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## **The Relevance of the Passing of Time in Criminal Law, with Special Reference to Due Process**

**ABSTRACT:** The requirement for the conclusion of criminal proceedings within a reasonable time appears as a component of the right to a fair trial in international human rights documents as well as among the national fundamental rights. The passage of time and the prolongation of criminal proceedings are considered by courts as mitigating factors during sentencing. However, taking these factors into account as mitigating circumstances is not unproblematic, as there is no objective point in time after which one can definitively state that the criminal authorities violated the requirement for adjudication within a reasonable time. In my study, I am investigating the criteria by which the European Court of Human Rights (ECHR) examines compliance with the requirement of reasonable time and how the prolongation of proceedings is treated as a mitigating factor in Hungarian judicial practice.

**KEYWORDS:** fair trial, prolongation of criminal proceedings, sentencing, passage of time, mitigating circumstances.

### **1. Introduction**

*‘With the passing of time, it is the truth that can disappear.’<sup>1</sup>*

The primary aim of criminal proceedings is to establish the substantial truth. The danger of the passing of time in criminal processes is that memories of witnesses are fading and the probative value of physical evidence diminishes, jeopardising the discovery of substantial truth. Sallustian's maxim that one should not move settled things<sup>2</sup>, has been quoted since ancient times. This notion is of particular importance and emphasis in criminal law, in prosecution and in sentencing. The statute of limitations for

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<sup>1</sup> E. Locardot quoted in Pradel, 2006, p. 251.

<sup>2</sup> *Quieta non movere.*

criminal offences or the criminal liability of the offender expires after the statutory period of time has elapsed,<sup>3</sup> but even if the statute of limitations has not expired, sentencing court must take into consideration when a long period of time has elapsed since the offence or since the initiation of criminal proceedings. In sentencing, the consideration of the time passed may also be explained by the purpose of the sentence. The purpose of sentencing is of great importance among the principles of sentencing. Some authors consider the purpose of punishment to be the most important of the principles of sentencing. Among these, Földvári argues that the purpose of punishment should be the most important factor in determining the type and level of punishment. In his view, only circumstances that have some connection with the purpose of the punishment should be assessed in the context of sentencing.<sup>4</sup>

Determining the purpose of punishment will remain a fascinating and unresolved question of criminal law. According to the Hungarian Criminal Code, the purpose of punishment in order to protect society is to prevent the offender or others from committing a crime.<sup>5</sup> Undoubtedly, and there is a professional argument to support this, that the most effective way to ensure that a sentence fulfils its purpose is to impose it as soon as possible after the offence has been committed.

Sentencing within a reasonable time is therefore in the fundamental interest of states, as the principle is also implicitly reflected in international documents as a subset of the fair trial principle. Accordingly, the speeding up of criminal proceedings has been a matter of concern to legislators, law enforcement officials and scholars of criminal law for many decades, if not centuries.<sup>6</sup> The issue is still relevant today, as the explanatory memorandum of the new Criminal Procedure Act,<sup>7</sup> which entered into force on 1 July 2018, sets the improvement of the timeliness of criminal proceedings as a priority objective, which it aims to achieve primarily by making special procedures (court trials, plea bargaining and sentencing procedures) more efficient.<sup>8</sup>

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<sup>3</sup> Art. 26(1-2) of the Criminal Code.

<sup>4</sup> Földvári, 1970.

<sup>5</sup> Art. 79 of the Criminal Code.

<sup>6</sup> Ficsor, 2015, pp. 25-27.

<sup>7</sup> New Criminal Procedure Act.

<sup>8</sup> New Criminal Procedure Act, General Explanatory Memorandum, III. The main directions of the reform of criminal procedure.

However, the question rightly arises as to whether it is in the interests of all parties to the procedure to ensure that the procedure is conducted swiftly. We must not forget the accused, for whom the lapse of time will be taken into account as a mitigating circumstance in the sentencing process. In many cases, the deliberate “stalling” of the proceedings by the defence can lead to the passing of time and the delay the criminal proceedings. In the light of these considerations, it seems worthwhile to examine the criminal law consequences of the passage of time in more detail. In my study, I aim to investigate which of the various elements of the fair trial requirement is a reasonable time and, accordingly, in which cases the passage of time has an effective tool in reducing the measure of the sentence in judicial practice. To answer these questions, I draw on the practice of the European Court of Human Rights and the Hungarian Constitutional Court on the one hand, and on the other hand, I analyse anonymous court decisions in Hungarian court practice. Knowledge of the international standards is essential for all judges, as correct, well-founded, and fair judgments are a fundamental expectation of the judiciary board.

## **2. The appearance of the fair trial requirement in international documents and Hungarian law**

The requirement of a fair trial is a fundamental rule of guarantee in all European countries.<sup>9</sup> The Universal Declaration of Human Rights enshrined the concept of due process in Articles 10 and 11 as early as 1948.<sup>10</sup> Additional Protocol II to the 1949 Geneva Convention of 1977 states that the guarantee of a fair trial is mandatory even in times of war.

Article 14 of The International Covenant on Civil and Political Rights, adopted in 1966, states that

*[e]veryone is equal before the law. Everyone shall have the right to have any charge against him or any rights and duties in any legal proceedings adjudicated upon him by an independent and impartial tribunal established by law in a fair and public hearing.*

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<sup>9</sup> Cohen, 2002, p. 115.

<sup>10</sup> See: Universal Declaration of Human Rights.

Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (ECHR),<sup>11</sup> lays down the essence of due process by providing that an *independent and impartial tribunal shall hear and determine in public and within a reasonable time the rights and obligations of citizens and the merits of criminal charges against any person*. The requirement to judge criminal cases within a reasonable time is a sub-justification of a fair trial, and thus a clear obligation in the ECHR.

With regard to the Hungarian declaration of due process, a so-called multi-layered human rights protection has been created, since the same human rights are not only found in the international documents promulgated by our country, but also in the Constitution, and later in the Fundamental Law and other laws.

Chapter 12 of Act XX of 1949 on the Constitution of the Republic of Hungary, under the heading of fundamental rights and duties, offers a fairly detailed discussion of the obligations constituting the components of due process, including the right to an independent and impartial tribunal and to a public trial, the presumption of innocence, the right of defence, the principle of substantive legality and the right to legal remedy. The requirement of reasonable time is also found in the Constitution through the provision in Article 55(2) that *'A person suspected of having committed an offence and detained shall be either released or brought before a judge as soon as possible.'*

The right to a fair trial has also been declared in Hungary's Fundamental Law. Article 28(1) of the Fundamental Law provides for the right to a fair trial, according to which *'Everyone has the right to have his rights and obligations in any charge against them or in any legal proceedings adjudicated by an independent and impartial tribunal established by law, in a fair and public hearing within a reasonable time.'* The right to a fair trial includes the principle of publicity, the right to a court, the requirement of a tribunal established by law, the principle of impartial justice and the right to a trial within a reasonable time. This article is essentially identical to the text of the previous Constitution, but there is one important change, which is not at all insignificant for our purposes, namely the declaration of the requirement of reasonable time as part of the right to a fair trial. This has also elevated the judging within a reasonable time to the level of a constitutional principle in our country.

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<sup>11</sup> In Hungary it was promulgated by Act XXXI of 1993.

Among the basic provisions of *Act XIX of 1998 (former Criminal Procedure Act)*, reaffirming some passages of the Constitution, one can find some of the fundamental principles of criminal procedure to fair trial, even if the requirement of reasonable time is not explicitly mentioned.<sup>12</sup>

However, the Act XC of 2017, namely the new Criminal Procedure Act, enshrines the requirement of reasonable time, which has been raised to the level of the Basic Law, in such a way that the legislator created the Criminal Procedure Act itself, among other things, for the purpose of prosecuting the perpetrators of criminal offences in proceedings that ensure the fundamental right to a fair trial within an effective and reasonable time. The spirit of the new Criminal Procedure Act is therefore permeated by the requirement of reasonable time, which is also reflected in a number of specific legal provisions.

### **3. Definition of the content of a fair trial in ECtHR case-law, with particular reference to the requirement of reasonable time**

The legal practice of the European Court of Human Rights (ECtHR) deals extensively with the definition of the content of certain elements of due process, including the right to be tried within a reasonable time. To date, about one third of the cases brought before the ECtHR relate to Article 6. It is difficult to imagine a state that has not been convicted of a violation of Article 6.<sup>13</sup> This is no coincidence, of course, as this Article covers a rather complex range of issues.<sup>14</sup> Its guarantees cover the whole criminal procedure, so the likelihood of such an infringement occurring in a Member State is very high.

Fair trial is an umbrella category, filled with a multitude of guarantees.<sup>15</sup> It includes the requirements which are intended to ensure that the law enforcement by public authorities is carried out in a procedure which guarantees a lawful and impartial decision.<sup>16</sup> As seen above, several international human rights documents deal with the formulation of due process, but its real content has been shaped by the jurisprudence of the ECtHR, which judges on a case-by-case basis whether the judicial

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<sup>12</sup> See Act XIX of 1998, Art. 1-10 of the former Criminal Procedure Act.

<sup>13</sup> See Koering-Joulin, 1996, pp. 13-14. and Nagy, 2011.

<sup>14</sup> Grád, 2005, p. 214.

<sup>15</sup> See in detail: Koering-Joulin, 1996. pp. 13-17.

<sup>16</sup> Rácz, 1990, p. 39.

authorities of the Member States have complied with the requirement of due process in a particular case.<sup>17</sup>

The jurisprudence of the ECtHR is based on the passages of Article 6 of the ECHR already described above, with the addition of the requirement of public delivery of the judgment and the possibility of excluding the public from the trial in justified cases. Article 6(2) lays down requirements specifically for criminal cases, namely the presumption of innocence and the need to inform all parties as soon as possible, in a language which they understand, of the nature of the charge against them. The ECHR also guarantees the time necessary to prepare for defence, the equality of arms, and the right to free interpretation.

The right to a fair trial obviously concerns primarily the administration of justice, but of course its requirements are not limited to that, but extend, so to speak, to the whole criminal procedure, and even to all areas of public activity where the citizen encounters public bodies as authorities.<sup>18</sup> According to Strasbourg case law, a complaint about the delay in proceedings may be lodged even before the case has been brought to a conclusion on the substance, since a delay in a stage of the proceedings may lead to the State being condemned.<sup>19</sup>

The ECtHR has developed a well-established practice of dealing with delays in proceedings over several decades. As a matter of principle, the basis for the adjudication of cases is never the objective duration of the proceedings.<sup>20</sup> This means that we cannot usually give a time limit beyond which a Member State is certain to be in breach of the Convention or within which it is certain to remain in the legal position. In a case against France, in view of the complexity of the case, the period of 8 years 9 months was not considered by the ECtHR to be in breach of the Convention.<sup>21</sup> However, in the Reinhardt and Slimane-Kaid case, which dragged on for nearly 8 and a half years, it was found that the proceedings against the applicants were excessively long.<sup>22</sup>

In order to be able to take a reassuring position on the question of whether the procedure infringes the requirement of reasonable time for

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<sup>17</sup> Berger, 1999, pp. 153-325.; Grád, 2005, pp. 213-348.; Koering-Joulin, 1996. pp. 9-197.

<sup>18</sup> Sári, 2001, p. 93.

<sup>19</sup> Halmai and Tóth, 2003, p. 712.

<sup>20</sup> Grád, 2005, p. 283.

<sup>21</sup> *Van Pelt v. France*, App. No. 31070/96, 23 May 2000.

<sup>22</sup> *Reinhardt and Slimane-Kaid v. France*, App. No. 23043/93;22921/93, 31 March 1998; see in detail, Tóth, 2001, p. 154.

proceedings under Article 6 ECHR, the ECtHR has developed a three-pronged system of tests, which it explained in great detail in the case *Pélissier and Sassi v. France*.<sup>23</sup>

First, *the objective complexity of the case* must be examined. In this respect, it is necessary to see whether the complexity of the case has a significant impact on the duration of the proceedings. The complexity of the dispute may be the result of three factors, namely the complexity of the facts, the legal problem, and the complexity of the procedure.<sup>24</sup> Undoubtedly, if, for example, a criminal offence takes on an international dimension and a request for legal assistance from another State is necessary, this may result in a lengthy procedure. However, the large number of defendants involved in the proceedings, the multi-stage nature of the offence, or even the very voluminous and complex case file may also lead to a prolongation of cases. In any event, if the courts or other authorities of the Member State have shown due diligence, there are no open cases and the proceedings are nevertheless delayed for the reasons set out above, the State concerned cannot be held responsible.<sup>25</sup>

On the other hand, *the conduct of the participants in the procedure* must be examined.<sup>26</sup> Did they contribute to the delay of the procedure or not? Here, the conduct of the accused is of particular interest, although it is undoubtedly of less importance than that of the accused in civil proceedings, since in criminal proceedings the influence on the course of the case is obviously less.<sup>27</sup> Nevertheless, it is necessary to examine whether the accused obstructed the work of the authorities, for example, whether his escape prevented the trial from taking place, or whether he deliberately abused any of the legal remedies to prolong the proceedings. If the delay is mainly attributable to the accused himself, the State cannot be held responsible. However, delays which do not affect the proceedings as a whole cannot be to the benefit of the State concerned if *'it did not itself act in a manner which could normally be expected in the circumstances.'*<sup>28</sup>

In *Csanádi v Hungary*, the Court stated that Article 6 of the Convention does not necessarily require cooperation with the authorities,

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<sup>23</sup> *Case of Pélissier v. Sassi v. France*, App. No. 25444/94, 25 March 1999.

<sup>24</sup> See in detail, Balla and Kardos, 2005, p. 44.

<sup>25</sup> Grád, 2005, p. 284.

<sup>26</sup> Balla and Kardos, 2005, p. 45.

<sup>27</sup> Grád, 2005, p. 310.

<sup>28</sup> *Kemmache v. France*, App. No. 17621/91, 24 November 1994.

since in this case the accused denied the charges against him. It is therefore not an act of deliberate obstruction of justice for the accused to exercise his right to remain silent.<sup>29</sup> Nor can the accused be held liable for availing himself of the legal remedies provided for by the law, such as a plea of bias. In the present case, the objection of bias was dealt with by the national court within a few months and did not, on balance, contribute to an unreasonable delay in the case.<sup>30</sup> These aspects need to be carefully examined, but judicial practice so far shows that it is much less common to find that the accused is responsible for the delay of the proceedings.<sup>31</sup>

However, in a case against France, the ECtHR found the involvement of a "*private prosecutor*" who insisted on the presence of certain witnesses during an attempt to prove a case, which led to a delay in the proceedings. In addition, he was reluctant to appear before the investigating judge and then at the evidentiary hearing, and his conduct contributed to the delay.<sup>32</sup>

The third aspect to be taken into account is whether the *public authorities* involved *have done everything possible to complete the case within a reasonable time*.<sup>33</sup> It is pointless for the State to invoke the fact that the judicial authorities are overburdened, that there are not enough judges, or that there are administrative or technical difficulties. Indeed, the ECtHR has explained that by acceding to the ECHR, States have also undertaken to operate their institutional systems in a manner consistent with the Convention.<sup>34</sup> There is no room for "*explanations*" or "*grace periods*" in this respect.<sup>35</sup> The inactivity of a single body is sufficient to constitute a violation of the ECHR, and it is not necessary that all the authorities involved in the procedure are in default. In one case, Hungary was condemned because the City Court held the first hearing in that case on 17 January 1997, even though the indictment had already been filed on 22 December 1995. This inactive period of more than one year could not be explained by the State and was therefore charged to the Strasbourg forum.<sup>36</sup> In the case of *Németh v. Hungary*, the unexplained inactive

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<sup>29</sup> E.g. the *Maglódi* case, the *Németh* case, see in detail Czine et al., 2008, pp. 341-349 and 358-361.

<sup>30</sup> *Csanádi v. Hungary*, App. No. 55220/00, 9 May 2004.

<sup>31</sup> Grád, 2005, p. 310.

<sup>32</sup> *Acquaviva v. France*, App. No. 19248/91, 21 November 1995.

<sup>33</sup> See, e.g. *Case of Péliissier v. Sassi v. France*, App. No. 25444/94, 25 March 1999.

<sup>34</sup> Grád, 2005, p. 286.

<sup>35</sup> Tóth, 2005, p. 158.

<sup>36</sup> *Csanádi v. Hungary*, App. No. 55220/00, 9 May 2004.

periods amounted to a total of four years and two months, and were therefore clearly imputable to the State.<sup>37</sup>

In criminal cases, it is also very important to determine the starting date in the reasonable time. It does not necessarily coincide with the opening of the investigation, which may be opened against an unknown person and may continue for a long period of time without the future accused being aware of it.<sup>38</sup> The accused may be prejudiced by the delay in the proceedings from the moment when he is actually affected, i.e. when he becomes aware of the proceedings against him. Citing *Reinhardt and Slimane-Kaid*: "An 'accusation' within the meaning of Article 6(1) can be defined as 'official information from a competent authority that a criminal offence has been committed', and this formulation is consistent with the concept of 'significant effect on the suspect's situation'."<sup>39</sup> The starting date is therefore the date of the first procedural act (interrogation as a suspect, search, arrest) which substantially affects the suspect.<sup>40</sup>

Some types of cases require a quicker procedure due to the nature of the legal relationships involved, and the ECtHR expects Member States to provide a smoother administration. It prescribes a stricter assessment of the requirement to respect a reasonable time if the suspect is under arrest or subject to other coercive measures restricting personal liberty.<sup>41</sup> The right to liberty and security is declared in Article 5 ECHR, so the ECtHR examines violations of this and Article 6 separately. A person may be detained for an unreasonably long period of time and as a result the State may be convicted of a breach of Article 5(3).<sup>42</sup> However, taking the proceedings as a whole into account, the length of the criminal proceedings does not necessarily mean that the State is in breach of the Convention.<sup>43</sup>

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<sup>37</sup> Czine et al., 2008, p. 361.

<sup>38</sup> Halmai and Tóth, 2003, p. 713.

<sup>39</sup> *Reinhardt v. Slimane-Kaid v. France*, App. No. 23043/93;22921/93, 31 March 1998.

<sup>40</sup> Herke, 2009.

<sup>41</sup> For the case law of the Court of Justice in this respect, see in detail Tóth, 2001, pp. 214-233.

<sup>42</sup> *Muller v. France*, App. No. 21802/93, 17 March 1997.

<sup>43</sup> See *inter alia I.A. v. France*, App. No. 28213/95, 23 September 1998.

#### **4. Definition of the concept of fair trial in the practice of the Hungarian Constitutional Court, with special regard to the requirement of reasonable time**

The Hungarian Constitutional Court has also tried to elaborate the constitutional concept of the right to a fair trial with regard to the relevant international documents. According to these, *a fair trial is a quality which can only be judged by taking into account the whole of the proceedings and the circumstances of the case. Therefore, despite the absence of certain details, as well as despite the observance of all the detailed rules, the proceedings may be "unfair" or "unjust" or "unfair".*<sup>44</sup> The Constitutional Court subsequently confirmed the findings of the aforementioned Constitutional Court decision on the content of the right to a fair trial in numerous decisions and has made them part of its practice.<sup>45</sup>

In defining the right to a fair trial, the Fundamental Law was based on the relevant provisions of the previous Constitution and no conceptual change has been made in this respect. Nor could it have been, since the concept of due process is also defined in international documents, which form the basis for constitutional concepts. The only change to the Constitution is the express verbis statement of the requirement to respect a reasonable time. The Constitutional Court stated in its decision 61/2011 (13 July 2011) AB that in cases where "for certain fundamental rights, the Constitution formulates the substantive content of the fundamental right in the same way as an international treaty (such as the Covenant on Civil and Political Rights and the European Convention on Human Rights), the level of protection of the fundamental right granted by the Constitutional Court in these cases may in no case be lower than the level of international protection (typically as developed by the ECtHR). The Constitutional Court may, however, establish a different, higher standard for the protection of human rights (fundamental rights).<sup>46</sup> This effectively declares that the minimum level of protection established by the ECtHR, as regards the requirement to observe a reasonable time, is also applicable in Hungary.

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<sup>44</sup> Constitutional Court decision 6/1998 (III. 11.).

<sup>45</sup> Constitutional Court Decision 5/1999 (31.III.), Constitutional Court Decision 1999, 75; Constitutional Court Decision 14/2002 (20.III.), Constitutional Court Decision 2002, 101, 108; Constitutional Court Decision 15/2002 (29.III.), Constitutional Court Decision 2002, 116, 118-120; Constitutional Court Decision 35/2002 (19.VII.), Constitutional Court Decision 2002, 199, 211.

<sup>46</sup> Constitutional Court Decision 3173/2015. (IX. 23).

For the first time since the entry into force of the Fundamental Law, the Constitutional Court has set out the main elements of its doctrine on the right to a fair trial in a decision rejecting a constitutional complaint against a judicial decision.<sup>47</sup> In doing so, the Constitutional Court maintained its previous doctrine and extended it to the constitutional review of judgments and took a position on the possibilities of the Constitutional Court to examine the issue of due process.<sup>48</sup>

According to the approach of Constitutional Court, the principle of due process does not constitute a closed system, and its content is made up of both legal and non-legal elements.<sup>49</sup> According to the practice of the Constitutional Court, the right to a fair trial is an absolute right against which there is no other fundamental right or constitutional objective, because it is itself the result of a discretionary process, and therefore the right to a fair trial cannot be limited. However, the necessity and proportionality of the restrictions on certain aspects of the right to a fair trial, i.e. within the concept of due process, can be examined. The partial rights may be limited and, taken together, guarantee the fairness of the proceedings in question.<sup>50</sup>

According to the practice of the Constitutional Court, the following are part of the fair trial: the right of access to a court, the fairness of the trial, the requirement of publicity of the trial and the public announcement of the court's decision, the establishment of a court by law, the requirement of judicial independence and impartiality, and the requirement of a judgement within a reasonable time. Although not enshrined in the text of the Constitution, the Constitutional Court interpreted the principle of equality of arms<sup>51</sup> and the right of the person concerned to a reasoned decision by a judge as part of the principle of a fair trial.<sup>52</sup>

A new element in the practice of the Constitutional Court after the entry into force of the Fundamental Law was the development of a position on the requirement of reasonable time. In their constitutional complaints several petitioners invoked the length of the underlying litigation and the consequent violation of their right to be tried within a reasonable time. The

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<sup>47</sup> Constitutional Court Decision 7/2013. (III. 1).

<sup>48</sup> See in detail, Sulyok, 2015, pp. 97-98.

<sup>49</sup> Fűrész, 2002, p. 489.

<sup>50</sup> Czine, 2017, 103-108.

<sup>51</sup> Constitutional Court Decision 8/2015. (IV.17) Reason 63.

<sup>52</sup> Constitutional Court Decision 7/2013. (III.1.) Reason 34.

Constitutional Court, however, rejected most complaints based on the infringement of this fundamental right, either for failure to exhaust the remedies available or for lack of competence.<sup>53</sup> In a few exceptional cases, the Constitutional Court has dealt with the merits of the requirement to respect a reasonable time, generally stating that the delay in proceedings was caused by objective reasons independent of the bodies involved.<sup>54</sup>

It is important to note that, in the exercise of the right to a trial within a reasonable time, the Constitutional Court has not annulled any legislation or judicial decision expressly on the grounds of infringement of this right.<sup>55</sup> The reason for this can also be found in the reasoning of a decision of the Constitutional Court. The Constitutional Court cannot effectively fulfil its task of protecting the fundamental right to be tried within a reasonable time, which is part of the right to a fair trial and is linked to a provision of the Constitution. The Constitutional Court does not have at its disposal any legal remedy which would enable it to remedy the infringement of this part of the right. In many cases, the infringement of the constitutional provision relating to the right to be judged within a reasonable time does not in itself render the court decision unconstitutional, since the petitioner's right is not infringed by the court decision itself, but by the delay in the proceedings preceding it, and the Constitutional Court cannot therefore annul the decision and can only indicate the infringement of the requirement of reasonable time.<sup>56</sup>

Constitutional Court decision 2/2017 (II.10) is a milestone in the practice of the Constitutional Court regarding the requirement of reasonable time, which leads us to the examination of the Hungarian case law. The Constitutional Court held that if the court mitigates the criminal penalty imposed on the defendant because of the delay in the proceedings, the reasons for its decision must state the fact of the delay and, in this context, the mitigation of the penalty and the extent of the mitigation.

According to the reasoning of the decision, the right to be heard within a reasonable time is part of the right to a fair trial. As a consequence, the constitutional approach of assessing the whole and the individual elements of the judicial proceedings must be applied to the examination of this sub-justification in order to ascertain the intention of the court to try the case

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<sup>53</sup> See in more detail Czine, 2017, p. 106.

<sup>54</sup> Constitutional Court Decision 3115/2013. (VI.4.) Reason 30.

<sup>55</sup> Dániel Antal draws attention to this in his study. See Antal, 2018, p. 28.

<sup>56</sup> Constitutional Court Decision 3024/2016. (II.23.) Reason 18.

within a reasonable time. If it can be inferred from the acts of the court proceedings under examination, from the history of the trial, that the court did not observe the fundamental legal requirement of a reasonable time limit, then the length of the criminal proceedings in question, as a result of the inactivity of the court concerned, can be established, irrespective of the duration of the proceedings. In so doing, the Constitutional Court has also stated that even criminal proceedings of objectively short duration may be protracted if the facts of the criminal proceedings do not show that the courts before them have made an effort to reach a decision on the charge as soon as possible, in compliance with the requirements of a fair trial. The duration of criminal proceedings, even if the rules on time-limits laid down in the Criminal Procedure Code are complied with, may infringe Article 28(1) of the Fundamental Law if there are unjustified periods of inactivity attributable to the courts hearing the case and the excessive length of the criminal proceedings is not justified by the complexity of the case. The Constitutional Court considers, however, that an infringement of fundamental rights resulting from protracted criminal proceedings may be remedied by the imposition of a sentence. If it can be established from the grounds of the judgment that the court, in view of the length of the proceedings, granted the accused a favourable sentence, that is to say, imposed a lighter sentence because of the length of time or the length of the proceedings or applied a measure in lieu of a sentence, the accused may no longer legitimately rely on a breach of his right to be tried within a reasonable time.

By following this rule outlined by the Constitutional Court and putting it into practice, proceedings before the ECtHR could be prevented, since in domestic law the delay in proceedings actually results in the persons concerned being compensated in the imposition of sentences.

## **5. The passage of time as a sentencing factor in Hungarian judicial practice**

In the course of my comprehensive research on the current issues of sentencing, I analyse sentencing from both theoretical and practical perspectives.<sup>57</sup> An important part of the research was an exploration of practice, which also analysed the occurrence of mitigating and aggravating circumstances in judicature and the problems associated with them. Correct

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<sup>57</sup> For the detailed results of the research see Pápai-Tarr, 2024.

sentencing is a key, if not the most important, issue in criminal law. It is at least as important as the correct classification of the offence. It is at the time of sentencing that the sanction comes into being, alongside the substantive disposition of the case, and it is at the time of sentencing that the criminal procedure culminates and the enforcement of the sentence becomes part of the process. It is at this stage of the procedure that criminal law in the broader sense, i.e. the intersection of this particular “*triple frontier*” of sentencing, is centred, since it is the correct choice of the sex and level of punishment and its subsequent effective execution that can fulfil the aims of punishment and give real meaning to criminal law in the broad sense.

Article 80 of the Criminal Code contains the general principles of sentencing declared by the legislator. In all cases, the punishment must be imposed with a view to the punishment objective and within the limits of the law. Among the criteria for imposing punishment, the Criminal Code emphasises the material gravity of the offence, the degree of culpability, the danger to society posed by the offender, and other aggravating and mitigating circumstances that cannot be listed among the above. The current Penal Code therefore quite rightly does not even attempt to list mitigating and aggravating circumstances, even by way of example.

However, Criminal College Advice no. 56 provides a collection of these circumstances. It differentiates between aggravating and mitigating circumstances related to the person of the offender, and also identifies mitigating and aggravating circumstances according to the material facts, data and aspects related to the offence committed, which are relevant for the imposition of the sentence. The mitigating and aggravating circumstances are not set in stone, but the Criminal College Advice provides detailed guidance for the courts, undoubtedly with a view to establishing more uniform sentencing practice.

According to the Criminal Code, the sentence must therefore be adapted to the other aggravating and mitigating circumstances. In addition to the material gravity of the offence, the offender's danger to society and his guilt, case-law also recognises aggravating and mitigating circumstances which do not fall into the above categories. The passage of time does not fall into either category. The passage of time is generally a mitigating circumstance arising from the fundamental right of the accused, as described above.

However, it is difficult to take this mitigating circumstance into account because we cannot define an objective criterion and a time period that would already have a clear mitigating effect. Therefore, the taking into

account of the passage of time cannot be automatic for the courts. In many cases, the delay is due not to the authorities at all, but to the deliberate "delaying" of the offender and the defence, which even the Strasbourg Court, which is so strict about respecting a reasonable time, does not attribute to the offender.<sup>58</sup>

According to Criminal College Advice no. 56, the more serious the offence, the longer the period of time that can be considered as a mitigating factor. This has a greater impact if it is close to the limitation period; it may also have a lesser impact, or even disappear, if the time lapse was caused by the offender. The lapse of time may be taken into account as a mitigating circumstance only to a very limited extent if the delay in the proceedings at first instance was attributable to the accused.<sup>59</sup> Time may have a different weight in each case.<sup>60</sup> However, inconsistencies in judicial practice abound in this sentencing circumstance. According to the Szolnok Court, the passage of time can be considered a mitigating circumstance if it is not attributable to the accused and the duration of the proceedings is close to the limitation period.<sup>61</sup> Such a view would lead to a rather extreme practice, since the limitation period is at least five years, but for many offences it is longer, given the upper limit of the penalty. In comparison, about 6% of criminal cases last more than five years.<sup>62</sup> The Constitutional Court interpreted that even an objectively short duration of criminal proceedings may be contrary to the requirement of a reasonable time limit. In judicial practice, although extreme decisions are always taken, there are of course also decisions which consider a shorter period than the limitation period as a mitigating factor. In a specific case, the prosecution proposed that the court of appeal should disregard the lapse of time as a mitigating factor because

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<sup>58</sup> For example: the European Court of Human Rights (*Kemmache v. France*, App. No. 17621/91, 24 November 1994; *Acquaviva v. France*, App. No. 19248/91, 21 November 1995. For more on this issue, see Pápai-Tarr, 2012, pp. 50-51.; Balla and Kardos, 2005, pp. 44-45.

<sup>59</sup> Szeged Court of justice Bf.429/2014/7., Eger Tribunal B.8/2020/10.

<sup>60</sup> For the following decisions, see the reasoning explicitly explained with respect to the passage of time: the Metropolitan Court of Budapest B.1016/2010/122., the Central District Court of Pest B.22776/2015/55., the Miskolc Court of Justice Bf.619/2017/16., the Metropolitan Court of Budapest Bf.7006/2018/18., the Metropolitan Court of Budapest B.659/2013/224., BH 2016.8.194., BH 2016.8.192.

<sup>61</sup> Szolnok Court of First Instance B.184/2006/385.

<sup>62</sup> Key data on prosecution in criminal courts 2022. p. 70. [Online] Available at: <https://ugyeszseg.hu/wp-content/uploads/2023/11/buntetobirosag-elotti-ugyeszi-tevekenyseg-fobb-adatai-i.-2022.-ev.pdf> (Accessed: 1 February 2023).

the proceedings were continuous after the discovery of the commission of the offence and the lapse of five years was not significant in relation to the punishment for the offences (aggravated homicide). While finally in the case at hand, the six-year period was assessed as a mitigating factor by the court of appeal. In another case, the court assessed the 2.5 years that had elapsed since the crime of manslaughter as a mitigating factor.<sup>63</sup> In another case, the district court assessed the passage of time as a mitigating circumstance, despite the fact that less than one year had elapsed since the commission of the acts at the time of its judgment.<sup>64</sup> At the time of the court of second instance's ruling, the time elapsed since the offences were committed was also barely more than one and a half years. However, the Court of Appeal considered that the passage of time had a greater impact, taking into account the fact that both defendants were in pre-trial detention, and the General Court assessed this as one of the mitigating circumstances.<sup>65</sup>

In practice, however, the opposite can also be observed, where the passage of time is not taken into account at all, especially by lower courts. In the court's view, the passage of time cannot be considered as a mitigating circumstance in favour of the accused, taking into account that, although more than two years have passed since the commission of the offence, this is not a very long time in relation to the gravity of the offence and the maximum sentence, and that the passage of time is partly attributable to the accused.<sup>66</sup>

There is also disagreement on whether the passage of time can be taken into account as a mitigating factor in the case of non statute of limitations offences. The Szolnok Court, based on the statute of limitations, concludes that the passage of time cannot be taken into account as a mitigating circumstance for non-prescription offences. The Curia explained that the four and a half years' lapse of time assessed and relied on by the lower court was not of such gravity as to justify the imposition of a life sentence. In the Curia's view, the more serious the offence, the longer the period that can be assessed as a mitigating circumstance. The qualified case of manslaughter is punishable by life imprisonment and the statute of limitations does not apply. In the present case, a criminal proceeding without administrative

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<sup>63</sup> Metropolitan Court of Appeal Bf.298/2016/28.

<sup>64</sup> BH 2004.2.53. II. pont.

<sup>65</sup> Debrecen General Court Bf.751/2013/8.

<sup>66</sup> Metropolitan Court B.6/2014/28., Metropolitan Court of Appeal Bf.167/2020/18.

delay, the duration of five and a half years from the commission of the offence, as well as the duration of the coercive measure, is irrelevant.<sup>67</sup> Consequently, the Curia did not take the view that the passage of time could not have a mitigating effect at all in the context of non-expiring offences.

As we have seen, there is little uniform practice in Hungarian judicial practice regarding the assessment of the passage of time as a mitigating circumstance. In order to standardise legal practice, the basic rules for the consideration of the passage of time as a mitigating circumstance should be laid down. In any event, it should be made clear that the passage of time has a mitigating effect not only when the limitation period has expired. There is no doubt, however, that the closer to the limitation period, the greater the mitigating effect. It should also be stipulated that in the case of offences for which the statute of limitations does not expire, the fact that time has elapsed should not automatically be ruled out as a mitigating circumstance.

## 6. Conclusion

Taking the passage of time into account as a mitigating circumstance and reducing the sentence imposed in view of this is a very important task for criminal courts, as the ECtHR has stated in several Hungarian cases that it explicitly considers the reduction of the sentence in view of the length of the proceedings as a remedy, and thus the country can no longer be sentenced.<sup>68</sup> It is a constitutional requirement against the passage of time that, if the court mitigates the criminal penalty imposed on the accused because of the length of the proceedings, it must state in its reasoning the fact of the length of the proceedings, the mitigation of the penalty and the extent of the mitigation.<sup>69</sup> The reference to the passage of time should therefore not be automatic and formulaic on the part of the court. The sentencing judge is in a difficult position, since there is no objective yardstick and no time limit, every case is different, and the consideration of the passage of time as a mitigating circumstance may vary from case to case. I consider the obligation to state reasons imposed by the Constitutional Court to be very important. In the

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<sup>67</sup> BH 2021.3.68.

<sup>68</sup> *Somogyi v Hungary*, App. No 5770/05, 11 January 2011, paragraph 31; *Goldmann and Szénászkly v Hungary*, App. No 17604/05, 30 November 2010, paragraph 26; *Földes and Földesné Hajlik v Hungary*, App. No 41463/02, App. no. 414660/01, 31 October 2006, paragraph 24; *Kalmár v. Hungary*, App. No. 32783/03, 3 October 2006, paragraph 27; *Tamás Kovács v. Hungary*, App. No. 67660/01, 28 September 2004, paragraph 26.

<sup>69</sup> Constitutional Court Decision 2/2017. (II. 10.).

case of sentencing, the obligation to state reasons increases the persuasiveness of the judgment. Each sentencing circumstance, including the passage of time, has a different weight from case to case, which must be supported by facts and reasoning.<sup>70</sup> Otherwise, the judge will be in breach of his duty to state reasons, and the mere listing of sentencing circumstances may result in a breach of the principle of fair trial and jeopardise the effectiveness of the purpose of the sentence. The sentence can achieve its purpose more effectively if the defendant also understands, as a result of the judge's cogent reasoning, why the sentence was imposed on him and to the extent to which it was imposed. Reasoning is a major contribution to legal education and can also be a useful means of preventing unnecessary recourse to legal remedies. The justification of the sentence and the aggravating and mitigating circumstances should not be formalistic but should be organically adapted to the facts of the specific case.<sup>71</sup>

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<sup>70</sup> Kardos, 2021, p. 53.

<sup>71</sup> Rendeki, 1976, p. 19.

**Bibliography**

- [1] Antal D., (2018) 'Az észszerű időn belüli tárgyaláshoz való jog és az új büntetőeljárás törvény külön eljárásai', *Eljárásjogi Szemle*, 2018(3), pp. 22-29.
- [2] Balla, L., Kardos, S. (2005) 'A tisztességes eljárásról a strasbourgi bíróság gyakorlatában', *Bírák Lapja*, 2005(1), pp. 34-53.
- [3] Berger, V. (1999) *Az emberi jogok európai bíróságának esetjoga*, Budapest: HVG-ORAC.
- [4] Cohen, G. J. (2002) *Aspects européens des droits fondamentaux. Préparation au C.R. F. PA. Libertés et droits fondamentaux*. 3rd Ed. Paris: Montchrestien.
- [5] Czine, Á. (2017) 'Mérlegen a tisztességes büntetőeljárás'. *Alkotmánybírósági Szemle*, 2017(1), pp. 103–108.
- [6] Czine, Á., Szabó S., Villányi, J. (2008) *Strasbourggi ítéletek a magyar büntetőeljárásban*, Budapest: HVG-ORAC.
- [7] Ficsor, G. (2015) 'A készülő új büntetőeljárás kódex margójára', *Büntetőjogi Szemle*, 4(1-2), pp. 25–27.
- [8] Földvári, J. (1970) *A büntetés tana*. Budapest: Közgazdasági és Jogi Könyvkiadó.
- [9] Fűrész, K. (2002) A bíróság. in Kukorelli, I. (ed.) *Alkotmánytan*. Budapest: Osiris, pp. 445-527.
- [10] Grád, A. (2005) *A Strasbourggi Emberi Jogi Bírászkodás Kézikönyve*. Budapest: HVG-ORAC.
- [11] Halmai, G., Tóth, G. A. (eds.) (2003) *Human Rights*. Budapest: Osiris.
- [12] Herke, C. (2009) A büntetőeljárás gyorsításának új jogintézménye és további lehetőségei. The conference paper was presented at the event

- of the Hungarian Criminal Law Association on 14 October 2009, the written version [Online]. Available at: <http://www.mbjt.hu/HerkeCsongor20091014.pdf> (Accessed: 1 August 2024).
- [13] Kardos, D. (2021) *A büntetéskiszabás elvei és rendszere, a büntetéskiszabási tényezők megjelenése a jogalkalmazói gyakorlatban*. PhD Thesis, Budapest: Károli Gáspár Reformed University, Doctoral School of Law and Political Sciences, [Online]. Available at: [http://real-phd.mtak.hu/965/1/ertekezes\\_KardosDora1\\_watermark.pdf](http://real-phd.mtak.hu/965/1/ertekezes_KardosDora1_watermark.pdf) (Accessed: 2 May 2021).
- [14] Koering-Joulin, R. (1996) *Introduction générale, in Les nouveaux développements du procès équitable au sens de la Convention européenne des droits de l'homme*. Bruxelles: Bruylant.
- [15] Nagy, A. (2011) 'A tisztességes eljáráshoz való jog az Emberi Jogok Európai Bírósága Magyarországgal kapcsolatos gyakorlatában, különös tekintettel az ésszerű határidő követelményére', *Debreceni Jogi Műhely*, 8(3); <https://doi.org/10.24169/DJM/2011/3/3/3>.
- [16] Pápai-Tarr, Á. (2024) *A büntetéskiszabás aktuális kérdései*, Budapest: Novissima.
- [17] Pápai-Tarr, Á. (2012) *A büntetőeljárás gyorsításáról*. Budapest: Gondolat.
- [18] Pradel, J. (2006) La célérité et les temps du procès pénal, Comparaison entre quelques législations européennes. in *Mélanges en l'honneur du professeur Reynold Ottenhof. Le champ pénal*. Paris: Dalloz.
- [19] Rácz, A. (1990) *Alapvető jogok és kötelességek*. Budapest: Államigazgatási Főiskola.
- [20] Renedeki, S. (1976) *A büntetés kiszabása, Enyhítő és súlyosító körülmények*. Budapest: KJK.

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- [21] Sári, J. (2001) *Alapjogok, Alkotmánytan II.* Budapest: Osiris.
- [22] Sulyok T. (2015) 'A tisztességes eljáráshoz való jog újabb kihívásai', *Alkotmánybírósági Szemle*, 2015(2), pp. 97–98.
- [23] Tóth, M. (2001) *A magyar büntetőeljárás az Alkotmánybíróság és az európai emberi jogi ítélkezés tükrében*, Budapest: KJK.