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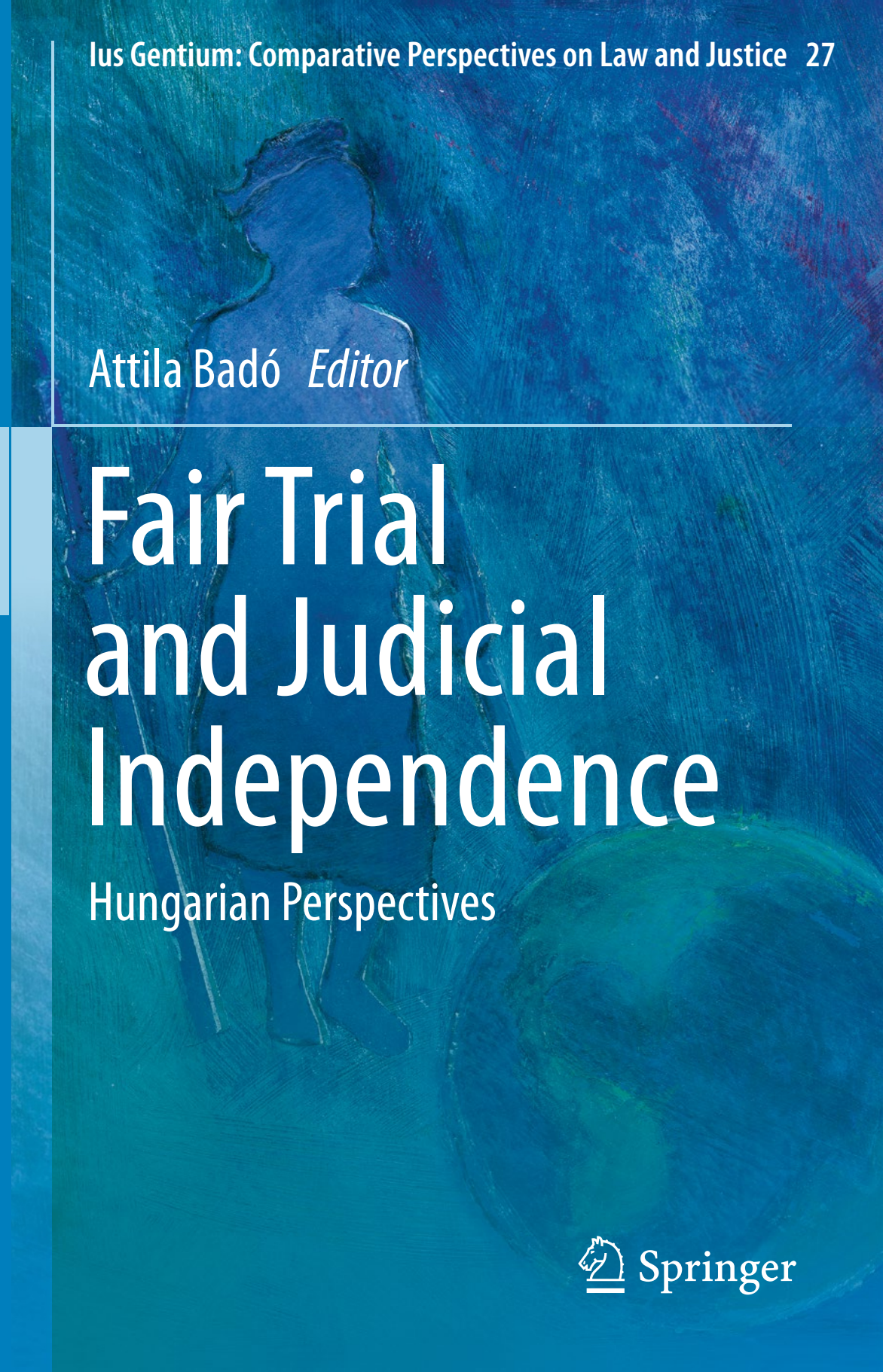

Attila Badó *Editor*

Fair Trial and Judicial Independence

Hungarian Perspectives

Springer

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Attila Badó
Editor

Fair Trial and Judicial Independence

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Editor
Attila Badó
Faculty of Law
University of Szeged
Szeged, Hungary

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Foreword

I. Fair Trial and Judicial Independence-Current Issues in Hungary

Authors of this book were driven to conduct a comparative analysis of judicial independence and fair trial by events unfolding in Hungary in recent years. These events prompted the authors to contrast the status of the Hungarian judiciary with international standards and trends, thus attempting to present an objective account. Since the first free elections in 1990, the judiciary in Hungary was subject to restructuring at multiple stages. The legislative intention during the reforms reinforced by the historical burdens of the one-party rule, the expectations surrounding the European integration process as well as a rare consensus among political parties was to safeguard judicial independence and create guarantees of fair trial.

The most comprehensive judicial reform was introduced in 1997 and ended the administration of courts by the Ministry of Justice, these tasks being transferred to a National Council of Justice. After heated debates concerning the composition of the Council, the National Assembly finally decided in favour of a body with a majority consisting of judges but also including representatives of other Government branches. Accordingly, the Council was composed of nine judges, the Minister of Justice, the Chief Prosecutor, the Chairman of the Hungarian Chamber of Attorneys and two members of the National Assembly designated by the National Assembly's Committees on Constitutional and Judicial Affairs and on Budgetary and Financial Affairs with the President of the Supreme Court acting as its Chairman. Right from its inception, the Council's activities were subject to severe criticism not only from judges and legal academics but frequently also from politicians. What one can say with certainty is that the existence of the Council enhanced both the opportunities and responsibilities of the Hungarian judges and marked the apex of a decade-long struggle for the institutional independence of courts.

Critiques of the Council – regardless of their approach and background – all contributed to its fundamental reform which none of them has foreseen or intended.

Zoltán Fleck, one of the authors of this book, as an ardent critique of the Council previously wrote:

> 'Hopefully in ten years our affairs will be handled by a judiciary the structure of which from the exterior looks confusingly similar to the present one. However, deep in the details it will show the consequences of changes resulting in the expansion of judicial independence, the birth of a responsible administrator of justice, and rendering its functioning more transparent, controllable and efficient'.[1]

The 2010 parliamentary elections brought a sweeping success for the centre right, giving it a qualified majority enough to rewrite the Constitution excluding the opposition. Even though the first news reports only alluded to a readjustment of the composition and rules of procedure of the Council, it soon became clear that the new Government will take on a significant restructuring of the judiciary in the framework of the establishment of a new constitutional order.

With the adoption of the new Fundamental Law and Law № CLXI of 2011 on courts of justice, the Council was replaced by a new system for the administration of the judiciary. The central administration of the judiciary is now entrusted to a National Office for the Judiciary (NOJ), its powerful President and the National Judicial Council (NJC) as a supervisory body.

One of the lines of criticism levelled against the former Council was the troubled relationship between the Council and its Office. The 2011 reform attempted to address this issue by a change in roles: an Office was set up under the strong individual leadership of its President to exercise most prerogatives of judicial administration, together with a supervisory body composed of judges with limited powers and without a meaningful influence on actual decisions. The President of the NOJ is elected by the National Assembly with a two-thirds majority for a 9-year period: her strong political mandate and long term in office makes her position obviously more relevant than that of the NJC, its members[2] or its chairmen, a position that changes based on a 6-month rotational system. The new institutional framework in itself corresponds to one of the European trends in the administration of the judiciary: it places the administration of the judiciary in the hands of judges (only judges are eligible to be elected as President of the NOJ). As regards the composition of the NJC, it goes even further than European standards would require: instead of a majority of judges, it provides for an exclusive membership of judges since no other branches of Government or legal professions are represented. However, far from being praised for strengthening the institutional independence of courts, the rapid introduction of the new institutional structures and the political environment prompted many observers to complain about the dangers of political influence in the judiciary as the first elected President of the NOJ is a close relative of a prominent member of the ruling party. The second reform of judicial administration since the democratisation of Hungary was also characterised by a lack of consensus between governing and opposition parties (a phenomenon that

[1] Zoltán Fleck: Bíróságok mérlegen. Pallas Tudástár, 2008, 17.

[2] Members of the NJC are elected for a 6-year term.

marred the whole process of constitutional reform in general), and as a consequence, the restoration of status quo ante has become an item on the political agenda of the centre left opposition.

The Government argued in favour of the reform citing the necessity to speed up judicial procedures and to increase efficiency, while the opposition feared the end or serious curtailment of judicial independence. The opposition was convinced that the real objective of the reform was to provide for an omnipotent President of the NOJ who – due to a lack of automatic case allocation schemes – is able to influence individual judicial decisions through the exercise of her powers related to judicial appointments, promotion and other administrative prerogatives. Another source of concern was a provision in the Fundamental Law that enabled an elected President of the NOJ to stay in office even after the expiration of the 9-year term if no candidate receives the support of a two-thirds majority required for the appointment in the National Assembly.[3]

The debate on the administration of the judiciary was not confined to Hungary: it shared the fate of the debates on the constitutional reform and the new media regulation by attracting the interest of international press. The dismissal of the President of the Supreme Court before the end of his mandate and the forced retirement of all judges over the age of 62 further increased worldwide scrutiny and contributed to a professional exchange of views on judicial independence. The Hungarian judicial reform received unprecedented international attention.

A number of constitutional lawyers and journalists abroad declared judicial independence in Hungary dead. In return, the Hungarian Government accused them of inciting hysteria and pointed out that courts remained independent and were not subordinated to the executive.[4]

A comprehensive opinion on the matter has been delivered by the Venice Commission, an advisory body of the Council of Europe composed of leading constitutional lawyers. The Venice Commission expressed a strong preference for the fine-tuning of the previous system of administration of the judiciary as opposed to the creation of a new framework that is less equipped to guarantee judicial independence. The Venice Commission was concerned about the unusually broad powers of the President of the NOJ that was quite uncommon in Europe and was coupled with a significant weakening of previous privileges related to self-Government of judges. The opinion explicitly objected to the prerogative of the President of the NOJ to reassign cases from one court to another as she pleases as a violation of the right to a lawful judge. The opinion also singled out the inadequate and vague description of the President's powers that gave her a large room of manoeuvre and made the exercise of supervisory functions within the judicial administration or by the National Assembly all but impossible. In addition, the Venice Commission had serious reservations about the NJC, the body that

[3]The relevant provisions of the Fundamental Law were repealed on 17 July 2012.

[4]Guy Taylor: Hungarian leaders see hysteria among critics of reforms. In: *The Washington Times*, 5 June 2012.

was supposed to monitor and control activities of the President of the NOJ: the representation of other legal professions was not provided for, and none of the important powers relevant for the administration of the judiciary was assigned to it.

Following up on the recommendations made by the Venice Commission, the Hungarian National Assembly amended the legal framework for the judiciary on several points. The most significant changes relate to the office and powers of the President of the NOJ: her prerogatives were limited and her activities were placed under stronger parliamentary and professional scrutiny. Regulations issued by the President became subject to review by the Constitutional Court, and the President's right to initiate disciplinary procedures was confined to court superiors appointed by the President.[5] Some of the powers of the President were transferred to the NJC, and for the exercise of the remaining powers, the assent of the NJC was now required.

Notwithstanding the amendments, international organisations continued to express reservations. In September 2012, the International Bar Association's Human Rights Institute issued a very critical report about the judicial reform in Hungary condemning the dismissal of the President of the Supreme Court, the exclusion of the opposition from the process, the forced early retirement of judges as well as the limitation of the scope of constitutional review by the Constitutional Court (e.g. the abolishment of actio popularis).[6] Constitutional scholar Kim Lane Scheppele, a Professor at Princeton University with previous research experience in Hungary, also follows the 'revolutionary' changes and voices her concerns about the constitutional and judicial reforms in publications raising international attention.[7]

Supporters of the reform process usually react to such criticism with incomprehension and hostility as exemplified by an anonymous comment to a short online article on Hungarian judicial reform[8]:

> 'And who appointed the "Venice Commission"? And what qualifications do the members have that they feel entitled to pronounce on a constitution drafted by a duly elected Government? The situation would appear to be that Communist era judges needed to be replaced because of their biased views.

That has been empowered by a democratically elected Government. Why is that a problem?'

The Hungarian Government attempts to deal with accusations about the breach of due process by pointing to other jurisdictions where similar solutions are already in place. In return, the opposition refers to cases of judicial appointments despite

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[5]This generally includes inter alia presidents and vice presidents of courts on all levels but excludes court superiors of the Curia (formerly known as the Supreme Court) and ordinary judges not appointed to any position by the President of the NOJ.

[6]Courting Controversy: the Impact of the Recent Reforms on the Independence of the Judiciary and the Rule of Law in Hungary, International Bar Association Human Rights Institute, September 2012, available on www.ibanet.org

[7]https://lapa.princeton.edu/newsdetail.php?ID=63#english

[8]Jonathan Rayner: Hungarian judicial reforms slammed as breach of rights, 19 March 2012, available on http://www.lawgazette.co.uk/news/hungarian-judicial-reforms-slammed-breach-rights

contrary recommendations by judges or the arbitrary reassignment of criminal procedures involving opposition politicians to other courts, thus painting a picture of a judiciary that is already politically biased.

It is not the objective of our research team to act as an arbiter in the political debate about the Hungarian judiciary. The debate, however, provides an opportunity for us to approach issues related to judicial independence and fair trial from a different angle. The present political situation in Hungary highlighted for us the importance of institutional structures and guarantees related to judicial independence and the necessity of a more precise definition of principles usually attached to the notion of a fair trial.

Consequently, this book aims to present problems and model solutions through a Hungarian perspective using a comparative methodology in areas that currently present professional and political challenges.

II. Fair Trial and Judicial Independence in an International Context

International comparative analysis of the judiciary indicates a significant convergence that has emerged over the past several decades. Essentially, western civilisations' legal systems are manifestly converging, which – along with having been influenced by ongoing democratisation processes in former Eastern bloc countries, as well as by European political integration – is due above all to the establishment of various international agreements. At first glance, the virtually countless number of international treaties touching upon – or specifically devoted to – basic principles of judicial administration of justice suggests that differences on the level of principles are exceptional. However, a strictly positivist analysis focusing only on international treaties, national constitutions or legislation governing the operation of the judiciary would inevitably lead astray.

Such approach would only provide an overview of general concepts – which are often quite broad and unsophisticated – while the criteria for the implementation of these concepts would remain vague. Despite the fact that practically all existing constitutions and international treaties related to the judiciary provide a definition of the term 'independent and impartial court', it may well be useless, because requirements for the implementation of the concept may significantly differ from one legal system to another. We encounter the expression of 'fair trial' (due process, procès équitable, faires Verfahren) more and more frequently in different international agreements, constitutions and legislation. It arguably has become the most important general clause and a basic constitutional principle for legal systems throughout the world – but it is still interpreted in a wide variety of ways by lawyers, judges and members of constitutional courts. It is one of those indefinite and vague terms, the utilisation of which has nowadays become requisite at the supranational level, followed by its inevitable integration into national legal systems. Although the declaration of the right to a fair trial often only generates an illusion of legal reform, its forward-pointing and developmental role is undeniable.

The success of the concept was ensured by the United Nations' International Covenant on Civil and Political Rights (ICCPR) and by the European Convention on Human Rights (ECHR), as well as national and international judicial practice related thereto. It can be said that 'fair trial' is a universal principle that is in one form or another binding for virtually all legal systems and which – in spite of differences in interpretation – enables a given country's judiciary system or a specific judicial procedure to be assessed by the outside world. In addition to international agreements, the term has also found its way into national constitutions and procedural codes. In many countries – including Hungary – constitutional courts had an active and significant interpretative role, constantly expanding the scope of the concept.

Notwithstanding the differences in the interpretation of this basic principle, the role played by the concept of 'fair trial' in terms of expediting the convergence of different legal systems is undeniable. Naturally, the convergence process is most speedy where different legal systems are forcefully tied together by international courts designated to interpret the principle. The European Court of Human Rights, for example, has such powers, but Courts of the European Union also create ties between jurisdictions that belong to common law and Romano-Germanic legal systems prompting a professional discourse on the so-called mixed legal systems. The European Court of Human Rights is of exceptional importance in Europe, because it has a quite significant role in establishing the most basic, fundamental standards concerning the judicature, as well as in the harmonisation of constitutional principles. Jurisprudence unfolding in connection with 'fair trial' indicates the development of a global principle that, as the dominant general clause of judicature, also encompasses traditional constitutional principles. Following the ratification of the Lisbon Treaty and the Charter of Fundamental Rights of the EU, the established case law of the Court of Justice of the European Union is a noteworthy element in this system. Through the jurisprudence of the Luxembourg Court, one can gain insight into the common constitutional heritage (or tradition) of the Member States, which is a derivative of international human rights instruments as well as constitutional principles and protections for human rights codified in the Member States' constitutions. This heritage or tradition is often used as a reference in the analysis of European regional human rights protection schemes.

Judicial independence may be conceived as an element of 'fair trial' similar to the right to defence and the presumption of innocence that are also components of an umbrella principle. While in the past 'fair trial' had a limited meaning as a procedural principle, nowadays it has emerged as the most important substantial principle related to the functioning of the judiciary.

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Szeged, Hungary Attila Badó

Contents

About the Authors

Attila Badó (Editor, Author) is a Professor of Law and the Director of the Institute of Comparative Law at the University of Szeged in Szeged, Hungary.

Main Areas of Research: Comparative law, judicial independence and the administration of justice. He is the author of numerous books, textbooks, articles and essays. His work has been published in Hungarian, English, French as well as German. Professor Badó has been the recipient of many distinctions, including the 'Pro Scientia Gold Medal', awarded by the Hungarian Academy of Sciences for excellence in mentorship and commitment to undergraduate research activities, and he also received the French honorary title of 'Officer of the Order of Academic Palms' (Ordre des Palmes Academiques) for his contributions to academics and education.

Mátyás Bencze is an Associate Professor of Law and the Vice Dean for International Affairs at the Faculty of Law at the University of Debrecen in Debrecen, Hungary. From 2000 to 2005, he served as a trial judge in the Criminal Court of Hajdú-Bihar County, Hungary.

Main Areas of Research: Legal sociology and comparative law, with special emphasis on sociological problems and the quality assessment of adjudication. He is the author of a book, a textbook and numerous articles and essays. His work has been published in both Hungarian and English. He has participated in several international cooperations and research projects with academics from other Eastern European countries, which were aimed at exploration of problems of adjudication and legislation in the region. He is also a member of a team at the Hungarian Supreme Court which analyses the judicial practice of Hungarian courts.

János Bóka is a senior lecturer at the Institute of Comparative Law at the University of Szeged, Faculty of Law in Szeged, Hungary. He attended high school in Hungary and in the United States and obtained his law degree at the University of Szeged in 2001. Between 2001 and 2003, he worked as a junior lecturer at the Department of International and EU Law. Until July 2009, he worked as a legal and policy advisor at the European Parliament. He obtained an MA degree in European Integration

and Development at the VUB (Vrije Universiteit Brussel, Brussels, Belgium). He defended his Ph.D. thesis in 2012 at the University of Szeged.

Main Areas of Research: He has published in Hungarian, English and French in the area of international and EU law as well as comparative law. His major fields of interest are European integration, judicial politics and comparative law.

Samantha Joy Cheesman is an Assistant Lecturer at the Institute of Comparative Law. She started her legal career by reading law at Bristol University. After graduating with an LLB (Hons) degree, she continued her education by studying for an LLM in International Human Rights Law at the University of West England (UWE). She wrote a thesis focusing on the rights of Roma women to access health and education services in Hungary. She is currently writing her Ph.D. on the right to a fair trial.

Samantha has also successfully trained as a Barrister (BVC) and has been called to the Bar in the United Kingdom.

Main Areas of Research: Human rights, with particular focus on minority and fair trial rights. To this extent, Samantha won the Graham Challis European Scholarship from the Honourable Society of Gray's Inn to undertake specialist human rights research with the Mental Disability Advocacy Centre. Samantha's academic publications include eight articles and two book chapters.

Zoltán Fleck is a Professor of Law and the Head of the Department for Sociology of Law at Eötvös Lóránd University in Budapest, Hungary. He has participated in several international research projects and has served as an expert of judicial system.

Main Areas of Research: The court system, the judiciary, sociology of lawyers and legal consciousness. He is the author of seven books and numerous articles, several of which have been published in English.

Péter Mezei is an Associate Professor of Law at the Institute of Comparative Law at the University of Szeged, Faculty of Law, in Hungary.

Main Areas of Research: Digital copyright law and comparative law, with special emphasis on the German and African countries' and Chinese legal systems.

He is the author of two monographs, several book and textbook chapters, as well as numerous articles. His work has been published in Hungarian, English and German. He was recently awarded the Pro Scientia Prize for the Best Published Ph.D. Dissertation of 2010–2012 from the Professors' Board of the Szeged Law Faculty. Since 2007, he has regularly held lectures at the University of Turku (Finland), the University of Jean Moulin Lyon 3 (France) and several universities in the United States.

Szonja Navratil received her law degree in 2000 from the Faculty of Law at Pázmány Péter Catholic University in 2000. She began her career working as a lawyer candidate and later on as a professional lawyer. In 2008, she received a degree as a sociologist from Eötvös Loránd University in Budapest (ELTE). During this time, she began teaching law and sociology at the Eötvös Loránd University. She

continues to hold lectures at the university and is also involved in academic research, working as a research fellow at the university and a researcher at the Eötvös Károly Institute (EKINT).

Main Areas of Research: Judicial power, legal education and anti-discrimination, publicity in judicial administration and the administration of justice, with special emphasis on the topic from a sociological perspective.

Márton Sulyok is a graduate of law, a Ph.D. candidate and a Junior Lecturer at the Department of Constitutional Law at University of Szeged, Faculty of Law in Hungary.

Main Areas of Research: The right to a fair trial in the changing world of the information age, with respect to the right to privacy, as well as emerging governance theories and the changing façade of the right to a fair trial in different legal systems throughout the world, with respect to the transparency of the justice system and the protection of fundamental rights. In his research he benefits from the well-founded knowledge of the US constitutional law acquired through the completion of a joint American Legal Expert certificate programme organised by the University of Toledo, OH, College of Law, and the University of Szeged, Institute of Comparative Law. He speaks fluent English, French and German.

Tamás Sulyok is an Attorney-at-Law and an Adjunct Lecturer of the Department of Constitutional Law at the University of Szeged, Faculty of Law in Hungary, and the constitutional status of the legal profession in Europe and in Hungary. In his research he makes use of his specialised postgraduate degree in European Community Law. Besides his academic interests, he is engaged in diplomatic relations and acts as the honorary consul for the Federal Republic of Austria in Hungary. He speaks fluent German and also English.

Main Areas of Research: The right to a fair trial (the right to defence counsel) and the constitutional status of the legal profession in Europe and in Hungary.

In his research he utilises his specialised postgraduate degree in European Community Law. In addition to his academic interests, he is also engaged in diplomacy and serves as an honorary consul for the Federal Republic of Austria in Hungary. He speaks fluent German and English.

Kata Szarvas is an Assistant Researcher at the Institute of Comparative Law at the University of Szeged, Faculty of Law in Szeged, Hungary.

She studied Criminal Justice (BS) and Criminology, with a core minor in Psychology at Indiana University (Indiana) in the United States; she later attended Oxford Brookes University and holds a degree in International Relations. She has been working as a professional translator for nearly a decade and is currently enrolled in the Anglo-Saxon Law and English Legal Translation Training Program at the University of Szeged.

Main Areas of Research: The legal system of the United States, judicial administration, family law, psychological profiling, theories of criminal behaviour and the field of comparative law.

Part I
Fair Trial and Judicial Independence in a Comparative Perspective

Chapter 1
A Comparative Analysis of Judicial Power, Organisational Issues in Judicature and the Administration of Courts

Zoltán Fleck

1.1 Introduction

The prevalence of personal freedom and expectations with regard to a fair process require a state of legal organisation to be a system that increases the likelihood of achieving these two concepts. Because of the special significance of the freedom of judicial decision, judicial autonomy and personal freedom, the quality of work of the judicature is simultaneously an indicator of the quality of the constitutional state. Practical and jurisprudential problems and political disputes related to pretrial detention demonstrate the significance of the question. However, the fact that organisational ties of judicial administration are hidden behind all of these often remains in the dark (Róth 2003).

For example, how and by whom judges responsible for weighing and ordering pretrial detention are selected are not irrelevant, nor are the type of administrative system governing their selection and the guarantees that exist to prevent the evaluation of unwanted factors. These belong under the direct effects of judicial organisational regulation. The organisation conditions the prevalence of these rights indirectly as well: the complex system of internal independence, organisational and managerial efficiency and quality affect practice, the quality of procedures and fairness in countless ways. It is difficult to deny that the anomalies that bar fair proceedings are closely connected to the shortcomings of administrative regulation. The contradictions and limitations of the Hungarian judicial administration model are obvious (Fleck 2008a). A comparative overview can confirm this experience and can shed light on further tensions that make the developmental potential of the model doubtful.

Z. Fleck (✉)
Faculty of Law, Department for Sociology of Law, Eötvös Loránd University, Egyetem tér 1, 1053 Budapest, Hungary
e-mail: zfleck@ajk.elte.hu

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The organisational system of judicial administration bears exceptional significance from the perspective of the quality of rule of law. One of the most formidable elements of the internal and external adjudication of a state is the intactness of the third branch of power, its effectiveness and its ability to guarantee individual rights. The conspicuously high level of inconsistency, the dynamism and the need for organisational change evident in the administration of the courts today teaches several lessons. On one hand, the classic principle of separation of powers and the stability of judicial independence do not rule out that the administrative solutions considerably deviate from one another. On the other hand, the organisational models are forced to adjust to environmental challenges, their own operational experiences, incidental failures and internal tensions. This process of adaptation is driven by well-defined principles: accountability and transparency, both having become equal to independence. The transformational crisis of the post-communist states coincides with the new wave of change in modern rule of law states. As a result, they must not only simply realise difficult to harmonise programmes but also command naturally nonconcurrent processes at a much faster pace. The codification in itself of the formal guarantees of judicial independence reveals nothing about the success of these processes; the economic, political, mental and cultural conditions of the prevalence of independence cannot be produced in a proactive manner. This process is seemingly more prolonged than the deployment of the organisational models. The basic lack of understanding concerning accountability stems from the fact that it is part of a system of expectations that has gained significance in modern constitutional states during the past decade and has become such a principle that has necessitated institutionalism. This *wave of accountability* hit the new democracies at a phase when the internalisation of the classic values of independence was underway. The sometimes astounding, while other times latent, causes of failure are complex, but organisational regulation reflects the majority of these perfectly.

1.2 The Significance of Judicial Power and Organisational Issues

The significance of judicial power in a constitutional state can hardly be debated; the guarantees of freedom and the predictability provided by an independent judiciary are the central hallmarks of a modern democracy. Just as a citizen with rights, the capitalist economy is dependent upon security and guarantees and, as a final measure, the protection of independent forums. Transitional societies' efforts to build constitutional states accurately demonstrate the importance of this: attempts to establish judicial and organisational independence did not lag behind, but traditions and power mechanisms having developed under dictatorships and limited autonomy brought considerable deviations in the uniformity of principles.

Diversity emerged in organisational structure, as well as in the administrative model. Smaller or greater organisational changes and reforms are typical of mature

democracies as well; the process of adapting to economic and social changes arrived at the regulation of administrative structure and competence. These reforms aim to establish an effective, accessible, transparent and responsible system, without jeopardising judicial independence and instead further developing it. Although the scope and volume of the transformations is difficult to measure, with regard to European nations, the European organisation – European Commission for the Efficiency of Justice – which was established to support the efficiency of judicial administration provides an insight. According to the Commission's latest report, comprehensive judicial reform is currently underway in 15 countries, and independence and transparency are under reform in 9 countries; in 40 countries, organisational and structural changes concerning the distribution of power are currently underway, and public prosecution is undergoing reform in 7 countries (CEPEJ 2010). Both new and older democracies can be found among countries undergoing reform. Even more changes are occurring in the legal, infrastructural and financial areas of judicial administration. This dynamism can be explained by the global, well-defined characteristics of the challenges. Thus, although the world of modern constitutional states is characterised by significant divergence, the directions (independence, transparency, accountability, efficiency) of the changes are distinct. These characteristics are what international organisations advocate as well. Global challenges (the increased significance of the legislature, difficulties in institutionalising accountability, the needs concerning the efficiency of management), as part of the transformational crises of post-communist societies, add an interesting twist. Here, the contradictions and shortcomings concerning the basic principles of the state's organisational system cannot be separated from the reform of judicial administration (TÁRKI 2009).

The significance of the question, the scope of changes, the institutional environment and deviation from traditions all have consequences in terms of methodological approach.

1.3 The Perspective Framework of the Comparison of Judicial Power

The broader perspective concerning judicial organisational solutions emphasises homogeneity and defines similarities in trends and the fading differentiating characteristics of traditional legal families (convergence). This approach has helped the formulation of international and professional recommendations that enforce principles with relevance to the courts. However, in order to interpret the differences, this approach needs to be set aside. After observing the political benefits of global recommendations, in order to get a valid picture of the sociological nature of judicial administration, comparison on a regional, a subregional and on a micro-level is also necessary.

Following global recommendations necessary for commanding great transitions, through closing the formal state of building rule of law, the time of understanding can return. And this can provide an opportunity for the failures and their causes to be revealed. Therefore, in this area of comparative law, expedience is achieved by 'focusing' often: we must turn to interpreting history and the internal balance of power, while keeping general, European expectations, legal cultures and relevant organisational norms in mind. As the experts of the field summarised: 'We are not convinced that any one indicator would serve as an ideal proxy for the myriad conditions that lead countries to adopt judicial councils. Our preliminary conclusion, then, is that there is no evidence that judicial councils promote independence' (Garoupa and Ginsburg 2009, p 130).

The exploration of the specifics of individual cases in post-communist states, especially the Visegrad Four – which in many respects have exhibited similar historical and organisational dilemmas – can give us a chance to not just look, but to see as well. During the past few years, analyses have emerged enabling policy distribution that is based on the perspective and corporative needs of professional judicial organisations (e.g. Consultative Council of European Judges) to be overcome. In fact, the need for a differentiated approach has also become evident in international recommendations that account for regional characteristics (Fleck 2008b).

A solid theoretical foundation could help the normativism of global comparison and epistemological uncertainty, but intermediate theories (e.g. theory of judicial independence, organisational theory of courts) do not support the analysis of the interwoven organisation of the judiciary. Courts apply theories supported by empirical research focusing on long-term effects, litigation trends and patterns in the use of courts to interpret social change (Boyum and Mather 1983). The increase and expansion of judicial power have been the primary areas of research during the past two decades, which has resulted in historically inspired theoretical foundations (Feely et al. 2008).

Analyses of dispute settlement procedures focus on the role of the third party who solves the problem (theory of the third party) (Black 1998). Analysis and interpretation of the court as an organisation, the distribution of power, the hidden framework beneath the hierarchically structured formal world, communication channels and decision-making processes are the areas organisational psychology and legal sociology are concerned with. Theories reflecting on these problems should offer a conceptual framework for describing organisational models, for aiding the analysis of actual operation, for clarifying the sociological relationship between hierarchy and independence and for clarifying the corporativism phenomenon.

In the following, I argue that legal culture and changes in judicial power do not leave judicial administration untouched; these in fact institutionalise administrative modifications. Aside from this, two high-impact elements cannot be overlooked: inherited factors and international influence. Informal practices that significantly influence legal culture must be taken into account when making formal structural changes. Otherwise, it is perplexing and incomprehensible why widespread, ambi-

tious and costly organisational reforms led only to limited results (Solomon 2007). In most cases, formal changes were not enough to shift the attitude, thinking and mentality of the judicial board. We can address institutional failures with answers that are cultural in nature. Attitudes and informal norms concerning legal regulation are more stable than the institutions. 'Local legal cultures' remain untouched or prove to be survivors, for example, the role of judicial management and the relationship between the courts and the prosecutor. For example, Peter Solomon highlights the marked rarity of acquittal in Russian courts and the closeness of the positions of the judge and the prosecutor (Solomon 2007). Literature on the failures of regulating law highlights that informal norms are capable of undermining both the law itself as well as the operation of formally established organisations (Galligan 2003). This is especially true in states that adopt institutional models from other legal cultures. The institutions guaranteeing judicial independence are especially dependent upon the mental and habitual capabilities of independence of the judges. These obviously do not develop through a simple legislative order. An organisational solution for judicial self-governance is without tradition in Central European legal systems. An overview of the organisational rules of the courts also suggests that such unwritten norms and capabilities cannot be expected of new democracies. In such states, it is especially true that only power imbalances are capable of maintaining operational balance. Hence, the common misunderstanding is that judicial independence and other constitutional expectations of the judiciary can only be achieved through complete administrative autonomy. This faulty logic was followed by international recommendations that considered complete judicial self-governance one of the main guarantees of establishing rule of law (Piana 2007).

Despite the former Latin American failures, the absence of democratic traditions and weakness in the character of independence were interpreted as organisational traits that could be overturned by switching to a different model. Following systemic changes, the scope of the states was defined by 'highly intensive globalisation', the exportation of organisational models and the adoption of legal institutions (De Sousa Santos 2002).

From the history of Hungarian reform, clearly the political elite's lack of concepts and administrative weaknesses ceded the role of model creation to judicial organisations, which in turn effectively advocated its own corporative interests. Strengthening judicial power organisationally emerged on the democratising half periphery as a programme of democracy consolidation. The corporative independence of judicial organisation is in itself the phenomenon of the crisis caused by state control and the distribution of powers and not the answer to it.

1.4 Challenges and Changes in the Administration of Courts

Comparative analyses of judicial administration in transitional societies focused on constitutional courts, on one hand because of more accessible empirics and on the other hand, because of its obvious constitutional-building effect and relative

success. Meanwhile, the effect constitutional courts of post-communist states had on everyday reality was a question addressed only much later (Zubek and Goetz 2010). Following studies that analysed judicial practices in individual countries, comparative analyses emerged about the post-communist Central European countries. These studies present all the advantages of a regional focus and serve as a valuable starting point for a multidimensional comparison and for the interpretation of the cultural elements of judicial administration (Matczak et al. 2010). This revolution in perspective and methodology was brought about by discovering the gap between formal institutional changes and changes in practice – in other words, legal sociological motivation made it possible.

Formerly, for states preparing for EU accession and for international organisations, the task was to ensure formal institutional compliance and monitoring. To achieve this, the traditional comparative legal approach was appropriate. Today, however, the constitution, the decisions of the constitutional court and the weak enforcement of European law have become the depressing reality (Falkner 2010).

The staggering enforcement of principles and the consequences which resulted from institutional solutions implemented with great exertion have opened a new chapter for analysis in the 'dead letter' countries. Aside from general problems in judicial administration (e.g. inconsistent practice, cases dragging on, preparedness of judges, absence of litigation culture), the faltered enforcement of expectations of independence and accountability manhandled the success of the quick transition. Emphasis and explanations shifted to various elements of legal culture (organisational culture, lawyers' traditions, following norms and litigation culture) (Hesselink 2001). Based on democratic transitions, European integration and international agreements that influence these, a slight convergence can be discovered in judicial administration, but significant differences in semantics are hidden behind similar terms. The constitutional setting of judicial independence is similar in nearly all countries' constitutions, but the enforcement of the conditions of independence varies. International agreements and international judicial practices do not offer guidance concerning organisational dilemmas that influence the prevalence of independence. The interpretation of independence and its application to organisational models is part of member state autonomy (Badó 2006). Convergence is suggested not only by agreements and constitutional declarations stressing the importance of independence but also by several trends in organisational regulation and legal practice.

Besides the persistence of traditional differences in the operation of judicial administration in different legal families, substantive elements have moved in the continental direction in United Kingdom, while continental legal systems have shifted towards the legal development of case law.

The spread of the Southern European judicial self-governance model was especially dynamic, and accountability – though often incompatible in many senses – became a distinctly general expectation. Transparency received an unquestionable role and organisational solutions to guarantee objectivity in the selection of judges received even more significance than in the past. However, the convergence of principles does not always lead to institutions becoming similar.

1.5 Stepping Out of Tradition

Considered the cradle of common law and characterised by institutions upheld by traditions, England has made significant changes in the organisational foundations of judicial administration. For literature concerned with judicial administration, this is important because it clearly shows the sociological forces behind organisational changes. In the past few decades in England, the legal profession – and especially the judicial board – has expanded significantly, and with this, the characteristics of the continental career system have emerged. In 1970, there were 356 full-time judges and by 2005 that number increased to 1,356. The dramatic increase was primarily in lower levels; the number of part-time judges increased from 132 to 2,414 in the same period. The expansion of the legal profession in general can also be sensed in the number of lawyers and law students (Bell 2006). In England, the part-time judge position is traditionally the starting point of training, the field of practical socialisation (education by practice). The need for internal training has existed since 1963 (sentencing discussions, sentencing conference), but the Judicial Studies Board was not established until 1979. But the need to adapt European human rights practice brought the real challenge. For long, administration did not follow continuous professionalisation, changes in organisational culture and the rapid expansion of the profession itself. Here, the importance of traditions is unquestionable. Operation depends on the personal independence of the judge and the dominance of informal rules; institutional independence is not imperative, and judicial power is not interpreted as a third branch of power.

After several decades of slow modifications, radical change in institutional regulation emerged at the end of the 1990s. With the enactment of the Human Rights Act in 1998, the courts found themselves in a new role. This role was much more political than the former and thus could be interpreted as an increase of power. The relationship between the judiciary and other branches exercising power changed (Malleson 2007). Earlier, the European Communities Act of 1973 meant a similar radical change, according to which judges were granted the power to repeal acts contrary to community law. In practice, however, this institution did not become significant and parliamentary sovereignty turned out to be unquestionable. But this too began moving towards change, not in the least resulting from the influence of the international judicial community. After time, the redistribution of power became irreversible. More intense exertion demanded administrative and managerial reform and procedural rationalisation. The report of Lord Wolf written in 1999 demanded more formality, professionalism, discipline and administrative effectiveness, based primarily on the principle that informal governance has become incompatible with the increase in manpower and workload. In the past, selection and administration resembled an exclusive club membership. Since 1994, application and the formal interview have existed, but the testing of judges entered as a foreign element. That said, selection was characterised as obviously lagging behind in comparison to both the public sphere as a whole and in comparison to the private sector. Strong social segregation became anachronistic with regard to changes in social structure and

mobility principles. The Ethnic Minorities Advisory Committee was established in 1991 within the framework of the Judicial Studies Board (after later reform, the Ministry of Justice operated as an advising body: Advisory Panel on Judicial Diversity).[1] By 2005, the Constitutional Reform Act[2] was born, which established the status of the Lord Chancellor, established the High Court and developed new rules of judicial selection.

The gradual transformation, which began earlier, was one of the major motives of constitutional reform. This also affected the internal relations of the judiciary. The far too direct connection between the branches of power became untenable; the symbolic representation of this was the tri-functional role of the Lord Chancellor (member of the Cabinet, head of the judiciary and the presiding officer of the House of Lords). The result of the transformation was a court that interprets his role like continental traditions do. The head of this branch presides independently, the President of the Courts of England and Wales – administration escaped from the grasp of government, and with this, independence strengthened in terms of organisational administration. The intermediary role of the Lord Chancellor became questionable. This came at a time when conflicts between the government and the courts were emerging.

The position was not simply filled by the 'first among equals' prestigious lawyer, but the position became political and could no longer be associated with the selection of judges and judging. Following intense debate, the Lord Chancellor (Lord Falconer) and the Lord Chief Justice (Lord Woolf) reached a consensus, which divided power between the courts and the executive. Cooperation and mutual consultation was required of the two branches of power. It required consensus in nearly all decisions, for example, the Lord Chancellor had the authority to decide on the number of judges but only after consultation with the Lord Chief Justice, because the traditions of partnership must be preserved. The Lord Chief Justice has the authority to take disciplinary action against judges, but the right to sanction requires consent from the Lord Chancellor. According to English perspective, 'two separate but equal branches working together to manage the court and the judiciary'. The informal, strict administration and the increased significance and responsibility of the courts, as well as the lack of permanent administration, would lead to administrative issues and would strain the power of senior, higher-level judges – who formerly had significant influence in the management of the courts. The selection of judges, considered the most distinctive feature of this legal family, underwent the most significant changes. Following open and intense debate, the supported solution agreed upon most closely resembles the Canadian model. The task was delegated to the Judicial Appointments Commission. The Chairman is a layman, so that he is not dominated by judicial or legal interest in the selection of successors. When judicial independence was strictly personal, organisational independence had no significant role – impartiality and neutrality of the judge

[1] See http://www.justice.gov.uk/index.htm

[2] See http://www.legislation.gov.uk/ukpga/2005/4/contents

were essential. The above changes forced the emergence of a new type of central administration: Her Majesty's Court Service was established. According to the report of this office, 'HMCS is an agency within the Ministry of Justice. We are responsible for managing the administration of the courts across England and Wales, with the exception of the Supreme Court. In order to do this, we work closely with partners across the criminal, civil, family and administrative justice systems. The 2008 partnership agreement between the Lord Chancellor and the Lord Chief Justice provides for the effective governance, financing and operation of HMCS to ensure the independent administration of justice. The agreement makes it clear that HMCS staff owe a joint duty to the Lord Chancellor and the Lord Chief Justice for the efficient and effective operation of the courts'.[3]

1.6 The Models of Judicial Administration

Competition between the branches of power is a key element of judicial administration and in judicial reform in general, i.e. laying out the functions of central administration. The solutions are quite varied, and consensus concerning the extent of the government's opportunity and responsibility does not exist. However, it can be said that a strong tendency is evident, according to which some administrative tasks are taken from the executive power. But a great deal of variety exists concerning authority, composition and the relationship to other branches of power. The division of authority and the separation of powers is a decisive factor concerning the operation of judicial administration as a whole. In transitional, democratising societies, the need for the establishment of judicial independence inclines handing over central administrative authority as a whole, minimising the chance of ever-important accountability. In comparative literature, the institutional establishment of independence is an analysed issue, rather than the prevalence of accountability. Based on experience, judicial councils having too much power can create a distinctive imbalance and ultimately develop an environment unfavourable for judicial independence. Judicial councils operating today have very different functions. The first and most obvious dividing line can be drawn between common law and continental legal systems (Garoupa and Ginsburg 2009). The model that developed in some of the countries in the southern region of the continent, those having experienced dictatorships, had great influence on Latin America through the mediation of international organisations. In countries that chose to preserve an external model, the logic behind establishing judicial councils was transparency and a more effective division of resources. They most typically received authority in the questions regarding the selection and promotion of judges, which is where governmental elements also surfaced. In the United States, many states have established the so-called merit commissions, which institutionalised the

[3] http://www.hmcourts-service.gov.uk/cms/files/HMCS_Annual_sReport2009-2010_web.pdf

traditionally political selection procedure, though such bodies obviously have less significance since selection does not operate as a career system. The establishment of judicial councils is spreading to the Third World as well: Egypt, Jordan, Lebanon, Morocco and Palestine have all stepped in this direction as a result of international pressure. In the following, we will analyse the judicial administrative systems of several countries from the central division of authority perspective. From endless opportunities and perspectives for comparison, I have highlighted central administration. This captures the relationship between the division of powers and the weight of judicial power and ultimately the connection between independence and accountability. Our basic hypothesis is that the defining dividing line is not between traditional ministerial (external) systems and administration built upon (internal) judicial councils. Rather, it is between complete separation and models built on the division of authority. The latter provides favourable conditions for independence and the balance of accountability. Therefore, it would be misleading to discuss southern and northern judicial models; less separates the Scandinavian judicial administration model from the German or Austrian system than from Hungarian or Romanian judicial organisation. During the past few decades, countries which preserved external administration have handed over significant authority to judicial organisations. The executive power has maintained significant authority in several areas in countries that chose judicial administration based on a judicial council.

1.7 External Administration and Judicial Participation

Traditions and the historical ways of development have a significant role. Switzerland, for instance, is in this sense an extreme example, because strong democratic legitimacy prevails over judicial power, political influence and liability to the parliament have not been questioned, the selection of judges and even their political careers are accepted, and prejudice to independence does not even arise. Dependence on certain ways, as well as historical traditions in less extreme circumstances, shall also be considered.

In Europe, the administrative models of Germany and Austria can be considered the most unambiguous versions of external administration. However, the disciplinary procedures against judges are carried out by judicial municipality organs in these countries as well, and these organs have certain powers in relation to the selection of judges too. The interpretation of German constitutionalism precludes the possibility of the executive power 'touching' the essential elements and the substance of judicial functions (decision-making). Strong constitutional traditions gave stability to the classical interpretation of the separation of powers, even in spite of challenges and a changing environment (increase in the significance of judicial power). A part of this tradition is that independence is not a privilege, but the institutional protection of judicial decision-making. Any interference with the internal relations of judicial work relating to establishing the content of decisions such as interpretation, the application of procedural tools, or the conduct of trials

is illegitimate. To these, only the special rules of disciplinary procedures can be applied, excluding any kind of executive influence. Different models are used within the country in connection with the selection of judges, and major differences exist among the provinces in this sense, but the participation of judicial councils in the process is nonetheless typical, either with or without a competent minister. The decisions relating to the judicial status are generally centred in the hands of judicial bodies (e.g. professional tribunals like the 'Dienstgericht'). Besides internal and external independence, administrative effectiveness and independence and balanced operation are also essential elements of the system. Abuse of executive powers is not typical; the debates are about how quality control can be exercised by using administrative tools. 'Judicial independence has most often been raised as a defense against supervisory measures. In general, there is less interference by the other branches of government than by the judiciary itself' (Seibert-Fohr 2012).

In Austria, there also are independent judicial committees participating in the selection of judges, in internal quality control and in regular judicial monitoring. Similarly to the German model, ensuring the independence and smooth operation of the courts and the appointment of judges is the Ministry's task.

We could also refer to the explanatory strength of historical elements, the unique conception of sovereignty and the traditionally limited power of the courts, such as in the case of France. The powers of central administration are allocated between by the Conseil Supérieur de la Magistrature and the Ministry, which the two organs exercise together. Administrative tasks are carried out by judiciary officials with specialised professional knowledge, sitting in the six directorates and other divisions of the Ministry. However, disciplinary liability and the selection of judges are not under the authority of the executive branch. Since 1883, the High Council for Justice (CSM) has been promoting the functions guaranteeing independence of the president, just as a sort of 'watchdog'. The selection of and disciplinary procedures against judges are within the competence of the Council (Garapon and Epineuse 2012).

Because of continuously changing public opinion, scandals and conflicts, although reforms seeking to strengthen the independence of the High Council of Justice emerge, shared authority is protected by strong traditions. This tradition does not consider the judicial branch an organically separate element, but an organisation close to the government. To balance this, the classical guarantees of personal independence are strong. The president is the preserver of constitutionalism and judicial independence, and the Constitutional Council (Conseil Constitutionnel) is the one responsible for filtering out the elements that could pose a threat to independence. The French type of judicial administration and the administrative model based on judicial councils differ significantly.

Belgium, where the state organisation often develops from scandal to scandal, has a strong tradition of independence as well, which is kept functional by unwritten rules. Since 1998, however, this is also strengthened by the constitution. The other goal of the constitutional reform of the judicial system was to strengthen accountability; therefore, besides establishing the High Council of Justice, the evaluation system of judicial work was also rationalised.

In 2008, it was revealed in the so-called Fortis case that the court decision was influenced by the government. It not only resulted in the resignation of the government but also led the Commission of Inquiry of the Parliament and the High Council of Justice to redefine the relationship between the three branches of power.[4] The Council, unlike most of the other judicial councils, is an external supervisory tool, independent of judicial power and under the direction of the Ministry. It deals with the selection, promotion and evaluation of judges. It is more than a simple distribution of work or authority: the Ministry and the High Council of Justice (which also has a consultative role) are not counterbalances to one another (Allemeersch et al. 2012). This makes the external supervision of internal administration, the external handling of complaints and the management of audits effective. The achievement of greater objectivity and higher quality in the selection of judges was the reason for change. As such, the High Council of Justice is not part of judicial power, nor does it belong to any of the branches of power, and is therefore not a self-managing organ. This is reflected in the composition of the body as well: work is internally distributed between the 44 members of the Council; half of the members are chosen by a two-thirds majority vote by the senate.

The regulation of divided authority resembles a 'puffer' function, which enables professional representation of interests but without giving space to corporate dominance. For the sake of internal independence and more efficient administration, the authority of court presidents is limited. The Council has introduced a formal central and transparent complaint procedure which, as part of external control, serves to strengthen public confidence. The reform was the culmination of a decentralisation process, the aim of which was to enhance accountability and effectiveness in administration, in such a way as to not jeopardise 'classical' independence. Based on the above, there obviously is a substantial difference between the Belgian model and those based on the administrative dominance of judicial councils.

In *The Netherlands*, the Council of Justice (Raad voor de Rechtspraak) was established in 2002. It carries out tasks related to the selection of judges and the budget and also provides for the evaluation of judges. It has analysing and consulting functions serving to increase quality. The five members of the council, who are nominated by the minister and appointed by the monarch, answer to the government. The characteristics of an intermediary or a 'puffer' can also be found here: the Council is the intermediate body between the minister and the judiciary, providing the Ministry with information on the operation of the courts (de Lange 2012). The Ministry has a general political responsibility for the operation of the judiciary system. The status of the Council of Justice is ensured not in the constitution, but in the Act of 2001 on the judiciary system. There is no strict separation of powers in the constitution; the system of checks and balances has a stronger tradition in the Netherlands. The Council of Justice is a body established in the framework of a

[4]See www.dekamer.be, www.hrj.be, Commission of Inquiry, High Council for Justice, Report of the special investigation into the functioning of justice following the Fortis case.

public management reform, based on the Scandinavian model, but in accordance with the country's own traditions. The Dutch solution does not in any respect belong to the systems which are based on the administrative dominance of judicial councils.

In *Sweden* the National Courts Administration (Domstolsverket) is an independent administrative body; its president is nominated by and answers to the government. In a country with strong bureaucratic traditions, a high level of trust and a firm cooperational culture, this independent organisation operating under the government deals efficiently with the selection of judges and the other tasks related to judicial status. In accordance with historical traditions, in Scandinavia it is not the courts who are deemed to be the most important preservers of rights. The expression 'northern council model' is therefore not applicable, because based on the above the shift to self-administration cannot be conceived. The situation is the same with respect to the judge-selecting bodies established in Finland in the year 2000.

Estonia, with its recent dictatorial past, shifted from clear external administration in 2002. The administration of the courts is a mutual task of the Ministry of Justice and the Council for the Administration of Courts, with the latter consisting primarily of judges (Ligi 2012). Just like in the case of other countries prior to accession, the European Union had a major effect in connection to this. The reforms, however, were rather motivated by efficiency problems, low prestige, an immense workload and the elimination of the administrative burdens imposed on judges. It was not independence alone that played a major role in institutional development, and as such, a unique form of 'mutual' administration (co-administration) was established. The Ministry is responsible for the operation of the courts, and the court managers, appointed by the minister, carry out the strictly administrative functions at local level. The managers are not lawyers, but the judges and the head of the court de facto participate in their selection. In administrative questions such as the number of judges or Chief Justice appointments, the manager shall decide in agreement with the Council. The cooperation between the manager and the Chief Justice reflects the distribution of work between the Ministry and the Council. This stems from the fact that the Chief Justice is the one responsible for issues concerning judicial work. The agreement of the Council is needed for the issuance of regulations concerning the court structure and internal relations within the system. The Council has no apparatus; in administrative terms, it is served by the Ministry. Although the above described system is criticised, and mostly by judges claiming that the influence of the Council is too weak, the prevalence of its independence is usually not questioned. Plans to establish a more powerful judicial council and a Ministry with more limited authority already exist, reflecting the style of the international judicial lobby (Citizens' Coalition for Economic Justice).

Concerning central administration responsibilities, traditional external administration divides powers in a variety of ways between the executive and judicial branches. The next chapter shows that the systems based on the administration of judicial councils are of even greater variety. Powers in this field are not clear either, but are divided, just as in the above described examples.

1.8 Judicial Councils and Remaining Governmental Powers

If we disregard the cases in which judicial councils were introduced as complementary to the decision-making competence of the executive branch, we should first become acquainted with the Italian and Spanish models. The division of powers is typical in this category as well, with a slight difference in variation.

Italy is one of the states that define the character of systems with judicial councils; because of the preponderance of corporative interests and the absence of efficient administration, the judicial system is the subject of constant debate. Pushing judicial interests, however, does not only work through the broadly competent judicial council, but through the automatic promotion system, the influence of judges working in ministerial bureaucracy, the permeability of the borders between judicial and political careers, as well as the strong role of judicial advocacy. Four departments of the Ministry deal with the general supervision of the courts, the initiation of disciplinary procedures, the selection procedure of chief judges, and the exercising authority concerning the budget. These activities are actually carried out by judges within the Ministry, under the influence of intense politicisation, the protection of interests and corporative traditions. Although the power of the judicial council is expansive by nature, for example, concerning the training of judges or the delivery of opinions on legislation, the operation of the council is public and the decisions on the status of judges can be challenged. As a result of the judiciary's ability to push forth its interests, the absence of accountability and a performance evaluation-based promotion system caused severe problems in terms of efficiency and quality. In spite of the above, the division of powers is still typical due to the stability of ministerial competence, even despite de facto judicial participation.

In *Spain*, which was often a point of reference in the search for institutions during the post-communist era, the court system underwent a significant transformation. Following the democratic turn and 2 years after the Constitution of 1978 was ratified, the act – influenced by the Italian model – modifying the judiciary system was introduced, granting almost full authority to the General Council of the Judiciary (Consejo General del Poder Judicial). However, the operation of the courts, the apparatus, the maintenance of the offices and court buildings, as well as financial administration remained with the executive branch. After a few years, this model also produced certain tensions, and the absence of efficiency and accountability turned into an explicit desire for reform, later into a political programme and finally into an amendment of relevant legal regulations. The improper operation of the Council of the Judiciary jeopardised the prestige of the judiciary and public confidence; and so it became the subject of political debates.

Following the establishment of the internal administration model, mending it appeared difficult, but they tried to remedy the unwanted consequences. In the first phase of the reform, the act on the judiciary system and then the procedural reforms were prepared and drafted simultaneously with the Constitution. These reforms of political nature primarily served the purpose of laying the foundations of the rule of law and arranging the relationships between the branches of power. The arguments

for efficiency, increasing administrative capacity and improving quality achieved success with the help of vigorous media and scientific attention and criticism. In the beginning, several resource-intensive measures were taken in response to the serious deficiencies in efficiency and coherence: the number of judges was increased in 1988, the Academy of Judges was established in 1994, and later further amendments were made to procedural rules.

The second phase of institutional development enriched the financial and human resources of the judiciary branch with new investments, but the results of this were limited due to the absence of comprehensive planning. The recognition of problems did not end with lobbying for resources; a coordinated long-term plan emerged, in which a select few enlightened members of the Council of the Judiciary played a key role. By 2001, the political parties in parliament formed a consensus and the 'Pact for Justice' was born, which viewed judicial administration as a public service. Learning from former failures, the next steps were based on the consensus of the affected parties. In 1985, the amendment to the act which called for the appointment of practising lawyers for the unfilled positions of judges failed because the selecting committees (composed mainly of judges) significantly limited the entrance of outsiders into the system. Similarly, the system developed to measure efficiency and enhance the work discipline was boycotted by the judges on grounds of judicial independence, just as the abolishment of compulsory legal representation in minor cases provoked resistance from the bar associations.

With the participation of the Council of the Judiciary, the *White Book of the Judiciary System* was published in 1997, based on which a proposal for reform was announced (Proposals for the Reform of the System of Justice).

A parliamentary committee supervised the implementation of the political agreement. In content, this reform resulted in a substantial characteristic change of the Council: like the eight non-judge members, the other 12 of the 20 members are now also elected by the Parliament. To preserve the principle of judicial self-administration, the legislative branch selects the 12 candidates from a list drawn up by the judicial bodies, consisting of 36 candidates. The President of the Supreme Court presides over the 21-member Council. The Council was moved under parliamentary control, and although political responsibility does not have dismissal consequences, all members may be questioned and reporting is not formal. The Council's administrative actions may be challenged at the Administrative Board of the Supreme Court, based on the principle that judicial remedy shall be available against all administrative decisions. Stemming from the unfavourable experience of the former 15 years, the possibility of external control also appeared alongside the dominance of self-administration concerning administrative regulation in the high-level court. In terms of administration, management of the judiciary system became more balanced. The central element of Spanish judicial administration is that although the Council has significant power, ensuring the administrative operation of the courts is the Ministry's task and is a stable power exercised by the executive branch. The Council of the Judiciary is obliged to report to the Parliament and its decisions may be challenged at the competent court. This demonstrates that in important cases the counterbalances between the branches of power do actually work.

The most serious issue in systems operating with the judicial council's preponderance of power concerns how accountability of the councils can be established. Would the composition of Council or changes in the selection or appointment of the members be capable of making central administration responsible to the judicial board, the legal profession and society (Guarnieri 2007)? The variety of organisational regulations in post-communist countries seems to justify that there is no chance for that without the division of central administration powers.

1.9 Post-communist Versions

The practice of new democracies regarding the establishment of the rule of law was determined by the need for judicial independence, but the actual content of it remained uncertain (Piana 2009). This uncertainty did not appear in the diversity of organisational solutions, but rather in the uncoordinated relationship between independence and accountability. Due to historical experiences and the misunderstanding thereof, the one-sided euphoria for independence obscured the connection that autonomy does not create transparency nor does it ensure efficiency and quality, and therefore the balance between accountability and independence is disrupted. Referring to independence as a general and unquestionable immunity began serving as a defence against critics attacking incompetency, the unchanged approach to the role of judges and isolation (Kosar 2010). The institutionalisation of strong organisational independence hid the fact that the mental changes had not actually occurred. Thus, the status of independent courts without independent judges became the determining context of the structural reforms, as part of the process of building democracy without democrats. Organisational reforms which build upon autonomy without any counterbalance remove all obstacles from the escape route of accountability. Because of acquired infirmities, salvaged traditions and mental routines, the grand organisational reforms have not closed the process of judicial reform. In those countries where central administration as a whole was not handed over to the judicial-majority body, friction between the judicial and executive powers kept institutionalised solutions to the separation of powers in a dynamic conflicting state. However, in countries that considered the reform finalised, operational defects of the judiciary remained beneath the surface, which no appropriate tools were developed to handle. First, this was because the judicial power considered itself independently authorised to develop such a strategy and it was unable to rise above its own corporative interests. The rule of law phraseology served to protect the organisational interface and authority.

The mental heritage that proved to actually be serious was the reason self-restrictive tipping back of the unbalanced states could not supervene.

At the time of transformation, international institutions paid less attention to consequences, but as the Hungarian example reveals, neither the legislature nor the political elite have concepts available for the necessary corrections; in fact, arriving

at the realisation that adjustment is necessary is difficult in itself. In Hungary, 12 years had passed after the introduction of the new administrative model before administrative reform reappeared on the agenda; the OIT put forth recommendations not relevant to central authority as a whole, which were generally accepted by the legislature. But in 2011, the right-wing government moved to displace administrative authority as a whole, or the majority of it, back to government – without regard to the fact that the rule of law necessitates certain responsibilities to be executed by judicial bodies (Fleck 2008a). During the era of post-communist transitions, the relationship between judicial independence and accountability was understood as opposing values. This stemmed from the fact that during the dictatorship, through administrative tools and while violating independence, the government interfered in substantive issues as well. Thus, through the transition, the judiciary – its significance having greatly increased – emerged as the 'least dangerous power' and as a safeguard of the rule of law. On one hand, this was based on the recognition of the adapted relationship between the branches of power and on the other hand on undifferentiated treatment of the dictatorial past.

From the direction of judicial reform in the affected countries, it can be concluded that balancing independence and accountability is always present in debates concerning authority. But in countries where administrative authority was delegated solely to judiciary-ruled councils, these two values turn against one another. In general, it can be said that independence and accountability are two sides of the same coin, but in final organisational solutions (clear external administration and full judicial administrative autonomy) they become mutually exclusive requirements and each prevails at the expense of the other.

The dangers of corporativism and political influence can only be avoided through the division of authority. The following overview serves to illustrate how states with similar goals produced different organisational solutions or different approaches to finding organisational solutions.

Institutional diversity is a characteristic of traditional, old or older democratising states as well. At the same time, monolithic regulation does not exist in the central administration of courts; in Europe it is only present in Hungary and Romania, obstructing rule of law modernisation in both. The story of the Hungarian regulation of the judicial administration serves strong illustration for the fate of the monolith administration (Fleck 2012). The newly elected Parliament in 2011 radically changed the administration of the courts; the judicial council, which was the central element of the reform in 1997, was abolished and a politically elected person has been charged with the task of administration. Between 1998 and 2011 many lawyers formed strong criticism of the structural shortcomings of the judicial self-administration. The most important objections were the lack of accountability, the administrative weakness and the opacity of the judicial selection; these features of the judicial administration brought with them serious efficiency problems. Thus, the politicians of the newly elected government overemphasised the efficiency argument. According to the new and deeply questionable model and its political protagonists, a strong central administration can enhance the formal efficiency and

by this also the popular support. Hungarian lawmakers missed the point again: the strategy of balancing did not play a role; sharing administrative authority has not emerged. The pure and corporatist judicial administration was forced to give way to a strong central administration without relevant judicial control. Neither the accountability nor the openness seems to be solved; moreover judges have lost their ability to have a say in selecting the high administration. The former system, because of some serious organisational fault, was a façade self-government, and the present system cannot be described as judicial self-government; thus, it raises also the infringement of independence. As such it cannot be efficient in the long run.

In *Romania*, the High Judicial Council was established in 1991 to govern judicial appointments and promotions, while other authority remained with the Ministry – burdened by many administrative deficiencies and little efficiency. Weakness in administration was sought through increasing the competence of the Council: starting in 2004, all central administrative authority and power was delegated to this body. The sharp turn from subordination to complete autonomy meant immediate total isolation and impenetrable, corrupt, nepotistic operation; and because of a history widespread national intelligence, it also meant possible blackmail and abuse of power. The fully empowered High Judicial Council failed to add self-restricting operational elements. In fact, the Chairman elected by the Council in 2010, as a former judge, was accused of espionage by the Minister of Justice, while his appointment was protested against by lawyers' organisations as well (Coman and Dallara 2012). It is generally known that, during communist rule, strong political subordinancy prevailed, while after communism was overturned, it became the fully accepted stance that the rule of law depended upon judicial independence. This was reinforced by Romania's intention to join the European Union; European institutions expected solutions to problems with their legal systems through a clear switching of administrative models. They established the fully empowered judicial council accordingly and eliminated everything counterweighing judicial power (Parau 2012).

The body immediately became a powerful obstacle to judicial reform. Isolation and the removal of power from the minister resulted not in independence but in supremacy, unaccountability and impenetrable influence. In fact, automatic assignment – introduced to counter the still existing widespread corruption – did not bring results either, because transparency was not dominant in developing the parameters for case assignment and thus left opportunity for manipulation. Therefore, small, necessitated organisational changes or reforms cannot remedy an enduring and uncontrolled central power. The judicial council, referring to the protection of judicial independence, silences judges wanting to unveil corruption. Characteristic of international influence, during 2003–2004 two plans existed regarding judicial administration. Under preparation by the Romanian Ministry, beyond extending the power of the Council, the minister would have had authority in the selection and promotion of judges. However, the second version turned into reality, which was advocated by the European Commission and drafted by the chairman of the judicial council. This was the undifferentiated understanding of independence, which was considered acceptable by the Commission. The threat of the suspension

of accession negotiations left the government with no other choice. Since 2004, the exclusive interpretation of judicial independence has been further strengthening the authority of the judicial council and the repression of political influence, even if that means possibly having to battle against corruption. The case of Romania demonstrates perhaps the most clearly that complete administrative autonomy immediately strangles necessary reforms; monolithic administration hinders the development of the rule of law judiciary and leads to further tensions.

In *Poland*, establishment of the Supreme Judicial Council emerged already in 1989, but was not entered into the Constitution until later. However, central administrative authority is divided between the Ministry and the Council. The Ministry is responsible for the operation and budget of the courts, while the authority to appoint the head of court is practised jointly. The judicial council is not a governmental body; its primary responsibility is the protection of independence, as well as to present opinions about judicial candidates awaiting appointment and opinions about the courts' budget (Bodnar 2012). Ministerial control remained strong; the Constitutional Court is forced to resolve issues that arise from time to time as a result, during which the court gradually alters the competence of each. Since 2001, the Ministry has been responsible for training and also provides the resources necessary for this. The goal of organisational changes is to strengthen administrative capacity. Behind the debate concerning central authority and organisational control, the administrative power of the court president remains significant.

In *Slovakia*, the judicial council was established in 2002 but differs from the usual composition in that of the 18 members only 8 are judges. Autonomy is highlighted in that the local judicial councils have a significant role in the selection of judges (Kosar 2010). The judicial council decides in all matters concerning personnel and training, but in budget-related and financial questions, it has a consultative role, and its authority is divided with the minister concerning the appointment of head of courts. In fact, the authority to promote the presidents of the courts remained in the hands of the minister, as well as the appointment of the courts' vice presidents. Removal of judges can take place based on recommendation from the judicial council or can occur by recommendation from the head of a superior court, but it can also take place without any of these. Organisational problems arising from this issue are commonplace. An ad hoc commission was established in 2004 to resolve nomination and reappointment issues, but even this solution was not capable of solving the conflicts surrounding the status of court presidents. In 2006, the minister concurrently dismissed seven heads because of their managerial inabilities. The Slovakian model clearly demonstrates that a crucial power such as the authority to select and reappoint a head of court has the ability to dominate conflicts surrounding the operation of the institution. The balanced solution still waits, but the conflicts are open, so seeking a solution is continuous.

In the *Czech Republic*, several institutional approaches developed to resolve similar conflicts but without ever leading to a final solution. Although in 1999, plans for an internal administration model and a judicial council developed, it was not supported by political consensus. Thus, external administration remained, along with minister's authority to nominate and reappoint judges, as well as

the surrounding conflicts. During the first phase after the fall of communism, widespread lustration selected the apparatus of judicial administration as well. In 2001, while central administration remained intact, judicial selection, promotion and trainings underwent changes in order to increase efficiency. The most significant institutional innovation was the court director, which was introduced to strengthen administration. To serve as a self-administrative counterbalance, in 2002 all courts with more than ten judges established judicial councils. The councils have an advising role in personnel-related and local administrative matters, but its success ultimately depends on the head of the given court, since he is not obligated to follow the advice of the council. The establishment of the Academy in 2005 by the Minister of Justice was also part of the reform, which provides obligatory training for judges. Judges are appointed by the President of the State, based on recommendations by the minister. During a heated debate, the question arose as to whether or not the president may deny an appointment. According to a 2008 decision by the Administrative Court, the executive power has an obligation to state reasons for rejection, but Klaus completely disregarded this ruling (Kosar 2010). Another case which led to serious conflict involved the president denying the appointment of two candidates because he considered them too young for the profession. According to the Administrative Court, only the absence of regulation concerning judicial appointment may give basis for denial of appointment. According to the President of the State, one should be at least 30 years old to be appointed to a judicial post. Following the conflict, the age requirement was added by the legislature to the legal requirements of becoming a judge. Passive behaviour by the president is also unlawful; he cannot unnecessarily delay making the appointments. In reality, presidents of the courts have a decisive role in the selection of judges; the minister does not typically filter the presidents' candidates. However, decisions related to personnel can be challenged in front of the court (Bobek 2008). In 2006, the Constitutional Court attempted to resolve the conflict concerning the reappointment of the heads of courts, deeming their reappointments unconstitutional. As a result of the insufficiencies of the internal system of administrative competence, this led to further dissatisfaction in the eyes of the executive power, whose interest lies in efficient administration. The practice of the disciplinary courts was unprincipled and weak, so the lack of responsibility was institutionalised and it was unheard of that the authority related to responsibility be delegated to disciplinary courts. According to another Constitutional Court decision made in 2007, the President of the State cannot appoint judges to the Supreme Court without the consent of the President of the Highest Court. In 2003, decreasing the pay of judges became impossible and a 2002 decision stated that training cannot be obligatory for judges. Meanwhile, in 2008 a Supreme Court decision brought in a serious plagiarism case involving a Supreme Court judge which stated that the judge could not be held responsible. Many accountability failures enraged public opinion, such as the judge who missed trial and later falsified the court records, and his punishment was limited to decreased pay (Kosar 2010). As a result, in 2008 the legislature established the disciplinary court. It consists of a six-member panel, only three of whom are judges and the other three are the prosecutor, a lawyer and a legal

scholar. In parallel to this, judicial leaders' appointments became fixed term. Conflict developed surrounding the President of the Supreme Court as well: the President of the State wanted to remove the President of the body but was prevented from doing so by the Constitutional Court. However, eventually the Ministry and the presidents established cooperation concerning the nomination of judges, and the training remained in the hands of the presidents. In the Czech Republic, the external model of administration remained, but as a result of the conflicts and through contribution from the Constitutional and the Administrative Court, the counterbalances of administration have gradually developed.

Because of corporativism and fear of the uncontrollable abuse of judicial power, a central judicial council was never established. However, the administrative rights of the executive power have changed as a result of resolving these conflicts: its rights have shaped to fit judicial independence and the currently developing constitutional balance.

An element of organisational regulation of the courts, the scope of central administration and the division of authority paint a varied picture. The examples introduced highlight how organisational dilemmas are embedded into social and political environments but with the clear advantages of a balanced division of authority. The exact solutions cannot be simplified into models, especially not into easily transferrable models. The reasoning behind comparison is to clarify that solutions and different levels of cooperation among the branches of power can be functional; if there is significant global displacement concerning the issues surrounding judicial administration, then that is the appearance of more intensive forms of the division of authority. Solutions opposing these accumulate serious contradictions and functional anomalies, which poses a threat that not subtle forms of cooperation will evolve, but instead retaliation and radical reversal.

Finally, I cite from institutional-building international organisations, affected by new and differentiated presentation comparable in number to the problems introduced, which advocated this very balance in the face of former international documents. After thorough comparison, in the interest of strengthening judicial independence concerning central administration, the Organization for Security and Co-operation in Europe recommends the realisation of a more prudent regulation of authority and of internal division for states in Eastern Europe, Southern Caucasus and Central Asia.[5]

[5] 'Judicial Councils are bodies entrusted with specific tasks of judicial administration and independent competences in order to guarantee judicial independence. In order to avoid excessive concentration of power in one judicial body and perceptions of corporatism it is recommended to distinguish among and separate different competences, such as selection (see para 3–4, 8), promotion and training of judges, discipline (see para 5, 9, 14, 25–26), professional evaluation (See para 27–28) and budget (see para 6). A good option is to establish different independent bodies competent for specific aspects of judicial administration without subjecting them to the control of a single institution or authority. The composition of these bodies should each reflect their particular task. Their work should be regulated by statutory law rather than executive decree'. Retrieved from OSCE website, http://www.osce.org/odihr/73487

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Chapter 2
'Fair' Selection of Judges in a Modern Democracy

Attila Badó

2.1 Introduction

In 2011, lively debate has unfolded in Hungary with regard to independence of the judiciary, after the governing power – with a significant majority in Parliament – adopted amendments that resulted in radical changes in the administration of the judiciary. As a result of the Acts, a National Office for the Judiciary (NOJ) was created that took over the tasks of the National Council of Justice under the supervision of a weak National Judicial Council (NJC). Someone with close ties to the government was appointed the head of the office for a 9-year term by a two-thirds majority and then acquired a power unparalleled in (all of) Europe in terms of having gained solitary control over the selection of judges and heads of courts. The reform, which was basically driven by problems of efficiency, was sharply criticised both domestically and abroad – stating that this paves the way for the political influence of judges and causes serious harm to the independence of the Hungarian judicature, which up until now had been considered neutral. That this solution does not violate any constitutional principles was fundamental to the government's argument, and the government further reasoned that in other countries, such as the United States, political parties have a significant role in the selection of judges. Undoubtedly, in many stable legal systems, which have age-old democratic traditions, political parties still continue to have a significant role in the process of judicial selection. In the following, this will be demonstrated through numerous examples. At the same time, however, a rather apparent tendency can be observed in most Western legal systems – including in both common and civil law areas – that the professional qualifications of judges are given priority over political

A. Badó (✉)
Faculty of Law, Institute of Comparative Law, University of Szeged,
Rákóczi Square 1, 6722 Szeged, Hungary
e-mail: attila@badoat.hu

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loyalty. This was what was emphasised by those who evaluated those changes in Hungary negatively because they believed that new system would results in a step backwards, especially in terms of the selection of judges. Ultimately, only time will determine how the reform measures that emerged during such a particular political climate may harm judicial independence. However, in the light of the international debate spawned by the reforms, we consider it necessary to draw attention to current trends and the prevailing situation in the area of judicial selection, through the introduction of the most significant, exemplary models. In spite of the significant differences among particular legal families, a perceptible tendency is evident, which by means of societal expectations and experiences resulting from political rotation or through their own self-moderation is driving the legislature to gradually give less consideration to or minimise political elements in the judicial selection procedure. However, if this is not the path taken, political and professional discourse concerning the questions of judicial selection flares up from time to time, which perceptibly weakens confidence in the judiciary.[1]

From many perspectives, the judicial systems of post-communist nations during the 1990s were endowed with a vantage point. With the neoteric experiences of dictatorship just behind them and as a result of intentions towards European integration, virtually no resistance was evidenced by the legislators in assenting to the creation of an independent judicial organisation and the establishment of independent judicial councils – which were either partially or fully independent of the other branches of power – and thus essentially placing the selection of judges into the hands of the judges themselves. We ourselves analysed the aftermath of this process, the limitations of accountability and the distortions and deformation of the selection mechanism here in Hungary (Badó and Nagy 2005). Nonetheless, we believe that the undeniable dangers inherent to a self-organising judicial power virtually vanish in comparison to the potential dangers of a partisan, politically selected judicial organisation, with regard to a democratic judiciary, the confidence of society and fair trial.

In addition, the legislative has effective means at its disposal to keep the dangers posed by judicial corporativism at bay. It is generally well known that the joint realisation of judicial independence and control is currently one of the major challenges faced by modern democracies and discovering the appropriate proportions is a difficult task. And in addition, a sort of balance is also necessary in order to simultaneously guarantee the diversity, professionalism and legitimacy of judges. However, we are convinced that the selection of judges has begun trending towards the adoption of systems that are merit based and for the most part free from ideological and political elements.

[1] As proof of this, we could mention the title of an article written by Peter Cook and published the Economist as an example, of which the subtitle in itself is enough to spark controversy and displace the confidence in judges: '*Money and back-room politicking are contaminating the selection of judges*'.

Note: for citation, see References.

The concept of impartiality is gradually being redefined, in that the role of the political parties empowered to represent ideological viewpoints and the governmental representatives they delegate has become increasingly subordinate, ancillary and counterbalancing.

It would be fortuitous if – upon temptations for judicial reform – this would be taken into account by politicians in post-socialist regimes.

2.2 Taking Impartiality Seriously

There is a remarkable agreement in the laws and generally in relevant literature as well, concerning the primary goals of the justice system. These goals should be none other than the pursuit of a lawful and professional judgement delivered by impartial court. Our topic concerns the process by which one becomes a judge as well as the questioning of the relationship between independence and impartiality. The importance of independence and impartiality – at least in theoretical terms – is undisputed in all legal systems.

The difference lies in the means of how this goal can be achieved. It is worth examining how under the greater legal branches these means – with regard to taking a judicial post – differ among various legal systems, which are considered to have set the examples from perspective. Before we evaluate these various systems, it is necessary to clarify some basic issues. In both legal practice and legal literature, the questions of independence and impartiality are discussed as interwoven topics. This is no coincidence, since the basic premise for delivering an impartial judgement is the independence of the judge or the body of judges from other branches of power or institution, higher courts, judicial leaders or judiciaries and the parties – in the sense that these factors should not either directly or indirectly affect the decision brought by the ruling court. Lawyers generally settle this by the commonplace legal tenet that judges can only be subjected to laws or other binding legal sources. (Both theoretical and practising lawyers are well aware that this naïve perception of independence usually only covers the very basic principles of the functioning of legal systems, and that this definition is not even remotely true, in neither common law nor continental legal systems.) Of those mentioned above, infringement of independence stemming from the intertwining of various branches of power deserves attention. It can be claimed that this kind of infringement – warranted by a court decision – is determined only in the most extreme cases in the various legal systems. In the practice of the European Court of Human Rights – which binds together most European legal systems – independence in this sense and consequently an infringement on the right to a fair trial (Article 6) can only be proven in exceptional cases. Contravention of Article 6 was determined, for instance, when a minister brought a 'quasi-judicial' decision that altered the original one to the detriment of the claimant.[2] It could be argued that such an obvious

[2]ECHR, 19 April 1994, Appl. no. 16034/90 (*Van de Hurk v. the Netherlands*).

example of the infringement on independence is indeed rare, just as the decisions concerning the system of the Military Courts of the United Kingdom or the Turkish State Security Courts, in which both countries were decided against.[3]

It can be asserted that the 'jumbling' of the judiciary, executive and legislative branches of power is considered rare. Since the abolishment of the pronounced and highly criticised intertwined organisational structure of the legislative and judiciary branches in the United Kingdom, primarily those cases have given rise to questions of independence in which the former role – under a different branch of power – of the presiding judge could be the cause of infringement of independence and impartiality. Almost inexplicably, it gives rise to few complaints that in the appointment and selection of judges, what kind of role is given to other branches of power or, for example, political parties. (It is an interesting phenomenon, although not examined in depth in this article, that while certain legal systems specifically prohibit judges from political party membership, in others, membership is not considered a compromising factor to their independence.) Even if such a claim arose among the litigants, in most cases it would be automatically dismissed. In a case involving governmental interest, could an Austrian lawyer successfully base a motion to exclude based on his opinion that he does not consider the judge independent, because the government through their appointment either directly or indirectly played or may in the future play an influencing role? Obviously not, mainly because such a claim could be made about all judges in the given legal system. In a compensation claims case against the state, could a lawyer in the United States successfully base his claim of impartiality on the fact that the judge was appointed by the governor of that state? Of course not, just as no one could successfully argue that the United States Supreme Court is incapable of bringing independent and impartial decisions, seeing that the political interests of the justices and the political nature of the appointment process are clearly evident (Hodes 2011). (In the latter instance it is even less likely, because who would decide on such a motion other than the Supreme Court itself.)

Which scenario is more likely? That a judge appointed by a political power will favour it out of gratitude or in order to get reappointed, or that a judge, who as a former prosecutor, becomes biased in a case he could have been involved with then, thereby creating an illusion of impartiality? In the latter case, for example, the ECHR ruled against a given country,[4] but we cannot really find an example of a successful claim against the relations between the appointment system and government.

We argue that one of the most sensitive but at the same time one of the most critical guarantees of judicial independence and impartiality would be worth considering more seriously. We argue that in a modern society, the judicial appointment

[3]See, for example, Rights (ECHR), 6 February 2011, Appl. no. 31145/96, 35580/97 (*Wilkinson and Allen v. The United Kingdom*); European Court of Human Rights (ECHR), 8 July 1999, Appl. no. 23927/94, 24277/94 (*Sürek and Özdemir v. Turkey*).

[4]ECHR, 1 October 1984, Appl. No. 8692/79 (*Piersack v. Belgium*).

system should be handled as one of the most critical elements of the independence and impartiality of judges. Additionally, our opinion is that no case assignment system, judicial exclusion system or ethical training exists which could balance against such a selection or appointment system in which unconcealed political or governmental influence is present and in which the question of the loyalty of the candidate plays a major role. Just as in other areas of social sciences, we cannot present empirical data or undisputable evidence to support our claim. We could cite scandalous cases, but it would be difficult to substitute exact evidence with such examples. We could use common sense, which serves as the basis of so many decisions in the world of common law and which through clinging to human emotions can give convincing explanation to things such as commitment or gratitude. Additionally, we could cite all those professors and practitioners, whose thinking is similar to ours, in that the judiciary of a modern democratic society must demonstrate neutrality to the greatest possible degree, in order to avoid showing even the slightest appearance of infringement towards its citizens. It is worth mentioning the thoughts raised by Michael J. S. Moran (2007), according to which the examination of the appointments of judges must be just as thorough as the examination carried out in the removal of judges. It really is incomprehensible that in the common law countries, where the removal of judges is extremely difficult, the issue of 'entrance' – concerning impartiality in comparison to other guarantees – has received very little attention. But of course the same thing is also true for some continental legal systems as well. It is also difficult to comprehend that in the United States, for example, while extensive effort goes into selecting jurors who are impartial, the political (party) identification of professional judges is completely conventional and accepted.

Hereinafter, we are looking to answer what types of solutions are offered by major foreign patterns to the selection of judges, what modifications each has brought about in the selection of judges and what consequences we can draw as a result. We do not wish to present a detailed description of each and every selection method in existence, nor do we aim to examine all legal systems in our analysis of judicial selection. On the one hand, several monographs (Guarnieri and Pederzoli 2002; Lee 2011; Malleson and Russell 2007) have already taken this approach, and on the other hand, this would not provide significantly more relevant information to understand international trends and the most pressing dilemmas regarding this topic. We deliberately abstain from providing a comprehensive analysis of the term 'merit', which in itself is an immensely expansive research area that has flamboyantly engaged many authors – who have approached the topic from a wide range of perspectives and in relation to a variety of different challenges or issues. However difficult the interpretation of this term may seem, its essence can be easily understood if we compare it to a selection system in which political loyalty and ideological commitment are substantive elements. In the aftermath of clearly biased judicial decisions, those distinctively characterised by political and ideological influence, it is typical to feel that a merit-based system is by all means better than a partisan system backed by legitimate reasoning – even if, for instance, the basis for selection would mean having to successfully cram the contents of an

entire phonebook overnight. Of course, we are well aware of the fact that this issue is much more complex, and that establishing a selection system, which at best is at least capable of sowing illusions of impartiality, can only be achieved through meticulous – almost perfectionist – regulation, one that also takes into account the traditions and political and legal culture of the given legal system.

2.3 'From One Extreme to the Other': Reforming the English Judicial Selection System

The millennium brought about almost revolutionary changes in the English judicial system.[5] The English power structure showed a remarkable refutation of the separation of powers, in which the Law Lords not just were legislators but also played a role in the interpretation of the law at the highest level. For many people at the end of the twentieth century, this definitely seemed old-fashioned, especially considering Western democratic societies' strained efforts to remove any remnants of such overlaps between the branches of power (Stevens and Cover 2002; Bogdanor 2003; Woodhouse 2002).

For those insisting on upholding traditions, it was difficult to let go of a judicial system that seemed to be functioning well and appeared to be balanced; and those who emphasised viewpoints expressing remorse referred to conventionalism and cited the settled customs, the legal traditions and the hallmarks of the legal and political culture that had served as a barrier against the overlapping of the branches of power, which would lead to inadequacies and a flawed judicial system (Kritzer et al. 1996). In addition, this reasoning is practical even today: the government representative Lord Chancellor – who was in the Appellate Committee, which is considered the highest branch of justice – did not systematically misuse his power with regard to the appointment of judges. Thus it can be understood that a pragmatic interpretation of the separation of powers began spreading, which shed light on the fact that the unwritten constitution is capable of breaking through all classic legal principles, although it is stated that these hallmarks will eventually develop into the rule of law.

In short, 'it works', or so they say. The words of Lord Irvine describe the situation well: '[w]e are a nation of pragmatists, not theorists, and we go quite frankly for what works'.[6] Consequently, again with reference to the words of Lord Irvine, '[t]he British Constitution, largely unwritten, is firmly based upon the separation of powers'. In glancing over Lord Irvine's statement – who was considered the primary mentor to Tony Blair – it's interesting to note that he spoke these words as Lord Chancellor, and that his predecessor, Lord Mackay, had arrived at a seemingly different conclusion several years beforehand. According to Lord Mackay, '[o]ur

[5]Constitutional Reform Act 2005.

[6]Evidence to the Lord Chancellor's Department select committee, 2 April 2003, Q 28.

constitution, unlike that of, for example, the United States, is not built on the principle that the legislative, executive and judicial powers should be separate and equal'.

We agree with Malleson (2006a), in that the above two opinions are basically describing the two different approaches to the very same principle, i.e. the separation of powers. Lord Irvine based his opinion on the formal, while Lord Mackay based his on the pragmatic point of view (Kritzer et al. 1996:151).

The opposition of the formal and pragmatic point of view clearly demonstrates and presents a summary of the heated debate concerning the judicial system in the United Kingdom. This eventually resulted in the severing of the interconnected system through the establishment of the High Court and also by placing checks on the powers of the Lord Chancellor and limiting his role.

Those who favoured the pragmatic approach mainly emphasised the fact that in a system that has developed as such throughout the course of many centuries, the Law Lords conventionally filled both legislative and judicial capacities and the role of the Lord Chancellor in assisting with the appointment of judges was not questioned as to whether or not it would jeopardise the independence of judges.

The English bench was apolitical; the appointment of judges was based primarily on professional aspects and on the opinion of barristers; and aside from just a few unique, 'odd-one-out' cases, controversial appointments were practically nonexistent.

Those who emphasised the formal aspects had more persuasive reasons for change. First, the changed role of the judiciary was pointed out, which on the one hand was the result of the judiciary and its expanding scope in administrative review, while, on the other hand, from the Human Rights Act 1998, which aims to ensure consistency with the European Convention on Human Rights. Both historically significant changes meant the limitation of power for the other two branches, even if the latter legislative act served to protect parliamentary sovereignty through not granting the power of judicial review to the courts.

The events brought radical change, since the number of political-type cases increased drastically, and the ambivalent role of the Law Lords became increasingly apparent. The likelihood of receiving a controversial case increased, i.e. having to try a case where the central issue involves laws enacted while the former Lords served as lawmakers or a case that could pose conflict of interests of with regard to government or political parties.

This accumulation of issues collectively led to the establishment of a separate Supreme Court and a significant change in the role of the Lord Chancellor. The Constitutional Reform Act 2005 was enacted; the main purposes of its execution included the following:

- To modify the office and functions of the Lord Chancellor
- To establish the Supreme Court of the United Kingdom and the abolition of the appellate jurisdiction of the House of Lords
- To lay out the Judicial Committee of the Privy Council's jurisdiction and the judicial functions of the president of the Council

And – as mentioned beforehand – the Act makes for provisions concerning the appointment (selection) of judges and judicial discipline and reforming the judiciary in general.

In 1997, the possibility was given for all legal professionals to take the place of the very narrow circle of barristers (barrister lawyers appointed by the Queen's Counsel), and with this, in principle any qualified candidate could be appointed as a judge. The establishment of the Commission for Judicial Appointments in 2001, a permanent committee involved in judicial appointments, was also important. The Committee served to supervise the appointment process and to examine relevant individual complaints without having competence in the field of appointments. Additionally, another significant step forward was that since 2005, appointments to the High Court can only be won through open competition.

The Commission for Judicial Appointments (possessing almost the same name as the former Judicial Appointments Commission) became operational in 2006. This body essentially took over the right to nominate from the executive power, through which notable self-restraint was undertaken by the government. The body consists of fifteen people (one layman president, five laymen members, five representatives of the justice system, two representatives of other legal professions, one judge and one Justice of the Peace). The members are appointed by the Queen on the basis of recommendation made by the Chancellor. According to the statutes, the candidates cannot represent any political interests. This is guaranteed by an independent specialist clerk, whose task is to create a transparent open nomination system, in which the only point of view is the competence of the candidates.

The competences regarding the appointment of the Commission and the Lord Chancellor are precisely governed.[7]

Another procedure applies to the selection of Supreme Court judges,[8] which is especially interesting considering the fact that the activities of the court increasingly

[7]When a judicial position is freed, the selection procedure is determined by the Committee, and the procedure is carried out. The Committee then sends the nomination proposal to the Lord Chancellor, who may then accept or reject the appointment or return it (to the Committee) for consideration. The incompetence of the candidate may be the only basis for rejection, while in returning the proposal for consideration, the Lord Chancellor must justify that the candidate does not have all sufficient evidence necessary to prove his competence. All of this must be reasoned in writing. The options available to the Lord Chancellor are limited in the next phase because if he had sent back the previous candidate for reconsideration, then in this phase he may now only reject the nomination. If he had rejected the first candidate, he has the option to return the nomination for consideration. In the first instance, the Committee may then nominate a new candidate, under the stipulation that he may not choose a candidate whose nomination was sent back for consideration in the first round. And, in the second instance, the candidate that was rejected in the previous round cannot be nominated again by the Committee. After this, the Lord Chancellor must accept the decision of the Committee, and his only other option is to accept the candidate whose nomination he sent back for consideration in the first round. Following this, depending on the level of the judicial post, either the Chancellor or the Queen officially appoints the judge, or in some cases, the judge is appointed by the Queen based on the opinion of the head of government.

[8]From 2007, this was extended to also apply to judges of the Court of Appeal.

resemble those of constitutional courts. A commission that in essence (and in practice) functions completely and discernibly separate from the other branches of power serves to administer judicial appointments – a concept that would be inconceivable in European constitutional courts or in the Supreme Court of the United States. The selection commission is comprised of the president and the deputy president of the Supreme Court of the United Kingdom, a member of the Judicial Appointments Commission of England and Wales, the Judicial Appointments Board for Scotland and the Northern Ireland Judicial Appointments Commission, and at least one of whom must be a lay person.

This complicated process, which restricts the government's elbow room, was extended further by the legislature,[9] through the establishment of the Ombudsman post. The Ombudsman is independent from the Committee and the government; his competence is primarily to investigate individual complaints concerning nomination and appointment procedures.

In England and Wales, the statutory definition of merit[10] derives from the policies set forth by the Judicial Appointments Commission, which is an independent nondepartmental public body established by the Ministry of Justice under Sections 61 and 62 of the Constitutional Reform Act 2005.[11] According to its own policy, the JAC 'selects candidates for judicial office on merit, through fair and open competition from the widest range of eligible candidates'. Contrary to what its name may suggest, the JAC does not actually appoint judges; it makes recommendations and serves to undertake the three spheres of responsibilities, which are (1) to select candidates solely on merit, (2) to select only people of good character and (3) to have regard to the need to encourage diversity in the range of persons available for selection for appointments (JAC Consultation 2011).

Sect. 27 (5) of the Act provides the following vague, somewhat ambiguous and matter-of-fact rule concerning merit: '[s]election must be on merit'. Restatement follows in the text of the legislation and is meagrely supplemented in Chapter Two: 'Selection must be solely on merit'. Interestingly, however, with regard to the merit principle, no further specificities are outlined in the Act. Thus, further investigation of the principle, the definitions as well as relevant concepts and rules shall continue in the direction of the policies and guidelines of the JAC, with particular focus on the 'qualities and abilities' assessment scheme. In the United Kingdom, this scheme (along with its varieties utilised in filling different judicial positions) serves as the standard benchmark and as the only underpinning source for merit-based assessment of candidates' qualifications.[12] As mentioned above, the JAC operates independently from the executive; among other goals,

[9] Judicial Appointments and Conduct Ombudsman.

[10] The qualifications that are necessary for appointment – including the elements and definition of the merit principle – are set forth in the Constitutional Reform Act 2005, s25; Supreme Court Act 1981 s10; Courts Act 1971 s16; County Courts Act 1984 s9. 9.

[11] Constitutional Reform Act 2005.

[12] See List of Qualities and Abilities, Judicial Appointments Commission.

it aims towards reducing abuse of the selection process and towards increasing transparency of the judiciary and judicial accountability (AWS Response 2006),[13] which will ultimately result in increased confidence in the judiciary (Clarke 2009). This will also be covered further in this chapter. But, in line with its goals of openness and transparency, the JAC provides public access to the specific evaluation criteria mentioned above.[14] The criteria are categorised into five major competency areas: intellectual capacity, personal qualities, an ability to understand and deal fairly, authority and communication skills and efficiency. Different varieties of the assessment scheme exist and are applied by the JAC systematically, depending on the position to be filled. As such, for positions in which leadership and management skills are a required qualification criterion, an additional element is included to measure these qualities.[15]

Furthermore, Malleson (2006b), who also conducted a thorough analysis of the merit principle, stated that '. . . there is always one best candidate in any particular selection decision who must be appointed regardless of any other considerations'. In other words, the possibility does exist for finding the absolutely most qualified, best candidate for each and every judicial position. However, in order to even begin drifting towards such 'idealistic' circumstances, the method of evaluating candidates' merits must be developed, which establishes selection criteria that are specific, relevant and clearly defined, as well as capable of accurately measuring the actual abilities.

In her study, she focused on meticulously defining the concept of 'merit' and merit-based selection schemes and addressed the examination of potential challenges such schemes may pose with regard to the adoption of various affirmative action policies by judiciaries. In short, she concluded that establishing a completely merit-based system of judicial selection while simultaneously implementing any sort of affirmative action policies is in essence inexecutable – impossible in all but name by the bottom-line definitions alone of these two concepts. In order to function effectively in practice, a merit-based system of selection must be sovereign and completely objective, whereas the heart and soul of affirmative action policies is the exact opposite this – they are absolutely subjective in nature (Malleson 2006b).

Of course, even with such precise regulation, which strives to ensure independent decisions in an institutionalised manner, the possibility could emerge that the government may enforce its will by favouring its preferred candidates. However, considering the English political culture, this terror is less likely to jeopardise the judiciary (Atiyah 1987). Rather, the new system has come under attack due to a perceptible democratic deficit, especially in the appointment of judges to the Supreme

[13] http://www.docstoc.com/docs/27925276/Response-to-Constitutional-Reform-A-new-Way-of-appointing-Judges

[14] See National Archives, retrieved from http://webarchive.nationalarchives.gov.uk/20100512160448/dca.gov.uk/consult/jacommission/judges.pdf

[15] See Selection Policy; Qualities and Abilities. Judicial Appointments Commission, retrieved from http://jac.judiciary.gov.uk/application-process/112.htm

Court. As Lady Hale put it, we have basically 'gone from one extreme to the other' – in other words, the selection system that clearly violated the separation of powers principle was replaced by a selection method almost completely dominated by judges (Paterson and Paterson 2012:31). Likewise, another topic of serious debate concerns the fact that a merit-based system is not capable of addressing the need for the composition of judges to more accurately represent the composition of society as a whole.

Regarding the realm of the common law, perhaps it is worth mentioning that while developing the Constitutional Reform Act, the drafters did not have to look far for examples. Ireland established its own committee (Judicial Appointments Advisory Board – JAAB) in 1995, which through examining the capabilities of candidates limited the ability of the executive power to interfere. In the evaluation of applications, the Commission for Judicial Appointments measures the capability of the candidates with various tools, among which tests play an increasingly more important role. This method – which has been inconsistent with common law – came into practice in some continental legal systems during the past several decades and aims to ensure the supply of judges in further generations through equal opportunities.[16]

Developments in the English method of judicial selection appear to be exemplary to external observers; moreover, they justify a perceptible convergence in the area of selection procedures.

At the same time, it should be emphasised that it has always been possible to accuse the English judicial bench elitism and conservatism – on the contrary, however, not even the slightest accusations could emerge claiming that political aspects play any sort of significant role in the selection of judges.

The latter accusations have generally affected the most influential representative of the common law world – that is, the judiciary of the United States – and to some extent continue to do so in present times as well.

2.4 From Partisan to Merit-Based Selection in the United States

Everything – and the opposite of everything. "The federal system of extreme solutions" – as we often hear it. The United States paints a varying picture in this area as well. There is hardly any selection process that cannot be found, with regard to the selection of the key players of the federal and state justice system (Guarnieri and Pederzoli 2002). The courts and politics are uniquely connected in the United States (Hodes 2011).

[16] *Qualifying tests and paper sift.* Retrieved 11 August 2011 from http://jac.judiciary.gov.uk/selection-process/19.htm

2.5 The Selection of Federal Judges

This world power that has the most lawyers – both proportionally and nominally – actually finances a relatively small judicial bench, whose judges win their office in a wide variety of ways. On the federal level there are about 1,000 judges appointed for life and 800 professional judges appointed for fixed terms, while at the state level there are less than 30,000 judges. There are several reasons as to how a justice system with relatively few judges is capable of functioning. Typically, two reasons are mentioned: the participation of lay judges and the extensive plea bargain system. For judges in this prominent legal system, the personal guarantees of independence depend on whether they won office at the federal or state level and on which level of the justice system they serve. The lifelong tenure of federal judges serves as a point of reference and is the most well-known example of the guarantees of independence, which strives to ensure that throughout their careers, the appointed ones will not have to be concerned with the political and carrier-related consequences of their decisions. (This statement – with the exception of Supreme Court Justices – can be true only with one restriction: it is theoretically possible that the motivation towards promotion still leads judges to render decisions in favour of the needs of politicians.) The lifelong tenure applies to a limited number of federal judges and accounts for only a small percentage of the entire judicial 'cast'.[17]

In their case, presidential appointment, requiring approval from the Senate, is laid out in the Constitution. This practice has led to politicisation of the selection process, which based on statistical data clearly demonstrates the 'partisanship' of judges. The emptied seats of federal judges are almost exclusively filled with members of the president's political party or its supporters. All this cannot be blurred by the gradual strengthening of professional points of view.[18]

It is an undisputable fact that in the selection of federal judges, the preliminary evaluation of professional achievements is playing a larger role. However, even in the light of the facts, the assertion by Mark Tushnet that some career judicial system is unfolding at the Federal Courts may seem like an exaggeration (Tushnet 2011). Just as the conclusion claiming that judges appointed through political agreements and based on the will of the ruling political party or party officials is also invalid, because the lifelong appointment really does eliminate the need for judges to act on direct 'party-orders' and for them to need to seek the gratitude of parties in order to extend their mandate. However, the commitment is not merely a question of reciprocity; it is much rather ideological, which for the ruling political party can lead to the most appealing decisions, without career considerations (Segal 1989; Ruger et al. 2004).

[17] Judges of the US District Courts, the US Court of International Trade, the US Court of Appeals Circuit Courts, and the Supreme Court of the United States receive lifelong appointments, while generally all other federal judges are appointed for 15-year terms (US Court of Federal Claims, US Bankruptcy Courts, US Tax Courts).

[18] Since the 1950s, a special committee of the American Bar Association also tests the competency of candidates.

Those cases when presidents expressed disappointment in the decisions rendered by judges they appointed cannot be obscured by the fact that there are appreciable differences in decisions brought by republican and democratic presidents. According to the survey by Carp and Rowland – which covered an extensive time period – the democrats made proportionally more liberal decisions than their republican colleagues (Carp and Stidham 1998).

As we pointed out earlier, the question of whether the desire for promotion may influence their judgements cannot be forgotten, even in the case of federal judges with lifelong tenures. This is a current issue even more so because a selection process which places more emphasis on professional aspects results in the appointment to higher-level federal positions of those judges who have served for many years as federal judges at lower levels. This can serve as gradually increasing motivation for judges to bring decisions in accordance with the will of politicians. We could mention a federal judge who alluded that younger federal judges knew very well that their decisions may later be reviewed from a political perspective, but of course empirical evidence supporting whether or not this was determinate in their decision-making does not exist. The studies that analysed judges' decisions from this perspective were also unable to produce completely unambiguous results (Sisk et al. 1998). It would however be difficult to rule out that with such an appointment system – one that so obviously takes partisanship into account – such cases would not occur.

2.6 The Selection System of State Judges

Although in the early years of the United States, even the state judges could have the benefit of lifetime appointment, but this quickly turns into a fixed-term appointment due to the common vision that the sense of responsibility of judges in connection with the sense of justice towards the people is better assured through a shorter, renewable mandate (Winters 1965). This idea to increase judges' sense of responsibility also led to the practice of election for not only governmental and legislative officials, but the election system by popular vote became the norm for state judges as well (Glick and Emmert 1987; Emmert and Glick 1988). So 'tourists' accustomed to the Roman-German career judicial system would be caught by surprise seeing activists in an American city wearing T-shirts with the faces of the judge candidates.

2.7 The Election System

There are various election systems still in existence today that evolved and spread throughout the nineteenth century. Heated debate has been generated among lawyers and politicians as to whether such a system, one that operates in a similar manner to the election of representatives and in which nominating interest groups play a considerable part, can comply with the twentieth-century nonpartisan standards.

Though at first glance it may seem obvious that a judge elected in the same manner as political representatives could not possibly separate himself from his political party and campaign financers, its supporters still consider it the most democratic system and also the system most capable of guaranteeing legitimacy and judicial independence. It should be added that the apologetic literature in this field usually does not argue that this election system would be the best possible solution (Shackelford and Butterfield 2010). Rather, it emphasises the advantages of this selection method in comparison to other methods applied in the United States, all of which could pose issues in terms of independence. The history of judicial elections began when people deemed a judge elected by them more independent than one appointed by the government. This idea became popular during the Jackson era, and the states began replacing their former appointment systems one after another. As a result, today more than 90 % of state judges must undergo some type of election.[19] The initial debates about the new election system usually were about whether elected judges would serve the needs of the people, even to the detriment of the law. To what extent will the will of the people be forced against the perceptions of legal dogmatism, and as a consequence, how much will the so-called results-oriented phenomenon increase? Nowadays it has been established that the real danger does not lie in this, seeing that the elections of the majority of judges are surrounded by apathy. Rather, judges identifiably having the support of parties, attorneys and other interest groups are those who pose a threat.

State judicial election systems are differentiated based on whether they are considered partisan or nonpartisan. Nowadays, although the majority (13) of states are nonpartisan, it does not mean that in the states with partisan systems (10), parties or other interest groups do not participate in the appointment or selection of judges.

The active participation of parties in the judicial selection process may seem quite odd, considering continental legal traditions, but is nonetheless consistent with the American attitude. If the people can elect the legislature on partisan grounds, why should they not be able to elect judges who apply the law in the same manner? And if the judges are elected, it would be unnecessarily disgraceful to exclude the opinion of society and that of the parties traditionally compiling interests. After all, no system can perfectly guarantee the selection of ideologically completely neutral actors, which is why it is still better if the judges' partisanship is visible, than if they judge biased behind the mask of impartiality. It may be that there is rationale behind this type of reasoning, but in practice, something much more extreme than ideological commitment sparked off the media frenzy: primarily, the intertwining resulting from campaign financing.

The amount of campaign finance spent on the election of judges has been on the rise for decades, which is more than worth considering (Brandenburg 2010). Neither parties nor chambers nor attorneys would contribute more and more funding if they did not have some expectations towards the candidate, unless of course all the supporters are groups of Good Samaritans. That this is a logical assumption is now not only based common sense but also a recorded judgement.

[19]Georgia was the first state to introduce the election system for judges in 1912.

The most important such decision, which placed judicial election systems in the spotlight, was rendered in the scandalous case of 'Caperton v. A.T. Massey Coal Co.', in which the Supreme Court set a revolutionary precedent regarding the exclusion of judges. The case began in 1998 and involved two mining companies as the litigants, and the jury awarded 50 million dollars in damages to the plaintiff. During the appeals process, the company president of the losing party contributed three million dollars to the campaign funds of a judicial candidate, through a nonprofit company he had established. After being elected, despite the submission of a motion to recluse, the judge was able to contribute with his vote to the court's decision to rule in favour of the defendant. The long case, through which other intertwining also surfaced, finally ended up at the US Supreme Court where the majority of the justices voted that in such cases there is a high likelihood of bias, and because of conflicting interests, the judge could not try the case. Up until then, there had only been two instances in which the US Supreme Court decided on issues of impartiality on the grounds that the Due Process Clause of the Fourteenth Amendment was violated: first, if the personal financial interest of the judge was pending on the outcome of the case and, second, in special criminal cases concerning the obstruction of justice.

The reasoning claimed that 'not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case. We conclude that there is a serious risk of actual bias–based on objective and reasonable perceptions – when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent'. 'The inquiry . . . centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election'.[20]

Perhaps the attached dissenting opinions, which shed light even more vividly on the special American attitude towards exclusion, criticise the new standard set forth in the decision because it can weaken the faith vested in the impartiality of the justice system. It is too vague and could start a chain of constitutional pleas with regard to elected judges, which would unnecessarily burden the courts.[21]

As mentioned above, it is rather difficult to methodologically prove precisely which form of selection, be that judges elected, appointment by the executive or merit based selection results in the adherence to a system which is impartial as

[20] "Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case. We conclude that there is a serious risk of actual bias-based on objective and reasonable perceptions-when a person with a personal stake in a particular case has a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." "The inquiry . . . centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election."

[21] See dissenting opinions of Justice Roberts and Justice Scalia.

well as independent. However, despite this fact if one uses their common sense it is not a difficult question. In spite of this, numerous studies – which have analysed judicial practice from this point of view and have tried to demonstrate to what extent judges made different decisions based on how they won their posts – can assist in answering the question. The research of Michael S. Kang and Joanna M. Shepherd is considered both interesting and instructive. They sought to determine what deviations are detectable in the decisions of partisan judges in comparison to nonpartisan judges, in the light of ever-increasing campaign financing. They concluded that significant differences exist, and we believe that their results can compensate for the absence of sound empirical data, mentioned with regard to the case introduced above (Caperton v. Massey). They analysed judicial practice in 50 states during a 4-year period (1995–1998), examining 28,000 decisions of 470 judges in order to determine how in specific cases judges selected through various means voted. Their research – based on an unusually large database – confutes earlier results, in which nonpartisan election campaigns exhibited much greater contributions. The parties are much more interested in election campaigns where at the presence of the candidate, they too are tested, which is why they exert more power to achieve their goal throughout the process from the selection of candidates to fundraising to convincing the business groups. They assert that a later decision of a judge is more determined by the level of party involvement during the campaign than by the amounts contributed. They also concluded that a judge elected in a partisan system is 12 % more likely to decide in the interests of business groups than a colleague selected through any other means. The authors also examined whether the possibility of re-election could influence justice (Kang and Shepherd 2011).

The analysis of the data revealed that the judges who will not face re-election are less mindful of the interests of business groups. One of the co-authors (J.M. Shepherd) exposed differences in the decisions of democrat versus republican judges in an earlier study. In proportionally more cases, the Republicans decided in favour of business groups than Democrats did. However, this latter study points out that significant differences between Democrats and Republicans are not detectable even in the case of judges who underwent partisan election and favour interests of business groups.

2.8 Retention Election

A ‘milder’ version of judge selection is the so-called retention election, when the citizens can express an opinion about a judge already in office, in a sense running without any opponent.[22] This method was first introduced in California in 1934. Nowadays this system to strengthen judicial legitimacy is mainly applied in states

[22] Alaska, Arizona, California, Colorado, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New Mexico, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, and Wyoming.

where judges are appointed by the governor. There is also one state where the mandate of a traditionally elected judge is prolonged in this way. Since today most appointments are preceded by selection by a professional panel and based on merit, it can be said that retention election can thus be considered some kind of a 'people's blessing' on the executive decision based on professional selection. Retention election could best demonstrate how much public awareness judicial practice draws, since the citizens are choosing the most appealing one from two or more candidates while expressing their opinion in the form of a yes or no vote about a judge already in office. The fears that social pressure on judges would lead to the deterioration of quality – could be most confirmed by this form of judicial election – could be most confirmed in this form of judicial election (Aspin and Hall 1994).

However, it seems that in the majority of cases, retention election does not provoke a response from citizens, and such an event rarely turns into a mediated social movement. The typical reasoning behind the removal of judges is that they support criminal behaviour through weak decisions, which makes them unfit for office. In California in 1986 three partisan judges were 'punished' by voters because they voted against the application of capital punishment in several instances. Similarly, at the turn of the millennium in Iowa, three Supreme Court Justices lost the retention elections, after their interpretation of the Constitution led to legitimisation of same-sex marriage. Of course, for the successful removal of these justices, a massive political campaign by the Republican Party was necessary. The value judgement differences between the people and the profession are often quite significant. In St. Louis in 2006, Judge Draper received a rather distressing opinion from his colleagues, only 27.5 % of whom deemed him competent for the job. Nevertheless, during the retention election he acquired the necessary majority. Retention election is considered expedient by many and a viable alternative to partisan or nonpartisan elections, as it deprives judge selection of strong political influence as well as of the negative campaign inevitably present in the other two forms of election. They also argue that in parallel to the decline of political aspects, professional aspects will inevitably strengthen, which will lead to the establishment of a more professional judicial bench (McLeod 2005).[23]

2.9 A Merit-Based Selection System: 'The Missouri Plan'

In examining the history of state judicial selection, we can discuss three eras that can be clearly differentiated. The early government-appointed practice was replaced by the system of direct election by the people in many states because from the perspective of independence, the simple assertion of governmental power was too problematic. The other method, though politicised by its very nature and requiring

[23] See American Judicature Society, Merit selection: The Best Way to Choose the Best Judges (2007), available via www.ajs.org/js/ms_descrip.pdf

even greater campaign financing, again established a serious camp of critics, who evaluated the selection as overshadowing professional aspects and diminishing the prestige of the judicial bench.[24] Roscoe Pound and Albert Kales (Pound 1937) established the American Judicature Society, the aim of which was the preparation of justice system reform. Albert Kales regularly criticised the judicial election system because he believed that with the participation of political parties, voters could actually only decide on which political forces they preferred. He also believed that the nonpartisan elections do not solve this problem at all, because the influence of the party leaders, whom he called politicrats, is strong here as well. In addition, voters lack the expertise about the candidates' professional competence. According to his proposal, a list of candidates should be prepared by a panel of experts, from which the Supreme Court Chief Justice of the given state could select the most competent candidate. This reasoning was accepted by the American Judicature Society in 1920 and was later adopted by the American Bar Association in 1937. Eventually, the first state to adopt the judicial selection system was Missouri in 1940, the primary goal of which was to strengthen the base of merit through establishing a panel of laymen and legal professionals. The point of Kale's original proposal was only minimally altered, in that the final decision is brought by the governor, rather than the Chief Justice of the Supreme Court.

It would be difficult not to recognise the similarities concerning the selection of judges between the spread of the merit-based selection method from state to state and the spread of judicial councils to continental legal systems (Fitzpatrick 2010; Caufield 2010; Ziedman 2004).

Both systems suggest an effort to free judicial selection from political burden through the separation of powers and in order to achieve the most nonpartisan bench possible may be worth the risk of strengthening elements of corporativism (Stilth and Root 2009).

2.10 Politics and Professionalism in the Selection of German Judges

The honour granted to the more than 20,000 professional judges in the Republic of Germany and the special legal stance that completely distinguishes them from all other public officers is derived from the Constitution established after World War II and is the basis for guaranteeing their independence.

Members of the professional judicial body traditionally have great autonomy in the area of judicial performance, and according to public opinion, any sort of influence or intervention – be it internal or external – would generate a precarious reaction.

[24]The famous words of Roscoe Pound can be quoted as 'putting courts into politics . . . almost destroyed the traditional respect for the bench'. See References, Pound (1937).

In order to uphold the balance between the branches of power and to provide the competence necessary for mutual control, a judicial selection system – controlled primarily by the executive power – has stabilised during the past several decades, and in general, it is capable of ensuring professionalism in the appointment of judges. However, guaranteeing independence from politics may well be another story.

Setting it apart from other European countries, in Germany, no central judicial council has yet been established that would delegate ministerial powers related to the judiciary to a self-governing (administrative) body. Although self-governing bodies do have significant roles in certain courts (i.e. where according to state regulations, they are empowered with a wide range of competences), the framework of external administration has nonetheless remained.

2.11 The Selection of Federal Judges

In the selection of federal judges – who account for a mere 5 % of all judges in Germany – politics plays a highly criticised, significant role. This is because the federal electoral committee ('Richterwahlausschuss') responsible for appointing federal judges consists of 16 members of the Federal Parliament and 16 Lander Ministers of Justice. As such, the Committee is influenced by partisan and ideological elements (Riedel 2005).

Since in Germany neither does current or former political engagement serve as grounds for disqualification from judicial appointment, nor is judges' political party membership banned, and the political identification of candidates is clearly pronounced.

Alongside the existing balance among determining political parties in Germany, this does not cause any astounding impairments to the selection procedure, but does spark controversy from time to time. For example, in 2001 during the selection procedure, two candidates were appointed even though they were evaluated as 'professionally unsuited' by the Presiding Council (Präsidialrat). The issue received high publicity; the criticism concerned the lack of qualification of two particular judges. The appointment of Judge Vezina and Judge Neskovic came under attack because they were considered underqualified and lacking experience necessary to hold federal judgeship. The other sources of criticism were more political in nature: Judge Neskovic was considered 'too liberal' by many (German Law Journal 2001). In response to the political controversies and criticism from conservatives, an intrinsic judicial self-governance emerged, and political aspects were overshadowed (Böttcher 2001).

Whether or not this resulted in any real changes is a completely different question – and according to the experts asked, no substantial outcomes were reported. Interestingly, the committee does not have a single member who is a judge, and furthermore, the body comprised of judges of the Federal Court of Justice is

only entitled to a preliminary opinion about the candidates – which has no binding effect for the Committee.

This status quo continues to be criticised by many, even today; a petition has already been drawn up for the Constitutional Court but thus far in spite of attempted efforts towards meeting the demand of the presence of judges in the Committee has been unsuccessful (Edinger 2003). In addition to all this, with regard to administration, within the framework of comprehensive demands for reform and in general, the expansion of the role of judges continues to be a common issue in professional discourse.[25]

In comparison to the selection of federal judges, politicisation stands even more so in the crossfire of accusations concerning the appointment of judges to the federal (and state) constitutional courts – where the political ties or, in the least, the ideological viewpoints of the judges are obvious and pronounced. The parties bring decisions regarding the appointment of constitutional court judges at their headquarters; half of the judges are selected by the 'Bundestag', while the remaining are chosen by the 'Bundesrat'. Because the election of judges requires a two-thirds majority vote, the dominant political parties must reach a consensus, which creates circumstances fit for playing political games.

2.12 The State-Level Selection of Professional Judges

At the state level, the procedures of appointing professional judges vary. Because we are discussing solutions that demonstrate extraordinary diversity, it must be emphasised in general that European requirement systems regarding judicial selection – with respect to a few exceptions – are systems that are difficult to conform with, since in reaching a decision in the substantial issue of selection, in the majority of cases, the predominance of other branches of power could prevail. In practice, however, the extent to which this opportunity can displace professional aspects inherently depends on the significance of the position, on the self-limitation of political decision-makers and on the professional ethos of the ministries undertaking administrative tasks.

In some states, ministries involve the judicial bodies – to a greater or lesser extent – in the decision-making process, and in other states,[26] similar to the procedure of the federal system, a committee comprised mainly of politicians or political delegates makes decisions concerning judicial appointments. However, contrary to the federal committee, judges are included among the members of these bodies. For the most part, political delegates enjoy the majority in these bodies. Baden Württemberg is considered one of the exceptional states, in which

[25] See, for example, interview with Renate Jaeger, constitutional court judge, Frankfurter Rundschau, 18 Sept 2003.

[26] Baden Württemberg, Berlin, Brandenburg, Bremen, Hamburg, Hessen, and Schleswig-Holstein.

the selection committee is only established if the candidate proposed by ministry is rejected by the 'Praesidialrat', which is comprised of the given court's judges. Some are apt to point out the fact that even these bodies are only partially capable of restricting the competence of the representatives of the executive power.[27]

In states applying different selection rules, general agreement is perceivable alongside the role of state-level ministries with regard to the professional nature of recent graduates first serving a probationary period and then later receiving final appointment. It is generally known that among the recent graduates serving their 'referendar' terms, only the candidates with the best academic records will apply successfully. The recruitment procedure is directed by the ministries with the involvement of advisory boards or the electoral committees. In addition to academic records, generally oral performance is also evaluated – which can naturally leave room for subjective aspects as well.

2.13 Party Interests Versus Professional Aspects

The academic performance, as well as their evaluation and the recruitment procedure is demonstrated to the outside world as being objective. This also provides a sense of authority for judges within the profession, just as the fact that based on primary principles, the promotion of judges is also based on professional aspects and, above all, is dependent upon the acceptance of the judge's work and acknowledgement by his colleagues. In the case of higher judicial forums, within merit-based selection schemes, political volition concurrently emerges as from time to time, which becomes statuesque in the appointment of members of the constitutional courts.

Concerning the selection of judges in Germany, it can be generally stated that while the recruitment of beginner judges is almost exclusively based on professional performance, moving upwards in the hierarchy, at first only sporadically and later in a more robust manner, the will of political parties emerges alongside professional aspects. Political aspects – with regional deviations and characteristics – also play a prominent role in the case of administrative heads of the courts.

While in the case of judicial positions where the final selection decision is made within the legislative branch of power, this is a necessary consequence resulting from the particularities of the legislature. At the same time, however, in the case of Germany, we must not overlook the executive power or the indirect influential role of political parties exercised through it, with regard to the judicial branch of power as an inherent part of external administration.

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[27] During a discussion, in questioning the role of ministries, the head of a state court stated that 'we are so accustomed to the ministries deciding in administrative issues that it has just always seemed so natural. Now that you've asked, it makes me think as well, that maybe this is not completely okay'.

Ministerial or legislative interference with the selection process (or other administrative issues) is only theoretical – merely a phenomenon that serves as a basis for debate – up to the point that it does not influence the decision-making activities of judges and hence does not violate the constitutionally protected concept of judicial independence. Seemingly, easily defensible arguments favour the creation of germaniums that function under other branches of power, those in which the members are representatives selected or delegated by the people or for the ministries established by the legislative to clearly define the process of judicial selection. According to some, this results in the emergence of the seamless chain of legitimacy – which serves as an underpinning foundation of democracy (Steffen 2008).

The extent to which the other branches of power influence judicial decisions is a matter of perspective. In 1951, Thoma – who undertook the protection of external administration – stated that it is unlikely that attempts towards influence would ever reach their goal. In response to this, Judge Hochschild indicated that in reality, this small likelihood actually presents an opportunity,[28] which he believes can be verified by social studies (Thoma 2011).[29] In his study, he poses many questions in which the wide-ranging repository of opportunities for influence is presented; he outlines the bottom line of the problem quite clearly, from a practical perspective: in the possession of administrative powers, the executive branch may influence the activities of judges in a way that affects the decision of the judge, whether or not such intentions exist, and their success is dependent merely upon the personality and individuality of the judge engaged in the administrative process.

Still there are others who view the situation more tragically and, going beyond the opportunities for influence, depict the German judiciary as an arena infected by party patronage, where those appointed by courtesy of political parties are motivated by gratitude. Interestingly a head prosecutor and a lawyer jointly signed an article in 1992, which examined party and political spirit in the judiciary. In the writing, the authors paint a surprisingly honest and rather dark picture of the interconnection between the judiciary and political parties. According to the authors, just as in other spheres, the role of parties could be caught red-handed, with regard to judicial selection and filling positions of head of court. Furthermore, the higher the salary of the judicial or prosecutorial position in concern, the greater the interest of political parties and the more effort goes into specifying who will fill the given position.

This is done at the ‘expense’ of all those who are not members of any political party, which in Germany amounts to 97 % of the population. The major parties dominating political life in Germany have unequivocal authority to select judges for posts in the constitutional courts, clearly based on aspects according to the party’s own point of view. For them, with regard to the selection of theoretically neutral

[28] See response of Judge Hochschild, References (Thoma 2011).

[29] Das Unwarscheinliche ist nur ein Grenzfall des Möglichen, und wenn es einmal eintritt, das Unwahrscheinliche, so besteht keinerlei Grund zur Verwunderung, zur Erschütterung, zur Mystifikation (Frisch, Homo Faber, 1957, 28. id. Hochschild i.m. 67).

judges, the most important form of assistance is provided by the books of party memberships. And this, according to the authors, with regard to selection, violates – among others – the provisions of the constitution concerned with the prohibition of discrimination. The two-thirds requirement forces the dominant political parties to engage in harmonious negotiations, which works less effectively in the case of justices of the supreme courts, since such a necessity for forced consensus does not exist in the selection committees. As such, in this instance one or the other party suffers defeat when the candidate – who was also elected on aspects defined by the party's viewpoints – secures the position.

As a matter of fact, with regard to lower-level judicial positions, the opinion of the authors is that in certain regions – due to stronger, more authoritative personas involved in judicial administration – political constraints have been effectively implemented. But other states exist in which 80 % of the court presidents and heads of prosecution are members of the current ruling party. According to the authors, all of this has a clearly pronounced effect on the operation of the judiciary and on the impartiality of judges and prosecutors. They pose the following question: what could be the reason behind the fact that the machinery of justice always comes into effect only in insignificant cases, i.e. when someone abuses budgetary resources? Why is it that a teacher, who due to lack of funds uses money from school's budget framework – one that was designated for funding a different set of objectives – to finance his own further education is held accountable for the commission of budgetary fraud (Haushaltsuntreue)? Meanwhile, much more serious offences committed by members of government and party leaders go unpunished. Of course, the authors meant for the question to be rhetorical. According to the authors' proposal, the only solution would be the exile and immediate prohibition, including criminal law sanctions, of party patronage (Schmidt et al. 1992).

The introduction of a judicial self-governance model has been a consistently re-emerging issue since the 1950s and has nowadays become an even more common demand; in addition to receiving support from judicial organisations and law professors, from time to time it also gains the support of political intentions. Discourse in professional literature heightened at the turn of the millennium, as well as the demand that emerged on this basis, and is perhaps best characterised by the often-cited expression of Peter Macke, who believes that the judiciary must be freed from the Babylonian captivity of the executive power.[30] Understandably, the demand for self-governance emerges more substantially from the side of judicial organisations, which led to the creation of a specific reform plan[31] in 2009 concerning state-level judicial administration, which was based on preliminary plans drawn up by the German judicial association in 2007. The reform aimed to replace the existing system of ministerial administration with a system in which a selection committee (Justizwahlausschuss) comprised of delegates from the state legislature, of judges and of prosecutors – who would establish the organisation (Justizverwaltungsrat)

[30] Macke, DRiZ 1999, 481.

[31] Diskussionentwurf für ein Landesgesetz der Selbstverwaltung der Justiz (18.03.2009).

that consists solely of judges and prosecutors and would be responsible for carrying out the central administration of state-level courts and making decisions in most issues – from judicial selection, the promotion of judges and disciplinary procedures to all personnel-related matters and other administrative questions.

However, the arguments for self-governance are suppressed by the voices that consider the structural features of the German judicial system to be the least of the problems and attempt to belittle the importance of the issue in the heat of current political debates. In Hamburg, in 2009, a typical response was given by the SPD to a proposal aiming towards judicial self-governance: it rejected the proposal claiming that such organisational reform would neither increase efficiency nor would it serve the best interests of the people and, furthermore, went on to call the idea a 'phantom debate'.

We believe that the efforts towards reform, which are aimed at strengthening the independence of the German judiciary and tend to emerge from time to time – sometimes firmly and at other times in a less pronounced manner – will sooner or later reach their ultimate goal; and the representation and balance between the branches of power as well as the administration of the courts and judicial selection methods free from political influence will be realised at both federal and state-level courts, within the framework of some sort of judicial council.

2.14 The Experiment of an Objective Merit System: The French Example

In the centuries passed, the continental legal systems in Europe – with regard to justice – have for the most part been busy with weakening the bond between the legislative, executive and judiciary powers while attributing this to an independent and nonpartisan justice system. Nowadays, judicial councils with a judge majority have become the most important institutional guarantees in most countries, which have acceded to take over most tasks – in whole or in part – related to the administration of justice. From among these tasks, in the perspective of our topic, the method of judge selection receives special significance, which is also a cardinal question in continental legal systems that operate mostly career judicial systems. Which aspects that form the basis and criteria for the recruitment of judges for particular judicial activities carry weight. And how much power the judicial councils in different continental countries have gained is also important.

In this perspective, Spain went perhaps the furthest, where everything was decided by the General Council of the Judiciary – comprised exclusively of judges selected by themselves from among themselves – and into the activities of which no other branch of power had a say. The Council decided on everything from the appointment of judges to disciplinary proceedings. The system, bearing the dangers of corporativism, was mended in 1985, and the election of council members was taken from the hands of the judicial bench. Since then, the Parliament appoints the

council members, as nominated by the King, with a three-fifths majority (Moreno-Catena et al. 2005). This re-established the nexus between the council and the legislature but in a way that ensures the minimisation of political influence on the justice system through (requiring a) qualified majority (vote). In addition, in 2011 within the framework of the so-called State Pact for the Reform of Justice, the selection of judges was revised in such a way that the role of judicial professional organisations in creating the list of nominees was increased (Provine 1996).

France also established its own judicial council relatively early. By now, the Council[32] has become a central institution of – from several perspectives – a distinctive justice system, despite the fact that the executive power has retained certain capacities in the area of justice administration. During the past several years, discontent with the courts has not left the French judicial system untouched either. Just as reform of the Belgian justice system came about as a result of a specific infamous criminal case (the Dutroux affair), so it was in France that a Belgian case – even bearing resemblance in its name to the previous example but with an opposite outcome – led politicians to 'fix' an already working system (Depré and Plessers 2005). In the case of the Belgians, a paedophile murderer was able to continue his killing spree because of the shortcomings of the justice system, while the French justice system is overshadowed by the Outreau affair, a miscarriage of justice in the early years of the twenty-first century, in which several people accused of paedophilia were wrongfully convicted and of whom one committed suicide while in prison.

Of the changes that resulted from the reform – brought about in part by this affair and which lasted from 2005 until the end of the decade – one of the most important elements was the transformation of the Council of the Judiciary. And with this, the intent to balance ensuring independence with the dangers of corporativism is clearly pronounced.

Earlier cases have also drawn attention to the flaws of the justice system – resulting in part from judicial self-administration – cases in which corruption, according to critics, led to the collapse of the judicial self-monitoring system.[33]

As a result of the reform, the highly criticised situation – in which the president who served as the head of the executive power as well as the foremost protector of judicial power in the Constitution – was eradicated (it was the words of Professor Carcassone that defined this situation "... this is like the safety of the sheep-pen is being guaranteed by the wolf"). The Minister of Justice is also no longer a member of the Council, but aside from disciplinary hearings, he may be present at all other trials. Besides these changes that strengthen independence,[34] this led

[32] Conseil Supérieur de la Magistrature.

[33] As a result of the national scandal resulting from Algére and Voirain judges, a much stricter ethical code was put in force with regard to civil judges. Furthermore, ethical questions received more widespread attention in the training of judges as well.

[34] Hereinafter, the Chief Justice of the Cassation Courts heads the Council.

to the elimination of the judicial majority – despite that the Committee established to investigate the Outreau affair called for an equal number of judges and external members. The reform has strengthened the Council through increasing the number of external members, who do not belong to either the legislative, the executive or the judicial power (such as law professors) but the nomination of whom is divided among key political actors (the president of the Republic, president of the Senate and president of the National Assembly). This process – which is mostly associated with President Sarkozy – reflects literary criticism related to the functioning of judicial councils and through abstaining from politics aims to ensure greater control over judicial power.

It may be that not enough time has passed to form a valid opinion about the effects of the reform, but it can, however, be said that the reform process, with which a better solution has been found for ensuring judicial independence and external control, can be evaluated as a positive regulation-level shift. We say this despite the fact that the elimination of the judicial majority apparently weakens the organisational independence of the courts and, from in some respects, contradicts the recommendations of the European Charter on the Statute for Judges. Regardless, we believe the selection method of non-judge members could serve as a guarantee towards a politically balanced composition of the Council.

In addition, the general method of judicial recruitment and advancement, which in the past several decades has set an example for other European countries, still limits the actual role of the Council to the appointment of those at the highest level of the judicial hierarchy. It also deserves to be mentioned that the practice, impartiality among the executive and legislative branches of power in appointments and often of influencing the outcome of particular cases, was not – even before the reform – criticised because of the judges (magistrat du siege). Rather, the appointment of the prosecutors – especially the higher-ranking ones (magistrat du parquet) – was what was considered unacceptable by many (Martin 1997). In this, the opinion of the Council of the Judiciary, contrary to the situation of judges, still does not limit the power of the judiciary, although the reform has extended the role of the Council in the appointment of prosecutors. (Likewise, criticism may ensue concerning the appointment of administrative judges, governed by a special order, in which case the separate Council of the Judiciary only has the right to submit a nonbinding opinion.)

We introduced the developments mentioned concerning the National Council of the Judiciary in order to illustrate how correctional experiments are ongoing even in a continental, career judicial system in the judicial administration, most often in the grip of incompatibility between efficiency, independence and social control (Gicquel:201–208). Thus naturally, these correctional attempts may, either directly or indirectly, influence the practice of judicial selection. However, from the standpoint of our topic, the reform is not what makes the situation in France especially interesting. Rather, a seemingly technical solution, which they began applying long before the reform, during the 1950s, in the recruitment of judges, and the connection between politics and the judicial office deserve special attention as well.

Typical to the French government, and nearly all state-funded institutions, is that applicants must undergo challenging testing as the basis of (providing) equal opportunities. It may seem unimaginable in many European countries for a university teacher with a well-established professional career to have to complete written and oral exams – much like a schoolboy – and compete with contenders in order to become a professor.

But in France, the system of competition exams (concours) is so widespread that if a position would come to be filled without these, it would be considered an exception. In France, considered to have pioneered the spread of competition exams within career judicial systems, has been operating a magistrate (judge-prosecutor) academy since 1985,[35] which by developing a recruitment system aiming to be merit-based and objective, ensures future recruitment of the ordinary judiciary. The uniqueness in this is that the essential part of selection occurs in only one location, at the National Judicial Academy (École Nationale de la Magistrature) in Bordeaux. A precisely worked-out exam, consisting of both an oral and a written section and integrating both questions measuring general knowledge and legal professional knowledge, ensures that those graduates are selected from the overwhelming number of applicants, who they considered suited for learning the activities of the magistrate. The result of this practice, which emphasises objectivity in the entrance exam, is that this form of selection is capable of minimising the importance of influence (resulting from) 'social capital' or politics in such a way that ensures the applicants' capability of professional preparation.

The aim is to filter out through the use of competence tests, the solving of legal cases and by measuring professional factual knowledge and language proficiency those applicants, who do not bear the competence necessary to become a judge or prosecutor. Performance and results achieved throughout the training, as well as class ranking, determine which position among those offered may be chosen by which trainee.

Not only recent graduates may apply to the academy. The academy differentiates between three types of exams,[36] depending on the age and (level of) former education of the applicant.[37] And in addition, a smaller portion of students are accepted without having to take the examination[38] but only if the applicant has

[35] Original name: Centre national d'études judiciaires. Since 1970 (Loi n. 70-642 du 17 juillet 1970) École nationale de la magistrature.

[36] The first type of exam may be taken up until the age of 31, and the opportunity is tied to obtaining a specific degree after high school graduation. The second type requires serving at least 4 years in a public office and must be completed before the age of 48. The third type must be completed by the age of 40 and requires at least 8 years of professional experience in the private sector or service in local public office or laic judicial experience.

[37] This is strictly dependent upon the number of applicants accepted through competitive examinations.

[38] Nomination directe en qualité d'auditeur de justice á l'ENM (Article 18-1 du statut de la magistrature).

sufficient professional legal experience.[39] Acceptance is decided upon by the 'Progression Committee', which with the exception of the highest judge-prosecutor positions (which are decided upon by High Council of the Judiciary) decides in all other magisterial advancement cases. Of the twenty members of this committee, only two are representatives from the Ministry of Justice, who because of their positions are magistrates themselves, while the remaining eighteen represent various levels of judicature based on their appointment or as they are authorised or entrusted by colleagues. However, the minimisation of ministerial representation is not the only factor that guarantees apolitical recruitment. At least 70 % of the elected judges are members of the largest and most significant magistrates trade union (L'Union Syndicale des Magistrats, USM), who consequently declare their activities as apolitical and who consciously see to it that only professional aspects are considered in the acceptance of candidates. This significant body, while not as well known as the Council, aside from deciding about acceptance, may also decide about the direct acceptance to the magistrate order. This opportunity ensures transferring between professions and that older, more experienced lawyers and legal professionals working in public administration or professors of law may apply for a position as a judge or prosecutor.[40] This is also the method for filling the position of a lay judge or a magistrate appointed for a fix term.

2.15 Conclusion

In his work about the institutions of justice, Roger Perrot put it this way: if we place great emphasis on legal techniques, then we select judges by competitive testing. If we are looking for judges with considerable experience in solving legal issues, then we select from those who have legal experience in some other legal area. And if we think that accountability has more weight than legal professional knowledge, then we must provide room for the election of judges by popular vote (Perrot 2008). The question is that who do we expect to think one thing or another about this question, seeing that the opinions of practising lawyers – who are directly affected by this question – and of politicians involved in government or the executive consistently differ from the opinions of legal professionals with no personal interest vested in an analysis of this question, which are of course not uniform in all respects, either.

Without a doubt, the search is still underway in the world's legal systems, and the number of approaches to judicial selection and technical solutions concerning the actual process of selection has not decreased. However, if we must find some

[39] Either is older than 31 years of age, holds a law degree, and proves at least 4 years of professional experience or holds a Ph.D. in law as well as a second degree or has been employed as a lecturer-researcher for at least 3 years after obtaining a degree in law.

[40] Intégration directe dans le corps judiciaire (Articles 22 et 23 du statut de la magistrature); Détachement dans le corps judiciaire (Articles 41 et 41-1 á 41-9 du statut de la magistrature); Magistrat exercant á titre temporaire (Article 41-10 du statut de la magistrature).

type of tendency in the events of the past half-century, we can draw a relatively clear conclusion. Unquestionably, merit-based elements have amplified in both the common law and Romano-Germanic legal systems, and each country intended to strengthen the expertise, the professional knowledge and the impartial assessment of judicial competence in one form or another. The political structure, the attitude towards democracy, the legal culture or the culture of endorsing social capital in the given society has limited and given direction to the types of change, but as we could also see from the examples of the formerly mentioned legal systems, some type of convergence is evident in this field, irrespective of which legal family (is being analysed).

In understanding the driving forces behind this process, regardless of the uniqueness of legal systems, the spread of the global constitutional school of thought cannot be ignored either, which has been interpreting judicial independence and the concept of fair trial in a wider sense since the mid-twentieth century.

The past several decades – especially in the continental legal systems – have been about the creation of judicial organisational independence. This more or less took the administration of the courts from the hands of other branches of power – (including) the future filling of judicial posts (recruitment), the promotion of judges and internal disciplinary actions – and gave it to the judges. This however has increased criticism regarding the dangers of corporativism, which warn against the dysfunctions of a self-monitoring organisation (that is) barred from social control. Recently, the French sought to face this challenge,[41] and we believe that they did so with an answer that is a moderate and respectful of judicial organisational independence. They have proven that positive developments reached during the past decades, which have strengthened judicial independence, do not have to be thrown out just because the efficiency of justice or self-monitoring capabilities have fallen victim to perhaps legitimate or even populist criticism (Canivet et al. 1996). As of nowadays in Europe, the German judiciary is considered to be unique because it is where the administrative framework of the courts had sustained and it is where the dominance of other branches of power is perceivable in filling certain judicial posts, and tenacious professional efforts towards changing of these features can also be sensed. Of the common law legal systems, the United Kingdom has also gained new ground in the interest of a judicial selection procedure free from possible governmental or political influence. Here, change was not induced by attacks against a politicised judicial bench, but rather in defence against theoretical vulnerability and European standards. We can also witness considerable shift in the United States as well, since the role of professional aspects in the selection of judges has increased significantly. Although radically different from the European, the ideology – still not wishing to endow judicature with the impression of neutrality – and the theory justifying direct election as allowing for judicial legitimacy still continue to preserve judicature as the arena for political battles.

[41] For further reading, see also the most comprehensive volume concerning this topic: Canivet et al. 1996, under References.

Perhaps it is a safe prediction to assume that in the coming decades, the field of judicial selection will face issues of how a merit-based selection could be aligned with the principle of diversity, which would lead to the spread of some sort of fair cross-section doctrine in the selection of professional judges as well. (All of the legal systems analysed in this text are already demonstrating strong interests in this area.)

We argue, even at the end of our analysis, that judicature in the twenty-first century is legitimised the most if society could be deeply convinced that in bringing decisions, the courts are not influenced by their relationships with political parties, government, lobbyists (interest groups), judicial leadership or voters, but by legal expertise and the judicial sense of justice. For now, nothing can lead to achieving this except a well-controlled, merit-based, objective selection mechanism – which, even if not perfectly, is capable of minimising impulses from both inside and outside the organisation. That is, of course, only if other tools to ensure judicial independence move in this direction as well.

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Chapter 3
'As luck would have it . . . ': Fairness in the Distribution of Cases and Judicial Independence

Attila Badó and Kata Szarvas

Whatever method different legal families or legal systems choose to apply in the recruitment of judges, one element will always remain constant. The hidden differences in the personality of the selected judges will never disappear. While the administration of justice is undertaken by human beings, conceptual, ideological and attitudinal differences will always be present. These differences are what lead to inconsistent outcomes while applying the same legal and factual conditions[1] (Bencze 2011). Of course, the human role can be overemphasised. Many believe this to result from legal realism, while others consider given positivist trends to downplay the significance of this question. Regardless, it would be naive to deny the fact that the judge's personality plays a role in rendering judgements.

The right to a legal judge from the perspective of this undisputable cliché, or, more precisely, from the principle of internal automatic assignment that derives from this right, is well worth analysing in the exemplary legal systems. If it were to be revealed to heads of courts, to government or to political parties that discrepancies in judgements could be linked to disparities in conception on the part of judges or to other sources, not much imagination would be needed to draw conclusions about the likelihood of their misuse of power. In the distribution of incoming cases, the increasingly intense demand for personal aspects to not predominate assignment to either a specific judge or judicial council serves to prevent influence on the judiciary and on individual judges, just as for government or other internal or external powers to not achieve having politically important cases assigned to judges they consider 'appropriate'. In the least, reasons for mistrust may arise if

[1]For an illustration of this in Hungarian judicial practice and its possible causes, *see in References:* Bencze (2011).

A. Badó (✉) • K. Szarvas
Institute of Comparative Law, Faculty of Law, University of Szeged, Szeged, Hungary
e-mail: attila@badoat.hu; szarvas.kata@rekt.szte.hu

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the assignment of cases falls under the competence of the heads of courts who participate in forced negotiations concerning budgetary issues with the government or whose appointment is dependent upon the other branches of power. Increasingly widespread concept of automatic distribution, which serves to circumvent this, randomises which judge or judicial council will preside over a given case (Ilonczai 1994:109–118). As part of the principle of the right to a legal judge, it is beginning to emerge as a factor guaranteeing independence in the administration of justice. An example already exists[2] of this being drafted into a [country's] Constitution (Badó and Trócsányi 2005:71).

We do not analyse the question of how exemplary legal systems approach rules concerning scope and jurisdiction, which is discussed in literature as external distribution. It may be that in Hungary during the past several years, reforms in terms of efficiency have occurred – though leading to scepticism concerning the enforcement of the right to a legal judge – we believe that an internal automatic case assignment system, even after having undergone such changes, could result in the effective protection of impartiality, or in what is perhaps even more important, it can provide such an impression. Interestingly, although in Hungary the topic was given a high priority status by the government in the 1990s, as of today it has been removed from the agenda. And, in connection with the 2011 judicial reform, its absence did not receive particularly significant criticism.

In this study, we argue that concerning the appointment of a legal judge to preside over a specific case, a case assignment method based on automatisation is a fundamental principle of judicial administration in a modern rule of state. In the absence of such a method – given the presence of certain organisational circumstances, along with a fragile political and legal culture – may result not only in theoretical violation but also in an explicit, impeding opportunity to infringe upon independence. We consider the enforcement of this principle particularly important in societies where significant doubt exists concerning the impartiality and independence of the judiciary.

Clearly, most counterarguments standing in the way of assignment automatisation are the objections voiced by the legislature or by heads of courts, since assignment that essentially eliminates discretionary decision-making evidently works well in completely differing judicial organisation systems and legal cultures. A good example of this is provided by the comparison of the German, Italian and US models. Obviously, in countries such as Denmark – where judicial specialisation is non-existent and a given judge presides over the widest variety of civil and criminal cases – random case distribution methods are more easily utilised and are nowadays done primarily with the help of computers (Fabri and Langbroek 2007:26). At the same time, in the highly specialised courts of Italy or Germany, automatic assignment works while receiving general satisfaction. Of course, the satisfaction

[2]See Österreichische Bundesverfassung (the Constitution of Austria); see also *Nemzeti Alkotmányok az Európai Unióban* 71 (Attila Badó & László Trócsányi eds.) (2005).

of judges is not primarily influenced by aspects of impartiality but rather by the fact that randomisation does not offer an opportunity for the heads of courts to show possible favouritism or to overwhelm some [judges] with a greater caseload while sparing others, as can occur when assignment is undertaken by the head of court.

Of course, where no constitutional requirement or judicial organisational rules exist necessitating a predetermined and random assignment system in order to fulfil the right to a legal judge, one cannot state that it would most definitely result in the development of manipulative assignment practices and that greater leeway is left for internal or external influence. However, what can be said is that the impression of infringing upon impartiality can definitely appear more substantially in relation to the administration of justice.

In France, for example, considered the founder of the right to a legal judge, decisions concerning the case distribution still remain under the discretionary authority of the head of court. Regardless, as a result of numerous reforms, the methods of judicial selection and important individual or organisational guarantees of judicial independence, currently no such pressure can be sensed from politicians, clients or the media that would justify the immediate mandatory introduction of automatic assignment (Fabri et al. 2005:450). And in many cases, practices even overwrite legal opportunities. Even though court presidents have the authority to 'replace' or substitute an appointed president and preside over any case in any council, this power is exercised only under exceptional or obligatory circumstances. However, an already assigned case can be taken from a judge at any time, based either on his/her request or on the decision of the president. Furthermore, this one-man system – inconceivable in Germany – operates without any direct controlling body, and yet it does not generate emotions within society, as in this area, no serious misuse of power has been documented during the past several years. It should be noted that in many jurisdictions, based on their own convictions, the heads of courts utilise case distribution plans ('Tableau de roulement') in which elements of randomness mix with personal decisions (Marshall et al. 2007:189–213).

In the following, we aim to present an overview of automatic assignment practices in several exemplary, indicative legal systems. We consider these to saturate the general concept of *the right to a legal judge* with content and as being capable of offering solutions to [issues concerning] the administration of justice in other legal systems.

3.1 The German Practice

Nearly all studies concerned with the right to a legal judge begin with the origin of the principle, which is rooted in the French Constitution of 1791 and which was later adopted by a majority of German states. The principle was established to limit the power of the executive and gradually gained a role as a limitation on the legislature and eventually came to serve a self-limiting role in the judiciary (Eser 1995: 286–293).

Interpreted broadly, just as in many other legal institutions, the spread of the principle to German territory was the result of shock caused by Hitler's administration of justice. Although the Constitution of the German Reich contained the principle of the right to a legal judge and in this regard matched [Germany's] present-day constitution almost word for word, the establishment of Special Courts was not bound to legislation. And in Hitler's Germany, this led to pursuing enemies of National Socialism with the aid of the proliferating Special Courts.

The practice in present-day Germany interprets the principle of the right to a legal judge broadly (alongside the constitutional clause prohibiting extraordinary courts) and, reflecting on painful historical experiences, tries to prevent legislative, governmental or arbitrary judicial administrative interference in [determining] which court, which judge or which judicial council composition may decide in citizens' cases.

The unravelling of the requirement of the right to a legal judge can actually be penned as an attempt to eliminate the factor of human uncertainty. Clearly, with regard to this principle, only such a system of regulating scope, jurisdiction and case assignment would fit perfectly, in which based on enacted legislation and on other rules built upon the law, the specific judge (as a person) or the composition of specific judicial councils (persons) could be predetermined and revealed without individual decision.

However, the realisation of this is hindered by other principles related to judicial administration, such as functionality and efficiency, which the Federal Constitutional Court of Germany was forced to consider.

In connection with the above, we can already easily find constitutional court 'concessions' in rules pertaining to the predetermination of scope, such as the so-called [concept of] mobile jurisdiction. In specific criminal matters, taking special characteristics of the given case into consideration, the prosecutors may decide on whether to bring charges at a lower or higher level court. According to the Constitutional Court, this does not infringe upon the right to a legal judge, because the regulation was established in order to promote the realisation of other legal principles (Eser 1995:287).

Likewise, we can find other minor exemptions from the principle of predetermination, which do not infringe upon the right to a legal judge. For example, a judicial council once comprised in a given form may adjudge a case that exceeds the time period designated in [the council's] annual case distribution plan, if the case had once already been assigned to it.[3]

Nevertheless, it can be said that the German legal system interprets the principle of the right to a legal judge especially rigorously. The legal manifestation of this is in the so-called case distribution plan, which assigns court cases to specific judges or judicial councils based on a type of automatisation.

Aside from the principle of predetermination, the principle determining case distribution has also gained stability and has accrued practical significance during the past several decades, primarily through the interpretation of the Federal Supreme

[3]BGH, 16.07.1998 - IZR 32/96.

Court and Federal Constitutional Court. Based on the principle of completeness, automatisation must extend to all judges and to all case types. According to the principle of abstractness, the case distribution plan must be established in such a general way, as to enable the assignment of incoming cases to a given judge or judicial council to be determined without [necessitating] individual decisions. The case distribution plan cannot be created in such a manner that one specific judge is assigned particular cases on an individual basis. The given cases must be adjudicated by the judge selected by means of general and clearly defined rules [governing case assignment].[4] In determining the composition of certain presiding councils, in addition to abstractness, another condition to be met is putting [the rules] in writing.[5] The principle of determination encourages the case distribution plan creators to define [the rules] as precisely and as specifically as possible. The principles of permanence and annuality limit the occurrence of modifications during the year (Schilken 1994:243).

Law governing the legal status of the courts ('Gerichtsverfassungsgesetz') delegates the task of distributing specific cases to a presidium (Prasidium), which exists in all courts and is comprised of the President of the Court and between 4 and 10 elected judges, depending on the number of judges employed at the given court.[6] This basically 'self-governing body' establishes the judicial councils and creates the annual case distribution plan, which predetermines the assignment of cases to specific judges or councils.[7] Deviation from this basic alphabetical system of assignment is only possible under special circumstances, which are demarcated in part by law, and also by the decisions of the Courts and of the Federal Constitutional Court.

Aside from abiding by the principles outlined above, in the assignment of incoming cases, the courts may freely determine whether to ensure automatisation through using either the first letter of the last name of the plaintiff (or accused) or the starting letter of his or her residential district. Not only is it predetermined which council will hear a given case, but a requirement exists that within a given judicial council, the roles of the members (e.g. who will present the case) must also be predetermined annually. Deviation from this may only occur in predetermined ways, in accordance with the rules governing substitution.[8] All of these are decided upon through voting by the members of the council at the beginning of each year.

The German legal system places special emphasis on the regulation of case distribution and, through this, on the enforcement of the right to a legal judge. If the courts do not adhere to relevant standards concerning the creation and application of the case distribution plan, the effected parties may have grounds for making a constitutional complaint.

[4]BGH 2 Zivilsenat 259/07.

[5]VGS 1-4/93.

[6]§21a GVG.

[7]§21e GVG.

[8]§21g GVG.

3.2 The Austrian Approach

The approach adopted by the Austrian legal system concerning both the right to a legal judge and case assignment demonstrates staggering similarities to the German perception.

In the Constitution of Austria, the method of case distribution is a constitutional guarantee of independence.[9] Regulation to this extent and the inclusion in itself of a technical method as a constitutional guarantee continue to remain uncommon in legal systems around the world. In addition, the Constitution of Austria specifically names the assignment methods which it considers constitutional, in terms of the right to a legal judge. Here, just as in the German system, the most important aspect lies in the predetermination of rules.

On both the first and second levels of judicial hierarchy,[10] judicial councils, which function based on the fundamental principle of self-governance, are responsible for personnel-related questions and the distribution of court cases. In the Council, the number of judges filling supervisory mandates is exceeded by the number of elected members. Based on the Constitution and the Court Organization Act (GOG), this is the deciding body in matters ranging from judicial appointment and the establishment of the Disciplinary Council to the possible relocation (transfer) of judges and in all important questions concerning assignment. The Court Organization Act states that the Council must provide a clear and predetermined assignment plan for the period of 1 February to 31 January, and in such a way that enables the professional competencies of individual judges and judicial councils to be considered, while at the same time ensuring an even distribution of cases. An additionally important point is that the Council must also determine substitution procedures in advance. More specifically, this means that the Council must govern how a specific judge or judicial council will be assigned cases in a given year – for example, in assignment based on the first letter of the last name of the plaintiff (or accused), a given judge may be assigned to deal with cases ranging from letters A to C. If for some reason the Council is incapable of functioning (e.g. because of illness), then competence in those cases would be delegated either to Judge 'XY' or to the second judicial council. Judges must be notified in due time about the preliminary plans (between 15 December and 12 January), so that they may raise objections to the schedule. Of course, prior to scheduling the assignment of cases, the cases are appropriately categorised, so that judges and councils are only assigned cases in line with their professional competences. In a given court, certain groups of cases exist that only one person may be competent to handle. In such cases, the problem of substitution is the only issue that may arise, since the cases are automatically assigned to that one judge or council, without infringing upon the right to a legal judge.

[9] Constitution of Austria [Bundes-Verfassungsgesetz] Art. 87.

[10] Bezirksgerichte, Landesgerichte.

What differentiates the Austrian from the German system is the variety of technical methods utilised in order to ensure predetermination. However, alongside the well-established system, newer approaches within the framework of automatic assignment have spread. As such, many jurisdictions utilise the first letter of the street's name rather than the starting letter of the last name of the plaintiff or the accused. The method of the council randomly assigning cases in the order of their arrival is also spreading, in which, for example, the first incoming case would be assigned to judicial council number one, the second incoming case to number two and so on until a new round begins.

In both Germany and Austria, automatic assignment functions while enjoying general judicial satisfaction; serious criticism has not surfaced on the part of government, political parties or the media. According to an analysis concerning the province of North Rhine Westphalia, only criticism arising on behalf of the litigating parties is worth noting, who at times voiced complaints if in a smaller court setting they repeatedly confronted the same judge. In such circumstances, the party would file a motion to disqualify the judge on the basis of judicial bias (Dyrchs et al. 2007:231).

3.3 Italian Automatic Assignment

Among the continental legal systems, Italy is where the relationship between politics and the judiciary is perhaps the most sensitive issue. Experiences stemming from the fascist regime strengthened society's need for a more independent judiciary, one that functions separated as distantly as possible from the executive power. Following the Second World War, in parallel to the strengthening of guarantees of judicial independence, the Italian judges – even in comparison to their European colleagues – gained increasingly significant power (Guarnieri 2004).

An independent judicial council comprised of judges appointed by judges and of lawyers appointed by the Parliament was already incorporated into the Constitution in 1948 as a requirement that should replace ministerial administration. Nevertheless, it was not until the end of the 1950s that this was actually realised. However, following this, the image of an increasingly activist judicial board with significant political power began to gradually develop, and its unsurpassed ability to push its own interests increased extremely by the 1970s, even in comparison to judicial boards of other countries.

In addition to emerging in significant constitutional and political decisions, further increase in both judicial (and prosecutorial) independence and power also appeared plastically in the battle against organised crime, when special power-entitlement and protections were granted to prosecutors and judges willing to wage war against the mafia.

This increasing power and independence, which from the perspective of the outside world was apparent in the salient pay or in the automatic promotion [of judges], had paired with the phenomenon of judges themselves assuming more

politically active roles. The proliferating judicial organisations did nothing to hide their ideological identities, which led to politicisation within the judicial board. This led to scepticism in Italian societal perceptions of judicial independence.

If a judge performs his/her duties as a member of the 'Magistratura Democratica' or as a 'Movimento per la Giustizia' or even as a 'Unita per la Costituzione' this can result simultaneously in an ideological stigma. In certain cases this can raise scepticism about the impartiality of a judge, even if legitimate reason for exclusion is non-existent.

The above should be considered by anyone studying the Italian case assignment system, which much like the German and Austrian examples nowadays pays extraordinary attention to prohibiting the influence of personal aspects in the distribution of cases.

In Italy, the administration of justice is extremely complex from both organisational and procedural perspectives, and the same can be said about the system established in the areas of judicial scheduling and case assignment, with the goal of promoting the implementation of the right to a legal judge and to achieving the requirement of the immovability of judges.

The preparation of statistical data and reports for the High Council for the Judiciary, which must include an abundance of data ranging from the schedule of judges to specific means of case distribution, presents a greater than average burden for the courts.

The High Council for the Judiciary maintains close liaisons with the courts, and contrary to most other continental legal systems, approval of the Council is required even in seemingly meaningless issues. Formally, the main element of data provision – which requires the submission of an organisational model plan and requires annual approval – is the responsibility of the presidents of the appellate courts. However, in reality, this places additional administrative burden on the head of court, judicial councils, the local association of lawyers and on every single judge (Contini et al. 2007:256). This may seem especially surprising in light of the fact that the central goal of various organisational reforms has consistently been the acceleration of judicial procedures. Yet the preparation of this plan is a condition that must be met if automatic assignment, as the final element necessary for the enforcement of the right to a legal judge, is to take place.

In Italian courts, automatic assignment has been practised for more than two decades and was introduced in the 1990s in order to limit the excessive power and abuse of power on the part of the head of court.

In the situation where the courts rendering decisions in the cases of mafia bosses, the assignment of cases depended on the one-man decision of the head of court, one can only imagine the weight of the burden or power the supervising administrator was faced with. In certain courts, such cases have made (or make) judicial work especially dangerous, and as a consequence many of these courts barely have any judges. The High Council for the Judiciary has initiated a variety of incentives and higher pay to try to lure judges from other courts to these jurisdictions. By today,

the situation has undergone significant changes, since based on the organisational model approved by the High Council, the assignment of cases to specific judges occurs in a predetermined, automatic manner.

With the exception of the smallest courts, cases are categorised as civil or criminal and are then grouped into units. In civil cases, the head of court utilises a method already introduced in the German and Austrian examples: the incoming cases are distributed to the given units based on the first letter of the plaintiff's last name. Within this method, randomness and predetermination are provided for by sorting the judges in a list based on age. The first case is assigned to the first, most senior judge, followed by the assignment of the second case to the second eldest judge and so on until the youngest judge is assigned a case, at which point assignment continues from the beginning of the list. The units are further divided into subunits (e.g. trade, agrarian), into which judges from the main unit are assigned based on the organisational model of the court, and thus the principle of predetermination is still enforced, though in somewhat varying forms of practical implementation. As such, in certain types of cases, differentiation is based on whether the case number is even or odd, while in other cases, it may be based on the previously set date of a hearing in the case.

In criminal proceedings, the principle is applied with similar stringency, but the complexity of the procedure demands a more intricate solution than the one applied in civil proceedings. Criminal proceedings can typically be divided into three stages, each of which is supervised by a different single judge, while either a single judge or a three-member judicial council presides over the main trial. Since it is a basic principle that the judge who tries the case as an investigating judge is prohibited from supervising both the preliminary hearing and the main trial, this fact in itself can be considered a significant element of guarantee in terms of ensuring impartiality. So naturally, the assignment system must function in a way that takes these limitations into consideration. Following judicial scheduling and the approval of the annual plan, the principle of predetermination is ensured through the application of various formerly introduced techniques in a manner that also differentiates between urgent and less urgent cases.

Experience concerning functioning of this system reveals that criticism surrounding both the unequal distribution of caseloads and the impartiality of judges has died off since the introduction of automatic case assignment, and the heads of courts can no longer be criticised in this area either. In fact, criticism remained absent even in cases involving politicians or prominent business executives (*CSM News* 2004). According to researchers who thoroughly analysed this method, the perception of judges regarding the right to a legal judge has also moved in a positive direction. Rather, criticism surfaces about the preparation of the annual plan, about the lack of computer software to simplify case assignment and concerning the practices of administrative courts, which operate with significantly more supervisory discretion in predetermination compared to criminal and civil cases (Fabri and Langbroek 2007:41–84; 233–266).

3.4 Lottery in the United States

In the United States, the application of random decision-making mechanisms enjoys general approval, and bringing decisions in fateful issues with the help of this method takes place in the widest variety of areas. Many foreigners are familiar with method of distributing Green Cards, in which 50,000 names are drawn from a pool of applicants, and who with this card are granted the right to work or study in the United States.

Naturally randomness and aspects of fairness deriving from it, which involve an equal chance for all and one that ensures independence from personal influence, is not unheard of in the realm of judicial administration either. Disregarding the extreme case that infringed upon the right to a fair trial involving judges who utilised coin tossing to decide the outcomes of cases, other areas exist in which the introduction of an element of randomness could succeed in serving to ensure due process.

This includes the automatic assignment of cases within the courts, which does not differ considerably from the European models outlined above, despite significant differences in legal cultural background – given that automatic, random case distribution processes function here as well. Considering that in comparison to the European models, as a result of [judicial] selection procedures, this is perhaps one of the most 'political' judicial boards, and no explanation is needed in order to understand why the application of random, predetermined assignment systems is necessary to ensure impartiality. Where the selection of state judges can be directly financed by political parties and economic lobbies, it is of significant importance that personal aspects do not influence the determination of which judge will preside over a specific case.

At the federal level, court cases (as well as the cases of some public administration agencies) are assigned through a well-regulated lottery system. In legislation governing automatic assignment, the protection of impartiality again arises, just as the equal distribution of caseloads and the elimination of political influence are also among the arguments (Hall 2010).

The different lottery systems play a significant role in the case assignment procedures of federal district courts, as well as in the distribution of cases at federal courts of immigration, federal courts of appeals, state trial courts and state appellate courts[11] (Samaha 2009:51).

In the United States, federal law delegates the establishment of rules pertaining to case assignment to the district courts.[12] Enforcement of these rules falls under the jurisdiction of the Chief Judge of the given district. Specific operation of the assignment system is to be agreed upon by the judges of the given court, while the absence of a consensus will result in the establishment and approval of rules

[11] Adam Samaha, *Randomization in Adjudication,* 51 William and Mary Law Review (2009).

[12] 28 U.S.C. § 137.

decided upon by the Judicial Council of the circuit. Based on the principles above, this decentralised system enables a given district court to distribute cases according to its own assignment plan or system.

Despite the fact that federal regulation does not require states to utilise automatic assignment, it can be said that varying methods of such case are generally widespread among state courts, ranging from state supreme courts and city, municipal and county courts to courts of limited jurisdiction. The same is true in the case of district and bankruptcy courts, where random assignment is the most widespread. Its application ensures the equal distribution of cases (caseloads) and decreases opportunities for 'judge shopping'.[13]

In the following, several generally widespread assignment methods will be introduced, which are avidly applied by both federal and state courts in the United States.

In both the California District Court and the Superior Court of California, the distribution of cases is based on a *master calendar system* (Seabolt 2008). Incoming cases in a given court are loaded into a calendar by an automated system. As such, the cases are not assigned to a specific judge but to a particular date and time (Galler 2011). The case will be presided over by the judge scheduled for that specific day. If a judgement is not rendered on that day, the next stage (court event) or trial will be assigned by the court using this same method. Thus, the likelihood of one judge being assigned multiple stages of a given case is quite minimal. This method is the most appropriate for courts dealing with cases that are not overly complex. Modified as well as further developed versions of the master calendar system exist; for example, the court may decide for a given judge to consistently participate in one particular procedural stage or to only preside over specific types of cases,[14] or judges may be assigned cases according to their expertise or specialisations (Soles 2006). Under such circumstances, the judge is said to have horizontal responsibility, because among all the cases he only deals with one particular procedural stage.

The *block system* (or independent calendar system) is more suitable in the assignment of complex, difficult cases. Just as in the master calendar system, the incoming case is assigned with the help of a calendar to a given judge by means of a random drawing. However, once assigned, each stage or court event within the given case is handled by that same judge (Church 1978); in other words, reassignment does not take place after each individual stage. In this case, the judges have vertical responsibility (Steelman et al. 2004). This enables one judge to follow a case along until its disposal, instead of having to become reacquainted with the facts of the case after each stage or each new trial (Tamm et al. 1981). However, the disadvantage

[13] See Federal Judicial Center, *available on* http://www.fjc.gov/federal/courts.nsf/autoframe?OpenForm&nav=menu3c&page=/federal/courts.nsf/page/A783011AF949B6BF85256B35004AD214?opendocument

[14] For example: Motions filed – Motions Judge; Pretrial conference requested/required – Conference Judge.

of this system is that the complexity of particular cases results in heavier burdens on some judges, so this method is less able to fulfil the goal of equal caseload distribution and is also theoretically less capable of serving the deliverance of unbiased, impartial judgements.

Calendar systems were already utilised by courts in the 1970s in the manner outlined above, but technological advances later provided opportunities for computer-aided assignment as well. Today, the majority of courts using calendar systems have relegated automatic assignment to computers, which essentially eliminates the likelihood of discretionary decisions (judgements).

Another example of automatic assignment is the *Cards and Decks system*, which among others is set forth in the assignment procedure rules of the US District Court of Minnesota and the Eastern District Court of California. Here, the assignment of cases occurs with the help of electronic computer software. Cards bear the names of the judges. The programme generates as many decks as the number of case types under which the given court categorises its incoming cases (e.g. criminal, civil, labour). The name of each judge appears the same number of times within each deck, and the decks are automatically reshuffled after each case assignment.[15]

The system of automatic *random blind assignment* is integrated in the case assignment plans of the US District Court of Northern California and the Northern District Court of New York. The court clerk assigns an ordinal number to each incoming case, and the numbers are then distributed among the judges. The system usually handles criminal and civil cases separately, and it enables the reassignment of cases based on the caseload of judges.[16] Some courts utilise alphabetical case distribution, similar to the formerly introduced systems of Germany or France, which is a simplified version of random assignment. This method is predictable and less random but nonetheless sidelines opportunity for manipulation. This system is employed in the Superior Court of Gordon County in the state of Georgia, where predetermined segments of the alphabet (e.g. A-K, L-S) are paired with the names of the judges and the incoming cases are assigned to specific judges based on the first letter of the last name of the plaintiff (the accused in criminal cases) and distributed in accordance with the alphabetical list.[17]

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[15] See, e.g. Preparation of Assignment Decks. U.S. District Court, District of Northern Ohio (1997), *available on* http://www.ohnd.uscourts.gov/assets/Rules_and_Orders/Local_Civil_Rules/Rule_3_4/Rule_3_4.htm; Eastern.

See also General Order on Automated Case Assignment Plan, District of Ohio (2002), *available on* http://www.caed.uscourts.gov/caed/DOCUMENTS/GeneralOrders/410.pdf

[16] See General Order No. 44 – Case Assignment Plan, U.S. District Court, Northern District of California, available on http://www.cand.uscourts.gov/filelibrary/132/GO%2044.pdf

[17] See Case Assignment, Superior Court of Gordon County, Georgia (2012), *available on* Georgia http://69.195.68.90/wp-content/uploads/2012/01/departments/superior-court/gordon_local_rules_and_procedures.pdf; *see also* Local Rules of Los Angeles Superior Court, Case Assignment Plan for the Northern District of New York, General Order No. 12 (2011), *available on* http://www.nynd.uscourts.gov/documents/GO12_withfillablenoticemtd.pdf

In many cases, a hybrid version of the assignment processes introduced above appears, which in managing certain [types] of cases enables the court to incorporate exceptions into its assignment system.

An example of this includes the *one family, one judge* method implemented by family courts. When a family first comes into contact with the court, its case is brought before a judge by way of automatic assignment, but each new and further case concerning that particular family (e.g. domestic violence, divorce, custody, child support) will be assigned to the same judge who presided over the very first case, regardless of how much time elapses between the new case (or cases).[18] This enables the judge of the randomly assigned case to clearly perceive all aspects of the family's problems and to bring a more competent decision.

Case assignment in the majority of courts is integrated into the court's organisational or procedural regulations (Brown 2000). However, accessibility to the assignment process itself and to the rules pertaining to methodical details is often times limited to local lawyers and to individuals with ties to the given institution (Samaha 2009). And since in some cases the court may build the rules governing the assignment system directly into the internal organisational regulations of the institution (Brown 2000:41), the rules are thus essentially inaccessible by the general public (Brown 2000:26).

3.5 Conclusion

Deriving from the principle of the right to a legal judge, the automatic assignment system can be viewed as a modern guarantee of impartial judicial decisions and the utilisation of which is becoming customary and natural in more and more legal systems.

Automatisation has significant importance not only in terms of ensuring impartiality and preventing corruption but also in the fair and equal distribution of caseloads.

However, even in modern western democracies, this requirement cannot yet be considered general and often has no relevance to whether or not the right to a legal judge is guaranteed by the constitution. Legal systems exist in which this constitutional requirement did not prompt conversion to automatic assignment, and numerous other examples demonstrate that automatic assignment systems work – even without a constitutional basis.

Clearly, democratic legal systems where the impartiality of judges, the politicisation of judicial appointment [procedure] or the relationship with the executive power becomes questionable by society, the inclination for establishing a system of automatic assignment becomes stronger. Germany and Austria continue to remain among the exceptional European legal systems, where the external administration

[18] See, e.g. Kentucky Court of Justice, Family Court Overview.

of the courts is undertaken by the Ministry, rather than being delegated to a Judicial Council. In Germany, political parties play an active role in the appointment of supervisory and higher-status judicial positions (Schmidt et al. 1992). Under such circumstances, if the appointment of judges was dependent upon the decisions of the heads of courts, strong doubts would arise on both sides in terms of the impartiality of appointments. In the United States, political parties and the ideological conviction of candidates both have a significant role regardless of whether the judge received his/her status through election or was appointed by the governor or the legislature, which just as in the German system provides for automatic assignment to serve as a necessary safeguard of impartial assignment. In Italy, the Council responsible for judicial administration has experienced a gradual increase in power since World War II, which has thus resulted in the establishment of a judicial selection procedure sharply divided from politics. As such, the introduction of automatic assignment in the case of Italy was not primarily driven by the politicisation of judicial appointments but rather by the traditionally politically active role judges, the special nature of mafia cases and the need for equal caseload among judges.

The examples we introduced can provide a general idea about the types of exemplifying approaches presently available, which beyond the enforcement of professional standards are capable of fulfilling the principle of predetermination and which can serve as models for legal systems that do not utilise automatic assignment.

The approaches offered by the models of Germany, Austria, Italy or the United States shed light on the fact that automatic assignment can function optimally even alongside a radically distinctive legal culture and judicial administration system, which for the most part is a technical issue. Thus, the arguments that consistently arise concerning the implementation of this system for the most part can only be evaluated from the perspective of fearing for the loss of administrative power. In our opinion, an automatic assignment method that consistently enforces the principle of predetermination serves as an effective device to ensure judicial independence and impartiality.

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Part II
A Comparative Approach to Analysing the Right to a Fair Trial in Light of Modern Political Challenges

Chapter 4
An Overview of Fair Trial Standards and National Security from a Comparative Perspective

Samantha Joy Cheesman

4.1 Introduction

The debate about who should be guaranteed what minimum standards in a criminal trial centres on the concept of what constitutes a 'fair trial'. Not only does this debate revolve around what is meant by 'fair' and 'due' but also that when guaranteeing an individual the security of due process, you will invariably be jeopardising national security. Due process guarantees that the government must respect all the legal rights owed to a person by the law. It is also the concept that the law and legal proceedings should be fair and that criminal proceedings should not be conducted outside of the law. When a government violates a principle of law (a due process violation), which infringes upon the fundamental rights of one of its subject, then it has offended the principle of the rule of law. The concept of due process first originated in the United Kingdom with the advent of the Magna Carta (1215) which established the rule of law in the United Kingdom. The Magna Carta set out the rules, which governed the relationship between the subjects against their King, which is herald as being an early example of due process. The Magna Carta at chapter 39 contains the following clause:

> *No free man shall be seized, or imprisoned … except by the lawful judgment of his peers, or by the law of the land.*

This principle was imported by England to its North American colonies where the term 'due process' was used and incorporated into their statutes. In the United States, the principle of due process is guaranteed in the 14th Amendment along with the 5th Amendment read together; they are a list of established legal principles. Together the 5th and 14th Amendments prohibit the government from arbitrarily or unfairly depriving an individual of his or her basic constitutional rights such

S.J. Cheesman (✉)
Institute of Comparative law, University of Szeged, Szeged, Hungary
e-mail: S.Cheesman@csizma.org

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as liberty. It follows that the more severe the level of deprivation of liberty, the more rigorous the due process procedures that must be afforded. Thus, due process procedures for those charged with a crime would include the right to be represented by counsel throughout the proceedings, the right to cross-examine witnesses who have testified against him and the right to a trial by an impartial jury of his peers. In order for criminal statutes to pass constitutional muster on these grounds, the law must be sufficiently clear so that citizens understand the specific conduct that is prohibited. A law that fails to meet this standard, because it is too vague, would be unconstitutional. In terms of due process, further distinction can be made between procedural and substantive rights. The distinction is made on the basis of the fact that while substantive law creates, defines and regulates laws, procedural law enforces those rights or seeks redress for their violation. In this context it can be said that procedural due process relates to the law itself, as to whether or not it is clear and fair and whether it contains a presumption of innocence.

Within the fair trial discourse, there are competing concepts and philosophies of what should be present in order for an individual to be guaranteed a fair hearing. The expansion of the European Union (EU) has resulted in increased pressure to reconcile the various different conceptions of a fair trial. This pressure partially originates, with the need to develop a system whereby states can be assured that their nationals, in another country, will be afforded the guarantees of certain procedural rights. The challenge now before the European Union is to realise a consensus regarding what a fair trial is and to institutionalise modalities that will ensure a consistent application of 'fair trial' procedures throughout the EU.

One such challenge currently before the EU is Hungary. The current constitutional reforms that are taking place in Hungary have called into question the independence of the judiciary. These reforms will be discussed in light of the impact that they may have upon the equality of arms. Recent case law from the European Court of Human Rights (ECtHR) concerning Hungary and the disclosures of documents will be discussed in light of the similar barriers to justice found in both the United Kingdom and the United States.

Hungary has, fortunately, not been the victim of terrorist attacks in recent years; despite this fact a similar issue, as in the United Kingdom and the United States, of viewing the defence as an obstacle to the State achieving its goal of deterrence is prevalent across the board.

The recent terrorist attacks in Europe have provoked renewed debate regarding how fair trial rights are to be understood and applied, especially to those people who are believed to have committed terrorist crimes.

It is in this climate that claims are made to revise and reinterpret fundamental rights and freedoms, which assure the right to a fair trial. This tension is currently being played out in the recent case of Julian Assange, in which he believes he is being constructed and presented as a terrorist, so he can be subject to legal processes that would especially apply to such a criminal suspect (Addley and Hadley 2010).

These tensions, which potentially act as a barrier to a fair hearing, originate in the historical foundations of the interpretation of law. The United Kingdom has a common law legal system in contrast to the civil law systems in place in the rest

of Europe. These differences in legal approaches have a nexus in the development of a European body of law. This nexus leads to tensions within the EU regarding the different emphasis and importance certain elements have as part of a fair trial in these different systems. This chapter now examines the importance of this nexus and its role in the development of a European and international jurisprudence with regard to 'fair trial' concepts and practices.

4.2 Competing Theories of the Right to a Fair Trial

One of the key distinctions between common law and civil law systems is that the common law places greater emphasis on the defendant having the ability to decide how he or she will choose to defend him or herself. With regard to the autonomy of the defendant, civil systems view that positive action needs to be taken to protect the rights of the defendant. So, in relation to the autonomy of the defendant, in order to be able to make their own decisions, the civil systems can only conceive of there being a 'fair trial' if the defendant has representation. Common law also provides for legal representation but places more weight upon the self-determination of the accused.

Herein lies a tension between the two systems. The common law approach emphasises the defendants' right to choose whether or not to have representation, i.e. after they have entered a plea (all based on the proviso that they are competent), and to refuse to give evidence and/or to answer questions (Jackson 2008:6–8). Civil systems find this concept of determination difficult to reconcile with the general view that for a fair trial to take place, a defendant should have legal representation. Here it is evident that the former system emphasises 'individual rights' and the latter 'accurate outcomes' (Jackson 2008). The European Court of Human Rights (ECtHR) is where civil and common law systems intersect. The European Convention on Human Rights (ECHR) sets out the minimum rights of the defendant at trial, which are put into practice by ECtHR. All of these rights have been developed with particular emphasis on two principles: the 'equality of arms' and the 'adversarial trial procedure' (Jackson 2008). It is generally accepted that for a trial to be fair, it is important that the confession be given freely and voluntarily before it can be admitted as evidence. Additionally, it is also important that the right to have counsel present while being interviewed by police is respected. This is the core principle underlying Article 6 principle, concerned with the equality of arms between the defendant's counsel and the prosecuting bodies.

The protection of equality of arms is fundamental to any criminal procedural system. In the early inquisitorial systems, defence counsel were not allowed to participate in the trial itself. The human rights instruments have marked a clear departure from the inquisitorial to the adversarial criminal procedural systems. The ICCPR and the ECHR name the right to the equality of arms. The way in which equality of arms is expressed in both the ICCPR and the ECHR is found expressed in

national constitutions of the EU. It has been argued that the principle of the equality of arms is the European equivalent or answer to the common law concept of due process. The ECtHR has set out in several cases that

> each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-a-vis his opponent.[1]

Equality of arms in its most basic of terms is the ability of both parties to be equally prepared in bringing their cases before any court. This becomes very important when talking about legal representation. It is important that the quality of the representation is maintained.

This is a factor, which is being completely disregarded in cases concerning national security. Equality of arms has traditionally focused on whether or not both sides have been disclosing the relevant information and evidence in the case to each other, as well as the opportunity to question witnesses. However, the ECtHR has focused on the overall fairness of the trial, and if not having a lawyer or access to a lawyer does not affect the overall fairness of the trial, then it can still be considered to be 'fair'. The principle of equality of arms acts as a safeguard against the abuse of power of the State. It is clearly recognised that the words themselves, 'equality of arms', do not appear anywhere in the wording of Article 6 of the ECHR. Despite this fact it can readily be inferred from the jurisprudence of the ECtHR. Several studies, the results of which will be discussed below, conducted across the EU member states have all shown that there are considerable divergent practices in terms of both assuring and informing the defendant of their procedural rights. It is important to note at this juncture that the 'right to information' in trial has two aspects to it. The first is the right to be informed of the charge being brought against you and also to have access to the evidence, which is the basis of the charge and accusations. The second part relates to the defendant's right to be informed of his or her fundamental procedural rights. These procedural rights take the form of the right to remain silent (this is not a statutory right in Luxembourg and France) and the right to have access to the file (this is not provided for on behalf of the defendant in Estonia, France, Germany and Spain) (van Puyenbroeck 2011). These are just two of the very many fundamental procedural rights that defendants are entitled to as they make up the relevant parts of what constitutes a fair trial.

The right to have access to the evidence, which forms the basis of the charge against the defendant, is being eroded not only in national security cases.

The right to a fair trial will be examined in light of the provisions established in Article 6 of the ECHR, with special focus on Articles 47–50 of the European Charter of Fundamental Rights (The Charter), as well as Article 14 of the International Convention on Civil and Political Rights (ICCPR). Together these three instruments not only provide a comprehensive framework from which the 27 European Union

[1]See Bulut v. Austria, App. No. 17358/90 ¶ 47, Eur. Ct. H.R. (1996); see Lanz v. Austria, App. No. 24430/94 ¶ 57, Eur. Ct. H.R. (2002); see Öcalan v. Turkey, App. No. 46221/99 ¶ 159, Eur. Ct. H.R. (2005); see also Josef Fischer v. Austria, App. No. 33382/96 ¶ 18, Eur. Ct. H.R. (2002).

member states can draw strength to support the right to a fair trial but also enable individuals to hold states accountable to the obligations that they have undertaken to protect and promote.

The right to a fair trial is enshrined in international human rights instruments, and the great bulwarks of justice of the defence counsel are the last line of defence when it comes to the protection of those rights. It is in times of tension that those protections are put to the test. The ability to have an effective defence is defined by two main things, the rights to disclosure of the case and the disclosure of evidence (Gideon Boas et al. 2012).

In essence the two aspects of disclosure hinge on how the scope of equality of arms is determined. As we will be seen in the United Kingdom, this is being put to the test with the advent of Special Advocates and control orders and with the Patriot Act in the United States. As recognised with the terrorism cases, the issue of disclosure often is the key determining factor as to whether or not the defendant will receive a fair trial. Article 14(3) of the ICCPR specifically lists and states that the equal access to courts is dependent upon a number of elements among those being the disclosure of evidence as well as the right to legal representation. This is further reiterated in the Human Rights Committee (hereinafter referred to as the HRC) General Comment No. 32 where in paragraphs 8–14 the HRC outlines in detail what is expected of the State in ensuring equal access to justice.

In paragraph 8 the HRC states that:

> 8. The right to equality before courts and tribunals, in general terms, guarantees, in addition to the principles mentioned in the second sentence of Article 14, paragraph 1, those of equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination.[2]

It is explicitly recognised in paragraph 10 that

> The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.

The ECtHR has recognised and agreed with the position taken by the HRC.

There are several elements to a fair trial specifically mentioned both in Article 6 of the ECHR and in Article 14 of the ICCPR, as well as in the Charter, which need to be adhered to. However, in addition to these very specific lists, concepts have developed over time arising out of the case law of the ECtHR and domestic courts setting standards to what a fair trial should 'look' like. Some of these concepts, which have developed over time, include the ideas of equality of arms, full disclosure, 'The Principle of Consistency' (Schmid 2009:30–31) and proportionality.

Of particular interest for our purposes is Article 6(1), which states

> In the determination of his civil rights and obligations . . . everyone is entitled to a fair . . . hearing.

[2]UN Human Rights Committee, General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/GC/32.

Article 6 stipulates that all member states need to ensure that both nationals and nonnationals receive a fair and public hearing within a reasonable time frame (this includes the right to be informed promptly and in a language that they understand, as well as having enough time to adequately prepare their case), an independent and impartial tribunal – which has been established by law, and for the judgement to be pronounced publicly. The press and the public can only be excluded from the hearing for the following reasons: (1) if it is in the interests of justice to do so, (2) if it would prejudice the interests of justice, (3) if it would endanger the public order and national security and (4) if it would jeopardise the interests of juveniles or the protection of private lives. In addition, the member states will ensure that everyone shall be presumed innocent until proven guilty, and that everyone charged with a criminal offence is entitled to certain minimum rights to defend himself in whatever way he so chooses and to be given financial aid (if necessitated) to help pay for legal assistance (i.e. legal aid) (Mahoney 2004), the right to have witnesses examined and to examine witnesses and the right to have the free assistance of a legal interpreter if needed.[3]

It is important to note that with regard to securing fair trial guarantees, both the ICCPR and the European Charter provide for similar provisions as Article 6 of the ECHR. Article 14 of the ICCPR compliments Article 6 by further elaborating and expanding upon these fair trial principles. With relation to Article 14, the Human Rights Committee in its second most recent General Comment has confirmed that 'deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times'.[4]

Chapter VI of the Charter, entitled 'Justice', is wholly dedicated to securing the right to a fair trial. Together, the Charter and Article 6 form the basis upon which European standards for guaranteeing procedural safeguards before, during and after (upon appeal) the trial are established. These two instruments together form the practice that the European member states should adopt when conducting trials. It is to these practices and standards that we now turn.

4.3 European Standards for the Right to a Fair Trial

In order to examine the extent to which the principles set out in Article 6 of the ECHR have been influenced by the practices of the European member states, the constitutions of the 27 member states were studied. The constitutions, which inform criminal justice practices in the individual countries, were scrutinised on the basis of what constitutes a fair trial in terms of the principles established in Article 6 of the ECHR. The approach taken by the member states as evidenced in their

[3]Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

[4]Human Rights Committee, General Comment 32, UN Doc. CCPR/C/GC/32 (2007), paras 6 and 19. The principle of a fair trial is a fundamental part of customary international law.

various constitutions is revealing with regard to their views of what are acceptable minimum standards for securing an individual the right to a fair trial. It can also be noted which elements are considered to be more significant than others. It is also important to observe that there are differences that can be identified between western European member states, post-communist countries and those that have recently become member states (Kuhn 2004). This distinction is important in that it shows the approach taken by 'newer' states in relation to the ECHR when formulating their constitutions and incorporating fundamental rights and freedoms (Jiri Priban et al. 2003:29–31).

4.4 Member States' Constitutions

The right to liberty and security of person (Article 5 of the ECHR) is predominantly enshrined in the constitutions of the member states in comparison to Article 6 (the right to a fair trial). Western European (United Kingdom, Austria, Belgium, Denmark, Finland, France, Greece, the Netherlands, Germany, Spain, Portugal, Italy, Luxembourg) member states which have not been subjected to communist rule or recent political leadership change as a result of a military coup provide specific guarantees of procedural justice. These include the following: pretrial rights, independence of the judiciary, public hearings and other basic provisions such as no punishment without law (Article 14 of the Constitution of Belgium)[5] or that fundamental rights and freedoms are protected by the judiciary (Article 4 of the Constitution of the Republic of the Czech Republic).[6] The overall due process principles are alluded to in the constitutions, and many provisions are made for the pretrial rights and the posttrial rights (in terms of the right to appeal), but little, if anything, is stipulated about the actual trial itself and the safeguards which should be in place. At best the constitutions mention that both the national and international law (of which the member state is a signatory) will govern the practice of fair trial. A few of the post-communist countries and the new member states, for example, Cyprus,[7] Greece,[8] the Republic of Slovenia[9] and Bulgaria,[10] provide for very comprehensive fair trial rights. It can be noted that these states follow the exact language of the Charter quite closely when it comes to assuring the right to a fair trial.[11] It is interesting to note that the Republic of Finland,[12] the Republic of

[5]LA CONSTITUTION BELGE Feb. 17 1994, art.14 (Belgium).

[6]Ústava CR [CONSTITUTION] Dec. 16 1992, art.4 (Czech Republic).

[7]Constitution of the Republic of Cyprus Jul. 1960.

[8]Constitution of Greece Jun. 11 1975.

[9]Constitution of the Republic of Slovenia Dec. 23 1991.

[10]Constitution of the Republic of Bulgaria Amend. Sep. 26 2006.

[11]Charter of Fundamental Rights of the European Union 2000/C 364/01.

[12]Finland [CONSTITUTION] Jun. 11 1999.

France[13] and the Kingdom of the Netherlands[14] do not provide for any specific fair trial rights. This means that there is no specific constitutional right, which guarantees the right to a fair trial.

It is worth mentioning that not one of the 27 member states provides complete assurance of adherence to Article 6 (ECHR), which stipulates the elements necessary for a fair trial. In order for there to be a unified system across Europe, it is imperative that the 27 member states take steps to ensure and protect the defendant's rights. It is vital that the member states work towards making fair trial a reality because today, more than ever, the interaction between member states is increasing and therefore making a cohesive criminal justice system that facilitates mutual trust vital. In order to build trust, it is necessary for basic fair trial rights to be established and guaranteed by every single member state. The goal of creating mutual trust and a unified system is essential for the European Union as it leads the way for member states to make their ECHR obligations a reality. Pretrial rights are not enough in and of themselves; as such more emphasis needs to be given to in-trial rights as these are essential when ensuring that all individuals are guaranteed a fair trial.

It is in light of the shortcomings of several of the member states that the tensions that are placed upon the State as well as the judiciary when it comes to conducting a fair trial will be discussed. The United Kingdom's Constitution and recent cases will be examined in light of its Article 6 (ECHR) obligations and the threat of terrorism, which have called into question the sanctity of the right to a fair trial.

4.5 Fair Trial Practice in the United Kingdom

The United Kingdom's Constitution is unique in that its guiding principles originate from several different documents, namely, the Magna Carta (1215) and the Bill of Rights (1689). The United Kingdom's Constitution (apart from these two main documents) is scattered over conventions, partly in statutes and customs. The Bill of Rights (1689) deals with the royal prerogative and the succession to the crown. Whereas the Magna Carta has recognised habeas corpus (May 2010:256) since 1215, this right is given new expression and protection via the right to liberty provided for in Article 5 in the ECHR:

> Habeas corpus has been a guarantor of freedom for centuries, but without the Human Rights Act's recognition of the right not to be subjected to arbitrary and discriminatory detention, terrorist suspects would still be held in high security prisons without any prospect of facing trial. (May 2010:256)

Over the last decade the threat of terrorist attacks has caused the boundaries of what is understood to be a fair trial for those suspected of their involvement or connection to terrorist activity to be redefined (Ashworth and Zedner 2008). There is

[13] La Constitution Oct. 4 1958 [France].

[14] Netherlands [CONSTITUTION] Feb. 17 1983

an underlying tension between the safety of the public and sovereignty of Parliament and the role of the judiciary to protect the procedural safeguards of the right to a fair trial (Smith 2007). The pressure of protecting its subjects from the threat of terrorist attacks has shaped the current approach that the United Kingdom has adopted when it comes to ensuring a fair trial for those suspected of being involved in terrorist activity (Smith 2007).

As mentioned above the right to a fair trial is considered to be one of the most fundamental principles for ensuring that the rule of law is observed when it comes to protecting the rights of suspected criminals (Cruft 2008). The right to a fair trial was also further enshrined in the United Kingdom when they adopted the Human Rights Act (1998), which incorporated into domestic law the ECHR. The observance of the rule of law in trials in the United Kingdom is evidenced by the importance attributed to factors such as the presumption of innocence and the right to cross-examine and be tried by a jury of one's peers (Ashworth and Zedner 2008). It is then all the more surprising when such entrenched values are watered down and a distinction is made between 'normal' criminals (i.e. not terrorist suspects) and those viewed as 'unusual' (suspected terrorists) and therefore warranting a different kind of trial.

It is in light of this fact that we can now turn to the most recent case law, which illustrates how the judiciary and Parliament are grappling with the threat of terrorism and how it has brought the question of whether or not a fair trial is guaranteed for all to the forefront.

4.6 The Advent of Chahal

In 1996 the case of Chahal v. United Kingdom[15] (Chahal) was brought before the British courts. This case centred around the argument that a State should not be able to send back (in this case a suspected terrorist) an individual to their country of origin if it can be shown that they will be subject to 'torture or to inhuman or degrading treatment or punishment' which would be in contravention of Article 3 of the ECHR (Warbrick 2004:5). The Chahal case was pivotal in that it first proposed the use of Special Advocates as a means to counterbalance procedural unfairness, thereby satisfying the observation of Articles 5 and 6 of the ECHR. Special Advocates are usually barristers or solicitors who have special rights of audience in assessing evidence that is otherwise restricted due to national security concerns. The role of the Special Advocate was created in 1998 after the Chahal case by the Special Immigration Appeals Commission Act 1997 (SIACA) Section 6(4) which stipulates that the Special Advocate shall not be responsible to the person whose interests he is appointed to represent. Special Advocates were proposed in order to remove any possible infringement of Article 6. It was intended that they would be able to view 'closed materials' that the government did not want

[15](1996) 23 EHRR 413.

to reveal in open court due to its highly sensitive nature; this was due to the potential risk to the public and the possibility that the suspect would then notify others of the information (Blake). The Special Advocate's role is limited in three significant ways. Firstly, once the closed material has been viewed, instructions cannot be taken from the individuals that they are representing or their ordinary legal representatives. Secondly, the Special Advocates are hindered in that limited resources are available to them in contrast to that of an ordinary legal team when conducting a normal full defence in secret. Thirdly, Special Advocates have no power to call witnesses (Blake). The Special Advocate is also prohibited from disclosing any of the information in the closed documents to the appellant (Blake).

The development in the law concerning the trial of terrorist suspects in the United Kingdom was followed by the case of A v. Secretary of State for the Home Department[16] (A v. SSHD). A v. SSHD addressed the indefinite detention of terrorist suspects under the Anti-Terrorism, Crime and Security Act 2001 (ATCSA) Section 23 at Belmarsh prison. In order for Section 23 of ATCSA 2001 to be enacted, the Secretary of State for the Home Department (SSHD) entered a derogation under Section 14 of the Human Rights Act 1998 (HRA 1998). Section 23 of ATCSA 2001 allowed the SSHD to detain a terrorist suspect for an indefinite period of time. However, in the case of A v. SSHD, the derogation order (Section 14 of the HRA 1998) was quashed as it was found to be incompatible with Articles 5 and 14 of the ECHR. Parliament responded to the decision in A v. SSHD by bringing into force the Prevention of Terrorism Act 2005 (PTA) (Section 16(2)–(4) repealed Sections 21–32 of ATCSA) which allowed and made provision for both derogating and non-derogating control orders. Section 1(1) defines a control order as being the following:

> *. . . an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism.*[17]

The PTA provided for the statutory support for the use of control orders. Once a control order has been issued, the court plays a supervisory role according to the provisions provided in Section 3 of the PTA. The SSHD has to apply to the court for permission to make the order unless it contains a statement by the SSHD that, in her opinion, the urgency of the case requires the order to be made without such permission. The role of the court at the hearing is then to determine whether or not the intention of the SSHD was flawed. The court does this by applying the principles of judicial review:

> *It is the duty of the Secretary of State to keep the decision to impose a control order under review, so that the restrictions that it imposes, whether on civil rights or Convention rights, are no greater than necessary. A purposive approach to section 3(10) must enable the Court to consider whether the continuing decision of the Secretary of State to keep the order in force is flawed.*[18]

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[16] [2004] UKHL 56; [2005] 2AC 68.

[17] Prevention of Terrorism Act 2005 (U.K.).

[18] Secretary of State for the Home Department v. E and Others [2007] UKHL 47 at para 18.

The use of control orders combined with the practice of Special Advocates led to the argument being mounted that individuals suspected of terrorist activity were being denied their right to a fair trial. The case that brought this argument was the Secretary of State for the Home Department v. MB[19] (MB). The case of MB sought to challenge the current system on the basis of the statutory provision (found in Section 3(10) of the PTA 2005) for judicial hearings using control orders and Special Advocates. MB sought to challenge the fairness of the application of control orders along with the practice of using Special Advocates. The case of MB established the 'irreducible minimum standard test' which serves to determine whether or not the controllee was afforded a fair trial. The 'irreducible minimum standard test' was replaced by the definite standard handed down by the Grand Chamber in A and Others v. United Kingdom[20] (A and Others) and applied in Secretary of State for the Home Department v. AF (No 3)[21] (AF). Up until that point the courts had not had a definite test that could be applied. The decision of the Grand Chamber in A and Others establishes that the controllee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to the allegations. If this requirement is met, there can still be a fair trial even if the controllee is not provided with details or sources of the information forming the allegations against him.

The case of A and Others was heard on appeal by the ECtHR where the Grand Chamber handed down their judgement just as the House of Lords was reviewing the appeal of AF. However, before AF was considered by the House of Lords, in light of the Grand Chamber decision in A and Others, they made a ruling on control orders in the case of MB.

The issue in both the MB and AF cases centred on the fact that the controllees could not mount an effective counter argument. They were not afforded a fair trial as the essence of the case against them was in the closed material to which they were not privy.

Lord Bingham in the case of MB stated that

> *a fair hearing requires that a party must be informed of the case against him so that he can respond to it.*

The case of MB reiterated the standard that an individual under a control order should be secured 'a substantial measure of procedural justice' (a standard established by the case of Chahal) by the courts.

It was commonly recognised in AF that the open materials that the SSHD had against AF did not afford the SSHD reasonable grounds for suspecting AF of any involvement in terrorism-related activity. Thus, the essence of the case against AF was in the closed materials.

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[19] [2008] 1AC 440.

[20] (Application No 3455/05).

[21] [2009] UKHL 28; [2009] 3 WLR 74.

AF amended their case accordingly and submitted that the Grand Chamber had made it clear that, in light of the demands of Articles 5(4) and 6, they should be provided with sufficient information in order to effectively instruct and inform their Special Advocate thus ensuring that their right to a fair would not be infringed.

The result reached in A and Others meant that the reading down of statutory provisions (as adopted in MB) remains instead of reaching a declaration of incompatibility. The reading down of the statutory provisions means that Section 3(10) of the PTA entails that the judge will have to consider not only the allegations that have to be disclosed in order to place in the open sufficient materials to satisfy the requirements laid down by the Grand Chamber but whether there is any other matter where disclosure is essential to the fairness of the trial.[22] If the Parliament were to exclude the reading in of Baroness Hale's recommendation in MB, then it would find itself incompatible with the ECHR unless the incompatibility could be justified under Article 15 of the ECHR. This innovative approach is a classic example of the creativity of the judiciary in finding a way to ensure that the United Kingdom will not be incompatible with its ECHR obligations. As Baroness Hale asserted in AF

> *The function of the courts is to apply the law. It is not the function of the courts to water down the concept and requirements of a fair trial so as to render Convention compatible legislation that may be incompatible*.[23]

Section 2(1)(a) of the HRA 1998 requires that judges 'take into account' the decisions of the ECtHR. If the United Kingdom were not to accept the decision set out in A and Others, it would result in the United Kingdom being in breach of the ECHR and international law. The ECtHR has applied a rigid rule that the requirements of a fair trial are never satisfied if the decision is 'based solely or to a decisive degree' on closed materials.[24]

The Lords in the AF case reached the result that the decision in A and Others ultimately meant that the appeals had to be allowed and the cases were ordered to be remitted for reconsideration.

A two-stage test has emerged as result of AF which needs to be applied when considering the application of a control order. Firstly, there is the MB test which raises the question: 'Can this material be disclosed without there being damage to the public interest?'[25] Secondly, there is the question in AF which is an overlaying of fairness question, 'Notwithstanding the damage to public interest that would be caused by this material, does fairness require it to be disclosed?'[26]

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[22] AF per Lord Philips of Worth Matravers at para 67.

[23] AF per Baroness Hale at para 97.

[24] AF per Lord Hoffmann at para 70.

[25] Secretary of State for the Home Department v. MB [2008] AC 440.

[26] Counter-Terrorism Policy and Human Rights: Control Orders (3 February 2010).

At issue are the judicial proceedings provided for and constructed by Section 3(10) of the PTA. The question remains as to whether or not a controllee is afforded a 'fair hearing' so as to conform with the requirements of Article 6(1) of the ECHR.

4.7 Fair Trial Practice in the United States

In the United States the domestic security and assurance for the right to a fair trial are enshrined in the Fifth and Fourteenth Amendments of the US Constitution. The two provisions must be read together in order to provide the full extent of the due process rights afforded those in a criminal trial. The Fifth Amendment (Trial and Punishment, Compensation for Takings) states that

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, *without due process of law*; nor shall private property be taken for public use, without just compensation.[27] (emphasis added)

The Fourteenth Amendment further supports and reiterates the Fifth Amendment at paragraph 1:

> 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, *without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws*.[28] (emphasis added)

The distinction between the two amendments is that the Fifth Amendment is applicable to the federal government, its courts and agencies, whereas the Fourteenth Amendment extends the provision(s) of *due process* to all state governments, agencies and courts.

When drafting the Constitution, the Fifth Amendment was originally intended to be applicable at a federal level and the Fourteenth at a state level; it is for this very reason that they must be always be read together in order to provide the full extent of the due process protections for individuals in a criminal trial. Apart from the constitutional provisions, the United States has ratified the ICCPR and as such is bound by the fair trial provisions set out in Article 14.

In response to the 9/11 terrorist attacks, the 'Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism 2001'

[27] U.S. Const. amend. V.

[28] U.S. Const. amend. XIV.

('Patriot Act')[29] was enacted. The purpose of this piece of legislation was to protect the American people (as well as prevent) from future terrorist attacks. Even though the original intentions of the Patriot Act may not have been to restrict American citizens' civil liberties, its unintended consequences (like in the case of the United Kingdom's legislation) threaten the fundamental constitutional rights of people who have absolutely no involvement with terrorism (Whitehead and Arden 2002). It is to the sanctity of the decisions of the executive in the United States when shaping the right to a fair trial and its consequent impact for terrorist suspects that we now turn.

4.8 Baker v. Carr[30] and Marbury v. Madison[31]

The issue of arguing for the protection of an individual's constitutional rights and the interplay (and the application) of Article III of the Constitution first occurred in the cases of Baker v. Carr [32] and Marbury v. Madison[33]. Baker concerned a civil action brought under 42 U.S.C. 1983 and 1988 to redress the alleged deprivation of federal constitutional rights. One of the central issues in Baker was that citizens were not being apportioned their equal protection of the law according to the 14th Amendment of the US Constitution. The question of jurisdiction was raised as to whether or not the court could hear the case. The importance of Baker in the US case law lies in the fact that this case was the first in which the 'political question' doctrine concept was first articulated. The political question doctrine is concerned with determining whether a question presented to the court falls within what is considered to be a political category.[34] When deciding if a matter falls into the political question, the court has the delicate task of interpreting the Constitution which is done by analysing the relevant cases and from that deducing what elements will be considered as falling under the political question doctrine heading.[35]

The case of Marbury v. Madison[36] established the Supreme Court's power of judicial review. The case centred around a dispute over the election process and its validity of judges to the Supreme Court.[37] Chief Justice John Marshall's act of overruling a law was the first time such a thing had been done by the Supreme Court.

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[29] Act of 2001 18 USC 1 note.

[30] 369 U.S. 186 (1962).

[31] 5 U.S. 137 (1803).

[32] 369 U.S. 186 (1962).

[33] 5 U.S. 137 (1803).

[34] Baker v. Carr 369 U.S. 186 (1962).

[35] Baker v. Carr 369 U.S. 186 (1962).

[36] 5 U.S. 137 (1803).

[37] The Judiciary Act of 1789 was illegal and not to be followed because it was unconstitutional because it gave the Supreme Court authority that it was denied it by Article III of the Constitution.

Together, these two cases provide the legal background against which the government has found constitutional authority for the way in which it conducts criminal trials of terrorist suspects.

The judiciary in the United States has afforded the executive too much determination by allowing the weight of national security arguments to take precedence over protecting individuals from the deprivation of their liberty (Fabbrini 2009). This situation is clearly illustrated in the case of *A*l-Aulaqi v. Obama.[38]

On 30 August 2010, the plaintiff (the father) filed his action that the defendants had unlawfully authorised the targeted killing of his son. The case centres around the complicated legal arguments of whether or not the father indeed has standing in the US courts to bring the case on behalf of his son and that the father's interests would be the same as that of his son. The similarity (with Baker and Marbury) in this case (which is important for us) was the use of 'secret evidence' used to place individuals on secret 'kill lists'. It was this very secret evidence that formed the basis of why Anwar Al-Aulaqi was placed on these 'kill lists'.

It is also important to highlight the issue of the standing of the father with regard to his ability to bring the claim on behalf of his son. The provisions relating to standing are governed by Rule 12 (b) (6) of the Federal Rules of Civil Procedure. To survive a motion to dismiss under Rule 12 (b) (6), a complaint need only contain 'a short and plain statement of the claim showing that the pleader is entitled to relief',[39] such that the defendant has 'fair notice of what the ... claim is and the grounds upon which is rests'.[40] To meet this requirement it must be more than merely 'labels and conclusions'[41]; hence, the complaint must contain enough factual matter, which can be accepted as true, 'to state a claim to relief that is plausible on its face'.[42] The standing application directly applies to the jurisdiction of the court to be able to hear the case. Article III of the Constitution 'limits the "judicial power" of the United States to the resolution of "cases" and "controversies"'. Article III of the Constitution and the question of standing are interconnected in that the standing doctrine places certain limitations upon the court on hearing cases. In order to surmount these limitations, the plaintiff must show that

> (1) an 'injury in fact' which is '(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical'; (2) 'a causal connection between the injury and the conduct complained of'; and (3) a likelihood 'that the injury will be redressed by a favorable decision'.[43]

The plaintiff sought an injunction prohibiting defendants from intentionally killing Anwar Al-Aulaqi 'unless he presents a concrete, specific, and imminent threat to life or physical safety, and there are no means other than lethal force could

[38] 727F.Supp. 2d 1, D.D.C., 2010.

[39] Federal Rules of Civil Procedure Dec. 31 2004.

[40] Federal Rules of Civil Procedure Dec. 31 2004.

[41] 727F.Supp. 2d 1, D.D.C., 2010.

[42] Federal Rules of Civil Procedure Dec. 31 2004.

[43] 727F.Supp. 2d 1, D.D.C., 2010.

reasonably be employed to neutralize the threat'.[44] This is a complex case raising nuanced legal questions that directly relate to the guaranteeing of fair trial rights. The case presents several key questions concerning the right to a fair trial such as 'Can the Executive order the assassination of a U.S. citizen without first affording him any form of judicial process whatsoever, based on the mere assertion that he is a dangerous member of a terrorist organization?'[45] What is important to note is that the United States is yet to publicly charge Anwar Al-Aulaqi with any crime.

What is asserted is that individuals are placed on these 'kill lists' on the basis of secret evidence and that Anwar Al-Aulaqi has been placed on one of these lists. These 'kill lists' are reviewed every 6 months and people are removed from them if they are deemed as no longer being a threat to the United States.

The plaintiff has four central arguments, three of which are constitutional and one which is statutory in nature. He argues that the defendant's actions:

- Violate his Fourth Amendment right to be free from unreasonable seizures
- Violate his Fifth Amendment right not to be deprived of life without due process of the law
- Violate his Fifth Amendment right notice requirement of the Fifth Amendment Due Process Clause (because the United States refuses to disclose the criteria of how someone is selected to be a target of killing)
- Alien Tort Statute 28 U.S.C. §1550 violates international and customary law (targeted killings do)[46]

The issues raised by the plaintiff that are most pertinent to the case are the violations to his due process and the right to know the nature of the evidence upon which he has been placed on the 'kill lists'.

The defendants assert that the plaintiff's claim be dismissed on five threshold grounds:

1. Standing
2. The political question doctrine
3. The court's exercise of its 'equitable discretion'
4. The absence of a cause of action under the Alien Tort Statute ('ATS')
5. The state secrets privilege

The political question doctrine is a fairly controversial doctrine in that critics have argued that it has little or no basis for it in the text of the Constitution and it is used by the courts to shrink from responsibility in deciding the 'difficult questions'. It is worth noting that the situations in which courts normally invoke the political question doctrine concern matters of national security, military matters and foreign relations which are all political questions in and of themselves.[47]

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[44] 727F.Supp. 2d 1, D.D.C., 2010.

[45] 727F.Supp. 2d 1, D.D.C., 2010.

[46] 727F.Supp. 2d 1, D.D.C., 2010.

[47] See El-Shifa, 607F.3d at 841 (quoting Bancoult v. McNamara, 445F.3d 427, 433(D.C.Cir.2006); see also Haig v. Agee, 453 U.S. 280, 292 (1981).

It is further asserted by the plaintiff that the failure on the part of the defendants to disclose the criteria by which US citizens are targeted for killing violates their rights to notice under the Fifth Amendment Due Process Clause.

All three of the constitutional claims were dismissed because of lack of standing. The courts used the 'floodgates' argument in that the US courts would then (potentially) be at risk of being inundated with people bringing claims that they are somehow at risk of or are afraid that they are somehow at danger because of some contemplated government action.

The court takes issue handing down a judgement which would in essence curb and act to prevent future US military action in the name of national security against specifically named targets enforced through, 'after-the-fact contempt motion[s]' or 'after-the-fact damages actions'. What is concerning is that the court in this case 'recognizes the somewhat unsettling nature of its conclusion–that there are circumstances in which the Executive's unilateral decision to kill a U.S. citizen overseas is "constitutionally committed to the political branches" and judicially unreviewable'.[48]

The military and state secrets privilege is premised on the basis that there will be certain circumstances in which the court will have to rule in favour of the executive when protecting the national security of the country in which they live and serve (which may mean that sometimes cases are dismissed completely). When applying the 'secret evidence' rule and with that the exclusion of certain evidence, the basis of this argument is found in the case of Totten,[49] where the bar only applies where, 'the very subject matter of the action' is [itself] a matter of state secret'. The United States has a very similar provision to that of the control orders regime in the United Kingdom where, 'In contrast, (to the Totten[50] principle) successful invocation of the Reynolds[51] privilege 'remove[s] the privileged evidence from the litigation', but does not necessarily require the plaintiffs' claims to be dismissed'.[52] The plaintiff argues that when the situation arises (as he says has been done in the case of his son) where the claims and the defences are so infused with state secrets that the risk of disclosing them is both apparent and inevitable, then the case should be dismissed. The US Supreme Court has interpreted Article III of the US Constitution very strictly and has imposed very thorough and strict standing requirements for adjudication in federal courts.

The decision in Al-Aulaqi v. Obama continues to assert the ultimate authority of the executive leaving the judiciary with no other option but to try to not completely erode the constitutional rights of its citizens while trying to maintain some semblance of a fair trial.

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[48] page 78 of 727F.Supp. 2d 1, D.D.C., 2010.

[49] 92 U.S. 105 (1875).

[50] 92 U.S. 105 (1875).

[51] 345 U.S. 1 (1953).

[52] 727F.Supp. 2d 1, D.D.C., 2010.

4.9 US and EU Approaches

The approach the United States takes in securing the right to a fair trial is important for the EU. The reason being that the approach the United States adopts is indicative of the standards (that they as a third country in their relationship with EU member states) that they will expect EU member states to aspire to and or allow them to set the standard. The United States and the EU both play a pivotal role in prosecuting international terrorists (Fabbrini 2009). In addition to this fact, they are 'two constitutional polities' bound by the principle of due process mandated with the role of ensuring the essential balance between security and liberty survives.

One of the big distinctions between the situation in the United Kingdom and the United States (in relation the right to a fair trial) is that the United Kingdom, unlike the United States, is bound firstly by the ECHR, and it can be held accountable by its subjects (nationals and nonnationals alike) to the ECtHR. The United States is also bound by its international obligations, and here specifically Article 14 of the ICCPR, but there is no human rights court other than the Supreme Court of the United States for individuals to take their cases. The United States is unconstrained in the international sphere and does not have to incorporate international human rights law into its domestic law; this is something that the United Kingdom has done via the Human Rights Act 1998. The Constitution of the United States is the source from which the right to a fair trial can be ascertained and support can be drawn for those trying to uphold this right. The protection of the right to a fair trial (as we have seen above) is secured in the principle of due process enshrined in the Fifth and Fourteenth Amendments to the US Constitution and is also a general principle of EU law (Fabbrini 2009). The very essence of the principle of due process is that governmental power when pursuing the public good shall always abide by the rule of law. It is this very 'abiding by' the rule of law which is at the centre of the debate over what can be considered to constitutionally constitute a fair trial.

As we have seen in both the United Kingdom and the United States, it is the role of the judiciary who are fundamentally crafting what is becoming understood as constituting a fair trial as well as what are the acceptable minimum standards which need to be present in order for it to be considered that a fair trial has taken place.

The importance of the role of the United States in shaping the EU approach to securing a right to a fair trial should not be underestimated. The United States has an integral part to play when it comes to the safety of EU nationals facing trial in the United States.

4.10 Conclusion: A European Approach to Securing the Right to a Fair Trial

Unlike the United Kingdom, which is under pressure from not only its own judiciary but also the ECtHR, the United States does not have the same kinds of tensions placed upon it. As can be seen from its recent case law, the United States has

actively chosen to adopt a close and stringent interpretation of its constitutional guarantees, always opting to err on the side of caution. The United States has not gone into any great detail nor touched upon the issue of the right to a fair trial save to say that when cases involve terrorist suspects that this is to be considered an 'exceptional' circumstance concerning national security. The judiciary is cautious to trample through national security concerns and instead of drawing on international standards they have chosen to keep the cases within domestic circles. In its actions the United States is creating an approach to the safeguarding of fair trials (in terrorist cases) which is concerning for the EU as it strives to uphold the minimum standards of the right to a fair trial provided for by Article 6 of the ECHR.

The future for control orders in the United Kingdom will have to be determined in light of AF which is currently the law in this area. The current system of control orders will come to an end in December 2011 when the system will not only be renamed (terrorism prevention and investigation measures (TPIM)) but the powers of the Home Secretary will be limited (Travis 2011). Since the monumental decision handed down by the ECtHR, the UK government has attempted to restructure as well as safeguard the rights of those subjected to the use of secret evidence in trials. These measures were brought about by the Home Secretary Mrs Theresa May and are included in the Act with the same title, Terrorism Prevention and Investigation Measures Act 2011. The Act abolishes the system of use of control orders established by the PTA 2005 and replaces it with the new system especially designed to protect the public with TPIMs.

Since the pivotal decision in AF and A and Others, the United Kingdom has had other cases within which they have to decide in which way and manner they will choose to apply the law. One such case was AT and Secretary of State for the Home Department[53] (AT). The case of AT (on appeal) concerned the all too familiar and similar factual issues of the use of secret evidence and the way in which this impeded the defendant from preparing and mounting an effective defence.

Here as in all of the cases, the right of 'knowing the case against you' is a fundamental part of ensuring procedural fairness to the defendant (Flinn 2012). It was decided upon appeal that there had not been adequate disclosure to the defendant. The approach adopted on appeal further reiterated the position of AF. The precedent created by MB and AF illustrates not only the tensions between the judiciary and the executive when it comes to balancing fundamental rights and freedoms with public security but also how the jurisprudence of the ECtHR is playing an ever-increasing role in protecting the right to a fair trial. It is the human rights jurisprudence of the ECtHR that is making the difference in the application of Article 6.

The ECtHR has taken a very clear position in the face of control orders in the case of the United Kingdom. It is this approach of the ECtHR and the bodies of the European Union that is forming the stance that needs to be taken to unify a European approach to the right to a fair trial.

[53] [2012] EWCA Civ. 42, Case No. TI/2009/0899.

The United Kingdom's approach to protecting the right to a fair trial is not uncommon in that other member states (as noted above) also have tensions which push the boundaries of the right to a fair hearing. It is in light of these tensions that the European Commission has attempted to create a unified criminal system (Loof 2006). The European Commission outlined its intentions in its five-year plan (initiated in 2009) in which it set out that one of its aims would be to create a Europe which would facilitate effective and efficient cooperation between the police forces and the judicial systems of all of the member states of Europe.[54]

The Stockholm Programme was formulated to work towards a mutual criminal system in addition to the efforts of the European Commission. This programme was initiated by Sweden (2009) and supported by successive EU presidencies and is intended to

> Consolidate and complete European Union policy on justice, home affairs, asylum and migration.[55]

A report conducted by the Maastricht University, JUSTICE, the University of the West of England and the Open Society Justice Initiative from September 2007 into the criminal defence and system practices of European Union member states (Cape et al. 2010) focused on how ECHR rights were secured and implemented and what structures are in place to enable citizens to be allowed to effectively exercise their rights. The report highlighted that the infringement of the right to a fair trial began at the pretrial stage because procedural rights were accorded more weight than substantive rights. It was noted that despite the European Union recently enacting a directive on the right to interpretation and translation[56] (in the case of Belgium), this right was not realised or secured in a number of cases (Cape et al. 2010). Another cause for concern was the amount of information (if any) that is given to suspects at the interview stage, in relation to the nature of the charges being brought against them, but also their right to remain silent. In Finland, there is no obligation to provide the suspect with information about their right to remain silent, and in Hungary there is no security of guarantee and no obligation upon the police to wait for the duty lawyer before the commencement of the interview. As with lack of disclosure in terrorism cases, Hungary has also fallen foul but in different circumstances. An example from Hungary of having access to documents was the case of Dallos v. Hungary. Here the ECtHR recognised the importance of being able to know the nature of the charge as well as the substance of the case against the defendant. The court stated in its judgement that:

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[54] *Communication from the Commission to the European Parliament and the Council. An area of freedom, security and justice serving the citizen. Brussels, 10.6.2009 COM (2009) 262 final.*

[55] The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens 2010/C 115/01.

[56] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

In criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterization that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair.[57] (emphasis my own)

The pretrial rights guaranteed in Poland are sparingly protected in that there is no absolute right to information and prosecutors can deny access to the file during the investigation stage. Turkey (similarly to the control order system in the United Kingdom) has a system whereby prosecutors can issue 'secrecy decisions' on very broad grounds which means that suspects and their lawyers can be prevented from knowing the exact nature of the charge(s) being brought against them.

One member state that has been attracting increasing media attention due to extensive constitutional amendments is Hungary. It warrants mention here because as pressure is increasingly placed upon the independency of the judiciary, the sanctity of equality of arms is put to the test.

The constitutional guarantee of the protection of the right to a fair trial in Hungary is found in Art. 57. 1 where it is stated that:

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

The Hungarian criminal procedure is incorporated into one single code of uniform structure, the Code of Criminal Procedure (Act XIX of 1998) (Karsai and Szomora 2010). Article 5 Be grants the defendant's right to defence at each phase of the criminal proceedings, which is a fundamental right which is further stipulated in the Hungarian Constitution at Article XXVIII Article 3(3) (Karsai and Szomora 2010).

Hungary has received guidance from the ECtHR in the form of three important judgements concerning the disclosure of documents.

The first was Osváth v. Hungary[58]; the applicant had their detention on remand extended based upon the motions, which were submitted by the Public Prosecutor's Office, all of which were based upon the risk of collusion. Neither the applicant nor his defence lawyer had access to any of these documents. The defence lawyer made an application to have access to the documents which did not reach the Supreme Court, and they decided in camera to prolong the applicant's detention holding that due to the seriousness of the charges against him that there was a real risk of him absconding. The applicant argued that the principle of equality of arms had been infringed in his case as he was not given access to the documents which formed the basis upon which his detention was extended. Despite the fact that the applicant was represented by a lawyer and did attend his hearings, this was not enough in and of itself to protect the principle of equality of arms. The Court stated that applicants should 'receive the benefit of a procedure that was really adversarial'.[59]

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[57] ECHR, Chamber, Application No 29082/95, 1 March 2001) Paras 47–53.

[58] (Application no. 20723/02) Judgment Strasbourg 5 Jul. 2005.

[59] Ibid para 18.

More recently in 2013 the ECtHR handed down two judgements in A,B, v. Hungary[60] and X.Y. v. Hungary[61] in which it was found that there had been an infringement of the equality of arms.

As Europe expands and tries to consolidate multiple criminal justice systems, there is an urgent need for the reform of criminal procedures and justice practices of individual states to ensure that they do not infringe Article 6 of the ECHR.

The domestic courts of Europe are now walking the very fine line of ensuring 'overall fairness of the trial is not compromised'.[62] They do have the guidance of the ECtHR in interpreting the principles of the ECHR, but this varies extensively from state to state. It is for this very reason that freedom, security and justice must be worked towards through close cooperation of the member states. This can only be achieved by the mutual recognition of the member states (when ensuring) that sentences should be served in such a way so as to also protect the rights of the defendant (Loof 2006). It is important that the protection of all individuals' human rights is not swept aside in the face of the threat of terrorism (Warbrick 2004). It is in the face of these threats that we should be wary not to allow the ECHR to be seen as the bare minimum of what member states should be working towards protecting and promoting.

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[61] Application no. 43888/08 Judgment Strasbourg, 19 March 2013.

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Chapter 5
'In All Fairness . . . ': A Comparative Analysis of the Past, Present and Future of Fair Trial Systems Outside of Europe

Márton Sulyok

5.1 Introduction

In this chapter I discuss the reasons and possible solutions of the absent respect for fair trial rights and standards inherent to Western legal culture and constitutional thought in three areas of concern: Russia, Africa and China. All of these countries are partners of the EU's human rights dialogue that serves – among others – the reinforcement of the respect for fundamental rights outside of Europe by unified standard setting and simultaneously fortifying the external relations of the Union after the ratification of the Lisbon Treaty.

Throughout my analysis I shall take into account the relevant international instruments that have been quintessential in establishing fair trial standards and protections in Europe, namely, the International Covenant on Civil and Political Rights (UN ICCPR, 1966), the European Convention of Human Rights (CoE ECHR, 1950) and the Charter of Fundamental Rights (EU ECFR, 2009). The above instruments are either applicable, as in Russia, or considered standard setting, as in Africa and China, in constructing guidelines and in seeing through constitutional reforms.

Albeit the right to a fair trial is a bundle of rights, like property or privacy, it shall rather be evaluated as an inherent quality of justice and the judicial process. The aim is to provide an overview of the above three areas in terms of current issues obstructing the fulfilment of the following prerequisites and elements of the bundle of fair trial rights: (1) access to justice, (2) the right to a fair and public hearing, (3) the right to an independent and impartial tribunal and (4) the right to an

M. Sulyok (✉)
Faculty of Law, Department of Constitutional Law, University of Szeged,
Rakoczi ter 1, 6721 Szeged, Hungary
e-mail: msulyok@juris.u-szeged.hu

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effective remedy. Such current issues arising in light of the doctrines of open and transitional justice include the tensions between Moscow and Strasbourg in light of recent statistics of the European Court of Human Rights (ECtHR), the dilemmas raised by the debated existence of 'failed' states in Africa and the appearance of 'petition villages' in China, to mention a few.

5.2 The Right to a Fair Trial: As a Principle of Justice and as a Fundamental Human Right

> It is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done.[1]

In providing an overview of how fair trial rights are protected globally, it is self-explanatory that we shall compare the existing protections of a fair trial alongside which justice is seen to be done in Europe – to those outside of Europe, from a comparative legal perspective. A host of borderline issues arise in terms of fair trial protections, which entail the reaching of conclusions that are true in the broader human rights' context as well. These borderline issues are positioned between multiple branches of law (international law, constitutional law, human rights law) and various doctrines of justice (open, transitional and transformative justice). Also, oftentimes, domestic, regional and international regulation and practice have to be examined in correlation and simultaneously, in order to understand the obstacles that hinder the effective protection and exercise of fair trial rights globally.

Jason Douglas reiterates a trivial truth in his thesis correctly when he declares that states can do two things when it comes to human rights: either infringe upon or protect them (Douglas 2009:86). Therefore, if infringements on human rights outweigh protections thereof, the importance of sovereignty is called into question, which leads to apparent tensions between international standards and domestic practices. I posit that if international law does not have the answer to release these tensions, then the analysis of international best practices may provide an adequate basis for rethinking models of human rights protections in the new era of governance, which is based on cooperate-and-control governance rather than the former command-and-control governance methods (Lobel 2004:342).

The development and status of fair trial rights outside of Europe shall be examined herein based on (1) the analysis of the aforementioned international best practices and (2) the fact that the EU's human rights dialogue provides continuous efforts to increase the level of protections of human rights, including fair trial rights. The human rights dialogue is a diplomatic tool of increased importance after the

[1] Lord Chief Justice Hewart in Rex v. Sussex Justices, Ex parte McCarthy [1924] 1 KB 256, [1923] All ER 233 (Engl.).

ratification of the Lisbon Treaty[2] in 2009, since it is pivotal in the formulation of the Union's autonomous external relations. The international instruments (directly) overarching universal and regional human rights protection frameworks in Europe, be it either under the umbrella of the UN, the CoE or the EU, are also (indirectly) applicable or standard setting outside of Europe as well. Therefore, we shall look at a few examples (Russia, Africa, China) in order to uncover possible issues that may hinder the fulfilment of fair trial standards which can be derived from the joint interpretation of Article 14 (ICCPR), Article 6 (ECHR) or Article 47 (ECFR).

5.3 The Notion of Justice and the Core Elements of the Right to a Fair Trial

Our starting point shall be the conclusion of Hungarian Constitutional Court (HCC) Decision 6/1998 (III. 11.) AB [of 11 March 1998], examining 'the right to a fair trial'. According to this opinion, in a case where some element of the rights originating from the rights to a fair trial were infringed upon; it does not allow for the unambiguous conclusion that the proceedings have been unfair in their totality. The HCC determined that the quality of the proceedings as a whole shall be taken into consideration in order to be able to assess fairness in this case; thus, fairness is an abstract quality and not a concrete characteristic of the judicial proceedings. Following this logic, the HCC refers to the generally acknowledged interpretation of the ECHR and the ICCPR and concludes axiomatically that the right to a fair trial is indeed a bundle of rights as property or privacy is, but instead of assessing it as such, we shall look at it as an inherent quality of justice and the judicial process. It is apparent from the standpoint assumed by the HCC that international and EU law might in fact define and develop the context and content (guarantees included) of fair trial protections that contribute to broader human rights protections generally.

Albeit I am in favour of such an approach, I nonetheless believe that each element of this bundle needs to be examined and assessed individually in order to reach a verdict in terms of the abstract quality of the judicial process. In relation to this, Spigelman notes that it is not entirely accurate to refer to the principle as 'a right to a fair trial'; nevertheless, doing so is convenient and 'not unduly misleading' (Spigelman 2003). Concerning the above principle, the definition applied by Spigelman is correct for our purposes, and therefore the term 'the right to a fair trial' shall be used throughout my examination of this bundle of rights.

Before presenting the focal points of my research, I endeavour to set up an exhaustive list of requirements, containing the de minimis elements to be contained in every constitutional regulation of the administration of justice and the 'not unduly misleading' right to a fair trial outside Europe. As part of the above-mentioned

[2]Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306 01.

qualitative analysis, in my view the following core elements merit reiteration as the prerequisites for a trial to comply with the overall requirement of (substantive, procedural, moral, ethical social) 'fairness' in its totality, i.e. including also the pre-trial and posttrial phases, in light of the purposes of my inquiry. These are (1) access to justice, (2) the right to a fair and public hearing, (3) the right to an independent and impartial tribunal and (4) the right to an effective remedy.

As a principle, the right to a fair trial is dynamic and hence should not be exclusively viewed as a bundle of rights. The primary subject of investigation shall be the quality of the proceedings in the administration of justice. This quality can be and is different in different legal systems, based on different principles amounting to a different classification, oriented by different approaches of law. Fairness as an abstract category has different contexts and contents and different forms. In this chapter, I posit that the dynamic principle of the right to a fair trial is able to follow the development of law and society. Moreover, in constitutional or international documents, the composition of the dynamic principle of the right to a fair trial may develop (widen or shrink) in accordance with change in the qualitative assessment of fair trials or influenced by those rooted in public opinion, be it either moral, religious or cultural standpoints or some other factors.

With respect to the analysis of the dynamic principle of fair trial along the above transversal lines, I now attempt to provide a definition for 'justice' for the purposes of our inquiry, because access to justice is the most paramount prerequisite of the right to a fair trial, i.e. its *conditio sine qua non*. In order to comply with my intentions in this chapter, I chose Spigelman's definition, who construed the word 'justice' to mean '*fair outcomes arrived at by fair procedures*' (Spigelman 1999). Justice – of which fairness is an inherent element – achieved through a fair trial shall be a given in rule of law constitutional states. Consequently, what shall the verdict say on the status of justice in countries that are prima facie in want of fair outcomes and fair procedures? As such, how can the status of justice or standards of fair trial possibly be judged in countries where the fair proceedings necessary in reaching fair verdicts are completely absent?

Among the countries I scrutinise in this chapter, there are nations where (constitutional) statehood is called into question due to gross human rights violations or due to the lack of a functioning constitution, as in Africa or Russia, and there are nations where the implementation of rule of law principles are out of the question, and governance is rather based on 'rule by law', i.e. the selective application of laws along the present governmental interests, as in China. In the assessment of the practices of these countries, stress shall be placed on the generic need to adapt the principles of fair trial in order to conform to the exigencies of the international community while at the same time maintaining respect for national traditions of the domestic justice systems in implementing reforms, in order to be able to more efficiently apply the democratic core functions of the right to a fair trial. As argued above, based on the cited opinion of the HCC, international law and EU law might in fact define and develop the context and content (guarantees included) of fair trial protections that contribute to broader human rights protections generally. Therefore, the following regulatory levels are examined in the context of different doctrines of justice and in the context of the countries mentioned above.

5.4 Doctrines of Justice in Connection with the Right to a Fair Trial

Consequently, fairness shall be examined in different depths (substantive, procedural, moral, ethical, social, etc.) in the different countries put to analysis, and different doctrines of justice shall be examined (open, transitional and transformative). In this dynamic analysis of the fair trial principle, the following doctrines of justice shall be applied in order to reach a verdict on the status of justice and fair trials.

The doctrine of transitional justice is a premise of paramount importance that needs to be discussed with respect to fair trial protections in Africa and China, taking into consideration but not extending to its traditional international law implications regarding restorative justice (i.e. the responsibility of states in front of the ICC and truth commissions). In general, the term 'transitional justice' is used in international law as a reference to responses to systematic or widespread violations of human rights; it seeks recognition for victims through restorative justice and to promote possibilities for peace, reconciliation and democracy. Transitional justice is not a special form of justice, but an administration of justice adapted to societies transforming themselves after a period of pervasive human rights abuse. Generally, transitional justice seeks to promote the toolbox of restorative justice (truth commissions, criminal prosecution of perpetrators, reparation), but another very important aspect thereof is the reinforcement of the state, including the judiciary, to abate corruption.[3]

I examine transition in terms of efforts of the processes put into place in creating lasting institutions to secure (constitutional) statehood and justice abiding by international best practices, as a means to secure fair trials and adjacent human rights. (The involvement of CSOs, NGOs and other international organisations signifies an important input in relation to the actual realisation of transition within the justice system in order to combat otherwise unhealthy dynamics of transitional justice countries.) Albeit the presumption of international legal academia is that there is little to be learned from the judiciary in Africa (Yusuf 2009:655), I am of the opinion that the 'melting pot' of transitional societies indeed deserves a closer look in this analysis. Transitional justice shall be examined in (a) countries in the process of 'democratisation' ('*struggling states*'), recovering or having recovered from armed, humanitarian conflicts or communist rule, that experiment with balancing justice and political reality, and (b) '*failed states*' or countries, where the traditional cornerstones of sovereignty (territory, population, public power) are called into question creating a primordial necessity to create lasting institutions in order to restore justice and peace.

The doctrine of transformative justice is a newer approach and concept growing out of transitional justice, which extends the general scope of the doctrine of justice and includes nonlegal (e.g. socio-economic, ethical, moral, political geographical

[3]Official Website of the International Center for Transitional Justice (ICTJ). Available via http://www.ictj.org. Accessed 21 Aug 2012.

and cultural) tools and points of inquiry in the examination of justice systems. As Killen so aptly points out in her thesis in 2010, this way, transitional states can evolve into democratic states securing the functional operation of the separation of powers (Killen 2010:52–53), which is for the purposes of my inquiry a key issue in furthering the protections of fair trial standards.

The doctrine of 'open justice' is another pivotal premise that shall be examined independent of and also in the context of transitional justice. In all three of the chosen areas of interest, this evaluation will be conducted in relation to the publicity of court proceedings, transparency and accountability of the judiciary based on determinations made and solutions applied by the ECtHR and by several NGOs.

By rendering the administration of justice visible, publicity contributes to the achievement of [. . .] fair trial, the guarantee of which is one of the fundamental principles of any democratic society.[4]

Transitional justice systems often fall behind in the realisation and embodiment of the open justice principle. Access to justice, a fair and public hearing and an independent and impartial tribunal, all core elements of fair trial standards, correlate with the exigencies of open justice; therefore, these are the most important questions to discuss in transitional justice countries. The furtherance of an open and accountable justice system (through guarantees that reinforce judicial independence and impartiality) is of utmost importance in transitional or inherently undemocratic states through the promotion of the right to a fair trial as a core human rights standard. The principle of separation and distribution of powers operating under the principle of checks and balances in a formulating 'transitional state' cannot operate without a respected, independent, open and accountable judiciary, especially not in transitional societies. We could also say that the justice system lives in a 'marriage without the possibility of a divorce' with the right to a fair trial.

In support of my introductory assertions, the presentation of fair trial standards follows in Russia, Africa and China. In the following subchapters we shall turn to the examination of the areas of concern in terms of the status of justice and existing fair trial protections. In case of the *Russian Federation*, we have to examine whether the ECtHR is able to provide effective protections for fair trial rights and for human rights in general or is there any other way to improve the situation? Turning to *Africa* (through the examples of Nigeria, Somalia, Liberia and South Africa), we shall examine what significance should be attributed to international judicial fora and whether remedies in front of said fora should take precedence over other possible solutions, e.g. in the form of domestic reforms? Addressing current issues in *China*, we shall focus on discussing whether there is room for transformative justice, international law and standards in shaping the application of norms under the doctrine of 'rule by law' and whether rule by law is able to create necessary and adequate protections for fair trials and human rights.

[4]Sutter v. Switzerland, ECHR Judgment of 22 February 1982, 26.

5.5 Caught in the Crossfire: Fair Trials in Russia

From among the three areas of concern analysed in this chapter, Russia has the closest ties with European human rights protection. The Federation demonstrates continuous commitment through resolutions to promote the protection of human rights by systematically adhering to international instruments and partaking in human rights dialogue with Europe. MEPs welcomed Russia's recent ratification of Protocol 14 to the ECHR and the moratorium on death penalty, hoping that these are the first steps towards improving respect for human rights. The EU advocates the stepping up of human rights dialogue and hopes that civil society, NGOs and human rights organisations will get more effectively involved in the twice-yearly EU-Russia summits. MEPs have also called on Russia repeatedly to intensify negotiations for a new (binding) partnership and cooperation agreement not only on economic cooperation but also in the areas of democracy, rule of law and respect for fundamental human rights.

Despite of this Russian commitment on the level of political declarations, meaningful change is impeded by actual political will to realise reforms.

To date, no significant and substantial progress on the issues raised in the dialogue, nor on the modalities of the dialogue can be measured. The consultations thus appear as a mere diplomatic exercise, which aim is to "discuss issues related to human rights and fundamental freedoms in a constructive and open atmosphere", rather than to be a leverage for human rights change in the field.[5]

Drawing on the results and deficiencies of the slow progress of human rights dialogue along the past almost 10 years, the Directorate General for External Policies of the Union, responsible for the conduct of human rights dialogue, has published its Human Rights Policy Towards Russia in March 2011 detailing concern about the status of democratic development and respect for human rights in the whole of Russia.[6]

Despite its reluctance to improve general respect for human rights, Russia has close ties to the European framework of human rights protection; the Federation recognised the jurisdiction of the ECtHR in 1998. Nonetheless, to this date, based on current data, Russia has been the state against which the most applications were launched every year in light of gross human rights violations that transpire, mostly under Article 6, the provision safeguarding the right to a fair trial. 'The Court

[5]Official Website of the International Federation for Human Rights. Assessment of the EU-Russia Human Rights Consultations. 'A good and constructive atmosphere' and 8 human rights defenders assassinated. October 2010. Available via http://www.fidh.org/IMG//pdf/assessment.pdf. Accessed 21 Aug 2012.

[6]Official Website of the EU-Russia Civil Society Forum. EU Human Rights Policy Towards Russia (March 2011). Available via http://eu-russia-csf.org/fileadmin/Docs/EU_Human_Rights_Policy_Towards_Russia_FRIDE.PDF. Accessed 1 Nov 2012.

attempts to give practical effect to the purpose of the provision, with a view to protecting rights that are practical and effective (principle of effectiveness) rather than theoretical and illusory' (Vitkauskas and Dikov 2012:7).

On 31 December 2011, statistics point to the fact that since the first violation decision against Russia was issued in 2002,[7] already under Article 6, the total number of judgements against the country has been 1212, a solid 1,053 of which are violation decisions (finding at least one violation) regarding Article 6 (fair trial) and Article 13 (effective remedy) read together (Art. 6. violations, 762 judgements; Art. 13. violations, 291 judgements). Some even dare to declare – in disserting upon the application of rule of law in Russia in relation to ECHR violations – that 'the egregious nature of violations to the Convention committed on the eastern extreme of the Court's jurisdiction make serious violations committed on the western side of Europe appear comparatively less serious, thus slackening overall protections as a result. This has been the burden placed on all of Europe by Russia's membership' (Kahn 2008:536).

The above-mentioned pilot case, Burdov, has its roots as far back as 1986. (In terms of undue delay, I could argue that the time passed between 1986 and 2002 – the year of the judgement – represents a serious obstacle to the requirement of access to justice itself. All this is true, of course, in a sense that justice is served when our effective remedies become eventually fruitful. However, I would not like to touch upon the relation between undue delay and access to justice, for it would exceed the limitations of this study.) In this case the ECtHR concluded that the applicant's Article 6 rights were infringed since the final judgements reached in his case were only executed with undue delay, thereby causing the compensation to be late for his severe radiation poisoning suffered through exposure during his work in the clean-up after the Chernobyl catastrophe. Damages were awarded to the applicant in 1991 based on an expert opinion, but paid only in 2001. Besides Burdov, however, we can cite many other cases, in which the Court did not find Article 6 violations. I now summarise the Bykov[8] case as an example, in which the Strasbourg forum reached a verdict in 2009. In his application, the applicant posited that audio recordings made of him during pre-trial detention, recorded secretly, with the involvement of the national security agency were used against him in trial as evidence to prove that he indeed ordered the killing of someone. However, the ECtHR concluded that Article 6 guarantees and protects the right to a fair trial as a whole and does not govern the admissibility of evidence, not even in the case of evidence obtained unlawfully under national regulations. Furthermore, the Court went on to note that the applicant's right to defence and the prohibition of self-incrimination were also respected during the trial, under the right to a fair trial, and he had the opportunity to present his arguments as regards the illegality of evidence in an adversarial system, which were then heard and taken into consideration by the court when reaching their decision. Consequently, there are some cases where Russian court proceedings are

[7]Burdov v. Russia, ECHR Judgment of 7 May 2002.

[8]Bykov v. Russia, ECHR Judgment of 10 March 2009.

looked at as being fair, based on the holistic qualitative assessment described in the introduction of this chapter, as in Bykov. However, it is clear from the jurisprudence of the ECtHR that where Article 6 might not be violated, other provisions of the ECHR can be invoked to offer protection in form of 'rights comparable to that of access to a court, such as the guarantees afforded to victims of crime by way of the positive obligation to protect life [...]under Article 2; to protect from and investigate ill-treatment under Article 3, [...] to protect family life and home [...] or to guarantee the right to an effective remedy' (Vitkauskas and Dikov 2012: 25–26).

5.6 The 'Kalashnikov' of the Russian System: Unfair Judgements on a Conveyor Belt?

Lying at the heart of disrespecting European and international fair trial standards are the Russian political elite's ever pursued illiberal practices inherent to states governed under communist rule. The judiciary is often submitted to play the role of an accomplice in the government's efforts to root out enemies, in close cooperation with law enforcement and state security agencies. These crusades are either motivated by political greed or by real or assumed economic necessity. Those in charge abuse their power and create a practice of 'selective justice' that is not much different from 'rule by law', i.e. the selective application of law along the government's interests. The ECtHR numbers cited above shall be hereby supported by the illiberal practices identified in Russia; we can agree with those who are of the opinion that in politically charged cases, judicial independence still remains elusive in Russia (e.g. Hendley 2011:3).

The eradication of individuals and companies, identified or labelled as being 'power centres' outside the government (ruling elite) who shall be eliminated (through unfair trials) to secure political (and/or economic) benefits, can be considered widespread in the Federation. Also, the right to an effective remedy is hindered by the introduction of such prolonged domestic remedial processes (to counter judicial or administrative sanctions) that cause remedy claims to be 'in the system' for such a long time that it causes the limitation of access to justice domestically and internationally as well, and thereby limits the effective remedy requirement as well. Nonetheless, in general, the population demonstrates an increased need for the assistance of courts in resolving their legal disputes, no matter however desperate or dissatisfied public opinion is with the situation of the administration of justice. 'Though the willingness of officials to mobilize 'telephone law' in such cases, either to further the interests of the state or for self-aggrandizement, clearly undermines the goal of equality before the law for all, whether it is reflective of practices in non-politicized cases is unclear. If it were, then we would expect to find reluctance on the part of ordinary Russians to take their disputes to court. Yet the caseload data document just the opposite: the number of civil cases has more than doubled over the past decade' (Hendley 2009:241). 'Put more bluntly, a belief in the legitimacy of the court is not a prerequisite to utilizing it' (Hendley 2011:5).

For the purposes of the present analysis, the Russian fair trial system was best described by former Yukos CEO Mikhail Khodorkovsky, who fell prey of the first practice in 2009, currently on trial for embezzlement in Moscow after he was sentenced for a second time not long before New Year's Eve 2010 by a Moscow Court for embezzlement. In accordance with the most recent developments of December 2012, he is allowed to walk free in October 2014 after a reduction of his sentence but only after the retroactive entry into force of certain changes in Russian criminal law and only after the shadow of suspicion (for the same crimes) shifted to Alexei Navalny, also among those heavily opposing Putin's regime. The first practice identified above usually embodies giant media frenzy that surrounds these high-profile cases that is why the 'fairness' of Russian criminal trials is not unknown to the world. Khodorkovsky authored several articles during his prior imprisonment describing the Russian justice system. Being an industrialist, he shed light on the biggest problems through a metaphor of his craft. (*Author's note*: Khodorkovsky's original article in Russian, published in Nezavisimaya Gazeta, has been translated into English and cited by Manes (2010):

> The System – the conveyor belt of a gigantic plant, which lives inside a logic of its own that does not submit, in general, to any kind of regulation from the outside. If you have become the feedstock raw material for this conveyor belt, then at the end of it there is always a Kalashnikov machine-gun, i.e. a guilty verdict. Any other outcome to the processing of the feedstock by the System is regarded as a defective product. Therefore – again, in general – you should abandon the very thought that somebody someplace is actually going to be try to figure something out and get to the bottom of things in your case.

Among the many internationally available resources relevant to the body of literature on the Khodorkovsky trial, certain arguments contained in a report by the International Bar Association (IBA), with minute detail on the trial setting, are necessary to be mentioned at this point. The IBA experts approach the problematic issues with regard to Russian justice through the case study at hand from a wide angle. The report correctly asserts that contemporary social development (in Russia) has a deficiency consisting in the fact that 'having declared the state to be governed by law de jure, but refusing to be subordinate to the law de facto, the state will develop along a vector leading to its demise. Such a development contradicts the goals of the current Russian Constitution, which, despite all its deficiencies and far from adequate implementation, is ideal in the sense of being normative'.[9] Normativity in itself is however not enough if, as the Report aptly point out, implementation of the normative content suffers from deficiencies and is inadequate.

However, the IBA report also sheds light on the fact that Khodorkovsky's application to the ECtHR under allegations of political prosecution was to no avail, while in other cases against Russia, the Court found such allegations to have support.

[9]The Khodorkovsky trial – a report on the observation of the criminal trial of Mikhail Borisovich Khodorkovsky and Platon Leonidovich Lebedev, March 2009 to December 2010 (September 2011), 9. Official Website of the International Bar Association. Available via http://www.ibanet.org/Article/Detail.aspx?ArticleUid=1c47f688-adcd-4d4b-aea6-5bf4039ff4d5 Accessed 17 Apr 2013.

In addition, it is also pointed out in said report that detailed regulation on the sub-constitutional level provides for equality in a criminal trial, required for access to justice, but also identifies several factors that hindered a fair and public hearing and allowed inferences to the partiality of the court. Recent developments resulting in the reduced prison sentence demonstrate convergence to the requirement of an effective remedy, but the IBA remains concerned with the general political climate, which they say is not conducive to fairness due to political declarations being made which clearly go against basic principles of criminal trials such as the presumption of innocence or even separation of powers.

5.7 Spy Mania? The Pourgourides Report

In relation to the first practice, we shall discuss the CoE investigation into the fairness of Russian trials from the perspective of the 'spy mania cases'. These were trials where espionage and illegal distribution of state secrets were among the alleged charges, and mostly targeted members of the Russian intelligentsia and academia. The Parliamentary Assembly of the CoE adopted the relevant Report by rapporteur Christos Pourgourides on 25 September 2006, which identified the following essential problems in the justice system based on consultation with Russian NGOs (e.g. 'Public Committee for the Protection of Scientists') and case studies (e.g. Danilov, Sutyagin cases).[10] The investigation was further continued in 2012, when the Venice Commission of the Council of Europe was asked to examine the compliance of the Russian regulation with European standards in terms of the federal law on the Federal Security Service (FSB).[11]

The conclusions of the 2006 investigation are presented below, which centred around four transversal lines and complemented – where relevant – with the major findings of the 2012 assessments. Generally it can be said that the necessary conclusions of the 2006 investigation have been drawn, and the Venice Commission welcomed the inclusion of specific legal provisions in the FSB law that protect human rights and prescribe compliance with international treaties. Although a paraphrasing section is included in the law reiterating the limitations on the restrictions of fundamental rights that are made possible under the ECHR, there are still no specific limitations on the actions of the FSB in rendering pre-trial procedures, trial

[10]Fair trial issues in criminal cases concerning espionage or divulging state secrets. Report, Committee on Legal Affairs and Human Rights, 25 September 2006. Official Website of the Parliamentary Assembly of the Council of Europe. Available via http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc06/edoc11031.htm#2. Accessed 21 Aug 2012.

[11]Opinion on the Federal Law on the Federal Security Service of the Russian Federation. 15–16 June 2012. Official Website of the Commission for Democracy Through Law of the Council of Europe. Available via http://www.venice.coe.int/WebForms/documents/?pdf=CDL-AD(2012)015-e Accessed 21 Apr 2013.

practices or effective remedies more transparent and more observed.[12] Some said more than a decade ago that 'the transfer of legal ideas between countries and the integrative force of international law' (Frei and MacLaren 2004:1297) might help in placing Russia within the category of rule of law countries. I do not go this far, but it is undisputed that the role of the integrative force of international law and international institutions is undeniable in the development of Russian law.

5.7.1 Fair and Public Hearing

In relation to the Article 6 requirement of a fair and public hearing, the investigators uncovered an 'all-or-nothing approach' regarding the classification of case files thereby allowing the court to hold closed sessions and restrict public access. Although the transparency and publicity of the judicial process is a long-solidified principle that can be derived from ECHR case law, in the 'spy mania cases', the main issue was that national security agencies often intervened on behalf of the 'state secrets' that were allegedly involved in the case and petitioned the Court to classify the whole case as confidential. This led to the trial to be on camera, in closed session, which is clearly contrary to the principles of publicity under ECHR, with limitations that shall be necessary in a democratic society. Investigation of these interventions by security agencies often uncovered tampering with case files as well, i.e. the insertion of 'secrets' into the documents file with the Court, in reference to which the petition to classify the whole docket was later filed on.

5.7.2 Independent and Impartial Tribunal

In terms of the next most important Article 6 element, CoE investigators in Russia uncovered the issue of personalised security clearances. In light of the purpose of the practice designated as the 'all-or-nothing approach' above, another relevant anomaly in the Russian justice system is the close connection of the judiciary and the national security. The FSB (Federal Security Bureau, the Russian national security agency) and other law enforcement agencies are intent on issuing 'personalised security clearances' to hand-picked judges, who then will be able to try the 'all-or-nothing' classified cases on their own, in camera. As the Report emphasises, the notion of any judicial security clearance is unacceptable in a country that abides by the principles of the ECHR. By definition, such clearance involves the FSB, which,

[12]Opinion on the Federal Law on the Federal Security Service of the Russian Federation. Page 27. 15–16 June 2012. Official Website of the Commission for Democracy Through Law of the Council of Europe. Available via http://www.venice.coe.int/WebForms/documents/?pdf=CDL-AD(2012)015-e Accessed 21 Apr 2013.

with the pretext of lack of security clearance, can choose the judge it wants to try the case and thus influences judicial independence and impartiality. The relevant investigation uncovered an instance in which a judge – having dealt with several of the 'spy mania cases' – defended a thesis on 'antiterrorist investigations' in an FSB training institute and now holds an advanced diploma of the FSB.

The Venice Commission referred recently to such practices as 'case hardening', referring in particular to specialist security judges but also to prosecutors in such miscarriages of justice. As the opinion in question reiterates, there are 'tight-knit' factions of security cleared judges and prosecutors (almost 'incestuous'), and 'they may come to identify more with the people with whom they are in daily contact – the security officials – rather than their judicial colleagues. There is a danger that these judges become so used to the types of techniques, information and assessments they see every day that they lose their qualities of independence and external insight through a process of acclimatization'.[13]

5.7.3 Forum Shopping

In the examination of the Sutyagin case, the investigation uncovered that the case had been transferred from one judge to another multiple times, without justification and proper notice to the defence. The investigators came to the obvious conclusion that the prosecution looked for judges prone to preferential treatment in their favour.[14]

The doctrine of popular participation in relation to impartiality and independence:

In this domain, we shall touch upon the issue of jury trials in the above-mentioned 'spy mania cases'. Just as judges, juries shall also be impartial and independent in the adjudication of a case. As the ECtHR concluded:

> [a]s to the question of "impartiality," there are two aspects [. . .]. Firstly, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.[15]

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[13] Opinion on the Federal Law on the Federal Security Service of the Russian Federation. 15–16 June 2012, 12. Official Website of the Commission for Democracy Through Law of the Council of Europe. Available via http://www.venice.coe.int/WebForms/documents/?pdf=CDL-AD(2012)015-e. Accessed 21 Apr 2013.

[14] Although partially relevant to the area of research herein presented, it is noteworthy that similar trends can be traced in Europe as well. In connection with the justice reform recently put in motion in Hungary, efforts have been provided to introduce regulation allowing prosecutors to go 'forum shopping', by choosing the court (and the judge) to file charges against offenders. These efforts, however, have been struck by constitutional review, thus securing the right to a fair trial.

[15] Findlay v. United Kingdom, ECHR Judgment 25 February 1997, 73, referring to Pullar v. United Kingdom, ECHR Judgment of 10 June 1996, 30.

In other words, there is no fair trial in a biased court, nor one by a biased jury, because fairness shall be complied with when selecting jury members. In Russia, state security agencies made it their objective to create bias in civilian juries sitting in the 'spy mania cases'. There were allegations by defence lawyers in the Sutyagin case that uncovered that the civilian jurors were influenced by 'informal leaders' – with ties to security agencies – formerly involved in previous spy mania cases, who were 'planted' by the Russian government in order to exert pressure on the other jurors.

Also, once the jury had been selected, on many occasions the Court replaced the jury after the trial had begun, without providing an adequate and timely notice to the defence.

The problem of abusing jury instructions was also identified by the Report: in the cases of both Sutyagin and Danilov, the judges' instructions to the jury were phrased in a way as to avoid asking the jury whether or not the information disclosed by the defendant was in fact 'secret', as alleged in the indictment. Of the four questions posed to the jury during Sutyagin's trial, none contained any reference to state secrets whatsoever. When investigators called the authorities on this, they told in their defence that the only purpose of such practice was that they did not intend to possibly confuse the jury with obliging them to reach a decision on such practical issues, and that is best therefore if the judge itself rules on this fact. (*Author's note:* however, it is a basic rule of jury systems that judges are not factfinders.)

5.8 'Effective Remedy and Undue Delay'

Although a conclusion relevant to the right to an effective remedy was not stated in the Report discussed above, the requirement of 'undue delay' was also examined. It is clear that – as argued above – lengthy proceedings, as described in the second Russian practice, delay the effective enjoyment and enforcement of any right to an effective remedy be it in front of domestic or international fora. The number and operation of judicial bodies tasked with the review of appeals and the length of administrative deadlines can clearly hinder access to justice and the right to an effective remedy, as it was recognised already in Burdov, examined above.

As closing arguments in discussing the anomalies of Russian fair trials, it is noteworthy to mention Khodorkovsky's remark on the flaws of Russian justice with respect to juries and effective remedies. His main criticism against the fairness of trials can be described as follows. He posits that the courts are being over-politicised, with close ties to the government, and he considers the restricted use of juries in cases involving treason, terrorism etc. to be a faulty solution due to recent procedural reforms in the Medvedev era. Khodorkovsky asserts that the only way out of the current chaos could be if juries were allowed to participate in trials once again and courts distanced themselves from politics, reinforcing the independence of the 'third prong' of the separation of powers. The mogul, whose case had the biggest global

media frenzy in recent years in Russia, also calls for a 'preventative judicial reform' that allows for citizens to have opportunities to complain about infringements of their rights.

In making the above picture complete, we shall also mention that the Federal Constitution of Russia is basically silent on overall fair trial protections. It provides for 'legal protection' stating that '*the decisions and actions (or inaction) of state organs, organs of local self-government, public associations and officials may be appealed against in a court of law* [and provides for the opportunity for everyone] *to turn to interstate organs concerned with the protection of human rights*', in accordance with the international treaties of the Federation (NB Russia submitted to the jurisdiction of the ECtHR in 1998), when all the means of legal protection available within the state have been exhausted (Art. 46.). Access to justice is 'safeguarded' by the provisions that assure one's right to have his or her case reviewed by a court: no one may be denied such rights and those charged with a crime are particularly protected. On the other hand, it has been considered a serious obstacle to access to courts and justice when courts denied the examination of the submissions of one party on appeal by denying the party the right to file a pleading in writing.[16] On other occasions, it has been found by the ECtHR after due analysis of Russian procedural laws that a criminal conviction may even be set aside upon extraordinary review, if such action might be warranted by serious defects of the underlying proceedings. 'That power must be exercised so as to strike, to the maximum extent possible, a fair balance between the interests of an individual and the need to ensure the effectiveness of the system of justice'.[17]

Besides supranational judicial control, there are efforts on the part of the Russian Constitutional Court to safeguard individual rights and to accommodate international expectations within the national legal order, but as Valerij Zorkin, the President of the Russian Constitutional Court said: it is best to compare the Constitutional Court to a gardener growing plants on native soil, although that soil might sometimes be poor and desert. The plant allegory obviously symbolises the fruits of constitutional development and the respect of internationally recognised principles through the interpretation of the Court. Zorkin argued that 'The Constitutional Court's practice demonstrates the trend that is determined by the Russian Constitution itself, for increase of the role of judiciary in strengthening of interaction between the national and international legal systems, and in more and more active integration of Russia into the international legal space, including the European one'.[18]

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[16]Dunayev v. Russia, ECHR Judgment of 24 May 2007.

[17]Lenskaya v. Russia, ECHR Judgment of 29 April 2009, 32.

[18]Constitutional Justice of the New Democracies in the Conditions of Modern Challenges and Threats. Speech held by Valerij Zorkin (President of the Constitutional Court of the Russian Federation) at the international conference Twenty Years of the Constitutional Court, in Budapest, Hungary, 23–24 November 2009. Official website of the Hungarian Constitutional Court. Available via http://www.mkab.hu/letoltesek/valerij_zorkin_beszede.pdf. Accessed 21 Apr 2013.

5.9 'Pilot Judgements': Piloting Safely to Ease Article 6 Tensions Between Russia and Europe?

In this last part of the chapter on Russia, it needs to be pointed out that the ECtHR has constructed a method (the Pilot Judgement Scheme, PJS) that might be a useful tool in the fight against gross infringements of fair trial rights resulting from systemic errors in Russia's legal system. From Russia's recognition of the ECtHR's jurisdiction in 1998, there have been enormous political tensions between the Federation and Strasbourg clouding EU-Russia relations; the statistics presented in the first part of this chapter alone attest to this fact. Although the Russian Constitution (Chapter 7, Article 125) acknowledges the individuals' right to file complaints against the government to the Russian Supreme Court (as an 'effective remedy'), critics of the system claim that this opportunity merely serves the purpose of delaying access to justice on the European level. The primary motivation of ECtHR PJS introduced recently is to protect the common European constitutional heritage (in a broader sense), such a motivation and the framework built on it might serve as the adequate tool necessary to effectively deal with systemic, generic faults of national legal systems and constitutional arrays not only in Europe but in the case of Russia as well.

Among the characteristics of the PJS that make it exceptionally effective (in this respect), which we can enumerate, are that these judgements not only declare the infringement of ECHR but also the error in the legal system of the defendant state is identified and an obligation is put on the state to revise it in order to prevent future violations of the ECHR. In Burdov, the Court introduced strict time limitations to introduce legislative change causing the violation, in looking beyond the facts, into the underlying systemic problems.

'What used to be a question of mere rigorous analysis, has now become a necessity for the Court. The rising number of applications concerning systemic or large-scale violations of human rights and the states' call for guidance by the Court have led to experiments with pilot judgments' (Buyse 2009:1902). The success of such a system, however, remains questionable in the fact of such numbers that demonstrate the preparedness of Russia to systematically resist initiating changes identified as necessary in these judgements. Kahn points out that Russia does not go as far as to refuse the legitimacy of a judgement, but points to the exponential increase in the amount of money the country designates to compensate for violations of ECHR in every respect, not just under Article 6 (Kahn 2008: 539).

Nonetheless, we can also point out – in agreement with those advocating for an evolving interpretation of ECHR rights – that rights protection under the Convention constantly reflects societal change and is in line with present-day conditions (Andenas and Bjorge 2011:7). Obviously, the derivative of this evolved and heightened protection of rights will need to be applied – eventually – in every Member State, no matter the cost.

5.10 Good Students and Bad Pupils: Fair Trials in Africa

Africa has been very active in forming bonds with the EU as part of the ongoing EU-AU human rights dialogue aiming at the development of human rights protection, especially after the 2002 disbandment of the Organization of African Unity (OAU) that was replaced by the African Union (AU). As an example of this cooperation, the most recent Joint Declaration by the African Union and the European Union in support of victims of torture – that clearly can have fair trial implications in the pre-trial phase – was adopted on 26 June 2010. Despite all of these efforts, Africa's misfortune is, however, that due to immense political tensions within certain regions, 'states' as we know them – as political structures – might not be able to function properly. Consequently, certain states are 'boxed in' in the debated classification of 'failed states',[19] in which the rule of law was substituted with 'rule of war' and warlords who tore up the traditional organisation of the state and government, and left the primary creators of statehood and sovereignty – territory, population, public power – questioned as we know them, thus leading to major humanitarian and armed conflicts that threaten the life of a nation. Adjacent crimes against humanity, which entail serious disregard of the right to a fair trial as a part of a greater campaign in general, also complicate the situation in the case of Africa, but this presentation will not discuss further the implications of this aspect. In several other, failing, 'struggling states', restoration efforts setting up a semblance of a governmental structure were commenced, mostly with assistance from international organisations or NGOs along the lines of international/European best practices, to re-establish or recreate the traditional framework of the justice system as a safeguard of the exercise of public power. Obviously, in a conflict-ridden region where corruption is traditionally seen as an 'earnest' (and possibly only) way of ensuring one's survival, the creation of an open, independent and accountable judiciary is more than problematic. Therefore, the two previous kinds of states where the restructuring of the judiciary (particularly with respect to the interest of openness and accountability) is in progress are hereby referred to as 'transitional justice states'. As argued in the introduction, this study solely focuses on the standard-setting aspects of international human rights instruments in terms of Africa and endeavours to trace the obstacles to the implementation of these standards in the national legal orders and constitutions of the continent, through some examples that have been the subject of several case studies and thus received international attention. The best way to arrive at an outcome befitting the research objectives was to demonstrate – through the case studies available – how international law (or such legal input) in action could point out the results of the inaction (or slow reaction) of the law (illegal output) in certain situations. NGO case studies were mainly used a

[19] See Chomsky (2007) for more details of 'failed states' and systematic curtailments of democracy. Further terminology to describes such states include 'états sans gouvernements' (states without governments), 'estados collapsados' (collapsed states), 'bukott államok' (fallen states) and 'gescheiterter Staaten' (failed states).

points of reference to assess field experiences on the relevant issues since the author himself did not have the occasion to have a first-hand impression of these conflicts and their aftermath, only through the study of an extensive body of reports and analyses.

Several legal instruments were adopted in Africa as part of the formerly mentioned restorative efforts, following best practice input from NGOs and based on the respect of standard-setting international instruments, like the ICCPR and the ECHR. The Organization of African Unity (OAU) secured the right to a fair trial (Article 7) in its African Charter on Human and People's Rights (ACHPR, 1981). Albeit the Organisation was disbanded in 2002 and replaced by the African Union, the protections of a fair trial included in the Charter then lived on to see the adoption of new Guidelines and Principles for the furtherance of the protections of fair trial and legal assistance in 2003. (For a broader comparison of European and African fair trial perceptions and standards, see Ugochukwu (2008).)

In terms of Africa, the involvement of civil society and international organisations, seeking the support of local stakeholders in favour of a transparent and accountable justice system that provides for fair trials, can help abate the unhealthy dynamics of current illiberal trends. International assistance shall gain the support of local interest groups and not force upon them solutions that are not acceptable in their system, as well as respect cultural differences (e.g. indigenous perceptions of justice, local legal practices and belief systems associated with justice). On an adjacent account, it is noteworthy that the examination of current problems concerning the right to a fair trial in general is not possible without reflecting upon the independence of the judiciary. This is especially true in the case of Africa, and in the transitional justice countries to be presented, where the judiciary (and the right to a fair trial) was and/or is either severely suppressed or is affected by the effects of armed conflicts, where either corruption flourishes in military juntas or the judiciary is debilitated due to military rule.

5.11 Existing Guidelines and Principles on African Fair Trials

The following documents to be presented symbolise a framework of rules that were codified with regard to the ICCPR and the ECHR, taking into consideration the territorial, sociological and cultural exigencies of African nations. The framework to be presented is only subsidiary (secondary) for the moment, due to the fact that several national constitutions have not adopted the provisions therein, or even if they did at some point, the constitutional protections have been suppressed by the ruling elites. Respective states should take autonomous domestic legislative action in order for these principles to solidify Africa wide.

The *Dakar Declaration and Recommendations* adopted in 1999 summarise the conditions necessary for the realisation of the right to a fair trial in Africa. These include rule of law and democracy in the first place; these two conditions jointly

appear as 'fully accountable political institutions' in the text. From a value-based point of view, the independence and impartiality of the judiciary is second, followed by the respect of fair trial standards by military courts and special tribunals. The Guidelines identify the existence and shortcoming of traditional courts[20] that result in the denial of fair trials, due to the fact that these courts decide the cases before them based on indigenous, local perceptions of justice or religious customs, customary law. (This problem is, however, not insurmountable, as it will be argued later on in this chapter, through the presentation of a possible solution.) Borrowing a metaphor from Roman law, in such a system of *fas et mos*, the most basic (even morally charged and justified) principles of *ius* (and as such the right to a fair trial) are not always welcome due to fear that they will encroach upon cultural traditions and tribal rites respected as laws. The Declaration moreover speaks of the need to achieve the independence of lawyers and bar associations and of the establishment of effective legal aid framework in creating access to justice for everyone. The Declaration also states that judicial activism and contribution shall be encouraged in order to create indigent defence systems to make fair trial protections more effective. This is an aspect of justice reforms in which economic and efficiency factors overlay, while mutually reinforcing the necessity of change. The Declaration makes specific recommendations for the member states of the African Charter, such as to:

1. Create adequately funded public defender and legal aid schemes.
2. Create innovative legal assistance programmes with the collaboration of Bar Associations and NGOs, through which paralegals shall be capable of providing legal advice for indigent suspects as part of a fair pre-trial stage.
3. Create opportunities for the pro bono representation of criminals.
4. Seek technical assistance from UN to reform constitutional regulation.
5. Improve judicial skills through educational programmes.
6. Incorporate the African Charter into domestic law.
7. Work in cooperation with local communities in order to better identify issues that hinder the effective realisation of fair trials.
8. Enforce the respect of fair trial standards in military courts, while ensuring that no civilians are tried in such courts.
9. Ratify all international treaties relevant to the right to a fair trial.

The *African Union Principles and Guidelines of the Right to a Fair Trial and Legal Assistance* adopted in 2003 contain the elements and prerequisites of the right to a fair trial in the broadest possible sense, even in a global comparison. The document comprises thematic lists through 20 pages, detailing the exact elements of a 'fair hearing', a 'public hearing', an 'independent tribunal', an 'impartial tribunal', an 'effective remedy' and an 'access to justice'.

Only a few of the Guidelines' very important provisions will be discussed, those which are relevant to the four fair trial cornerstones presented earlier.

[20]Traditional courts are judicial bodies deciding cases in a particular locality based on local customs, cultural or ethnic values, religious norms or traditions.

With regard to ‘access to justice’, the Guidelines prescribe access to judicial services for everyone with additional guarantees for women and rural communities, in terms of access, and provide for compensation of victims of past discrimination through affording them complete access to justice. The necessity to foster the right to effective defence in all stages of the trial (e.g. appointment of counsel) and of an effective indigent defence system also appears in the text, along with the stipulation that sufficient compensation shall be paid for legal representatives to accord adequate and effective representation. An important part of the Guidelines is the appearance of the thought that the role of paralegals shall be recognised in judicial proceedings, since granting paralegals similar rights and facilities as lawyers would enable them to carry out their duties independently. Recognised paralegals can establish a link to legal profession in underdeveloped areas where access to justice is a problematic issue, due to lack of infrastructure and further educated manpower. The Guidelines also set forth the promotion of cross-border cooperation within the legal profession, for example, in terms of representation and exchange of ideas.

The cornerstones of fair and public hearing, along with the element of the right to remedy, are contained in the Guidelines as detailed in the following. According to the Guidelines, a ‘fair and public hearing’ means the realisation of equality of arms, of persons before a judicial body and of access to judicial bodies. Furthermore, it also means the respect for the dignity of human beings and the provision of adequate opportunities to prepare, to argue and to provide evidence, as well as to challenge evidence presented in court. The Guidelines prescribe that a hearing is public if a permanent venue is established for the proceedings, or it is made public where the forum is ad hoc, and if adequate facilities for the attendance thereof are provided. The Guidelines emphasise the role of the media as well, as per the document they shall be entitled to be present at a public hearing, with the limitations contained in the ECHR as a default. (The language used is only slightly different.) Publicity, according to the Guidelines, also entails the restriction of the use of anonymous witnesses, that is, if the judge and defence are unaware of their identity at trial. The requirement of the public pronunciation of judgements is enumerated as well. The concept of fairness is apparent from the Guidelines, which implies the promotion of an entitlement to consultation and representation and to a decision solely based on evidence presented, without undue delay, with adequate justification provided for the decision, accompanied by entitlement to appeal.

The prerequisite of an ‘independent tribunal’ is interpreted in the Guidelines to be guaranteed by constitutions and respected by governments, established by law, whereby judicial bodies independent from the executive branch are brought to life that have exclusive authority to decide cases of judicial nature and suffer no unwarranted interference with the judicial process. (The Guidelines also detail appointment requirements in order to secure fairness.) In accordance with what has been said on the doctrine of appearances and the close connection of independence to impartiality by the ECtHR in Piersack[21] and in Findlay (supra), the Guidelines

[21] Piersack v. Belgium, ECHR Judgment of 26 October 1984.

tell us that 'impartiality' means the examination of the position of the judicial official and whether it allows the officer to play a crucial role in the proceedings, the examination of the fact whether the officer may have expressed an opinion that would influence the decision-making, the examination of the fact whether the official would have to rule on an action taken in a prior capacity and also no opportunity to consult a higher official authority before rendering a judgement in order to ensure that the decision will be upheld.

Besides the factors unveiled in the introduction of this chapter, to this date, the national-level transposition of these guidelines into constitutions faces the challenge of tensions between coexisting customary laws, ethnic and cultural traditions and residual statutory law in governance. Geopolitical implications and the large number of low-inhabited, underdeveloped regions also exacerbate the falling behind of access to justice as a prerequisite to a fair trial; in addition, several transitional states are being struck by armed conflicts or innate corruption and power politics.

5.12 Possible Pathways to the Respect of Fair Trial Rights in Africa

It is only if there is a willingness to protect the worst and the weakest amongst us that all of us can secure that our own rights will be protected. (Justice Chaskalson, President of the Constitutional Court of South Africa)

The motto for this subchapter was set in stone in State v. Themba Makwanyane and Another,[22] a case in front of the South African Constitutional Court in which the Court declared the death penalty unconstitutional on 17 February in 1995, thereby becoming the South African equivalent of Marbury v. Madison (Webb 1998:235). The direction of change in South Africa supports my initial assertion that European human rights instruments being indirectly applicable as standard setting outside of Europe as well. South Africa is the 'good student' learning the lesson and implementing fair trial standards, because its Constitution contains extensive fair trial protections. As such, the South African fundamental law is one of the most individualist constitutions around the globe, in that it protects individual freedom to the teeth against the state.

The legislature not only provided for a right to a fair and public hearing in court (Article 34) but also incorporated the right to just administrative action (Article 33), which if infringed upon can be redressed by way of the right to a fair trial (as an effective remedy). The constitution also contains provisions on access to courts (Article 34), and it also sets forth the 'access to justice' principle. Just administrative action set forth in Article 33 shall be lawful, reasonable and procedurally fair, and the constitution sets forth that everyone shall have the right to be given written

[22] 1995 (3) SALR 391 (CC).

justification of the decision. The fundamental law further prescribes that national legislation must be enacted to give effect to these rights and must provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal. Article 34 on the access to courts contains that legal disputes are to be decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. (An additional mention of the right to a fair trial is also apparent in a different context: that of accused persons. At this point, the wording of the constitution changes and it sets forth the right to a fair trial for those accused in its Article 35.)[23]

Notwithstanding the above, 'bad pupils' outnumber good students in terms of adequate human rights and fair trial protections. The success of the toolbox of transitional justice in Africa revolves around the efforts to restore degraded human rights protections and to create legal safeguards that are able to guarantee the right to a fair trial. In the resolution of these issues, states' central organs are helpless or dysfunctional due to humanitarian conflicts and the rise and fall of warlords. In a system of transitional justice the traditional, purely judicial toolbox of rule of law and human rights protection is useless on its own; it has to be applied together with other nonjudicial (and nonlegal) tools as well (cf. Killen 2010). Transformative justice is one of such doctrines, extending along psychosocial, political and economic perspectives. Killen places substantive and justified emphasis on the doctrine of (citizen) empowerment and on the activation of the local levels and on the increase of their participation in conflict resolution (Killen 2010:52–59). The importance of the role of the local levels is a factor that needs to be further analysed later on.

Nigeria's struggling state, our first bad pupil, disposes of a legal system that is a mixture of customary, Islamic and common law. After a long period of military rule, the transition towards democratic rule began in 1999. Transitional constitutionalism and transitional justice in Nigeria is 'balancing of ideal justice with political reality, [assuming] the task of constructing liberalizing change' (Yusuf 2009:658). One might say that transitional justice and judicial systems possess a strategic advantage in contrast to political power (e.g. government), since courts might have more stable institutional backgrounds in transitional states. These judicial structures are however destined to be partial to some extent.

Nigeria has a functional but 'partial' judiciary and justice system: the judiciary's complicity and complacency in the military era attests to partiality, with the benefit of being the only state organ that was not ever truncated or disrupted. That is a valid point, from the point of view of a relative constitutional stability of transitional states and in the interest of survival in a climate paralysed by constant military conflicts, but such a judiciary might not be seen as ultimately independent and impartial and as such in harmony with international fair trial standards. Currently

[23] Official South African Government Information Website. Chapter 2 (Bill of Rights) of the South African Constitution. Available via http://www.info.gov.za/documents/constitution/1996/96cons2.htm. Accessed 21 Aug 2012.

as well, in 2011, the judiciary is continued to be seen as the redeeming agency of the country in, e.g. securing democratic elections. The role of the judiciary still continues to be 'delivering justice and ensuring that the political will of the people, as expressed through their votes, prevailed, stressing that the 2011 elections will pose new challenges and we appeal to the Judiciary to be prepared and courageous enough to deliver justice' (Ahiuma-Young 2011).

When the judiciary is assuming a significant role in directing governance as part of the political transition to democratic rule, impartiality suffers obvious injuries, due to the existence of a political elite, which the court is intent on pleasing in order to ensure the success of political transition. In Nigeria from 1999 to 2009, judicial activism and governance in holding the country together as a political entity and their direct role in governance and policymaking in the political transition to democracy was apparent. The difficulty lied in juggling their three core interests while maintaining normative balance between politics, law and interpretation (Yusuf 2009:656).

Despite the proven 'partiality' of the judiciary on the surface in cases of necessity, fair trial standards are adequately regulated in the Constitution (1999, Chapter IV). The Nigerian fundamental law sets forth the right to a fair hearing within reasonable time, by a court or other judicial forum established by law in proceedings that ensure impartiality and independence. The Constitution provides that each and every proceeding by the courts and other judicial fora shall be public, including the pronunciation of judgements. The right to a fair and public hearing by a court or other judicial forum is also guaranteed to those accused and within a reasonable time. Limitations of publicity appear in the Constitution of Nigeria as well, similarly as in its South African counterpart, with wording familiar from the concerned international instruments.

By reason of the judicial activism touched upon by Yusuf, inferred herein, we shall also refer to the theory of judicial governance. Gar Yein Ng axiomatically determines in relation to this notion that court activities are not merely in the sphere of judicial competence, nor purely of legal interest, but they fit also within the responsibility of government, ergo politics or policymaking (Ng 2011:102–103). The practical application of this theory can be traced in the example of Nigeria, based on the above.

Debates concerning the politicisation of the judiciary arise globally in terms of judicial governance when the question of judicial impartiality and independence gets in the crossfire of debates on fair trial rights. Ng brings legal points of view to the table and reasons that the independence of judges becomes protected via their investiture, e.g. appointment, termination and salary (Ng 2011:104–106). This is obviously true and functional in a constitutional system built on the separation of powers, but the case of Nigeria begs the question whether judicial appointments to be awarded and kept in an environment burdened with military interests and power politics bow to the dangers of partiality and to external pressure or not?

Our next country, termed the 'No #1 "failed state"' by Foreign Policy Magazine in 2010, is Somalia. Contrary to Nigeria, Somalia has no functional national judiciary system. Due to the region being torn into fractions, there is no real national

judicial system in Somalia. Some kind of a government has been set up in and, after 2004, consisting of the following organs: the Transitional Federal Assembly (TFA) and the Transitional Federal Government (TFG) operate under the Transitional Federal Charter (TFC). As a recent development, on 20 August 2012, the mandate of the TFG has expired and the Federal Parliament of Somalia has been set up, but political tensions have yet to decrease enough for the world to see any real outcome of how the conflict within the country has been resolved. In general, local authorities administer a mix of Shari'ah and traditional Somali forms of justice and reconciliation, together with the remainder of statutory law, where applicable.

According to the TFC, the judiciary is independent, and the laws cannot violate the principles of Shari'ah (Islamic law) as the governing law of the State, as implemented by the TFA in May 2009, but lacking practical application ever since. Local courts might be prone to partiality due to their dependence on dominant clans in the territory. In practice, the government bypasses the courts and uses secret security committees to try many defendants without fair trials. The judiciary is seriously undereducated, often lacking formal legal training and also underfunded, which is a factor that decreases the financial guarantees of judicial independence and creates a loophole for corruption to thrive (Freedom House 2010).

In assessing solutions for the problems raised in terms of the right to a fair trial and adjacent perceptions of justice in Africa, we shall look at the example of Liberia and the work of the United States Institute of Peace (USIP), an NGO of international experts present on site since 2005. After 14 years of civil war ended in 2003, the lack of a reliable and appropriate mechanism for resolving disputes through the state justice system still helped the total marginalisation of the population. USIP's programming in Liberia is centred upon improving the citizens' access to justice – through programmes that target not only formal justice institutions but also local legal practices and indigenous perceptions of justice. USIP's role in this process is to stress the importance of the application of new governance methodologies, like creating Model Codes (based on international best practices of human rights protection) for the upcoming government to abide by when creating norms that clarify the mess left behind by the many-many interim governments in the form of often overlapping or contradicting interim legal measures. In such a framework the (re)creation or resurrection of formerly existing fair trial standards can be adequately seen through, but until then, as in the case of every other transitional justice system:

1. The role of international judicial bodies will be more emphatic until sustainable and functional national judiciary systems are created based on international best practices.
2. There is also the possibility of creating 'hybrid trial procedures' taking into account local, indigenous perceptions of justice while conducting trials in local courts involving local partners but also requiring the assistance of international judges or counsel, who abide by internationally recognised fair trial standards, which solution might lead to the creation of lasting national justice institutions.

5.13 'Two Birds With One Stone'? A Showcase of Fair Trials in China

I chose China as an area of interest for the inquiry described in this chapter primarily due to their involvement in the EU human rights dialogue. The 31st round of the (second-in-a-row) annual (instead of the original semi-annual) dialogue was held in Brussels on 29 May 2012 and touched upon general questions of criminal justice under the right to a fair trial.[24] Secondly, the announcement and introduction of the Chinese human rights protection scheme in 2009, instigated by the injuries suffered due to the global financial crisis, also contributed to raising attention. This human rights commitment has been since reaffirmed and extended, and reforms are said to continue through the period 2012–2015 as well.[25] The future of China is closely linked with that of the whole world – determines the Preamble of the Constitution of the People's Republic of China. In keeping with this declaration, when the fate of the world turned due to the hardship caused by the financial crisis, China took a turn and decided to change its fate, as explained below.

The argument can be made that by reason of these recent changes and developments, the international public opinion may change in favour of the country, and China may irreversibly become a 'transitional state' due to the introduction of the human rights protection scheme. The introduction of such a framework obviously entails some sort of change to the justice system, in order to make it conform to international standards. In my view, China became a transitional state just as the African states analysed earlier, with the slight difference that the economic pressure on the state is the main incentive for reforms, while it is rather the necessity to resolve armed conflicts and military rule that guides the states in introducing reforms in the case of Africa.

Nonetheless, the outcome of the field work accomplished by extensive NGO activity shall be assessed and incorporated in the description of the Chinese case study herein, since it provides important insight into the workings on the Chinese justice system, which could not be achieved through a mere analysis of reform efforts and resulting changes in legislation. The research goal set in the introduction, namely, the examination of the international input on the development of the Chinese legal system in 'making room' for rule of law is best met by assessing the main steps in the preparation to ratify the ICCPR, which has been – for years – a pronounced political objective of the country.

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[24] Official Website of the Council of the European Union. EU and China Hold Human Rights Dialogue. Press release, Brussels, 30 May 2012. Available via http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/130529.pdf. Accessed 1 Nov 2012.

[25] Official Website of the XinhuaNet news outlet. The Full Text of the National Human Rights Action Plan of China (2012–2015). Available via http://news.xinhuanet.com/english/china/2012-06/11/c_131645029.htm. Accessed 21 Aug 2012.

5.14 How Does Law Rule? The Difficult Choice Between Rule of Law and Rule by Law

It is obvious and apparent that China's commitment to a law-based order has deepened in the past decades. Reform initiatives and opening policies attest to this fact. From among the representations made supporting this assertion, I now would like to stress one: it has been argued that the justice reform is a demand of widespread layers in the society, which the state strives to meet. Chief Justice Zelin stressed the paramount importance of a fair justice system first of all, which he presented as both an essential prerequisite and a supreme ideal. He emphasised that substantive fairness and procedural fairness are prerequisites of fair justice, but he also stressed the importance of creating social fairness as well (Zelin 2005). Obviously, however, without approaching the norms and fundamental values represented by moral fairness and adhering thereto, no international standards regarding substantive or procedural fairness can be met.

Reforms actually taking place and policies signifying a willingness to open duly represent and attest to the change. From the 'opening' in 1978, the goal of extensive constitutional reforms, seen through from 1999, was to establish a 'socialist rule of law state' in which the government must act in accordance with law has been the objective of a wide-range constitutional amendment in 1999. Spigelman also discussed the problematic raised by the denominations 'rule of law' and 'rule by law' and emphasised the role of economy as an incentive as regards reforms (Spigelman 2002). The actual kick starting of rule of law however encountered several obstacles in China. The conceptual and ideological background of '*a socialist rule of law state may not be equated with the rule of law*' (Peerenboom 2000), and instead of rule of law, the 'role of law' is the governing principle in China that lead to the formulation of the 'rule by law' concept, which is basically an old Chinese practice hidden behind a new name that stands for the selective application of laws for the government's own political interests. In the above-cited speech of Chief Justice Zelin, the expression judicial democracy appears as a fundamental value, by which Zelin describes that the main goal of rule by law is progressively contributing to the systematisation and legalisation of a socialist democracy (cf. with the role of judicial democracy in the case of Nigeria, above). As Zelin reiterated, it is important in building judicial democracy that popular participation strengthen in the administration of justice, either by way of allowing their participation in the proceedings or in cooperating in the controlling of the judiciary. Later on this is why we have to examine the practice of justice 'open ajar' in China.

Based on what we have concluded on the colliding content of rule of law and 'socialist rule of law' turning into 'rule by law' and adding to it that China has stressed many times that its primary motivation for the adherence to the ICCPR and commencing relevant human rights protection development was that the country sees an opportunity, a possible way out of the economic crisis through establishing an adequate framework for human rights protection in compliance with international standards.

Thus, with the creation of this new human rights protection scheme with potentially beneficial effects on the international public opinion of the country, China became a transitional justice system, where changes are made to the judiciary system (abiding by international human rights standards) in order to ensure the more effective protection of human rights. The only difference in comparison of China and its African counterparts in terms of transitional justice is however that in China transition is not motivated primarily by wishing to eradicate military rule and to wind up armed conflicts but instead by severe economic pressures on the state. With the commitments made in their most recent human rights action plan, China proverbially killed two birds with one stone.

Motivated by economic consideration, the country recognised that by elevating the level of human rights protection (the 'one stone'), this will also increase the state's international prestige as an undemocratic country that is intent on opening up for democratic influences; therefore, this increased acknowledgement of China will incentivise investment and attract capital into the country (the 'first bird'). If capital is attracted to the country, then hindrances caused by the financial crisis can be abated (the 'second bird'). I think at this point, it is safe to say that the human rights protection system communicated by China is unique and never seen before given that its incentives are economic (capitalist, if you will!) in a country traditionally ruled by communist elites. The reforms introduced by China have the potential to lead to an effective 'opening' due to democratic influences, even if such an opening will only remain ajar in the foreseeable future.

5.15 Identifying Problematic Fair Trial Issues: The Role of NGOs

After careful analysis of several NGO case studies conducted in China over the course of the last 10 years, I identified several issues of fair trial protection that need to be discussed herein. The first and foremost is the issue of gross human rights violations in light of the international scandal that ensued around the Tibetan conflict and the default violations of the right to a fair trial that surrounded the pertinent riots that have also been scrutinised in international media. Secondly, we shall discuss the system of *xinfang* ('letters and visits') bureaus also known as 'petition offices', as means to comply with the people's need for a right to an (effective?) remedy in case any kind of abuse of power or rights infringement. This system might seem as per se corruption-bound for the eyes of a Western legal scholar, although it is best suited to accommodate the needs of Chinese people due its long-solidified practice and traditional application. In relation to these two first topics, reforms of the judiciary and the furtherance of open justice in courts shall also be evaluated.

Along with the constitution, the Civil and Criminal Procedure Codes were also subject to revision before (1996) and after 1999 (2007) in the spirit of an all-encompassing justice reform creating fair trial guarantees like an effective indigent defence system and legal aid services all over the country as cornerstones of access

to justice. China also ratified the ICCPR recently. The most recent of reforms was the introduction of the 2009–2010 Human Rights Action Plan (HRAP), with specific provisions strengthening the respect and promotion of fair trials. This Action Plan is based on China's participation in human rights dialogue initiated by the EU and also on the assessment of China's 9th White Paper on Human Rights, issued in Beijing on 16 September 2010.[26] (As mentioned above, the commitments undertaken herein have been reaffirmed to be maintained and continued in 2012–2015 as well.)

Along with the analysis of the reforms based on NGO case studies, taking a closer look at the Human Rights Action Plan for 2009–2010 (HRAP), including its regulation aiming at the protection of the right to a fair trial, might shed light on the current trends in the transitional justice system of China. This methodology serves to answer the question whether the results of field projects concluded since the millennium and the solutions to problems uncovered by said studies are to be found among the commitments included in the HRAP or not? Such a point of view, as intended, might shed light on the current trends of Chinese transitional justice that adapts itself to the newly acknowledged exigencies of human rights protection in the information economy, clearly motivated solely by economic factors and in a system of 'rule by law'.

In the following, the more important justice reforms are presented in this Chinese case study, without the intent of completeness, merely emphasising certain core achievements and problematic issues. These have a traceable effect in the development of Chinese fair trial rights.

The first in line is the 2011 reform of the 1995 Judge's Law on the judiciary of the People's Republic of China (PRC) that sets forth that courts exercise the administration of justice independently after 1 January 2002. Internal regulation of justice institutions (prosecutorial services included) opened the way for new disciplinary rules in order to increase transparency and efficiency. The introduction of a unified state justice examination also took place around this time that has to be passed by everyone who wishes to work in the administration of justice, thereby increasing the efficiency of professional standards and the quality of the administration of justice. The importance of said regulation is attested by the fact that only 7 % of the applicant passed the examination successfully for the first time.

In 2003, the Chinese Executive State Council introduced regulation to guarantee free of charge the legal representation of indigent clients, however to no avail, since the demand for legal assistance is still very much higher than supply.

Pursuant to a 2004 regulation, the role of popular participation (jurors) was increased in the administration of justice; jurors might end up having functions and powers similar to those of judges eventually.

It is important to emphasise that both before (1996) and after the millennium (2007), both the civil and criminal procedure laws have been subjected to extensive

[26] Official Website of the XinhuaNet news outlet. Progress in China's Human Rights in 2009. Available via http://news.xinhuanet.com/english2010/china/2010-09/26/c_13529921_2.htm. Accessed 21 Aug 2012.

reforms and modifications, aimed at strengthening the access to justice and justice institutions. The introduction of the 'Three Supremacies' (i.e. the supremacy of the cause of communism, of the people's interest and of the Constitutions and other laws) spread insecurity regarding the future of justice in China. However, on a positive note, the Chinese trend with respect to reforms means slow but steady restructuring of the current system, and the megatrend as regards the modernisation of Chinese justice is irreversible (Xin and Rongrong 2009).

As mentioned above, the freshest tokens of China's commitment to increasing the level of human rights protection are the preparation for the ratification of the UN ICCPR and, in relation thereto, the introduction of the HRAP, partly due to China's participation in human rights dialogue with the EU.

5.16 Results of Transitional Justice: Chinese Perceptions of Fair Trial

As part of the examination of the achievements of transitional justice in China, we shall discuss Chinese perception of the protections of fair trial rights in the ICCPR and the corresponding goals set out in HRAP. Due to China's ratification of the ICCPR and relevant fair trial protections, it is only fair to analyse the Chinese standpoint on Article 14 protections at this point. Fair trial standards can be classified in the following three categories (Zhang 2009:39–42):

1. Basic rules (para. 1–2, Art. 14)
2. Minimum guarantees (para. 3, Art. 14)
3. Other provisions (rest of Art. 14, 15)

Under this three-tier system, abiding by the core elements I defined earlier for this inquiry, the right to be equal before the court (access to justice) and the right to a fair and public hearing by an independent and impartial tribunal are considered as 'basic rules', the right to appeal (effective remedy) can be found as part of 'other provisions', and the class of 'minimum guarantees' incorporates the most of the accused person's rights enumerated in ICCPR as part of the bundle of fair trial protections. [These are (i) the right to be informed of the charge, (ii) the right to prepare defence and communicate with counsel, (iii) the right to be tried without undue delay, (iv) the right to be present during the trial, (v) the right to defence, (vi) the right to legal assistance, (vii) the right to call and examine witnesses, (viii) the right to the free assistance of an interpreter and (ix) the privilege against self-incrimination.]

'[The] fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive' (Zhang 2009:43). Zhang's standpoint reflects on an overarching general right to a fair trial under the ICCPR establishment of which requires evaluation of the proceedings as a whole, element by element. This view is in adherence to the qualitative approach taken by the HCC, reiterated earlier.

The conclusion provided by Zhang assessing the fair trial rights set out in the ICCPR seems to overlay that of the HCC when declaring that the fact that the specific rights as guarantees of the fair trial have been respected does not yet indicate that the trial in itself was fair or not. As Zhang concludes correctly, in accordance with Western views on the all-encompassing fundamental right to a fair trial, the general right to a fair trial makes the provisions of the ICCPR in question to be exoteric thus being able to accommodate to the development of the society (Zhang 2009:43). Following the logic commenced, it has to be pointed out as a general conclusion with respect to fair trial protections that this quality-based approach enables national and international judicial bodies and organisations to broaden the scope of the right to a fair trial by adding several enumerated rights and guarantees to the extent of protections offered by the general right to a fair trial.

5.17 Committing to Fair Trials Without Committing to Fairness?

In relation to the ICCPR protection, we should look at the additional safeguards of the 2009–2010 Human Rights Action Plan, taking into consideration several international instruments. The HRAP contains commitments to securing *lawful, timely and impartial trials that provide for legitimate trial procedure that allow for, e.g. clear facts, the presentation of evidence and for the examination of witnesses, with due time provided for the parties to prepare their case*. (‘*The state, in accordance with the law, guarantees the rights of litigants, especially those charged with criminal offences, to an impartial trial*’.) The question still remains: Is impartiality as a prevalent quality of the trial sufficient to comply with the general standards of fairness based on the qualitative approach?

Among the commitments with detailed goals relevant to open justice, we can find, for instance, that the information of open trials shall be fully released. As for open trial cases, the people’s court shall announce, 3 days before the opening of the session, the summary of the case to be heard in public, the name of the defendant and the time and place of the court session. People’s courts are required by law to give the reasons for cases that are not tried openly, when trying cases openly, the court allows for evidence to be provided openly, witnesses to be questioned openly, all arguments made openly and all judgements announced openly, and any citizen with a valid certificate may attend any open court session.

As for the independence and impartiality of the judiciary, the HRAP ensures the juror’s independence in voting in a collegial panel on the facts determined and the application of law in the judgement.

Establishing the guarantees for the right to defence and the revision of relevant laws is also envisaged by the HRAP, and in promoting access to justice, the state expands the targeted recipients and scope of judicial assistance and promotes legislative work to provide national assistance to victims of crime. The state is

also strengthening the legal aid system while expanding the coverage of legal aid and increasing related funding to extend convenient, rapid and sound legal aid to more poor people. As an additional commitment, the state guarantees the revision of compensation laws as well, thus providing citizens legal persons and other entities state compensation for the injuries suffered.

Such a system of safeguards is able to adequately protect the right to a fair trial in light of the qualitative assessment of the judicial process; however, if notwithstanding these safeguards several elements of this 'taboo list' suffer irreparable harm due to illiberal state practices, then it is not worth talking about a right to a fair trial, but only about the right to a trial. If the reform is materialised and safeguards are put into place, only then can the answer be answered with adequate certainty.

Three years after the adoption of the HRAP, the reaffirmed human rights commitments for 2012–2015 focus on the following general objectives under the enterprise to improve fair trial protections: (i) development of legal regulation guaranteeing the right to a fair trial; (ii) with regard to criminal defendants, pleading rights are to be broadened and access to legal aid; (iii) guarantees are to be introduced safeguarding lawyers in seeing through their professional duties as defence counsel; (iv) a system of hearing witness and expert witness statements will be established, extending to the protection of these witnesses; and (v) the introduction of exclusionary rules is promoted, amounting to the elimination of 'illegal evidence', and strict observance of evidentiary rules is to be complied with in cases involving capital punishment. Further exact commitments are made to issue publications in order to 'clarify the norms of application of death penalty' and to 'improve the trial procedures of death penalty cases', albeit disregarding the need for open justice in first-instance trials of capital cases. A new system of 'penalty measurement' (sentencing guidelines) is also addressed in the new action plan, guaranteeing openness and fairness by the inclusion of several state organs (Supreme People's Court, Supreme People's Procuratorate, Ministry of Public Security) into the adoption process of standardised penalties.

Should these reforms meet no obstacles in being easily realised, a re-evaluation and assessment of Chinese fair trials is unavoidable and necessary.

5.17.1 Xinfang: Effective Remedy Through 'Letters and Visits'?

In addition to the right to a fair trial, a separate right to be heard appears in HRAP, reiterating the importance of the long-existing practice of the *xinfang system* (petitioning) as a general form of legal redress for individual rights infringements of any kind be it committed in judicial or other official capacity. Here, the question arises: *Is xinfang able to conform with the requirement of the right to an effective remedy?*

Xinfang has 1,000 years of past to show for in China as a general form of remedy to be applied in case of fair trial right infringements or of any elements thereof. In its practical workings, however, the system was constructed in a way to derail the path of the petition claiming redress for injustice in a 'system of letters and visits' (i.e. *xinfang*) through a maze of local and central petition offices that are open to corruption. Studies show that due to economic differences and inequalities, local levels are more inclined to be unduly influenced; therefore, claimants have to travel to Beijing to the central petition offices to see through their petition letter submitted locally, in person, by a visit to Beijing, even with significant delay. However, since the caseload of the central office is enormous, petitioners have to wait, sometimes for long periods of time in the surroundings of Beijing, where so-called petition villages came to life. In these villages idly waiting claimants have to share accommodation and sometimes even food in makeshift resorts while they await their number to be called.

Due to the different regional economic and financial situations, the operation of local authorities usually is harder in providing effective remedy; local officials can be more easily bought and might choose the corrupt path. Countrymen, led by the promise that the prospering capital city will administer justice in their case, travel to Beijing, notwithstanding the fact that it might result in significant (and undue) delay in access to justice. Hereby connecting the right to an effective remedy with the 'undue delay' requirement, it shall be concluded that no remedy can be assessed as effective if there is an unreasonable time factor attached to it; in other words, the delay in access to justice is unreasonably long. Therefore, the eradication of the 'incentives' causing such delay in the xinfang system is a justifiably necessity in China. For scholarly eyes used to Western human rights approaches and constitutional culture, current examples of xinfang practices not only infringe the effective remedy requirement of fair trial rights but might also encroach upon human dignitarian terrains as well. The system might offer effective remedy for the Chinese, who – traditionally – have a different sense of time than we do; however, the argument needs to be made that, in due time, xinfang might need to adapt in order to accommodate Western expectations in terms of effectiveness.

5.18 Hands on the Doorknob: The Chinese Example of Justice as 'Open Ajar'

In this part of the Chinese case study, I shall discuss the appearance of open justice in China, a model I call 'justice open ajar'. Most of the practices, some in forms slightly different, identified by the CoE in Russia in 2006 are apparent in China.

Among the details of the regulation more or less existing and observed in China since the mid-2000s, I place the rules of holding a closed trial (*in camera*) first. Closed trials can be held in case there are juvenile defendants or state secrets involved in litigation or the protection of privacy requires the trial to be held in camera. From 1996, when the relevant criminal procedural reforms started,

defendants' rights constantly broaden in scope and, from 2007, the legal protections of judicial independence were also codified, so was the requirement to announce judgements publicly. It is a peculiarity of Chinese civil procedure that a court session can be held in camera if trade secrets are involved in litigation, following an order by the Supreme People's Court in 1999 (Rosenzweig 2009).

It can be concluded from the case studies examined that state secrecy is still heavily present in Chinese justice that is why it is only 'open ajar'. This is problematic because flexible and vague standards appear in the classification of case file as part of a full-on national security approach, similar to the all-or-nothing approach identified in Russia, which is in clear contradiction with the Siracuse Principles amending the ICCPR,[27] stating that national security can only be invoked in case of any derogation from the ICCPR if it is necessary:

1. In order to protect the existence of the state in case of its endangerment
2. To protect the territorial integrity of the state
3. To counteract the threats against political independence

Besides vague and flexible classification standards, most trials, even from the pre-trial stage, are wholly classified as either closed or open, solely based on the classification of singular case files, without respect to other requirements of open justice. This issue was identified as an 'all-or-nothing' approach in the presentation of the 2006 Pourgourides Report in the case study on Russia and is referred to as ESS (endangering state security) case management in China.[28]

As an example, we can mention the case of Yang Tongyan in 2006, in which Tongyan was under house arrest on charges of subversion, and the police petitioned the Provincial Public Security Office to rule on the classification of the case because due to the (fictional) charges the suspect was involved in organising the opposition movement. The Office ruled, with reference to above, that the case should be classified as state secret and tried accordingly. This case clearly attests to the effects of power politics and abuses of power on fair trial standards and on the respect of the open justice doctrine. One of the most recent cases was that of Liu Xiaobo (2010 Nobel Peace Prize winner), who was placed under house arrest under similar charges. In its 2010 (12 January) opinion on infringements of human rights in China, the European Parliament voiced its concerns about the situation of human rights violations in China, with special emphasis on Xiaobo's case.[29] In this document, the EP expressly refers to the achievements of human rights dialogue conducted

[27] Siracuse Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984).

[28] United Nations Universal Periodic Review. NGO Submission for the Universal Periodic Review of the People's Republic of China: Promoting Increased Transparency in China's Criminal Justice System. Dui-Hua Foundation. Available via http://www.upr-info.org/IMG/pdf/DHF_CHN_UPR_S4_2009_TheDuiHuaFoundation.pdf. Accessed 21 Aug 2012.

[29] Human Rights violations in China, notably the case of Liu Xiaobo. Official Journal of the European Union. C 305 E. 11 November 2010. Available via http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:305E:FULL:EN:PDF. Accessed 21 Aug 2012.

with the participation of China. The EP's opinion also sheds light on the restrictions of open justice in China, when it enumerates the circumstances that lead to the adoption of the Xiaobo opinion. These are (i) the wife of defendant and the staff of foreign embassies were not allowed access to the courtroom, not even Vaclav Havel, former President of the Czech Republic, was allowed access to the Prague Embassy of the People's Republic of China to file a former complaint regarding the case.

The interpretation and implementation of standards relevant to the publicity of court proceedings is shaky at best, as several case studies point to this conclusion. Experts found the distribution of court judgements to be narrow in scope and restricted in content, mainly due to the invocation of national security. As it can be read in the case study of the NGO, IBJ (International Bridges to Justice): otherwise legitimate reasons, e.g. national security, shall not be used as blanket excuses to restrict access. I also support this conclusion. Such a practice would obstruct the ordinary and adequate functioning of the justice system and fundamentally infringes the right to a fair trial and the equality of arms. Some of the examinations mention isolated pilot projects by mainly local courts that envisage information of the public in form of public notice on court proceedings. These are certainly positive developmental trends, but as I have said, merely isolated.

The October 2009 Report of the NGO, Human Rights Watch (HRW) is noteworthy hereby, dealing with the Xinjiang trials.[30] In these cases the death penalty was ordered in six instances without the information of the public and without allowing access to the public. The judgements underlying the sentences have been reached in less than 1 day, and due to the political ties of judges and prosecutors, independence and impartiality were infringed. HRW identified:

1. The restriction of effective legal assistance (equality of arms, access to files)
2. The over-politicisation of court proceedings
3. The lack of public information available on trials
4. The absence of cases tried openly in practice (as prescribed by law) as the main problems in terms of open justice in China

Open justice is hindered by the illiberal practice of handing out 'observer passes' by the court, which clearly transforms the right to access into a privilege overseen by court administration. It is possible that in theory, the openness of Chinese justice is a given, but in practice effective counteracting tools are applied in order to obstruct access to proceedings in practice. One of these practices is the 'full house' strategy meaning that if someone wants to participate in an otherwise public trial, the administrators inform them that all the seats are taken so they cannot partake. (NB this practice is not common in China however.) Rules regarding publicity and access extend in theory to nonnationals as well (cf. Smith and Gompers 2007). However, practices involving providing access to nonnationals vary on a place-by-place basis.

[30]Xinjiang Trials Deny Justice. 15 October 2009. Official Website of Human Rights Watch. News. Available via http://www.hrw.org/news/2009/10/15/china-xinjiang-trials-deny-justice. Accessed 21 Aug 2012.

This is mainly due to widespread confusion as regards the exact content of relevant regulation; therefore, organs facing these issues are rather inclined to not comply with provisions on publicity being afraid of governmental, political retribution. Besides the case of Liu Xiaobo, there are several other high-profile cases in China (e.g. the execution of Akhmal Shaikh or Hu Xia, Sakharov Prize winner) that lead to rethinking the priorities of the EU-China human rights dialogue, stressing that the situation of the protectors of human rights shall be safeguarded and fair trials shall be assured for them.

From the fact that more and more public officials acknowledge that China is in need of change as regards their standpoint on the respect of human rights and the right to a fair trial, we can conclude that change is in fact in progress, as Xin and Rongrong reiterated (2009).

As the case study of IBJ so aptly points out, although the ultimate goal of reform efforts is to eventually ensure the same rights to every accused person under the umbrella of the right to a fair trial, and albeit there are many positive trends, China is still lacking financial resources and adequately trained professional personnel in order to achieve its goals (Smith and Gompers 2007:108, 110). Taking economic implications into consideration, we shall stress that the number of lawyers who would be ready, willing or able to take up defence of indigent clients is still low.

A significant increase in the number of qualified paralegals compared to the very slow increase in the number of qualified legal professionals (lawyers, judges, prosecutors) is an emphatic factor as regards the right to a fair trial. It is a tangible trend, enlightened by the 2003 AU Guidelines in the case of Africa. If we observe the numbers within legal education globally, we can see that the number of paralegals grows increasingly in comparison to the significant decrease in the number of legal professionals, caused by the redundancy of the labour market that results in choosing alternate careers other than law. Training paralegals to this extent however will be in vain if we do not compromise on giving them adequate participation rights and allow them to interact in court on behalf of clients especially in regions where due to some economic, geographic or social factor the number of professionals is less than the number of legal personnel. Providing paralegals with rights similar to those of legal professionals might ease most obstacles in terms of access to justice in developing countries and in transitional justice countries, where above-mentioned factors obstruct the completion of the exercise of the right to a fair trial.

In light of the above, it has already been concluded by the IBJ in 2007 that China's efforts in reforming their justice system are in accordance and harmony with international standards, but they added that change is not over because the Chinese transitional justice system is in the early stages of development. Correlating to Zhang's conclusion on the right to a fair trial being able to change with society, the evident conclusion can be drawn, namely, that the engine of Chinese justice reform in order to reach a transformed concept of fairness comprises (Smith and Gompers 2007:109):

1. Sociopolitical awareness
2. Economic maturity to address arising issues

5.19 The Costs of Truth?

5.19.1 Conclusions

To conclude, we shall reiterate what are the current problems that raise questions as to the guarantees of the right to a fair trial, based on the three countries that have been analysed herein.

Firstly, power politics and illiberal state practices lead by unfair political and economic motivations emerge, along the examples of Russia and China. These render useless the otherwise meaningful and extensive procedural and constitutional reforms, and several sectors remain (as discussed) in which the restriction and limitation of open justice remains to be disregarded. The 'all-or-nothing' approach in classification of certain files attests to this, for example.

Secondly, the lack of an institutional setting or the adequacy thereof is apparent as the root of problems, as it can be derived from the cases analysed in Africa or for that matter in China. In order to create a functional judiciary and in order to meet the requirements of transitional justice to reach permanent and respected fair trial standards, compromises have to be made that could help compensate the inadequacies of the institutional background, as it is evidenced by the example of Liberia and the creation of hybrid trial procedures in Africa.

Thirdly, the economic factor should be mentioned, in its multifaceted nature, since it depends on the system and country examined what role the economic motivation has in changing the fair trial climate. Economic factors can appear as problems, solutions and also incentives to solve problems. Killen seconds my assertions, among others, through the presentation of an African case study (Killen 2010:38–45), namely, with the toolbox of transitional justice, future human rights violations cannot be necessarily prevented when these infringements bearing economic implications are not redressed adequately (see economic factors as problems).

Adding to this third conclusion on the problematic nature of economic factors, I shall emphasise that the present chapter intended to shed light on all three facets (source of problems, solution and incentive) described above. In the case of Russia and Africa, the inadequacies of the institutional background and the lack of guarantees opened the gate for corruption, while in the case of China, we have seen how economy helps as an incentive and possible solution to create human rights protections and fair trial protection frameworks in a country that is considered by Western constitutional culture to be inherently undemocratic.

In closing, when discussing economic implications, it stands to reason to finish this chapter with a thought on the price of truth in justice with respect to the right to a fair trial. Vice Chancellor Knight Bruce in the 1846 Pearse v. Pearse decision argued:

> Truth like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much. (Spigelman 2003)

Spigelman is right. When talking about fair trials in Africa, China and Russia, this is a fair assumption.

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Part III
A Comparative Analysis of Some Basic Fair Trial Elements

Chapter 6
'To Delay Justice Is Injustice': A Comparative Analysis of (Un)reasonable Delay

János Bóka

6.1 'If You Knew "*Time*" as Well as I Do'

In Chapter VII of *Alice's Adventures in Wonderland*, entitled 'A Mad Tea Party', Lewis Carroll describes in detail a very interesting conversation with the participation of Alice, the March Hare, the Hatter and the Dormouse at an afternoon tea party. A central element in their exchange of views is the relationship between the Hatter and Time, since the Hatter claims to know Time quite well and insists that 'if you only kept on good terms with him, he'd do almost anything you liked with the clock': one might as well jump forward in time or even stop the clock if one so desired. Unfortunately, actors of judicial systems usually do not have such extraordinary skills, and their relationship with procedural time factors is often quite troubled.

A significant percentage of the caseload of the European Court of Human Rights (ECHR) is related to alleged infringements of the fundamental right to have a hearing within a reasonable time as enshrined in Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (Rome Convention), and almost all Member States of the Council of Europe are involved in such cases. According to data from 2008, in absolute numbers, Turkey, Poland and Italy, closely followed by Greece and Hungary, were the most notorious perpetrators. As far as numbers per population are concerned, Hungary takes fourth place behind Luxembourg, Greece and Macedonia (CEPEJ 2010). So, it seems that from a Hungarian point of view, it may be particularly interesting to take a closer look at the requirements of reasonable delay. Its ability to render decisions within a reasonable time is an important element of a judiciary's quality, even though the time element is not the only factor to be taken into account (CCEJ 2008).

J. Bóka (✉)
Faculty of Law, Institute of Comparative Law, University of Szeged,
Rákóczi tér 1, 6722 Szeged, Hungary
e-mail: boka@juris.u-szeged.hu

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In order to highlight the complexity of the issues, some caveats must be added to the statistical data referred to above. The number of complaints filed at ECHR heavily depends on the nature of available local remedies and the domestic compensation system put in place by Member States to handle victims' claims of unreasonably prolonged procedures. Italy has a comprehensive compensation scheme, while Greece totally lacks such an instrument. Hungary follows the principle of limited compensation, because it does not compensate for undue delay in general, but only in specific designated cases, e.g. for time spent in detention or house arrest, if the criminal procedure must be discontinued because of the extinction of criminal liability due to limitation (CEPEJ 2010).

It is also important to note that a high number of adverse judgements against a particular Member State do not necessarily mean that procedures in general are unreasonably delayed in front of all judicial instances. In Hungary the average duration of first instance civil procedures was 170 days, while the European median stood at around 206 days (CEPEJ 2010). Thus, a significant number of cases might occur where the judiciary was unable to satisfy the Strasbourg standards for reasonable delay even if on average procedures are completed within a reasonable time. This phenomenon is usually due to the suboptimal productivity of certain courts or dysfunctionalities of certain types of procedures or procedural institutions.

The general strategy adopted by the now defunct National Council of Justice (NCJ) Hungary expressly acknowledges this fact by stating that 'the timeliness of procedures is of fundamental importance', and there is a significant difference in the caseload of some courts that 'often has an adverse effect on equal access to justice'. In 1999, the Court of Budapest Capital (Hungary) terminated criminal procedures vis-à-vis approximately 10 % of defendants due to limitation (Objections and Recommendations for Improvement 2010). The problem seems to persist: by the end of 2011, the relative share of cases pending for more than 2 years in the region of Central Hungary (including Budapest) was three times higher than the average in other regions (Report by the President of the National Office for the Judiciary 2012).

In Hungary in 2008, there were 2,282 successful motions for the removal of a judge based on incompatibility or conflict of interest. The similar figure was a mere 39 in the Netherlands and 961 in Poland. This signals dysfunctionalities in the Hungarian case assignment system and/or the relevant legislation on incompatibility (CEPEJ 2010).

6.2 Two Approaches to Reasonable Delay

Academic literature and judicial practice offer two approaches to the concept of reasonable delay that exist in parallel, without their relationship being satisfactorily defined. A *programmatic* approach to the requirement of conducting judicial procedures within a reasonable time primarily focuses on legislative, organisational and financial tasks to be performed by the legislative and executive branches and secondarily on an expectation towards legal and paralegal personnel in the judiciary

and elsewhere to apply the law and conduct procedures in a way that contributes to a timely conclusion of cases. These programmatic norms related to undue delay have a soft law character. The content of these norms is usually a duty of due diligence and not a duty to achieve a specific result. The nature and form of international documents containing these norms also make it very difficult to enforce their provisions.

A *normative* approach to the requirement of conducting judicial procedures within a reasonable time establishes a duty to achieve a specific result that is at the same time a fundamental right of the participants in the procedure, the violation of which is subject to sanctions or is a ground for compensation. The distinction between programmatic and normative provisions is usually unproblematic; however, there are examples of the legislative or judicial administrative organs using hard law tools to enforce programmatic norms. In this study we are following a strict definition of the normative approach, meaning only provisions safeguarding individual procedural rights by granting the injured party a direct right of action or a direct remedy.

In general, it is submitted that the triple objective of protecting individual rights, legal certainty and the public trust in the judiciary permeates both the programmatic and normative approaches to the requirement of conducting judicial procedures within a reasonable time. However, the two approaches prioritise these three objectives in different ways and have a different inclination to resolve possible conflicts between the objectives. Some attempts to enhance the efficiency of the judiciary and speed up judicial procedures (e.g. disposition of claims in civil procedures without a hearing or criminal procedures held in absentia) have a tendency to strengthen public trust in the courts and legal certainty in general to the detriment of the individual's procedural position. On the other hand, experience of the past decades has shown that the functioning of international human rights protection systems – based on a normative approach to the requirement of conducting judicial procedures within a reasonable time – does not in itself prevent the undue prolongation of procedures or even lower the number of unduly prolonged procedures. This result requires the adoption of legislative and administrative provisions and the introduction of a legal culture that no international entity could prescribe for a sovereign State in a general and normative way.

6.3 The Programmatic Approach

6.3.1 Requirements for the Judge Hearing the Case

According to the 2002 *Bangalore Principles of Judicial Conduct*,[1] a judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently,

[1]The text was approved by the *Round Table Meeting of Chief Justices* in the Hague based on a proposal by the *Judicial Group on Strengthening Judicial Integrity* adopted in 2001.

fairly and with reasonable promptness (Principle 6, Application 6.5). The 2007 Commentary to the *Bangalore Principles* defines this requirement as a duty to (i) dispose of matters efficiently and promptly, (ii) deliver reserved decisions without delay and (iii) reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. The 2010 *Magna Carta of Judges*[2] expects judges to take steps to ensure access to swift, efficient and affordable dispute resolution (Art. 15). The 1999 *Universal Charter of the Judge*[3] approaches this requirement from the side of individual procedural guarantees, by stating that judges shall promote the right of individuals to a fair and public hearing within a reasonable time (Art. 1).

International documents contain very few and only vague references as to how a judge is supposed to comply with such requirements, besides of course respecting the relevant substantial and procedural norms. It seems that in this framework, judges are generally expected to perform information and diversion activities. *Information* activity on behalf of judges is undisputed and quite straightforward: parties must receive clear and unequivocal briefing on the estimated duration of the procedure or the current status of ongoing procedures and must have the right to file a complaint if in their view the procedure is unduly delayed. Courts in Albania, Finland, France, Latvia, Northern Ireland and Norway are obliged by law to inform the parties about the estimated duration of the procedure, while courts in England and Wales, as well as in Scotland, do so customarily. A similar duty is imposed on attorneys in Estonia.

The scope and content of *diversion* activities is more disputed and unclear. The Commentary to the *Bangalore Principles* urges judges to encourage and seek to facilitate a settlement without the parties feeling coerced to surrender their rights in order to have their dispute resolved by the courts. The 1998 *Caracas Declaration*[4] and the *Magna Carta of Judges* refer to the promotion of alternative conflict or dispute resolution mechanisms. This objective is also frequently recurring in various recommendations and opinions by the Council of Europe or its specialised organs in both civil and criminal justice.[5] However, it is questionable whether the State actually complies with its obligation to conduct judicial procedures within a reasonable time by simply diverting some of the legal disputes to mechanisms located outside the judiciary. In 2003, the 1st European Conference of Judges concluded that no matter how interesting and useful alternative measures such as mediation or conciliation may be, confidence in the judicial institution remains an essential feature of democratic societies. As a consequence, one must come to the conclusion that the duty to conduct judicial procedures within a reasonable time is imposed on States, and that compliance with this obligation can be facilitated by the promotion of alternative dispute resolution mechanisms, but nonetheless, the State

[2] Adopted by the CCJE in November 2010 in Strasbourg.

[3] Approved by the Central Council of the *International Association of Judges* in November 1999 in Taipei.

[4] Adopted by the *Ibero-American Summit of Presidents of Supreme Justice Tribunals and Courts.*

[5] COE Rec (86) 12; COE Rec (87) 18; CCEJ Op. No. 6 (2004).

cannot escape this obligation by simply referring to such possibilities. Of course, alternative dispute resolution mechanisms can also be conceived as preliminary procedures and not necessarily as substitutes of judicial dispute resolution. In this case, with the exception of arbitration, they do not exclude the initiation of a subsequent court procedure by any of the parties, thus do not erode guarantees of access to justice.

Courts themselves might provide a venue for alternative dispute resolution and in some jurisdictions are expressly called on to attempt mediation before adjudication. In Hungary, a law adopted in 2012 allowed for designated court secretaries to conduct mediation. In practice, these court secretaries are recently retired judges re-employed by the President of the National Office for the Judiciary. A pilot project under consideration would also allow licensed mediators to conduct ADR in court buildings on the joint request of the parties. Apparently, mediation and other forms of ADR within the courts are a novelty for Hungarian judges and court administrators as well as the parties themselves, and a substantial effort is needed to devise an effective structural and procedural framework for implementation and publicity.

The promotion of alternative dispute resolution mechanisms is motivated by a conviction that a reduced caseload will result in a speedier disposition of cases within the judiciary. Besides diversion, another tool to reduce the caseload of courts is *blocking*, i.e. the use of procedural devices to discourage or refrain parties from initiating cases at courts of justice. Procedural limitations are examined in detail in Subsection 6.3.2.3; here we only briefly mention some filters of a different nature. These filters operate by making it financially disadvantageous for the parties to file a lawsuit or making the reliable calculation of costs and benefits related to a court procedure extremely complicated. In this spirit, some recommendations advocate a comprehensive revision of legal expenses or legal protection insurance policies (LEI, LPI) with a view to ascertain whether they are conclusive to unnecessary litigation. The system of attorney fees may also have a targeted filter effect: fees based on litigation value may prevent attorneys from taking petty cases, and fees based on work hours may prevent clients from going to court in overly complex cases or those which have an unpredictable outcome. So far, no international recommendation has been adopted with a view to block the access to the judiciary in certain category of cases, and even if such documents were ever produced, they would probably not frame this objective as a duty on behalf of the judge.

6.3.2 Requirements for the State

6.3.2.1 Personnel and Material Conditions

States are generally called upon to provide sufficient personnel and the necessary material conditions for the proper functioning of courts of justice. The compliance with this requirement is usually expected from all judicial administrations regardless

of geographic position, political system or cultural background. The 1998 European Charter on the Statute for Judges[6] declares it a duty of the State to ensure that judges have the means necessary to accomplish their tasks properly and in particular to deal with cases within a reasonable period (Art. 1.6). Opinion No. 2 (2001) of CCEJ places a duty on States to make financial resources available that match the needs of different judicial systems. The amount of resources allocated for the judiciary of course cannot be independent from the general budgetary situation. This limitation is most obvious in the case of developing countries, as recognised by relevant international documents. For example, the 1995 Beijing Statement of Principles of Independence of the Judiciary[7] considers it essential that judges be provided with the resources necessary to enable them to perform their functions but at the same acknowledges the role of economic and budgetary factors in deciding actual allocations (Art. 42).

The international consensus regarding the exact meaning of sufficient personnel and necessary material conditions remains on the level of generalities. The Council of Europe has dealt in detail with the composition of judicial personnel, including professional and non-professional (occasional or lay) judges, as well as non-judge staff. Recommendations of the Council of Europe suggest that besides a sufficient number of judges, also appropriately qualified support staff should be allocated to the courts, and in order to reduce the workload of judges, nonjudicial tasks should be assigned to other suitably qualified persons.[8] Statistics show that an increase in the number of professional judges is probably not the most efficient and is certainly not the most economic way to speed up the functioning of the administration of justice. In Hungary the number of professional judges per 100 000 inhabitants is rather high from a European perspective (28.9 judges, as opposed to 19.9 in Austria, 14.1 in Sweden or 3.5 in the United Kingdom). However, the Hungarian judiciary does not take advantage of the opportunities offered by the use of non-professional judges or support staff performing nonjudicial tasks. If one compares the number of non-judge staff per one professional judge in European jurisdictions, one may find the opposite of the sequence described above (United Kingdom, 10 persons; Sweden, 4.2 persons; and Hungary, 2.7 persons). To remedy this situation, new procedural rules and personnel policies were introduced from 2012. The competence of court secretaries was significantly broadened, and a large number of court clerks were hired to form 'judicial teams' with judges and assisting secretaries and clerks. The effect of these policies on timely administration of justice remains to be seen.

As far as the number of non-professional judges are concerned, Hungary is again among the European leaders (43.6 non-professional judges per 100,000 inhabitants;

[6]The *Charter* was adopted under the auspices of the Council of Europe with the participation of the *European Association of Judges (EAJ)*, the *European Association of Judges for Democracy and Freedom (MEDEL)* and 13 judge-experts from various European jurisdictions.

[7]The final version of the *Principles* was adopted in 1997 in Manila by the *7th Conference of Chief Justices of Asia and the Pacific.*

[8]CM/Rec (2010) 12, Arts. 35–36.

the same indicator for the United Kingdom is 54.2 persons). However, in Hungary lay judges – unlike their British colleagues – have no independent authority to decide cases; thus, their employment does not result in a reduced workload for professional judges (CEPEJ 2010).

In order to allow judges to deal with cases within a reasonable time, the Council of Europe recommendation on judges' independence, efficiency and responsibilities calls for the use of 'electronic case management systems',[9] which seems to be modern terminology for 'office automation and data procession facilities', included in a similar 1994 recommendation.[10] There are no comparable recommendations in other universal or regional documents. However, the establishment and functioning of a case management system is just as much a question of organisation and administration of courts as it is a question of an adequate material background, and, therefore, it leads us to a new issue dealt with in the next subsection.

6.3.2.2 Organisational and Administrative Issues

Organisational and administrative solutions play a crucial role in enabling a timely disposition of cases. The administrative independence or autonomy of courts falls outside the scope of this study. However, it is necessary to note here that recommendations with a view to guarantee the right to have one's case heard by a tribunal within a reasonable time might have very different connotations depending on the particular model of judicial administration. If judicial administration is the prerogative of the executive, the implementation of such recommendations can be demanded without any reservations as to the independence of the judiciary, while in the case of an independently or autonomously self-governed judicial administration, the values of efficiency and independence might be conflicting.

From an organisational and administrative point of view, the fulfilment of the requirement of disposing cases within a reasonable time can be facilitated by avoiding an excessive caseload and developing an optimal organisation of labour. Excessive caseload can be avoided in an inter-court relation by a careful and flexible framing of rules on jurisdiction and competences of courts and in an intra-court relation by developing an efficient system of case assignment. The first issue will be dealt with in detail in the next subsection. Case assignment systems are the subject of a separate chapter because related problems usually appear primarily in connection with the right to a lawful judge, and not simply as a matter of rational case management. In principle court presidents are responsible for an optimal organisation of labour, and they are most of the time not specifically trained for this task. It is with regard to this difficulty that the *Caracas Declaration* calls for the management training of senior court leaders.

[9] CM/Rec (2010) 12, Art. 37.

[10] CM R (94) 12, III.1.d.

6.3.2.3 Procedural Considerations

Procedural tools may contribute in many ways to a speedy disposition of cases. Flexible rules on jurisdiction may – with the consent of the parties involved – allow the final or temporary transfer of a case to another competent court. This solution can, for a certain period, reduce the workload of some overburdened courts. Parties here obviously must weigh the burdens of venue change against the expected benefits from a faster procedure, which is quite difficult to estimate in advance. The transfer of cases without prior consent of the parties can raise concerns of arbitrariness and might violate the right to a lawful judge.

The possibility for the transfer of cases without the parties' consent has been one of the most controversial aspects of the recent Hungarian judicial reforms. Applicable from January 2011, originally the transfer could be requested by the President of the now defunct NCJ and approved by the Supreme Court. From 2012, the right to transfer cases belongs to the President of NOJ on the initiative of the presidents of courts where the cases were filed as well as the chief prosecutor. This solution drew harsh criticism on the basis that it allows the completely unrestricted transfer of politically sensitive cases to preferred courts and – due to a lack of automatic case distribution mechanisms – to preferred judges or judicial panels. The opinion of the Venice Commission on the independence of the Hungarian judiciary published in February 2012 led to some changes in the procedure: from July 2012 the President of NOJ can only transfer cases in accordance with general principles adopted by the National Judicial Council (NJC, a supervisory body consisting of judges), and her decision is subject to appeal to the Curia (the successor of the Supreme Court) by the interested parties based on violation of the relevant legal provisions. Critiques consider this appeal to be far from an effective legal remedy (so far the Curia has not overturned any transfer decisions by the President of NOJ), while proponents are convinced that the procedure is well supported by safeguards and guarantees and is not unheard of in other jurisdictions as an exceptional tool to deal with case backlogs. So far the policy of the President of NOJ has been to transfer high profile or very complex cases from Budapest courts to courts in various other regions. The number of cases that have been transferred to date is around 30.

Procedural rules may facilitate the hearing within a reasonable time by speeding up first instance procedures and limiting the right to appeal. Different organs of the Council of Europe have been tackling the issue of accelerating first instance civil and criminal procedures since the 1980s. A recommendation from 1987[11] had already emphasised the role of prosecution in enabling a swift conclusion of cases by making use of its power to waive or discontinue prosecution and possibly apply sanctions on its own, thus satisfactorily closing a significant number of cases out of court.[12] Even if a case cannot be closed satisfactorily out of court, most

[11] CM R (87) 18, I (discretionary prosecution).

[12] As regards the authority of prosecution, there are three basic models in contemporary Europe: (i) the prosecution merely has the function of preparing the case for a court, (ii) the prosecution

jurisdictions offer the prosecution and the defendant a variety of *summary*, *simplified* or *accelerated* procedures.[13]

A fundamentally different approach to the acceleration of criminal procedures is a strategy to disable the procedural brakes activated by the defendant's defensive or obstructive behaviour. One of the most common reasons for the prolongation of procedures is the fact that the defendant is on the run or his whereabouts are otherwise unknown. Hearings held in the absence of the defendant (in absentia) might remedy such problems, but having trials without defendants as a main rule presents a clear erosion of procedural guarantees. The duration of procedures can equally be significantly shortened if the offender makes a detailed confession at an early stage or otherwise admits to his guilt. Some jurisdictions provide incentives by allowing a reduction of sanctions in case of a confession or opening the door to a formal bargaining process with the defendant. The two concepts are based on different theoretic foundations. In the former case the mitigation of sentences is a discretional decision by the sentencing judge that is not conditional upon or limited by any previous agreement between the defendant and the court or the prosecution. Common law jurisdictions widely use different variations of *plea bargaining* that can be divided into two major types. *Charge bargaining* is an agreement between the prosecution and the defendant, occasionally with the approval of the court, according to which the prosecution will not press charges in some criminal offences if the defendant admits to the commission of other crimes or will press charges in a less serious criminal offence if the defendant confesses or at least does not plead innocent (nolo contendere). In the case of *sentence bargaining*, the court will undertake to apply more lenient sanctions in return of a confession. This latter option is applied less frequently because, in principle, courts should not be parties to such bargains, and the defendant may reasonably believe that the court is already convinced of his guilt and confession is his only chance to get a more favourable verdict.

There is no consensus regarding the necessity and practicality of these procedures. Their application is usually justified by procedural efficiency and economy and has nothing to do with the defendant's right to a hearing within a reasonable time. It is debatable whether they contribute to legal certainty and strengthen public trust in the judiciary. The frequently cited argument that confession is the sign of repentance on behalf of the offender is nothing more than an illusion. The protection of victims and witnesses might be a relevant consideration but only if their actual

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has the discretionary power to decide whether to prosecute or not to prosecute even if there is sufficient evidence to prosecute and (iii) the prosecution has the discretionary power to decide whether to prosecute and also has the right to drop a case with conditions or with certain sanctions imposed with the consent of the offender.

[13]Terminology in this matter is far from being uniform. In common law jurisdictions summary procedures are at the same time simplified and accelerated with the final decision being *res judicata*. In continental legal systems the three concepts have somewhat different meanings: summary procedures do not result in *res judicata*, in simplified procedures some procedural elements and requirements may be omitted or alleviated, while accelerated procedures operate with closer deadlines than in the case of ordinary procedures.

presence is required during the hearing and if such presence might prove to be a severe traumatic experience for them due to their age (infants) or due to the nature of the crime committed (crimes against life or sexual offences). Mitigation of sentences and plea bargaining thus carry only two benefits for the society as a whole: (i) ensure the conviction of those offenders who otherwise have no chance of convincingly refuting charges before a judge or a jury and (ii) the swift disposition of cases to open up court capacity for other procedures.

Concerning civil cases, a 1984 recommendation by the Council of Europe enumerates nine principles that, if implemented, would effectively prevent violations of the right to have a hearing within a reasonable time.[14] The recommendation calls for not more than two hearings in a single proceeding, one of a preparatory nature and another for taking evidence, hearing arguments and, if possible, giving judgement – with the possibility of adjournment only in exceptional cases. The document seeks to provide judges with wide-ranging powers to suppress dilatory practices by the parties and in general to sanction non-compliance with deadlines, as well as to decide, at least at first instance, whether written or oral proceedings or the combination of the two should be used and to control the taking of evidence or limit the number of witnesses. The introduction of simplified or accelerated procedures is supported in civil cases as well, especially for non-disputed or petty claims where a swift disposition of cases could be facilitated by the omission of an oral hearing, strictly controlled taking of evidence and an active role by the courts in the management of the procedure.[15]

In addition, opinion No. 6 (2004) of CCEJ emphasises the importance of a proper preparation of the case,[16] to create financial incentives for the parties to settle out of court[17] and to make better use of interlocutory judgements as a means of efficient case management.

As far as timely disposition of cases is concerned, the availability and number of ordinary appeals is a crucial aspect of judicial procedures. There are two conflicting views on the nature of appeals. One approach considers appeal a fundamental procedural right (*ius litigationis*), in effect a second chance for the parties to have

[14]CM R (84) 5.

[15]Two basic types of such procedures exist: the order for payment (*Mahnverfahren*) and the *référé* or *kort geding*. The latter procedure enables the judge to pass a judgement immediately after a single hearing based on possibly incomplete evidence that is enforceable but does not have the force of *res judicata*, and the parties are free to commence a procedure on the merits.

[16]*Pre-action protocols* developed in the United Kingdom for certain types of disputes (personal injuries, medical negligence) prescribe steps to be taken by the parties in order to identify issues and exchange information or evidence before proceedings are even commenced. Pre-action protocols may facilitate a settlement by the parties and avoid litigation, but even in lack thereof they definitely accelerate court proceedings. The court may sanction the failure to follow a pre-action protocol.

[17]English law and some other legal systems have introduced *offers to settle and payments into court* where the claimant may offer to accept and the defendant may offer to pay less than the full claim. In lack of a settlement if a claimant gets more than he offered to accept or the defendant must pay less than he initially offered, adverse consequences may follow for the other party.

their case decided with the possibility to present new evidence and legal arguments to the Court of Appeal with very few limitations. Another approach looks at appeal as an instrument to ensure a uniform administration of justice and the unconditional prevalence of certain fundamental legal principles (*ius constitutionis*), thus usually limiting the Court of Appeal to consider questions of law, occasionally allowing the reconsideration of evidence already submitted but always severely restricting the introduction of new evidence or legal arguments. Contemporary procedural systems combine the two approaches and tend to allow at most one appeal that is equivalent to a retrial of the case. In practice, even jurisdictions recognising a *ius litigationis* developed safety valves (e.g. the possibility to dismiss manifestly unmeritorious appeals without a hearing) to ease the burden on courts of appeal.

In fact, the arguments for the recognition of a *ius litigationis* as a main rule of procedure are not very convincing. Besides making procedures more expensive and time consuming, it also erodes the authority of first instance courts and questions the seriousness of first instance procedures. It provides a disincentive for first instance judges to thoroughly examine questions of law and fact at hand and makes parties disinterested in a proper preparation and conduction of first instance proceedings. Appeals might be excluded or limited by law, or an appeal – as customary in common law jurisdictions – might be conditional on a *leave to appeal* by the proceeding court or on a certiorari or *certification for appeal* by the Court of Appeal.

6.4 The Normative Approach

6.4.1 Common Law Origins

It is submitted that the conceptual foundations of the notion of the right to have a hearing within a reasonable time – just like that of a fair trial – can be traced back to the common law of England. The concept of *abuse of process* as developed in England was adopted by the courts of the American colonies and later the United States; its time factor was separated and reformulated as a fundamental right of the individual (*right to a speedy trial*), to be subsequently transplanted into a number of international and regional norms as well as national constitutions. In Europe, the driving force behind this process of constitutionalisation has been the Rome Convention and the ECHR, and paradoxically it is through this process that the requirement of a hearing within a reasonable time was introduced to the law of England and other jurisdictions of the United Kingdom. The process of constitutionalisation shows different characteristics in Europe and the United States, and while the European system has been initiated and developed clearly under a strong American influence, now the two systems have an equally important impact on global developments in this area of law. To respect the chronological order of legal development, it seems logical first to take a look at the common law origins of the concept of unreasonable delay.

Customarily common law origins of the right to have a hearing within a reasonable time are traced back to the 1166 *Assize of Clarendon* and the 1215 *Magna Carta* providing that '. . . *nulli negabimus aut differemus rectum aut justiciam*' (that is still the law of the land in the translation: '. . . *we will not deny or defer to any man either Justice or Right*'). As a matter of fact, it is not clear what the exact meaning of this sentence was for the signatories of *Magna Carta*. It is well known, however, that already in the beginning of the seventeenth century, Sir Edward Coke explained this passage as that a claimant '*for injury may take remedy speedily without delay*'. But strictly speaking it is incorrect to say that English common law at that time recognised a constitutional or absolute right of the individual to a speedy trial or to have a judgement passed in his case within a specified period of time. The 1679 *Habeas Corpus Act*, which is often referred to in this context, is a procedural remedy to regain personal freedom and not a guarantee of a speedy trial.

The concept of abuse of process developed in English common law to deal with problems of unnecessary procedural delays is a flexible instrument to reconcile individual and public interests related to a particular procedure. Until the adoption of the 1998 *Human Rights Act*, neither Parliament nor the Lord Chancellor was particularly interested in formulating a comprehensive regulation, even on the level of general principles, as to the temporal aspects of judicial procedures; thus, the law of England in this matter is mostly judge-made law.[18] As a consequence, this body of law has developed organically during the centuries and expresses a strong preference for an ad hoc evaluation and discretion by the judge instead of strict deadlines.

It is a cornerstone of the concept of procedural justice followed by the common law that a judicial procedure is fair only if it entails no excessive or avoidable delay.[19] However, the notion of the abuse of process does not exclusively or primarily focus on the duration of the process. In the following, we will examine the main indicators for the establishment of an abuse of process. We will focus on criminal procedures, noting that the standards are identical for civil procedures[20] and legal consequences are very similar as well.[21]

The common law undertakes to answer the practical questions whether excessive delay after the commencement of the procedure (i) may be a reason to stay the proceeding, (ii) even if there has been no fault on behalf of the prosecution, and

[18]The *Code for Crown Prosecutors* issued under the 1985 *Prosecution of Offences Act* gives guidance on general principles in determining whether proceedings for an office should be instituted: a prosecution is less likely to be needed if there is a long delay between the offence taking place and the date of the trial. Court practice directions have also been promulgated, setting time limits for certain procedural steps to be completed. As far as civil cases are concerned, there is a precedent to the effect that the adoption of procedural deadlines included in the *Civil Procedure Rules* makes all previous case law irrelevant: *Biguzzi v Rank Leisure* [1999] 1 WLR 1926.

[19]*Kwamin v Abbey National* [2004] IRLR 516 (EAT), para 4.

[20]*Porter v Magill* [2002] 2 AC 357, para 107.

[21]*Cobham v Frett* [2001] 1 WLR 1775, 1783–4: for excessive delay a judgement can be set aside only if to allow it to stand would be unfair.

if so (iii) what is the degree of likelihood and seriousness of prejudice suffered by the defendant that will justify the stay of procedure. It is important to note that the above framework is designed to analyse excessive delay only as regards the activities of the prosecution; thus, it is more of a substitution for the incomplete statutory regulation on limitation periods than an instrument to make courts comply with the requirements of disposing of a case within a reasonable time.

Traditionally there is an abuse of process under common law if[22]:

(a) The prosecution has manipulated or misused the process of the court so as to deprive the defendant of a protection provided by law or to take advantage of a technicality.
(b) An unjustifiable delay on behalf of the prosecution has prejudiced or will on the balance of probability prejudice the defendant in the preparation or conduction of his/her defence.
(c) The delay is excessive and has produced genuine prejudice or unfairness for the defendant, even if the prosecution is not responsible for the delay.

It is the discretionary power of the courts to order a stay of proceeding. In doing so, the court must consider the reasons for the delay; the responsibility, if any, of the prosecution or the defendant for the delay; as well as the nature of the issues and evidence that are likely to arise or to be presented during the procedure. If the case depends on documentary evidence, the defendant is less likely to be prejudiced by delay than in case witnesses have to be summoned to recollect old memories that inevitably fade as time passes. In the beginning of the 1990s, there was a quite diverging court practice as regards the consequences of delay as an abuse of process. At that time the majority view held that excessive delay is necessarily prejudicial for the defendant, and as a result it may in itself justify a stay of proceeding. In contrast, a minority held on to the view that a fair trial is possible even if the defendant suffered some kind of prejudice, and prejudice cannot be simply inferred from a delay.

Finally in 1992 the Court of Appeal took the opportunity to review and standardise the law in this matter with the declared objective to attain a significant decrease in the number of rulings granting a stay of procedure.[23] Lord Lane CJ emphasised that stays granted on the ground of delay should only be employed in exceptional circumstances, when the defendant shows that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held. Obviously, the Court of Appeal considered that the defendant must tolerate some prejudice arising from the delay even if this was in no way his fault. Lord Lane CJ also expressed his view that less serious procedural prejudice might be remedied or mitigated by the use of the judge's procedural powers or the trial process itself, even though he offered little advice on how this actually can be done besides giving appropriate directions to the jury before they consider their verdict. The ruling practically

[22] *R v Bow Street Stipendiary Magistrates, ex p DPP* [1992] Crim LR 790, CA.

[23] *Attorney-General's Reference (No 1 of 1990)* [1992] QB 630, CA.

excludes a stay of proceeding if the defendant is responsible for the delay or the complexity of the case justifies delay on behalf of the prosecution. The Court of Appeal calls on judges to be more reluctant to stay proceedings if there has been no fault on behalf of the prosecution. Alternatively this might suggest that courts may, as a way of disciplining prosecution, apply less severe standards when granting a stay of proceeding if the prosecution was indeed culpable in the delay.[24] However, regardless of the responsibility of the prosecution concerning the delay, the burden to prove a serious prejudice or unfairness caused by the delay is always on the defendant.[25]

The law of Australia follows English common law as it was before the 1998 Human Rights Act and takes the view that common law does not recognise the right to a speedy trial existing independently from the right to a fair trial, thus keeping firmly within the limits of the abuse of process.[26] On the other hand, jurisprudence in Canada and New Zealand has been manifestly transformed by a revolution of fundamental rights bearing marks of a strong US influence; thus, these jurisdictions will be analysed in the next subsection.

6.4.2 Constitutional Development in the United States

Legal development in the United States was naturally based on English common law; however, in some aspects it took a distinctively different, and sometimes opposite, path. The *right to speedy trial* was already recognised by the *Virginia Declaration of Human Rights* of 1776, and it is also included in the *Bill of Rights* of 1791 as the 6th Amendment. The 6th Amendment originally restricted the application of this right to criminal procedures under federal jurisdiction. This latter limitation was lifted by the US Supreme Court in 1967 based on the *Due Process Clause* of the 14th Amendment, extending the application of the standard to Member States as well.[27] Warren CJ, delivering the opinion of the court, outlined that 'the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment' and 'has its roots at the very foundation of our English law heritage', including the *Magna Carta* itself.[28]

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[24] This view is shared by David Young, Mark Summers, David Corker: *Abuse of Process in Criminal Proceedings (3rd ed.).* Tottel Publishing, 1.88. On the contrary: '*Generally speaking a prosecutor has as much right as a defendant to demand a verdict of a jury on an outstanding indictment* . . . ' [1964] *Connelly v DPP*, 48 Cr App Rep 183, AC 1254.

[25] *Tan v Cameron* [1992] 2 AC 205, PC.

[26] *Jago v District Court of New South Wales* [1989] 168 CLR 23, High Court of Australia.

[27] *Klopfer v North Carolina* (1967) 386 U.S. 213. The ruling declared unconstitutional the practice of *nolle prosequi with leave* in North Carolina.

[28] Such interpretation of the *Magna Carta* is expressly rejected by English and Australian courts, primarily referring to the principle *nullum tempus occurrit regi*, and taking the view that had the *Magna Carta* had the objective of securing such right, it would have certainly established a remedy

Given the allegedly fundamental role of the right to a speedy trial in American legal heritage, it might come as a surprise that one can find only scattered references to this right in American jurisprudence until the 1960s and even those tend to regard it as a less than absolute procedural right. Joseph McKenna, speaking for the majority of the Supreme Court in 1905, emphasised that 'the right of a speedy trial is necessarily relative', and 'it is consistent with delays and depends upon circumstances'.[29] Other decisions point out that an unconstitutional deprivation of right can be ascertained only if the delay was unreasonable, which is interpreted by the court as 'purposeful or oppressive', caused by 'a deliberate act of the government', thus making the simple passage of time an insufficient ground for complaint.[30] Thus, while it is accepted that a declaration of the right to a speedy trial in constitutional documents of the United States was a source of inspiration for other jurisdictions, including international and regional human rights conventions, and preceded those, the practical and substantial evolution of the right has been a parallel development in the United States, Europe and Latin America where the learning process has been mutual.

The Supreme Court waited until 1966 to clarify that the objective of the right to a speedy trial is 'to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibility that long delay will impair the ability of an accused to defend himself'.[31] In *Barker v Wingo*[32] the Supreme Court finally took the opportunity to outline the factors to be taken into consideration when judging an infringement of the right to a speedy trial: (i) length of the delay, (ii) the reasons to justify the delay, (iii) the defendant's assertion of his right and (iv) prejudice to the defendant. As under English common law, jurisprudence here has also refused to set strict and specific deadlines. A delay of less than 5 months is very rarely considered an undue delay; however, a delay over 8 months establishes a presumption of infringement. The protection of the speedy trial provision is engaged from the time the person involved can feel the actual restraints imposed on him by the procedure, i.e. even before a formal indictment or information, if he is arrested.[33] If no such restraint can be identified, the protection of the right to a speedy trial does not extend to the pre-indictment period. However, legal protection is not altogether missing: besides the application of the rules on limitation, the individual is entitled to the protection of *due process*, if he can prove that the pre-indictment delay in his case caused

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for these purposes: *Attorney-General's Reference (No 1 of 1990)* [1992] QB 630, CA; *Jago v District Court of New South Wales* [1989] 168 CLR 23, High Court of Australia.

[29] *Beavers v Haubert* (1905) 198 U.S. 77.

[30] *Pollard v U.S.* (1957) 352 U.S. 354.

[31] *U.S. v Ewell* (1966) 383 U.S. 116,120. Ironically, a prolonged criminal procedure is often in the interest of the accused.

[32] *Barker v Wingo* (1972) 407 U.S. 514.

[33] *U.S. v Marion* (1971) 404 U.S. 307.

substantial prejudice to his rights to a fair trial and the delay was an intentional device to gain tactical advantage over him.[34]

It is the responsibility of the prosecution to accord a speedy trial to the defendant; therefore, the fact that the defendant has previously failed to expressly assert this right cannot be construed as a waiver. However, courts must always consider whether the defendant actually contributed to the delay or acquiesced in it convinced that delay works to his benefit. It is also important to note that the right is not only to a 'fair' but to a 'speedy' trial; therefore, the defendant is not obliged to prove actual prejudice by the delay.

According to a controversial ruling from 1973 by the Supreme Court, the determination that the defendant has been denied his right to a speedy trial results in a decision to dismiss the indictment or to reverse the conviction in order that the indictment be dismissed with prejudice.[35] Here the Supreme Court argued that this was 'the only possible remedy' because none of the less severe options deal with all the adverse effects of an unreasonable delay. The defendant may assert his right to a speedy trial during the first instance procedure or on appeal. However, a trial court denial of a motion to dismiss on speedy trial grounds is not an appealable order; the defendant must raise the issue on an appeal from a conviction.[36]

A decade of extensive adjudication by federal courts on speedy trial issues was ended by the adoption of the *Federal Speedy Trial Act* (FSTA) of 1974. Congress – with a move unprecedented in common law jurisdictions – took from federal courts the discretionary power to rule on the reasonability of procedural delays.[37] An explanation for this drastic measure might be the inability of the traditional approach of the judiciary to dispose of huge backlogs recently accumulated at courts. In *Strunk v U.S.* the Supreme Court virtually excluded all practically feasible measures at the disposal of federal courts to fight unreasonable delay, since the dismissal of indictment with prejudice is clearly disproportionate in most cases and is not in the proper interest of the administration of justice.

The FSTA provides that the time between arrest and charge shall not exceed 30 days, and the time between indictment and trial shall not exceed 70 days. Some periods are excluded from the computation of time (e.g. as long as the whereabouts of the accused or an important witness are unknown), and courts may authorise the prolongation of deadlines in exceptional cases. Unreasonable delay will result in the dismissal of indictment with or without prejudice depending on the gravity of breach and other circumstances. An overwhelming majority of States have adopted legislation similar to FTSA.

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[34] *U.S. v Lovasco* (1977) 431 U.S. 783.

[35] *Strunk v U.S.* (1973) 412 U.S. 434.

[36] *U.S. v MacDonald* (1977) 435 U.S. 850.

[37] The federal legislation did spark some constitutional debate. In *U.S. v Howard* (1977) 440 F. Supp. 1106, a federal judge declared the act unconstitutional because it violated the principle of separation of powers and was an unnecessary infringement on judicial power.

Similarly, the *Canadian Charter of Rights and Freedoms* of 1982, which is part of the Constitution Act, in section 11 (b) frames the right to be tried within a reasonable time in constitutional terms.[38] The Supreme Court of Canada interpreted these provisions in a way that is identical to the US approach and in its ruling explicitly referred to *Barker v Wingo*.[39]

Later the Supreme Court also took the view that legal protection is engaged by the act of indictment.[40] Canada chose not to legislate along the lines of the FSTA, and it is the jurisprudence of courts that usually sets the threshold of unreasonable delay at around 1 year from the start of procedures to the first court hearing. As far as the consequences of breach are concerned, the determination of a violation of section 11 (b) might result in a stay of proceeding if the delay is primarily attributable to the trial court itself,[41] but otherwise courts have flexible tools to apply different and proportional remedies to accelerate procedure or compensate the defendant (e.g. by mitigating criminal sanctions).

New Zealand also adopted a *Bill of Rights Act* in 1990, which is part of the country's uncodified constitution, and its section 25 (b) contains the right to be tried without undue delay in criminal procedures. According to the leading case in the matter (*Martin v Tauranga District Court*),[42] wherever the length of time taken to complete a trial had gone beyond the time in which most cases were able to be disposed of and the defendant subsequently raised the issue of undue delay, it is for the Crown to prove that the delay had not become 'undue'. The court refused to lay down guidelines as to tentative deadlines even for orientation purposes. However, it is clear that the law of New Zealand recognises a right to be tried within a reasonable time that is distinct from a general right to a fair trial; thus, in case of an excessive delay, the breach can be determined even in the absence of proven prejudice to the defendant.[43] New Zealand joins other common law jurisdictions in considering the stay of procedure an ultima ratio and having the tendency to remedy the resulting unfairness in flexible ways (e.g. mitigating criminal sanctions, compensation).[44]

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[38] Its predecessor, the *Canadian Bill of Rights* of 1960, was an ordinary federal act, without any legal effect on provincial legislation, and was subject to a rather conservative interpretation by the judiciary.

[39] *Askov v R.* [1990] 2 S.C.R. 1199.

[40] *R. v Finta* [1994] 1 S.C.R. 701.

[41] *Rahey v R.* [1987] 1 S.C.R. 588.

[42] [1995] 1 NZLR 491.

[43] *Graham v District Court at Blenheim* [2007] NZAR 32 (22 months passed between arrest and trial); *Davies (Daniel) v Police* [2008] 1 NZLR 638 (11 months passed between the first hearing and judgement).

[44] '*The right is to trial without undue delay: it is not a right not to be tried after undue delay*'. *Martin v Tauranga District Court* [1995] 1 NZLR 491.

6.4.3 Constitutionalisation in Europe and Its International Impact

International human rights conventions adopted after World War II fundamentally reshaped jurisprudence related to fair trial that had so far developed purely within disconnected national legal frameworks. Contemporary national legislation is passed with a view to international standards, and national organs entrusted under constitutions with the task of protecting human rights usually do so with frequent references to the practice of international judicial or administrative bodies responsible for the implementation of the abovementioned international conventions. Admittedly, these international bodies often use the common constitutional tradition of the Contracting Parties to a particular convention as a source of inspiration (Ambrus 2009; Polgári 2005); however, the determining influence comes the other way around: from supranational level down to States. It is not an exaggeration to state that in some regions supranational standards of fair trial have effectively replaced former national standards.

From our perspective, the 1950 Rome Convention is of paramount importance, because it is the first binding international document[45] declaring a right to be tried within a reasonable time (criminal procedures, Art. 5 (3) from the point of view of personal liberty and Art. 6 (1) from the point of view of a fair trial) as well as the right to have one's civil rights and obligations determined at a hearing within reasonable time (civil procedures, Art. 6 (1)). This structure has been adopted by the American Convention on Human Rights in 1969 (Arts. 7 (5) and 8 (1), respectively). On the other hand, the International Covenant on Civil and Political Rights adopted in 1966 by the General Assembly of the UN extends this protection to criminal proceedings only (Art. 9 (3)). The African Charter on Human and People's Rights adopted in 1981 under the auspices of the Organization of African Unity is more ambiguous in terms; while it affirms the general right to have one's cause heard, the requirement of reasonable delay is specified only in the context of a trial, i.e. a criminal procedure (Art. 7 (1) (d)).

The jurisprudence of the ECHR is quite settled on unreasonable delay due to a vast number of referred cases under Art. 6(1). The court applies the same standards to criminal and civil procedures with the caveat that dilatory practices on behalf of the defendant in a criminal procedure are less relevant in determination of a breach than a similar strategy adopted by parties in a civil lawsuit. Besides the objective length of procedure, the complexity of the case as well as the conduct of the parties and the authorities involved must be taken into consideration.[46]

[45] The Universal Declaration of Human Rights (1948) does not expressly mention the right to a hearing within a reasonable time besides a general requirement of a fair and public hearing (Art. 10).

[46] For a detailed yet accessible analysis of Art. 6 jurisprudence, see Mole and Harry (2006). For a targeted analysis of the time factors in Art. 6 jurisprudence, see Calvez (2006).

Unfortunately, the African Commission on Human and People's Rights has not been in the position so far to elaborate on the meaning of the right to be tried within a reasonable time.[47] On the other hand, the Inter-American Commission on Human Rights has an extensive case law as regards both Arts. 7 (5) and 8 (1) of the American Convention. The commission uses standards identical to the jurisprudence of the ECHR.[48] A peculiarity of the Inter-American approach is that the requirement of reasonable delay is extended to the proceedings of courts when acting as constitutional courts addressing constitutional complaints (*amparo*).[49]

To support our submission in the first paragraph of this subsection, it is necessary to touch upon the changes induced by the jurisprudence of the ECHR, as transposed by the Human Rights Act of 1988, on the law of the United Kingdom. The adoption of the Human Rights Act made it imperative to review previous common law principles that was attempted by the *Court of Appeal* in 2001 and accomplished by the *House of Lords* in 2004.[50] Pronouncing on behalf of the *Court of Appeal*, Lord Woolf CJ went as far as he possibly could in maintaining the previous authority of the principle articulated by Lord Lane CJ of the possibility of granting a stay of procedure only in case of a serious prejudice. For Lord Woolf the significance of the Strasbourg case law was an expansion of available remedies at the disposal of a judge (declaration of breach as a remedy in itself, compensation), while a stay of proceeding can be granted only on the basis of the relevant principles of common law.

The *House of Lords* shared the *Court of Appeal*'s opinion on remedies, however, further elaborated on the implementation of the right accorded by the Rome Convention. A breach of Art. 6 (1) necessarily occurs by an unreasonably delayed procedure even if the applicant cannot prove a serious prejudice that so far was a constituent element of an abuse of process. Consequently, as far as the time aspect of a procedure is concerned, abuse of process has been replaced by the stricter Art. 6 (1). The same applies for the available remedies, with the clarification that a stay of proceeding as the ultima ratio might be granted only if preconditions for an abuse of process are met, and some of the remedies (e.g. mitigation of a sentence) might be granted only by courts of England. It is worth noting that as a side effect of the Human Rights Act of 1998, the uniformity of the laws of England and Wales and Scotland was achieved as well in this area.[51]

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[47] There are examples, however, of declaration of breach, e.g. *Mouvement Burkinabé des Droit de l'Homme et des Peuples v Burkina Faso*, Communication 204/97 és 14th Annual Activity Report (2002) 9 IHRR 250, where the Supreme Court of Burkina Faso has refused to deal with a claim for 15 years.

[48] See, e.g. *Dayra María Levoyer Jiménez v Ecuador*, Case 11.992, rep n 66/01 (2003) 10 IHRR 512, where the commission has determined a breach of both articles.

[49] *Milton García Fajardo & Others v Nicaragua*, Case 11.381, rep n 100/01 (2003) 10 IHRR 531.

[50] *Attorney-General's Reference (No 2 of 2001)* [2001] 1 WLR 1869 (CA); [2004] 2 AC 72 (HL).

[51] Privy Council DRA No 3 of 2002 (*R v H.M's Advocate and the AG for Scotland*).

6.5 Trends and Perspectives

The normative requirements of the right to a hearing within a reasonable time are firmly settled: its constitutionalisation is completed in all influential legal systems, and its scope and content is also beyond serious dispute. Fundamental change is not expected in this area. However, the number of unreasonably delayed proceedings is still a matter of grave concern in many jurisdictions; thus, measures currently in place do not seem to perform their function satisfactorily. The question is whether these problems can be addressed by normative means.

It is submitted that in most modern legal systems, the compliance with the requirement of a hearing within a reasonable time is not a constitutional, and not even a primarily legal, issue. Of course, it is desirable to adopt effective constitutional guarantees in legal systems where they are still lacking. However, it does not seem very practical to further strengthen normative standards or aggravate sanctions of a breach (e.g. an automatic grant of stay of a criminal procedure or dismissal of an indictment in case of a breach).

We are convinced that in order to implement the right to a hearing within a reasonable time, governments and international bodies must focus on a more effective performance of organisational, administrative and legislative tasks outlined in Subsection 6.3.2, i.e. to follow a programmatic approach. However, for these purposes a number of additional surveys and reviews must be conducted in the area of legal and organisational sociology. In lack thereof, most of the opinions, suggestions and recommendations currently on the table are just a hunch, conventional wisdom or dogma and do not add up to a solid concept fit for the planning of actual intervention.

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Chapter 7
A Comparative Approach to the Evaluation of Evidence from a 'Fair Trial' Perspective

Mátyás Bencze

7.1 Introduction

Criminal procedures at Hungarian courts are often criticised for being too reliant on the case of the prosecution. This excessive reliance manifests itself in a mere formal judicial consideration of the evidence presented that results in convictions based on few and nonconclusive evidence. This problem is characteristic of a number of jurisdictions in Eastern Europe not just Hungary; it is feasible to study the phenomenon from a comparative perspective. The objective of this chapter is not to provide a comprehensive and systematic overview on evidence rules and practices of the countries concerned but to substantiate a connection between the political background of a legal system and the fair judicial evaluation of evidence as a professional issue.

7.2 The Relationship Between the Evaluation of Evidence and the Enforcement of a Fair Trial

It is an interesting phenomenon that in literature concerning the requirements of a fair procedure, different authors favour focusing on those requirements of 'fairness' which can be clearly described and the application of which can be relatively accurately measured (e.g. adequate defence, right to silence, length of procedures).

Of course, each requirement is equally important, but even in spite of methodological difficulties, we cannot ignore the analysis of those elements of a fair

M. Bencze (✉)
Faculty of Law, Department of Legal Theory, University of Debrecen,
Kassai 26, 4028 Debrecen, Hungary
e-mail: bencze.matyas@law.unideb.hu

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procedure that are present only as general norms at the level of positive law and the prevalence of which significantly depends on the perceptions of actors in the administration of justice.

The greatest stake in the criminal procedure is what facts are established by the court. Other drivers of a fair procedure are also important (independence and impartiality of the courts, right to appeal, effective defence), because they indirectly ensure that the evidentiary procedure will be fair towards the accused. If we consider these guarantees fundamental, then we must particularly focus on the 'core' of the evidentiary procedure: the problem of assessment and evaluation. In criminal procedures, one such requirement of a fair procedure is that evidence is assessed in such a way that is reasonable and in accordance with the interests of society while at the same time is fair towards the accused as well. A procedure in which the evaluation of evidence by the court is one sided, or in which guilt was determined based on very few or only distant evidence, would be difficult to call fair.

In criminal procedures, however, evaluation of evidence is the area in which the calibration of exact standards is the most difficult. Any criticism can be easily fended off based on the principle of free evaluation of evidence: evidence has no predetermined binding power and can become either compelling or unimportant based on the circumstances of the given case or in some instances, even based on formally unexaminable 'judicial wisdom'. Perhaps these difficulties motivated the European Court of Human Rights in the Monnel and Morris case to state the following: in the cases brought before the court, only the fairness of the procedure is examined, and its examination does not extend to determining whether the competent bodies made legal or factual mistakes.[1] However, these contradictions cannot give reason for us to not attempt to find solutions and rational models which, while minimising limitations on freedom of evaluation, are capable of ensuring the fair evaluation of evidence to the greatest extent. Otherwise, we can easily face worrying developments like in Hungary where, for example, according to a Supreme Court decision, a witness testimony in itself – without any further evidence – is enough to make a conviction.[2]

By present day, in the development of Western criminal procedure law, fundamental regulations have been established to specifically serve fairness in the evidentiary procedure. These are uniquely interrelated, and their coincided and simultaneous application ensures fairness in the evidentiary procedure.

In evidentiary procedures, when reasonable, legally obtained evidence must be examined by the court directly. The court can freely evaluate evidence but has an obligation to account for in its justification why specific facts were established, and, in connection to this, why certain evidence was either used or thrown out. If after the assessment process, the existence of a fact remains doubtful, the court must apply the *in dubio pro reo* rule (giving the benefit of doubt to the accused) and take this into consideration in concluding the verdict.

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[1]Monnel and Morris Affair, Decision of 2 March 1987, A series, volume 115.

[2]BH 1987. 391.

It can thus be concluded that in the evaluation of evidence, the discretionary freedom of judges does not fully determine which statement of facts is accepted as the basis for the verdict: freedom of evaluation is not equivalent to reliance on judicial intuition. The remaining rules of evidence place reasonable limits on discretion, primarily the obligation to reason and the *in dubio pro reo* rule. During the comparative analysis, I sought to answer how the opportunity of free evaluation of evidence can be reconciled with other rules that ensure fair consideration.

7.3 Methodological Questions

In the search for solutions to fair evaluation of evidence, the comparison of laws undoubtedly plays an important role – but such analyses presume we already have some sort of preliminary assumption of which legal systems could serve as an appropriate model for us. Since the purpose of criminal procedural fairness is to guarantee citizens' rights are protected against the state power, the requirement of a fair procedure can be evaluated as a political expectation. According to Károly Bárd, a fair trial serves to prevent, and maybe even expose, the forces and processes working against democracy and to fend off the possible consequences of such a verdict. His stance on the relationship between the rule of law and fair trial is clear: 'A criminal conviction is the most serious interference with the individual's sphere of freedom. This is why it is commonplace to state that the treatment of the accused in a criminal case is the best indication of the general state of human rights in a given society, because this is where collective and individual interests directly collide' (Bárd 2003: 72–73).

With regard to this, I attempted to ensure that the comparison does not only consider legal technicalities but also accounts for the differences in political structures. So, instead of the traditional practice of contrasting common law and continental law, in my comparison, I focused on including both older (United States, England) and newer (e.g. Germany, Italy, France) solid democracies under the rule of law, systems that have undergone democratic revolution in the past two decades – but remain politically unstable (e.g. Poland, Hungary) – as well as centralised countries, in which less limitations are placed on the power of the state (Russia, Azerbaijan, China). The comparison of common law and continental legal systems only plays a role to the extent when differences in the criminal procedure systems are reflected in different approaches applied in different legal systems, in terms of the position of the accused person.

Throughout my comparison, I took into account how at the level of written law the evidence standard is defined in each legal system and how each guarantees the fair nature of the evaluation of evidence. However, I considered it more important to analyse what types of practices developed in reality in each legal system. Lessons from legal history have demonstrated that similar legal texts in different political atmospheres can have very different roles in legal reality. In accordance with this assumption, I used primarily secondary sources that evaluated the practices of the legal systems analysed.

7.4 Results of the Comparative Analysis

7.4.1 The Standard of Proof Required for Conviction

In this area, the differences in common law and continental legal systems are clearly apparent. However, the differences are not based on the varying legal characteristics of the two systems (precedent versus 'code law') but on historical traditions and political-philosophical principles justifying legal practice. The first observable difference is manifested in that in common law countries, the standard of proof varies depending on the type of case given. In Anglo-Saxon systems, fundamentally different standards are applied in criminal versus civil procedures, whereas in continental law, the differences are much more uncertain (Kengyel 2005). In civil cases in common law systems, the standard of proof requires that the evidence supporting the plaintiff's claims must be more substantive (preponderance standard). This means that it is more likely than not that the facts the plaintiff claims occurred (Clermont 2009: 469). In criminal procedures, the standard of proof is much higher. As the court held in Lego v. Twomey, a fact can only be evaluated against the accused if its existence is proven beyond reasonable doubt.[3] In contrast, in continental legal systems, the goal in criminal proceedings is to reach 'absolute certainty', while in civil cases, only very few cases require a level less than 'bordering on certainty' (Kengyel 2005).

Second, in common law countries, lawyers in criminal cases do not seek reaching absolute certainty but are satisfied with a level of probability in which reasonable doubt has no place. In continental law, facts proven beyond *any* doubt are evaluated, based on which – according to the doctrine – the judge establishes his/her own inner conviction (*inner conviction standard*). According to certain authors, the judicature hopes to approach the level of complete certainty as closely as possible, which is why they strive to support the justification of their decision by their deepest, innermost convictions. According to Clermont, this is why judges in continental systems are more likely to acquit or dismiss a petition (Clermont 2009: 471).

The apparent differences in requirements of proof are the result of the differing functions of the procedural systems. The requirement raised by continental legal systems, in terms of the high level of proof, supports public justification and the legitimacy of judges. The courts give the impression that their decisions are based only on real, and not presumed, facts. In other words, proof must be beyond any doubt in order for it to be evaluated (Clermont 2009: 472). According to Erzsébet Kadlót, this was also the result of the fact that during the process of centralisation, the state took over from the injured party the right to carry out the procedure of calling to account. The state justified this by claiming that in contrast to an unprepared layman, a professionally operating state apparatus is capable of discovering the 'objective truth' (Kadlót 2010).

[3]Lego v. Twomey, 404 U.S. 477 (1972).

In common law procedures, besides the discovery of truth, an important goal is to minimise the costs of incorrect decisions. The costs vary depending on procedure type, which serves to explain the existence of different levels of probability. The most considerable social consequence is a judgement establishing criminal liability of an innocent person, which is why in common law systems, a higher level of proof is required in establishing the facts in criminal trials than in civil trials (Clermont 2009: 485). The 'cost' in this case is ethical: the burden of conscience that results from condemning the innocent (in civil cases: the non-defaulting party) (Tadros and Tierney 2004: 402).

Even in questions regarding the standard of proof applicable in criminal procedures, the two different historical models reflect different traditions and approaches regarding the relationship between the state and the citizens.

In spite of this, the question remains: which model fits fair trial requirements more? More accurately, the question would be: in the evidentiary procedure against the accused, what degree of doubt must be ruled out in order for the evaluation of evidence to be considered fair? Doubt, or doubtfulness, does not operate on an 'all-or-nothing' principle but is manifested in seamless degrees. We too feel that sometimes a given statement may raise strong doubts, while other statements may leave us with few doubts. At first glance, it seems that the strict continental rule serves best to protect the innocent: the burden of 'absolute certainty' ensures that no innocent individuals are convicted. However, if the courts took this completely seriously, no one would ever be convicted. A shred of doubt always remains, even if only because our knowledge of the world is nowhere near complete, and there are physical, chemical, biological and psychological relationships and laws we have yet to discover. Attaining mathematical proof outside of math (and pure logic) is impossible. We knew that Newton's laws appeared certain – up until they were replaced by Einstein's new paradigm. Then how could a judge be 100 % certain in establishing the facts? Witnesses can be fooled by their own senses or weakness of memory. Material evidence does not speak for itself; in most cases, the judge is not competent in the question of evaluating the expert's opinion. But even if, in a given case, several mutually reinforcing and overwhelming sources of direct evidence exist against the accused, can we be certain that an acute, rapidly subsiding disorder did not arise that resulted in mental incapacity of the individual (or maybe perhaps he was under hypnotisation)? Of course, this is an extreme example, but it highlights that in a strict sense, absolute certainty cannot be achieved in the evidentiary procedure.

Considering these epistemological obstacles, the perfectionist desire to demand absolute certainty from the courts is pointless. What is more important is that it is not only pointless but also dangerous considering the fair evaluation of evidence. The introduction of such a standard results in the courts not taking it seriously (because it cannot be taken seriously). Under such circumstances, with the absence of certain standards, a practice could come into being that reduces the level of proof required for conviction to such a low level, that even from a distance could not be considered fair towards the accused. In my opinion, this is the situation in present-day Hungary, and this is also supported by an empirical study which was carried out in 2010 by me

and my colleagues. A statistical analysis of nearly 300 cases shows that on average courts examined more witnesses in cases ending in acquittal than in cases ending in conviction. Thus, it seems that innocence must be more thoroughly proven than guilt (Bencze 2010: 86–90).

Returning to the search for proper solutions, it appears fundamentally important for us to find some kind of justifiable standard – the application of which can be reasonably expected of the courts. Achieving absolute certainty is obviously impossible; therefore, the standard of proof necessary for conviction must be lowered. The doctrine of 'reasonable doubt', developed in Anglo-Saxon legal practice, requires *moral certainty* to be achieved. It became clear in the works of seventeenth- and eighteenth-century philosophers that areas exist which cannot be analysed in absolute or mathematical terms, because by their very nature (*natura rerum*), they are incompatible with such proof. However, the conclusion drawn from this is not that acceptable proof, degree of certainty and convincing certainty cannot exist. A reasonable person will be satisfied with proof that is subject to consideration. Moral certainty, in contrast to theoretical-scientific and theological certainty, is linked to reasonableness of human practice – for example, to state administration or to the administration of justice. The term 'moral' suggests that someone has arguments upon which his actions cannot be morally condemned, for example, a judge having this degree of certainty may sentence someone to prison. In this manner, on one hand, absolute, metaphysical, coercive certainty can be distinguished from moral certainty (the latter is enough to determine guilt), while on the other hand, weightless, trivial, unusual assumptions can be differentiated from reasonable doubt. Thus, proof beyond reasonable doubt does not require guilt to be proven mathematically with absolute certainty, but at the same time, this does not mean it is a faint, simply theoretical or unserious doubt – but rather, a doubt that after analysis and thorough consideration any competent, intelligent and impartial person can recognise as existent (Waldman 1959). Hence, it is important that the absence of doubt not be determined based on the psyche of the judge trying the case: this is a universal standard, the base of which is the reasonably thinking average person. The achievement of moral certainty – since it does not expect those applying the law to have superhuman capabilities, means a standard with better accountability, and so it gives greater protection to the falsely accused innocent.

Superiority of the common law approach is conspicuous if we include the law of pre-economic and political reform China in the comparison, which exhibits the dangers of the continental approach: sacrificing fair procedures for the interest of state protection. In China, even before the Cultural Revolution, they believed that the in dubio rule is not applicable: if a fact is not proven beyond doubt, investigation must continue until absolute certainty is reached (Thieme 1984). It is not surprising then that countries such as communist China or the once-communist Soviet Union, which placed collective interests before individual interests and which believed in the objectivity and infallibility of the state, did not consider achieving absolute certainty impossible (Stevens 2009). It is thus clear that evidentiary fairness is closely linked to the rule of law and democracy in a given legal system.

Second, it can be concluded that different expected levels of certainty in the two legal families are not the result of different legal approaches but stem from differing political principles and approaches behind criminal procedures. It would not be opposing to the legal culture of continental legal systems, if the general level of certainty were developed in as much detail as the Anglo-Saxon doctrine.

7.5 Legal Instruments to Suppress Arbitrary Discretion

7.5.1 Obligation to Justify

In the process of establishing the facts, in filtering out the distorting effects of individual subjective convictions, one of the best solutions could be public control over the decision. The verdict, and especially the publicity of the justification, forces the decision-maker to support his/her conclusion of facts with evidence that is reasonable and generally accepted. Beyond this, even during the evaluation of evidence, the obligation to justify incites the judge to rethink his/her concept about the facts of the case over and over again. Because of this – in continental legal systems – as a general rule, the evaluation of evidence must be justified. Within each legal system, the differences can be grasped into what extent the legal regulations provide points of reference and guidance to the judge concerning what the justification must include.

The most detailed and well-developed expectations are defined in German law: the justification must be such that it is clearly understandable even without knowledge of the case. A simple listing of the facts does not constitute justification; the assessment must be logical and coherent. The justification is inadequate if concerning a given fact, the court failed to report why it was considered proven or why it was dismissed. A further requirement obligates the judge not only to argue in favour of the accuracy of his/her own insights but to also consider the arguments brought forth. For example, in the case of witness testimonies, this means that the relevant testimonies must be assessed in great detail in the judge's decision, especially if in the testimony the possibility of facts contrary to the testimony arises. The obligation to refute counterarguments exists in Belgium as well, but with that the judge must rebut the legal claim, and not the arguments supporting it (Cape et al. 2010: 290–291, 87). So, if it can be clearly proven that the accused had not legitimate self-defence, the court does not have to argue the defence claims of the accused one by one.

In Italy, it is also a fundamental expectation of the courts to convince the reader of the decision: under the given circumstances, the best possible decision was made, which is supported by the fact that accordingly, the rules of evidence are adequately detailed. The fair consideration requirement is clearly highlighted in the detail rule according to which the judge may only refer to evidence in his/her justification if it was presented during the trial, that is, the evidence underwent the test of questioning

by the participants (Cape et al. 2010: 406, 409). It is typical of Eastern European countries that the rules for evaluation of evidence leave ample room for judicial discretion and do not contain clear guidelines. The Hungarian law on criminal procedures requires the justification of the decision to contain only that the evidence was accounted for and evaluated.[4]

In part, this general rule is why the Hungarian practice is often satisfied with merely formal justification (e.g. the justification simply accounts for the evidence but does not analyse, compare or explain why each was accepted or dismissed, and in many cases the justification does not extend to cover all evidence used). Justification panels have developed, through which even decisions based on the extremely little and weak evidence can be justified, such as the acceptance of a realistic and coherent testimony without material review (Bencze 2010: 29, 59–60, 64–66). It is no coincidence that the rate of successful prosecutions in Hungary, according to the Annual Reports of the Chief Prosecutor,[5] is high even in an international comparison and has been a steady 96–97 % over the past several years. The risks associated with such practice – especially in politically sensitive cases – are clear.

Similar to Hungary, the rate of acquittal in Poland is very low (2–3 %). According to advocates of the Polish practice, the reason for this is that only the most serious and most thoroughly investigated cases are brought before the courts. A further general problem is that the justification of the decision usually only includes the law applied and the judge does not extend to cover the special circumstances of the case (Cape et al. 2010: 435, 458, 460).

In Turkey, according to attorney reports, some judges simply copy the arguments of the prosecution and the defence into the justification, so the judge's system of arguments is essentially missing. Others refer to the text of the law but provide no real justification and common phrases (e.g. 'based on the court's discretion . . . ') recur as well (Cape et al. 2010: 526). The explanation for this is that the operation of the Turkish courts is burdened by extreme case loads, and that there is no public online database of decisions.

From the above, it may seem that legal systems in which serious cases are decided upon by juries, bodies having no justification obligation, have accumulated deficits concerning the fair evaluation of evidence. Juries are also often accused of making decisions based on subjective considerations and neglectful impressions (Frank 1949). In spite of this, if the suppression of arbitrary decision-making – the most important phase in terms of a fair trial – is kept in mind, it can be clear that a decision-making process with multiple actors, and especially the argumentation preceding it, can be suitable for the case to be argued from relatively many perspectives and in the determination of whether the crimes in the indictment occurred, and for the possible subjective aspects in the decision to be filtered out more easily.

[4]Criminal Procedure Code (hereinafter: C.P.C.), 1998, (Hun) s.258 (3)(d).

[5]http://www.mklu.hu/cgi-bin/index.pl?lang=hu

Therefore, in terms of fair evaluation, such decision-making can be equivalent to the control brought by the obligation to justify.

7.6 The Limitations of Free Evaluation

According to Károly Bárd, the introduction of a free system of proof can be regarded as the manifestation of faith in the unlimited cognitive abilities of the human mind, as the triumph of the concept of rationality (Bárd 1987).

The medieval, often irrational evidentiary procedures (e.g. arbitraments of God) were later replaced by formalistic evidentiary systems, in which the probative value of evidence was predetermined – but this too had its own disadvantages. The principle of free evaluation of evidence directly reflects on this historical antecedent when it declares: the probative value of evidence and means of evidence is not predefined in law. General experience suggests, however, that it can be problematic as well if the law is built upon a degree of rationality which strays far from the run-of-the-mill reality: that is the case if generalised principles and expectations are set as the goal to be achieved, which seem more like utopian ideals than criteria that can be met. For example, in principle, the reconstruction of the actual thought processes going on in the mind of the accused is part of the evidentiary procedure, which in many cases is a hopeless undertaking, since often even the perpetrator is unaware of these. Such an obviously inconceivable task can have detrimental effects on analysis of the facts that are otherwise provable and need to be proven and on evaluation of testimonies and other sources of evidence. As I mentioned above as an example, in Hungarian judicial practice, it is absolutely acceptable to dismiss a testimony – without any further argument – if the court holds that it is 'unrealistic'. It is far from the concept of fair consideration.

Capitalising on these insights, many countries place limitations on free evaluation. An example of such limitations is the corroboration principle, which requires at least two separate sources of evidence in order to make a conviction (in Scotland, e.g. corroboration is universally applied). In Holland, the judge may only use a testimony made to police if it is supported by other sources of evidence (witness testimony or report). The law in Holland also lists other sources of evidence that are only admitted in corroboration, for example, police reports, expert testimonies and other documents, such as notes or diaries. According to the law in Portugal, the judge cannot question and is obligated to admit expert testimony, unless a technical objection arises (Pradel 1992: 451). Further limitations on free evaluation are observable in legal systems which do not admit certain sources of evidence, even if those would be capable of proving the facts. Again, transparency of evidence is the goal behind this: a conviction should only be based on evidence that has undergone the adversarial process.

This does involve the fact not only that evidence obtained outside of trial is more unreliable but also that the fundamental right of the accused to contest evidence presented must be guaranteed. Although, one author (Jean Pradel) believes that in

general all legal systems have a rule according to which witnesses are not obliged to testify before trial, specifically to police, and that only few exceptions exist to this rule (Pradel 1992: 441). However, we will see that this rule can actually only be considered general in modern, constitutional democracies. In other legal systems, the right to contest evidence is provided to a much lesser extent.

In England and the United States, one of the cornerstones of the rules of evidence is the question of hearsay evidence. In the United States, according to federal provisions on criminal proceedings, evidence based on hearsay testimony is not admissible, with the exception of certain well-defined circumstances.[6] The same is true in England: courts do not admit hearsay evidence, unless terms specifically detailed in law are applicable.[7]

The substantive taking of evidence occurs during trial in Italy and Belgium as well. According to Italian law on criminal procedures, in establishing the facts, statements made outside of the courtroom are not admissible, except as evidence to prove the credibility of witnesses or of the accused. During the taking of evidence, with very few exceptions, personal perception is the most important. However, a negative characteristic of the Italian system is that although information justifying the arrest cannot be taken into account during trial, in practice this nonetheless influences judges in determining guilt. This may be a consequence of the practice common in most continental legal systems today, according to which the investigation phase carries too much weight, and that the most important and conclusive sources of evidence are not only collected but also thoroughly evaluated first during this phase. In France, for example, analysers of the practice highlight that evidence taken during trial is less significant, while the investigation file has overwhelming importance during the evidentiary procedure, which typically steers the judge in the general direction of establishing a guilty verdict (Cape et al. 2010: 92, 231, 405, 410, 554).

Not surprisingly, the same is true in Russia as well: before the trial, the judge is obligated to read the investigation materials (the 'dossier') and must examine whether a sufficient amount of evidence exists needed in order to convict the accused (JRank Russia).

Testimonies made to the police have strong probative value in Hungarian judicial practice as well: not only are these used in determining credibility but are also used as evidence supporting convictions in cases where all testimonies made during trial were contradicting those made to police (Bócz 2006; Bencze 2010: 61–63). Interestingly, it was a Hungarian judge who came to defend this practice by stating that trial publicity hinders effective evidentiary hearings because public trials provide a less relaxed environment for the presentation of witness testimonies compared to a police investigation where detectives apply tested techniques to 'ease the tensions' (Bíró 1994).

[6]Fed. R. Evid. 803 (1999).

[7]Criminal Justice Act, 2003, c.44 (U.K.) s.114.

7.7 The Problem of the Burden of Proof

The burden of proof lying on the accuser is one of the fundamental pillars of criminal procedures in constitutional legal systems, which stems directly from the principle of the presumption of innocence. Experience has shown, however, that in nearly all legal systems, effective administration of justice has forced the burden of proof to be handled more leniently. The problem with strict enforcement is the same as with the 'beyond any doubt' standard of proof: if it were consistently applied, the court could not bring condemning judgements even in cases where rational insight would require it to do so. The question to be clarified then is when and to what extent can limitations on the presumption of innocence be acceptable in the evaluation of evidence.

Among different legal systems, discrepancies in this area are detectable in whether the burden of proof shifts at a point predefined by the lawmakers, or if this happens implicitly, often not even consciously, through judicial practice. The advantage of the former solution is that it becomes clear which unproven facts burden the authorities and which are attributable to the accused; in the latter case, the rights of the accused may be seriously violated.

In England, besides the acknowledgement of the presumption of innocence, in many cases the burden of proof lies with the accused (e.g. illegal possession of a firearm, lawful self-defence, plea of mental incapacity). Many laws specifically place the burden of proof on the accused, and also, the courts may interpret the law in such a way that the burden is shifted. According to a study, in more than 40 % of cases, the accused must prove the claims of his/her defence or disprove the occurrence of the alleged crime. If he/she is unsuccessful in doing so, a conviction may result (Cooper 2003). In English practice, one of the main problems is that of proportionality. According to analysts, in this sense the practice of the courts lacks theoretical foundation (Tadros and Tierney 2004: 431–433).

In France, the burden of proof shifts under certain predefined circumstances as well. For example, in cases such as drug-related crimes, trafficking and self-defence, the accused has the obligation to prove specific facts. In a case against France, the European Court of Human Rights acknowledged that within reasonable boundaries, while taking into account the significance of the given case and the right of the accused to defend himself/herself, shifting the burden of proof does not violate the presumption of innocence.[8]

In countries where individual rights have less significance, such as Western democracies, a hidden shift of the burden of proof is observable. It may be that in Turkey, the rate of conviction is 'only' 80 %, the burden of proving innocence lies with the accused, because the judges are inclined to presume their guilt. Where the saying 'where there's smoke, there's fire' prevails, it is difficult to endorse the presumption of innocence (Cape et al. 2010: 505, 523).

[8]Salabiaku Affair, Decision of 7 October 1988, A series, volume 141.

The communist Soviet Union viewed the presumption of innocence as 'bourgeois nonsense', incompatible with the inquisitor nature of criminal proceedings – however, in present-day Russia, this principle is stated in § 49 of the Constitution. Still, we cannot discuss its practical application. This is supported by statistical data, according to which in 1998 less than one per cent of cases resulted in acquittal. One of the most controversial rules of criminal procedures is that if evidence is insufficient, the judge may order the investigation to continue even after the trial has begun. During the Soviet era, this rule enabled the judges to make convictions even in the absence of sufficient evidence. But even today, if the law assigns such a role to the judge, it makes it questionable whether the accuser bearing the burden of proof is adequately enforced (Thaman 2013).[9]

Hungarian procedural rules are no different: it is the ex officio obligation of the judge to notify the prosecutor if he/she considers the indictment to be incomplete and order him/her to make amendments or to find other means of evidence.[10] These provisions essentially make the judge a 'second accuser', who must now share the burden of the unproven with the prosecutor. For this reason, it is difficult to expect the judge to not consider it his/her own failure, when despite his/her efforts, he/she must acquit the defendant. It is no coincidence that while analysing Hungarian judicial justifications, we often run into signs of a hidden shift of the burden of proof (Bencze 2010: 49). This approach is exemplified by an excerpt from the justification of a judgement in a criminal case: 'The defendants failed to provide a reasonable explanation [sic] why it was in the victim's interest to initiate criminal proceedings'.[11]

Reports indicate that in the Eastern world, the presumption of innocence in weighing evidence exists merely on paper. In Azerbaijan, the Constitution and the Criminal Procedure Code as well as the laws governing administrative offences contain explicit provisions relating to the presumption of innocence. Azerbaijan also acknowledged the international human rights as binding upon itself, which not only declares but emphasises the importance of this principle. Despite this, the accused are generally treated as guilty throughout the procedure, up until they have cleared themselves of the charges. So it can be said that in Azerbaijan, the presumption of guilt prevails, and it is up to the accused to prove his/her innocence. This attitude shows that in Azerbaijan, the Soviet mentality continues to live on, that the authorities taking part in the investigation and the indictment (police and prosecutors) never make a mistake concerning the grounds of the charges.[12]

[9] Ibid. 53.

[10] C.P.C. s.268 (1).

[11] Judgement No. 812/2006 of Metropolitan Court of Hungary.

[12] Organization for Security and Co-Operation in Europe (2006) The Presumption of Innocence in Azerbaijan – Executive Summary. Retrieved from http://www.osce.org/baku/20270

7.8 Summary

From this short analysis, covering the main directions and tendencies rather than the topic as a whole, several conclusions can be drawn concerning the fairness of the evidentiary procedure. In connection with the level of proof, we were confronted with the importance of how the standards of proof must be realistic and not wish for the impossible (otherwise, they would become nonsensical). Concerning the area of justification of consideration, we could see that in general, it can be stated that the practice in well-developed democracies is that convictions must be based on evidence and not on opinions or presumptions. The judge not only has to justify his/her decision, he/she must also provide an answer to what arguments confute contradictory statements concerning relevant questions. From the analysis of rules limiting the free evaluation of evidence, it can be concluded that legal systems in mature democracies do not trust in 'judicial wisdom' as much as younger democracies do, and that the enforcement of fair trial actually necessitates this precautionary approach. Although at first it may seem strange, we can nonetheless conclude that in specific cases, shifting the burden of proof does not weaken but rather strengthens the effective application of the in dubio rule.

Two further general conclusions can be drawn from the analysis. First, fair consideration of evidence cannot be deprived of reasonably detailed rules (e.g. concerning provisions on justification requirements, the inadmissibility of certain evidentiary instruments, corroboration requirements), because this way, the risk of judges falling into the trap of their own prejudice or conditioned thinking is reduced, and so is the risk that their first impressions mislead them.

Second, differences in legal solutions that ensure the fairness of free evaluation have not developed in accordance with the classic legal family categorisation, and from this perspective, neither the development level of jurisprudence nor the professional preparedness of judges serves as the most important element of guarantee. A much stronger correlation can be shown between the age and depth of democratic traditions. If respect for individual rights is deeply rooted in the attitude of legislators and judges, then in general, judicature and the regulations concerning consideration will develop fairly as well. The superiority of the common law legal systems in this area can be traced back to this tradition and not to the peculiarities of their legal technical solutions.

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Chapter 8
A Comparative Overview of Publicity in the Administration of Justice

Szonja Navratil

8.1 Principles, Regulations and Challenges

The essential feature of the publicity in the administration of justice is ensuring social control over the independent administration of justice, because as Justice Burger, the former US Supreme Court Justice, put it, depriving the public access to judicial procedures leads to erroneous decisions and, in the worst case, corruption (Open Society Justice Initiative 2009).

Ensuring efficient and wide-ranging social control over the administration of justice is rooted in the independence of the justice system, because based upon the theory of checks and balances no controlling organisation exists in judicial administration. However, providing a possibility of control over the branches of power is essential in a system governed by the rule of law. Consequently, publicity is the only such possible instrument capable of controlling the activities of the judiciary.

As a result of the various, simultaneously and thus mutually reinforcing procedures, the significance of regulations concerning the publicity of judicial administration has indisputably increased.

Increasing judicial power, the freedom of information, transparency and the emergence of the imposition of judicial accountability continuously expand and widen the publicity of the administration of justice. And, as a result of technological advancement, the scope of publicity has also widened, granting everyone the opportunity to become familiar with court decisions and even court documents.

S. Navratil (✉)
Center for Theory of Law and Society, Eötvös Loránd University, Budapest, Hungary
e-mail: navratilszonja@gmail.com

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The significance of publicity is also supported by the fact that two recent comprehensive comparative studies analysed the regulatory practices of publicity in the administration of justice.[1]

This study undertakes to provide secondary analysis of the two international comparative studies. The goal of the secondary analysis is the systematic presentation of similarities and differences in national regulations through analysing and organising changes in the publicity of judicial administration, based on the findings of the comparative studies (Open Society Justice Initiative 2009; DPLF 2007).

In the following, besides introducing the concept of judicial publicity and the relevant elements, I take those theories into account, which have set judicial administration to face new challenges and thus influenced judicial publicity as well.

After reviewing the changes outlined by the comparison, I analyse the similarities and differences in terms of the conceptual elements of publicity.

The conceptual elements serve as the basis of the comparison, rather than individual national regulations, because publicity in the administration of justice is an area so complex, with regulations as a whole having disparities so pronounced, it is nearly impossible to compare them. No country regulates judicial publicity through one distinct piece of legislation but rather in the norms, constitutions and the laws, and in some cases the courts apply discretionary powers delegated to them in making decisions concerning the regulation of publicity. It is not possible to rank the countries in terms of publicity in the administration of justice or to determine which country provides a greater degree of judicial publicity. Each country's national regulation governs the individual conceptual elements differently. While in regard to a particular conceptual element a country may allow for widespread publicity, it may severely limit publicity in another area. For example, in Ecuador, while court decisions and court documents (only in print, not electronically) are accessible to everyone, making an audio or video recording of a trial is forbidden.

The area of publicity in the administration of justice is so complex in character that the extent of publicity can only be interpreted in terms of the relation of the elements of publicity to one another.

As a result of the secondary analysis, two tendencies are outlined that fundamentally influence publicity in the administration of justice. On one hand, it can be contended that the spread of publicity is continually expanding worldwide, meaning that more and more data and information concerning judicial administration is becoming available to everyone. As a result, we are witnessing the widening of publicity. On the other hand, however, parallel to the increasing extent of publicity, the role and significance of the limitations of publicity also appear to be strengthening. Due to the special nature of justice administration, greater and wider publicity may conflict with private rights of the players in the judicial process. And as a result of the conflict between publicity and private rights – through the surfacing of dimensions of electronic publicity, or the opportunity of creating audio and video

[1]The data in the study is derived from two comparative studies, which analysed regulation in 26 countries.

recordings of trials – the role of limitations on publicity is also increasing. The two tendencies are proportional, though moving in opposite directions: as the scope of publicity widens, the regulation of limitations on publicity becomes imminent.

8.2 Publicity in the Administration of Justice

One significant constitutional principle of all modern democratic justice systems is the publicity of court trials, as well as of court decisions. Most national legislations do not only encompass this principle but also include limitations on publicity in the administration of justice, and the exceptions are demonstrating significant convergence as well. International agreements, the International Covenant on Civil and Political Rights as well as the European Convention on Human Rights unquestionably play a significant role on one hand in that legal systems in different countries normatively guarantee the principle of publicity of trials and on the other hand in that these standard texts converge.

Before the 1990s, publicity in the administration of justice basically meant courtroom presence and public announcement of court decisions. Neither national-level regulation nor international agreements provided for detailed rules regarding how court decisions and court documents may be accessed outside the courtroom. International conventions set forth minimum requirements where appropriate, and at the time, publicity in the administration of justice only comprised of open trials and the disclosure of court decisions. However, the past two decades have brought change in the publicity of the administration of justice; the scope of publicity has expanded, and today, judicial publicity refers to much wider publicity than in the past. Beyond the openness of trials, publicity also includes electronic access to court decisions and court documents and even access to the administrative data about courts.

In the following, under the criteria developed in a previous study (Eötvös Karoly Policy Institute 2009), I attempt to systematically organise new publicity in the administration of justice that resulted from the changes in the field.

The comparative analyses each contain different classifications, as a result of the complex nature of publicity in the administration of justice which has evolved to this day. Each system of organisations contains all categories; emphasis is rather on the differences.

8.2.1 Elements and Dimensions of Transparency

In the subject of publicity, we can differentiate between *institutional-organisational publicity* and *publicity of process*. The former refers to data pertaining to the operation of the judicial system, and the latter applies to data generated as a result of the judicial process. Within judicial procedures, *openness of trial, access to court documents* and *disclosure of court decisions* can be separated.

In terms of dimensions of publicity, we can discuss both *momentary* and *electronic publicity*.

	Institutional-organisational publicity	Publicity of the judicial process
Momentary publicity	–	Open trial
		Public announcement of court decisions
Electronic publicity	Budget (finances) of the courts	Disclosure of court documents
	Organisational structure of the courts	Disclosure of court decisions
	Data pertaining to the operation of the courts	Media presence in the courtroom
	Selection, appointment of judges	
	Data on disciplinary proceedings	

The publicity of the judicial system, as a separate branch of power, does not differ from that of any other publicly funded organisation. In the case of judicial administration, *institutional-organisational publicity* refers to data of public interest, regarding economic and professional activities. This includes the budget of courts, the organisational structure of courts and the information on who the judges are, while in some South American countries, data pertaining to the process of the selection of judges, the criteria of selection and the outcome of disciplinary proceedings against judges are also disclosed here. Within publicity of the judicial process, both publicity of the courtroom and public announcement of court decisions are included under *open trial*. *Disclosure of court documents* refers to the access to documents generated throughout the judicial process. Access to court documents further distinguished in terms of closed cases or cases still under trial. *Disclosure of court decisions* is to be interpreted not as public announcement of the decisions but as access to the decision in a written and unedited format.

Momentary publicity means courtroom publicity. This type of publicity is obviously influenced by having knowledge of the list of trials (when which case is to be tried at a given court), the schedule of those interested (since courtroom presence is required) and the size of the courtroom itself. As a consequence, the extent of publicity is lowest here, because these three criteria must all be in order for someone to become familiar with the data of the given judicial procedure. Nevertheless, this type of publicity, because of personal involvement, gives the broadest publicity of content, by enabling the audience to directly experience every event in the trial, the documents introduced as well as the presentations of the judge and the parties, their gestures, inflections and the arguments of the legal representatives.

Electronic publicity refers to indirect publicity, within which access to judicial activities is granted through the Internet. In this case, the sphere of publicity expands considerably; Internet users can freely access data published on the World Wide Web at any time. As a result, activities of justice administration are accessible without any further effort – such as having to appear in the courtroom. Although within publicity of the judicial process, media presence in the courtroom is a dimension of momentary publicity, I have listed it under electronic publicity, because although the media must be physically present at the courtroom, its role and the effects of its activities are closer to the electronic dimension.

Thus, the overall picture is intricate and complex. It is evident that the dimensions of momentary publicity and electronic publicity intersect the contents of publicity.

And media presence in the courtroom cannot be precisely categorised as either momentary or electronic publicity, because technical conditions are given for the direct transmission of pictures and information to the public straight from the courtroom through the Internet. This is further complicated by live television broadcasting of courtroom trials and so the opportunity for electronic transmission as well. Such court television channels exist, which continually broadcast courtroom trials.

Based on these, we can endeavour to make the statement that publicity in the administration of justice has changed as a result of an increase in the elements and in the dimensions above.

Today, publicity in the administration of justice is better interpreted as a system of relationships, rather than a single dimension of courtroom publicity, as a result of the diversity and overlaps given by this a complex area. The extent and scope of publicity can only be examined through the relationships between different elements, so the only way to determine the extent of publicity in judicial administration in a given national legal system is in light of the different aspects of publicity. Of course, this all significantly influences the results of comparative law studies. Because while at first glance, publicity in the administration of justice seems to be a phenomenon which can be easily compared across different national legislations, the complexity of this area makes this rather difficult.

The national laws introduced later cannot – as a result of changes in laws concerning publicity – be considered uniform. In other words, the laws vary considerably in terms of the individual elements. In analysing the new elements and dimensions of publicity, we may see that legislation in a given country allows for widespread publicity under one element, while it may be explicitly restrictive along another element. As a result, this study does not approach the analysis of legislation as uniform whole but rather as a comparison according to previously defined elements. Thus, in my opinion, comparative analysis only makes sense in terms of the individual elements and not as legislation concerning publicity in the administration of justice as a whole.

8.3 New Principles and Challenges in the Administration of Justice

The introduction of principles, theories and new challenges influencing the administration of justice is important because these processes were the drivers of change in regulation. Without understanding the theories of transparency, accountability and freedom of information, we cannot comprehend the global phenomenon of the expansion of publicity. If we draw the conclusion that the scope of publicity in the administration of justice is continuously expanding worldwide, that legislation of the given national laws is continuously increasing the degree of publicity – and we compare this to changes in publicity and the complex characteristics of publicity – we can easily fall into the trap of assuming changes in publicity resulted from the increase of the individual elements of publicity. If the elements of publicity have multiplied compared to the publicity of trials, an increase in the elements assumes

increased publicity. However, this explanation does not answer the question of why, and as a result of what processes, the new elements of publicity appeared.

Of the underlying effects and processes, perhaps technological advancement seems to be the most practical answer. The spread and development of the Internet leads to the formation of electronic publicity, thus expanding the degree of publicity. But technological advancement is only opportunity and does not necessarily give rise to electronic publicity in the administration of justice in itself. The results of comparative analysis of laws have drawn attention to the significance of an underlying principle and regulation that appears only as an intermediary process between technological development and the expansion of publicity: the freedom of information. As we will see later on, strong interaction can be discovered between publicity in the administration of justice and regulation of the freedom of information. Regulation of freedom of information facilitates the expansion of publicity in the administration of justice. Thus, one of the causes of the expansion of publicity lies within the principle of freedom of information. Freedom of information, as the right to access and disperse public information, serves as a fundamental prerequisite for freedom of opinion to prevail and for the participation in public affairs. Access and unrestrained dispersion of information relating to the operation of the state and the justice system enables us to form an opinion about the activities of state organisations and about their lawfulness and effectiveness and to monitor their activities. The core principle of freedom of information is that data managed by organisations serving public functions – including the courts as organisations of justice – are public and accessible by anyone, except as expressly prohibited by law. The principle of freedom of information expanded publicity to administrative data of the judiciary as well and ensured a basis and background for changes in the publicity of judicial administration (Eötvös Karoly Policy Institute 2009). The requirement of the publicity of data concerning the budgets and the organisational structure of the courts as well as the selection or appointment of judges can be derived from the contents of the freedom of information.

The principle of freedom of information not only served as a theoretical basis for publicity in the administration of justice but also provided a logical framework and a system of tools. Accessibility of public information can be realised in two forms: either through disclosure via a publicly accessible forum (proactive freedom of information) or through providing information to individuals upon explicit request. Proactive freedom of information is designed to meet the need of disclosure in cases where larger groups of society are affected or interested, in such a way that the information can be accessed without request. Hence, the disclosure of court decisions and court documents on the Internet is the realisation of proactive freedom of information.

In addition to freedom of information, the concepts of transparency and accountability served as underlying principles that have led to the expansion of publicity in the administration of justice.

The classical theory of separation of powers is built upon the fundamental basis that the assurance of freedom and with that, the avoidance of tyranny can only be guaranteed if the three branches of power operate completely separately from one another.

The organisational independence of the judiciary, as a branch of power, is derived from the above concepts, as well as from the constitutional principle of the independence of individual judicial decisions, as the act of solving conflicts. On one hand, the courts must be segregated from external influence, and on the other hand, in judicial decision-making, the judge cannot be commanded – that is, he is only subject to the laws.

Independence, as a fundamental principle to the requirements of the rule of law, continues to remain a determining foundation of judicial operation, but it no longer stands alone. Two further requirements have emerged in parallel, which cannot be ignored. The results of recent studies in jurisprudence (Federico 2007; Voermans 2007; Garoupa and Ginsburg 2009; Hack 2008) confirm that judicial power is steadily increasing and that the courts are becoming an increasingly significant powerful force. Proportionally to the increase in power, the need to monitor the activities of the courts is also on the rise. However, this monitoring, while fully maintaining independence, can only be achieved if and when the judiciary and judicial decision-making are transparent, meaning it is accessible for the public. Hereinafter, the operation of the judiciary must not only be independent from the other branches of power, it must also be both transparent and able to be held accountable.

Activities of the justice system are only transparent if both the operation of the courts and court decisions are accessible by and available to the public. Accountability does not refer to impairing judicial independence, but for the courts and the judges to be controlled and monitored if they operate inappropriately, inefficiently, arbitrarily or even unlawfully. If the administration of justice operates in a manner visible to the public, then there is a way to discover operational and decision-making errors and to identify deficiencies in the system – and then to apply the appropriate sanctions. Hence, publicity serves both as a tool for and as an enforcer of the mechanism of control.

8.4 Changes in the Field of Publicity in Justice

8.4.1 The Expansion of Publicity: The Significance of the Limitations of Publicity

As I briefly discussed in the introduction, data from comparative studies suggests that the scope of publicity in justice is increasing, along with the elements of publicity. While before the new challenges and theories appeared, publicity in justice only meant publicity of trials; today publicity also encompasses the disclosure of court decisions and court documents and publicity of data pertaining to the courts as a body of public authority. It seems unquestionable that electronic publicity, the emergence of the Internet, has played the most significant role in the widening of publicity. The Internet provides the opportunity for everyone to access

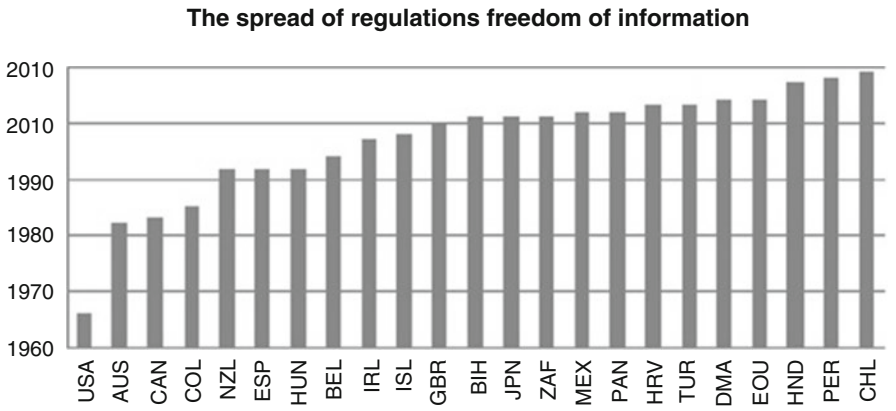
court decisions and documents, regardless of their geographic location, and all this leads to change in the quality of publicity. Therefore, we are not only speaking of the widening of publicity (i.e. the volume of information available concerning the justice is continuously increasing) but also of the transformation of the quality of publicity. In contrast to the momentary publicity granted by an open trial, electronic publicity means public memory – rendering publicity timeless. Court decisions and documents published on the Internet can be searched at any time, because as we know, the Internet does not forget. In addition to the element of timelessness, the fact that information published on the Internet can be accessed from anywhere – regardless of geographic location and without the need for physical presence – has also led to the transformation of the quality of publicity. This means that decisions electronically published by national courts have become accessible even to citizens of other nations. Though it cannot be foreseen what the consequences of this abundance of information will be, one thing is certain: the quality of publicity is undergoing transformation, and the system of justice is facing challenges that are continuously forcing the interaction of judicial power. With the transformation of the quality of publicity, judicial power will leave the court house and move away from the system of relationships established by the parties and enter a sphere that is timeless and irrespective of location, which will undoubtedly influence the operation of the judiciary in some way. Paradoxically, as a result of the widening of publicity, the limitations of publicity have gained significance as well. Along with the widening of publicity, the dangers of publicity have also surfaced, reinforcing the statement that publicity in justice is not without limits. The more the publicity of the activities of the judiciary widens, and as more information becomes accessible, the more light will be shed on the unintended negative consequences of publicity, which may strengthen the need for establishing limitations on publicity. Anonymisation (protection of personal data in court decisions and documents) was not difficult when we were considering only publicity of trials; when someone went and viewed an open trial, although he became familiar with the names and personal data of the parties, the information only left a trace in his mind. The situation is different today, when the decision or even the court documents can surface on the Internet. Thus, the changes here do not affect the power of the judiciary but rather the parties involved. The determination of guilt, and electronic disclosure of the fact, can result in, for example, the convicted offender to never be freed from the stigma of his criminal record. It is important to note that while the tendency of the widening of publicity appears to be global, the limitations and regulation of publicity paint a slightly different picture. Within the publicity of justice, the protection of personal data, the anonymisation of published court decisions and documents, can be described as regulatory areas so new that they emerged only as a consequence of the widening of publicity. Through the comparison of national regulations, it can only be concluded that because the problems resulting from greater publicity are similar, the areas that require regulation are also similar. Possible means of regulation and the protection of personal data are difficult to compare, probably because the regulations have not yet cultivated – the change in quality of publicity has just commenced. Therefore, the change is for now only evident in the need for regulation concerning the limitation of publicity.

8.4.2 The Wave of Change in Regulation

By the 1990s, several factors gradually triggered a wave of change in the regulation of publicity in justice. The elements of publicity in justice multiplied, which led more and more national legal jurisdictions to adopt legislation concerning not only publicity of trials but also in the disclosure of court decisions, court orders, court documents and information about the administration of the courts. However, even as a result of the wave of new regulations, we are still not speaking of a uniform regulation system. No country has established a single, new piece of legislation regarding publicity in justice – rather, the regulations have been integrated into already existing legislation.

Based on findings from the study, it can be concluded that the correlation between the spread of regulation concerning the freedom of information and regulation concerning publicity of the courts is a significant determinant, but in addition to changes in the field of freedom of information, the theories of transparency and accountability also contributed to the birth and spread of regulation of publicity. The need that emerged for transparency and accountability provided the theoretical framework for the expansion of publicity, which established the guidelines towards wider publicity. This is how the most important goal of publicity in justice became increasing the extent of publicity, and the most effective tool for achieving this was through regulation.

The underlying catalyst of the wave of change in regulation was thought by comparative studies to have been discovered in the spread of freedom of information. The following graph[2] demonstrates how regulation concerning the freedom of information spread almost virally throughout the world in the 1990s.



[2]Source: from the results of the analysis.

And this spread of regulation impacted publicity in the administration of justice as well. Analysis conducted of Latin American countries revealed that regulation of freedom of information, even if it does not extend to the field of justice, furnishes a general pattern that facilitates the expansion of regulation to the area of publicity in justice and to the development of regulation as well. Therefore, it is easier to determine the regulations concerning freedom of information in publicity of the courts, since the freedom of information establishes a system so clear and unequivocal that only the new regulations need to be integrated into the existing system of regulations. In contrast, the researchers compared lack of regulations concerning the freedom of information to a jigsaw puzzle, where the picture itself from which the puzzle could be assembled was not available. To that end, regulation in the freedom of information concerning publicity in justice ensures that regulations are uniform and systematic and not fragmented.

The study divided the countries having freedom of information into three groups. In the first group of countries (Panama, Honduras, Ecuador and Peru), publicity in justice is subject to freedom of information legislation. The second group includes countries where judicial discretion determines the rules pertaining to publicity, and in the third group, regulation of freedom of information extends to publicity in justice in only some respects. In the first group of countries – presumably as a result of the regulations – rules limiting publicity are specifically detailed, especially in the case of criminal procedures. According to the analysis, in the case of the second group of countries, delegating regulation to the courts does not necessarily lead to greater publicity. This is exhibited in the case of Mexico as well, where public opinion forced the extent of publicity to increase, but only after under the authorisation of freedom of information legislation, the Mexican Supreme Court – under its own jurisdiction – adopted decisions which narrowed publicity in the administration of justice. It can also not be ignored that even though the disclosure of court decisions is the competence of the courts, in the majority of the common law countries and even in some continental legal systems, publicity can still be considered extensive. To delegate the decision to the courts could be unsuccessful if publicity has not yet become a principle in the administration of justice or if the courts sense dangers in publicity, in which case they would rather limit publicity than support its prevalence. In the third group of countries, freedom of information legislation extends to the institutional side of justice but does not regulate publicity in proceedings.

8.5 Similarities in the Regulation of Publicity in Justice

Of the elements of publicity in the administration of justice, the publicity of trials is the area that demonstrates the most similarities in the regulations of different nations. In the case of institutional publicity, the similarities are less compelling, but significant convergence is noticeable in the countries where freedom of information legislation exists. Similarities are the most unsubstantial in the electronic disclosure

of court decisions. In this case, however, it is not the regulations that exhibit similarities but rather the practice of disclosure itself and the actual fact of disclosure. In many cases, the disclosure of court decisions is not governed by legislation but the decided upon by the courts under their own authority.

8.5.1 Open Trial

An open trial is one of the oldest principles existing in the judicial process, which all democratic countries without exception guarantee either constitutionally or in legislation. Open trial means both courtroom publicity and the public announcement of court decisions. In all countries examined, while along a determined set of perspectives courtroom publicity can be limited, the public announcement of court decisions is a rule to which the only exception is, for example, as in Hungarian legislation, cases in which parts of the reasoning of the decision containing data for the protection of which the court has specifically ordered for the trial to be closed may be excluded from publicity. While the specific text of the regulations among national legal orders varies, and while a distinction is not always made between publicity in the courtroom and the public announcement of court decisions, an open trial is guaranteed under legislation in all countries analysed in the study. To that end, an open trial is such an element of publicity in justice that inherently exhibits more than similar regulatory practices, because of its basic conceptual nature.

Just as the positive aspects of publicity, regulations concerning the publicity of trials have also been converging. As a result of similar regulations, the justifications for court-ordered closed trials can be grouped. Closing a trial to the public is possible if it is done so to protect public morality and to maintain order, if it is in the interest of the parties, if public interest so necessitates it and if public health or public safety concerns would otherwise arise. The closing of trials can also be grouped according to whether it is based on the order of the judge, or if the parties have requested a closed trial, and, in addition, according to whether the trial is closed to the media too or to the general public only. Limitations on trial publicity differ in most countries in civil versus criminal proceedings: in general, a broader set of restrictions can be applied in criminal proceedings.

Strong similarities exist across different national legal systems in regulations concerning trial publicity, as well as exceptions to the regulations, and in opportunities available for ordering a closed trial. Regulations are not simply dissimilar; they are downright divergent concerning media presence in the courtroom and even more so concerning the tools used by the media – or more specifically – about audio and video recording.

Similarities in regulations concerning trial publicity stem from the conceptual nature of the topic. The principles concerning the right to a public trial are set out in the International Covenant on Civil and Political Rights, as well as the European Convention on Human Rights. According to the International Covenant on Civil and Political Rights, '[t]he press and the public may be excluded from all or part

of a trial for reasons of morals, public order (order public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children' (ICCPR Art. 14(1)).

The right to a public trial (hearing) and the public announcement of the decision are also defined as fundamental rights under the European Convention on Human Rights. In restricting publicity, according to the Convention, 'the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice' (ECHR Art. 6(1)).

Jurisprudence of the Strasbourg Court reinforces the similarities as well. According to the European Court of Human Rights, the function of public trials is to ensure monitoring of justice through public opinion in as to what extent the right to a fair trial prevails (Pretto and others v. Italy 1983). In the Axen case, the Court explained that 'the public nature of the proceedings serves as the safeguard of a fair judgment, through protecting the person on trial from arbitrary decisions, and ensuring society the opportunity to monitor the administration of justice (. . .) the public nature of the proceedings, along with public announcement of the decision, serves to ensure that the audience is adequately informed, including being informed through the media, as well as to ensure public control over legal proceedings. As a result, it strengthens confidence in the administration of justice (Nagy 2007). The convention does not require publicity of decisions to be in either a written or oral format; therefore both means are acceptable according to the convention' (Pretto and others v. Italy 1983).

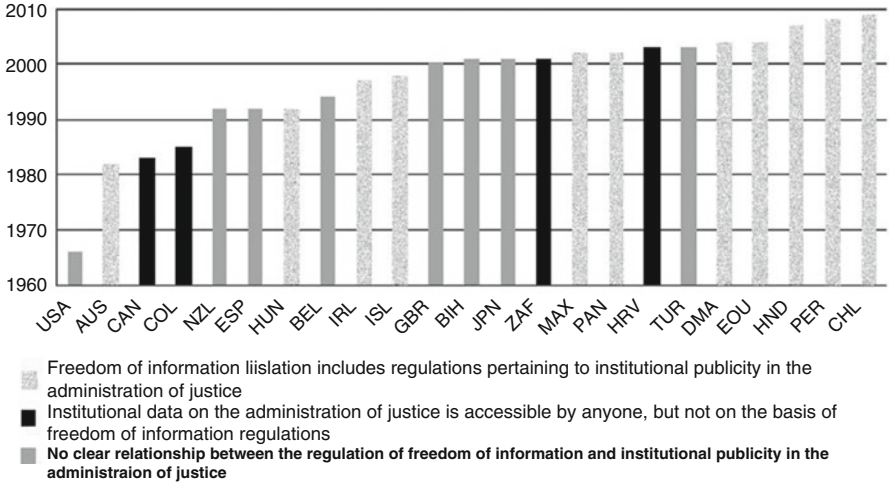
8.5.2 Institutional-Organisational Publicity

The effects of regulation concerning the freedom of information on the administration of justice have already been briefly mentioned, but the relationship between institutional publicity and the regulation of freedom of information is not direct; it is much rather indirect.

Analysis conducted of Latin American countries revealed that in all countries in which freedom of information legislation exists, the judicature also publishes similar institutional data.

In countries where freedom of information legislation is in place, data on the budget of the court, court staff and personnel and the organisational structure of the court are all obligatory information that the judicature must publish. There are also countries that in addition to the information above require the salaries of the court staff and their declaration of assets to be published and accessible for anyone.

The Relationship Between Regulation Concerning Institutional Publicity in the Administration of Justice and Regulation of Freedom of Information



The table above[3] reveals that regulation of freedom of information does in fact influence institutional publicity. In half of the countries analysed, legislation on the freedom of information is what obligates the courts to publish organisational and operational data. The newer a regulation, the more likely this correlation is to be true. At the same time, it cannot be neglected that in many Latin American countries, the establishment of regulation on the freedom of information was the result of pressure from an external player – for example, the World Bank, in an effort to step up against corruption. This also meant that obligation to publish data spreads to the administration of justice as well (Banisar 2006).

Although, in many cases, countries without regulation on the freedom of information (Chile, Argentina, Columbia, Uruguay) publish institutional data on the Internet, the lack of legislation makes determining what information the obligation to publish extends to difficult. The data put forth by the countries without regulation, the published data is much more diverse in comparison to countries where the freedom of information is governed by legislation. In Argentina and Columbia, access to institutional public data is widespread even without regulation.

In contrast to specific organisational data, information on the selection or appointment of judges reveals great discrepancies. While many court websites publish regulations on the selection or appointment of judges, the names and resumes of candidates are public in very few countries. Of course there are exceptions; in Ecuador, for example, during the appointment process the names of the judicial candidates are published on the Internet for 1 week. In Columbia, every decision concerning the selection procedure is public, but the names of the candidates

[3](10) Source: from the results of the analysis.

are not. Argentina, one of the countries granting the most publicity, publishes the schedules of the candidates' hearings, as well as records of the hearings. Regulation also varies greatly concerning publishing information on disciplinary proceedings against judges. Although, in most countries, data on disciplinary proceedings is not published, in Argentina, Columbia and Mexico, even this information is accessible.

8.5.3 Disclosure of Court Decisions

In this case, similarities arise in practice rather than among the regulations. In all the countries examined, regardless of the regulations, decisions of the superior courts and the Supreme Courts are accessible on the Internet. The United States and Argentina are examples of the few countries in which the entire spectrum (or almost the entire spectrum) of court decisions are published. In most countries (e.g. Belgium, Ireland, Hungary, Columbia, Mexico, Turkey), only decisions of the superior courts and the Supreme Court are published on the Internet. Consequently, in many countries, court decisions are not published in one uniform system but can be searched online according to the given court.

In many countries, publishing court decisions is not a legal obligation. Instead, the courts publish the decisions acting in their discretion. In the common law legal systems, built upon case law (New Zealand, the United States, Australia, the United Kingdom), courts exercise their discretion in choosing to publish court decisions. There are also countries in which legislation obligates the courts to publish decisions: Hungary, Honduras and Mexico. In addition to court decisions, the decisions of the constitutional courts must also be mentioned, which are accessible online in all the countries analysed.

While the similarities in the electronic disclosure of court decisions are not so evident in the regulations, but rather in practice – the European Court of Human Rights does have some type of law development role, supporting the establishment of even wider publicity of court decisions. According to the European Court of Human Rights, the Convention does not require court decisions to be in either written or oral form (Pretto and others v. Italy 1983), and Article 6 does not require the publicly announced court decision to be published in writing. According to the Court's judgement, anyone with presumptive interest in the case may review or receive a copy of the complete text of the court decisions. And in addition, the Court publishes the most important decisions (Sutter v. Switzerland 1984).

According to the Court, it would be especially important to publish the decisions in collections or databases but has concluded in each case thus far that Article 6 of the Convention does not suggest such a requirement (Z. v. Finland 1997). Appropriately, the Convention only sets forth minimum requirements. However, from the lack of obligations, it should not be assumed that more cannot be expected – for example, obligatory publishing of other legal documents, e.g. first

and foremost, starting with the constitutions of all member states, and obligating the publication of court decisions as well.

However, it should be noted that the lack of obligations concerning the publishing of court decisions was established in accordance with Article 6 of the Convention in connection with the right to a fair trial. So it follows that not making the written court decisions accessible to everyone does not infringe upon the right to a fair trial guaranteed under Article 6 of the Convention. Until now, the Court has overlooked whether such an obligation can be derived from another article or another fundamental right guaranteed by the Convention. Here, Article 10 (Freedom of expression) can be taken into account, from which the Court recently deduced the obligation guaranteeing freedom of information (Társaság a Szabadságjogért v. Hungary 2009). The practice of the Court can thus be interpreted as having added freedom of information as a guaranteed right under the Convention. In light of this, the disclosure of court decisions still continues to remain an open question.

8.6 Differences in the Regulation of Publicity in the Administration of Justice

Interestingly, differences in the regulation of publicity in the administration of justice cannot truly be interpreted along the lines of legal families – in which law comparison plays a major role. Rather, the subject of regulation and the individual elements of publicity serve as the basis for comparison. The differences are not similar either in the regulation of court documents or in regulation concerning media presence in the courtroom, in the common law or continental legal families. In comparing common law versus continental legal systems, the differences can be traced to the mentality of the judiciary, rather than being grounded in the specific rules. While in common law countries, more decisions are left under the discretionary authority of the courts, in continental legal systems, the problem is more often solved through regulation. Publicity is such a deeply rooted and firm principle in common law legal systems, which, although does not always yield wider publicity (e.g. in the case of media presence in the courtroom), generates some sort of proactive approach, as a result of which the courts truly become interactive.

In two areas, regulation of publicity in the administration of justice differs significantly: in the publicity of court documents and in media presence in the court room. The differences in the regulation of the publicity of court documents stem from the fact that this is the newest element of publicity. Regulation is just now developing, so electronic access to court documents does not have a history that could possibly pave the way for unification. Additionally, the sensitivity of data may also play a role in why the widening of publicity in the case of court documents is less noticeable. The media – audio/video recordings – also involves sensitive information, which creates intense conflict between publicity and the personal rights of the parties.

8.6.1 Publicity of Court Documents

In different countries, the regulations and practices are contradictory in the publicity of court documents, and it is difficult to find similarities in regulations. For example, in Ecuador, all court documents are public but can only be accessed through the archives of the courts, and they are not published online. In Australia, publicity of court documents differs from court to court, since the courts decide on this under judicial discretion. In many cases, the regulations are not clear enough. In Belgium, for example, legislation guarantees access to information of public interest, but only certain court documents are subject to this law. By contrast, in Canada, no legal requirement exists, but courts established their own practice of publicity in justice, through elaborating on the principle of publicity. However, this does not ensure adequate means for access to the public, because in most cases, the documents are only accessible in printed form. Regulations concerning the disclosure of court documents are generally set forth within the laws of procedure. Because of the special nature of the documents, regulations concerning the disclosure of court documents demonstrate significant discrepancies. Access to court documents is influenced by multiple factors, for example, whether the court documents concern a closed case or a pending case, or whether a civil case or criminal case is concerned, and whether the documents are accessible in print or electronic format.

In all the countries analysed, court documents concerning cases still under trial are accessible only by the parties. In Argentina, Mexico, Sweden, Japan and Ecuador, they allow public access to court documents for all closed cases. In half of the states in the United States, a portion of court dockets are accessible online for a fee. In the United States, federal court documents are accessible by the public through PACER (Public Access to Court Electronic Records), which is a database containing docket information of the US courts of appeals and bankruptcy courts. The basic principle of the regulation (since 1 November 2004) is that all documents that are accessible by the public in print format in the court building must be accessible in electronic format online for 1 year from the date of the decision (Pap 2009).

Country	Documents of civil proceedings	Documents of criminal proceedings
Argentina	Accessible by anyone	Accessible by anyone
Uruguay	Accessible by anyone, only inside the court building	Accessible by anyone, only inside the court building
Mexico	Accessible by anyone, only after the decision is final	Accessible by anyone, only after the decision is final
Sweden	Accessible by anyone, only after the decision is final	Accessible by anyone, only after the decision is final
Japan	Accessible by anyone	Accessible by anyone, only after the decision is final

(continued)

(continued)

Country	Documents of civil proceedings	Documents of criminal proceedings
Ecuador	Accessible by anyone, from the court archives	Accessible by anyone, from the court archives
Turkey	Accessible by anyone	Not accessible
Great Britain	Accessible by anyone	Not accessible
Chile	No regulation	Accessible after a period of 5 years
Peru	Accessible for a fee	Not accessible
Hungary	Accessible if well-founded legal interest is established	Not accessible
Columbia	Not accessible	Not accessible
Dominican Republic	Not accessible	Not accessible
Panama	Not accessible	Not accessible

The table above[4] shows how significantly regulations in each country differ from one another. In the table, the countries are listed in descending order according to the degree of publicity granted in each. That is, the countries listed in the top rows of the table ensure the greatest extent of publicity, while those at the bottom offer none whatsoever. There are fewer countries in which publicity can be said to be full – where all court documents of both civil and criminal proceedings are accessible – than countries in which no court documents are disclosed. Therefore, in the case of disclosure of court documents, the publicity expansion process is still quite unnoticeable. The degree of publicity is generally narrower in criminal proceedings, in comparison to civil proceedings. Criminal proceedings generate a great deal of sensitive information, so providing access is more difficult, because the possible negative consequences of publicity must also be taken into account.

8.6.2 Media Presence in the Courtroom: Expanded Media Coverage

Although in theory, media presence and audio and video media coverage of a trial are considered to be a part of trial publicity, since the media representatives follow the events of the procedure inside the courtroom while abiding by the regulations and limitations to publicity. Nonetheless, it is my opinion that media publicity should be a separate and independent element within publicity in the administration of justice. Media presence in the courtroom is another aspect of publicity. Press reports assure that the public is widely informed of the legal proceedings. The public can become acquainted with the most important elements of the trial through

[4]From the results of the analysis.

the intermediary function filled by the press, without actually being present in the courtroom. The public at large can gain knowledge of the proceedings, as well as the decision, through the filter of the media.

In most countries, audiotaping and videotaping of the trial are restricted (Voermans 2007). In some countries, for example, in Great Britain, the law prohibits videotaping in criminal proceedings, as well as audio recording without express permission from the court. Expanded media coverage is prohibited in France as well. In Italy, audiotaping and videotaping are permitted, but only with authorisation from the court and the parties. This is also the case in Hungary, with the exception that audio and video recordings can be made of members of the court, of the court reporter and of public officers without authorisation. In the United States, the regulations vary from state to state, but in many cases the courts establish their own rules concerning media coverage – as a result of which legal practice in the individual states is quite fragmented.

In many countries, media publicity is not governed by legislation but instead under the discretionary authority of the judiciary. Generally, audio and video recording in the courtroom may be prohibited on two grounds: either because the presence of press disturbs the maintenance of court order or on the grounds that it violates personal rights.

There are countries in which the court may revoke authorisation, for example, in Hungary. And there are countries (e.g. Holland and Germany) in which recording is restricted to only permit recording at the start of the procedure and during the deliverance of the court's decision. Some countries also have restrictions on movement in the courtroom: only fixed, mounted cameras are permitted. Certain countries not only regulate the audio and video recording, but in some cases quality of reporting as well: in Denmark, according to regulations, the information reported by the media cannot be one sided; it must be honest and objective.

8.7 Publicity of the Administration of Justice in Hungary

In Hungary, publicity of the administration of justice is regulated by several separate laws. As elsewhere, in Hungary, the regulation concerning freedom of information in general has advanced the publicity of the administration of justice since online accessibility of court decisions was first provided for by the law on freedom of information. The expansion of publicity at different levels has occurred in accordance with international trends.

Even though at first glance Hungarian regulation seems to be fragmented, it is not incoherent. The principles related to the publicity of court decisions and hearings are included in the laws on civil and criminal procedures, while the law on the structure and administration of courts provides for the anonymous publication of court decisions. The freedom of research is regulated by the law on archives and a decree on the rules of administrative procedures at courts.

The principle of the publicity of court hearings is applicable as a general rule with some exceptions as provided for by the international agreements mentioned above and ratified by Hungary. Access to information related to the institutional and organisational structure of courts is regulated by the freedom of information act. The scope of publicly accessible data is quite large; however, they mostly relate to financial and budgetary issues – data concerning the selection and appointment of judges and disciplinary procedures are not made public. This might be due to the fact that since 2012 the appointment of court superiors is the exclusive prerogative of the President of the National Office for the Judiciary (NOJ). Since 2007, court judgements must be made accessible free of charge within 30 days after finalising the written version. Publication of the decisions by higher courts on the merits as well as some of the decisions in administrative procedures (together with the administrative decisions under review) is compulsory. In accordance with international trends, not all court decisions must be published: decisions by lower courts are not included, even though court presidents may order their publication if they deem them necessary. Court decisions are published in an anonymous form; thus, the name and residence of the parties are erased.

Hungary adopted its freedom of information act quite early, in 1992. This regulation marked the beginning of a moderately long process that by 2007 eventually fully aligned Hungary's laws to relevant international standards as regards publicity of the administration of justice.

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Chapter 9
'Not Twice for the Same': Double Jeopardy Protections Against Multiple Punishments

A Comparative Analysis of the Origins, Historical Development and Modern Application of the Ne Bis In Idem Principle

Péter Mezei

9.1 Introduction

The corpse of Julie Hogg – who disappeared in November 1989 – was found by her mother 3 months later hidden behind the bath panel of the woman's bathtub. The English authorities suspected the girl's boyfriend, William Dunlop, as being the perpetrator of the murder. Dunlop was acquitted even after two jury procedures in 1991; as such, he was declared 'not guilty' in the charges.

However, Dunlop, who was sentenced to imprisonment because of another unrelated crime, confessed to lying in the former procedure and admitted that he was in fact the one who had killed the young girl.[1] As soon as the prosecutor learned about this, he initiated a criminal procedure against Dunlop for perjury, and when he was found guilty he was sentenced to a further 6 years in prison.

In 2005, the Court of Appeals reopened the Dunlop file – based on the motion by Ken Macdonald, the Chief Prosecutor at the time – and on 16 June 2006, William Dunlop was sentenced to life in prison for the murder of Julie Hogg (Slapper and Kelly 2010).[2]

The outcome of the Dunlop case may have brought relief for many, especially for the relatives of the deceased. However, an intriguing question may emerge for lawyers: does the decision made by the Court of Appeals violate the prohibition

[1] 'I have accepted that I have problems and I have spoken with the Prison Doctor and I have admitted that I was responsible for the death of Julie H. I stood trial at Newcastle Crown Court for her murder and was acquitted. I denied the offence and I accept that I lied.' See R v. Dunlop [2006] *EWCA (Crim)* 1354, point 10.

[2] The convict has to serve at least 17 years from the punishment.

P. Mezei (✉)
Faculty of Law, Institute of Comparative Law, University of Szeged,
Rákóczi tér 1, 6722 Szeged, Hungary
e-mail: mezei@juris.u-szeged.hu

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of double procedure? Based on English Law currently in effect, the answer is *no*. The present study attempts to compare the application of the procedural limitation (procedural obstacles) known classically as *ne bis in idem* or known as *double jeopardy* in Anglo-Saxon laws, i.e. the legal system of the United States, as well as in the practice of the European Court of Human Rights (ECHR) and the Court of Justice of the European Union (ECJ). In addition, the study also provides an outlook on the legal system of Great Britain. The interesting aspect of the latter is the fact that although Great Britain is a party to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter as European Convention on Human Rights), it has yet to sign its relevant protocol. Similarly, although it is a member of the European Union, it is not a member of the Schengen Area. Consequently, this situation provides a very good example of the national regulation and application of the 'double jeopardy' principle.

Based on the above-mentioned issues, the structure of the study is as follows: Chapter II provides a brief presentation of the history and development of the *ne bis in idem/double jeopardy* principle, followed by the presentation of the 'philosophy' (legal policy principles) behind the principle in Chapter III. Chapters IV and V concern the application of legal principles in ECHR and ECJ case law. Chapter VI briefly summarises a special interpretation of the doctrine by the Hungarian judicature. Chapter VII introduces the development of the double jeopardy principle in the US legal system. Chapter VIII provides a comparison of how the basic principles outlined in Chapter III are manifested in the judicial practices of the courts analysed in this study. Finally, we will review the unique British approach to the issue.

9.2 The History and Development of 'Double Jeopardy'

The prohibition of double procedure or punishment is not a modern legal institution to such an extent that it was already referred to in ancient Greece and the Roman Empire, and even the Old Testament and the Talmud contain texts referencing it (Rudstein 2005:197–199). In 355 B.C., Demosthenes said 'the laws forbid the same man to be tried twice on the same issue' (Against Leptines 1930). The principle known in continental European law as *ne bis in idem*[3] was later recorded in the early period of the Roman Republic[4] and eventually became part of the 'Digest' as well.[5]

[3]This term is sometimes used as the *non bis in idem* principle, and the European Court of Human Rights uses both versions.

[4]'An acquittal by a magistrate in a criminal prosecution barred further proceedings of any kind against the accused.'

[5]Dig. 48.2.7.2.: 'Isdem criminibus, quibus quis liberatus est, non debet praeses pati eundem accusari, et ita divus pius salvio valenti rescripsit: sed hoc, utrum ab eodem an nec ab alio accusari possit, videndum est'. (*Ulpianus libro septimo de officio proconsulis)*. Dig. 48.2.14.: 'Senatus

Among the 'modern' legal systems in existence today, it first appeared in English Common Law. The first recorded application of the *double jeopardy* principle dates back to 1201, but its interpretation could not rest upon consensus for a long time (Coffin 2010:776). Neither the Magna Carta of 1215 nor the Bill of Rights of 1689 referred to it. In spite of this, by the end of the seventeenth century the *autrefois acquit* ('previously acquitted') and *autrefois convict* ('previously convicted') objections were integrated into common law, which was underpinned in the writings of representatives of classic English legal literature (like Coke, Hale and Blackstone) (Benét 1864; Rudstein 2008:233–234; Coffin 2010:776).

In addition to the common law countries, this principle also came into practice in classic European continental law countries. In Spain, the *Las Siete Partidas* codified the prohibition of double procedure into the legal system in the thirteenth century (Rudstein 2007:402).

From the above examples, it is apparent that in some countries, the principle was first recorded in writing as part of judicial practice (customarily in countries with legal systems based on common law), while in other countries this was provided through legislation (in continental legal systems). In relation to the latter, it is important to note that aside from a few old cases, the principle was contained mainly in modern criminal law and criminal procedure laws (Pápai Tarr 2007:101). The 'revolutionary-spirited' France and the United States were chronologically the first to constitutionally acknowledge the *double jeopardy* principle, and both did so in the very same year of 1791.[6] By today, aside from these two pioneers, at least fifty other countries have introduced this procedural guarantee into their constitutions (Bassiouni 1993).[7]

Finally, in the twentieth century the prohibition of double procedure and double punishment became part of the international law. So, for example, relevant provisions are also contained in the *European Convention on Human Rights*,[8] the *International Covenant on Civil and Political Rights*[9] and the *Charter of Fundamental Rights of the European Union*.[10]

censuit, ne quis ob idem crimen pluribus legibus reus fieret' (*Paulus libro secundo de officio proconsulis*).

[6]The above statement needs a little refinement. In 1791, the French revolution was still 'going on'; however, in the United States the *double jeopardy* was recorded as a part of an amendment made for the already drafted constitution.

[7]For example, Germany, Canada, India, Japan, Pakistan or Israel.

[8]Article 4 of the optional Protocol 7 of the European Convention on Human Rights.

[9]'No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.' See Article 14 Paragraph (7).

[10]Article 50.

9.3 The Philosophy Behind 'Double Jeopardy'

The 'double jeopardy' principle is a legal maxim known and acknowledged worldwide (Conway 2003). And although in many instances throughout the study it seems necessary to use the short English term, the application of Hungarian terminology is much more appropriate in this chapter, because it is conceptually more practical. Accordingly, it is equally *prohibited to apply procedures twice for the same act and to punish the perpetrator twice*.[11] The concept needs to be refined further along these lines.

The *prohibition on applying procedures twice* prevents the possibility of establishing the accused party's criminal liability one more time for the same act, regardless of whether the accused was acquitted or convicted in the first procedure or if the procedure was terminated for some formal reason.[12] Consequently, the prosecuting authority cannot use 'tactics', so, for example, cannot withhold certain sources of evidence for later procedures.

However, this general requirement is not without limitations. On one hand, the legal principle does not prevent the possibility that the particular person be held liable for the particular act based on other grounds, which are separate from the criminal procedure. So, for example, disciplinary action can be taken following a criminal procedure against an officer.[13]

Similarly, it is also not conflicting with the philosophy of the principal if after the criminal procedure, the injured party (or the party's family) initiates action for damages against the perpetrator. This is supported by the practice of the *ECJ*[14] and is specifically referred to in Article 103 Paragraph (3) of the German Constitution (Bartha 2005). However, the best example is still the famous *O.J. Simpson case* from the United States. Although the jury did not find the famous athlete guilty in the brutal murder of his ex-wife, a few years later the relatives of the deceased were awarded damages in a lawsuit against him (Badó 2004).[15]

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[11] The Explanatory Report to Protocol 7 of the European Convention on Human Rights provides the briefest summary: 'This article embodies the principle that a person may not be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted (*non bis in idem*).' See Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 117, Art. 4, para. 26. (Hereinafter as Explanatory Report.) See http://conventions.coe.int/treaty/en/Reports/Html/117.htm. (Last view: 30 May 2011).

[12] In the words of the *US Supreme Court*, 'It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.' See North Carolina v. Pearce, 395 *U.S.* 711 (1969) 717.

[13] Explanatory Report, para. 32.

[14] Joined Cases C-187/01 and C-385/01, criminal proceedings against Hüseyin Gözütok and Klaus Brügge [2003], ECR I-01345, point 30.

[15] Partially, the fact that helped the relatives was that the athlete presented the circumstances of the victim's death in such a realistic manner in his book called *If I Did It* that it made doubts about Simpson's innocence in people who previously trusted it.

Finally, with reference to the legal principle, someone can be subject to prosecution in a given country even if he was already subject to criminal procedures in another country for the same act – given that both countries have legal jurisdiction concerning the act and/or if both countries have interest in the punishment. The most important documents of international law equally support this (Grád 2005:367; Karsai 2007:88–89).[16] However, this cannot be applied to the law of the European Union. Based on the 'Schengen law', if a judge learns that the particular act was adjudged in the territory of another participating member state, and that all the necessary requirements are present, then the second procedure cannot be carried out – otherwise the Union law would be violated.

It is worth noting that the application of the *ne bis in idem* principle does not require a conviction in the second procedure as well. As the relevant rule of the *European Convention on Human Rights* points out, the application of double procedure and the application of double punishment are alternative conditions. The second procedure in itself is a violation of the law regardless of its outcome.[17]

The *prohibition on multiple punishments* is also a joint requirement. If the accused party was legally punished for a particular act, then the same act cannot be taken into account again when applying sanctions in a later criminal procedure.[18] However, this part of the requirement is not violated by such 'double punishments', in which the acting authority applies two separate sanctions for acts that can be separated legally but were committed simultaneously.

Of course, the prohibition on double procedure and double punishment is *a principle not without limitations.* As we could see in the example in the introduction, the English authorities established Dunlop's liability as soon as they learned about his 'confession of committing the crime'. It can be clearly concluded from the example that in 1999, Dunlop was sentenced to 6 years of imprisonment for perjury and not for the previous murder.

The prohibition of 'dual accountability' is also violated by the legal category of recidivism. Consequently, based on this, in a later procedure the criminal record of the perpetrator is considered an aggravating factor by the authorities. The philosophy behind the concept of recidivism is not to punish the perpetrator again for a previous act but in the interest of deterrence to adjudge the new (and newer) actions of a person dangerous to society more strictly. So to this extent, the aggravated punishment of recidivists does not conflict with the principle of *ne bis in idem*.

[16] Among these, see in particular Explanatory Report, para 26–27; Charter of Fundamental Rights Article 50; International Covenant on Civil and Political Rights, Article 14 Paragraph (7).

[17] For its practical support, see Sergey Zolotukhin v. Russia, ECHR Judgement 10 February 2009, points 96, 110. The *US Supreme Court* stated the same already in 1874. See Ex Parte Lange, 85 *U.S.* (18 *Wall.*) 163 (1874).

[18] So, for example, because the second authority found the first sanction too mild.

Rudstein, regarded as an expert of the – Anglo-Saxon – institution of 'double jeopardy', pointed out the following eight circumstances as the basis for the 'philosophy' behind the legal principle:

1. Preserving the finality of judgements
2. Minimising the distress and trauma of the trial process
3. Reducing the risk of an erroneous conviction
4. Protecting the power of the jury to acquit against evidence
5. Encouraging efficient investigation and prosecution
6. Conserving scarce prosecutorial and judicial resources[19]
7. Preventing harassment of the accused
8. Maintaining the public's respect for, and confidence in, the legal system (Rudstein 2007:403–418, 2008:240–256)

With the exception of the fourth point, since European courts do not have jury trials thus rendering this aspect incomparable to other legal systems, the above thoughts seem to be correct on a worldwide scale as well.

9.4 The European Convention on Human Rights and the Practice of the European Court of Human Rights

The Council of Europe is an institution for cultural, legal and political cooperation which aims to protect human rights, the pluralist democracy and the rule of law.[20] Any European country can become member of the Council of Europe with the condition of 'accepting the principle of rule of law, and ensuring human rights and basic freedoms for every individual living under its jurisdiction'.[21]

Another aim of the Council of Europe is to provide support in concluding human rights agreements (Nagy 1999). The most well-known such agreement is the *European Convention on Human Rights,* which was adopted in 1950 and came into effect 3 years later. The agreement makes it mandatory for the participating countries to ensure the fundamental rights listed in the convention for all individuals living under the jurisdiction of the country (i.e. not only the citizens). Among others, the enforcement of these rights is a task of the *ECHR.* The court is headquartered in Strasbourg and has the same number of judges as the Council of Europe has members. The governments of the member states provide recommendations for the judicial positions (there may be three applicants); however, it is the Parliamentary Assembly of the Council of Europe that makes the final decision. Any private person

[19] Rudstein means here that the little resources of the police and the prosecution should not be wasted for bringing newer and newer procedures against people already acquitted.

[20] See http://www.europatanacs.hu/index.php?workSpace=pages&id=40&langId=1#2. (Last viewed: 30 May 2011).

[21] See http://www.europatanacs.hu/index.php?workSpace=pages&id=40&langId=1#1. (Last viewed: 30 May 2011).

can turn to the *European Court of Human Rights*, and the judgements concluded in the procedures are obligatory for all member states. The Committee of Ministers is responsible for monitoring the implementation of judgements in which infringement was established.[22]

Article 4 of (optional) Protocol 7 (hereinafter as Article 7-4) of the *European Convention on Human Rights* contains the prohibition of double procedure or double punishment. This protocol came into effect on 1 November 1988. As such, it can be concluded that prior to 1 November 1988, the member states of the Council of Europe had their own practices and that the practice of the Strasbourg court only has a brief history. It should be pointed out that because of its optional nature, not every member state of the Council of Europe signed the protocol. Five member states of the European Union decided this way: Belgium, Germany, Spain, the Netherlands and the United Kingdom. However, those countries that did sign the protocol began moving towards a unified interpretation, as a result of the control of the European Court of Human Rights.

The above-mentioned Article 7-4 is as follows:

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
3. No derogation from this Article shall be made under Article 15 of the Convention.

The case law of the *European Court of Human Rights* concerning the general rule of Article 7-4 Paragraph (1) has undergone substantial developments in the last two decades. In the first case,[23] an Austrian man named Gradinger caused a traffic accident while intoxicated on New Year's Eve in 1988, in which the innocent party died. The regional province court of St. Pölten only imposed a pecuniary penalty against the suspect, because although the act was committed under the influence of alcohol, his blood-alcohol level did not exceed the legal limit (.08 ‰ at the time). Shortly after this, the government administration authority of St. Pölten, based on its own expert's opinion, determined that the blood-alcohol level 'must have been' above 0.95 % at the moment of the crime. Consequently, the authority imposed a fine against the perpetrator for the violation of traffic rules.[24] The *European Court of Human Rights* pointed out that the primary objective of Article 7-4 is to prevent the

[22] See http://www.europatanacs.hu/index.php?workSpace=pages&id=45&langId=1. (Last viewed: 30 May 2011).

[23] Gradinger v. Austria, ECHR Judgement 23 October 1995.

[24] For the detailed facts and the presentation of the national procedure, see Gradinger, points 6–11.

possibility of initiating a new procedure against an individual for the same action for which a previous procedure has been closed finally.[25] According to its opinion, the blood-alcohol-level issue was cleared in the procedure of the St. Pölten court, and therefore, a new evaluation by government administration of the same issue clearly conflicts with Article 7-4. As a result, the Court ruled against Austria for violation of the supplemental protocol. [26]

The *European Court of Human Rights* further detailed the interpretation of the prohibition on double procedure in the *Oliveira case*.[27] In this case, a Swiss resident caused a traffic accident when he collided with two vehicles after each other, due to driving at the wrong speed on the icy, slippery road; the driver of the second vehicle sustained serious injuries in the accident. As a result of the perpetration, the acting authorities determined Oliveira's criminal liability in two separate verdicts: one for reckless driving and one for negligent physical assault.[28] According to the *European Court of Human Rights*, based on the Swiss legal system, the particular act of the perpetrator resulted in two separate violations of the law (*concurs idéal d'infractions*, *Idealkonkurrenz*), so a separate trial for each – even if it may not be practical in every way – does not violate Article 7-4. In other words, the perpetrator was not tried for the same act twice but *was tried in separate procedures for two separate violations of the law*.[29]

These two verdicts – even if only minimally – may have led to misunderstanding, so the *European Court of Human Rights* developed a third, even more refined interpretation. In another Austrian case of *Franz Fischer*,[30] the petitioner caused a deadly traffic accident under the influence of alcohol (he ran over a bicyclist), and although he reported the accident to police later that evening, he had fled the scene without providing assistance. This time it was the government administration agency of St. Pölten who made the decision first, according to which Fischer was fined for endangering traffic on a public road. A few months later, the regional provincial court sentenced the perpetrator to 6 months imprisonment for causing a traffic accident.[31] Fischer was exasperated that a procedure was initiated against him twice, so he brought the case to the *European Court of Human Rights*. Here, the Austrian state referred to the *Oliveira case* while the petitioner referred to the *Gradinger case*. The *European Court of Human Rights* supported the *concurs idéal d'infractions* decision of the *Oliveira case* but pointed out that the crucial issue is whether the two violations of law have the same essential elements.[32] Because

[25] Gradinger, point 53.

[26] Gradinger, points 54–55.

[27] Oliveira v. Switzerland, ECHR Judgement 20 July 1998.

[28] For the detailed facts and the presentation of the national procedure, see Oliveira, points 6–15.

[29] Oliveira, points 26–27. For similar argument, see Göktan v. France, ECHR Judgement 02 October 2002, points 51–52.

[30] Franz Fischer v. Austria, ECHR Judgement 29 August 2001.

[31] For the detailed facts and the presentation of the national procedure, see Fischer, points 7–11.

[32] Fischer, point 25.

the Austrian national rules relating to the violation of traffic rules and to causing traffic accidents essentially sanctioned the violation, the court ruled in favour of the petitioner.[33]

However, the 'idem' part of the *ne bis in idem* principle was still not in its final form at this time. In a quite recent decision, in February 2009, the Court in Strasbourg clarified (you could say 'overruled') the previous three trends and established a fourth interpretation method.[34] The court stated that the text of the *European Convention on Human Rights* is to be interpreted in accordance with its goals and in light of the principle of efficiency.[35] As such, it stated that the *Fischer thesis* was too restrictive on the rights of private individuals, because in this way it may be possible for *the defendant to be held liable twice without any difficulty based on legal violations classified by the legislator as having different legal content*.[36] Consequently, the court stated that Article 7-4 prevents a second procedure from being initiated for a crime *based on the same or substantially the same facts as the previous procedure*. The Russian authorities found the petitioner Zolotukhin guilty in 'minor disorderly conduct' of the Code of Administrative Offences; however, they retried him later in the charge of 'disorderly conduct' of the penal code. The basis for both charges was the fact that Zolotukhin – after entering a restricted military base with his girlfriend under the influence of alcohol – was taken to the police where he verbally insulted the police officers, spitted upon them and once hit them while threatening with killing them at the police department and during his transfer to the detention facility and also attempted to leave the room without permission.[37] Based on the specific case, the *European Court of Human Rights* applied this principle and established a violation of Article 7-4.

Based on a synthesis of the above opinions, the general rule of the 'ne bis in idem' principle in the practice of the European Court of Human Rights is not to prohibit the separate evaluation of the different crimes based on the same act but to prohibit separate procedures for the same act that are based on absolutely identical or substantially the same facts (Grád 2005:368). Based on these, if an actual act

[33] Fischer, point 29. Later, the *European Court of Human Rights* supported this theory in further five legal debates (all related to the violation of traffic rules and causing road accident or endangering traffic on public roads) from Austria. See W.F. v. Austria, ECHR Judgement 30 May 2002; Sailer v. Austria, ECHR Judgement 06 September 2002; Stempfer v. Austria, ECHR Judgement 26 October 2006; Hauser-Sporn v. Austria, ECHR Judgement 23 May 2007; Schutte v. Austria, ECHR Judgement 26 October 2007.

[34] 'While it is in the interests of legal certainty, foresee ability and equality before the law that the Court should not depart, without good reason, from precedents laid down in previous cases, a failure by the Court to maintain a dynamic and evaluative approach would risk rendering it a bar to reform or improvement.' See Zolotukhin, point 78.

[35] 'The provisions of an international treaty such as the Convention must be construed in the light of their object and purpose and also in accordance with the principle of effectiveness.' See Zolotukhin, point 80.

[36] Zolotukhin, point 81.

[37] Zolotukhin, point 82.

violates two, clearly separate and different legal provisions, then adjudging these in [two] separate procedures does not conflict with Article 7-4. This argument was further supported in cases in the 2 years following the adoption of the Zolotukhin decision.[38]

Paragraph (2) of Article 7-4 restricts the general rule of Paragraph (1) of Article 7-4 within stringent boundaries. According to this, if 'new or newly acquired facts or basic errors of the procedure have an impact on the adopted decision because of their nature, then the national criminal laws or criminal procedural laws of the particular country may enable a new procedure'.

With relevance to case law, the *Nikitin case* is the most important element of the *European Court of Human Rights*.[39] In this case, the Russian authorities initiated a procedure against a former member of the Russian Navy for treason, espionage and other serious crimes. According to the court in St. Petersburg, the indictment was confusing and prevented the court from actual inspection of the case, which put the defence in a disadvantaged position. Because of this, the court obliged the prosecutor to amend the indictment. Since the prosecutor failed to do so, the court found the defendant innocent on every charge. The acquittal was approved by the Supreme Court as well. Shortly after this, the Russian prosecutor general submitted a motion for a review process to the Supreme Court, which it denied, but [the motion] was found grounded by the Constitutional Court. The defendant in the procedure found that the decision of the Constitutional Court violates Article 7-4, and so he turned to the *European Court of Human Rights*.[40]

The court in Strasbourg divides its analysis into two parts: it is necessary to analyse [1] whether the requirements of Paragraph (1) Article 7-4 exist and [2] whether Paragraph (2) of Article 7-4 is applicable in this particular case. The judges answered the first question with 'no', since according to Russian law, the prosecutor's motion for review 'ab ovo' excludes the possibility that the basic case be finally closed. Furthermore, it is a conceptual requirement of Paragraph (1) Article 7-4 that a second procedure be initiated, but thus far, that had not happened yet.[41] The second question was answered with 'yes', since according to Russian law, the prosecutor general has a statutory right to reopen the trial based on new or newly acquired evidence or with reference to basic procedural errors.[42] Later, the *European Court of Human Rights* further strengthened this argument in the *Xheraj decision*.[43]

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[38] Ruotsalainen v. Finland, ECHR Judgement 16 September 2009, points 48–57; Maresti v. Croatia, ECHR Judgement 25 September 2009, points 62–69; Tsonyo Tsonev v. Bulgaria, ECHR Judgement 14 April 2010, points 51–52.

[39] Nikitin v. Russia, ECHR Judgement 20 July 2004.

[40] For the detailed facts and the presentation of the national procedure, see Nikitin, points 7–21.

[41] Nikitin, points 38, 41.

[42] Nikitin, points 45–46.

[43] Xheraj v. Albania, ECHR Judgement 01 December 2008, points 69–74.

9.5 The Practice of the European Court of Justice

Concerning the European Union, the application of the *ne bis in idem* principle is enabled by Articles 54–58 of the [Schengen acquis] convention implementing the Schengen Agreement,[44] for which the legal basis is provided by Articles 31 and 34 of the Treaty on the European Union (Karsai 2007:89–90).[45] Consequently, the *ECJ* (previously as *CJEU*) was granted preliminary ruling jurisdiction in bringing decisions about member states' issues related to our topic.

The most important provision related to the 'ne bis in idem' principle can be found in Article 54 of the CISA: 'A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party'.[46]

Taking into account that the *ECJ* decided by 'autonomous interpretation in its context' of the above-quoted article, the substantial elements of the *CISA* provision are to be inspected in the light of the ECJ practice (Karsai 2007:92).

1. The first such conceptual element is the *person*. Although the *CISA* provides obvious wording in this field, the *ECJ* sharpened the interpretation of the term further in the *Gasparini case*. According to the facts in this case, the Minerva Corporation exported refined olive oil to Portugal without reporting it to customs authorities and through using a forged billing system made the false impression that the oil originated from Switzerland.[47] The second of the questions brought to the *ECJ* sought to answer the question of whether the statute of limitations established by the court of a member state for a given crime advantageously effects the position of further defendants who are being tried in other member states for the very same act.[48] Of course, the *ECJ* answered 'no', since the *CISA* clearly stated that the *ne bis in idem* principle provides protection only for those private persons whose act was adjudged in the first procedure. No one else can gain an advantage through referring to the previous decision.[49]

[44] Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (hereinafter as *CISA*).

[45] This was set forth in decision 1999/436/EC of the Council of the European Union.

[46] Article 50 of the Charter of Fundamental Rights is and equally important source of the procedure of the ECJ. According to this, 'No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law'.

[47] C-467-04, Criminal proceedings against Giuseppe Francesco Gasparini and Others [2006] ECR I-09199, point 16.

[48] Gasparini, point 20.

[49] Gasparini, points 34–37.

2. The *same act* ('idem') term in the practice of the *ECJ* – similarly to the final interpretation-direction adopted by the *European Court of Human Rights* – can be paralleled with the *material acts* of the case.[50] Material acts are a 'set of concrete circumstances which are inextricably linked together in time, space and subject'[51] that must always be decided upon by the courts of the member states. If the courts of the member states are faced with such a linked chain of acts, then the decision made in light of these 'material acts' serves to obstruct the initiation of a second procedure in another member state.[52]
3. According to Article 54 of the *CISA,* the basic case can be considered *finally disposed of* if the penalty has been enforced, is currently being enforced or can no longer be enforced. However, the *CISA* does not refer with a single word to the content of the final verdict. Based on this, according to the interpretation of the *ECJ*, Article 54 of the *CISA* can also be applied in cases in which the defendant was sentenced to *suspended imprisonment*[53] and even in cases where the defendant was finally acquitted because of the *lack of evidence*[54] or because of the *lapse of the limitation period of the crime*[55] or if the person involved in the procedure *fulfilled the obligation imposed on him/her by the verdict*.[56]

However, the *ECJ* discernibly indicated that custody and pre-trial detention are not considered such imprisonment that would violate the *ne bis in idem* principle, because these cannot be considered sanctions made in 'finally' decided cases.[57] The *ECJ* also denied referring to Article 54 of the *CISA* in connection with judicial decisions brought with regard to prosecution in another member state who

[50] Gasparini, point 54; C-436/04, Criminal proceedings against Leopold Henri Van Esbroeck [2006] ECR I-02333, point 27; C-150/05, Jean Leon Van Straaten v Staat den Nederlanden and Republiek Italië [2006] ECR I-09327, point 41; C-288/05, Jürgen Kretzinger v Hauptzollamt Augsburg [2007] ECR I-06441, point 29; C-367/05, Criminal proceedings against Norma Kraaijenbrink [2007] ECR I-06619, point 26.

[51] Van Esbroeck, point 38; Kretzinger, point 34; Norma Kraaijenbrink, point 27.

[52] In the Van Esbroeck case, a Belgian citizen was sentenced to imprisonment in Norway for importing drugs. After a part of the punishment was served, Van Esbroeck was escorted to Belgium where a trial was brought against him for the charge of illegal export of drugs (see Van Esbroeck, points 14–15). The Kretzinger case was about illegal exportation of tobacco products and consequently about illegal importation of it to another member state (see Kretzinger, points 14–17).

[53] Kretzinger, points 38–44.

[54] Van Straaten, points 54–56.

[55] Gasparini, points 23–26, 33. The ECJ pointed out that the harmonisation of the limitation periods did not happen (so theoretically, it can happen apart from the above example in any case that a crime is already over the limitation period in one member state while not over the limitation period in another member state). However, the application of Article 54 of the CISA does not require any harmonisation of the legal systems. See Gasparini, point 29.

[56] Gözütok-Brügge, point 30. According to the judgement of the court, such obligation is, for example, if the person under trial paid a certain sum to the state treasury or some public institution. See Gözütok-Brügge, point 22.

[57] Kretzinger, points 49–50.

retracted from initiating criminal proceedings against the same perpetrator for the same act – namely, because the case of the individual involved in the procedure is not considered finally disposed of.[58] Otherwise, both countries would lose the possibility of making substantial decisions on the criminal liability of the individual involved in the procedure.[59]

9.6 The Ne Bis In Idem Principle in the Hungarian Criminal Law

Although the present study mainly extends to the international and comparative aspects of the ne bis in idem principle, it is worth discussing shortly the special dogmatic issues of the Hungarian criminal law as well. A detailed analysis is not necessary for at least one reason: Hungary is a 'good member' of the international community. Hungary is a signatory of the European Convention on Human Rights, and the country did not exercise its right to derogate from Article 7-4. Similarly, Hungary is a member of the Schengen system. All these mean that the substantive legal provisions and the case law of the Council of Europe and the European Union are equally binding on the country and serve as a guideline in discussing the principle.

However, the issue has already been analysed by several excellent Hungarian professionals (Tóth 2001; Tremmel 2003; Wiener 2003; Karsai 2007:85–101; Pápai Tarr 2007:101–118; Nagy 2008; Belovics 2012:18–19), and the court practice is also extensive in this area. The Supreme Court of Hungary has explicitly declared the importance of the doctrine, as it stressed that 'the prohibition of double punishment equally applies to the evaluation of circumstances relevant to the punishment. Circumstances that have been regulated by the legislators as an element of the bearing of a case or that serve the basis of more serious or lighter classification cannot be considered as mitigating or aggravating circumstances'. [60]

Although the ne bis in idem principle serves the same function as abroad, that is, it prohibits the double use of the relevant facts of the criminal act in the criminal proceeding (Karsai 2007:86), a specific perspective of the principle is discussed partially distinctly by the Hungarian judges than by the above-mentioned international courts. It is incorporated and interpreted within the frames of the *inquisitorial doctrine*. According to Article 2(2) of Act XIX of 1998 on the Criminal Proceeding, 'the court may only ascertain the criminal liability of the person against whom the accusatory instrument was filed, and in the course thereof may only contemplate acts contained in such an instrument'. The above rule serves the basis for the principle of *identity of the acts*. Under this maxim the factual

[58] Gözütok-Brügge, point 30.

[59] Gözütok-Brügge, point 34.

[60] Opinion No. 56/2007 of the Criminal Divison of the Supreme Court.

considerations of the judgement shall be based upon the factual considerations of the indictment. Neither the above-quoted inquisitorial doctrine means nor has the courts ever confirmed that the *identity of the acts* principle shall mean *the verbatim identity* of the judge's and the prosecutor's factual consideration. The work of the judge shall never be a 'copy-paste' activity, since the Act on Criminal Proceedings orders the judge to gather evidence in order to elucidate the true facts thoroughly and completely.[61] This means that 'the factual considerations of the judgment might differ in circumstances like the place, time, mode, instrument, motive, result etc. of the criminal act from those included in the factual considerations of the indictment without infringing the principle of inquisitorial doctrine'.[62] Another decision of the Supreme Court has confirmed that the judgement does not contradict the *identity of the acts* doctrine, if it does not totally cover the facts included in the indictment; however, it encompasses the most important statutory prerequisites of the criminal act.[63] The Supreme Court emphasised in the same decision that courts might even rule against the motion of the prosecutor, since the latter does not bind the judge.[64]

9.7 The Application of the 'Double Jeopardy' Principle in the United States

Because of the influx of English settlers, the *double jeopardy* prohibition was adopted in the Northern American territories long before the United States was founded. Before the Revolutionary War, several colonies provided protection for their citizens against being tried or punished twice. So, it was set forth during the seventeenth century in Massachusetts and Connecticut that nobody can be sentenced twice for the same crime, offence or infraction by Civil Justice (Coffin 2010:777).[65] At the end of the eighteenth century, but still before the foundation of the United States, two further colonies codified this warranty into their constitutions: New Hampshire and Pennsylvania. Aside from these, no other written document existed in the thirteen founding states which prohibited this action. This meant that although the legal regulation of *double jeopardy* started slowly but surely, the application of the maxim spreading as part of English common law was left to the courts. This is underpinned by many verdicts from the eighteenth century.[66]

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[61] Art. 75(1) of the Act on Criminal Proceedings.

[62] Court Decision No. 2005.242.

[63] Court Decision No. 2011.245.

[64] Ibid.

[65] The 'Body of Liberties' can be dated to 1641 in Massachusetts, while in Connecticut the Code of 1650 declared the above warranty.

[66] See, for example, the Hannaball v. Spalding, 1 *Root* 86 (Conn. 1783) case from Connecticut; the Steel, qui tam, v. Roach, 1 *S.C.L.* (1 Bay) 63 (1788) case from Massachusetts; or the Respublica

James Madison suggested the amendment of the Constitution of the Unites States in his famous speech to Congress on 8 June 1789. The Fifth Amendment, which came into effect [among others] in 1791, contains the *double jeopardy* principle. Despite the fact that the principle was now regulated on constitutional level, its practical application remained at the state court level for several decades to come.

In relation to the continuous development of this legal principle, three interesting sub-questions must be addressed. First, it is important to analyse how the judiciary of the United States interprets the constitutionally defined 'same offence [sic]' (i.e. the 'idem') term. Second, related to this issue, it must be discussed how the *Supreme Court* extended the so-called 'collateral estoppel' principle, applied customarily in civil law, to criminal cases. Finally, it is necessary to analyse how the *Supreme Court* extended the principle of the Fifth Amendment – which was thus originally only binding for federal government – to the state courts.

9.8 The Meaning of the 'Same Offence' Phrase

The constitutional definition of the *double jeopardy* is as follows: 'nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb'. Probably the only phrase of this definition that might have provided a reason for serious debate was the *same offence*. The roots of the related argument of the *Supreme Court* date back to the nineteenth century. In the *Morey case,* the Supreme Court of Massachusetts decided that the person who was tried with the charge of *lewd and lascivious cohabitation* can be tried with the charge of adultery as well. According to the argument of the court, although the same evidence must be evaluated in both cases, different sources of evidence are needed to prove the two counts, so as such, the 'two counts' do not rule out one another.[67]

The *Supreme Court* lifted the ratio decidendi of the *Morey case* – related to the illegal trafficking of drugs – to federal level. In the *Blockburger verdict*, the *Supreme Court* stated, '[t]he applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not'.[68]

At this point, it is worth noting that the practice of the *Supreme Court* is in agreement with the stance of the *European Court of Human Rights* in the *Oliveira case*. Another similarity is worth noting between the practice of the *Supreme Court* and the *European Court of Human Rights*. Consequently, the latter does not prohibit the procedure for several violations of the law perpetrated in the same act, but

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v. Shaffer, 1 *U.S.* (1 *Dall*) 236 (Pa. 1788) case from Pennsylvania. Besides, relevant judgements were made in Virginia, New York and South Carolina colonies.

[67] Morey v. The Commonwealth, 108 *Mass*. 433 (1871).

[68] Blockburger v. United States, 284 *U.S.* 299 (1932) 304.

prohibits separate procedures initiated because of the same criminal act by the perpetrator. In 1990, William J. Brennan, a former *Supreme Court* justice, while drafting the *Grady v. Corbin* case attempted to replace the above interpretation of the 'same offence' with a so-called *same conduct* test. Based on this, it would have been impossible to initiate a new procedure in which the prosecution would prove an act for which the defendant had already been tried.[69] However, the *Supreme Court* distanced itself from Brennan's test 3 years later. The *Supreme Court* stated that contrary to the test applied in the *Blockburger case*, the application of the *same conduct* interpretation is inconsistent.[70]

9.9 Collateral Estoppel in Criminal Cases

The principal of *collateral estoppel* rules out the possibility that *previously tried facts can be debated in subsequent trials* (Garner 2005).[71] Traditionally, the courts in the realm of common law refrained from applying this principle in criminal cases.[72] Contrary to this, in 1970 the *Supreme Court* made a decision to fit the *collateral estoppel* principle within the framework of the *double jeopardy* principle.

In the *Ashe case,* four people were charged with armed robbery against six poker players. Contrary to the original plans, the prosecution did not bring charges against the perpetrators for the robbery of all the poker players, but only for the robbery against one of the players. Because of insufficient evidence presented at the trial, the defendants were acquitted. Shortly after the first verdict, the prosecutor brought charges against one of the defendants (Bob Fred Ashe) again, but this time for the robbery against one of the other poker players. The newly presented evidence (which was mainly based on the modified statements of the poker players) convinced the second jury, and Ashe was sentenced to 35 years' imprisonment. However, the *Supreme Court* had integrated the *collateral estoppel* principle into the constitutional warranty of *double jeopardy*. In an 8:1 decision, the justices declared that the evaluation of evidence substantially debated in the previous procedure is prohibited in the second procedure. In other words, the jury should not have accepted the testimony of the robbed poker players in which they identified Ashe as one of the perpetrators.[73]

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[69] Grady v. Corbin, 495 *U.S.* 508 (1990).

[70] United States v. Dixon, 509 *U.S.* 688 (1993).

[71] In accordance with the definition of Black's Law Dictionary, 'A doctrine barring a party from relitigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one'.

[72] So, for example, in the DPP v. Humphreys, [1977] *A.C.* 1 (*H.L.* 1976) case, the House of Lords in the United Kingdom refrained from adopting the principle to criminal cases.

[73] Ashe v. Swenson, 397 *U.S.* 436 (1970).

9.10 Double Jeopardy Becomes a Fundamental Element in the Administration of Justice

The *Blockburger decision* was presented above. Only a few years later, in a verdict drafted by Benjamin Cardozo, the *Supreme Court* stated that the *double jeopardy* principle does not belong to those fundamental principles of American justice administration, which according to the 'due process' clause of Fourteenth Amendment would be mandatory for the states to abide by.[74]

However, three decades later, in the *Benton v. Maryland case*, the winds of change led the *Supreme Court* to take a different stance. John Dalmer Benton was charged with burglary and larceny. The jury did not find the defendant guilty of the latter charge, but found him guilty of burglary, and the judge sentenced him to 10 years' imprisonment. The major turning point in the course of events was when the Maryland Court of Appeals removed the section of the Maryland State Constitution that had set forth a requirement for jurors to take an oath of a belief in God. Because of this unexpected event, Benton had an opportunity to submit a motion for the reversal of the earlier verdict and to request a new procedure. Benton took the opportunity, but the second jury found him guilty of both charges and he was sentenced to 15 years of prison.

Thurgood Marshall, a liberal judge of the Supreme Court, drafted the verdict that was relief for Benton and stated that the *double jeopardy* principle is a fundamental to American justice and to the constitutional customs of the country. *It derives from this that the due process clause of the 14th Amendment to the Constitution also involves this principle, and hence it is mandatory for the states as well.*[75]

9.11 How the Philosophy of 'Ne Bis In Idem' Prevails in the Practice of the European Court of Human Rights, the European Court of Justice and the Supreme Court of the United States

The legal policy goals of the *double jeopardy* principle as collected by Rudstein were presented at the end of Chapter III. His findings were primarily based on case law and legal dogmatics of the United States and other common law countries. Let us briefly examine which, and to what extent, these goals appear in the case law of the three analysed judicial systems.

According to the *Supreme Court,* the primary goal[76] of the principle is to preserve the finality of the judgements even if these keep an obviously false acquittal in

[74] Palko v. State of Connecticut, 302 *U.S.* 319 (1937).

[75] Benton v. State of Maryland, 395 *U.S.* 784 (1969).

[76] United States v. Scott, 437 *U.S.* 82 (1978).

effect.[77] In addition, the judges of this court also stated that the prohibition of double trial or double punishment is necessary, because without it, the state – due to its dominant position – could keep individuals under constant pressure.[78] This would be not only financially detrimental for the defendants but also physically, spiritually and mentally. Rudstein pointed out that the common law world adopted the argument of the *Supreme Court* everywhere, according to which sooner or later the defendant – however innocent he may be – would eventually be found guilty if new procedures could be initiated against him again and again (Rudstein 2008:249).[79] The constitutional exclusion of *double jeopardy* also guarantees that in this manner, the investigating authority and the prosecution focus on the first case, on successfully gathering sources of evidence, on finding the real perpetrator and on using their resources in the debated issues awaiting judgement (Rudstein 2008:253–255).[80] Finally, strong support exists for the thesis in legal literature and in the codification works for the legal policy that if the state could bring procedures again and again against individuals until they are defeated, public confidence in the judicial system would be weakened or even destroyed (Rudstein 2008:256).

Of course, it cannot be surprising that many of Rudstein's legal policy goals have not even been slightly mentioned in the decisions of the *European Court of Human Rights* and the *European Court of Justice*.

The only legal policy goal mentioned in *European Court of Human Rights* case law is the goal concerning the finality of judgements ('res judicata').[81] Although as a goal, preventing the harassment of defendants could derive indirectly from Article 3 of the *European Convention on Human Rights*, its direct application has yet to occur in any case. Thus far, only one case can be mentioned where it has emerged, but the acting committee denied this based on substantive legal reason: the disputed 'second procedure' was not actually a second procedure, but a review of the first case in accordance with the law. Consequently, the thought of inhumane treatment could not even be mentioned.[82] Again, without mentioning it as a specific legal policy goal, the *European Court of Human Rights* once pointed out that 'outsourcing' certain procedures initiated against acts of infringement outside

[77] In accordance with the *Supreme Court*, '[I]t is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous'. See Green v. United States, 355 *U.S.* 184 (1957) 188.

[78] Green v. United States, p. 187.

[79] Green v. United States, p. 188.

[80] These interests were supported by the Australian, New Zealand and English codification materials.

[81] However, this appeared in almost all related judgements. To be exact, a total of seven judgements referred to the 'res judicata' term – Gradinger, point 53; Oliveira, point 22; Nikitin, point 35; Xheraj, point 70; Zolotukhin, points 83, 107; Ruotsalainen, point 44; Maresti, point 62 – besides the above-mentioned ones, further three judgements referred to the interest for the finality of judgements – W.F., point 23; Sailer, point 23; Göktan, point 47.

[82] Nikitin, point 47.

the scope of criminal law, quasi-establishing one's criminal liability outside the criminal procedure, is not possible.[83]

The *ECJ* musters further interesting legal policy goals in its practices in relation to the application of the *ne bis in idem* principle. Each of these is strongly related to the basic philosophy of the European Union as an organisation. According to one recurring reference, the basic principle presumes that 'the Contracting States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied'.[84] The judges also frequently refer to the fact that the task of the *ne bis in idem* principle is 'ensuring that no one is prosecuted for the same acts in several Contracting States on account of the fact that he exercises his right to freedom of movement'.[85] Finally, in the *Van Straaten* case, the following was also mentioned: '... furthermore, in the case of a final acquittal for lack of evidence, the bringing of criminal proceedings in another Contracting State for the same acts would undermine the principles of legal certainty and of the protection of legitimate expectations. The accused would have to fear a fresh prosecution in another Contracting State although a case in respect of the same acts has been finally disposed of'.[86]

The role of the courts involved may provide a clear explanation of the differing legal policy principles referred to by the above-mentioned courts. The *Supreme Court* functions as the highest court in the United States, so the predictability (unity) of its case law serves as a basic requirement of a nation state. By contrast, the task of the *European Court of Human Rights* is 'only' to enforce the basic rights of the *European Convention on Human Rights*, which does not necessitate the application of further rules or any sort of legal development. The role of the *ECJ* is to promote the achievement of the common goals set by the member states of the European Union.

Although the supranational position of the *European Court of Human Rights* and the *ECJ* may seem similar, the specific goals each is set on achieving sharply differ, because of the basic goals of the organisations under which they exist. While the former strives to mainly protect human rights, the latter also aims to uphold the common economic policies of the EU member states. This is the reason for frequent reference to the free movement of people as a legal policy interest. And this further developed the principle of prohibiting double procedure and double punishment in a way that is nonexistent in the other two legal systems analysed: it led to the establishment of the *cross-border ne bis in idem* principle.

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[83] Gradinger, points 49–51.

[84] Gözütök-Brügge, point 33. See also Gasparini, point 30; Vas Esbroeck, point 30; Van Straaten, point 43.

[85] Gözütök-Brügge, point 38. See also Miraglia, point 32; Gasparini, point 27; Vas Esbroeck, point 33; Van Straaten, point 45.

[86] Van Straaten, point 59.

9.12 Pioneer Interpretation: The English Extension of the 'Double Jeopardy' Principle

Before 2003, the *double jeopardy* principle was continuously applied within the framework of English common law, which also meant the application of the 'res iudicata'. It is important to note that the latter sub-element of the principle was overruled several times in the twentieth century. On one hand, a 1964 judicial decision set forth that a defendant cannot be tried in a new procedure again based on the set of facts used in a previous case, unless 'special circumstances' proven by the prosecution make it necessary.[87] Unfortunately, the above-mentioned decision did not elaborate on what the meaning of such special circumstances might be, but English lawyers reason that it may refer to newly acquired evidence.[88]

Conversely, the English Parliament also adopted such statutory provisions, which, in spite of an already pronounced verdict, enabled appeal under special circumstances or for a new procedure to be carried out. Since 1968, a new procedure may be carried out based on an appeal submitted by the convicted, if it is necessary in the interest of justice.[89] In 1980, the prosecution was granted the right to appeal in cases where an acquittal was made in a former summary procedure because of legal error or through exceeding the jurisdiction of justice.[90] Finally, a statute entered into force in 1996, according to which if in a case closed by acquittal, it is later uncovered that [the defendant] tried to attack or intimidate a juror or a witness, then this *tainted acquittal* may be attacked before the High Court (Rudstein 2008:257–288).[91]

Finally, another act was adopted recently, the *Criminal Justice Act 2003 (CJA)*,[92] which enables diverging from the enforcement of the prohibition on double trial in some exceptional cases (Coffin 2010:774). According to the *CJA*, based on the motion of the prosecutor and the written consent of the Director of Public Prosecutions, the *Court of Appeals* may annul a previous acquittal and order for a new procedure to be carried out in cases involving the severe crimes listed in the statute.[93] The Director of Public Prosecutions may give consent only if *new and compelling evidence* is produced against the person previously acquitted, if the initiation of a new procedure is *in the interest of the society* and if *the initiation of the new trial does not violate Articles 31 or 34 of the Treaty on the European Union*.[94]

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[87] Connelly v. DPP [1964] *AC* 1254.

[88] Attorney general for Gibraltar v. Leoni, Court of Appeal [1999] *Law Com CP No. 156*, para 2.24.

[89] *Criminal Appeal Act 1968*, §7.

[90] *Magistrates' Courts Act 1980*, §§28, 111 – *Supreme Court Act 1981*, §28.

[91] *Criminal Procedure and Investigations Act 1996*, § 54.

[92] *Criminal Justice Act, 2003*, c. 44, Part 10, §§ 75–97 (Eng.), hereinafter as *CJA*. Several states of Australia (New South Wales, Queensland, South Australia) followed the example of the *CJA*.

[93] For the list of these crimes, see *CJA*, Part 1 of Schedule 5, points 1–29. For example, homicide (point 1), kidnap (point 5), rape (point 6), drug trafficking (point 18), war crimes (point 25), hostage-taking (point 28) or conspiracy against the state (point 29) belong to this category.

[94] *CJA* §76 (4)(a)–(c).

The Court of Appeals must hold a hearing in which it must be convinced that the newly acquired evidence is [in fact] *new and is compelling*[95] and that *it is in the interest of justice to bring the new procedure*.[96] The evidence is *new* if it was not used in the first procedure,[97] and it is *compelling* if it is important and incriminatory against the person acquitted.[98] In deciding whether it is in the interest of the justice to strike down the previous acquittal and bring a new procedure, the acting judge must take into account the issue of whether a fair process can be carried out under the given circumstances; the time that has lapsed since the alleged perpetration of the crime; whether the given evidence could have been taken into account in the procedure, but was omitted because of error on behalf of an officer or the prosecutor; and whether following the procedure, the officers and prosecutors acted with due diligence and speed.[99]

After the statute was adopted, the above provisions were applied for the first time in the *Dunlop case* described in the introduction. In this case, the court found that the letters Dunlop had wrote and his testimony in another case – in both of which he admitted to murdering Julie Hogg – could on one hand be considered new evidence, because these were not tried in the basic case, and on the other hand be considered compelling, hence increasing the likelihood of Dunlop being guilty.[100] The court noted that homicide is one of the crimes listed in the scope of the *CJA*, and according to its view it is in the interest of justice to exactly clarify a crime of this seriousness; furthermore, the procedure did not conflict with EU norms.[101] Factors to be taken into account in accordance with Section 79 of the *CJA* were all in favour of the new procedure: the evidence and testimonies gathered in the basic case were all preserved, and the time having lapsed since the first procedure had not been so long as to serve as an obstacle to procedure either.[102]

In December 2010, the first such verdict was made, in which based on forensic evidence, a second jury established the guilt of a defendant who had been acquitted in the first procedure. The jurors – after deliberating for 50 min – found Mark Weston innocent on the charge of a 1996 battery which had resulted in a death. When the Thompson file was reopened following the statutory change in 2005, the investigators presented factual evidence to the new jury which had not been taken into account in the original procedure (the shoe of the defendant that was

[95] *CJA* §78 (1).

[96] *CJA* §79 (1).

[97] *CJA* §78 (2).

[98] *CJA* §78 (3).

[99] *CJA* §79 (2)(a)–(d).

[100] R v. Dunlop, points 10–12.

[101] R v. Dunlop, point 13.

[102] R v. Dunlop, point 14. In accordance with the argument of the court, 'The delay is no longer than that which often occurs in trials based on allegations of historic sexual abuse'. See *at the same place.* For Dunlop's objection to the related findings, see R v. Dunlop, point 17. For the court denial of these, see R v. Dunlop, points 19–41.

contaminated with the victim's blood, the victim's bra that was contaminated with the defendant's semen). According to the jurors, in light of the new facts discovered using modern DNA-analysis technology, there was no doubt that Weston was guilty.[103]

In conclusion, it is worth pointing out that based on the above, the British legislator cannot be criticised for either politically or legally 'softening' the *ne bis in idem/double jeopardy* principle. Protocol 7 of the *European Convention on Human Rights* is optional, and the United Kingdom did not sign it. On the other hand, Paragraph (2) itself of Article 7-4 provides the opportunity for exemption from applying the general rule, and the exemption brought under the *CJA* does not conflict with the requirements therein. Finally, the United Kingdom is not a member of the Schengen Area, so the application of Article 45 of the *CISA* cannot be required of the island.

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[103]Related to the *Weston case,* see http://www.bbc.co.uk/news/uk-england-oxfordshire-11982681. (Last viewed: 30 May 2011).

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Chapter 10
The Path to the Waterhole: The Right to Defence as a Fundamental Element of the Fair Trial Principle – A Comparative Analysis of Islamic and European Constitutional Thought

Tamás Sulyok and Márton Sulyok

10.1 Introduction

The primary sources of protections for the right to defence shall be examined on two levels: international (global and regional, transnational) instruments and national constitutions and domestic criminal procedure codes.

Inclusive of these two levels, the scope of research in this analysis extends solely to the examination of relevant international instruments, several national constitutional documents and one part of a national criminal procedure code, that of Hungary, in relation to (precluded) reform efforts aimed at degrading right-to-defence protections. In addition, several references will be made, if appropriate, to corresponding jurisprudence of the ECtHR, in support of our findings.

As promised in the title, the present study should contain arguments based on a comparative analysis of the different national practices in light of the right to defence. There are, however, a few problems with a 'deep-tissue' comparative assessment of the right to defence. Certain opinions (e.g. Jung 1998) in Western constitutional literature assert that any comparative endeavour into the domain of branches of law that involve the examination of criminal law as well raises great expectations in terms of creating the adequate methodology for the conduct of comparison. Correct and revealing comparison is useless without well-defined indicators and reference bases (i.e. criteria). We can only compare more legal systems to one another if we have the necessary assessment criteria for the comparison.

One example: the possibility of having an attorney in our defence in criminal proceedings is a basic human rights requirement for criminal procedure throughout the world. Different domestic legal systems apply different solutions to accommodate

T. Sulyok • M. Sulyok (✉)
Department of Constitutional Law, University of Szeged, Faculty of Law, Szeged, Hungary
e-mail: msulyok@juris.u-szeged.hu

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this prerequisite. In this domain, we cannot limit ourselves to the fact that the accused shall have the right to freely choose counsel, but – eventually – it might all come down to deciding who will pay the lawyer if the defendant is in fact indigent? Moreover, we shall also see how the legal system in question regulates the access to counsel along with the choice of counsel and what actual procedural legal action is legally required from defendants so that they could benefit from their right to defence. We argue that the essential content of the fundamental right to defence lies in the institution of an independent legal profession enabled to act as defence counsel. The regulation of this slice of the legal profession is in fact so diverse globally, so specific to each state, that it renders impossible the presetting of a well-defined and useful set of criteria for comparison. Therefore, we start the compilation of our comparison criteria from the international level working our way down towards the national (constitutional) level.

A detailed examination of criminal procedure laws and of the regulation of lawyers in relation to their capacity as defence counsel would compromise the integrity of the research to be laid out herein; therefore, we omit discussing such aspects and endeavour to create models through which the different approaches to the right to defence could be classified.

In accordance with the regulations examined and compared, the following preliminary conclusion is drawn: *the right to defence exists as a general procedural principle throughout the globe.* In this respect, however, it is important to call attention to the fact that in any state the mere procedural regulation of this right to defence does not allow the conclusion to be drawn per se, that the state and its criminal procedure (as a whole) does in fact comply with the requirements and principles of the right to a fair trial, considered the cornerstones of the rule of law.

Thus, a simple (be it formal) declaration of *the right to defence* does not necessarily result in the conclusion from the rule-of-law perspective that the procedure itself is fair. An *exemple éclatant* of this assertion is the accession of several Muslim states to the international instruments setting forth the right to defence. The mere presence and provision of the right to defence in Islamic criminal procedures, built on Shari'ah law, cannot be interpreted in a way that brings the criminal procedure system as a whole closer to compliance with the requirements of the right to a fair trial (and with the right to defence), under the elements of the general rule-of-law concept inherent to Western constitutional thought.[1]

The Venice Commission interpreted the rule-of-law concept based on the work of Tom Bingham and reiterated that there is consensus on eight core ingredients that need to examined. Of these eight, we hereby enumerate those that are to be considered on the merits in comparing Eastern and Western perceptions of justice under the aegis of the right to defence as part of the right to a fair trial. These are the following: (1) accessibility of the law (that it be intelligible, clear and predictable); (2) questions of legal right should be normally decided by law and not discretion; (3)

[1]A broad-spectrum analysis of principles of adjudication and justice in Islamic countries is provided by Elsan (2010).

equality before the law; (4) power must be exercised lawfully, fairly and reasonably; (5) human rights must be protected; (6) means must be provided to resolve disputes without undue cost or delay; and (7) trials must be fair.[2]

In reflecting on these elements of rule of law in the context of the comparison to be laid out herein, the following need to be declared:

(1) Accessibility of the law – in terms of its intelligibility, clarity and predictability – faces significant challenges in such legal systems that operate a mixture of Shari'ah and customary law, with significant religious influence due to traditions especially in criminal law. The ideological and/or emotional content reflected in the legal provisions through the inherent influence of religion undisputedly affects everyday law-abiding behaviour. Also, it can be argued that religiously influenced norm creation might lead to the application of sanctions that are in fact stricter than legal sanctions created in observing proportionality. In this sense, religion might influence law in that law-abiding behaviour decreases, but simultaneously there is the danger of heavily reinforced and religiously influenced sanctions against decreasing law abidance. In summation of the argument, religious content inherent to Eastern perceptions of justice goes contrary to those standards of rule of law that are held to be unified by Western constitutional thought. Along European or such standards that are inherent to Western constitutional thought, the application and supremacy of religious law is unimaginable. The situation is obviously different in Eastern legal systems influenced by religious or customary law. There is a fine line between these two, a so-called line of stability, which is achieved if the fundamental rights and their guarantees (for our purposes the right to defence) are codified in the constitution. The direction of the development from this line of stability is dependent on a myriad of interdependent factors, be it political, societal, cultural (these two inclusive of religion) or economic.

(2) Religious content also allows for more ways in which discretion can come to the foreground in the application of the law. In other words, religion can be an instrument for the administration of justice. Different approaches to proportionality in religious terms under Eastern perceptions of justice might overbear such perceptions inherent to Western thought. An administration of justice determined by religious principles, one that applies religious traditions, is incompatible with the secular state concept inherent to Western rule-of-law countries. A de facto and de jure implementation of Western rule-of-law standards cannot be interpreted in nonsecular states defined (even if partially) by religious law due to the fact that basic legal tradition necessary for the implementation thereof is absent and it is the only room for declaratory protections. (One simple example: in divorce under Islamic law, the institution of talaq – in certain forms – allows exclusively for men to declare a divorce by merely making one, two or three oral statements to their spouses telling them

[2]Report on the Rule of Law, Page 9, 37. Adopted on 25–26 March 2011. Official Website of the Commission for Democracy Through Law of the Council of Europe. Available via http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e. Accessed 21 Apr 2013.

that they divorce them. The traditional declaration takes legal effect without formal proceedings, legal representation or witnesses, in certain schools of Islamic law.)

(3) Legal systems based in religion and custom are unfamiliar with traditional Western notions of equality. (4) The lawful, fair and reasonable exercise of power can easily be distorted in considering religious implications when applying the law, where emotions might end up overbearing reason. (5) Human rights are protected on the level of words as part of standard setting or legally binding international instruments and sometimes through national constitutions even, but since the letter of the religious code is usually primordial in Eastern constitutional thought, the actual protections for human rights remain inefficient and overpowered by traditional practices led by religious influence. (6) Undue cost and delay are not such factors that could be easily interpreted in the face of religious criminal law, since realising religious commandments to the letter in administering justice spares no time or money. (7) The concept of fairness ringing in the ears of constitutionalists growing up in Western constitutional thought cannot compare to one that is equivalent or even similar to such notions of fairness that are based on religious dogma, however similar their footing might be.

> The lack of human rights in the Islamic and in Particular the Arab World stems not from the presence of Islam but from the fact that the governments have abandoned the only constitutional guarantees that the citizens enjoyed namely the rights enshrined in Sharia [sic!] Law (Daneshyar 2003:1).

We assert that according to Western rule-of-law standards, protections for the right to a fair trial and the right to defence are not guaranteed in Eastern constitutional practice. Therefore, the continued application of Shari'ah law argued by Daneshyar does not amount to better protections of these cornerstones due to the lack of specific, clear, intelligible and unambiguous written rules on regional and on the national level.

The Quran (under al-Ma'idah 5:42) sets forth the following dogma:

> If they come to you [Prophet] for judgment, you can either judge between them, or decline- if you decline, they will not harm you in any way, but **if you do judge between them, judge justly**: God loves the just (Haleem 2004:72).

There is a point in arguing that justness is an inherent quality of traditional legal systems (i.e. customary legal system), heavily influenced by religious beliefs and alternative but indigenous approaches to justice. For example, the institution of the *kadi* is defined as being just. Salamon argues that his or her utmost duty is [to ensure] respect for the parties' statements, to safeguard the legality and fairness of the proceedings and the evidence and to prohibit the admittance of *fasid* (irregular) evidence in the trial; otherwise, his or her judgement is rendered void by such action (Salamon 2003). However, these traditional legal systems cause tensions with international expectations vis-à-vis the respect for fair trial rights and, as such, to the right to defence. There are elements that put justness to the pedestal and attribute a quintessential moral value to it:

> In Islamic law defence was not discussed as a theoretical question but there are different traditions about the behaviour of the Prophet that let us understand that the defendant has

> to be informed about the charges against him. When the Prophet granted Ali governorship of Yemen, he said to him: "O Ali, people will appeal to you for justice. If two adversaries come to you for arbitration, do not rule for the one, before you have similarly heard from the other. It is more proper for justice to become evident to you and for you to know what is right (Tellenbach 2004:934–935).

In order to better highlight some of the tensions mentioned above, it is sufficient to take into consideration the fact that in Islamic procedure law, the burden of proof rests solely on the shoulders of the plaintiff/prosecutor (the party pressing charges), and the one being charged shall not present evidence, but merely deny the charges via a sworn oath, and this is the only obligation that must be complied with. Consequently, the defendant cannot and shall not be obliged to provide evidence in his or her own favour contradicting the allegations of the opposing party (e.g. Salamon 2003:50–51). This principle follows from the words of the Prophet: '*The burden of proof is on him who makes the claim, whereas the oath is on him who denies*' (Tellenbach 2004:933). It is apparent from this example how this whole concept of 'justness' seems strange under the Western approach to the right to defence and the right to a fair trial.

We think that it is meritorious to point out in the above context of denying the individual freedom to act in one's own defence under religious dogma that the Hungarian Constitutional Court (HCC) in its Decisions 8/1990 (IV. 23.) AB [of 23 April 1990] and 1/1994 (I. 7.) AB [of 7 January 1994] has reiterated that the right to decide whether to exercise certain rights in the process of defending one's legal rights originates from the general right to personality as a subsidiary right to the right to human dignity and – as part of it – from a general freedom to act, in terms of having an ability to decide whether to act or not to act (self-determination).

It has been said by the HCC that it is an important element of this right to self-determination that individuals be entitled to enforce their rights as demands in front of state organs, such as courts. Such right shall also encompass the right not to act in the enforcement of individual rights, but serves the protection of individual autonomy. Therefore, the right should also encompass power to freely make a decision whether one intends to resort to the enforcement of their rights in the protection of their legal interest through the channels allowed in the constitution.

This can obviously be assessed as one clear inference to the power of the individual to have constitutional footing in insisting on protections offered by the assistance of counsel in criminal proceedings or choose not to do so. Such an approach of self-determination in terms of the autonomy of defendants in trial is inherent to Western constitutional thought and represents a clear counterpoint to the Eastern practice referred to above in terms of evidentiary proceedings conducted under Shari'ah law.

We must understand that in Islamic legal tradition, the concepts of law and religion completely differ from our Western legal thinking (whether American or European). While usually there is a thick Jeffersonian wall between the two spheres in Western constitutional thought, mainly due to American influences, in Islam, similarly to Judaism, the two concepts overlap; moreover, they are essentially the same. Thus, the notion and conceptual framework of Shari'ah (meaning '*the*

path towards the water hole' (Weiss 1998:17), consequently: *guidance*, *directions*, *religious law*) governs the external relations of devout believers and sanctions their deviances through a network of religious commandments.

Emanating from this interconnectedness, we shall also note that in traditional Islamic training, law and theology are and were never separated; in fact, even nowadays, justice in the Shari'ah Courts is administered by 'theologists'. The greatest experts on religious law are the *mufti*, who can be addressed by anyone against the decision of a *kadi* in religious legal questions. Their legal expert opinion is the *fatwa*, and it serves as precedent as in the common law (Salamon 2003:49, 55). Therefore, we shall not attempt to approach Islamic concepts of a fair trial and right to defence with a Western (European) mindset. Islam lacks the process of *legislatio* in the European sense. Islamic law is not founded on legislation, but on *iurisprudentia*: the studying and knowing of a law that is considered eternal (Dobrovits 1998).

Following the path to the waterhole, with guidance in mind, we shall also mention that the declaration of the right to defence cannot replace other criteria of the fairness of procedures, e.g. [the right to trial under] an impartial tribunal and [the right to] use one's native language. The interconnectedness between Islamic law and religion is present in Europe as well, namely, between the right to a fair trial and the right to defence. This interconnected relationship can be construed from the jurisprudence of the European Court of Human Rights (ECtHR), but it cannot be simply described by applying the holistic principle 'the greater includes the less'[3] – not even by the relation of the whole and its parts. It stems from the fact that the fairness of the proceedings is a standard that cannot be assessed on a case-by-case basis, merely by an exhaustive list of procedural rules and principles observed. Even if this list of principles and rules is complied with, we still cannot simply conclude that the proceedings are automatically fair, nor can we claim that the procedures are not fair, should the list (or part of it) be disregarded. This is a qualitative approach to the right to fair trial which includes the evaluation of the right to defence in a holistic manner.

The fair quality of the proceedings does not depend on the isolated and formal use of rules and principles, but on whether the whole of the proceedings, based on the rule-of-law standards and perception of law, qualifies as fair. However, even though every – and all – de minimis rule has been formally observed in the administration of justice, it may still be possible that the quality of the proceedings is not fair in its entirety. Consequently, several of the elements presented above concerning the right to a fair trial, such as the right to defence, shall be constantly interpreted and assessed in this context.

Moving on to a detailed description of European perceptions of the right to a fair trial and the right to defence, we shall below cite cases of the ECtHR, which on many occasions indicated that the respective prerequisites of the right to a fair trial may not be evaluated in isolation.

[3] Also the title of an essay by Thomas Wentworth Higginson, Civil War soldier and abolitionist.

In *Ekbatani*,[4] the Court declared that direct participation of the parties at trial arising out of the requirements of publicity and equality of arms (as 'advantages') cannot be replaced (in case of, e.g. the simultaneous restriction of the parties' presence) by the mere fact that the parties are entitled to submit written briefs in reaction to the decision of first instance or to the representations of each other. The State cannot justify its actions solely by raising that publicity had been ensured in the first-instance proceedings.

Moreover, in *Van Geyseghem*,[5] the ECtHR has stressed that the question of publicity and 'access to the trial' is closely related to the whole of Art. 6, and hence to the right to defence (in terms of in absentia convictions). The Court also emphasised in *Lala*[6] that the process cannot be 'unduly formalistic', and as the case may be, the opportunity shall be provided for the defence (in lieu of the absent defendant) to argue its case (orally).

Therefore, when discussing the actual content of the right to defence, we shall not disregard the fact that the requirement of a fair hearing is comprised of a unified set of prerequisites, from which certain elements can only be seized arbitrarily.

The interpretation of this question also appears similarly in the doctrine of the Hungarian Constitutional Court (HCC). In its interpretation, fairness is a characteristic of the proceedings that has developed throughout legal history, and the elements of which are interconnected. In HCC Decision 14/2004 (V. 7.) AB [of 7 May 2004], the Court concluded that the right to a fair hearing is absolute, in contrast to which there exists no other relative fundamental right or constitutional objective subject to discretion, since this right in itself is a result of discretion as well. The Court reasons that the premise of the right to a fair trial is founded on the aggregate experience of historical systems of criminal justice. The rationale of the same decision further points to the fact that *the most convenient method of finding justice is when an impartial and independent tribunal sits in a public hearing and finds the facts necessary to decide the case, through the discretion and free evaluation of evidence in order to hold the defendant criminally accountable, with the active cooperation of the parties to the evidentiary process in command of their equal rights*.

Thus, when we examine the content of the right to defence in a singled out manner – isolated from other elements of the bundle of rights to a fair trial – the following shall be noted:

Even though we examine the right to defence in a confined manner, as a point of reference we shall always use other institutions that protect the right to a fair trial. In this paper, with respect to the right to defence, we shall not discuss the impartiality requirement and the prerequisites of publicity, equality of arms and the prohibition of undue delay, since these pertain to the broad sense of the right to a fair trial and not strictly to the right to defence.

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[4]Ekbatani v. Sweden, ECHR Judgement of 26 May 1988, 28–31.

[5]Van Geyseghem v. Belgium, ECHR Judgement of 21 January 1999.

[6]Lala v. The Netherlands, ECHR Judgement of 22 September 1994.

Below, we exclusively examine the rights of defendants:

To defend themselves through legal counsel
To freely correspond either in writing or orally with their counsel
To have adequate time and facilities at their disposal to prepare necessary defence

And (i), in a spirit of comparative law, and with a reference to what has been said about the standpoint of the HCC on the role of individual autonomy flowing from human dignity in terms of the right to defence, it needs to be noted hereby that besides the right to (legal) counsel, there is of course the possibility for the defendants to act *pro se* (in person) in their own defence (although not in the course of the appeals' process). Such a right is enshrined in most European constitutions to be analysed hereunder; albeit, it is not an aboriginal facet of another important Western constitutional thought, that of the United States. Obviously, though, the 'right to counsel' (NB thus distinguished from the 'right to defence' in US constitutional thought referring to the right to self-defence) is present in Assistance of Counsel Clause of the Sixth Amendment of the Constitution, but the elements of the right are not regulated further therein or elsewhere. The right of defendants, e.g. to refuse counsel and represent themselves in person, was only declared via interpretation, in 1975 by the US Supreme Court (in Faretta).[7] Besides allowing for *pro se* defence, the US Supreme Court jurisprudence also constructed further protections for defendants 'against counsels' as well, e.g. due to ineffective assistance of counsel, constructed in Strickland, where it was concluded that the assistance of counsel shall be considered ineffective due to 'constitutionally' deficient performance resulting in a prejudice on the outcome of the judicial process thereby infringing the individual's right to the effective assistance of counsel.[8]

In comparison, generally, all elements of the European right to defence should be acknowledged on the constitutional level, through their explicit inclusion in the text of the constitution. If so, their exact content can then be further interpreted by sui generis constitutional courts or supreme judicial fora. These rights, therefore, shall be examined and compared through examples from the national constitutions of the majority of the 27 EU Member States.

At this point, we shall present first and foremost three possible classification frameworks (instead of criteria for comparison), in which we can place the different legal systems and countries examined in terms of the guarantees provided for the right to defence as part of comprehensive fair trial safeguards within European constitutions.

In our opinion, we can distinguish between three interconnected models of protecting the right to defence; countries are better off adopting a mixture of these approaches in order to realise the most efficient and effective protections for the effective assistance on counsel as part of the right to defence. These approaches are as follows: (1) The 'rule-of-law' approach, which can be complemented by either or both of (2) the 'judicial control' approach and (3) the 'institutional' approach.

[7]Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562, 1975 U.S. LEXIS 83 (1975).
[8]Strickland v. Washington, 466 U.S. 668; 104 S. Ct. 2052; 80 L. Ed. 2d 674 (1984).

Under (1), there are states that observe the internationally standardised protections of the individual right to defence as part of their existence as democratic rule-of-law states (e.g. signatories of the ICCPR and to the ECHR; EU MS under the ECFR; NB some of these protections can be interconnected themselves; i.e. the EU is a signatory to the ECHR; thus, the protections offered by the ECFR and the ECHR complement each other, which brings the jurisprudence of the ECtHR and the CJEU closer together).

Within this group there are two subdivisions to be distinguished: (i) the first comprises states that either have established explicit and detailed (constitutional) declaratory protections for this right in their national legal order based on international standards and (ii) those which failed to realise such protections for this right but dispose of very detailed and safeguarded regulation on the sub-constitutional level. (Several constitutions do not mention the right to defence per se or do not contain references to defence counsel, just a segment thereof, but the protections can become extensive through procedural rules enacted based on the authorisation provided by the constitution.)

Under (2), we can distinguish between models that offer a different range of protections respectively, determined by the existence and quality of judicial control in terms of the right to defence. We shall thus draw the line between models making use of either material (formal and institutional) or immaterial (informal, encumbered) judicial control. Where there is material judicial control, we shall investigate whether constitutional review is a possibility in case of violations of the right to defence or judicial control takes place mainly in front of international judicial fora.

In terms of the constitutional review available under these models, we can distinguish between abstract and concrete review of constitutionality, with abstract control falling within the jurisdiction of sui generis constitutional courts and the like and concrete control taking place in front of supreme judicial bodies. Where abstract constitutional review is possible, several countries adopt frameworks that extend the effects of abstract review to apply to concrete cases as well, through the expansion of the scope of individual complaints. In terms of protections available mainly or solely through international judicial control, the two primary aspects need to be considered herein. The one that focuses on protections is constructed through the interpretation and development of relevant international human rights instruments, and the other is centred upon applying sanctions in relation to detected violations, thereby offering effective remedy and future protection. (NB: The two options can be at our disposal in a simultaneous fashion; however, the constitutional review decision is not a prerequisite to seek remedies in front of international judicial fora in the European structures.)

Immaterial judicial control might be due to the fact that safeguards only exist on the level of constitutional declarations and adequate institutional safeguards are lacking on the sub-constitutional level in terms of procedural rules, but judicial control can be immaterial if an independent judiciary is absent. (See our further observations on the importance of other aspects of the institutional background under the third 'institutional' approach.)

Under (3), the 'institutional' approach – in our view – shall be focalised herein on the existence of an adequate, operational and independent legal profession, namely, the existence of counsel who can safely function in a capacity of defence attorney. There are two sides to this approach.

On the one hand, in certain countries a separate legal profession might exist, but the special safeguards that should permeate criminal proceedings only exist on the level of declarations, either in the constitution or in the procedural law. In these frameworks, the apparent deficiencies of the practice of the right to defence can be resolved by creating both normative and institutional guarantees for the declarations and establishing an independent legal profession. If the legal profession is independent, then we can talk about an effective and actual practice of the right to defence in every aspect of the criminal proceedings, for the purposes of our inquiry.

On the other hand, there are countries in which there is no separate, functional and operational institution within the legal profession for the purpose of the efficient exercise of the right to defence, although there might be regulation enacted in order to put such a professional framework into place. In these countries it can also exacerbate the dynamic of the problematic issues that there are no specific safeguards on the sub-constitutional level that define the right to defence in criminal proceedings, and further factors, such as economic implications, also might come into play. Problems in these structures could be resolved by actually putting into place an institutional background focusing on creating an independent legal profession in charge of the right to defence. If there is a dedicated, independent profession with adequate professional autonomy to exercise obligations with respect to the right to defence, then we can talk about the realisation of the right to defence under this approach.

Having clarified our views on the possible classifications, we shall now move onto looking at the different levels of protections available for the right to defence in international human rights instruments (also through the eyes of the respective courts responsible for the interpretation of these documents) and in some national constitutions.

10.2 Different Levels of Water in the Hole: *Safeguarding the* Right *to Defence*

As we have reached the end of the path to the waterhole, let us check the water level. Depending on the perspective, it is capable of change.

Not only are the elements of the right to defence interconnected with the right to a fair trial, but the levels of its protection are also in close connection. The dimensions in which human rights are generally protected converge with the dimensions safeguarding the right to defence as a fundamental human right. However, international legal protection is subordinate compared to the governing protections provided under national constitutional regulation and relevant laws. The

level of national protections may not be derogated by reference to the lower level of protection under international law. The elements of the right to defence apparent in international instruments shall be considered as the de minimis prerequisites of any national protection.

Shading this picture a bit further, we shall take a brief look at the quite peculiar situation of the EU. The Union is supranational and has a sui generis legal system. With the primacy and direct applicability of community law and the Member States' obligation to execute it, Union regulation on the right to defence shall be considered as an autonomous set of rules within the legal system of a Member State.

10.3 The Surface

With regard to the protection of the right to defence at a global level, it shall be pointed out this right is not specifically mentioned in the Universal Declaration of Human Rights (UN UDHR).

Under Subsection (3) of Article 14 of the International Covenant on Civil and Political Rights (UN ICCPR, 1966), the accused shall have full and equal rights to at least the following protections:

Everyone shall have adequate time and opportunity to prepare their defence and to freely correspond with the attorney of their choice.

Everyone shall have the right to be present at the hearing in person or represented by the attorney of their choice.

In case one does not have an attorney, everyone is entitled to information by the court that they are entitled to have one and in the event the interests of justice require so that they be equipped with an attorney appointed and free of charge if one does not possess the financial means necessary to compensate said attorney.

10.4 The Mid-Level

Regarding regional protections of the right to defence, we shall now provide insight into the regional frameworks outside of Europe, as well as the protections provided on the European level.

In Africa, the Banjul Charter on Human and Peoples' Rights was adopted on 27 June 1981 by the Organization of African Unity (since 2002, the African Union). Point (c) under Subsection (1) in Article 7 of the Banjul Charter provides for the right to a hearing, including the right to defence by an attorney of choosing. There is constant effort on an international level and pressure from human rights watchdogs to convince states that effective national legislative action must be taken to codify and solidify fair trial rights and right-to-defence protections in

national constitutions. (Some 'good students' aside, these protections and any observance thereof remain absent from many African Fundamental Laws, and so our examination does not extend further at this point.)

With regional protection frameworks covering Arabic countries, the protection of the right to defence is governed by the Universal Islamic Declaration of Human Rights (UIDHR),[9] signed in 1981, and by the Cairo Declaration on Human Rights in Islam (CDHRI),[10] adopted in 1990. Both instruments build upon the UN UDHR, but differ from one another in some basic objectives and some important details. Both documents are based on Shari'ah, as declared in Articles 24–25 of the CDHRI:

Art. 24. 'All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah'.

Art. 25. 'The Islamic Shari'ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration'.

In addition, indirect references to the Shari'ah make the legal effect of several sections relative. Subsection (a) of Article 2 of the CDHRI sets forth: '*Life is a God-given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies and states to safeguard this right against any violation, and* ***it is prohibited to take away life except for a shari'ah prescribed reason***'. The Islamic perception of human rights solely and exclusively accepts God, as a sovereign legislative power, as the source of law; this is clearly opposed to the secularised perception of human rights protections in European or Anglo-Saxon thought. Human rights lose their absolute character, apparent in Western approach, as a result of the fact that their protection '*becomes a ritual deed committed against the will of God*' (Bassionoui 2010:215).

The Arab Charter on Human Rights (ACHR, adopted on 15 September 1994)[11] can be assessed similarly to the two aforementioned instruments. Article 7 of the Charter provides that '*the accused shall be presumed innocent until proved* [sic!] *guilty* ***at a lawful trial in which he has enjoyed the guarantees necessary for his or her defence***'. The presumption of innocence is deemed to be 'cast in stone' in the Islamic thought (Daneshyar 2003:8).

All of the above instruments refer to a theoretical basis found in Shari'ah, a foundation that is clearly contradictory to the principles of the rule of law, because it essentially creates religious criminal law. As such, the formal declaration of the right to defence in these documents does not amount to the observance of the requirements of the right to a fair trial (including the right to defence) in the countries of the Middle East. Equal protections of the law, promoted by,

[9] Universal Islamic Declaration of Human Rights. Center For Arab Culture and Dialogue. Available via http://www.alhewar.com/ISLAMDECL.html. Accessed 21 Aug 2012.

[10] Cairo Declaration on Human Rights in Islam. University of Minnesota Human Rights Library. Available via http://www1.umn.edu/humanrts/instree/cairodeclaration.html. Accessed 21 Aug 2012.

[11] Arab Charter on Human Rights. University of Minnesota Human Rights Library. Available via http://www1.umn.edu/humanrts/instree/arabhrcharter.html. Accessed 21 Aug 2012.

for example, Article 14 of the UN ICCPR, cannot materialise in the Shari'ah system, since by default its principles separate Muslim people from non-Muslims, as well as men from women. As such, equality before the law and the prohibition of discrimination thus cannot be realised under Shari'ah law. In the absence of equality before the law, the law cannot serve as a universal and equal standard in the assessment of people's conduct, and so the basic situation of the administration of justice, present in the rule-of-law states, is missing.

Directing our attention to the European rule-of-law states, we shall now evaluate the existing European regional frameworks that protect the right to defence.

In Points B and C of Subsection 3 in Article 6, the European Convention on Human Rights and Fundamental Freedoms, which was adopted within the framework of the Council of Europe (CoE ECHR) in Rome on 4 November 1950, provides for the right to defence. Based on the ECHR, the main elements of the right to defence are:

Provision of time necessary in order to prepare defence
Provision of an opportunity to choose or appoint a defence attorney independent of the financial situation of the person accused
Requirement of free correspondence with the defence attorney (and the provision of protection for the secrecy thereof)
Provision of an opportunity to exercise defence in person

Claims of infringement of fair trial rights can be brought before the ECtHR through the institution of individual claim, and the Court is able to provide an effective remedy should the remedial processes of the Member State be exhausted unsuccessfully.

The protective frameworks of the European Community and the European Union shall be distinguished from that of the CoE, discussed above. It is true that all EU Member States shall accept (at the time of accession) the jurisdiction of the Strasbourg-based ECtHR to try cases involving claims of human rights violations under the ECHR; however, the legal system and structure of the EU is different than that of the CoE.

The law of the European Community and the European Union represents an autonomous level of regional human rights protection in Europe, as a sui generis legal system, with specific provisions shielding the right to defence.

During the 1980–1990s, in the European Commission, the issue of the right to defence emerged in cases involving competition law. During the course of investigation in these cases, the Commission was entitled to seize documents and to enter into sealed inventories (i.e. to conduct investigative action under Community law). The companies being investigated attacked the Commission's aforementioned actions, especially those involving using (otherwise privileged) attorney-client correspondence as evidence. In AM&S,[12] the Court of Justice of

[12]Case 115/79, AM&S Europe Limited v. Commission of the European Communities. [1980] ECR 1529, 35.

the European Communities (ECJ)[13] concluded that '*the written communications at issue must accordingly be considered [. . .] as confidential and on that ground beyond the Commission's power of investigation*'. Another judgement reached in two joined cases, applying the rationale of AM&S, coming to a different conclusion was Akzo Nobel,[14] dealing with the Commission's powers of investigation in light of documents seized in the course of an investigation and the attaching legal professional privilege protecting the communications between lawyers and their clients and their admissibility. Pratt (1999:168) also discusses this issue relevant to the right to defence (referred to as ACP, attorney-client privilege, under Anglo-Saxon legal terminology). He concludes that the protection of communications only applies in international perspective, contrary to US protections, when communications are conducted for the purposes of seeking legal advice. Providing legal advice lies at the heart of the right to defence; therefore, any such communications shall be deemed as confidential and thus protected. The CJEU concluded that based on the right to defence and the common constitutional heritage of the Member States, the *secrecy of correspondence between the attorney and his or her client is protected in Community law* as well. In Anglo-Saxon legal culture, it is the 'solicitor-client privilege' that can be considered the cradle for the right to defence, but the rules that evolved therefrom were originally constructed to protect not primarily the client but the lawyer and '*the integrity and honour of the solicitor by not obliging testimonial disclosure of professional communications made between lawyer and client*' (Murphy 1999:185). The protection of professional communications, inferred by Murphy, ties the question to existing European protections analysed by Pratt, shielding information that has been subject of correspondence for the purposes of seeking legal advice.

In its decision brought in Wouters,[15] based on a Dutch reference for preliminary ruling,[16] the ECJ once again reiterated that the right to defence is an integral part of the common constitutional heritage of the Member States. This case dealt with issues arising under the possibility of a professional Bar to regulate the exercise of the profession in question, especially with respect to the prohibition of multidisciplinary partnerships between members of the Bar and accountants. Eventually, the Court concluded that lawyers and accountants should be precluded

[13] After the ratification of the Lisbon Treaty, the Court was officially renamed to the Court of Justice of the European Union (CJEU) in 2011.

[14] T-125/03 and T-253/03, cases joined in Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. Commission of the European Communities on 14 September 2007. The case was decided on appeal in 2010: Case 550/07 P, Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. European Commission 2010 ECR I-08301.

[15] Case 309/99, J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten [2002] ECR I-01577.

[16] The reference for a preliminary ruling. Available via EUROPA – Summaries for EU Legislation. http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l14552_en.htm. Accessed 1 Nov 2012.

from forming multidisciplinary partnerships, based on the fact that lawyers are bound by secrecy, a fundamental value that ensures the right to defence, and accountants are not generally bound by such an obligation.

The Charter of Fundamental Rights of the European Union[17] (ECFR, adopted along with the Lisbon Treaty in 2009, gaining full legal force after ratification by all Member States) led to the inclusion of the right to defence in the primary legislation of the EU and, as part of the normative text of the ECFR, is therefore mandatorily applicable in the Member States. Subsection (2) of Article 48 of the ECFR prescribes the guarantees and the '*respect for the rights of the defence* [sic!] *of anyone who has been charged*'.

In summary, it can be concluded that in a Community context within the EU, the content of the right to defence was deemed valid by EU law, based on the common constitutional heritage of the Member States, up until the adoption of the ECFR. However, the regulation of the details pertaining to the right to defence continues to rest in the hands of Member States. In most cases, the obligation of legal harmonisation continues to avoid the domain of the right to defence. Nonetheless, there are certain instances where Member States' authorities shall apply Community law in relation to, e.g. cargo carriers and impose penalties or fines on them based on Community law. In some of these cases, the Community legislative deemed it necessary to call the attention of Member States to apply and ensure the right to defence. Thus, Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, in its Preamble para. (5), prescribes that

> Member States should ensure that in any proceedings brought against carriers which may result in the application of penalties, the rights of defence [sic!] and the right of appeal against such decisions can be exercised effectively. [Under Article 6 of the Directive,] Member States shall ensure that their laws, regulations and administrative provisions stipulate that carriers against which proceedings are brought with a view to imposing penalties have effective rights of defence [sic!] and appeal.

Based on the above, an interesting issue arises. In connection with the Schengen Cooperation, which serves to solidify and strengthen the effectiveness of cooperation in justice and home affairs, claims intent on the defining the contextual conditions of de minimis to be applicable to EU Member States' criminal procedure laws tend to surface. The idea is far-fetched for now, albeit should it come true, it would bring us one step away from the creation of a European right to defence possessing a unified, exactly defined content. Within the domain of JHA (Justice and Home Affairs), there is still constant debate on the topic of whether it is possible to bring the 'European right to defence' to life, in the furtherance of which all Member

[17]Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union Charter of Fundamental Rights of the European Union [2010] OJ C 83. Available via http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0001:0012:EN:PDF. Accessed 21 Aug 2012.

States would have the same obligations, i.e. all Member States would need to ensure the same rights within the scope of the right to defence. This was the issue dealt with at the *Europäische Rechtsakademie* (ERA, Academy of European Law) conference, organised in February 2007 in Trier, Germany. EU Commissioner Franco Frattini, who participated in the event, suggested the adoption of a framework decision on the de minimis requirements of European criminal proceedings.

The solution to right-to-defence problems is hardened by the fact that the adoption of a framework decision requires unanimity. However, the truth of the matter that the principle of mutual recognition gains acknowledgement in more and more Member States' cooperation in criminal law and criminal procedure law seems to logically support and underline the importance of this idea. The gradually increasing cooperation in justice affairs can be obviously built on such mutual trust, in which the judge who extradites a citizen to another state while executing a European Arrest Warrant (EAW)[18] shall trust that the citizen in question will be treated in accordance with criteria of rule of law in that state of extradition.

The solution to this problem can be imagined as follows: a unified regulation extending to every Member State should be created, making it possible for someone subject to criminal proceedings in multiple Member States to have his or her right to defence protected and unharmed, even if references are made to these simultaneous criminal proceedings in other Member States. Based on the principle of non-discrimination, a basic principle of the Founding Treaties of the European Community, it would be right to set in stone that law enforcement agencies shall not have the right to curtail or provide the right to defence in a lesser extent for those accused, based solely on the fact that these respective authorities exercise their activities on the territory of another Member State in the scope of cross-border law enforcement.

Indeed, this objective may most likely be achieved through the adoption of a framework decision – one that would enumerate the elements of the right to defence to be ensured in every Member State in an itemised manner, equipped with a clause setting forth that the extent of the rights enumerated shall not be diminished or limited to a greater extent arising from the fact that other Member States' courts or authorities conduct proceedings against someone simultaneously.[19] The necessity of the adoption of a framework decision is supported by the comparison of several EU Member States' constitutions. In these constitutions, analysed below, significant differences are evident in terms of the regulation of the right to defence.

[18]Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States [2002] OJ L 190. Available via EUROPA – Summaries for EU Legislation. http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/l33167_en.htm. Accessed 1 Nov 2012.

[19]*Diskussionspapier: Verfahrensrechte des Beschuldigten im Europäischen Raum*, para. 4 and 13. Available via http://www.eu-verfahrensrechte.de. Accessed 21 Aug 2012.

10.5 The Bottom

In the following, national constitutions of Western and Central-Eastern Europe are evaluated, in terms of their content on the right to defence. In Western Europe, the rule of law has centuries-long traditions and is more stable than in Central-Eastern Europe. It should also be mentioned that in Western Europe, infringements upon the right to defence are rare and exceptional and mainly arise in connection with local political conflicts (e.g. Northern Ireland) or in the battle against terrorism (IRA, ETA), as, e.g. in *Magee*.[20]

Central-Eastern Europe has little tradition concerning the rule of law, although pre-transition constitutions of the then socialist block did in general contain – as a formal declaration – the right to defence. In pre-transition practice, however, due to the absence of fair trial standards, the right to defence was not respected. Its existence as a formal declaration was used to offset tensions caused by politically charged show trials and similar illiberal state practices. In reality, however, the lack of regulation amounted to the reinforcement of the legitimacy of the oppressing regime. Interestingly, Central-Eastern European states' rule-of-law constitutions usually explicitly mention the right to defence, while constitutions of Western European states do not contain such provisions. This issue is not so problematic and is basically rendered irrelevant by the fact that Article 6 of the ECHR becomes automatically 'integrated' into the legal systems of EU and CoE Member States, without specific domestic legislation to that effect.

As stated above, among Western European constitutions, not many contain explicit provisions concerning the right to defence. The Fundamental Law of Austria, Belgium, Denmark, France, Greece, the Netherlands, Ireland, Luxembourg, Germany, Sweden and Finland provides no such guarantee. However, Article 37 of the Czech Charter of Fundamental Rights and Freedoms sets forth that legal assistance be provided for the accused from the 'very beginning of the proceedings'.[21] The same system is applied in practice in Poland, Slovakia and Germany (Fenyvesi 2001). Furthermore, in Article 19 of the Instrument of Government,[22] part of the Constitution of Sweden, reference is made to the ECHR and specifically forbids the adoption of any laws contradictory to it. A similar measure was taken in the United Kingdom, where, by the adoption of the 1998 Human Rights Act,[23] the whole of the ECHR became part of the constitutional order (discussed at length by Betten 1999).

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[20] Magee v. United Kingdom, ECHR Judgement of 6 June 2000.

[21] The 2012 Text of the Charter of Fundamental Rights and Freedoms. Official Website of the Czech Constitutional Court. Available via http://www.concourt.cz/view/GetFile?id=4128. Accessed 1 Nov 2012.

[22] The 2007 Text of the Instrument of Government. Website of the Stockholm Institute for Scandinavian Law. Available via http://www.scandinavianlaw.se/pdf/52-26.pdf. Accessed 1 Nov 2012.

[23] Last amended with respect to antiterrorism derogations in 2005 through Human Rights Act 1998 (Amendment) Order 2005 on 3 April 2005.

The following conclusions can be drawn based on examination of the constitutions of the states in Mediterranean Europe. According to Article 24 of the Constitution of Italy, '*the poor are entitled by law to proper means for action or defense in all courts* [and] *defense is an inviolable right at every stage and instance of legal proceedings*'.[24] The Italian solution provides for a broad right to defence, guaranteeing it as an inviolable right (i.e. for everyone). The approach taken by Portugal correlates to the Italian point of view. Section (2) of Article 20 of the Portuguese Constitution provides that '*subject to the terms of the law, everyone shall possess the right to legal information and advice, to legal counsel and to be accompanied by a lawyer before any authority*'.[25] The Constitution of Spain mentions the right to defence only in connection with people under arrest and, as such, closely resembles those utilised by Latvia, Lithuania and Estonia, as well as Russia. Section (3) of Article 17 of the Constitution of Spain states: '*The arrested person shall be guaranteed the assistance of a lawyer during police and judicial proceedings, under the terms to be laid down by the law*'.[26]

To continue our analysis with Central-Eastern European states' constitutions, several examples are introduced in the following from the constitutions of states that underwent EU accession in 2004.

The relevant provision (Subsection (3) of Article 57) in the former, now ineffective Constitution of Hungary (Act XX of 1949) set forth that '*individuals subject to criminal proceedings are entitled to the legal defense at all stages of the proceedings*',[27] while the Fundamental Law of Hungary, in force and effect since 1 January 2012, contains in its Section (3) of Article XXVIII that '*every person subject to prosecution shall have the right to legal defence* [sic!] *at every stage of the trial*'.[28]

It needs to be noted hereby on a tangent account relevant to the Hungarian case study that the issue of this above-mentioned 'restrictive interpretation' of the right to defence (entailing that only those accused or subject to criminal proceedings benefit from said right) was addressed on many occasions by the HCC and extended so as to incorporate 'quasi criminal proceedings' as well under the protective umbrella of

[24]The English Text of the Italian Constitution. Official Website of the Senate of Italy. Available via http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf. Accessed 21 Aug 2012.

[25]Official Website of the Parliament of Portugal. The 2005 Text of the Portuguese Constitution. Available via http://app.parlamento.pt/site_antigo/ingles/cons_leg/Constitution_VII_revisao-definitive.pdf. Accessed 21 Aug 2012.

[26]Official Website of the Senate of Spain. The 1992 Text of the Spanish Constitution. Available via http://www.senado.es/constitu_i/indices/consti_ing.pdf. Accessed 21 Aug 2012.

[27]The Official English Text of the Constitution of Hungary, in effect until 31 Dec 2011. The Official Website of the National Assembly of Hungary. Available via http://www.parlament.hu/angol/act_xx_of_1949.pdf. Accessed 1 Nov 2012.

[28]Official Website of the Government of Hungary. The Official 2012 English Text of the Fundamental Law of Hungary. Available via http://www.kormany.hu/download/4/c3/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf. Accessed 21 Aug 2012.

this right. E.g. in the 2004 Decision No. 8/2004 (III. 25.) (AB határozat), upon the examination of the scope and effect of disciplinary proceedings commenced against enlisted members of the national security agency; although in such proceedings there is no decision on a criminal charge, it has nonetheless been the opinion of the HCC that the fair trial requirements of a decision on a criminal charge brought against one shall also be applied in similar proceedings that have a tendency to result in similar disadvantages for the subject of such proceedings as a criminal conviction. The HCC argued that enlisted members subjected to disciplinary hearings are comparable to them being sentenced in a criminal trial; moreover, on occasion, it might result in even more serious consequences in terms of continuing their profession and in terms of the public opinion formed on them. Therefore, the HCC argued for the right to defence in similar disciplinary proceedings as well, among the principles of the right to a fair trial.

According to the constitutions of the Czech Republic, Poland, Slovakia and Slovenia, the appointment of a defence attorney falls within the competence of the court, throughout the whole duration of the criminal proceedings, including the investigative phase. From the rule-of-law perspective, such an approach seems more acceptable than that in which the attorney is appointed by the law enforcement authority conducting the investigation.

This concept is inscribed in the constitutions of the Czech Republic, Slovakia and Poland. In addition, it is also applied as a rule in German criminal proceedings, but without constitutional regulation. The constitutions of Bulgaria, Slovenia and Croatia explicitly prescribe representation by legal counsel concerning the right to defence. Subsections (4) and (5) of Article 30 of the Constitution of Bulgaria sets forth that '*everyone shall be entitled to legal counsel from the moment of detention or from the moment of being charged,* [and] *everyone shall be entitled to meet his or her legal counsel in private*'.[29] It is noteworthy on an adjacent account that the point in time from which one is entitled to the right to counsel in Bulgaria appears in the constitutional text cited.

With reference to the regulation of the right to counsel in the United States, it is important to underline that the Supreme Court has elaborated a general standard in terms of the 'beginning' of the right to counsel. In Cobb, the Court concluded that a suspect acquires the right to counsel when prosecution is commenced against him. This is called '*the attachment of the right to counsel*'.[30] However, the Supreme Court also concluded, e.g. in Kirby,[31] that the Sixth Amendment right to counsel arises as an absolute right of the accused, when judicial proceedings have been initiated against the suspect '*whether by way of formal charge, preliminary hearing, indictment, information, or arraignment*'. Some might argue, however, that many of the references made by the Supreme Court to different stages of criminal

[29] Official Website of the Parliament of Bulgaria. The 2007 English Text of the Bulgarian Constitution. Available via www.parliament.bg/en/const Accessed 21 Aug 2012.

[30] Texas v. Cobb, 532 U.S. 162, 121 S. Ct. 1335, 149 L. Ed. 2d 321, 2001 U.S. (2001).

[31] Kirby v. Illinois, 406 U.S. 62, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972).

procedures complicate the attachment rule because the procedural stages inferred by the Court take place once a complaint has been filed and prosecution has thus in fact commenced.

Such problematic issues arising under unclear definitions of the 'attachment of the right to counsel' in Europe are avoided by specific and definite references in European constitutions to the different stages (or to the whole) of the proceedings in which the person subject to said proceedings, in whatever context (suspect, accused, defendant, etc.), is entitled to have (legal) counsel for his or her defence. The wording used to describe the attachment of the right to counsel may differ in Europe but without causing uncertainty as to when the right 'comes to life' during the proceedings.

In the Central-Eastern European region, the only nation that explicitly states the right to unrestricted communication with the defence counsel in its constitution is Croatia (Article 29),[32] and it sets forth that those accused are to be informed of this right by law enforcement authorities. Only the Slovakian (Subsection (3), Article 50)[33] and Slovenian (Article 29)[34] constitutions contain a clause concerning the provision of adequate time for preparation.

The constitutions of Estonia and Lithuania, as well as that of the Russian Federation, prescribe that *defence counsel shall be appointed only in the case of incarcerated defendants*, while the Constitution of Romania only grants the *right to defence for the trial phase* of the proceedings, stating in Article 24 that '*the right to defence* [sic!] *is guaranteed. [. . .] All throughout the trial, the parties shall have the right to be assisted by a lawyer of their own choosing or appointed ex officio*'.[35] The Estonian constitutional regulation is interesting because it does not explicitly contain the right to defence, but instead prescribes this as part of the guarantees concerning the deprivation of personal liberty (Article 21): '*a person suspected of a criminal offence shall also be promptly given the opportunity to choose and confer with counsel*'.[36] The constitution of Lithuania sets forth (in its Article 31) that '*a person suspected of the commission of a crime and the accused shall be guaranteed, from the moment of their detention or first interrogation, the right to defence* [sic!] *as well as the right to an advocate*'.[37]

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[32]The Consolidated English Text of the Croatian Constitution. Official Website of the Parliament of Croatia. Available via http://www.sabor.hr/Default.aspx?art=2408. Accessed 21 Aug 2012.

[33]The English Text of the Slovakian Constitution. Official Website of the Slovak Republic. Available via http://www.slovakia.org/sk-constitution.htm. Accessed 21 Aug 2012.

[34]The English Text of the Slovenian Constitution. Official Website of the United Nations Public Administrations Network. Available via http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN014895.pdf. Accessed 21 Aug 2012.

[35]The English Text of the Romanian Constitution. Official Website of the Chamber of Deputies of Romania. Available via http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=2#t2c2s0a24. Accessed 21 Aug 2012.

[36]The English Text of the Estonian Constitution. Official Website of the President of Estonia. Available via http://www.president.ee/en/republic-of-estonia/the-constitution/print.html. Accessed 1 Nov 2012.

[37]The English Text of the Lithuanian Constitution. Official Website of the Parliament of Lithuania. Available via http://www3.lrs.lt/home/Konstitucija/Constitution.htm. Accessed 21 Aug 2012.

Section 4 of Article 11 of the Constitution of Cyprus states the following provision: '*every person [. . .] shall be allowed to have the services of a lawyer of his or her own choosing*'. Moreover, it is explicitly set forth as a de minimis requirement that persons charged with an offence shall have adequate time and facilities for the preparation of their defence (Subsection (b), Article 5).[38] Subsections (b) and (c) of Section (6) of Article 39 of the Constitution of Malta[39] also prescribe the provision of adequate time and facilities for defendants to prepare their defence and allow for the possibility of *defence by a legal representative* if the accused cannot be present. Furthermore, under the Maltese Fundamental Law, if a person cannot afford to pay for legal representation as it is otherwise reasonably required by the circumstances of the given case, he or she shall be entitled to have publicly funded representation.

Lastly, the regulation of the right to defence shall be examined in its constitutional context in Hungary, as it recently been undergoing amendment and interpretation by the HCC, as already mentioned above. It should be highlighted that under both constitutional texts so far examined, the inclusion of the term '*eljárás*', meaning '*proceedings*', allows us to conclude that those subject to criminal proceedings shall be granted the right to defence throughout every stage of these proceedings, including the investigative and pre-trial phases as well. The Court was able to enlighten that the legislative intent behind the original constitutional text was that fair trial protections be available throughout the course of the proceedings and not solely over the trial period (i.e. proceedings). Moreover, in its jurisprudence, the HCC provided effort to extend the protections of the right to defence, under the Constitution, even outside criminal justice system, as evidenced above.

Due to the fact that it is too early to perform an evaluation of the context of the new Fundamental Law concerning the right to defence, we shall now take a closer look at recent efforts to change the newly codified right-to-defence standards with the intent to conform to international treaties.

10.6 Paths from the Waterhole: Leading Towards Conclusions

After the adoption of the new Fundamental Law of Hungary, but before it had come into effect, various efforts had surfaced which intended to reform criminal law and criminal procedure law and to derogate internationally acknowledged standards concerning the right to defence. The HCC later declared these intended changes unconstitutional. As a result of intervention by the Court through ex

[38]The Articles cited can be found in Appendix D, Part 2: Fundamental Rights and Liberties of the Constitution of Cyprus. Available via http://www.kypros.org/Constitution/English/appendix_d_part_ii.html. Accessed 1 Nov 2012.

[39]The English Text of the Maltese Constitution. Official Website of eServices in Malta. Justice Service Website. Available via http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8566&l=1. Accessed 21 Aug 2012.

ante constitutional review, these proposed amendments were struck down firmly; however, there has nonetheless been dissent among the judges. In the following, we shall reflect on the regulatory intent underlying these efforts towards reform and analyse the relevant decision of the HCC in order to highlight that the right to defence is still an important and respected element of core fair trial rights in Hungary.

HCC Decision 166/2011 (XII. 20) AB [of 20 December 2011] was adopted with the dissenting opinion of 6 out of the 15 judges sitting at the time. The decision extends to the examination of the Hungarian Criminal Procedure Code as well, but in our analysis we focus only on the constitutional perspective and rationale, deduced from the interpretation of Article 57 of the (now ineffective) Constitution, to be understood in conjunction with the relevant criminal procedural regulations. (Authors only examine the regulatory content of the HCPC to the extent necessary to justify the conclusions derived from constitutional legal interpretation of the right to defence.) This decision essentially declared several provisions of the modified Criminal Procedure Code unconstitutional, and furthermore, the given provisions were declared null and void, as they also infringe upon international human rights conventions. The following section presents the problems that had been identified by the HCC in its examination of the Criminal Procedure Code (Act XIX of 1998 on criminal procedure, HCPC):

Based on the law adopted and then subjected to constitutional review, it would have been possible for the prosecution to exercise jurisdictional competence over high-profile cases, i.e. such cases would have been tried under the jurisdiction of courts that would have been able to ensure that the cases were tried within a reasonable time and could guarantee an expedited decision. (Quashed Section (9) of Article 17 of the HCPC would have enabled the Supreme Prosecutor to decide, and the execution of said decision would have been placed in the hands of the prosecutor in charge of the case.) The HCC, eventually, struck down the legislation as unconstitutional and argued that aside from infringing upon the principle of impartiality and breaching the equality of arms requirement concerning the right to a fair trial, such a practice that entitles the prosecution to select the competent court for trying a particular case also severely infringes upon the right to effective defence, as provided for by the ECHR and under Article 57 of the Constitution.

The next issue addressed by the HCC concerned allowing for the possibility of cases to be heard in absentia, should defendants not be present. The regulation disregarded two important facts: in such cases, the whereabouts of the defendant may be known, and that in a majority of instances, the court does know and has knowledge about whether or not the defendant is willingly absent. (The eventually quashed Article 532 of the HCPC set forth that if the place of residence of the accused is known abroad, then the prosecution could initiate that the trial be held in absentia, in the indictment.) According to the opinion of the President of the Supreme Court, submitted in a motion for review to the HCC, this severely limits the right to a fair trial and the right to defence, which is enshrined in Sections (1) and (3) of Article 57 of the Constitution, and such practice would also infringe upon Article 6 of the ECHR. The HCC invoked their solidified practice concerning the question

of in absentia cases and reiterated that such practice is only justifiable if it becomes clear that the defendant intentionally – knowingly and premeditatedly – fled justice in a mala fide manner. Furthermore, a mere failure of efforts to locate the defendant shall not serve as basis to conduct trials in absentia. The HCC referred to the practice of the ECtHR in support of their conclusions. On the grounds that the proposed rule did not adequately assure that in absentia hearings be only exceptionally conducted, the HCC deemed the regulation unconstitutional.

The third issue identified by the Court was based on the petitions for ex ante review. The issue concerns Article 554/G, which unnecessarily and disproportionately limits the right to defence in the first 48 h of detention, by allowing for the restriction of the defendant's access to counsel. (Article 554/G, quashed in part, contained that '*during the first 48 hours of detention the correspondence of defendant and counsel can be forbidden, based on the unique circumstances of the case, on the motion of the prosecutor. There shall be no remedy against such action*'. The rule went on to state, under Article 554/J, that '*in high profile cases the suspect held in custody shall be interrogated in 72 hours. Should the interrogation take place within the first 48 hours of detention, then defense counsel shall have the right to present at such interrogation, even if the prosecution forbade the correspondence of the accused and its counsel under 554/G*'. Article 554/J referred to herein has also been declared unconstitutional due to its material connection to Article 554/G.)

Had the regulation not been declared unconstitutional, in certain high-profile cases, it would have been possible to limit defendants' rights to freely correspond with their attorneys. The problem was also identified as infringing upon Article 6 in the motion for review submitted to the Court by the President of the Supreme Court, according to which the right to defence and the right to an attorney are fundamental elements of the right to a fair trial and therefore can only be limited under clearly defined exceptional and exigent circumstances and within strictly narrow time limits. However, the intended regulation would have placed discretion upon the prosecution, who depending on the circumstances of the case would determine whether or not to limit the defendant's access to counsel.

In their motions for review, two MPs have referred to a proposed Directive concerning the right to access to a lawyer within the EU, providing access from the very moment deprivation of liberty commences. Article 3 of the proposal provides that '*access to a lawyer must be granted at the latest upon deprivation of liberty, as soon as possible in the light of the circumstances of each case*'.[40] As such, the examination of the circumstances of the case shall not circumvent nor overwrite the fundamental principle of providing access to defence counsel, not even in the hands of the prosecution.

[40]Outlined in the Proposal for a Directive of the European Parliament and the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest. See citation in References, Brussels, 8.6.2011 COM(2011)326 final, 2011/0154(COD).

Referring to former case law in the decision analysed, the Court stressed that the right to defence materialises in the individual rights of the defendant and in particular in the right to counsel and so consequently in the status of said counsel.

In Decision 1320/B/1993 AB, the HCC concluded that in determining criminal liability, the right to defence, including the functions of defence, is a guarantee of utmost importance up until the point of rendering the final judgement, and the decision must comply with the requirements of substantive judicial rule of law. As such, the right to defence shall only be limited to an extent that is unavoidably necessary and proportionate, and in terms of substantial content of the right to defence, it cannot be limited whatsoever.[41] The Court then concluded that the regulation in question is unconstitutional, because the exclusion of remedial options countering the effect of a prosecutorial decision that restricts access to counsel limits the essential core and the substantial content of the fundamental right to defence. We fully agree with this opinion of the Court.

Another example, also invoked by the Supreme Court motion described earlier, was *Salduz*.[42] The ECtHR concluded that Article 6 prescribes the following:

> [A]s a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even when compelling reasons may exceptionally justify denial of access to a lawyer, such restriction- whatever it's justification – must not unduly prejudice the rights of the accused under Article 6. [. . .] [T]he rights of the defence [sic!] will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.[43]

In *Panovits*,[44] the ECtHR held that:

> As regards the applicant's complaints which concern the lack of legal consultation at the pre-trial stage of the proceedings, the Court observes that the concept of fairness enshrined in Article 6 requires that the accused be given the benefit of the assistance of a lawyer already at the initial stages of police interrogation. The lack of legal assistance during an applicant's interrogation would constitute a restriction of his or her defence rights in the absence of compelling reasons that do not prejudice the overall fairness of the proceedings.[45]

Following an extensive analysis of ECtHR case law, concerning the right to defence, the HCC defined the following clear-cut principles:

A systematic obstruction of attorney-client correspondence is clearly contrary to Article 6, especially if obstruction is not more than the word-for-word execution of

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[41] The HCC reached its conclusions in accordance with its solidified practice established in Decisions 8/1990. (IV. 23.) AB [of 23 April 1990], 22/1994. (IX. 8.) AB [of 8 September 1994]; 6/1998. (III. 11.) AB [of 11 March 1998], cited supra.

[42] Salduz v. Turkey, ECHR Judgement of 27 November 2008.

[43] Ibid. 55.

[44] Panovits v. Cyprus, ECHR Judgement of 11 December 2008.

[45] Ibid. 66.

a provision of law. If defence counsel is only absent from the first interrogation hearing, then the infringement of Article 6 can only be determined through the evaluation of the circumstances of the case and, in particular, with regard to the faith of the statements made in the absence of counsel. Restriction of access to counsel at the time of arrest against the defendant's request is contrary to the ECHR and is reinforced by the fact that certain international instruments may provide for law enforcement to guarantee the provision of access to counsel at – and from the time of – arrest. The Court was not in a position to conclude that each and all of the HCPC provisions at hand did in fact infringe upon the ECHR, but due to their contradiction to Article 57 of the Constitution, they were struck as unconstitutional.

In light of the above, we shall now evaluate the dissenting opinion of Judge Mária Szívós,[46] which dealt with the issue of the limitation of access to, and more specifically, correspondence with, counsel. The above-mentioned legislation would have allowed for such restriction in the first 48 h of the detention and, at the latest, at the time of the interrogation. Szívós argued that the right to defence is not harmed to an extent that would necessitate the determination of constitutionality. However, in our opinion, any sort of access to, thus including correspondence with, counsel is in fact an embodiment of the material content of the right to defence, and as such it shall not be limited in any respect. Limitation of access to counsel limits access to justice and access to an effective remedy; therefore, under the qualitative approach to the right to a fair trial, it shall always be guaranteed. The fairness of a trial can only be determined if the right to defence is ensured, by way of granting unlimited and unfettered access to counsel.

The rights of the defendant to grant power of attorney are not harmed by the provisions limiting access to counsel. Furthermore, Judge Szívós also argued that should the defendant not opt for granting power of attorney, then the authorities should appoint counsel for him. It is not fully pertinent to our reasoning at this point, but noteworthy nonetheless, that the free choice of counsel is also a quintessential element of the right to defence, assuming that the defendant has the financial resources necessary to actually have an attorney of his or her choice.

Szívós also stated that by appointing counsel or granting of power of attorney, the defendant's right to voice comments or complaints may be realised through his or her lawyer, who may also make statements and file motions, as well as be granted access to certain documentation within a limited scope. Accordingly, the right to defence materialises at the time of the inclusion of counsel into the proceedings. However, in such an interpretation, 'the right to defence' more closely resembles 'a right of the counsel', and not a right of the defendant. In such a scenario, the interests of the defendant are actually not at all protected. In her dissent, she concludes: the

[46] Szívós is a quite new addition to the Court; she has been appointed in 2011. Previously she worked as a defence attorney and then she sat on the bench in criminal court. It is all the more surprising that she voiced an opinion in her dissenting opinion that leads us to think that the limitations struck by the Court as unconstitutional are not in fact limitations of the right to defence at all.

regulation only intends to limit the correspondence between the defendant and his or her counsel. The attorney is nonetheless entitled to act as defendant's attorney in the meantime.

In our opinion, which is in line with the interpretation of the majority opinion of the Court, the rationale and justification of the dissenting opinion is clearly contrary to the principle of equality of arms and empties the actual meaning and purpose of the right to defence. Should communication between the defendant and its counsel be restricted, how would counsel possibly have knowledge of representation and what documentation should be looked into?

As justification for upholding the regulation as constitutional, the dissenting opinion also refers to the superiority of compelling state interests relevant to the success of crime prevention, in relation to the limitation of access to counsel. As argued, the first 48 h of an investigation are crucial in its success, especially in terms of gathering evidence, securing crime scenes and finding and preventing accomplices from escape. The dissent also concludes that the 'social goal' of crime prevention outweighs the fact that the detainee shall 'have a talk' with counsel during this time frame. Although we accept the necessity of crime prevention, we are of the opinion, in line with ECtHR case law and Hungarian constitutional jurisprudence, that it should not surmount the guarantees of the right to defence, solely based on the serving the common good. Such extended time limitations unjustifiably degrade the protections of the right to defence and also detrimentally influence the status of counsel, due to the fact that such limitation of access prevents the defendant and his or her counsel from having adequate time and facilities to prepare for effective defence.

In closing, the dissent draws the conclusion that the regulation struck as unconstitutional should have been upheld and that it was also in line with international instruments. Szívós concluded that the right to defence as materialised in establishing contact with counsel before the first interrogation is merely an abstract legal possibility that lacks content and serves a purpose none other than stalling the investigation of crimes and the apprehension of perpetrators.

Even if so, defendants shall not be denied of core human rights in the name of improving crime prevention statistics; such a task is a responsibility to be undertaken by law enforcement agencies.

In relation to the previous Hungarian case, it is noteworthy that recent constitutional jurisprudence in relation to the right to defence has brought important developments based on an individual constitutional complaint lodged against an unconstitutional court decision. The issue of testimony made without the presence of an attorney in a custodial interrogation and later used in trial was made subject to constitutional review by the HCC, and in their Decision 8/2013 (III. 1) AB [on 1 March 2013], an extensive analysis of the protections for the right to defence constructed by the ECtHR and the SCOTUS was laid out, with special emphasis on Escobedo and Miranda[47] among several others.

[47] Escobedo v. Illinois 378 U.S. 478 (1964) and Miranda v. Arizona 384 U. S. 436 (1966).

The HCC determined that in the case at hand the law enforcement agency in question could not provide sufficient evidence that would have supported such claims that they have in fact informed defence counsel on the time and place of the custodial interrogation, thereby rendering impossible the presence of the counsel (public defender) in a custodial interrogation. It was also established based on the case files that the trial court erred in evaluating the unconstitutionally obtained testimony among the evidence without noticing the serious omission of the authorities. However, in reference to the other Hungarian case presented above, the HCC reminded that in their previous decision it has been found that if defence counsel was not present at the first hearing and the first hearing only, such a fact raises concern under Article 6 of the ECHR, but whether such procedural violation effectively violates Article 6 shall only be assessed based on the totality of circumstances in the case at hand. In such analysis, the HCC pointed out, the future legal faith of the testimony made without the assistance of counsel is determinative (whether the defendant corroborated or revoked it and whether it had an effect on the outcome of the criminal proceedings). It shall also be factored in such an analysis, according to the HCC, whether other procedural steps were taken without the presence of counsel. Interestingly, it is also considered to be relevant to a decision on violation of the right to defence under Article 6, whether the defendant as a lawyer, if the case may be, is otherwise familiar with the character of the criminal proceedings. The implication of the previously analysed case to the 2013 one is an examination as to the role of the unconstitutionally obtained custodial testimony in the criminal proceedings, in light of the protections offered by Article 6. Due to the circumstances of the underlying case, the HCC came to the conclusion that in the criminal proceedings in relation to which the individual complaint was lodged, the guilty verdict was not based on the unconstitutionally obtained custodial testimony, which did not materially influence the judgement of the court at all. The HCC stated that there is no irreparable harm to the right to defence and the individual complaint shall thus be denied and the judgements of the trial court upheld. The HCC defined constitutional criteria for the right to defence in their decision through references to ECtHR and SCOTUS case law, however, did not find sufficient footing in favour of the petitioner. If the case would have been tried in the United States, the results would have been entirely different under the protections afforded by the Self-Incrimination Clause of the Fifth Amendment, along with the requirements specified under the Assistance of Counsel Clause of the Sixth Amendment.

10.7 Conclusion

The right to defence, as evidenced above, is regulated and stipulated in as many different ways and in as many different regimes as the number of paths that exist to a waterhole in the desert. In some countries, the regulation remains at the stage of a (formal) declaration, while in others, effective protection is provided based on constitutional regulation developed by the detailed rules of procedural codes.

As argued above, a declaration of the right to defence does not amount to the given state being classified as a rule-of-law country. The fact that a procedural law system complies with the exigencies of rule-of-law fair trial standards does not follow from the fact that the right to defence is declared or is effectively protected and observed in criminal proceedings.

As presented above, the right to defence is protected by an interconnected framework of international, regional and national legislation; the relation of each to the other is defined by the subsidiary and complementary nature of international law, the choice of model in the observance of rule-of-law criteria, the application of the different methods of judicial control and the safeguards for the effective operation of an independent legal profession.

However, the right to defence with the greatest protection and most extensive scope should come to life at the national level, within the national constitutions and domestic procedural codes of the given country.

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