, the CCP in force supports a novel trend; so does the new one, but somewhat more forcefully: nowadays defendants have ever-expanding rights to remain away from the trial, which they like to exercise. These facts, and the possibilities of accepting negotiated confessions, justify disposing of the idea of directness. Codes of criminal procedure should not violate their own principles. End of remark.)

The weaknesses of the argumentation of the MM are conspicuous. In the continental mixed systems, it is only natural that, in addition to principles valid for the whole procedure, some characterise either the *preparatory* or the *trial phase* only. For this reason, if principles valid in only one phase of the procedure are not to be named in the CCP, the codifiers should not have mentioned by name the division of functions, the *ex officio* procedure, and the accusatorial principle among the fundamental provisions.

Naturally, it is up to the codifiers to decide whether the code should declare principles directly and, if at all, how many, and what they should be. Nevertheless, it is a welcome idea of theirs that the traditional principle of seeking the material truth remains unmentioned among the fundamental provisions. Although the MM almost genuflects when speaking of the importance of establishing the material truth, it is mostly lip service. The various possibilities for the parties to make agreements and the encouragements by the CCP for their use

[1] Directness in this context is a term expressing that the court must base its decision on evidence taken and examined at the trial.

clearly suggest a limited acceptance of formal truth at least as a basis for judgement. True, the CCP in force also has the same suggestion even if somewhat less clearly.

Another sign of changing attitudes is that the principle of legality (*Legalitätsprinzip*[2]) does not appear among the declared ones either, since the MM promises the strengthening of the institutions based on the principle of expediency (*Opportunitätsprinzip*[3]). It is unfortunate if a code declares a principle but the real legislative intention is to give a prominent role to its opposite. By leaving the legality principle unmentioned, the new CCP prevents critical remarks being made, at least on these grounds. Happily, with this observation, the present discussion can end on a positive note (and almost within the time limit).

[2] According to the principle, criminal procedure must be initiated *ex officio* for every criminal offence.

[3] The principle of expediency represents certain flexibility as compared to the rigid legality. According to its original interpretation, the principle of legality does not apply, when leaving an offense unprosecuted is expedient (for example because the offense is insignificant but the costs of the proceedings would run extremely high), unless this decreases the respect for the law.

Péter Hack*

Sacrificing Core Criminal Procedural Principles on the Altar of Efficiency

This essay attempts to give a brief presentation of the main new features of the new Code of Criminal Procedure. After comparing the conceptual ideas determining the new code with the concept of the old version, my conclusion is that the legislator codified several aspirations that had been defined about 25 years ago but never implemented; many of these new rules therefore simply carry on these old ideas.

The Parliament approved Act XC of 2017 on the Code of Criminal Procedure (hereinafter 'new Code') on 13 June 2017. The quite lengthy act – which contains 864 paragraphs – enters into force on 1 July 2018, replacing the present code, act XIX of 1998 (hereinafter 'Be.') after 15 years.

The Be. was enacted in 1998 but, due to lobby fights, and political conflicts, it only entered into force five years later, in 2003. Strangely, the new Code has had its difficulties as well, because, less than two years after entering into force, 138 paragraphs of the code were modified by Act XLIII of 2020, adopted by the Parliament in May 2020.

These facts show that, in the case of criminal procedural code, it is quite difficult to find a proper balance between public expectations and legal guaranties, and between the protection of fundamental freedoms, and the requirement of efficiency.

During the voting, the provisions of the act requiring a qualified majority were approved with 154 'yes', 10 'no' and 34 'abstention' votes, while the remaining provisions requiring a simple majority were enacted with 154 'yes', 7 'no' and 33 'abstention' votes.[1] The voting ratios clearly show that, regarding the provisions of the draft act, there was no significant conflict between the governing parties and the opposition. In addition to the representatives of Fidesz and KDNP, the opposition party Jobbik also supported the draft; only two representatives of MSZP and five independent members of parliament voted against it while the other attending MPs from LMP and MSZP abstained.[2]

The results of the voting allow the conclusion that the new Code does not contain solutions that represent the values of the actual majority of the competing legal policies as such; instead, it is a system of new procedural rules to which the different sides of politics do not

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1 Website of the Hungarian Parliament, <https://rb.gy/g0l2wv> accessed 2 April 2018.

2 Website of the Hungarian Parliament, <https://rb.gy/xv3heu> accessed 2 April 2018.

have any basic objections. This fact is rather surprising with regard to the significantly permissive rules on the applications of covert means of surveillance, especially so since the act's provisions on the subject required a qualified majority. It is equally surprising, in the light of the opposition's previous questioning of the independence and impartiality of the prosecutor's office. The new Code seems to grant trust to the investigating authorities and their supervisor, the prosecutor, to a remarkable extent regarding both open and secret data collection and procedures requiring the use of covert means of surveillance.

Undoubtedly there are several important innovations in the new code, their most important feature being the improvement of the efficiency (timeliness and economic efficiency) of criminal procedures. The new code places simplified procedures (based on the confession of the accused) in the focus of the proceedings, instead of the traditional trial-based approach. Should the legislator be successful, most cases will be settled an out-of-court procedures. This change will result in the re-evaluation or abandonment of traditional legal values. The new code departs from the principle of material truth. In the cases that will eventually brought to court, the principle of adjudication in chamber will be extremely limited, as will be the participation of lay judges, and the principles of oral procedure, directness and publicity are also limited in the new code, much more than we ever saw in codified Hungarian criminal procedure before 1945 or since 1990.

I The Relationship of between the New Code's Concept and the Be.

The new Code is a much lengthier set of rules than its predecessor: it provides several positive new legislative solutions but it does not create a new criminal procedural system. In order to evaluate the significant elements of the new provisions it is useful to observe which fields show a conceptual change compared to the Be. Obviously, the volume limitations of this essay do not make it possible to present a detailed analysis of all sections of the new Code and their comparison with the present rules but we may attempt to examine the most important conceptual elements of the changes and to compare the legal solutions of the new Code and the Be.

The codification concept of the act of 1998 was defined at the beginning of 1994, and this concept was finally incorporated into the approved Be., with minor changes.[3] The main conceptual elements were the following:

> 1. Within the criminal procedure, the division of tasks and functions shall be enforced much more than today. The police, prosecutorial and judicial powers shall be clearly separated. 2. The newly

[3] I provide a detailed review of the procedure of the enactment of the Be. in my monograph in chapter VI titled 'The influence of organisations on the regulations of the procedural code'. Hack Péter, *A büntetőhatalom függetlensége és számonkérhetősége* (Magyar Közlöny Lap- és Könyvkiadó 2008, Budapest) 257–346.

established procedure shall respect the requirement that the issue of guilt shall be determined at trial with the application of the principle of directness, and that the principle of contradiction, including the parties' right to self-determination, shall be enforced much more. 3. The powers of the single judge shall be broadened, while still respecting the principle of adjudication in chambers. 4. In order to protect fundamental rights, the possibility of judicial participation shall also be ensured for procedural actions taken in the phases of the procedure preceding the trial. 5. Two-level ordinary appeal shall be ensured. 6. The possibilities of the enforcement of the victim's claims shall be broadened with the position of substitute private prosecutor. 7. In addition to the basic form of procedure, in which trial dominates, simplified procedures shall be established, the proper application of which allows the differentiated determination of cases. 8. The problems of the legal regulations of the judicial branch (lay judges, appointed defence counsel) shall be resolved.[4]

After comparing the points of the original concept, which had been drafted 28 years ago, with the text of the new Code, we may conclude that there are only 3 of the 8 points that are not affected by the present changes. These are no. 4, which was realised with the introduction of the position of the investigating judge; no. 5, which recommends the introduction of the two-level ordinary appeal – which was attempted by the act of 1998, but was eventually realised in 2006 – and no. 6, the introduction of the substitute private prosecutor, which has been part of the system of criminal procedure since 2003. The latter is only modified by the new Code by regulating the procedure conducted in the event of the participation of the subsidiary private prosecutor as a special procedure, like the procedure of the private prosecutor.

Regarding the remaining points, no. 1–3 and 5–6 of the 1994 concept, the drafters of the new Code considered it their task to realise the endeavours defined 28 years ago but they also set out new priorities.

1 Principle of the Division of Functions

According to the first point of the concept of the new Code: '1. Within the criminal procedure the division of tasks and functions shall be enforced much more than today. The police, prosecutorial and judicial powers shall be clearly separated.'

During the enactment of the Be., and also during the period between the enactment and the entry into force of the Be., an important point has been raised, namely whether the Hungarian judicial system would be able to depart fundamentally from the system maintained since 1955,[5] characterised by the over-dimensional features of the investigation, the problem of distinguishing between the competences of the investigating authority and the prosecutor, and the expected activity of the trial court in the evidential procedure. The act of 1998 was unable to solve these problems due to the resistance of the judicial authorities.

[4] See Government decision 2002/1994. (I. 17.).

[5] Bócz Endre, 'A Be. újabb novellája elé' (2005) 52 (12) Magyar Jog 712–722, 712–719.

The new Code regulates the division of tasks between the investigating authorities and the prosecutor by dividing the investigation into two parts; in the inquiry phase, the task of the prosecutor is to supervise the inquiry, while in the second phase – in the prosecution – it is to control the prosecution.[6]

The debate on the issue of the division of powers between the prosecutor and the judge has been present for decades; it even continued after the proclamation of the Be. in 1998. Mihály Tóth summarised the essence of the problem as follows:

> Finally, we have to reject the scenario – even though many may consider it comfortable, but it is hardly in conformity with the modern concept of the division of tasks – that at the trial the judge makes enquiries, the prosecutor complies with his tasks, even if he only upholds the charges and at the end he files some useless motions; and the defence counsel refers to the 'difficult childhood' of the accused as a plea for a merciful judgment. We have to return to the roots, even if this makes us realise some suspiciously obvious principles again, namely that the prosecutor accuses, the defence counsel defends and the court judges.[7]

Based on the old debate, the provisions of the Be. set forth that 'The burden of proof shall be on the accuser.' [section 4 paragraph (1)], and the rules on evidence state that 'The objective of gathering evidence shall be the thorough and complete elucidation of the true facts; however, if the prosecutor does not suggest so, the court is not obliged to gather and examine evidence supporting the indictment.' [section 75 paragraph (1)]. In addition to these provisions, the notion of lawful accusation was introduced in 2006.[8]

These provisions were not enough to close the debate finally, therefore presently we may witness two different approaches to the role of the judge. According to one, the prosecutor shall be responsible for the charges; therefore, in line with the cited provision of the Be. the judge shall not gather evidence *ex officio,* due to the lack of a submission by the prosecutor. Others, however, stress the first part of the provision, namely the requirement of 'thorough and complete elucidation of the true facts' and the 'corrective feature' of the procedure.[9]

In the new Code, the legislator makes further steps to strengthen the division of powers, as section 164 states:

> (1) The gathering of facts necessary for proving the indictment, and the provision of, or filing a submission for the acquisition of means of evidence supporting these facts shall be a burden on the accuser. (2) During the clarification of the facts, the court shall gather evidence only on the

[6] Act XC of 2017, section 25 paragraph (2).

[7] Tóth Mihály, 'Új büntetőeljárási törvény vagy további novellák sora?' (A new act on criminal procedure or the latest in the series of novels?) (2000) (2) Belügyi Szemle.

[8] Act LI of 2006, section 1.

[9] This approach is obvious in the Summary opinion *Examination of the lawfulness of the indictment 2013* of the Jurisprudence Analysis group of the criminal law department of the Curia. <http://www.lb.hu/sites/default/files/joggyak/a_vad_torvenyessegenek_vizsgalata.pdf> accessed 02 April 2018.

> basis of a motion. (3) In the absence of a motion, the court shall not be obliged to gather and examine evidence.

However, the last sentence of this provision still allows the judge to gather evidence *ex officio,* in the absence of a submission by the prosecutor.

In addition to the possible activity of judges, contrary to the provisions in the Be., section 163 paragraph (2) of the act expects the judges to determine 'truthful', not 'true' facts. The section 164 declares, that the judge is not obliged, to collect the evidences if the prosecutor failed to provide them. According to section 593 paragraph (4): 'If groundlessness is obviously due to the failure to act in line with section 164 paragraph (1), the effects of groundlessness shall not be applicable.' In such a case, the court of second instance shall not repeal the judgment of the first instance court and shall not order the court of first instance to conduct a new procedure.

2 The Significance of Trial and the Principle of Contradiction

There was a government decree of 1994 that, *inter alia,* aimed at increasing the significance of hearings and strengthening the principle of contradiction at trial. The new Code dramatically departs from this endeavour. Its main goal, as analysed in detail below, is to allow most cases to end without a hearing, with an agreement based on the confession of the accused. If the legislator's aim is realised in practice, most criminal cases will arrive at the proclamation of guilt and application of punishment based on a bargain and agreement between the prosecutor and the accused (and their defence counsel, if available), in which the court will only have a symbolic role. If the case gets to the submission of charges then , according to the new rules, the – closed – preparatory session[10] will be one of the most significant events of the procedure, partly because the court will have the chance to 'convince' the accused to confess and waive the right to trial: in such a case, the proclamation of guilt and the application of sanction may happen without a formal trial, at the preparatory session. The significance of the preparatory session is further increased by the provision that the accused 'may present the facts grounding his defence and the supporting means of evidence, and may initiate the gathering or the exclusion of evidence (…)' [section 500 paragraph (2) item *c)* of the new Code].

The accused may only file a motion for the gathering of evidence at the trial if

> *a)* the fact or means of evidence justifying the motion emerged after the preparatory session or it came to the knowledge of the initiator – for reasons outside the control of the initiator – only after the preparatory session, or *b)* the motion aims to rebut the probative value of a means of evidence or of the result of the already performed gathering of evidence, provided that the relevant method and means became apparent for the initiator only from the gathering of evidence performed. [section 520 paragraph (1) of the new Code]

[10] Act XC of 2017 Chapter LXXVI.

Prior to the enactment of Act XIX of 1998, the legislator aimed at increasing the contradictory features by changing the order of questioning at the trial, namely that the accused and the witness would not have been questioned by the court, but by the prosecutor or the defence counsel, depending on the initiator of the questioning. Due to the resistance of the professions, this legislative goal was not realised and it remained in the Be. in the simplified form of 'Questioning the witness by the prosecutor, the accused or the defence counsel' (section 295 of the Be.). The new Code completely abolishes this possibility.

3 Principle of Adjudication in Chambers

At the time of drawing up the Be., the concept stated: 3. The powers of the single judge shall be broadened, while still respecting the principle of adjudication in chambers.

Therefore, the Be. states that the district court shall proceed in a panel, comprising a judge and two lay judges, if the crime is punishable by at least 8 years of imprisonment. Furthermore, the district court may also proceed in a panel if the imprisonment ordered by the Criminal Code for the indicted crime is lower, but the court believes it may be classified more severely, or if the single judge refers it to council.

In cases with a lower possible punishment, the court shall proceed as a single judge. It is possible for the district court to proceed in a panel of two professional judges and three lay judges, if the level of difficulty of the case requires it. The Municipal Court acting as a court of first instance may conduct its proceedings in a panel consisting of one professional and two lay judges, or of two professional judges and three lay judges The Municipal Court acting as a court of second instance and the appeal court, acting as a court of second or third instance, may conduct its proceedings in a panel consisting of three professional judges The Curia shall act in a council of three, or if the law provides it, five professional judges (section 14 of the Be.).

The new Code limits adjudication in chamber to a very narrow scope. At district courts, the main rule will be proceedings with a single judge. According to section 13 paragraph (2) of the new Code, both the district court and the tribunal only proceed in councils of three judges if the single judge refers the case to council, in which case three professional judges will proceed. In proceedings at the district court, the new Code does not prescribe obligatory council participation. In cases before the tribunal, in a narrow scope the new Code regulates the procedure of councils made of three professional judges for special crimes related to financial management, in which case, at second and third instance, a council of five may also proceed [section 13 paragraph (5) of the new Code]. [The scope of such cases is listed in section 10 paragraph (1) item 3 of the definitions part.][11]

[11] According to the research made by the National Judicial Office, from July 2018, to March 2019 nationally there were just 58 cases, when it was obligatory to adjudicate in chamber. In *Az új Be. alkalmazásának tapasztalatai (Experience of the application of the new Code of Criminal Procedure)* 07 May 2019, 43.

The court of second and third instance proceeds in councils of three professional judges. The new Code allows for adjudication in chambers at first instance only exceptionally, while the participation of society realised through lay judges is only possible in juvenile cases if the crime is punishable by imprisonment of at least 8 years, or the single judge refers the case to council.[12] In addition to this the participation of lay judges remains in military procedures.[13]

4 The Simplification and Acceleration of the Procedure

The concept of the Be. considered the court hearing as the basic form of procedure and, in addition to this basic type, it also considered it important to establish simplified procedures.[14] Eventually the Be., in addition to the arraignment and the omission of the trial, only contained a waiver of trial, inspired by the American form of plea bargaining, but with a significantly different content, which did not meet expectations despite numerous modifications of the law. According to the report by the Chief Prosecutor to the Parliament in 2016, 'the number of those accused against whom first instance court judgment was delivered as result of the waiver of trial dropped further (2016: 101, 2015: 132, 2014: 148). The number registered in this year was the lowest in the past five years.'[15] Compared to the 10-14,000 arraignments,[16] and the 16-17,000 omission of trial cases, this shows the complete failure of this legal institution.[17]

One, if not the main reason for establishing the new Code was that the judicial government had to face the fact that not only had the waiver of trial failed, but the attempts to conduct effective and quick procedures in general did not meet expectations. The average length of the main phases of procedures conducted against the accused increased from 545.8 days (2007) to 665.2 days (2013), and they still required 641.6 days in 2016, according to the statistical figures of the Office of the Chief Prosecutor.[18]

It also compounds the situation analysed that the growth in the length of the procedures happened when the number of crimes committed dropped by 25%,[19] and the same percentage

[12] Act XC of 2017 Chapter 680. § (1) a), b).

[13] Act XC of 2017 Chapter 698. §.

[14] Government decision 2002/1994. (I. 17.) section 7.

[15] B/17351 'Report of the Chief Prosecutor to the Parliament about the activities of the prosecutor's office in 2016' 25. <http://ugyeszseg.hu/pdf/ogy_besz/ogy_beszamolo_2016.pdf> accessed 02 April 2018.

[16] Ibid, 24.

[17] Ibid, 25.

[18] Criminality and justice. Office of the Chief Prosecutor 2017. The average number of days of the main phases of criminal procedures conducted against indicted persons (in calendar days) <http://ugyeszseg.hu/repository/mkudok264.pdf> accessed 02 April 2018.

[19] Office of the Chief Prosecutor Registered crimes. <http://ugyeszseg.hu/repository/mkudok264.pdf> accessed 02 April 2018.

increase in the staff and budget of the police and prosecutor's office[20] should have led to more effective and quicker procedures. However, the figures show that this is not what happened.

The reasoning of the new Code states:

> Furthermore, there is a high expectation from society for the timely completion of procedures and the effective operation of criminal justice, the essence of which is that the perpetrators – and only the perpetrators – of crimes shall all be prosecuted, with the least social contribution and in a fair procedure.[21]

And

> a special goal of the Draft is to improve the timeliness of criminal procedures, for example by making certain special procedures – such as arraignment, consent procedure and penal order – more effective.[22]

As figures about the length of the procedures show that, of all the procedural phases, the one lasting from the filing of charges to the delivery of the final court judgment takes the most time (in 2007 356.8 days on average, in 2013 410.6 days on average, in 2016 361.5 days on average[23]), the legislator established a procedural system in which most cases end without a proper hearing. In order to reach this goal, the legislator considered three special procedures to be the most important: arraignment,[24] which is an improved version of the procedure regulated in the present Be.,[25] the consent procedure,[26] which is the revision of the waiver of trial regulated in the Be.[27] and the procedure for a penal order,[28] which is a slightly modified version of the omission of trial procedure in the Be., the simplified and accelerated special procedure that is used the most.[29]

I believe that one of the main modifications of the new Code is in this context. These changes have been allowed by the constantly changing approach of Hungarian legal practitioners. In 1998 the practitioners of criminal justice could hardly or in no form accept a procedural simplification based on confession, whereby the court does not deliver its decision

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[20] Office of the Chief Prosecutor Statistical budget figures (million HUF), Staff figures <http://ugyeszseg.hu/repository/mkudok264.pdf> accessed 02 April 2018.

[21] Draft law T/13972. 316. <http://www.parlament.hu/irom40/13972/13972.pdf> accessed 02 April 2018.

[22] Ibid, 317.

[23] Criminality and justice. Office of the Chief Prosecutor 2017. The average number of days of the main phases of criminal procedures conducted against indicted persons (in calendar days) <http://ugyeszseg.hu/repository/mkudok264.pdf> accessed 02 April 2018.

[24] Act XC of 2017 Chapter XCVIII Arraignment.

[25] Act XIX of 1998 Chapter XXIV Arraignment.

[26] Act XC of 2017 Chapter XCIX Consent procedure.

[27] Act XIX of 1998 Chapter XXVI Waiver of trial.

[28] Act XC of 2017 Chapter C Procedure for penal order.

[29] Act XIX of 1998 Chapter XXVII Omission of trial.

based on the material or objective truth. As such, within the waiver of trial, rules had been defined that were directly leading to the failure of the procedure. Regarding the applicable punishment, the legislator specified the limits within criminal law (in sections 82–83 of the then valid Penal Code), within which lit was not the waiving prosecutor but the judge who determined the degree of punishment. However, after 20 years, the new Code seems to be ready to depart from the requirement of material truth and, with regard to confession, it is ready to accept that, in such cases, the basis of the factual background determined will not be the absolute truth.

5 The Problems of the Judicial Organisation

The 1994 decree also stated that '8. The problems of the legal regulation of the judicial branch (lay judges, appointed defence counsel) shall be solved.'

Some of these problems are still relevant. Dealing with these problems is still timely. As we have seen, the new Code takes a radical step regarding the issue of lay judges, as it only allows for their participation in case of serious crimes (punishable by at least 8 years of imprisonment) in juvenile and military cases; in all other procedures, the principle of the participation of society (through lay judges) ceased to exist as of 1 July 2018.

The appointment of a defence counsel has been another unsolved issue in Hungary for decades.[30] The essence of the problem is that in cases in which the participation of a defence counsel is obligatory and the defendant cannot or does not want to hire one, the authorities appoint the defence counsel – those authorities in whose interest it is not at all to provide a defence counsel for the defendant, one who does everything in the interest of his client and whose work makes the actions of the authorities more difficult.[31]

Section 46 of the new Code aims at settling the issue by stating:

> (1) The appointment of the defence counsel acting as appointed defence counsel shall be the task of the regional bar association competent in the territory of the proceeding court, prosecutor or investigating authority. (2) For the purposes of appointment, the decision on the appointment of defence counsel shall also be delivered to the competent regional bar association defined in paragraph (1). (3) For the appointment of a defence counsel, the regional bar association shall operate an information system that possibly allows the immediacy of appointment and the effective availability of the appointed defence counsel.

At first sight, this complies with the suggestions formulated in the legal literature for the solution of the problem. The question, however, is whether this approach will also be suc-

[30] I have already analysed this issue in 2011. Hack Péter, 'A védelem és a védő szerepének aktuális kérdései' (Topical questions on defence and the role of the defence counsel) (2011) (2) Magyar Jog 87–92.

[31] The problem, together with its possible solutions is described very clearly in Kádár András Kristóf, Tóth Balázs, Vavró István, 'Védtelenül. Javaslat a magyar kirendelt védői intézmény reformjára' (Defenceless. Suggestions for the reform of the institution of the appointed defence council) (2007) Budapest <https://helsinki.hu/wp-content/uploads/Vedtelenul.pdf> accessed 02 April 2018.

cessful in practice, for example whether the chambers will be able to ensure, the 'immediacy of appointment' at weekends or at night. The legislator does not exclude the possibility that this new form of appointment will sometimes be ineffective, therefore it also regulates the substitute defence counsel. Section 49 of the new Code states:

> (1) The court, the prosecutor or the investigating authority shall appoint a substitute defence counsel in order to replace the defence counsel if *a)* the defence counsel fails to attend any procedural actions despite a lawful subpoena, *b)* fails to inform the authorities of his absence in advance for justifiable cause or fails to arrange a substitute defence counsel, *c)* the further conditions of the performance of the procedural action are fulfilled, and *d)* the performance of the procedural action cannot be avoided.

As we can see, in this case, the presently known and disputed form of the appointment of defence counsel returns, and the authority will decide on the counsel for the defendant.

Based on the aforementioned reasons, we may conclude that even though the new Code is a much lengthier act than its predecessor, and contains several positive legislative innovations, it still does not bring about any revolutionary changes in the system of criminal procedure. The most important conceptual elements of the draft were present in the government decision of 1994. The system of criminal procedure is still a mixed system, in which the pre-charges and the after-charges phases are closely built on each other. However, the recently introduced changes strengthen the inquisitorial features of the procedure, departing from the goal of the act of 1998, which tried to emphasise the accusatory features, especially the contradictory nature of the procedure. It is unquestionable, however, that there are useful and positive changes in several minor issues, among which the regulation of coercive measures in Part 8 of the new Code should be mentioned, as well as the rules on special care, in which some improvements have been made as well.

II Sacrifices for the Sake of Efficiency

The main objective of the new regulation is to improve the effectiveness of the procedure, and to ensure quicker procedures. This is an objective to be hailed, as, according to the famous British legal saying, 'justice delayed is justice denied'. However, it should also be considered that, as Károly Bárd put it in his great book published in 1987:

> In the focus of debates about the acceleration and simplification of the procedure, there are the issues of the trial system and the procedural principles. (…) Many believe that the way out is the departure from traditional principles.[32]

[32] Bárd Károly, *A büntető hatalom megosztásának buktatói* (Közgazdasági és Jogi Könyvkiadó 1987, Budapest,) 30–31.

Bárd's forecast proved to be right about the new Code of 2017, too; the new Code departs from several principles that had been considered unshakeable earlier. One of the most important of them is probably the principle of material truth. The textbook by Tibor Király which discusses the Be. states:

> According to the laws, the task of and requirement for criminal procedure is to allow the judge to determine the truth about the commission and the perpetrator of the crime, as result of the mutual activities of participating persons. (…) The Hungarian criminal procedural code does not contain the word 'truth' but, in general, neither laws nor legal practice have ever questioned that the main requirement for criminal procedure was to determine the truth.[33]

As I have referred to before, the obligation to establish objective, material truth may be interpreted from the provision of the new Code stating

> During the gathering of evidence, the goal shall be the thorough and complete elucidation of the true facts; however, if the prosecutor does not suggest so, the court is not obliged to gather and examine evidence supporting the indictment [section 75 paragraph (1)].

Even though the reasoning of the new Code states:

> The Draft preserved those values of the valid code that are useful, and about which neither legal practitioners, nor legal scholars, nor new foreign experiences require changes. The Hungarian people are committed to and search for the truth, and criminal prosecution based on the material truth is a fundamental value of our valid criminal procedure code.[34]

Regarding material truth, the provisions of the act refer to the assumption that the new Code does not preserve the value of the principle of 'criminal prosecution based on material truth'. As I have mentioned before, the new rule does not oblige authorities to establish 'true' facts, only to base their decisions on 'truthful' facts. [section 163 paragraph (2) of the new Code] In the same section, the new Code states that 'It is not necessary to prove those facts, the truth of which has been mutually accepted by the accuser, the accused and the defence counsel in the given case' [section 163 paragraph (4) item *c)*].

Without giving up the requirement for material truth, the set of simplified procedures built on the confession of the accused, especially the one named Consent procedure, could not be used.

Among those principles sacrificed on the altar of efficiency, there are the principles of adjudication in chamber, participation of society and directness. Giving up or radically lim-

[33] Király Tibor, *Büntetőeljárási jog (Criminal procedural law)* (Osiris Kiadó 2003, Budapest) 21.

[34] T/13972. törvényjavaslat indokolása (Justification of Bill T/13972), 316. <http://www.parlament.hu/irom40/13972/13972.pdf> accessed 12 April 2018.

iting traditional principles will probably lead to the expected result, namely that procedures will be finished quicker, but it is also an issue whether efficiency, appearing in the forms of speed and economic efficiency would in any way diversely affect social efficiency.

Due to these changes, criminal procedure significantly moves towards the inquisitorial model, and in most cases the 'inquisitor' will not be the judge, but the prosecutor, because, through agreement with the accused, the prosecutor will establish the truthful facts and will apply the sentence. It will only be possible to assess the effects of this change in the course of time.

Georgina Horváth*

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.

Eszter Király*

The Interpretation of Legal Force in the New Hungarian Code of Criminal Procedure

I Introduction

Birthdays are normally happy events, celebrated in an atmosphere of festivity. This conference is one of the series of conferences organised to commemorate the 350th anniversary of the foundation of the Law School of the University. One could think it a wonderful coincidence that the participants in today's conference can celebrate the foundation of our Faculty and the birth of the new Code of Criminal Procedure (CCP) adopted on June 13, 2017 (Act XC of 2017) at the same time.

When a baby is just born, the first information given to family and friends about him or her is normally their size. Our newborn CCP is rather large, having 879 sections. It could not have been easy for the codifiers to help such a lengthy code to come into this world. Doubtlessly, it would not be an easy task for anyone to undertake the general introduction of any of its institutions, since it involves unravelling an intricate web of provisions.

In this presentation, dedicated to the examination of the ancient institution of legal force as it appears in the CCP, the first fact to note is that, in the European mixed systems of criminal procedure, it is of fundamental importance. Despite this fact, in the more than 120 years of codified Hungarian criminal procedural law history, the CCP is the first to define its concept. Naturally, scholarly writings on it, its contents, and doctrines concerning their characteristics, are abundant. Even so, it is a fact that the lack of a legal definition has been a fertile ground for producing conflicting interpretations of legal force, although it would be a fallacy to believe that to define something in a code is a value in itself – the secret of creating value is that when someone is doing the right thing, they should do it well. It is a question whether the codifiers have been privy to this secret.

To see how the CCP approaches legal force, it is the CCP's provisions directly concerning it that one first has to examine and compare with the earlier forms of regulation. The study must also extend to other institutions that have more remote connections with legal force but exert a significant, although indirect, influence on the new doctrines and theories to be formed by necessity.

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As the Ministerial Motivations for the Bill (MM) declares, the codifiers did not intend to effect a paradigm shift concerning legal force. It was, however, their declared intention to eliminate the difficulties of interpretation related to legal force. For this reason, the discussion in the following parts will touch upon the actual extent of the changes and the question of whether the responses to the practical challenges are adequate.

II The Role of Legal Force

The first issue to examine is whether the CCP introduces changes to the role of legal force. To answer the question, one first has to see if the aim set for criminal proceedings – which so far has been (at least *in principle*) the establishment of the material truth – would change. The answer to the question is (again in principle) in the negative. In the lofty formulation of the MM, 'Hungarians are a truth-loving nation, and establishing criminal responsibility on the basis of the material truth is a fundamental value of the Code in force'. The CCP is intended to preserve such values, the MM claims. In fact, however, more than one factor seems to contradict the claim. In the following discussion, three of them will form the subject matter.

1 The Principle of the Division of Procedural Functions

The principle of the division of procedural functions included in Section 5 of the CCP ('In the criminal process, the functions of prosecution, defence and rendering judgment shall be separated.') is stronger, even if not implemented with absolute consistency, than in the previous Code in force. One may realise that when examining the provisions on the objects to prove by evidence and on the consequences of passing judgment based on insufficient grounds together.

Among those belonging to the first group, Section 163 (1) provides that, in criminal proceedings, the court, the prosecutor's office and the investigating authority 'shall base their decision on facts corresponding with reality.'

It is interesting to compare this command with the provision of Section 75 (1) of the Code in force. According to that, in the evidentiary process, 'endeavours shall be taken for the sound and complete clarification of the facts corresponding to reality'. As Balázs Elek points out, with this formulation, the code previously in force 'admits that it is not always possible'.[1] In turn, based on its language, one may say, the CCP seems to give a categorical declaration of the principle of seeking the material truth.

In fact, the material truth principle cannot be absolute. The Hungarian codes of the mixed system have accepted countless exceptions to its validity. It is easy to see if one thinks

[1] Elek Balázs, *Jogerő a büntetőeljárásban (Legal Force in Criminal Procedure)* (Debreceni Egyetem Állam- és Jogtudományi Kar, Büntető Eljárásjogi Tanszék 2012, Debrecen) 42.

of the fair trial principle or the rules of evidence. As far as the latter are concerned, Section 163 (3) of the CCP prescribes that the court shall clarify the facts 'within the framework of the accusation'. It follows from this that, similarly to the previous situation, under the CCP, only the segment of the material truth (in the classic sense of the term) that appears within the framework of the accusation may be part of the facts of the case that the court is allowed to establish. It is from Section 164 that one may learn what the mentioned 'clarification' means and what the court is empowered, and obliged, to do in the course of it.

Section 164 (1) regulates an aspect of the burden of proof. According to it, the obligation of exploring the facts necessary to prove the accusation, making available the means of evidence necessary to prove them, and/or making motions to the court to obtain them, rests with the prosecutor. This provision is supplemented by par. (2), which prescribes that, in the course of clarifying the facts, the court shall procure evidence only upon motions. The language used clearly shows that both paragraphs are mandatory. As a conclusion, one could say that, in the absence of the appropriate motion, the court may not obtain evidence at all.

At this point, one could assert that the CCP has left behind the uncertainties of the previous Code and stands for the unambiguous acceptance and implementation of the division of procedural functions. The formulation of par. (3), however, instead of excluding all possible doubts, recreates the earlier confusion. It declares that without a motion to that effect, the court *is not obliged* to obtain and examine evidence. Thus, it steps back to the level of the Code in force: it does not prohibit the court from obtaining and using evidence without a motion to that effect from the prosecution or the defence, it merely declares that the court does not have such obligation. The formula again produces legal uncertainty as a legislatively unintended result: it supports judges who prefer judicial passivity and the parties' activity in evidence, but it does not exclude that their more active, more inquisitorial fellow judge could engage in the exploration of facts on his own initiative.

That despite all these facts the CCP seems to have reinforced the principle of the division of functions may be attributable to the provisions regulating the consequences attached to unfounded judgements. Section 593 (4) prohibits applying the consequences of groundlessness when it is caused by the prosecutor's omission of performing his obligations determined in Section 164 (1), as described above. It seems that the legislation complied with the advice formulated by the group selected in the Curia in 2012 for the analysis of judicial practice, which studied how the appellate courts exercised their right to remand cases. The group proposed that different consequences should be attached to the groundlessness of judgments according to whether the cause was attributable to the fault of the prosecutor resulting in a failure to obtain some relevant piece of evidence, or to that of the court.[2] In this way, the prosecutor bears a higher-level responsibility for avoiding situations where, due to prosecutorial inactivity, unfounded judgements gain legal force.

[2] A bíróságok hatályon kívül helyezési gyakorlatának elemzése – Büntető ügyek 2012. Összefoglaló vélemény. (Analysis of the Judicial Practice of Remanding Cases – Criminal Cases 2012. Final Report.) 43. <http://www.kuria-birosag.hu/sites/default/files/joggyak/osszefoglalo_velemeny_2012iimod2_2.pdf> accessed 7 April 2021.

2 Possible Procedural Agreements

In addition to the reinforcement of the division of functions, the expansion of the areas of agreements concluded within the procedure also have an impact on the nature of the truth sought for in the proceedings. The prosecutor's office and the defendant may enter into an agreement concerning the confession to the offence committed and its consequences even before the accusation is preferred (see Chapter LXV). Although according to the Code, the facts of the case and their legal classification may not be negotiated, it is allowed to enter into agreement as to what offences the defendant wishes to confess and, in exchange for the confession(s), for what offences he will not be called to account [cf. Section 411 (1) c), and (3)]. In such situations, according to Section 424, the prosecutor's office prefers the accusation based on the facts and offence agreed upon and, in the written act of accusation, shall make a motion that the court approves the agreement, imposes the sanction agreed upon, and passes other decisions.

In court proceedings carried out as agreed, after interrogating the defendant and examining the file on the case, the court decides at the preparatory hearing on the issue of the approval of the agreement, and if the decision is positive, an extensive and direct evidentiary process does not have to be carried out at the trial. In this way, the Code goes further on the path followed by the CCP in force, which is different from the traditional one, leading to the establishment of the material truth through taking evidence directly by the court at the trial.

3 Needlessness of Evidence

In regulating the issue of what requires proof by evidence, the CCP introduces a provision aimed at speeding up proceedings. According to Section 163 (4) c), it is needless to prove the facts, the correctness of which is accepted jointly by the prosecutor, the defendant, and the defence counsel. In such cases, the court accepts the facts if undisputed by the parties without requiring evidence. As far as the facts of the case are concerned, when they are established by relying on such rules, they may just as easily correspond with reality (material truth) as not. Consequently, it is only the illusion of the truth one may speak of in such a situation.

Thus, contrary to every declaration to the contrary, what one can see when reviewing the provisions of the CCP is that the shift from material toward formal truth, which is present in the CCP in force, is manifested in the CCP as well but, in my opinion, in a significantly stronger form. It is in order to speed up proceedings and to increase the efficiency of the process of calling perpetrators to account that all this happens – provided that speedier proceedings are more efficient proceedings as well. This phenomenon exerts a profound impact on the interpretation of legal force if it is considered to be the factor setting the balance between the requirement of truth (justness, legality), and of legal certainty.

Giving up the principles of seeking the material truth raises the value of legal force. One may say of legal force that it renders the truth attainable in criminal proceedings through

taking and evaluating evidence to be a *legal fact,* as it is legal force that attaches legal effects to it. In turn, if the truth is attained in criminal proceedings with setting the evidentiary process aside and using the admission of the defendant, the lack of dispute, or agreements, there is a very serious need for legal force as a presumptive fact to firm all those facts into legal truth. One can agree with Tibor Király, who claims that the term 'legal truth' is an abuse of the term 'truth' since it may hide a falsehood.[3] However, it is worthwhile to take into account Árpád Erdei's position as a quasi-supplement to the previous view. He interprets the 'legal' epithet attached to truth in the term as the indication that everything included in the court's judgment is validated by, and the recognition of what is expressed in them to be the truth is connected to, legal force. Consequently, the indication of the epithet is that legal truth 'is the quality of something, showing that it is accepted 'as truth' by the law'.[4]

III Legal Force Versus Finality

The CCP in force does not have a Chapter on legal force. It is only on the implementation of judgments that the Code regulates exhaustively in Sections 588 and 589. It provides that judgments may be implemented only after having gained legal force, while court orders, rulings and similar, in general may be implemented even if they do not have legal force yet. The Code precisely determines for every type of court decision when legal force sets in. In this situation, it is not from the Code but from the doctrines of criminal procedure that one may learn what legal force is, what its contents are, what effects it produces.

According to the prevailing view, legal force is a characteristic feature of judicial decisions attached to them by law, which results in the termination of proceedings in matters the decision settles. A decision having legal force may not be challenged anymore with *any ordinary legal remedy,* it may not be changed, and it may, and should, be implemented. What is included in it is binding, not only *inter partes,* but for everyone *(erga omnes),* authoritative, has probative force and must be taken as the truth.

The customary categorisation of legal force distinguishes absolute and relative; full and partial; formal and material legal force. Most of the problems of these categories are related to the pair mentioned last.

The MM claims that the CCP 'is striving for filling a gap of 25 years […] by the consistent use of the legal force concept, defining it as material legal force'. The MM refers to the Constitutional Court's decision 9/1992. (I. 30.) AB, which declares 'the institution of legal force, precisely defined as material and formal legal force is a constitutional requirement, an element of the rule of law'.

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[3] Király Tibor, *Büntetőítélet a jog határán (Criminal Judgement on the Edge of Law)* (Közgazdasági és Jogi Könyvkiadó 1972, Budapest) 222.

[4] Erdei Árpád, *Tanok és tévtanok a büntető eljárásjog tudományában (Doctrines and False Doctrines in the Science of Criminal Procedural Law)* (ELTE Eötvös Kiadó 2011, Budapest) 51.

The codifiers of the CCP found the solution to the problems in including only *material legal force* (and the effects originating from it) in the concept of legal force, which they declared attributable only to definitive judgments, i.e. those deciding the outcome of the case. With this solution, the CCP joins the interpretation of the concept given (in my opinion erroneously, as I expounded in a paper published earlier[5]) by the supreme judicial organ in the 1/2007. BK opinion and 2/2015. BJE decision. According to it, material legal force may be attained by judgments deciding issues of substantive criminal law *on the merits.* The basis for the view is the idea that *formal* legal force should be understood as excluding the possibility of using ordinary remedies to challenge the judgement having legal force. In turn, material legal force built on the formal one is the collective name for the *extra effects* of deciding the main substantive law issue that exert their impact in the area of *substantive law.*

The textbook by Mihály Móra, published about 60 years ago, points out that the use of the *formal* and *material* epithets as legal terms is misleading: it makes the false impression that the term formal legal force means the effects of procedural law, while material legal force refers to the effects of substantive law. The basis of the use of material legal force name is an idea originating from the doctrines of civil law. According to those, it is the judgment having attained legal force that creates the situation of substantive law in which a person's conduct is punishable: for the punitive claim of the state, a conviction is a creative, an acquittal is a destructive, force. Móra also points out that formal legal force in fact is a precondition for both processual and substantive law effects, whereas material legal force equally carries substantive law and procedural law effects.[6] Mihály Móra is right: the application of the 'formal' and 'material' epithets to distinguish the two classes of legal force has confounded even the supreme judicial organ.

The erroneous conclusions, drawn after lengthy theoretical disputes in the literature of criminal procedural law, and, in the wake of those in the practice making use of them, could have been avoided with relative ease. In order to achieve that in the future at least, the theoretical categories of formal and material legal force should be revised because the present classification causes more confusion than it eliminates. It would be worthwhile to distinguish the *formal* and the *material effects* of legal force.

The formal effects are independent of the contents of the decision having legal force. What they express is that ordinary remedies may not be used to challenge them. In turn, the material effects of legal force concern elements or parts of the decision. The substance, in other words the elements making up the contents of the decision, become *res iudicata/ iudicatae* when the legal force sets in, and it is those elements that the material effects concern. Therefore, the term material legal force does not in fact refer to material (substantive)

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[5] Király Eszter, 'A törvényes vád hiánya miatti megszüntető végzés „jogerőtlenedésének" tanulságos története' (The Edifying Story of the Lost Legal Force of the Decision to Terminate Criminal Proceedings for the Lack of Lawful Accusation) in Fazekas Marianna (ed), *Jogi Tanulmányok (Studies on Law)* (ELTE 2014, Budapest) 167–179.

[6] Móra Mihály, Kocsis Mihály, *A magyar büntető eljárási jog (Hungarian Criminal Procedural Law)* (Tankönyvkiadó 1961, Budapest) 394.

criminal law, but to the material effects created by legal force, which may equally be of the nature of substantive law or procedural law.

The codifiers, however, thought something else and set aside the century-old doctrinal traditions. As mentioned above, under the new Code, material legal force is only attributable to definitive decisions.

The contents of (material) legal force, i.e. the effects of it, are determined by the Code. Section 456 (1) defines *finality* ('The definitive decision of legal force of the court is final.'); the *binding force* ('it includes a decision on the accusation and/or on the criminal liability of the defendant, on the consequences under substantive criminal law or the absence of those, binding for everyone'); the *exclusion of the possibility of further ordinary legal remedy* ('After attaining legal force, the definitive decision may be changed only by an extraordinary remedy or as a result of special proceedings.'); the *ne bis in idem* rule and the *prohibition of double jeopardy* [Section 4 p (3): 'Criminal proceedings shall not be initiated or the opened proceedings shall be terminated if the conduct of the perpetrator was judged earlier, except for the cases of proceedings of extraordinary remedy and specified cases of special proceedings.' Section 456 (2): 'If the definitive judgment attains legal force, for conduct adjudicated in it, new criminal proceedings against the defendant shall not be carried out.']; and the *rules of the implementation of the sentence* [Section 456 par. (3): 'The implementation of the imposed punishment or applied penal measure shall be started after the definitive judgement attains legal force and the legal consequences attached to the conviction, to the acquittal or to the termination of proceedings shall set in after the attainment of legal force.']

Considering the fact that the MM stresses the importance of the precise definition of the concept of legal force, it is justified to note that perhaps the probative force of a judgment having legal force should have been mentioned in the Code. The same applies to that the attainment of legal force sets up the presumption of the truth of facts determined in *(res judicata pro veritate habetur),* and that of the legality and justness of, the judgement.

It is a different question whether it is right to include theoretical concepts and definitions in a code. Laws, including codes, are composed from norms having special structures, and scholarly definitions are not always reconcilable with them. For this reason, it may happen that writing legal provisions in that manner causes more trouble than it has advantages (see the story of the enactment of the scholarly concept of legal accusation in the previous Code). The fiasco of the attempt and its causes are well known in legal circles. The CCP itself is evidence of the fact that the codifiers share the opinion of the critics of the definition taken up by previous Code: it is left out of the CCP.

The CCP has some provisions in Section 457 on the partial legal force of definitive decisions: identically with Section 346 (4) of the previous CCP, it provides that the appeal shall suspend the onset of the legal force of the definitive judgment in the part that the appellate court is to review. The CCP adds that if the decision has parts not reviewed by the appellate court, those parts attain legal force. This provision in fact promotes the fulfilment of the requirement of clarity of norms, but scholars and practicing jurists proved equally able to see this element in the earlier code.

A significant change of attitude is clear in the CCP's provisions that make it clear that non-definitive decisions of the court are able to attain only formal legal force. In connection with them, the CCP, presumably in order to avoid misunderstanding, does not even use the term legal force, but introduces the category of *'finality'* instead. The meaning of the new term is that, as a rule, these final decisions may not be overturned by ordinary remedies and may not be changed,[7] but the CCP may determine exceptions to the general rule [Section 460 (1)]. The implementation of these decisions (also as a general rule) is separated from their finality. They are to be implemented directly after have been passed, except when the Code attributes suspensive force to the appeal or the court passing the decision or reviewing it on appeal orders the suspension.

The CCP eliminates a shortcoming of the previous Code, which was criticised by practicing jurists and led, in fact, to differences in judicial practice. In addition to the existing clause of legal force (Section 459), the introduction of the finality clause makes it possible that, under the CCP, the time when legal force actually set, and its extent, as well as the same data of any final decision, may be easily established.

IV Legal-Forceless Judicial Decisions

At this point, it is reasonable to make a short detour and look at how the CCP classifies judicial decisions (sections 449–451).

The Code sets up three categories for them. There are

a) definitive decisions;

b) non-definitive decisions; and

c) measures taken by the court, without passing a formal decision.

Definitive decisions are judgments (which either determine the guilt of or acquit the defendant), and the definitive orders (some of the orders terminating proceedings and the so-called *penal order*).

Under the CCP, non-definitive orders are of two kinds.

The first kind is composed consists of orders, neither issued to determine the way of proceeding with the case nor to decide its outcome but to settle some interlocutory matter (such as disqualifying the judge, appointing a defence counsel or deciding on the exclusion of the public from the trial). There are two types of these orders; those that may be appealed (it is the general rule), and those that may not (these are the exceptions).

The orders issued for conducting the trial are, as declared by Section 449 (4), 'non-definitive decisions, made after the case is registered at the court, in order to determine the way of proceeding or to prepare procedural acts or to ensure their performance' (such as sending the case to trial; setting the trial date; postponing the trial; and issuing summonses). According to Section 580 (1*) d)*, no appeal is possible against these orders: it is possible,

[7] So, final decisions are forever (at least in principle).

however, to claim exception because of them in the appeal against the definitive decision [Section 580 (3)]. The same applies in the case of measures taken by court, which do not require a formal decision [Section 580 (1*) e)*, and (3)].

In connection with the issue of legal force, a change deserves special attention. The Code divides the decisions of terminating proceedings into two groups. Such decisions are definitive, therefore capable of having (material) legal force, in the cases enumerated in Section 567 (1), as follows:

a) when the punishability of the defendant is terminated by his death, statutory limitation, pardon, or other circumstances;

b) the conduct was earlier adjudged with legal force;

c) the prosecutor's office dropped the case and private prosecution or private accessory prosecution is excluded or does not take place;

d) [repealed]

e) [repealed]

f) proceedings are carried out for an offence of a significance, as compared to another offence to be judged in the same case, is negligible from the point of view of criminal liability,

g) the lack of the required private complaint with no possibility of obtaining it.

In the cases enumerated in Section 567 (2), the legislators selected (using unknown criteria) some causes for terminating proceedings in situations where the order is demoted from a definitive decision (capable of having legal force) to a non-definitive one (capable of being merely final). These are as follows:

a) the lack of the required special complaint or the Prosecutor General's order substituting for it;

b) [repealed]

c) the accusation was made by an unentitled person;

d) the written act of accusation does not have all the elements required by Section 422 (1) and, owing to that, the accusation is not fit to be judged *on the merits*;

e) proceedings are taken over by another state;

f) Hungary does not have criminal jurisdiction for the case.

The consequence of this manner of regulation is that the termination of proceedings by a non-definitive decision does not have *res judicata* and *ne bis in idem* effects. Section 4 (3) prohibits initiating, and carrying out, criminal proceedings for the perpetrator's offence when earlier proceedings for the same conduct was concluded with a decision having legal force, unless it is a case of extraordinary remedy or that of certain special proceedings. If the decision closing down the original case is only a *final* one, there is no procedural bar to exclude the initiation of new proceedings.

I find the problem is in the inconsistencies in the differentiation between the causes for the termination of proceedings. It is inexplicable why the legislators think that orders of termination are definitive decisions adjudicating the accusation *on the merits,* thus deserving legal force, when the *cause* is either that the prosecutor drops the case, or it is considerations

of expediency. In turn, it is just as difficult to explain why it is that when the proceedings are terminated because the written act of accusation does not have the necessary legal elements, the lack of legal force provides a new opportunity for the prosecutor's office to pursue the accusation after the appropriate corrections. To make them, one should just follow the court's instructions (included in the court's opinion as criticism of the original one). This makes one suspect a violation of the division of functions and some other principles. As Justice Miklós Lévay pointed out in his dissenting opinion attached to decision 33/2013. (XI. 22.) AB of the Constitutional Court, just because the law declares that the lack of legal elements does not lead to the termination of proceedings with legal force is why the principles of fair trial, the division of functions and the impartiality of the court remain in danger.[8]

V Concluding Remarks

In this presentation, I have focused on the provisions of the CCP that predict a change in the role of legal force caused by the changing nature of the truth sought for in criminal proceedings. Together with that, I intended to show how the transformation of the concept of legal force in the Code had become the cause of its 'transfiguration'.

Legal force is a basic institution of criminal procedure, having many ramifications and connections. In order to have a complete picture of the interpretation of legal force expressed in a code, one could say with some exaggeration that most of its provisions must be examined, because they may have elements influencing the picture. Let us take, for example, the regulation of extraordinary remedies. It does not only indicate how important the respect for legal force is for the legislators, but also shows how the requirements of seeking the truth, striving for justness, and ensuring legality and legal certainty are ranked on the list of values to be defended.

There are many questions concerning legal force in the new Code that require answers. This conference may contribute directly or indirectly to finding some. Let us hope it will.

[8] The Constitutional Court did not find it unconstitutional that under the previous CCP, the court decision to terminate proceedings due to the lack of some element of the definition of 'legal accusation' would not exclude presenting the accusation again after the corrections of the mistakes. The CCP abandoned the definition but the introduction of the distinction of the 'legal' and other elements of the written act of accusation raises the same issues as the previous regulation. Thus, Justice Lévay's words remain valid for the new Code.

Barbara Mohácsi*

Special Procedures Provided for in the New Hungarian Code of Criminal Procedure

I Introduction

Traditionally, Hungarian criminal procedural law recognises three types of criminal procedures. The process of criminal prosecution is governed by the general rules. Where justified by a special circumstance, it is nevertheless possible to derogate from the general rules. Special procedures provide for rules governing criminal prosecution in derogation from the general rules. Special procedures may be justified by the person (juvenile or soldier) of the accused, the subject matter of the procedure (private prosecution in the case of offences specified by law, 'substitute private prosecution' where the conditions established by law are met, or the procedure in the case of offences related to the border fence). Further reasons include the absence of the accused during the procedure (procedure *in absentia,* procedure against an accused residing abroad, provision of security), as well as the simplification or expedition of the procedure (bringing to justice, procedure for issuing a penalty order and procedure if a plea bargain has been reached). The third type of criminal procedures are the so-called 'particular procedures', which are not about adjudicating criminal liability, but are related to a final judgment, and their primary purpose is to rectify or supplement such a judgment in matters that do not affect the determination of criminal liability.

The new Hungarian Code of Criminal Procedure[1] (hereafter referred to as the 'new CCP') retains the three types of criminal procedure known previously, but makes some slight changes to the system of special procedures. One of the main objectives of this new statute, in addition to the enforcement of the right to a fair trial, is to rationalise the length of proceedings. One of the most important means to achieve this objective is the re-regulation of the 'procedure aimed at reaching a plea bargain', which is the best way to expedite the procedure. An important and major innovation of this statute is that it provides a coherent framework for and integrates the rules of the Code of Criminal Procedure previously in

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1 Act XC of 2017 on Criminal Procedure, date of entry into force: 1 July 2018.

force[2] (hereinafter referred to as the 'CCP') on 'substitute private prosecution' (in Hungarian: *pótmagánvád*) under a separate special procedure.

The table below provides an overview of the system of special procedures (special procedures are listed in the same order as in the statute).

Table 1.

CCP	New CCP
1. Procedure against juveniles	1. Procedure against juveniles
2. Criminal procedure against soldiers (and members of certain armed forces)	2. Criminal procedure against soldiers (and members of certain armed forces)
3. Private prosecution	3. Procedure in the case of a person enjoying procedural immunity
4. Bringing to justice	4. Bringing to justice
5. Procedure in absentia	5. Procedure if a plea bargain has been reached
6. Waiver of right to trial	6. Procedure for issuing a penalty order
7. Procedure in the case of offenses related to the border fence	7. Procedure in absentia
8. Judgment without trial	8. Procedure in absentia of an accused residing abroad
9. Procedure in the case of a person enjoying procedural immunity	9. Procedures where the provision of security is required
10. High-priority cases	10. Private prosecution
11. Asset recovery procedure	11. Substitute private prosecution
	12. Procedure aimed at confiscating property or assets or rendering data inaccessible
	13. Procedure in the case of offences related to the border fence

The above table illustrates the most significant changes made by the new statute, both taxonomically and in terms of their nature. Certain changes made to the special procedures are worth looking into.

II Special Procedures Established in View of the Person of the Accused

1 Procedure against Juveniles

Under the statute previously in force, procedures against juvenile offenders must be conducted in an age-appropriate manner, and so that they promote the juveniles' respect for

[2] Act XIX of 1998 on Criminal Procedure.

the law. Under the new statute, criminal procedures against juvenile offenders must be conducted so as to ensure the *social inclusion* of juveniles and to *prevent them from committing another crime* by promoting *education, as well as the physical, intellectual, moral and emotional development* of juveniles. It is evident that the purposes of this type of procedure have become more complex and more specific. According to the new rules, not solely the living conditions and age of the accused should be taken into account, but the involved authorities and court are required to adopt a more proactive approach. Special prevention, socialisation and the promotion of physical, intellectual, moral and emotional development have become the purposes of this procedure, going far beyond 'mere' prosecution. Through this, the criminal procedure itself has also been given an 'educational' nature, which is strongly manifested in the enforcement of criminal penalties. These changes in the purposes of this procedure and in the manner in which it is conducted anticipate and illustrate the legislator's intention to take better account of the situation of juveniles and better protect them.

According to the rules in force, there is no separate juvenile court or exclusive jurisdiction in procedures against juveniles, and the new statute does not bring changes in this respect either. In cases involving juveniles, current rules provide that specially composed courts must be set up to take the best interests and particularities of juveniles into account. The new CCP provides for even *more complex* regulation, not only for judges but also for lay judges (also known as lay assessors, in Hungarian: *ülnök*). According to the previous rules in force, one of the two lay judges participating in the criminal procedure must be a pedagogue. The new CCP requires that lay judges possess specialist knowledge. However, in addition to pedagogues, the new CCP allows the involvement of psychologists and persons who work, or had worked earlier, in a position requiring specific college or university qualifications and serving the healing, nursing, employment, development, care, education of or providing social assistance to or remedying the situation of young people in the framework of family, child or youth protection services or child welfare administration.

One of the guarantee rules is that, in certain cases, *the time limits for investigations* are reduced in the case of procedures against juveniles. In the case of criminal offences punishable by a custodial sentence of no more than 5 years, investigation must be completed within 1 year, while in the case of criminal offenses punishable by a custodial sentence of more than 5 years, this time limit is set at 2 years and may not be extended. Time limits are counted from the moment of the accused's first interrogation as a suspect.

The new CCP intends to provide more possibility for *derogation*, and broadens the scope of application of alternative justice options that can be used instead of prosecution. It therefore allows the application of such justice options in the case of offences punishable by a custodial sentence of no more than 8 years (in contrast to the 5 years laid down in the statute in force before). Earlier, juveniles were not allowed to accept a plea bargain, but the new rules do not exclude the conduct of the procedure to be applied after a plea agreement has been reached. This is sort of a paradigm shift, because the current rules have so far focused on the need to conduct a trial in procedures against juveniles exactly because a

trial was considered to be best suited to take into account the particularities of juveniles and to achieve the purposes of the procedure. Enabling plea bargains introduces the option to avoid trial, which is intended to expedite completing the procedure. This is an opportunity that juveniles may benefit from under the new CCP.

2 Criminal Procedure against Soldiers (and Members of Certain Armed Forces)

The nature of criminal procedure against soldiers (and members of certain armed forces) (in Hungarian: *katonai büntetőeljárás)* has not changed; however, some of the detailed rules have been amended, mainly for pragmatic and practical reasons. It is important to note that the new CCP maintains the institution of lay judges, i.e. the involvement of lay people in the judicial process, in the case of criminal procedure against soldiers (and members of certain armed forces), similarly to criminal procedures against juveniles.

The current rules do not lay down provisions for cases where both *a juvenile and a soldier* are involved in a procedure. Previously, there had been a pertinent rule, but it was repealed. The new statute considers that the 'unregulatedness' of this matter needs to be remedied, and therefore provides that if the cases of two accused people are related, and one of the accused people is a juvenile and the other is a soldier, then both cases should be dealt with under a criminal procedure against soldiers (and members of certain armed forces). However, the provisions on criminal procedures against juveniles shall be applicable to the juvenile accused.

In a criminal procedure against soldiers (and members of certain armed forces), a special investigating authority is the 'competent commander' (in Hungarian: *illetékes parancsnok*), the person who investigates cases in which the military prosecutor has no exclusive investigative powers (i.e. non-military offences). It is an innovation of practical significance that the competent commander may not only act personally, but also exercise their powers by delegating them to an investigating authority or an investigating officer entrusted with the specific task. Investigations shall be directed and supervised by the competent commander. The investigating officer shall act on the commander's instructions during investigations.

3 Procedure in the Case of a Person Enjoying Procedural Immunity

Essentially, the new statute does not amend the rules of this special procedure.

II So-called 'Consensual' Special Procedures Designed to Simplify and Expedite the Procedure Based on the Accused's Plea of Guilty

1 Bringing to Justice

The simplified and expedited procedure called 'bringing to justice' (in Hungarian: *bíróság elé állítás*) is a special procedure often used in practice; it was therefore justified to widen the scope of application of this particular form of procedure. Instead of the current 8 years, the new CCP allows 'bringing to justice' in the case of offences punishable by no more than 10 years. Similarly to the currently effective one, the new statute provides separate rules for the case when the accused is caught *in flagrante delicto* (i.e. in the act of committing a crime) and when they confess to the crime. In such a case, the accused shall be brought to justice within 15 days of committing the crime; if they make a confession then this time limit is longer: one (1) month from the questioning as suspect.

In addition to this shorter time limit, the procedure is expedited by the fact that the stage of preparations for the trial is skipped in this procedure. The prosecutor is required to ensure that the administrative duties associated with preparations for the trial are carried out, and the court shall ensure the conditions necessary for holding the trial. The new CCP integrates into its provisions the current prosecutorial practice, namely that when someone is 'brought to justice', the prosecutor *prepares a memo,* in which they record the essential elements of the charges made earlier orally, as well as the personal data of the accused, the act on which the procedure is based, its classification under the Criminal Code and any evidence. In order to conduct a procedure within a reasonable period of time, it is necessary that the procedure cannot be protracted, even when the first instance judgment is appealed against. It is therefore an important innovation of the new statute that *it also sets a deadline for the court of second instance to conduct its procedure*. Appeals must be considered within 2 months. Since the rules governing the procedures of third instance refer back to the procedures of second instance, this two-month time limit also applies to the procedures of third instance.

2 Procedure if a Plea Bargain Has Been Reached

This special procedure, which is based on the accused's guilty plea and therefore the avoidance of a criminal trial, is very rarely used in practice, even though it is intended to simplify and expedite the procedure; it was therefore necessary to 'reform' this particular type of procedure. Its essence has remained unchanged: it allows the accused to exercise their right of disposal under which they are entitled to choose the form of the judicial procedure, i.e. to choose a simpler and expedited procedure instead of a trial. The detailed rules, however, have changed completely.

It is possible for the accused to accept a plea bargain only *before* an indictment is filed. The prosecutor and the accused agree on the facts of the case and how the offence will be charged, while the latter pleads guilty. The prosecutor subsequently proposes to the court, in an indictment, to approve the plea bargain and to impose a corresponding penalty on the accused. The court approves the plea bargain by means of an order during a so-called *preparatory meeting,* against which no appeal lies. The court has to examine several aspects, in particular whether or not the acceptance of the plea bargain and its content are in conformity with the statutory provisions; whether or not the accused is aware of the nature and consequences of the plea bargain; whether or not the accused pleaded guilty upon his own decision; and whether or not their confession was unambiguous and is supported by the case files. Where the court finds it necessary on the basis of the statements of the accused or the available evidence, the accused will be interrogated.

Wherever possible, the court clarifies any matters not covered by the plea bargain during the preparatory meeting; otherwise it will hold a *hearing* and collects evidence on the undecided matters. In its judgment, the court may not derogate from the facts of the case as set out in the indictment and the legal classification of the offence, as well as the penalty, measures and other provisions specified in the approved plea bargain. This latter rule implies that the court *is left with no discretion with regard to the imposition of penalties* and, if the plea bargain is lawful, it must impose the penalty specified therein. Given the nature of plea bargains, *the right to appeal is limited*. No appeal lies against the finding of guilt or the terms and conditions of the plea bargain (facts of the case, legal classification, or the type, duration or extent of the penalty). It follows from the foregoing that the decision-making powers of the court of second instance are limited; it is only allowed to modify the judgment of first instance if it can be established without a trial that the acquittal of the accused or termination of the procedure is justified. The judgment of first instance shall be annulled in the event that the court should have refused to approve a plea bargain.

3 Procedure for Issuing a Penalty Order

The special procedure, which is currently named 'avoidance of trial' (in Hungarian: *tárgyalás mellőzése*), will be regulated by the new CCP under the name 'procedure for issuing a penalty order' (in Hungarian: *büntetővégzés meghozatalára irányuló eljárás*). However, no substantive changes have been made to the procedure itself.

III Special Procedures That May Be Applied *in Absentia*

1 Procedure *in Absentia*

A special procedure may be conducted *in absentia* (i.e. against an accused who is absent) if the accused is a fugitive, or is hiding or otherwise unavailable in order to avoid criminal

prosecution; the actions taken to find the accused have not yielded results within a reasonable time; and the gravity of the offence or the public opinion on the case justifies the conduct of a judicial procedure. If the conditions necessary for conducting the procedure are not in place then it shall be suspended.

Prior to filing an indictment, it must be declared in a decision that the procedure will be conducted in the absence of the accused. As of that moment, a defence attorney's involvement in the procedure is mandatory. This special procedure may only be conducted at the public prosecutor's request. The rules of this particular form of procedure have not changed essentially; the new CCP has made a few minor adjustments to the rules governing the conduct of this procedure in cases where the accused's location becomes known at different stages of the procedure. According to the rules previously in force, it is necessary to start or resume the procedure at the proceedings of first instance, depending on the stage when the accused was found. The new statute provides for the possibility of not starting the procedure automatically from scratch, but the court of second instance can be ordered to conduct a new procedure, where appropriate. This change also helps to ensure the timeliness of the procedure.

2 Procedure *in Absentia* of an Accused Residing Abroad

If the accused is at a known location but abroad, the rules of the procedure *in absentia* should be applied *mutatis mutandis*. The new rules contain the same provisions, but the category of cases covered by this procedure is regulated under a separate special procedure. It is also possible to conduct this procedure if an accused cannot appear before the Hungarian courts for some reason, regardless of their will. If the *accused is detained,* however, their consent is required to conduct a procedure *in absentia* after filing an indictment.

3 Procedures where the Provision of Security is Required

According to the rules in force, the procedure where the provision of security is required is included in the list of particular procedures; however, it is more logical to regulate it as a separate special procedure, as it is not an auxiliary procedure following a final decision, but the security determines the manner in which the main procedure is conducted.

The public prosecutor's office and the court may authorise the provision of security for an accused resident abroad in cases where the subject of the procedure is a criminal offence punishable by a custodial sentence of no more than 5 years (8 years according to the rules previously in force). Additional preconditions for this procedure are that the imposition of fines or confiscation of property is foreseen; the absence of the accused does not prejudice the procedure; and the accused has retained a defence attorney to act as their agent for service of process. The rule stating that 'no security is allowed if the offence has resulted in the death of someone' has remained unaltered. Where the provision of security is allowed,

the accused can be legally absent from the procedure, and therefore *there is no place for the suspension of the procedure or the application of 'procedure in absentia'* or *'procedure in absentia of an accused residing abroad'*.

IV Special Procedures Established in View of the Subject of the Procedure

1 Private Prosecution

The rules applicable to private prosecution remained substantially unchanged. Some conceptual clarifications have been made, and the new CCP lays down rules for the presence and representation of private prosecutors.

The new CCP stipulates among the general rules that there is no place for private prosecution if the accused is a juvenile or a soldier. It is an important innovation that it defines the concept of *'countercharge'* (in Hungarian: *viszonvád*), according to which, where they mutually committed a simple assault (causing minor bodily injury), libel or slander, the accused may also raise charges against the private prosecutor. A new rule has been included stating that, in the case of a countercharge, the public prosecutor's office may take charge of the prosecution if the private prosecutor has not taken charge of or withdrew from the prosecution. It is a new element that the public prosecutor's office is allowed to take charge of the prosecution instead of the private accused on *one occasion* only. It is clearly stated that, even if the public prosecutor's office has taken charge of the prosecution, the rules of private prosecution shall continue to apply. However, the victim's right of disposal does not cease, and the victim may drop the charges at any time.

An important rule is that *the private prosecutor is required to attend the trial in personal*. If they fail to appear and to provide proper justification in advance, this shall be regarded as if they dropped the charges. Private prosecutors cannot be expelled or held in contempt if they cause a disturbance during the trial, but this shall be regarded instead as if they dropped the charges. Private prosecutors may be present at the accused's interrogation. An important change is that the presence of the private prosecutor will be mandatory during the procedure of second and third instance as well.

The new CCP provides for more detailed rules on the extraordinary remedies available in a private prosecution procedure. In accordance with the existing rules in force, the private prosecutor may apply for a *revision (retrial)*, but only against the accused. Private prosecutors may not apply for any of the other special remedies, such as judicial review, legal remedy designed to ensure legality *('törvényesség érdekében bejelentett jogorvoslat')* or appeal in the interest of law *('jogegységi eljárás'),* but they may be affected by these procedures, and therefore must be notified thereof. Private prosecutors shall have the right to make comments and express an opinion in these procedures.

2 Substitute Private Prosecution

The new CCP summarises and consolidates the provisions on substitute private prosecution *('pótmagánvád')* in the form of a separate special procedure. Substitute private prosecution may take place where the public prosecutor refuses to act on a petition, a procedure is terminated or the charges are dropped.

Similarly to the statute in force, the new CCP provides that legal representation of the victim acting as a *substitute private prosecutor* continues to be *mandatory*. The public prosecutor may take charge of the prosecution on *one occasion* during the procedure. Even in that case, the victim shall remain the 'owner' of the case, and they may therefore drop the charges at any time. The prosecutor may not drop the charges, but they may withdraw from being the legal representative of the prosecution.

According to the regulations formerly in force, in the event of a *refusal to act on a petition or termination of a procedure,* the victim must file an indictment with the office of the public prosecutor that refused to act on the petition. The indictment must be signed by the victim's legal representative. This provision is associated with the introduction of mandatory legal representation at all times and is also related to the fact that a legal representative must be available as early as at the time when the indictment is drafted. What is new is the provision stipulating that *a victim has 15 days to file another indictment* if it was previously dismissed by the court due to the lack of a legal representative or incompleteness of the indictment, and the ground for refusal no longer exists. If the court accepts the indictment then, from that moment on, the victim may act as a substitute private prosecutor. As a new rule, the statute contains provisions on the *translation of the indictment,* if the accused used a language other than Hungarian in the procedure.

In cases where the public prosecutor's office *drops the charges,* victims may present themselves as a substitute private prosecutor, within 15 days of receiving the relevant statement from the public prosecutor's office, by informing the court of their intention to prosecute the case further. Under the new statute, therefore, *there is no need to file an indictment in cases where the charges have been dropped,* which entails a significant simplification and expedition of the procedure.

3 Procedure Aimed at Confiscating Property or Assets or Rendering Data Inaccessible

The new CCP contains a special procedure, the name of which is new, but its content partially exists in the previous statute. It comprises three categories of cases. One of them is the *special procedure for confiscation, confiscation of property, rendering electronic data permanently inaccessible and disposal of seized property,* as named in the current rules in force. This can take place in cases where the necessary measures (confiscation, confiscation of property, rendering electronic data permanently inaccessible, or disposal of seized items) are not possible due to some procedural obstacles, for example that no investigation has

started or the investigation has been terminated or suspended (because the perpetrator's location is unknown, they reside abroad or have a permanent serious illness or their identity could not be established during the investigation). Under the current rules in force, the other category of cases is the *'asset recovery procedure,'* the precondition for which is that enforcement was not possible in the main proceedings in the absence of secured assets. The third category of cases is where *confiscation, confiscation of property or rendering electronic data permanently inaccessible needs to be ordered subsequently, after the court has delivered its final decision*. This is possible if any of these measures subsequently becomes necessary.

In order to prepare a court decision, it is necessary to conduct an *asset investigation* (asset search or asset check). Asset investigations can be ordered by the public prosecutor's office or the investigating authority, or by the investigating authority's asset recovery body once a final decision has been delivered. Usually this takes place when the assets could not be secured or the enforcement did not yield results after delivery of the final decision. Asset investigations may last up to 2 years, and this time limit may not be extended.

If the court delivers its decision based on the available documents, no appeal may lie against the final court order; however, a hearing may be requested within 8 days. An appeal may be lodged against the final court order delivered at the hearing. At the end of the procedure, the court may order confiscation, confiscation of property, rendering electronic data permanently inaccessible or transfer of the possession of seized property to the Government. In a procedure for recovering assets, the court decides whether or not the assets discovered are subject to confiscation of property.

4 Procedure in the Case of Offences Related to the Border Fence

According the previous rules in force, the appointed judge delivers a judgment as a single judge with regard to offences related to the border fence. The new CCP determines *the court of competent jurisdiction,* presumably having regard to the high number of cases, among other things. In cases falling within the competence of the district courts, the district court of the place where the General Court *(Törvényszék)* has its seat, or in the jurisdiction of the Metropolitan Court of Budapest *(Fővárosi Törvényszék),* the Pest Central District Court *(Pesti Központi Kerületi Bíróság)* shall proceed in these cases.

It is important to take into account the requirement that the interests of any person under 18 years of age accompanying the accused must not be prejudiced. This requirement must be considered, in particular, during the imposition of coercive measures. For this reason, the new statute regulates in detail *the place of imposition of coercive measures restricting personal liberty* (in addition to penal institutions and police detention facilities, as provided for in the general rules, group homes or reception centres or other immigration or asylum institutions can also be designated).

If an asylum procedure is pending because the accused has applied for asylum, this constitutes a *special ground for suspension*. Application of the *rules governing the procedure against juveniles* is not excluded for offences related to the border fence.

V Summary

In general, it can be concluded that the number of special procedures has increased; in terms of content, however, the new procedures are very similar or identical to the former procedures, just under a new name. Changes are more evident if the special procedures are compared by type.

Table 2.

CCP	New CCP
a) by the accused in the procedure	
– criminal procedure against juveniles	– criminal procedure against juveniles
– criminal procedure against soldiers (and members of certain armed forces)	– criminal procedure against soldiers (and members of certain armed forces)
– in the case of a person enjoying procedural immunity	– in the case of a person enjoying procedural immunity
b) by the subject of the procedure	
– private prosecution	– private prosecution
– procedure in high-priority cases	– substitute private prosecution
– asset recovery procedure	– procedure aimed at confiscating property or assets or rendering data inaccessible
– procedure in the case of offences related to the border fence	– procedure in the case of offences related to the border fence
c) 'consensual' procedures	
– bringing to justice	– bringing to justice
– waiver of right to trial	– procedure if a plea bargain has been reached
– judgment without trial	– procedure for issuing a penalty order
d) the accused is absent during the procedure	
– procedure in absentia	– procedure in absentia
	– procedure in absentia of an accused residing abroad
	– procedure where the provision of security is required

The above table shows that the number and nature of the criminal procedures dealing with special categories of accused people have remained unchanged. However, there have been changes to the subject of these special procedures. Substitute private prosecution has been included, which is more of a taxonomical innovation because it only consolidates the existing provisions on the legal institution of 'substitute private prosecution' (in Hungarian: *pótmagánvád*) under a special procedure. Special procedural rules for dealing with high-priority matters will cease to exist, primarily on the grounds that general procedural rules,

as a whole, intend to implement the principles concerning high-priority matters, and therefore maintaining this special procedure is not justified. The name and, to a certain extent, the content of the 'asset recovery procedure' (in Hungarian: *vagyon-visszaszerzési eljárás*) have been changed, but the new special procedure called 'procedure aimed at confiscating property or assets or rendering data inaccessible' covers the same scope. Consensual procedures have remained unchanged; however, the rules applicable to the 'waiver of right to trial' have changed and appear under a new name and with new content in the provisions of the special procedure called 'procedure if a plea bargain has been reached'. 'Judgment without trial' remains fundamentally unchanged. The name change is due to the new statute explicitly specifying 'penalty order' (in Hungarian: *büntetővégzés*) as a special type of court order. Since the fundamental purpose of the new CCP is to expedite procedures, it regulates those special procedures that are to be applied when the accused is absent from the criminal procedure, whether on their own will or for other reasons in a more detailed and transparent manner. Under the statute in force, the special procedure *in absentia* covers two categories: where the accused's location is unknown and where their location is known but it is in a foreign country. The new statute regulates these two categories separately, in the context of two special procedures. The 'procedure where the provision of security is required', which also existed in the previous statute, will be regulated under a special procedure in the new CCP.

In summary, it can be concluded that the criminal procedure against juveniles has been modified to the greatest extent, in order to focus more on and better protect the interests of juvenile accused people. The other major change is the re-regulation of the plea bargain-based procedure, which is another attempt to implement in practice a simpler and expedited procedure that is based on an agreement between the prosecutor and the accused. Time will tell whether these changes manage to achieve the objectives set by the legislator.

Katalin Holé*

Certain Aspects of the Right to Human Dignity in the Light of the New Code of Criminal Procedure

I The Right to Human Dignity in the Legal System

The title of my lecture provides a wide opportunity for the analysis of the rules of criminal procedure, because the right to human dignity appears in the practice of the Constitutional Court in two forms,[1] on the one hand, as an absolute right protecting the whole of human life, a foundation of the system of fundamental rights, and, on the other hand, as a relative right protecting the development of personality.[2] According to the interpretation of the Constitutional Court, the right to human dignity is a 'mother-right', a subsidiary fundamental right that may be relied upon at any time by both the Constitutional Court and other courts for the protection of an individual's autonomy when none of the concrete, named fundamental rights are applicable for a particular set of facts. Without going into detailed constitutional law analysis, I will examine certain provisions of the new Code of criminal procedure (hereinafter 'the new Code') from the aspects of the right to privacy, originating from this mother-right and the right of informational self-determination.

Article VI. of the Fundamental Law declares that: 'Everyone shall have the right to have his or her private and family life, home, communications and reputation respected. Everyone shall have the right to the protection of his or her personal data.' Certain aspects of the protection of privacy also appear in instruments of international law. From this approach, the most sensitive field of the new Code is the use of secret surveillance methods because covert information gathering necessarily means intervention in the privacy of the individ-

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1 According to Deli and Kukorelli, in the former practice of the Constitutional Court related to the Constitution, human dignity formed a three-level system. On the first level there was the untouchable human dignity, which was interpreted by the Constitutional Court as an 'undefinable notion', and defined certain points of reference only on the second level, along certain basic functions, from which it derived the specific fundamental rights on the third level. Deli Gergely, Kukorelli István, 'Az emberi méltóság alapjoga Magyarországon' (2015) (7–8) Jogtudományi Közlöny 341–343, 347.

2 Balogh states that the right to human dignity is present in two dimensions: first, as a right grounding the dogmatic system of fundamental rights (a kind of abstraction, which still has fundamental right features), and second, in the form of rights originating in the right to human dignity (subjective rights). See Balogh Zsolt, 'Az emberi méltóság: Jogi absztrakció vagy alanyi jog' (2010) (4) Iustuum Aequum Salutare 38.

ual; as such, it is of crucial importance that the application of such means shall be possible only in line with legal rules providing proper protection within a constitutional framework. According to the reasoning of the new Code, this set of provisions takes a step forward compared to the previous regulation and makes prosecution more effective. It is debated, however, whether all rules of the Code comply with the fundamental right requirements of the right to privacy, which is declared in several international human rights instruments. Other means of criminal procedure also have a significant effect on privacy. In my lecture, I touch upon some sensitive issues that may challenge the new Code.

II The Constitutional Problems of the Preliminary Phase of Criminal Procedure

One of the main novelties of the new Code is that it integrates the rules of secret surveillance available for the inquiry and investigation of crimes in the system of criminal procedure, and thus in the future the present division between covert information-gathering and covert data-gathering will disappear. According to the general reasoning of the Code, this reduces the risk of the loss of evidence, which has made the evidentiary procedure unsuccessful in several cases. According to the experiences of practitioners, the results of covert information-gathering are excluded from evidence in the court proceedings quite often due to the failure to start an investigation without delay in relation to the given crime or to not immediately filing charges. The reason for this is often that the members of the authority performing the preliminary investigation, in line with the valid rules, become involved in the gathering of facts way beyond the level that would be necessary to start a criminal investigation or to establish the necessary suspicion for an accusation, therefore – or due to negligence – they do not meet the requirements specified in section 170 (1) or (2) of the Code of Criminal Procedure, in light of section 206/A of the same. Even though the authority acted lawfully when performing the covert information-gathering and made its efforts in order to reveal evidence in line with section 63 paragraph (1) of the act on the Police, the result will however not be admissible as evidence because the surveillance should have been performed within the framework of covert data-gathering following the start of an investigation. According to the legislator, the other problem is that the previous code failed to define precisely which time period shall be interpreted as 'without delay', in relation to the obligation to report the crime.[3] (Unfortunately, I could mention several cases into the contrary in which accusation happened only months or even a year later, which cannot be considered to be 'without delay' in any way. Moreover, the state could be condemned for crimes performed 'with state approval' and the authority failing to perform its obligations could be obliged to pay damages. Let us think about the recent major case, in which

[3] Miskolczi Barna, 'Titkos információgyűjtés és adatszerzés helyett titkos nyomozás' (2016) <http://jogaszvilag.hu/rovatok/szakma/titkos-informaciogyujtes-es-adatszerzes-helyett-titkos-nyomozas> accessed 15 January 2017.

70 people died in a closed truck, for which, in my opinion, the European Court of Human Rights could condemn Hungary for the violation of the right to life.)

The goal of the new regulation of covert information gathering is probably to allow 'preliminary inquiry' in order to develop suspicion about major crimes within the criminal procedure, but before the start of the investigation. The new Code calls this new phase a 'preliminary phase', which is followed by an investigation cut into two parts – inquiry and prosecution. Further novelties are that, in the process of covert information-gathering performed for law enforcement purposes, the prosecutor receives a special role, and that, for law enforcement purposes, covert information-gathering requiring a judicial permit cannot be performed for an unlimited period of time if it is conducted against a specific person. (However, let us not forget that not all means of secret collection of information require a judicial permit.)

The legislator often claims that the new system meets the criteria of the rule of law much more than the previous rules did. However, before becoming too optimistic, is it worth examining in detail the application of unveiled devices regulated in part 6 of the new Code. Without analysing the regulations in detail, let me focus on some issues relevant for the protection of privacy. According to section 214 paragraph (1) of the new Code,

> The use of concealed devices is a special criminal procedural activity performed by the authorised bodies without the knowledge of the concerned person, which results in the restriction of the fundamental right of inviolability of private home and of the protection of private secrets, correspondence and personal data.

The new Code lists the concealed devices in three groups based on the rules of their authorization. The first group (chapter XXXVI) lists those that are not subject to court or prosecutorial authorisation; the second group (chapter XXXVII) contains those that are subject to prosecutorial authorisation; while the third (chapter XXXVIII) collects those, the application of which requires judicial permit. Section 214 paragraph (5) lists three conjunctive conditions of the application of concealed devices. Therefore, these means may be used only if

a) there are reasonable grounds to believe that the information or evidence to be acquired is essential for the success of the criminal procedure and cannot be acquired in any other way,

b) and its application does not result in a disproportionate limitation of the fundamental right of the concerned person or other persons, compared to the investigation goals, and

c) there is reasonable ground to believe that, with the application of these devices, crime-related information and evidence may be acquired.

This is in fact a step forward compared to the previous code because it requires comparison with the restricted fundamental rights. This complies with the practice of the European Court of Human Rights, which held that

> the domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in and conditions on which public authorities are empowered to take any such measures. As minimum safeguards, they shall include a definition of the categories of people liable (…)

Moreover,

> it is essential that the intervention of the state shall be performed upon significant public interest, and it shall be proportionate to the emerging threat and the disadvantages caused. The examination of this is not limited to the performance of the necessity-proportionality test regarding the conditions prescribed in law, but also cover the necessity of the actual application of law.[4]

Upon returning to the above described groups of concealed devices, we may see that with those requiring a judicial permit the new Code exhaustively lists those crimes in relation to which concealed devices tied to a judicial permit may be applied. This meets the constitutional requirements but, due to legislative techniques, it is feared that this list may be extended freely, upon the mere will of the legislator. In relation to this I would like to stress Decision 2/2007 of the Constitutional Court, in which the it held that 'it considers the use of covert methods and means exceptional. They shall not be generally available in investigations, but shall be used only for the investigation of major (qualified), properly-defined criminal acts'.

In the light of this decision of the Constitutional Court, section 215 of the new Code which regulates the use of concealed devices not subject to court or prosecutorial authorisation may raise concerns. According to the new Code the authority using such devices may:

– apply secret contributor(s);

– collect and confirm information about crimes without revealing the real purpose of the procedure;

– apply traps for the confirmation of evidence that shall not cause injury or damage to health;

– replace the victim or any other party concerned in order to protect their life and physical integrity with the aim of interrupting a criminal act, of identifying a perpetrator of crime and of confirmation of evidence.

One of the concealed devices that does not require judicial permit is the process during which the authorised body may secretly observe any person, house, other premises, fenced areas, places open for the public or an audience, any vehicle or any thing amounting to physical evidence, all of which may be related to a certain crime, may collect information on events and may record its observations using technical devices. This *'covert surveillance'* is such that the authorised organisation may apply a secret contributor and, in line with its goals, by covering the sources of its information, may disclose to the person who is the subject of the concealed devices false or misleading information. Such devices, however, shall

[4] *Valenzuela Contreras v. Spain,* no.58/1997/842/1048 ECHR 30 July 1998.

not be used during the questioning of the accused and the witness and, during the evidentiary procedure, it shall not contain any illegal promises, shall not amount to threat or aiding and abetting, and shall not lead the subject into the direction of committing more serious crime than they have been planning. It is worth comparing this provision with another new rule on the testimony of the accused, according to which, after having been advised of his rights, any oral or written statement of the accused made in front of or directed at the authority shall be considered testimony – even without a vivid imagination, this provision may be considered doubtful from the aspects of the requirements of the rule of law. Another problem may be the secret surveillance of things amounting to physical evidence, the collection of information in relation to these, and the recording of the related observations because, according to the rules of the new Code, physical evidence may include even a mobile phone or a computer.

However, the main problem with concealed devices applicable without a judicial permit is that they may be applied without practically any restrictions, in relation to any minor, supposed crime, without the suspicion of the crime, without any temporal or other restrictions. It is also doubtful that secret surveillance, regulated in section 215 of the new Code, has no de facto differences from 'secret search' regulated among concealed devices requiring a judicial permit. During a 'secret search' requiring a judicial permit, the performing authority may search, with the exception of places open to the public or an audience, any house, surrounding area, vehicle (except for means of public transport) and things used by the subject, and may record these use technical devices, just like in the case of secret surveillance. The difference is that, during a secret surveillance, the authority cannot place technical devices at the place of application (though the contributor may have one in its pocket), may not open postal deliveries and may not become familiar with the content of any communication performed through information technology systems or electronic communications services. The use of concealed devices requiring court authorisation may be performed as an urgent procedural action for 120 hours without authorisation; the authorisation shall be requested subsequently.

A problem related to the right of informational self-determination and data protection is that section 250 paragraph (1) of the new Code provides wide discretional powers for the investigating authority regarding the notification of the subject person. Unless it endangers the success of another criminal procedure, or the interests of covert information gathering regulated by the act on police or national security services, the person subjected to the use of unveiled devices subject to judicial permit shall be informed of the fact of the application of concealed devices only if, after the completion of the preliminary phase, no investigation was initiated, or if after the completion of the investigation the accused was not interrogated or was not brought to court. The person concerned may not be informed of any other data, and any relevant requests shall be rejected in writing. The right of informational self-determination could be exercised only if in such cases the subject person was informed of the fact of monitoring and the possibilities of appeal in the procedure leading to the information permit. It is also problematic that in the case of other concerned persons the

new Code does not provide for indemnification at all. This latter provision is not better than the previous one because ,according to the rules of the act on the protection of classified data, the subject person will not have the chance to resort to remedy within the procedure regulating information permit, if the investigating authority does not want to reveal the fact of the application of concealed devices in the interests of the investigation. This violates the right of appeal, among others. In addition to this, in relation to the use of concealed devices, it must be stressed that their consequences necessarily the privacy of those outside the criminal procedure, and the new Code provides them with no protection whatsoever.

III The Progressive Provisions of the Code

The new Code, however, contains several progressive provisions related to the right to human dignity. Among these, I would like to mention the procedure concerning persons requiring special treatment. The provisions allow customised handling of the concerned persons, within the limits provided by the new Code, if special, unique circumstances arise in relation to the persons concerned by the criminal procedure. Features resulting in special treatment are the age and the mental, physical, or health condition of the concerned person, the especially violent nature of the crime, and the relationship of the concerned person with any other person participating in the criminal procedure. Persons under the age of 18, disabled persons and victims of sexual offences shall automatically be considered persons requiring special treatment. One of the related rules is, for example, that the confrontation of a person under the age of 18 may be initiated only upon his/her consent, while the confrontation of persons under the age of 14 is prohibited. Victims of sexual crimes may be interrogated only by an officer of the same gender as the victim, and, at any other procedural actions conducted in the presence of the victim, an officer of the same gender as the victim on the part of the investigating authority shall be present.

IV Summary

In summary, it may be stated that if we compare the rules of the new Code on the covert gathering of evidence with the presently valid provisions, we may see no significant changes, except for the differences between the structure of the procedure. However, the gaps in the system of provisions may raise concerns, as well as the fact that information may be collected in secret, without any judicial permit, with regard to any minor offences. It is true that the process itself was basically the same before as under the new Code but now such a procedure may only be initiated upon proper grounds, and the results may only be used in the procedure with strict judicial control. This makes the balance shift to the negative, even though the protection of the rights originating from the right to human dignity is wider than in the previous code with regard to all participants in the procedure.

Tamás Kende*

Distant Cousins: The Exhaustion of Local Remedies in Customary International Law and in the European Human Rights Contexts

Article 35(1) of the European Convention of Human Rights (ECtHR) provides that it is an admissibility criterion for a matter to heard by the European Court of Human Rights (ECHR) that all domestic remedies have been exhausted according to the generally recognised rules of international law.[1] In this context, the limitation 'according to the generally recognised rules of international law' is of interest. Did the framers of the age-old institution of exhaustion of local remedies (ELR) simply transpose, 'as is,' this rule in the context of the ECtHR? If so, does this rule apply to admissibility to the ECHR in the same way as it applies to the admissibility of claims to the International Court of Justice (ICJ)? Or did the framers of the ECtHR just (half)apply an analogy and does it apply rather differently? The latter would not be surprising, as ELR applies in a completely different context, is a precondition of a completely different process and the ECHR in fact does not apply public international law but it applies the rules of a treaty (the ECtHR), its own practice and uses general public international law as a last resort.

I The Exhaustion of Local Remedies Rule under General Public International Law

Public international law has developed organically over centuries (some parts of it over millennia) and it applied different rules when two sovereigns directly clashed and when a sovereign and subjects of another sovereign were in conflict.

In the former scenario as the Permanent Court of International Justice stated in *the Phosphates in Morocco Case (1938) 'this act being attributable to the state and described as contrary to the treaty right of another state, international responsibility would be established immediately as between the two states'*.[2]

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1 '1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law…'

2 PCIJ Series, 1938: 28.

In the latter situation, public international law mandated a much more complicated set of procedures to be followed before it would start to apply. This set of procedures is called exhaustion of local remedies. In public international law, this requirement of ELR dates back to the Middle Ages[3] and concerned the protection by sovereigns of their nationals injured abroad. The requirement concerned a sequence of procedures to follow: such nationals were to first seek redress from the foreign sovereign and 'only if this was not forthcoming could they turn to their own prince for aid'.[4] In this way, the rule gave the host state a certain dispute settlement function in the transnational (state v. alien) disputes in which they were concerned. In classical international law (i.e. international law predating the end of WW2), individuals and corporations could not sue states under it, and a construct was put in place: by causing injury or allowing injury to be caused to foreigners, the state where the injury was suffered injured the home state of the foreigners concerned was. Vattel, a Swiss giant of 18th century international law, described this with the following sentence: 'Quiconque maltraite un Citoyen offense indirectement l'Etat…'[5] In *Mavrommatis* in 1924, it was further explained by the Permanent Court of International Justice as follows:

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels.[6]

The ICJ clearly stated in the *Interhandel case* that ELR was a rule of customary international law.[7] The court declared that

> The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law.

In 1986 ELSI[8] the ICJ also confirmed that ELR was 'an important principle of customary international law'[9].

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[3] Chittharanjan F. Amerasinghe, *Local Remedies in International Law* (Grotius 1990, Cambridge) 24.

[4] James R Crawford, Thomas D Grant, Local Remedies, Exhaustion of – in Encyclopedia of international law January 2007.

[5] Emer de Vattel, Le Droit des gens ou principes de la loi naturelle [reprinted edition Carnegie Institution Washington 1916]) vol 1 Reproduction of Book I and II of the Edition of 1958 page 309 para. 71.

[6] *Greece v Great Britain* [Judgment] PCIJ Rep Series A No 2, 7.

[7] *Interhandel Case,* 1959 I.C.J. at 27.

[8] P. 42, para. 50.

[9] J. Chappez, *La règle de l'épuisement des voies de recours internes* (Pedone 1972, Paris); G. Perrin, 'La naissance de la responsabilité internationale et l'épuisement des voies de recours internes dans le projet d'articles de la Commission du droit international' in *Festschrift für Rudolf Bindschedler* (Stämpfli, 1980, Bern) 271; Amerasinghe (n 3).

The ELR rule reflects a compromise achieved during the centuries between at least two conflicting interests: that of the State where the alleged violation occurred and those of the individual concerned. It is in the interest of the host State to have the issues of law and fact which the claim involves dealt with by its own judiciary in order to discharge its responsibility and to redress the wrong committed.[10] The individual concerned has a slightly but not diametrically opposite goal: he/she/it wants the alleged wrong remedied in the quickest way in its favour. A rule that requires resort to local remedies in most cases hampers the individual from having immediate access to seemingly quick and – if the local fora are biased – then more favourable and independent fora. Arbitrator Bagge framed this as follows: '…it appears hard to lay on the private individual the burden of incurring loss of money and time by going through the courts…'[11]

The law as it currently stands still reflects this compromise with certain major changes in human rights, investment protection, consular protection[12] etc.

Domestic law also applies the ELR requirement in certain exceptional cases. The ELR requirement has appeared, for example, in the US jurisprudence in relation to the Alien Tort Statute ('ATS') of 1789. In *Sosa v Alvarez-Machain,*[13] the U.S. Supreme Court noted that, in litigation under the ATS, consideration would certainly be given to the rule of exhaustion of local remedies 'in an appropriate case'. Before Sosa, one school of thought argued that, under the ATS, plaintiffs needed to exhaust local remedies[14] and another argued the opposite[15]. In Sosa, ELR essentially became an exception.

Elsewhere in the US jurisprudence, there was a dispute in the application of the ELR in a situation where taking exception to the Foreign Sovereign Immunities Act (FSIA) abrogates the defence of sovereign immunity when a foreign government takes property in violation of international law. It was not clear whether, in these situations, plaintiffs must first exhaust local remedies in the relevant foreign country before filing suit in the United States. In the absence of clear statutory guidance, the circuit courts have reached divergent conclusions.

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[10] *The Interhandel Case* 1959 ICJ Reports, 27: 'Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.'

[11] Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the First World War (Finland, Great Britain) (1934) 3 UNRIAA, 1497.

[12] *LaGrand Case (Germany v United States of America)* [Judgment] [2001] ICJ Rep 466 paras 21, 126.

[13] *Sosa v Alvarez-Machain,* 542 U.S. 692 (2004).

[14] Eric Engle, 'The Torture Victim's Protection Act, The Alien Tort Claims Act, and Foucault's Archaeology of Knowledge' (2003) 67 (501) Albany Law Review 504; Gregory G. A. Tzeutschler, 'Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad' (1999) 30 (359) Colum. Hum. RTS. L. Review 396.

[15] Symeon C. Symeonides, 'Choice of Law in the American Courts in 2002: Sixteenth Annual Survey' (2003) 51 (1) The Americain Journal of Comparative Law 48; Eric Gruzen, Comment, The United States as a Forum for Human Rights Litigation: Is This the Best Solution? (2001) 14 (1) Global Business & Development Law Journal 207, 232; Nancy Morisseau, 'Seen but Not Heard: Child Soldiers Suing Gun Manufacturers under the Alien Tort Claims Act' (2004) 89 Cornell Law Review 1263.

In the jurisprudence, it was argued[16] that that international law does not oblige US courts to impose the exhaustion rule. Courts should, however, require American plaintiffs in cases where foreign governments have taken their property to exhaust local remedies (in foreign jurisdictions) when the president advises such courts that the requirement would advance the national security or foreign policy interests of the United States.

The ILC Draft articles on the responsibility of states from 2001[17] seem to deal with ELR as a matter of admissibility (a procedural filter) and provides in Article 44 that

> The responsibility of a State may not be invoked if: … (b) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

As such, the draft itself distinguishes between state to state claims (where ELR does not apply) and state to foreigner disputes where the ELR rules apply. As the ILC has stated, the provision 'is formulated in general terms in order to cover any case to which the exhaustion of local remedies rule applies, whether under treaty or general international law, and in spheres not necessarily limited to diplomatic protection'.[18]

It was not clear for some time whether the ELR is a matter of substance (there is no internationally wrongful act if the remedies were not exhausted) or a matter of procedure[19] (responsibility cannot be invoked). If it is a matter of substance,[20] state responsibility at the international law level only arises after the fruitless resort to local remedies and international law had not been violated at the time the initial injury to the individual was committed. On the other hand, if the liability of a State under international law is already generated at the time of the initial injury to the individual, the responsibility of a State at the international level is already created at the moment it committed an internationally wrongful act, yet its responsibility cannot be enforced until ELR has been complied with. The fact that the draft

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[16] Ikenna Ugboaja, 'Exhaustion of Local Remedies and the FSIA Takings Exception: The Case for Deferring to the Executive's Recommendation' (October 2020), 87 (7) University of Chicago Law Review 1937–1976.

[17] Draft articles on Responsibility of States for Internationally Wrongful Acts, <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 4 April 2021.

[18] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001. 121. <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 4 April 2021.

[19] Alwyn Vernon Freeman, *The International Responsibility of States for Denial of Justice* (Longmans, Green 1938, London) 407; Chittharanjan Amerasinghe, 'The Formal Character of the Rule of Local Remedies' (1965) 25 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 445 et al.

[20] See Philip C. Jessup, *A Modern Law of Nations* (Cambridge University Press 1956) 104; García Amador, 'State Responsibility: Some New Problems' (1958) 94 Hague Recueil 449; Herbert W. Briggs, 'The Local Remedies Rule: A Drafting Suggestion' (1956) 50 (4) Americain Journal of International Law 921; Edwin M. Borchard, 'Theoretical Aspects of the International Responsibility of States' (1929) 1 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 237; C. Durand, 'La Responsabilité internationale des états pour déni de justice' (1931) 38 RGDIP 721. In front of the courts see: Panevetys-Saldutikis Railway Case (PCI], Series A/B, No.76, 47) and Case Concerning the Barcelona Traction, Light and Power Company, Limited: Preliminary Objections *(Belgium v Spain),* International Court of Justice, judgment of 24 July 1964, ICJ Reports 1964, 6.

contains the language 'cannot be invoked' and the other fact that the draft deals with ELR as a matter of admissibility seem to suggest that the ILC considers it as a matter of procedure, not of substance.

Figure 1: Description of the classic scenario for exhaustion of local remedies

The ILC Draft articles on diplomatic protection from 2006 deals with ELR as a precondition of diplomatic protection.[21] The draft articles provide in their Article 14(1) that 'A State may not present an international claim in respect of an injury to a national (…) before the injured person has… exhausted all local remedies.' in situations where (see Art 14.3.) 'such an international claim… is brought preponderantly on the basis of an injury to a national'. The ILC Draft – for the first time in international law – actually defines local remedies as 'legal remedies which are open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury.'

Although the ILC draft itself does not go into detail about the way and depth to which local remedies need to be exhausted, the term vertical and horizontal exhaustion has been coined, primarily among the French-speaking students of the ELR rule.

The ILC, in its draft, has also identified several traditional formulas applied in leading international cases where the international tribunals dispensed with ELR. Vertical exhaustion is the requirement of going through all available instances and horizontal exhaustion is the requirement that all meaningful arguments and all necessary evidence be presented, i.e. the claim be pursued at full speed and properly resourced.[22] This latter requirement was

[21] Draft articles on Diplomatic Protection 2006 Text adopted by the International Law Commission at its fifty-eighth session, in 2006 see also: <http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_8_2006.pdf> accessed 4 April 2021.

[22] See AIDI, 1956, pp. 302 ss, especially p. 358); and see also in Whiteman, « Digest of international law », Washington, (1963–1973) 8, 778–779). see also D. Sulliger, « L'épuisement des voies de recours internes en droit in-

tested in the famous *Ambatielos* case,[23] where the Greek shipbuilders lost the case because in front of the international instance it was successfully argued that they had failed to produce an important witness during the lawsuits in front of local instances. A witness from an agency of the respondent (the Navy) was allegedly prevented from giving testimony. Nevertheless, the Court believed that such a lack of use of a witness was equal to not meeting the ELR requirement.

Table 1: Situations where exhaustion of local remedies can be dispensed with

FORMULA	CASES[a]
'the local court has no jurisdiction over the dispute in question'	Panevezys-Saldutiskis Railway[b] Norwegian Loans[c] innish Ships Arbitration[d]
'national legislation justifying the acts of which the alien complains will not be reviewed by local courts'	Forêts du Rhodope Central[e] Ambatielos[f] Interhandel[g]
'the local courts are notoriously lacking in independence'	Robert E. Brown[h]
'there is a consistent and well-established line of precedents adverse to the alien'	S.S. 'Seguranca', X. v. Federal Republic of Germany[i]
'the local courts do not have the competence to grant an appropriate and adequate remedy to the alien'	Vélasquez Rodríguez[j]
'respondent State does not have an adequate system of judicial protection'	*Mushikiwabo and others v. Barayagwiza*[k]

[a] The commentary of the Draft articles on Diplomatic Protection 2006 quotes all these cases and list the various tests.

[b] The *Panevezys-Saldutiskis Railway Case Estonia v Lithuania* General List No. 74 and 76 Judgment No. 29, 28 February 1939 PERMANENT COURT OF INTERNATIONAL JUSTICE Judicial Year 1933.

[c] *Case of Certain Norwegian Loans,* [1957] I.C.J. Rep. 9.

[d] Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war (Finland, Great Britain) 9 May 1934 VOLUME III pp. 1479–1550.

[e] Affaire des forêts du Rhodope central (question préalable) *(Grèce contre Bulgarie)* 4 novembre 1931, 29 mars 1933 VOLUME III 1389–1436.

[f] *Ambatielos case* (n 23).

[g] *Interhandel Case* (n 7).

[h] *(United States v Great Britain)* (1923) 6 R.I.A.A. 120.

[i] *S.S. Seguranca* (United States of America/Great Britain), Award, … *X v Federal Republic of Germany,* ECmHR Case No 27/55.

[j] Inter-American Court of Human Rights *Case of Velásquez-Rodríguez v Honduras* Judgment of July 29, 1988.

[k] *Louise Mushikiwabo, et al., Plaintiffs, v Jean Bosco BARAYAGWIZA,* Defendant. No. 94 CIV. 3627 (JSM)

ternational général et dans la Convention européenne des droits de l'homme » (Thèse, Université de Lausanne, Faculté de droit 1979, Lausanne) 18–21.

[23] *Greece v United Kingdom* [1952] ICJ 1 and also Wolfgang Weiß: Ambatielos case in Encyclopedia of Public International law April 2007.

Based on the above review of the jurisprudence, Article 15 of the draft articles provides five exceptions where local remedies would not need to be exhausted. These are situations where (a) there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress; (b) there is undue delay in the remedial process which is attributable to the State alleged to be responsible; (c) there was no relevant connection between the injured person and the State alleged to be responsible at the date of injury; (d) the injured person is manifestly precluded from pursuing local remedies; or (e) the State alleged to be responsible has waived the requirement that local remedies be exhausted. The introduction of these exceptions to the general rule are already quite ground-breaking and they are likely to explain the reticence of the states when the draft articles are submitted to the General Assembly for review and for taking next steps towards turning the draft articles into an international treaty.

II Structural Differences between ELR under General Public International Law and ELR within the Context of the Enforcement of Human Rights

Since the end of WW2, states seem to have extended the application of ELR from the diplomatic protection of citizens abroad to the protection of human rights. The International Covenant on Civil and Political Rights and its Optional Protocol, the former Article 26 (now article 35) of the European Convention on Human Rights and the American Convention on Human Rights all provide for it and call it a principle of general customary international law.[24] These provisions could suggest that the age-old customary rule existing in the field of the treatment of aliens is now applied by analogy in the protection of human rights.

Yet, in human rights, the context in which ELR needs to operate is fundamentally different from the classic setup of diplomatic protection. The *parties* involved in the two situations are fundamentally different. In the classic one, ELR is a condition for diplomatic protection

[24] Article 41.1c of the *International Covenant on Civil and Political Rights* provides: 'The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged'), and its Optional Protocol in Article 5.2 provides: 'The Committee shall not consider any communication from an individual unless it has ascertained that: …(b) the individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged'; Former Article 26 of the *European Convention on Human Rights* provided: 'The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken'; and Article 46.1 of the *American Convention on Human Rights* provides: 'Admission by the Commission of a petition or communication …shall be subject to the following requirements: (a) that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law…'). See also the *African Charter on Human and Peoples' Rights* [Articles 50 and 56(5)].

afforded to one's own national who has suffered an injury abroad. Hence, the situation is first that of a state and an alien – although a resident of planet Earth – transforming into a legal conflict between the state of nationality and the foreign host state. Diplomatic protection is the lever to move the dispute between the foreign national and the host state into the realm of public international law. In the context of human rights, the individual most likely has never left his/her country and the conflict – even after ELR remains a conflict between a single state and an individual who, in most of the cases, is its own citizen.[25]

Moreover, even after an ELR, a state and an individual remain in conflict while, in the classic setup, when the home state grants diplomatic protection, it takes on the claims of the individual who becomes a simple bystander or witness in the conflict between the home and the host state. So while in the classic setup ELR is a condition for diplomatic protection to be granted, in the human rights situation, ELR is a condition for granting access to international fora.

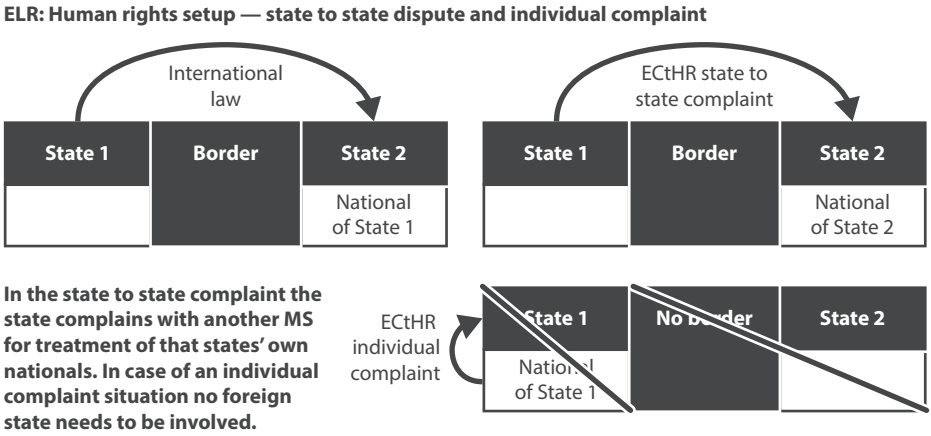

Figure 2: Two situations compared: ELR in case of an international law dispute and in the case of a human rights complaint

It may be self-evident but it makes sense to mention that while the classic setup is well grounded in customary international law, which is just being codified (or not, if the Draft articles on diplomatic protection share the fate of the Draft articles on state responsibility), access to international fora in human rights is exclusively based on treaty law. It therefore makes sense to repeat the question that was asked at the outset: what did the framers of Article 35 mean when they incorporated ELR by reference as it is in customary international law?

[25] *Cyprus v Turkey,* 25781/94, 2001 ECHR 331 (10 May 2001), paras 82–102; *Denmark v Turkey,* 2000 ECHR 150, (5 April 2000), p. 34; and *Cyprus v Turkey,* 8007/77, Dec. 10.7.78, D.R. 13, p. 85.

III Other Differences between ELR under Customary International Law and ELR within the Context of the Enforcement of Human Rights in Europe, in Particular in the ECHR Context

There are also teleological differences. The primary reason for ELR in international law is the protection of the 'host state's' sovereignty. The reasons for the introduction of the ELR rule in international human rights treaties on the other hand were manifold. The *travaux préparatoires* of the ICCPR[26] and of the ECtHR[27] show that the ELR rule was discussed to avoid (1) local courts being replaced by international courts and (2) international courts being overloaded with complaints and ultimately to (3) uphold the sovereignty of the member states.

The ECHR has also politely framed one additional reason for ELR. In *Burden v United Kingdom*[28] it was stated that the ECHR should have the benefit of the views of the national courts, as being in direct and continuous contact with the vital forces of their countries. In *Selmouni v France*[29] the ECHR also linked the requirement to the assumption, reflected in Article 13 of the ECtHR, that the domestic legal order will provide an effective remedy for violations of Convention rights.[30]

The aim of human rights systems such as the European one based on the ECtHR is to provide *effective* protection to individuals in the member states. The European Commission of Human Rights aimed at the same thing as the ECHR now seeks, to ensure effective protection, based on a certain level of burden sharing between the national and the international fora. This burden-sharing – such as in general public international law – means that before proceedings are brought to an international body, the State concerned must have had the opportunity to remedy matters through its own legal system. In the *Akdivar* case, the Court stated that

> …the rule of exhaustion of local remedies… obliges those seeking to bring their case against the State before an international judicial or arbitral organ to use first the remedies provided by the national legal system. …The rule is based on the assumption, reflected in Article 13 of the Convention, that there is an effective remedy available in respect of the alleged breach in the domestic

[26] Guide to the "travaux préparatoires" of the International Covenant on Civil and Political Rights by Marc J. Bossuyt; preface by John P.Humphrey. Dordrecht; Boston: M. Nijhoff; Hingham, MA: Distributors for the United States and Canada: Kluwer Academic Publishers, c1987.

[27] See <https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART26+27-CDH(70)30-BIL3774370.pdf> accessed 4 April 2021. See for example Draft Convention presented by the European Movement in Jul 1949: 'It is, of course, most important that the authority of national courts should not be impaired or undermined in any way by the establishment of the European Court of Human Rights…'.

[28] [GC], § 42.

[29] [GC], § 74; see also *Kudła v Poland* [GC], § 152.

[30] See also *Demopoulos and Others v Turkey* (dec.) [GC], §§ 69 and 97; *Vučković and Others v Serbia* (preliminary objection) [GC], § 69).

> system whether or not the provisions of the Convention are incorporated in national law. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights.[31]

This principle of subsidiarity has since appeared in several judgments[32] and many policy documents, such as the Brighton Declaration[33] that states in its point 3 that

> The States Parties and the Court share responsibility for realising the effective implementation of the Convention, underpinned by the fundamental principle of subsidiarity. The Convention was concluded on the basis, inter alia, of the sovereign equality of States. States Parties must respect the rights and freedoms guaranteed by the Convention, and must effectively resolve violations at the national level. The Court acts as a safeguard for violations that have not been remedied at the national level. Where the Court finds a violation, States Parties must abide by the final judgment of the Court.

This clearly shows that ELR is an effective means of power-sharing between member states and the Court in Strasbourg. The principle is also embedded in Protocol No. 15 amending the Convention, which in its Article 1 on subsidiarity is quite specific about the desired division of labour between domestic courts and the ECHR.[34] It provides as follows:

> Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.

This addition to the preamble of the ECtHR underpins the importance of Article 35 and ELR.

In what ways is the rule different in the human rights context and, in particular in the context of the ECtHR, different from the requirement of ELR in customary international law? When, in the period after the Second World War, the rule was introduced into some human rights treaties, the aim was to emulate and transpose the rule 'as is' into human rights protection and so ELR in human rights protection is to be interpreted in the light of

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[31] *Akdivar and others v Turkey,* Application No.21893/93,16 September 1996, in Reports, 1996-IV, para. 65.

[32] *Selmouni v France,* 28 July 1999, in Reports, 1999-V, 175, para 74; *Ankerl v Switzerland,* 23 October 1996, in Reports, 1996-V, 1565, para 34.

[33] High Level Conference on the Future of the European Court of Human Rights Brighton Declaration The High Level Conference meeting at Brighton on 19 and 20 April 2012 <https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf> accessed 4 April 2021.

[34] Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 24. June 2013, Council of Europe Treaty Series – No. 213.

the equivalent rule in the field of diplomatic protection.[35] The rules, however have developed differently because of the many structural and other differences quoted above. According to D'Ascoli and Scherr, the main reason for this differentiation is the aim to which the rules were applied, the classic one for safeguarding sovereignty, the other to protect individual rights.[36]

According to the report of the ILC, ELR under general public international law and in the context of the ECtHR are different because the practice of the ECtHR is more lenient as to when local remedies may be dispensed with. The ILC draft articles on diplomatic protection of 2006 also find that international jurisprudence uses essentially three different tests to dispense with ELR, namely, where local remedies

(i) 'are obviously futile';

(ii) 'offer no reasonable chance of success';

(iii) 'offer no reasonable possibility of effective redress'.

The ILC considers that the practice of the ECHR is based on the second test, and it found that this test was way more relaxed than it was under general customary international practice. The ILC determined that, based on the practice it identified, the third test seems more appropriate to reflect the status in general public international law.[37] The ILC goes on to describe how much more flexible the ECHR test is than the test applied in customary international law.

There are other differences as well. The number of cases originating in one state and ending up in an international tribunal (ICJ or other) under customary international law are nowhere near comparable to case numbers, for example, in front of the ECHR. Besides the fact that overloading the international tribunal is a real possibility, this has several other consequences: the fact, for example, that there was no legal remedy in one case in one country may be proof of the lack of remedies in a similar case in front of the same court. Such an influx of 'mass torts' would likely never happen in general international law, while it happens so often in front before the ECHR that it has developed a new procedure known as the pilot-judgment procedure[38] as a means of dealing with large groups of identical cases that derive from the same underlying problem in order to avoid completely repetitive work.

Large case numbers from countries and a functional limitation of cases to human rights allow the court to know the functioning of each of the judicial instances in each of the member states intricately and to know whether that instance is able to provide a remedy in a given case. Functional specialisation also allows the ECHR to determine, even in advance, whether an instance (given its competences and practice) would be capable in theory of pro-

[35] Silvia D'Ascoli, Kathrin Maria Scherr, 'The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection' EUI Working Papers LAW 2007/02, 17.

[36] Ibid 17.

[37] Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10).

[38] Rule 61 of the rules of the court <https://www.echr.coe.int/Documents/Rule_61_ENG.pdf> and <https://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf> accessed 4 April 2021.

viding an effective remedy to the alleged injury or not. This is not something general public international law instances could ever provide.

The fact that there is a convention and close to 50 member states behind the ECHR also makes it possible for it to study in parallel whether, with regard to a specific right ensured in the convention, a particular instance of the different member states is an effective remedy or not. Not only can the ECHR study in parallel whether, for example, constitutional courts in different member states are effective remedies but also whether different legal causes in different domestic laws that allow recourse to constitutional courts provide adequate remedies in general or just in the context of that particular right ensured in the Convention or that kind of remedy ensured in the convention. The ECHR's practical guide on admissibility[39] gives many examples on this particularity.[40] Such detail and precision and that the Court issues a guide to its own practice relating to ELR are unheard of in terms of legal certainty in international law.

There are by now many differences in applying ELR in general public international law and the ECtHR setting. The European Commission of Human Rights[41] had earlier issued a notice[42] on the interpretation of Article 26 and then the ECtHR issued a practical guide on admissibility[43] which officially details the application of the ELR rule. The notice confirms *inter alia* the international law context of the rule. The guide, in its para 64, refers to the *Interhandel* case, acknowledging the international legal background of the rule. However, in para 68. it refers to flexibility in both ways:

> The exhaustion rule may be described as one that is golden rather than cast in stone. The Commission and the Court have frequently underlined the need to apply the rule with some degree of flexibility and without excessive formalism, given the context of protecting human rights (Ringeisen v. Austria, § 89; Lehtinen v. Finland (dec.); Gherghina v. Romania (dec.) [GC], § 87). The rule of exhaustion is neither absolute nor capable of being applied automatically (Kozacıoğlu v. Turkey [GC], § 40). For example, the Court decided that it would be unduly formalistic to require the applicants to avail themselves of a remedy which even the highest court of the country had not obliged them to use (D.H. and Others v. the Czech Republic [GC], §§ 116–18). The Court took into consideration in one case the tight deadlines set for the applicants' response by emphasising the 'haste' with which they had had to file their submissions (Financial Times Ltd and Others v. the United Kingdom, §§ 43–44). However, making use of the available remedies in accordance with domestic procedure and complying with the formalities laid down in national

[39] Practical Guide on Admissibility Criteria 4th edition.

[40] See page 21 of Practical Guide on Admissibility Criteria 4th edition.

[41] An institution folded into the ECHR in 1998.

[42] EUROPEAN COMMISSION OF HUMAN RIGHTS NOTE by the Human Rights Department concerning Article 26 of the Convention Strasbourg; September-1955, DH (55) U Or. Fr. <https://www.echr.coe.int/Documents/Library_TP_Art_26_DH(55)11_ENG.pdf> accessed 4 April 2021.

[43] Practical Guide on Admissibility Criteria 4th edition.

> law are especially important where considerations of legal clarity and certainty are at stake (Saghinadze and Others Georgia, §§ 83–84).'

This approach is clearly very different from the approach of the Ambatielos tribunal and also from the approach of the ILC in its draft articles on diplomatic protection.

The guide goes on to detail the rule at length but it does not mention either the vertical or the horizontal exhaustion requirement as set out in Ambatielos. On the contrary, in para. 71, it stipulates that in domestic proceedings the complaint must be raised 'at least in substance' but there is no requirement that all reasonable arguments be made and all possible evidence be availed of.[44] This probably comes from the Van Oosterwijck case, where the Belgian government raised the issue that the complainant never referred to the ECtHR during domestic proceedings. The European Commission of Human Rights[45] stated that *'la référence à la Convention ne lui paraissait pas, en l'espèce, nécessaire, étant donné le caractère peu précis de ses dispositions pertinentes'*. Horizontal exhaustion has, therefore been understood first as a requirement to raise in domestic proceedings as a cause of action and then it was dispensed with as unnecessary, although in customary international law, for example, the ambit of this requirement is far wider.[46]

Paragraph 79 of the Guide itself sets out instances where it thinks there may be special circumstances dispensing the applicant from the obligation to avail him or herself of the domestic remedies available (*Sejdovic v Italy* [GC], § 55) in that context and, unlike in the general setting of public international law, it provides that ELR

> is also inapplicable where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective (Aksoy v. Turkey, § 52; Georgia v. Russia (I) [GC], §§ 125–59).

It also provides that the rule is inapplicable if

> to use a particular remedy would be unreasonable in practice and would constitute a disproportionate obstacle to the effective exercise of the right of individual application under Article 34 of the Convention.[47]

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[44] The practical guide in para 71 refers to a number of ECtHR cases in this respect such as *Castells v Spain,* § 32; *Ahmet Sadik Greece,* § 33; *Fressoz and Roire v France* [GC], § 38; *Azinas v Cyprus* [GC], §§ 40–41; *Vučković and Others v Serbia* (preliminary objection) [GC], §§ 72, 79 and 81–82; *Gäfgen v Germany* [GC], §§ 142, 144 and 146; *Karapanagiotou and Others v Greece,* § 29; *Marić v Croatia,* § 53; *Association Les témoins de Jéhovah v France* (dec.); *Nicklinson and Lamb v the United Kingdom* (dec.), §§ 89–94).

[45] A body folded into the ECHR in 1998.

[46] See Ph. Couvreur, L'épuisement Des Voies De Recours Internes Et La Cour Europeenne Des Droits De L'homme: L'arret Van Oosterwijck Du 6 Novembre 1980. in RBDI 1981–82 <http://rbdi.bruylant.be/public/modele/rbdi/content/files/RBDI%201981%20et%201982/RBDI%201981%20et%201982%20-%201/Etudes/RBDI%201981-1982.1%20-%20pp.%20130%20%C3%A0%20171%20-%20Philippe%20Couvreur.pdf> accessed 4 April 2021.

[47] *Veriter v France,* § 27; *Gaglione and Others v Italy,* § 22; M.S. v Croatia (no. 2), §§ 123–25.

In addition to the above, in September 2013 the Committee of Ministers adopted another guide on 'good practice in respect of domestic remedies'. This latter guide informs practitioners as to what may be considered as an efficient remedy in general and in particular situations.

As far as the ECHR's jurisprudence on ELR and interpretation of Article 35 § 1 of the Convention is concerned, its general principles were declared in *Vučković and Others v. Serbia.*[48] The ECtHR provided that the only remedies to be exhausted are those that relate to the alleged breach and are capable of redressing the alleged violation. The existence of such remedies must be sufficiently certain, not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness: it falls to the respondent State to establish that these conditions are satisfied.[49] In the ECtHR's jurisprudence, there is no need to apply the rule on exhaustion with some degree of flexibility and without excessive formalism, given the context of protecting human rights[50] The rule of exhaustion is neither absolute nor capable of being applied automatically; in monitoring compliance with this rule, it is essential to have regard to the circumstances of the individual case.[51]

Recent case law suggests a coherence in ECHR jurisprudence on the matter of ELR. Below I will examine just three recent decisions taken in 2021 on certain Hungarian matters, stating that the jurisprudence on other jurisdictions is very similar.

In Kournikov[52] (2021), the City of London Police opened criminal proceedings against a British national on charges of embezzlement and money laundering. In 2010, Southwark Crown Court ordered the attachment of the bank accounts to which money had been transferred from the defendant's bank account. Relying on the European Convention on Co-operation in Criminal Matters, the London Crown Attorney's Office requested from the Hungarian authorities the attachment of the applicants' personal bank accounts and the bank account of the companies owned by one of the applicants, all held by Hungarian banks. The Hungarian courts – at first and second instance – ordered the attachment of the bank accounts, concluding that the conditions for attachment under the Code of Criminal Procedure were met. In front of the ECtHR, the Hungarian Government argued that – because the Hungarian authorities only assisted the British ones in the matter – the applicants could and should have appealed against the attachment directly before the British authorities. The ECHR noted that the Government failed to point to any specific remedies available in Hungarian law which the applicants should have used but did not. There it did not reject the claim for non-exhaustion of domestic remedies.

In another recent and important Hungarian case, in *Vig*[53] the ECHR in 2021 also rejected the government's argument that the applicant had not exhausted domestic remedies

[48] Preliminary objection [GC], nos. 17153/11 and 29 others, §§ 69–77, 25 March 2014.
[49] *McFarlane v Ireland* [GC], no. 31333/06, § 107, 10 September 2010.
[50] *Ringeisen v Austria,* 16 July 1971, § 89, Series A no. 13.
[51] *Kozacıoğlu v Turkey* [GC], no. 2334/03, § 40, 19 February 2009.
[52] *Kosurnyikov v Hungary* (Application no. 59017/14).
[53] *Vig v Hungary* (Application no. 59648/13).

because he had not pursued a review of the decision of the administrative court before the *Kúria* and did not bring constitutional complaints under section 26(1) and 27 of the Constitutional Court Act. The case concerned a police search carried out based on a notice from the National Police Commissioner, ordering them to carry out regular enhanced checks ('fokozott ellenőrzés') throughout the whole of the territory of Hungary 'on illegal migration routes leading to the European Union and to operate a screening network preventing illegal migration'. Vig was searched in Budapest in the Sirály Community Centre although his actions did not give rise to any particular suspicion. After the search he appealed against the notice of police measures to the Independent Police Complaints Board and also lodged a complaint a complaint with the Constitutional Court under section 26(2) of the Constitutional Court Act, challenging the constitutionality of sections 30(1)–(3) and 31 of the Police Act. His complaint to the Constitutional Court was rejected as well as his appeals through the ordinary courts.

The applicant complained to the ECHR that the identity check and search had resulted from the terms of legislation rather than unlawful actions by the authorities (the police officers) being at variance with those provisions and challenged the underlying legislation, and not the police's compliance with those provisions. The ECHR established that the purview of administrative courts and judicial review by the Kúria would have been limited to a formal determination of whether the police powers were legally exercised.

> Since the applicant did not argue that the stop and search measures used against him had not complied with the Police Act, judicial review proceedings before the Administrative and Labour Court would not have constituted a relevant or effective remedy in respect of his complaint under the Convention to redress his grievances stemming from the terms of the legislation itself. As a consequence, the remedy identified by the Government – an application for a review by the *Kúria* of the Administrative and Labour Court's judgment – would not have been an effective remedy either.

The ECHR also rejected the Government's argument that the applicant could have been expected to pursue an application for a review under section 26(1) and/or 27 of the Constitutional Court Act. The ECHR ruled that Vig did try to bring his case before the Constitutional Court. He first lodged a complaint under section 26(2) of the Constitutional Court Act, but that complaint was rejected and he also requested the administrative courts, unsuccessfully, to initiate proceedings before the Constitutional Court to establish that the Police Act was unconstitutional.

Under those circumstances, the ECHR found that the applicant had raised the complaint of the unconstitutionality of the legal provisions before the domestic courts, thus providing the domestic authorities with the opportunity to put right the alleged violation. The ECHR observed that it did not '…consider that the applicant was expected to pursue further constitutional avenues which were to remedy a judicial decision applying the legislation, unrelated to the applicant's complaint' (para 41.).

In *LB v Hungary,*[54] the Hungarian Tax Authority published the applicant's personal data, including his name and home address, on the list of tax defaulters on its website. An online media outlet produced an interactive map called 'the national map of tax defaulters' with the applicant's personal data.

The Government argued that the applicant could have requested that the data controller erase his personal data. If his request had been refused, he could have challenged this decision before the courts. The applicant submitted that the Data Protection Act offered no effective remedy.

The ECHR clarified the burden of proof regarding ELR. It stated that the burden of proof was on the Government to prove that a relevant and effective remedy was available both in theory and practice at the relevant time. Once this burden of proof is satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case, or that special circumstances absolved him or her from the requirement.[55] The ECHR noted that, under the Data Protection Act, there was no prospect of LM having his personal data deleted from the tax defaulters' list. The ECHR (in para 30) did not accept that 'it would have served any purpose for the applicant to lodge a request for the erasure of his personal data' and did not accept it as effective in the particular circumstances of the applicant's case.

IV Conclusions

The exhaustion of domestic remedies rule was transposed from international law at the birth of the European Convention on Human Rights, as well as into a host of other human right conventions. However, certain elements of customary international law have never been truly applied (such as the requirement of horizontal exhaustion) while others have disappeared over time as treaty law in particular has developed, and flexibility became the norm. Now, ELR in the ECtHR context is no more than a distant cousin of ELR under customary international law, even if the truth is that, following codification and progressive development work by the ILC, the exhaustion of local remedies rule is no longer what it was customary international law either.

[54] *L.B. v Hungary* (Application no. 36345/16).

[55] *Tiba v Romania,* no. 36188/09, § 21, 13 December 2016.

Article

Wojciech Piątek*

Do We Need a General Regulation on Prescription in Administrative Law?

I Introduction

Discussion of the necessity of passing a statute concerning general provisions of Polish administrative law is still present within Polish legal doctrine. Projects on such a regulation were undertaken in 1988, 1997 and 2008,[1] but none of them was added to the Polish legal system On the one hand, the doctrine of administrative law presents a significant need to pass such provisions,[2] yet, on the other, the initiative and postulates about passing general provisions of the administrative law are impossible for various, above all political, reasons.[3]

An analysis of the three above-mentioned projects concludes that they contain similar provisions. Each of them had a special general rule on prescription (Fr. *prescription,* Ger. *die Verjährung,* Pl. *przedawnienie*) in administrative law.[4] According to Article 16 paragraph 1 of the last version from 2008, an obligation cannot be imposed and the existence of the

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1 The first project was published in materials from the conference of administrative law institutes in Gdańsk, devoted to administrative legislation. See Bojanowski E. (ed), *Legislacja administracyjna* (Wydawnictwo Uniwersytetu Gdańskiego 1993, Gdańsk). The second project was published in a monograph titled *Prawo administracyjne. Materiały źródłowe,* collected and prepared by team E. Smoktunowicz and others (1997), Wydawnictwo Prawo i Praktyka Gospodarcza 1997, Białystok. The third was prepared in an office of the Polish ombudsman and published in Biuletyn RPO (2008) nb 60.

2 In 2018, the need to prepare general provisions of administrative law was formulated by J. Jagielski, P. Gołaszewski, 'O problemach z prawem administracyjnym oraz niektórych węzłowych zagadnieniach tego prawa' in J. Jagielski, M. Wierzbowski (eds), *Prawo administracyjne dziś i jutro* (Wolters Kluwer 2018, Warszawa) 33–34.

3 Similar reasons are formulated in connection with passing general provisions of administrative procedure in EU law. See M. Wierzbowski, 'ReNEUAL a europeizacja i unifikacja prawa administracyjnego' in Jagielski, Wierzbowski (n 2) 313–314.

4 The term 'prescription' derives from Latin *praescriptio, onis*, which means a preliminary objection, objection raised by the accused or excuse. See M. Plezi (ed), *Słownik łacińsko-polski* Volume IV (PWN 1999, Warszawa) 263; W. Korpanty (ed), *Słownik łacińsko-polski* Volume II (PWN 2003, Warszawa) 503. A *praescriptio* appears to have been the earliest kind of exceptio used in the Roman formulary system of actions or it was the parent from which one use of exceptio sprang. See T. A. Herbert, *The law of prescription in England* (C. J. Clay and Sons 1981, London) 1.

obligation cannot be settled after the expiry date, which is five years from the day when the legal and factual basis came into existence.[5] The justification of the project explains that the need to create such regulations is obvious from the perspective of the security and stability of the legal order.[6] After this time has elapsed, connected with insufficient activity or even lack of activity by an administrative authority, a private entity is free from either the threat of punishment or being forced to perform a concrete administrative obligation, such as paying money or performing non-monetary obligations.

The above law is sufficient to inspire us to ask whether we really need a general provision on prescription in our domestic administrative law systems and in European administrative law. Given the nature of administrative law, would it be justified to introduce it as part of a general provision on the time limitation of public rights and obligations? Answering these questions is not possible without a theoretical analysis of this legal institution, which is typical of civil law in particular and originates from ancient times. It does not mean that prescription is not known within administrative law. As such, this paper will present, besides an analysis of this institution in civil law, the special provisions that are characteristic of administrative law and constitute its special axiology. Answering the question about general regulation in the area of prescription would be more complicated without an analysis of regulations about prescription in selected European countries, from the standpoint of both continental law systems and common law. In the last part of this paper, EU law and the jurisprudence of European courts will be taken into consideration to answer the prescription is currently present in European administrative law and if we need general rules to make this regulation more transparent and effective.

The expiration of a time-limit is a significant phenomenon for all branches of law and is manifested in many normative ways.[7] Prescription is one of the legal institutions that make the reconciliation of a legal order with practice possible. The preliminary thesis of this paper is linked with the increasing significance of all these kinds of institutions that make the legal system more foreseeable and certain, which can lead to the necessity for creating general regulations of prescription in the future, both in the legal regulations of domestic administrative law systems and in the EU administrative law.

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[5] Similar and special regulation was established for administrative penalties. According to Article 36 paragraph 1 of the General Provisions of Administrative law from 2008, it is not permitted to impose a pecuniary penalty after the expiry of one year from the commitment of the punishable offence. In the next paragraph of the same Article, the course of the prescription term shall be suspended during the administrative procedure.

[6] Biuletyn RPO (2008), nb 60, 84.

[7] This phenomenon is broadly analysed in the literature. See the essays by G. Husserl, *Recht und Zeit* (Vittorio Klostermann 1955, Frankfurt am Main). From the area of public law see A. Autengruber, M. Bertel, C. Drexel, T. Sanader, Ch. Schramek (eds), *Zeit im Recht – Recht in der Zeit. Tagung der Österreichischen Assistentinnen und Assistenten Öffentliches Recht* Band 6, (Jan Sramek Verlag 2016, Wien).

II Prescription as a Typical Regulation in Civil Law

Regarding ancient law, the origins of prescriptive regulation are derived from Hammurabic law,[8] old Attic law[9] and the law of ancient Egypt.[10] In ancient Greece, despite the lack of a general statute of prescription, were some single regulations, the existence of which enabled the parties to plead the inadmissibility of complaints against them due to the expiry of the prescriptive period.[11] The need to set clear prescriptive rules in relation to the possession of certain objects was noticed by Plato, though he excluded the possession of houses and landed estates.[12] Similar institutions, close to the modern understanding of the statute of prescription, could be found within old Jewish law, having as their object, above all, ownership and legal estate relations.[13] The regulation of prescription was also connected with private law institutions.

At the beginning of its evolution, Roman law did not know time limits for filing complaints; ownership and usage rights could be contested perpetually. As explained in the literature, the reason for this was that Roman law was initially oriented towards the protection of citizens' rights, rather than the interests of certainty and legal peace.[14] Subsequently, with the passage of time, time restrictions were introduced on initiating proceedings.[15] This phenomenon was not known until 424 AD, when Emperor Theodosius II set general rules on the statute of limitations. According to these general rules, the demands shall not extend the 30-year period, maximum expiration time *(praescriptio),* which will result in their

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[8] In § 30 of Hammurabi's Code, there is a construction also found in today's laws. It concerned the right to take ownership of an abandoned field, garden or home after having used, cultivated or lived in it undisturbed for three years. See J. Klima, *Prawa Hammurabiego* (PWN 1956, Warszawa) 77–78.

[9] The right to submit an allegation preventing the commencement of a lawsuit due to the passage of time was known in the year 402 BC in the Archinos statue. See H.J. Wolff, *Die attische Paragraphe: ein Beitrag zum Problem der Auflockerung archaischer Prozeßformen* (Graezistische Abhandlungen 1966, Weimar) 87.

[10] D. Nörr points to the Ptolemaic law of ancient Egypt, which took into account the passage of time by establishing deadlines. However, their functions are not known. Nörr provides detailed examples of the impact of the time course on the legal situation of selected entities, referring not only to the institution of prescription but also to today's circumstances. See D. Nörr, *Die Entstehung der longi temporis praescriptio. Studien zum Einfluß die Zeit im Recht und zur Rechtspolitik in der Kaiserzeit* (Westdeutscher Verlag GmbH 1969, Köln) 12–15.

[11] H. Oetker, *Die Verjährung: Strukturen eines allgemeinen Rechtsinstituts.* Kieler Rechtwissenschaftliche Abhandlungen, Band 2, (Nomos 1994, Baden-Baden) 21.

[12] The periods of prescription proposed by Plato varied because of the place of using individual objects, i.e. in the city and beyond, in the market and in the temple. See Plato, *Nomoi, Sämtliche Werke IX, Griechisch und Deutsch*, Volume XII, nb 954, (Insel Verlag 1991, Frankfurt am Main und Leipzig) 981–983.

[13] According to Mosaic Law, a slave – if a Hebrew – should serve his master for six years, and in the seventh year he should be released without redemption. See Exodus 21, 2–6. If a brother fell into captivity because of poverty, then he should serve his brother as a mercenary or as a settler only until the jubilee year. See *Leviticus* 25:40, 25, 50–54.

[14] Nörr (n 10) 72; E.J. Russell, *The law of prescription and limitation of actions in Scotland* (W. Green 2015, Edinburgh) 1–3.

[15] K. F. Savigny, *System des heutigen Römischen Rechts* Band 5, (Veit 1841, Berlin) 273; P. Nabholz, *Verjährung und Verwirkung als Rechtsuntergangsgründe des Zeitablaufs* (H.R. Sauerländer 1961, Aarau) 26.

ineffectiveness.[16] In 491 AD, Emperor Anastasius I established a law establishing a period of 30 years of prescription for all complaints that had not been covered by the institution's activities. As a result, complaints of a public-law nature began to fall into the prescriptive period.[17]

Prescription has been present in the civil law for centuries, which is even explicitly granted by the representatives of administrative legal science.[18] It is usually associated with a wider issue of 'antiquity'. In Poland, prescription is used for the joint recognition of legal norms regulating the effects of the non-exercise of rights for a period of time specified by law. These regulations include prescriptive periods, acquisitive prescription and concealment.[19] These normative institutions are collectively referred to as the 'prescription in largo sensu', and then divided into so-called 'purchase prescription', when the passage of time is a way of acquiring subjective rights, and so-called 'statutory prescription', when the course of time results in the weakening or loss of certain rights.[20] The latter version of the analyzed institution could be considered 'prescription in stricto sensu'.

It is also worth mentioning that the passage of time and the resulting consequences are not inconsequential in criminal law, in which the institution of prescription has been known for many centuries.[21] Prescription in criminal law is not only a subject of particular domestic regulations but is also present in international law.[22] Regarding other branches of law with a similar nature to administrative law, prescription is present in tax law, where one subject of this institution is tax obligation.[23]

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[16] Savigny (n 15) 274; Nörr (n 10) 73.

[17] Savigny (n 15) 276.

[18] L. K. Adamovich, B. Ch. Funk, G. Holzinger, S. L. Frank, *Österreichisches Staatsrecht* (Springer Vienna 2009, Wien) 174. At the same time, some researchers devote considerable attention to the search for those features of prescription that remain in connection with the nature of public law. F. Schack, 'Die Verjährung im öffentlichen Recht' (1954) (34) Der Betriebs-Berater 1037; E. Forsthoff, *Lehrbuch des Verwaltungsrechts* (C.H. Beck 1973, München) 193–194.

[19] S. Dalka, *Skutki prawne przedawnienia zobowiązań* (Wydawnictwo Prawnicze 1972, Warszawa) 15; W. Wolter, *Prawo cywilne. Zarys części ogólnej* (PWN 1977, Warszawa) 323–324; B. Kordasiewicz, 'Problematyka dawności' in Z. Radwański (ed), *System Prawa Prywatnego.* Tom 2. *Prawo cywilne – część ogólna* (C.H. Beck 2008, Warszawa) 565–566.

[20] Kordasiewicz (n 19) 563–566.

[21] P. Łojko, 'Przedawnienie w prawie karnym' (2011) (7–8) Jurysta 51–53; M. Kulik, *Przedawnienie karalności i przedawnienie wykonania kary w polskim prawie karnym* (C.H. Beck 2014, Warszawa) 1–27.

[22] A basis for a broader analysis is Art. 7 of the *European Convention on Human Rights*. According to C. Wild and S. Weinsyein, Article 7 may be raised in an appropriate case, in that no heavier penalty shall be imposed than the one applicable when the offence was committed, bearing in mind that there is no general limitation of actions where prosecution for crime is concerned. See C. Wild, S. Weinstein, *English law. Text and Cases* (Longman 2010, Harlow) 144.

[23] In the Polish legal system, a tax obligation will not arise if the decision establishing this obligation was delivered after 3 years from the end of the calendar year in which the tax obligation arose. See Art. 68 paragraph 1 of the Tax Ordinance from 29 August 1997 (Journal of Law 2018, Poz. 800 as am.).

III The Axiology of Prescription in Administrative Law

Civil, criminal, and administrative law formulate similar justifications for the functioning of prescription in legal practice. The predominant purpose of this institution is to clarify the relationship between the parties to a dispute before court or administrative proceedings.[24] Uncertainty of their legal status causes unfavourable consequences for private entities, which have much more difficulty in planning their economic activities and anticipating their consequences, as well as for public entities, which want to conduct their social and organisational activities without surprises.[25] For this reason, it is not astonishing that the position expressed in the case law of the German Federal Administrative Court *(Bundesverwaltungsgericht)* is that the principle of legal certainty in the context of prescription institutions also serves public administration.[26] The same view is expressed in the doctrine of Austrian administrative law.[27]

The second role of prescription, which deserves to be distinguished, is an ordering function. Thanks to prescriptive regulation, organizations of public and private authority are created and function better. Legal status is not only reliable but also clear and legible. The passage of time, combined with the consequences of the passivity of an entity authorised or entitled to perform a given activity organises the normative space and makes both the private and the public sphere aware of the existing legal status, including the rights and obligations that apply to them. In that sense, the passage of time itself should be evaluated as a reason to protect established legal status.[28]

The third role of prescription is an incentive function, stimulating both the behaviour of public administrative bodies to conduct proceedings in which obligations are imposed on individuals, and then to enforce them, as well as private entities to exercise their rights, all in due time. The absence of any deadline for the exercise of the right or performance of the obligation usually has an adverse effect on the entities that are authorised or obliged to take this action. If a prescriptive period is established, public authorities are motivated to fulfill their obligations, but after the expiry of this period it will become impossible. Prescription affects an activity of public authorities in a developed and concrete way.

Prescription also has a protective function towards entities that do not remain indefinitely obliged to fulfill their obligation. Establishing a time frame beyond which it is unac-

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[24] The same reason is presented in the English doctrine of law in comparison with statutes of limitation. A potential defendant should not have to live with the risk of legal action indefinitely, if a potential plaintiff does not pursue his remedy. See T. Prime, G. Scanlan, *The modern law of limitation* (Butterworths 1993, London) 1.

[25] In the event of prescription of the rights of the addressee of an administrative act, the corresponding duties of the authority shall cease. See L. Staniszewska, *Administracyjne kary pieniężne* (Wydawnictwo Naukowe UAM 2017, Poznań) 259.

[26] U. Ramsauer in U. Ramsauer (ed), *Verwaltungsverfahrensgesetz* (C. H. Beck 2017, München) 1321.

[27] P. Weninger, 'Die Verjährung im Steuerrecht' in M. Holoubek, M. Lang (eds), *Die allgemeinen Bestimmungen der BAO* (Linde 2012, Wien) 426–427.

[28] D. Dörr, 'Die Verjährung vermögensrechtlicher Ansprüche im öffentlichen Recht' (1984) (1) Die öffentliche Verwaltung 14.

ceptable to impose an obligation on the individual or its enforcement fosters confidence in public authority, because it makes the individual aware of the fact that the administration is bound by the applicable law that prescribes its intervention.

Taking the specifics of administrative law into consideration, it is worth analysing those axiological functions of this institution that would be typical for this branch of law. In German science, as pointed out earlier, prescription favours the stabilising the economic condition of public bodies. The expiry of prescriptive periods means that the past liabilities of individuals, as well as those derived from them, are not included in the budgetary plans of state entities. This increases the level of clarity, transparency and reliability of public finances.[29]

Prescription serves to relieve public administration authorities and administrative courts from considering cases that are often complicated in terms of evidence, due to the passage of a significant period of time.[30] In some of these cases at least, making factual findings consistent with the principle of objective truth would not only be very difficult but frequently impossible.

The presented justifications do not mean that, in a doctrine of administrative law, we do not observe some negative effects of prescription, which the legal institution does not derive from natural, but positive law. A prescriptive regulation is always the consequence of a legislator's activity. Sometimes the passage of time and the resulting expiry of an obligation or entitlement may lead to unjust consequences because the private entity ceases to be obliged to fulfil public duties, which could be significant for the interests of many other entities, both public and private.[31] Prescription may help to improve the legal situation of those entities whose proceedings are not legal. They may delay their obligations to avoid fulfilling them and rely on the time expiring and with it the prescriptions' effect.

The above-mentioned threat can be analysed from another angle. Prescription may make it impossible to fulfill obligations or to exercise rights that expire after the prescribed time period. Some of public obligations could be significantly important for private entities. In Poland, would be impossible for private entity to fulfill a public duty for moral or material reasons after the prescription time has passed. It could have negative consequences in applying for other public rights, if obtaining these rights depends on fulfilling previous obligations or on the good reputation of the petitioner.[32]

The reasons presented against improving prescription in administrative law are not convincing for neglecting to improve this institution into positive law. Unjust consequences

[29] E. Becker, *Die Verjährung im öffentlichen Recht* (Dissertationen 1923, Frankfurt am Main) 103; A. Guckelberger, *Die Verjährung im Öffentlichen Recht* (Mohr Siebeck 2004, Tübingen) 83.

[30] M. Binder, *Die Verjährung im schweizerischen Steuerrecht,* (Zürcher Studien zum öffentlichen Recht Bd. 54, 1985) 8–9; Guckelberger (n 29) 83–84.

[31] P. Przybysz, *Egzekucja administracyjna* (Dom Wydawniczy ABC 1999, Warszawa) 40–41.

[32] E.g. in the jurisprudence of the administrative courts, a previous conviction, despite its prescription, is important for assessing compliance with the conditions for granting a firearm permit. See the judgments of the SAC from 12 May 1999, III SA 7339/98, and from 16 October 2012, II OSK 1097/11.

should not be connected with prescription but with the passivity of the public authority that is responsible for enforcing concrete public duties. This problem is linked with the incentive function of prescription. Without this institution, an administrative authority could be obliged to perform their activities in a less active way. In other words, without prescription, the public authority conscientiousness in fulfilling its obligations within a reasonable time period would not be so obvious or clear. The matter of legislative power is to create time periods in which the enforcement of public duties will really be possible. In German science there is the doctrine of the 'useful illegality' *(brauchbare Illegalität)* of prescription, which allows surrendering the pursuit of compliance with the law after a long period of inactivity by the administration, which tolerated the existing state of affairs.[33] According to this doctrine, refraining from enforcing a public obligation after a long period of time could be less harmful for private and public bodies than involving caution in its enforcement.

Returning to the second reason presented against implementing prescription in administrative law regulations, prescription in administrative law has a substantive nature. The effect of the expiry of the prescriptive period is taken into account by the public administration authority *ex officio*. Unlike in civil law, an individual entity cannot evade the final effect of prescription and allow for the imposition and enforcement of obligations. In the legal systems of some countries, for example in Slovakia, there are known exceptional cases in which prescription in administrative law is only taken into account regarding the party's allegation.[34] Other countries have formulated proposals to create such a possibility for a private entity.[35] Some representatives of the doctrine indicate that administrative law also has a general rule regarding the statute of prescription for the party's allegation. Such a solution, due to the nature of administrative law, could only occur in exceptional cases, if the individual who was entitled to claim the statute of prescription was to be aware of the consequences of not reporting this allegation. The functioning of this possibility belongs to the special requirements and models of prescription in a specific legal system. It should not be treated as a reason for the general non-existence of prescription. Giving a positive answer to the question of implementing general prescriptive regulations in administrative law is only a first step to creating detailed solutions for normative provisions for this institution, such as concrete periods of prescription, suspension, interruption and prolongation.

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[33] Guckelberger (n 29) 111.

[34] As pointed out by M. Horvat, considering the prescriptive period by the authority only for the party's allegation is the basic criterion for distinguishing this institution from other kind of legal deadlines. See M. Horvat, *Administratívnoprávna zodpovednost právnických osôb* (Wolters Kluwer 2017, Bratislava) 98. The expiry of the prescription is taken into account at the request of the creditor, where it is a private entity, is known in Switzerland. See U. Häfelin, G. Müller, *Allgemeines Verwaltungsrecht* (Dike Verlag AG 2016, Zürich) 165–166. See also M. Binder (n 30) 299–300. This type of prescription considered for the allegation is not known, in Polish, or Austrian administrative law. See M. Kalteis, 'Verjährung im Verwaltungsrecht' in Holoubek, Lang (n 27) 469.

[35] In German legal science, it is pointed out that in the case of limitation on a charge, the party should be informed by the authority of the expiry of that period, but that it retains the right to decide on raising this allegation. See H. F. Lange, *Die verwaltungsrechtliche Verjährung. Begriff und Zweck, Wirkung sowie prozessuale Behandlung* Schriften zum öffentlichen Recht, Band 469, (Druncker und Humboldt GmbH 1984, Berlin) 85–86.

IV Prescription and Other Normative Institutions Connected with the Expiry of Time

From the presented analysis, it is possible to create a definition of prescription in administrative law: it is the legal mechanism according to which, after the passage of a set amount of time, established within administrative law, if there has been no action made by authorised person, whether a private entity or public authority, the legal right to impose an obligation, to perform, or grant rights that is to it expire.

Prescription always remains in the relationship between a public authority and a private law entity, in which the legal situation of one of them is connected with the legal situation of the other. In German and Austrian legal science, it is emphasised that the prescription affects a specific legal relationship *(das Rechtsverhältnis),* not an existing legal situation *(der Rechtszustand)*[36]. Its negative effect is caused by passivity or by the individual himself, who loses his right, or by a public authority, who cannot impose an obligation on the individual or enforce it in practice. As a legal organ arising from the relationship between public and private entities, prescription is a consequence of the specificity of administrative law and the mutual rights and obligations of these entities. Prescription does not exist in relationships within the public administration structure.

The institution of prescription is only one form in which the passage of time is connected with administrative law, where it affects this law. The other institutions or constructions, which are characteristic of administrative law are administrative silence, the temporary inactivity of an administrative authority and special inter-temporal regulation in administrative law. A difference between the theoretical nature of each of these institutions and prescription is presented below.

Administrative silence can be situated in opposition to prescription. Just as in the case of prescription, the legal structure of the administration's silence was based on the direct relation of the attitude of a given subject to the passage of time. The essence of administrative silence is included in the category of omission, which has legal effects.[37] The creation of administrative silence is connected with the passage of time specified by the law, regarding the exercise of a competence, on the basis of which the public authority is obliged to take action.[38] The final effect of the expiry of the deadline shapes the legal situation of the individual, as well as the expiry of the authority's competence to take action in the sphere of

[36] See Guckelberger (n 29) 162–173. See also B. Raschauer, *Allgemeines Verwaltungsrecht* (Springer Vienna 2009, Wien) 412.

[37] M. Stahl, 'Szczególne prawne formy działania administracji' in R. Hauser, Z. Niewiadomski, A. Wróbel (eds), *System Prawa Administracyjnego. Tom 5. Prawne formy działania administracji* (C.H. Beck 2013, Warszawa) 391; S. Skulová, L. Potěšil, D. Hej, R. Bražina, 'Effectiveness of judicial protection against administrative silence in the Czech Republic' (2019) 17 (1) Central European Public Administrative Review 47–48.

[38] T. Bąkowski, 'W sprawie „milczącej zgody organu"' (2010) (3) Państwo i Prawo 107–108, M. Miłosz, *Bezczynność organu administracji publicznej w postępowaniu administracyjnym* (Wolters Kluwer 2011, Warszawa) 238.

administrative law.[39] As with prescription, the administrative silence of an authority within the time limit set by the legislator gives rise to specific consequences for the legal situation of an individual. Deadlines for limitation and silence are substantive. Unlike prescription, administrative silence during the term of prescription has a positive effect for an individual who can realise their intention according to the current legal status.[40]

Inactivity in an administrative procedure possesses a distinct meaning compared to both administrative silence and prescription. It is when the administrative authority does not deal with the administrative case within the appointed period of time. In the Polish Code of Administrative Procedure,[41] an administrative case should be settled without undue delay.[42] If it is obligatory to conduct evidential proceedings, a case should be settled within a month and in complicated matters within two months.[43] Unlike prescription, administrative inactivity is of a procedural nature. The deadline for settling an administrative case and the period of prescription exist independently of each other. If a prescriptive period is linked with imposing an obligation on a private entity, administrative inactivity can lead to the prescriptive period, and in the end result in the expiry of the competence to impose the obligation on the entity.

A different nature from the other mentioned institutions has a deadline set in an administrative decision as an additional element of its structure. The term in the decision limits its binding force in such a way that its validity begins and ends after a certain period of time.[44] In such a situation, a time-limitation of the binding force of an administrative decision is performed by an administrative authority, whereas prescriptive periods are only appointed by legislation. A second difference between these two kinds of terms is connected with the activity of a private entity performed before the expiry of the term. It has crucial importance for the prescriptive period, because it can lead to making a prescription-term groundless.[45] However, a term appointed in an administrative decision is neutral toward the activity of the

[39] B. Adamiak, 'Od klasycznych do współczesnych koncepcji gwarancji prawa do szybkiego załatwienia sprawy administracyjnej' in J. Supernat (ed), *Między tradycją a przyszłością w nauce prawa administracyjnego. Księga jubileuszowa dedykowana Profesorowi Janowi Bociowi* (Wydawnictwo Uniwersytetu Wrocławskiego 2012, Wroclaw) 24; M. Dyl, *Środki nadzoru nad rynkiem kapitałowym* (Wolters Kluwer 2012, Warszawa) 240.

[40] For example, according to Article 30 paragraph 5 of the Polish building law (Journal of Law 2018, Poz. 1202 as am.), an individual entity may initiate building works after 21 days from submitting notification to the proper public authority. During this time, the authority may reject the notification. In this event, an individual entity must apply for a building permit.

[41] Kodeks postępowania administracyjnego from 14 June 1960 (Journal of Law 2017, poz. 1257 as am., henceforth as CAP).

[42] Article 35 paragraph 1 CAP.

[43] Article 35 paragraph 3 CAP.

[44] This construction is typical of authorizations in performing statutorily regulated activities. E.g. the fire protection inspector's rights are acquired for a period of 5 years, according to Article 4a paragraph 1 a Fire protection act (Journal of Law 2018, Poz. 620 as am.).

[45] E.g. if an obligation imposed (administrative fine) on an individual is enforced, the time epirey after the enforcement has no impact on its legality. In some situations, e.g. during enforcement proceedings the prescription time can be suspended.

parties to a dispute before an administrative authority, and the effects related to the expiry of the period resulting from the decision are pre-determined. Thus, while prescription is time-sensitive, other factors may also be important, whereas administrative decisions are only concerned with the passage of time.

Prescription as an institution of positive law can be evaluated from a broader perspective of the inter-temporal law provisions. In each branch of the law, special regulations that determine the existence of time rules for the validity of legal norms operate. The basic difference between inter-temporal law and the institution of prescription concerns the legal character of these regulations. While inter-temporal law falls within the wider issue of the inter-temporal nature of the applicable legal regulation, prescription is an institution of substantive law; it does not refer to the entire legal system, or general and abstract norms, but to the legal situation of individual entities. In other words, the expiry of the limitation period affects the rights and obligations of an individual, not an unspecified circle of addressees of a legal norm.

The relationship between inter-temporal law and prescription concerns the impact that the change in legal regulation has on the course of the prescriptive period. It is particularly intensely considered in the area of criminal law, in which the right of the individual to the statute of prescription was denied, thus approving the legislator's practice of extending the running period of prescription as a part of the inter-temporal regulation. This practice is approved by ECJ.[46] There is no right to prescription. A legislator creating inter-temporal norms can modify prescriptive periods, which do not expire.

V Prescription in Administrative Law of Selected European Countries

Prescriptive regulations are present in the legal systems of European countries. Below we will analyse selected examples of this institution in Poland, England and Germany. In each of these countries, the regulations are evaluated as an exception from a general rule that administrative obligations and rights are not a subject to prescription. Nevertheless, in the selected legal systems, prescriptive regulations are present and affect administrative legal relationships in a characteristic way.

1 Poland

Despite the projects mentioned on the general provisions of administrative law, until this day there is no general regulation of prescription in Polish administrative law. The normative situation changed significantly in 2017, with a significant amendment of the

[46] C-584/15, *Glencore Céréales France v Établissement national des produits de l'agriculture et de la mer (France-AgriMer),* EU:C:2017:160.

CAP.[47] The most crucial change, which caused the whole amendment, was concerned with improving the general provisions for imposing administrative penalties. As one element of these provisions, general time periods for their imposition and enforcement became regulated.

According to Article 189g paragraph 1 CAP, an administrative punishment cannot be imposed after 5 years from committing an administrative offence or the occurrence of the consequences of the infringement. The same regulation is located in Article 189g paragraph 3 CAP, in connection with the enforcement of an imposed administrative penalty. Justifying the introduction of a general provision on the imposition of administrative penalties, it was indicated that it should ensure uniform standards for treating individuals and guarantee rationality in imposing penalties.[48] One of the rational mechanisms, which relies on imposing prescriptive regulations, is making the punishment of private entities without any legal time limits impossible.

Besides these general provisions limited to administrative punishments, there are no similar regulations typical of other branches of public obligations and rights. Polish law knows only isolated examples of prescription. In the area of building law, according to Article 37 paragraph 1 of the building law,[49] a building permit shall expire if construction has not started before the expiry of 3 years from the date on which the decision became final, or if the construction was discontinued for a period longer than 3 years. It is an example of a prescriptive period in the area of individual rights and proof that prescription has a universal nature, which is not limited only to public obligations.

Many examples of prescription of a various nature are settled in the water law, which is a new act from 2017.[50] From the perspective of obligations and rights that are subject to prescription, the water law provides a prescriptive period for administrative penalties,[51] payment for the legalisation of water equipment,[52] and non-monetary obligations incurred for the benefit of a water company due to the benefits of obliged persons or contributing to the pollution of water for which the water company was founded.[53]

The above-mentioned normative examples on the one hand, are proof of only incidental regulation of prescription in administrative law without any general rules for calculating the periods of prescription and its suspension, interruption and prolongation, except general rules on prescription of administrative penalties laid down in the CAP. On the other hand,

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47 The amendment was introduced by a statue from 7th April 2017 on an amendment to the Code of Administrative Procedure and other statues (Journal of Law 2017, poz. 935).

48 See written justification of the statue from 7th April 2017; Sejm printing nb 1183. Available at: <http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=1183> accessed 14 February 2020.

49 Building law Act from 7th July 1994 (Journal of Law 2018, Poz. 1202 as am.).

50 Water Law Act from 20th July 2017 (Journal of Law 2017, Poz. 1566 as am.).

51 Article 109 Paragraph 9 of the Water Law Act.

52 Article 190 Paragraph 7 of the Water Law Act.

53 Article 454 Paragraph 8 of the Water Law Act.

new regulations on prescription in the CAP and in water law show that the legislature will take this institution into consideration in other normative regulations in the future.

2 England

English law has a normative approach to prescriptive regulation that is very similar to the Polish normative solution, though English law does not know general statutory provisions of administrative law and about prescription. A typical English regulation that combines law and an expiration of time is the Limitation Act of 1980, which, contrary to prescription, has a procedural nature and provides that, after a certain period of time, particular kinds of claims are legally unenforceable and cannot be relied on in actions.[54] It does not mean that the prescription is not known in the English law at all. From the jurisprudence of the courts, it could be stated that an expiration of time would have a negative effect on performing obligations and rights. This thought was clearly stated in the case of *Agecrest Ltd v Gwynedd* County Council, as a judge said: '…the longer the time that elapses, the less chance there will be that a court will accept that there was an intention to develop at the material time or that what was done was genuinely done for the purpose of carrying out the development'[55].

Focusing on normative acts, prescriptive regulations are present in planning law,[56] in the duration of planning permission, to be precise. According to Article 91 paragraph 1 point a) of the TCPA, every planning permit granted or deemed to be granted shall be granted or, as the case may be, be deemed to be granted, subject to the condition that the development to which it relates must be begun not later than the expiration of three years beginning with the date on which the permission is granted or, as the case may be, deemed to be granted.[57] Planning permission will lapse if the development is not begun within the prescribed time.

If the development has begun, but has not been completed within the prescribed period, the local planning authority, according to Article 94 Paragraph 2 TCPA, may serve a completion notice stating that the planning permit will cease to have effect upon the expiry of a further period specified in the notice. If, upon the date specified in the completion notice, the development has not been completed, planning permission will be invalidated.[58]

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[54] R. Hewidson, *Licensing law handbook* (Law Society 2013, London) 271–274; E.J. Russell, *The law of prescription and limitation of actions in Scotland* (W. Green 2015, Edinburgh) 5–6.

[55] R. M .C. Duxbury, *Telling & Duxbury`s planning law and procedure* (Oxford University Press 2018, Oxford) 308.

[56] Town and country planning act from 1990, legislation.gov.uk (access 19th July 2018), farther as TCPA.

[57] In Article 91 paragraph 1 point b) TCPA, an authority is authorised to appoint a longer or shorter term of prescription beginning with that date as the authority concerned with the terms of planning permission may direct. According to Article 91 paragraph 2 TCPA, the period mentioned in subsection (1)(b) shall be a period which the authority considers appropriate, having regard to the provisions of the development plan and to any other material considerations.

[58] A completion notice gives the developer the choice of completing the development or of letting the planning permission lapse. It is a particularly useful procedure where a developer has kept planning permission alive by doing only a minimal amount of preliminary work. See more Duxbury (n 55) 315.

The planning law also regulates time limits for enforcement actions that must be taken within a certain time from the breach of planning control having occurred. There are two principal time periods, which depend on the subject of control. According to Article 171 B paragraph 1 and 2 TCPA, enforcement action is enforced if operational development is undertaken without planning permission for building, engineering, mining or other operations in, on, over or under land, or the change of use of any building to use as a single dwelling house. This enforcement can only be taken within 4 years, beginning with the date on which the operations were substantially completed or with the date of the breach, if it concerns using a building as a single dwelling house. In the case of any other breach of planning control, according to Article 171 B paragraph 2 TCPA, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.

The above-presented regulation is regarded in the English doctrine of law as fair to both parties in a dispute. The local planning authority has sufficient time to identify any significant planning problem arising as a result of the breach of planning control. At the same time, it would not place an undue evidential burden upon the landowner, who could rest assured that after 10 years he would be free of the threat of enforcement action.[59] This kind of reasoning is unfamiliar for the Polish legislator, who has not decided to embrace prescription influence non-pecuniary obligations from an area of planning law.

3 Germany

In Germany, as with Poland and England, a general regulation on prescription in administrative law does not exist. There is only one general rule devoted to prescription in public law, located in Article 53 of the statue on administrative procedure.[60] According to the 1st paragraph of Article 53 VwVfG, an administrative act adopted to establish or enforce the right of a public law entity suspends the prescriptive period of that claim. The suspension ceases when the administrative act is final or six months after it has been discharged. In the 2nd paragraph of the same Article, there is la general prescriptive period for the essence of an administrative act as up to 30 years from its becoming final and binding. This provision is reduced only to the effects of issuing an administrative act and its consequences to the prescriptive period and does not explain the essence of this institution and all plots of its existence in practice.

Prescription is partially regulated in some statutes in the area of administrative law. According to Article 45 paragraph 1 of the statute on social assistance[61] a request for social benefits prescribe in 4 years, at the end of the year in which they were granted. In the next paragraph of the same Article, the suspension, interruption, and influence of prescription

[59] R. Harwood, *Planning enforcement* (Bloomsbury Professional 2013, London) 35.

[60] Verwaltungsverfahrensgesetz von dem 25 Mai 1976 (Journal of Law 2003 I S. 102), hereinafter as VwVfG.

[61] Das erste Buch Sozialgesetzbuch – Allgemeiner Teil von dem 11 Dezember 1975 (BGBl. 1975 I S. 3015), farther as SGB.

is governed by regulations from civil law[62] Special regulations concerning prescription are also located in the statute on the marketing of medical supplies,[63] and in the statute on protection against harmful soil changes and remediation from contaminated sites.[64] A separate regulation of prescription is present in the tax law[65].

If there are no special regulations regarding prescription then property law provisions which are the most similar to the nature of a special claim are borrowed by analogy *(die sachnächste Verjährungregelung)*[66]. In reality, the regulation that is usually applied, comes from BGB[67]. It is worth mentioning that the common regulation on prescription in BGB was significantly amended in 2001.[68] As a result of this change, the general prescriptive period from Article 195 BGB was shortened from 30 down to 3 years. The other periods of prescription are 10 years for claims connected with real estate,[69] and 30 years for various special claims derived from judgments or enforceable settlements.[70]

The lack of general provisions on prescription in administrative law is negatively perceived by some members of the doctrine of law, who formulate *de lege ferenda* postulates.[71] The reasons for these conclusions are the same as in Poland. Only partial and incidental regulation of prescription does not give real certainty in applying the norms of administrative law.

VI Prescription in EU Administrative Law

Provisions containing some prescriptive regulations are not only typical of domestic legal regulations, but are also present in selected parts of European Community administrative law. A clear example of that regulation is connected with international cooperation between EU Member States in recovering public claims. The basic legal act devoted to this regulation is Directive 2010/24/EU.[72]

The directive does not contain either general provisions of prescription or even use the term of this institution. Taking the features of this institution into consideration, it contains

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[62] Bürgerliches Gesetzbuch von dem 18 August 1896 (Journal of Law 2002 I S. 42, 2909; 2003 I S. 738).

[63] § 105b Arzneimittelgesetz von dem 24 August 1976 (Journal of Law 2005 I S. 3394).

[64] § 24 paragraph 2 Bundes-Bodenschutzgesetz von dem 17 March 1998 (Journal of Law 1998 I S. 502).

[65] See § 169 Abgabenordnung von dem 16 March 1976 (Journal of Law 2002 I p. 3866; 2003 I S. 61). See more Guckelberger (n 29) 48–58.

[66] A. Engels, 'Commentary to the Article 53 VwVfG' in T. Mann, Ch. Sennekamp, M. Uechtritz (eds), *Verwaltungsverfahrensgesetz* (Nomos 2014, Baden-Baden) 1385.

[67] W. Dötsch, 'Verjährung vermögensrechtlicher Ansprüche im öffentlichen Recht' (2004) (7) Die öffentliche Verwaltung 277–278.

[68] Das Schuldrechtsmoderniesierungsgesetz von dem 26. November 2001 (BGBl. 2001 I S. 3118).

[69] Article 196 BGB.

[70] Article 197 BGB.

[71] Dörr (n 28) 18.

[72] Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, Official Journal of EU from 31.03.2010, L 84/1.

provisions that correspond with its nature. According to Article 18 paragraph 2, a requested authority shall not be obliged to grant the assistance provided in the listed provisions if the initial request for assistance is made in respect of claims that are more than 5 years old, dating from the due date of the claim in the applicant Member State to the date of the initial request for assistance. In such conditions, a requested authority may refuse to grant assistance.[73] Inaction by an applying authority within a defined period of time can make assistance impossible. A difference between the above-defined prescription and the presented example relies on the final effect of the expiring time for prescription, which in public law is considered *ex officio* and without a possibility to resign from their binding influence.

The same directive lays down a special rule that settles a conflict between national laws on prescription. According to its Article 19 paragraph 1, questions concerning periods of prescription shall be governed solely by the law in force in the applicant Member State. The main reason for this provision is to simplify the existing rules in the area of suspension, interruption and prolongation of periods of prescription.[74] Although the directive does not formulate its own prescription provisions directly, the EU legislature recognises the existence of this institution in national legislations and seeks a solution that reconciles the contradictions at the EU level between them.

Positive regulation of prescription in European administrative law creates only one sphere of this institution. The second is linked with the jurisprudence of the ECJ on the basis of domestic prescriptive rules. Because of an absence of general provisions on prescription at the level of EU law, the ECJ allows the application of national rules on prescriptive periods under the indirect effect of national law on EU law. The ECJ insists that the length of the prescriptive periods should take account of the balance between allowing the competent national authorities to handle irregularities causing damage to the Union budget and the requirements of the certainty and stability of legal transactions. In concrete judgments, the ECJ has assessed national prescriptive periods as too short,[75] proportionate,[76] and too long[77].

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[73] See more J. Olszanowski, Realizacja wniosku o odzyskanie należności pieniężnych in J. Olszanowski, W. Piątek (eds), *Współpraca państw członkowskich UE przy odzyskiwaniu wierzytelności podatkowych* (Wolters Kluwer 2016, Warszawa) 143–144.

[74] More detailed rules than a general provision are located in Article 19 paragraph 2 of Directive 2010/24/EU. Any steps taken in a requested Member State in the recovery of claims, if they had been carried out on behalf of the applicant authority in its Member State, would have an effect in the applicant Member State insofar as that effect is in this State concerned.

[75] In the judgment *Taricco II,* the ECJ, granting Member States the right to set rules for limitation of the fulfilment of obligations under art. 325 TFEU stressed that the legislator shall ensure that the national prescription system does not lead to impunity in a significant number of cases of serious fraud in the field of VAT. See C-42/17, *M.A.S., M.B. with the participation of Presidente del Consiglio dei Ministri,* EU:C:2017:936.

[76] In the opinion of the ECJ, a 3-year prescriptive period may allow every average taxpayer enforce his or her legal rights to effectively in the Union's legal order. See C-472/08, *Alstom Power Hydro against Valsts ieņēmumu dienests,* EU:C:2010:32.

[77] The 30-year prescriptive period for disputes concerning the refund of unduly collected refunds, which are provided for in Regulation No 2988/95, was assessed negatively by the ECJ. See joined cases C-201/10 and C-202/10, *Ze Fu Fleischhandel GmbH and Vion Trading GmbH against Hauptzollamt Hamburg-Jonas,* EU:C:2011:282.

The ECJ allowed the possibility of applying, by analogy to disputes relating to the refund of unduly paid refunds, prescriptive periods laid down in national law, provided that their application remains the result of a sufficiently foreseeable judicial practice, which should be verified by the national court.[78] This judgment is of particular importance in those countries wherein, in the absence of specific solutions regarding prescription in administrative law, they apply regulations from other areas, including primarily civil law.

VII Conclusions

Prescription is a legal institution, not only typical of civil law but contemporarily known in all branches of law, including administrative law, both at the European level as well as domestic legal orders. The history of this institution, the same as the history of administrative law, is less developed in comparison to civil law and for that reason has weaker theoretical grounds. A visible proof of this thesis is clearly recognisable in Germany, where prescriptive regulations from civil law find supplementary application in administrative law. It does not mean that administrative law does not need solutions that would be helpful for legal institutions to adapt to practical requirements. Prescription, as an institution wherein expiry of the defined time leads to a loss of rights and obligations as well as entitlements for individual entities, is one of the time-oriented institutions of law and is necessary for all branches.

Contemporarily, both in domestic and European administrative law, the general regulation of prescription is not known. There are only selected provisions in special areas of administrative law, such as planning law in Poland and England, water law in Poland or social benefits in Germany. In some countries it is clear that the rules of prescription are implemented in new legal branches, such as medical supplies in Germany or in new statutes that are adjusting traditional administrative law branches, such as the new water law in Poland. This tendency can justify the thesis on the gradual increase of prescription in national administrative law. It is coherent with the axiological grounds of this institution, and with the need to synchronise legal order with contemporary challenges of economic demands.

In answer to the question of implementing general laws on prescription in administrative law, it is not possible to give a reasonably positive or negative explanation for all domestic and European legal orders. It is noticeable that, in some countries, for example Poland, prescription is implemented in new areas of administrative law by the legislature. In such circumstances, a general law could be more transparent than only selected provisions. In other countries, where the process of implementation is not developed, the same proposal would not be necessary or understandable. If there are no regulations connected with a special normative institution, there is no need to formulate general provisions for its functioning. It does not mean that prescription should not be present in select areas of administrative law, where the relationship between law and time is intensive.

[78] Ibid.

Observing a general tendency in Europe, the expiry of time will affect administrative law in a deeper way. This process is connected with the increasing speed of the legal market. Therefore, in the future, the above-mentioned answer could be insufficient, and we would need this kind of common regulation in many domestic legal systems as well as in European administrative law. Prescription will have a significant importance, not only from the theoretical but, above all, from the practical point of view.

VIII Summary

This paper's analysis is devoted to an institution that is typical of civil law but has its own significance also in administrative law. Prescription, as an institution which, after a defined time has lapsed, leads to the loss of rights, both obligations and entitlements for individual entities, is one of the time-oriented institutions and is necessary for all branches of law. Observing a general tendency in Europe, such expirations of time will affect administrative law in a deeper way. Therefore, in the future the answer to the necessity for implementing a general regulation of prescription within administrative law could be unambiguously positive and we would need this kind of common regulation in many domestic legal, as well as in European administrative law.

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CONTENTS