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UNIVERSITY OF MISKOLC

UNIVERSITY OF MISKOLC, FACULTY OF LAW
3515 MISKOLC-EGYETEMVÁROS, HUNGARY
Tel.: +(36) (46) 565-111/13-53
E-mail: editor.eis@uni-miskolc.hu

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Studies in honour of the 70th birthday of Prof. Dr. Ákos Farkas

Foreword

The Special Issue 1 of the European Integration Studies 2024 is a truly special edition. Although this is not obvious at first glance, as it contains high-quality articles relevant to the profile of the journal. But the careers of the authors have one point in common: they all obtained their doctoral degrees under the supervision of Professor Ákos Farkas at the Ferenc Deák Doctoral School of Law and Political Sciences in Miskolc. Their papers are a tribute to their supervisor, who is now celebrating his 70th birthday. This occasion motivated the management of the Faculty of Law and Political Sciences of the University of Miskolc and the staff of the Institute of Criminal Sciences to invite researchers of the new generation to present their achievements in honour of the celebrated professor.

The milestones and achievements of Ákos Farkas' career are presented in detail in the volume published on the occasion of his 65th birthday[*], and his autobiography with a personal tone is also available to the public[**]. This time, adapting to the specificity of the issue, we highlight only his role in doctoral training.

Professor Ákos Farkas is currently a core member of the Ferenc Deák Doctoral School of Law and Political Sciences, a member of the Disciplinary Doctoral Council and the head of the research programme entitled Trends in the Development of Criminal Sciences, in the framework of which he holds a special seminar on Criminal Procedure. In addition, he teaches the core subject "Trends in the Development of Criminal Sciences" in Hungarian and English, so all doctoral students participating in doctoral training can meet him during their studies.

The scientific interest of Professor Ákos Farkas, his sensibility to new phenomena are the guarantee that in the framework of the courses he teaches students can get acquainted with the latest trends in the field of criminal sciences and the novelties of scientific life. He also supported his

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[*] Miskolc Law Review, Special Issue 2 of 2019, Volumes 1-2. https://www.mjsz.uni-miskolc.hu/201902KSZ.

[**] Zoltán Nagy (ed.): *Legal Education in Miskolc*. Association for the Preservation of Legal Traditions in Miskolc, University of Miskolc, Faculty of Law, 2022. 177-182. https://real.mtak.hu/158858/1/ME_AJK_LegalEducationinMiskolc2022.pdf.

doctoral students in attending scientific events abroad, where they had the opportunity to meet well-known speakers, internationally recognized experts in the field of criminal sciences.

The research area (Trends in the development of criminal sciences) within which those intending to participate in doctoral training under the supervision of Professor Ákos Farkas can choose a topic is quite broad. His own research topics cover a wide range of issues of comparative criminal procedure, efficiency of criminal justice, law of evidence, European criminal law, criminal law protection of the financial interests of the EU.
The first PhD student under his supervision obtained her PhD degree in 2004, so the year 2024 means a double anniversary. Not only because of the Professor's birthday, but also because his first PhD student received her PhD degree 20 years ago. This year the ninth thesis prepared under his supervision will probably be defended. Among his graduated PhD students, we can find researchers, university lecturers and high-ranking judges, who, regardless of their current work, were happy to undertake the preparation of the studies that can be read in this volume, thus thanking Professor Ákos Farkas for his support.

We should also not forget that Professor Ákos Farkas is involved in the doctoral procedures not only in Miskolc, but has also been invited to participate in the work of evaluation committee and examination board of other doctoral schools. His helpful attitude, extensive professional background and thorough knowledge of the special literature have thus supported the obtaining of PhD degree of the doctoral students not only in Miskolc.

The teacher lives on in his students and the fruit of his work is the "infection" of the new generation with interest in scientific issues. The studies in this volume confirm that Professor Ákos Farkas activity has been successful in this respect.

On the occasion of Your birthday, on behalf of the authors, editors and your colleagues, we wish You further professional success, good health and we hope that in the future You will accompany even more candidates on their way to the PhD degree!

Happy Birthday Professor Ákos Farkas!

Miskolc, September 2024

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BALÁZS ELEK*

Arrest practice and habeas corpus principle

ABSTRACT: The legal history of habeas corpus goes back to the period of the 'Golden Bull' issued by King Andrew II of Hungary. In the development of English law, the Magna Carta Libertatum marked the emergence of the principle before that. The essence of the principle is that deprivation of liberty may be pronounced by a person vested with judicial power and that the person concerned must be brought before a judge in order to be heard by the accused before an arrest can be ordered. The judicial order for arrest is also provided for in the Fundamental Law of Hungary. The principle raises a number of questions of law enforcement in domestic court practice, but also in the context of EU cooperation.

KEYWORDS: habeas corpus principle, criminal procedure, arrest practice.

1. Introductory thoughts

I was a student at the Miskolc University Faculty of Law when Professor Ákos Farkas aroused my interest in the science of criminal procedure. Later, at the Ferenc Deák Doctoral School, he undertook the supervision of my doctoral studies. I also owe my later scientific achievements to him. Dear Ákos! Thank you for letting me be your student!
By the habeas corpus procedure, we usually mean when the detained person can turn to the court with an urgent request for his release. The right to a judicial hearing and the right to judicial review are also closely related to the principle. The law on criminal procedure seeks to ensure that the pretrial detention of the accused takes place only in the context of adversarial proceedings. During the investigation, the investigative judge makes a decision in a meeting, during the preparation phase of the trial this is only possible in a meeting. However, there may be several procedural situations where there is no clear prescription for the given form of procedure.

* Univ. prof. Department of Criminal Procedural Law, Debrecen University, Hungary, elek.balazs@law.unideb.hu.

2. The origin of habeas corpus principle

Habeas corpus is the greatest safeguard of personal freedom, guaranteeing that an individual can only be deprived of liberty for a short period of time unless he is formally charged or arraigned before a judge.

The principle first appeared in the 13th Century as a means of preventing the arbitrary restriction of personal freedom during the war between England's barons and the king. An individual detained at the king's behest could receive a writ of habeas corpus from a judge, which would then be handed to the arresting authorities. In this manner, the detainee could demand that the authorities disclose the reasons for his arrest, grant him a court hearing and allow a judge to review the legality of the arrest. By sending back the writ, the authorities would confirm that they had fulfilled these conditions. The development of the habeas corpus principle covers several important milestones, including the prohibition on arbitrary detention enshrined in the Magna Carta.[1]

The very first written source of law in Hungary, the Golden Bull, shows that the Hungarian legal system was developing in parallel to that of England. Proclaimed in 1222 by King András II, this document qualifies the detention of suspects as the most basic restriction on the individual right to liberty. According to Ferdinandy, the Golden Bull represents "the basic code of personal freedom in Hungarian public law" since it mandates the state to respect the individual and, by extension, personal freedom.[2] The Bull deals with arrest and detention in Article II: "We also desire that neither [the current monarchy] nor any king that succeeds us shall arbitrarily arrest or oppress any nobleman unless he is previously convicted in a court of law and through proper procedure."

It is worth mentioning that the 1789 Declaration of the Rights of Man and of the Citizen also codified habeas corpus. The Universal Declaration of Human Rights, adopted in 1948 by the United Nations, makes the principle mandatory. Habeas corpus also constitutes a significant part of the European Convention on Human Rights, signed on 4 November 1950 in Rome intending to defend human rights and fundamental freedoms.

Article 5 of the Convention lists the circumstances under which it is possible to deprive an individual of liberty. The Convention not only details the scope of circumstances but also discusses the most important

[1] Mezey, 2015, pp. 2-6

2 Ferdinandy, 1899, p. 169.

procedural necessities, such as the requirement that court proceedings be overseen by a judge. An arrested or detained individual must, with all deliberate speed, appear before a judge or other public official who is legally vested with commensurate powers. Throughout the period of arrest or detention, every individual who is deprived of liberty has the right to a hearing during which the court will decide on the legality of the detention; in case of unlawful detention, the court will order the petitioner released.[3]
The Convention's clause on arrests is supplemented by other recommendations. These include Resolution 11 (1965) of the Council of Europe's Committee of Ministers, which suggests that detention of suspects should not be an automatic requirement, but rather a decision made by a court of law following an examination of the facts and circumstances of the particular case. Arrest should be regarded as an exceptional measure that can be ordered and sustained only when absolutely necessary.[4]

In EU law it is also required by the Directive on the right to information in criminal proceedings that the Member States shall ensure that suspects or accused persons who are arrested or detained are provided promptly with a written Letter of Rights, which contains information about the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority.[5]
The rules relating to the legality of detention also stem from the principles that ultimately led to the common rules of the European Arrest Warrant. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.[6] The mechanism of the European arrest warrant is based on a high level of confidence between the Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union.

[3] Hungarian Act XXXI of 1993, the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Rome; Art. 5, Right to Liberty and Security.
[4] Elek, 2022, pp. 259-279.
[5] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.
[6] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).

The execution of the European arrest warrant may be refused if there are reasonable grounds for believing that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation.

The requested person may not be transferred even if there is a risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

The case law of the European Court of Justice has also raised the question of whether the execution of a European arrest warrant can be refused if there is a danger of judicial independence.

3. The right to a judicial hearing in the practice of the CJEU

The first legal instrument was adopted in 2002 on the European Arrest Warrant and the Surrender Procedures between the EU Member States.[7] The European arrest warrant is the first concrete measure in the field of criminal law implementing the principle of mutual recognition. The EAW was introduced after the 9/11 terrorist attacks to create a fast-track extradition system in the EU. A new system was needed to ensure efficient cooperation in transnational cases. However, a legal institution had to be established without prejudice to fundamental rights to liberty and the right to judicial hearings.

The *right to liberty* is one of the most important principles in judicial cooperation between member states. The right to liberty requires that rules allowing for deprivation of liberty be enacted and enforced in an accessible and foreseeable way.[8] This means legal certainty. In law enforcement activities, the most common restriction on fundamental rights is the limitation on personal freedom – that is, the apprehension and preliminary detention of suspects. Habeas corpus proceedings are generally understood to be cases in which an individual in custody files an urgent petition to a court with the aim of obtaining his release. The principle is closely related to the accused party's right to a hearing before the bench and right to judicial review.

[7] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).
[8] Mancano, 2019, pp. 1-15.

A preliminary referral question was formulated in the context of the execution in Romania of four EAWs issued by the German authorities against a Romanian national who had not been heard before issuing the EAW.

The CJEU decided that the FD EAW cannot be interpreted as meaning that the requested authority may refuse to execute an EAW because the person had not been heard before issuing the EAW. The FD EAW grants the right to be heard in the state of execution which complies with the rights recognised under Articles 47 and 48 of the EU Charter.[9]

The CJEU underlined that Under Article 1(2) of Framework Decision 2002/584, the Member States are in principle obliged to act upon a European arrest warrant.

The Member States may refuse to execute such a warrant only in the cases of mandatory non-execution provided for in Article 3 thereof and in the cases of optional non-execution listed in Articles 4 and 4a. Admittedly, under Article 4a of Framework Decision 2002/584, the infringement of the rights of the defence during a trial which has led to the imposition of a criminal sentence *in absentia* may, under certain conditions, constitute a ground for non-execution of a European arrest warrant issued for the purposes of giving effect to a custodial sentence. By contrast, the fact that the European arrest warrant has been issued for the purposes of conducting a criminal prosecution, without the requested person having been heard by the issuing judicial authorities, does not feature among the grounds for non-execution of such a warrant.

> The observance of Articles 47 and 48 of the Charter does not require that a judicial authority of a Member State should be able to refuse to execute a European arrest warrant issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard by the issuing judicial authorities before that arrest warrant was issued. It must be stated that an obligation for the issuing judicial authorities to hear the requested person before such a European arrest warrant is issued would inevitably lead to the failure of the very system of surrender provided for by Framework Decision 2002/584 and, consequently, prevent the achievement of the area of freedom,

[9] Case C-396/11, *Ciprian Vasile Radu v. Curtea de Apel Constanţa,* 29 January 2013.

> security and justice, in so far as such an arrest warrant must have a certain element of surprise, in particular in order to stop the person concerned from taking flight. In any event, the European legislature has ensured that the right to be heard will be observed in the executing Member State in such as way as not to compromise the effectiveness of the European arrest warrant system.
> Thus, it is apparent from Articles 8 and 15 of Framework Decision 2002/584 that, before deciding on the surrender of the requested person for the purposes of prosecution, the executing judicial authority must subject the European arrest warrant to a degree of scrutiny. In addition, Article 13 of that framework decision provides that the requested person has the right to legal counsel in the case where he consents to his surrender and, where appropriate, renounces his entitlement to the speciality rule. Furthermore, under Articles 14 and 19 of Framework Decision 2002/584, the requested person, where he does not consent to his surrender and is the subject of a European arrest warrant issued for the purposes of conducting a criminal prosecution, is entitled to be heard by the executing judicial authority, under the conditions determined by mutual agreement with the issuing judicial authorities.[10]

Framework Decision 2002/584 must be interpreted as meaning that the executing judicial authorities cannot refuse to execute a European arrest warrant issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard in the issuing Member State before that arrest warrant was issued. [11]

[10] Police and judicial cooperation in criminal matters – Framework Decision 2002/584/JHA – European arrest warrant and surrender procedures between Member States – European arrest warrant issued for the purposes of prosecution – Grounds for refusing execution. [Online]. Available at: https://curia.europa.eu/juris/document/document.jsf;jsessionid=E03B61AB2C5EE15841503FE2DC5016A5?text=&docid=132981&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=624569 (Accessed: 30 July 2024).
[11] Ibid.

4. The practice of the European Court of Human Rights on the guarantee system for ordering coercive measures

The European Court of Human Rights has, in numerous judgments, addressed the legality of detention in light of the guarantee of due process enshrined in Article 5 of the European Convention on Human Rights.

In harmony with the provisions Article 5 (1c), every person who is arrested or detained must be brought promptly before a judge (or other public officer authorized by law to exercise judicial power); the arrested or detained individual has a right to a hearing on his case within a reasonable amount of time or must be released until the hearing takes place. His release must take place under conditions that will guarantee his appearance at the hearing.

In several judgments, the European Court of Human Rights dealt with the procedural guarantees of the legality of detention in relation to the provisions of Article 5 of the European Convention on Human Rights.

All persons arrested or detained in accordance with the provisions of Article 5.1.c) shall be immediately brought before a judge or other official empowered by law, and the arrested or detained person shall have the right to a hearing within a reasonable time limit or released pending trial. The release may be subject to conditions that ensure the appearance at the trial.

The European Court of Human Rights has pointed out that the purpose of interrogation during detention under Article 5(1)(c) is to supplement the criminal investigation by confirming or rejecting the suspicions that led to the arrest.[12] The same criteria were listed by the European Court of Human Rights in case of Goussinsky v. Russia in § 53 of the judgment of May 19, 2004.[13]

According to the European Court of Human Rights, the guarantee system in relation to detention and arrest is based on three conditions: it must work quickly, it must be automatic, it must be carried out by an independent, judicial institution that also has the right to release.[14]

The Strasbourg court also found a violation of Article 5, Section 3 of the Convention because the applicant, who was later sentenced to eighteen

[12] *Murray v. United Kingdom,* App. No. 14310/88, 21 September 1994, paras. 55-56.
[13] *Case of Gusinsky v. Russia,* App. No. 70276/01, 19 May 2004.
[14] *Zervudacki v. France*, App. No. 73947/01, 27 July 2006, paras. 33-35.

years and nine months in prison, was not immediately brought before a judge or other official with judicial powers after his detention.[15]
In the case of Gábor Nagy v. Hungary, the European Court of Human Rights stated that "in this case, the court is not convinced that the applicant was heard at reasonable intervals regarding the justification of his detention, not least because his requests for release were judged only in the framework of a written procedure. In particular, a period of around four months cannot be considered a reasonable interval."[16]

It is especially worth mentioning that in the Strasbourg judiciary, an emphasized part of the guarantee system related to coercive measures is the full fulfillment of the obligation to provide reasons. The justification must also exhaustively cover what was experienced during the personal interview. Perhaps an illustrative example of this can be when, due to the principle of ne bis in idem, no further proceedings could be conducted in the Member State related to the given crime, so the ordering of a coercive measure is also excluded if the defendant has already been held responsible for the same crime in another European country.[17] Due to the lack of available databases and the paucity of information, this is sometimes revealed only during the defendant's personal hearing.

The European Court of Human Rights insisted on the test established in this way, emphasizing the importance of the existence of judicial guarantees, even if the same should not be expected based on Article 5, paragraph 4, as according to Article 6, paragraph 1 (Wesolowski v. Judgment of September 22, 2004 in Poland, § 60). In such cases, a hearing is essential (Kampanis v. judgment of July 13, 1995 in Greece, § 47) and, in general, equality of arms must be ensured between the parties, i.e. the prosecutor and the detainee (Wesolowski v. Poland judgment, § 61). Equality of arms imposes the obligation on the state to ensure that the complainant appears at the same time as the prosecutor, so that he can reflect on his conclusions (Wesolowski v. Poland judgment, § 66).[18]

[15] Czine et al., 2008, p. 255.
[16] *Gábor Nagy v. Hungary*, App. No. 33529/11, 11 February 2014; *Erisen and Others v. Turkey*, App. No. 7067/06, 3 April 2012, para. 51.
[17] Marek, 2011, pp. 221-226.
[18] 1/2008. (I. 11.) Constitutional Court Decision, Dr. Kovács Péter judge dissenting opinion.

5. Constitutional aspects in domestic habeas corpus proceedings

We also occasionally use the technical term 'habeas corpus' for procedures restricting personal freedom in Hungary. This is especially noticeable in the practice of the Constitutional Court. The Constitutional Court clearly calls the ordering and extension of pre-trial detention and house arrest 'habeas corpus-type proceedings'. Section 55 of the previous Constitution was defined by the Constitutional Court as the right to security, as the right to freedom and personal security. "This provision is the habeas corpus rule of the Constitution, which continues in such a way that no one can be deprived of his liberty, except for reasons and procedures defined by law, and must be brought before a judge as soon as possible."[19]

In its 2007 decision, the Hungarian Constitutional Court found unconstitutional and violated the right to a fair trial, and annulled the provision of the previous law on criminal procedure, which made it possible to order the pretrial detention of the accused in his absence and without a hearing. The challenged provision, when making the decision on pre-trial detention, required only the absence of pre-trial detention as a fact. Not only the conduct of the defendant, but also the error of the court ordering the pretrial (for example, inaccurate, incomplete filling) or the discretionary decision of the executive body, and a number of other circumstances can lead to the failure of the pretrial. On the other hand, the former procedural law automatically based the presumption that all of this was due to the defendant's fault.

The Constitutional Court said, that this necessarily entails that the court does not actually conduct any investigation into the circumstances that are the basis of the pre-trial detention, which are the responsibility of the defendant. It also does not investigate whether the defendant is staying in an unknown place, even though in this case the ordering of the coercive measure is provided for in the Criminal Procedural Act it is excluded by the rules of its procedure against an absent defendant or a defendant residing abroad.[20]

The decision of the Constitutional Court examining the constitutional requirements of the investigative judge's procedure was also based on the practice of the Strasbourg court, according to which the requirements of Article 5, paragraph 3 of the Convention are met "if the judge or the person

[19] 67/2011. (VIII. 31.) Constitutional Court decision.
[20] 10/2007. (III. 7.) Constitutional Court decision ABK 2007.

entrusted with judicial authority hears the detainee and if he is obliged to examine the circumstances that speak for or against his detention, to decide on the reasons that justify it, and in the absence of these, to decide on his release. (Schiesser v. Switzerland, 4 December 1979, § 31)"[21]

During the Schiesser v. Switzerland decision, the dissenting judge expressed even more strongly: (Judge Ryssdal): „I am unable to agree with the conclusion of the majority of the Court that there has been no breach of Article 5 para. 3 of the Convention in the present case. The object and purpose of Article 5 is to give specific guarantees for the protection of personal liberty. It is fundamental that no person may be deprived of his liberty except when this is decided on the basis of very clear reasons prescribed by law. It is also fundamental that such a decision should be taken by an impartial and independent authority in accordance with a procedure prescribed by law. In criminal cases this applies not only to the detention of convicted persons but also to detention on remand. It would certainly be preferable if everyone arrested on suspicion of having committed an offence had to be brought promptly before a judge and if only the courts had competence to decide on the reasons for and against detention on remand. However, Article 5 para. 3 of the Convention leaves it to the Contracting States whether arrested persons are to be brought before a "judge" or before an "other officer authorised by law to exercise judicial power". This wording is not quite clear and it is difficult to say what its meaning is if it is considered apart from its context. Here the relationship between the provisions of Article 5 para. 3 and of Article 5 para. 4 is of importance. According to Article 5 para. 4, everyone who is deprived of his liberty by arrest or detention "shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court ...". Paragraph 4 thus expressly requires the intervention of a court. Both the wording of paragraph 3 and the relationship between paragraphs 3 and 4 seem to support the view that Article 5 para. 3 does not require for the "officer" mentioned therein the same sort of judicial attributes as it does for the "judge".”[22]

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[21] 166/2011. (XII. 20.) Constitutional Court decision; *Schiesser v. Switerland,* App. No. 7710/76, 4 December 1979., para. 31; *Assenov and Others v. Bulgaria,* App. No. 90/1997/874/1086, 28 October 1998, paras. 146-149; *McKay v. United Kingdom,* App. No. 543/03, 3 October 2006, Vincent, 1999.

[22] *Case of Schiesser v. Switerland,* App. No. 7710/76, 4 December 1979.

6. The practice of Hungarian Supreme Court on the right of judicial hearing in connection with coercive measures

In a criminal procedure the Regional Court of Appeal ordered the arrest of the accused until the end of the second-degree proceedings. Prior to this, the Regional Court found the defendant guilty of attempted homicide and sentenced him to 15 years in prison as a repeat offender.
The verdict did not become legally binding when it was announced. The Regional Court rejected the prosecutor's motion to order the arrest. He justified the refusal with the fact that the accused is serving an other legally binding prison sentence, and the decision to order his arrest may be timely at the time of his release, which is the task of the second-instance court.

In the second-degree proceedings, the Regional Court of Appeal ordered the arrest of the accused after the jail office informed him of his expected release.
The defendant and his defense lawyer filed an appeal against the decision of the Regional Court of Appeal.

During the written justification of the appeal, the defender objected primarily to the form of the procedure leading to the decision to order the arrest. According to his point of view, the court made its decision in council meeting and not ensured the hearing of the parties. So the court rejected the procedural form that provides broader guarantees to a council meeting held without the possibility of personal participation of the parties is a measure that violates the spirit of the Basic Law, the Constitution. The Supreme Court found that the appeal filed by the accused and his defense attorney was well-founded. The Regional Court of Appeal made its decision at a council meeting and ordered the arrest of the accused. The Supreme Court found that the judgment reasoning regarding the procedural form of ordering the arrest was wrong. It is a general guarantee rule that the court can only decide on an arrest in the presence of the accused. The arrest of the accused cannot be ordered without his or her presence. In view of all this, the Supreme Court overruled the order of the Regional Court and ordered the court to proceed with a new procedure, and reserved the arrest of the accused until the second-instance court's decision in the repeated procedure.[23]

[23] Supreme Court decision Bpkf.II.1.045/2021/2.

7. The possibility of extraordinary legal remedies against pretrial detention orders in Hungarian law

It is perhaps indisputable that constitutional concerns may arise in connection with coercive measures. In several Hungarian cases, the Strasbourg court made a condemning decision, referring to the fact that the courts dealing with pre-trial detention did not adequately justify their decisions, thus the defendants were unnecessarily and unreasonably long in pre-trial detention. In the interpretation of Article 5 of the Convention, detention is considered illegal if it cannot be sufficiently justified, if, for example, the court decision does not adequately justify the existence of the conditions of detention.[24]
According to the practice of the Strasbourg court, it also constitutes a violation of Article 5 of the Convention if the court does not take into account the arguments put forward by the parties, but instead makes a mechanically repeated reference to the deprivation of liberty.[25]
According to the current rules, however, a constitutional complaint cannot be filed against pretrial detention.[26]

However, the constitutional judge Miklós Lévay, noting the parallel reasoning of the Constitutional Court's decision, drew attention to the contradictory situation that arose between the approach of the Constitutional Court and the European Court of Human Rights in Strasbourg regarding the reviewability of the decision on pretrial detention. Indeed, the European Court of Human Rights considers independent judicial decisions on coercive measures to be a separate substantive decision. This contradiction may lead to the fact that, in the case of a violation of the right to personal freedom guaranteed in both the Basic Law (Constitution) and the European Convention on Human Rights, in the case of pre-trial detention, according to the current rules of the Act on the Constitutional Court, the Constitutional Court cannot perform its function of protecting fundamental rights, instead the person concerned must turn directly to the court in Strasbourg for legal protection. Pursuant to Article 35 of the Convention, cases may only be

[24] Szabó, 2014, pp. 725-729.
[25] E.g: *Nikolova v. Bulgária*, App. No. 31195/96, 25 March 1999; *Klyakhin v. Italy*, App. No. 46082/99, 30 November 2004; *Maglódi v. Hungary*, App. No. 30103/02, 9 November 2004; *X.Y. v. Hungary*, App. No. 43888/08, 19 March 2013; *Hagyó v. Hungary*, App. No. 52624/10, 23 April 2013; *Hunvald v. Hungary*, App. No. 68435/10, 10 December 2013.
[26] 3002/2014. (I. 24.) Hungarian Constitutional Court Decision.

referred to the Strasbourg court if the applicant has exhausted all domestic remedies. What is considered a remedy depends on the legal system of each state. Based on the practice of the Strasbourg court, however, the exhaustion of legal remedies is only mandatory if it is accessible to the person concerned and can be classified as meaningful and effective.[27] Based on the practice of the Constitutional Court, it is not possible to file a constitutional complaint against a decision on pre-trial detention. At the same time, this also means that the appeal against the decision on pre-trial detention exhausts the domestic legal remedies, after which it is possible to appeal directly to the human rights court.

And according to the dissenting opinion of the constitutional judge András Bragyova, the constitutional complaint submitted against the final judicial decision on pre-trial detention should have been accepted by the Constitutional Court.

The pre-trial detention is the judicial deprivation of the defendant's personal freedom before a legally binding decision is made. The decision on pretrial detention is decisive in determining whether a person accused of a crime can be lawfully detained, but a person who is not considered guilty due to the presumption of innocence. In this matter, the judicial decision on pre-trial detention is decisive: the issue is the legality of pre-trial detention. "Nevertheless, the majority position leads to the fact that Article IV of the Basic Law The legal protection of the basic constitutional guarantee for the protection of personal freedom, similar to the rule of common law habeas corpus contained in Hungarian Constitution, remains incomplete."[28]

8. Closing thoughts

Today's procedural rules can only be understood through historical and European perspectives. Jurisprudence can only be well-founded if it is supported by high-level scientific activity. It is the eternal merit of Professor Ákos Farkas that criminal judgments can rely on outstanding scientific results at any time.

[27] *Cardot v France*, App. No. 11069/84, 19 March 1991; *Vernillo v. France*, App. No. 11889/85, 20 February 1991.

[28] 3002/2014. (I. 24.) Dissenting opinion of constitutional judge András Bragyova against the decision of the Constitutional Court, joined by constitutional judge Péter Kovács.

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ANDREA JÁNOSI*

Main characteristics of the Hungarian criminal records system

ABSTRACT: The aim of this study is to present the development of the Hungarian criminal records system, to examine the general principles of the existing Hungarian framework and criminal data management. Moreover, it aims to analyse how the present Hungarian legal system meets the requirements of applicable EU legislation.

KEYWORDS: criminal records, Hungarian criminal records system, Hungarian Criminal Records Act, criminal data management.

1. Introduction

The importance of criminal records is generally recognised. Using criminal records is essential for detecting and proving criminal offences, uncovering the perpetrators and prosecuting them, as well as for crime prevention. Criminal records are an important tool to law enforcement, providing a growing set of information on crime, offenders and all other circumstances that can make this work more effective and efficient.[1] The need for criminal records in law enforcement is unquestionable. Their crucial role has been confirmed by numerous studies.[2]

In my belief the most comprehensive definition of criminal records can be found in the Hungarian Constitutional Court's Decision No. 144/2008 (XI.26.). According to this document, a criminal record is a set of interrelated and interconnected public records (databases), organised according to different organisational principles and requirements, which can be used for criminal (criminal, law enforcement, investigative) purposes in the broadest sense. These criminal databases contain personal and sensitive

* Associate professor, PhD, Department of Criminal Procedural Law and Criminal Enforcement, Institute of Criminal Sciences, Faculty of Law, University of Miskolc, Hungary, andrea.janosi@uni-miskolc.hu.

[1] Szigetvári, 2018, p. 171.

[2] See: Finszter, 2006; Herke, 2005; Jánosi, 2014; Jánosi, 2020; Kármán, 1908; Lázár, 1970; Rudas, 1959; Szigetvári, 2018.

data on offenders in a structured order, but in a way that is determined by the specific purpose of each dataset.[3]

The aim of this study is to highlight the main cornerstones of the establishment of the Hungarian criminal records system, to examine the general principles of the existing Hungarian legislation and to examine how it meets the requirements of EU legislation.

2. The process of creation and development of the Hungarian criminal records

According to a study written in 1959 by Dr. György Rudas, a police officer, the punishment of stigmatisation[4], which was popular in the Middle Ages and during the absolutist period, as a form of marking the perpetrators of crimes, was abolished in the first half of the 19th century in Europe in general and in Hungary as well. The need to develop a reliable, modern form of criminal records system has been a major concern for crime-fighters since the second half of the 19th century. In the past, it was common practice to rely on the lists of individual prisons and the memories of older, experienced officials and police commissioners. These officials, who had a great deal of personal knowledge, used so-called 'identification tests', relying on their memory, to declare whether the person in front of them had already been convicted and was the same person they said they were. After the Austrian-Hungarian Compromise in 1867 the role of these officers in identification diminished, while police reports and records containing descriptions of offenders became more valuable. Later, in the 1880s, there were already a considerable number of criminal records available containing details of recidivists, their grouping places or the items they stole. These served as the basis for the first official register in Hungary, which was established in the building of Budapest Police Station in 1885. However, this form of criminal register was only used in Budapest and a few other large cities, but it did not meet the needs of the police, and the need for a unified, nationwide criminal record became more and more urgent.[5]

[3] HCC Decision No. 144/2008 (XI. 26.) AB, ABH 2008. pp. 1107-1178.

[4] The Sanctio Criminalis Josephina of 1787 still included stigmatisation as an additional penalty, the function of which was to operate a kind of criminal register. However, the possibility of marking the face or forehead was abolished in 1763. See: Mezey, 2018, pp. 288-289. and p. 358.

[5] Rudas, 1959, pp. 22-24.

The next step in this process was the Act XXXIV of 1897 on the enactment of the Code of Criminal Procedure, which provided for the establishment of a register of convicted persons by final decision.[6] However, its implementation took an unduly long time.[7] There were also jurisdictional disputes as to whether the office to be created should fall under the competence of the Ministry of the Interior or the Ministry of Justice. Finally, the National Criminal Records Office was established under the Decree No. 24.300/1908 IM. It started its operations on 1 January 1909 in the building of the Budapest Police Headquarters. This register was not only a 'casier iudiciaire', but also served the investigations and the executions of sentences. One part of the record was related to identification, consisting of fingerprints and photographs.[8] With the appearance of these central registries, criminal records became the primary tool of criminalistics.[9]

In 1944, a large part of the criminal register was transferred abroad, where it was destroyed. In 1950, the National Criminal Records Office was abolished and the police criminal records continued to operate under the control of the Ministry of Interior.[10] In 1965 a comprehensive scrapping of the register was ordered. During this period, the central register lost its homogeneity and the data processing activity was no longer merely a tool to support investigations.[11] In 1969, the Registry Centre of the Ministry of Interior was created to manage centralised registers (containing data on specific persons, objects, vehicles, offences), to control local registers and to monitor the exchange of information based on these registers.[12] In 1970, the register consisted of 12 sub-registers (such as: description of criminals, specific identifier, pseudonym, nickname, modus operandi, dactyloscopic records, etc.), for which computerised data processing was becoming increasingly important.[13] During this period, in addition to the central

[6] Section 26 of Act XXXIV of 1897 on the Enactment of the Code of Criminal Procedure.
[7] Kármán, 1908, p. 377; Pálvögyi, 2018, p. 150.
[8] Kármán, 1908, pp. 377-378; Pálvölgyi, 2018, pp. 152-153.
[9] Finszter, 2006, p. 39.
[10] Rudas, 1959, pp. 25-26. and pp. 30-31.
[11] Finszter, 2006, p. 40.
[12] An interview on the situation and perspectives of criminal records with Dr. Károly Fekete, Head of the Criminal Records Department, Ministry of Interior, 1975, p. 30.
[13] Lázár, 1970, pp. 36-38.

registers, there were also local registers, which were not interconnectable, but were useful for local law enforcement authorities.[14]

From 1990 onwards, a new internal affairs structure was established, and the two most important sources of police data management became Act XXXIV of 1994 on the Police and Act LXXXV of 1999 on Criminal Records.[15] On the basis of these acts, the criminal records system was divided into (1) offenders, (2) persons under coercive measures, (3) persons under criminal proceedings, (4) fingerprints and palm prints, (5) DNA profile records.[16] By Decision No. 144/2008 (XI. 26.) of 30 June 2009, the Constitutional Court declared unconstitutional and annulled certain provisions of Act LXXXV of 1999 on Criminal Records. The constitutional petitioners argued, among other things, that the restrictions on the transfer of data after the conclusion of criminal proceedings, the principles of data security and data economy – in particular with regard to the unreasonably long and undifferentiated retention periods – are not enforced, and the authorisation of external users to request data is too broad. Therefore, unjustified restrictions on the right to informational self-determination and the protection of personal data have been highlighted.[17] The Act XLVII of 2009 on the Criminal Records System, on the Register of Convictions of Hungarian Citizens by the Courts of the Member States of the European Union and on the Register of Biometric Data in Criminal and Law Enforcement Matters (hereinafter referred to as: Hungarian Criminal Records Act) entered into force on 30 June 2009.

3. Main principles of the present system in Hungary

The main features of the new system are set out in the explanatory memorandum to the Hungarian Criminal Records Act.

- The two main units of the criminal records system, which are also separated by their nature and data content, are (1) the records of personal identification data and photographs, and (2) criminal records. The separate and unrelated sub-registry units of the current criminal records system are: (1) the register of offenders, (2) the register of persons with clean criminal record, but subject to detrimental

[14] Finszter, 2006, p. 40.
[15] Finszter, 2006, p. 41.
[16] Herke, 2005, p. 229.
[17] HCC Decision 144/2008. (XI. 26.) AB, ABH 2008. pp. 1107-1178.

consequences attached to prior convictions, (3) the register of persons subject to criminal proceedings, and (4) the register of persons subject to travel restrictions abroad. The latter has been part of the criminal records system since 1 January 2013 and aims to facilitate the enforcement of the travel restrictions and preventing foreign travel despite travel restrictions.[18]

- The criminal record also includes a register of convictions of Hungarian citizens by the courts of other Member States of the European Union. In Hungary, like only a few Member States (like Bulgaria, Finland and Portugal), a separate register has been created to store national convictions.[19]
- A register of biometric data in criminal and law enforcement matters, consisting of dactyloscopic and DNA profile register, is a separate unit from the records of personal identification data and criminal records. These can be further divided into three-three registers, namely (1) the register of fingerprints and palm prints/DNA profiles recorded at the scene of the crime and on objects bearing traces of the crime, (2) the register of fingerprints and palm prints/DNA profiles of persons prosecuted for a criminal offence, and (3) the register of fingerprints and palm prints/DNA profiles of convicted persons.
- Different organisations perform the tasks of data management related to the units of registry. In the case of criminal records and register of convictions of Hungarian citizens by the courts of the Member States, the data management body belongs to the Ministry of the Interior, while in the case of biometric data, the data manager is the Hungarian Institute of Forensic Sciences.
- Data stored in criminal records or in the criminal and law enforcement biometric data registers can be matched with the identity data on the basis of a so-called contact code, which ensures the separate processing of the identity data.
- In the Hungarian Criminal Records Act, the previous concerns of the Constitutional Court have been addressed by separating the register of

[18] Section 30/A of the Hungarian Criminal Records Act.

[19] Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from criminal record between Member States. COM/2016/06 final. (Hereinafter referred to as COM/2016/06 final) 4. Obligations of the Member State of nationality.

persons with clean criminal record, but subject to detrimental consequences attached to prior convictions from the register of offenders. The register of offenders shall only include the data of a person against whom a court has issued a final decision of conviction and who, on the date on which the decision becomes final, has not yet been exempted from the detrimental consequences attached to prior convictions.[20] The register of persons with clean criminal record, but subject to detrimental consequences attached to prior convictions includes, among others, all those whose data have been removed from the register of offenders as a result of exoneration, or in whose cases exoneration shall take effect on the day when the peremptory decision becomes final.[21] According to the Explanatory Memorandum of the Hungarian Criminal Records Act, the purpose of this register is primarily to establish recidivism and to ensure for example the enforcement of employment rules relating to convictions.

- For the reasons set out in the Constitutional Court's Decision,[22] the period for which data are recorded in the criminal register has also been redefined along the following main principles: (1) as a general rule, the minimum period of registration is 3 years from exoneration; (2) maximum duration is 12 years from exoneration; (3) the duration of registration is increased according to the seriousness of the offence; (4) the registration period is differentiated for intentionally and negligent crimes; (5) judgement of acquittal and decisions to dismiss criminal proceedings are not part of the register.[23]
- From 1 January 2022, the so-called 'elimination register' was introduced as part of the criminal record[24] to exclude innocent trace contamination. In essence, this means that this register contains the personal identification data, fingerprints, palm prints and DNA profiling samples of persons who are involved in activities that may give the risk of contaminating evidence in the context of criminal proceedings. The possibility of innocent contamination at the scene of

[20] Section 10 of the Hungarian Criminal Records Act.
[21] Section 15 of the Hungarian Criminal Records Act.
[22] HCC Decision 144/2008. (XI. 26.) AB, ABH 2008. pp. 1107-1178.
[23] An exception to this is, for example, if the court applied involuntary treatment in a mental institution in addition to an acquittal. Section 30/B(d) of the Hungarian Criminal Records Act.
[24] Act XXXI of 2020 amending several acts to strengthen the security of citizens.

> the offence or on the person, object or evidence bearing traces of the offence. The data processing will be limited if the person concerned opposes the processing of his or her personal data in the elimination register. The comparison with the data recorded in the elimination register may only be made in relation to the offence in connection with which the prosecution or investigating authority conducting the criminal proceedings has provided the data of the person concerned. If the person concerned does not object to the processing, his or her data will have to be deleted from the register after ten years.[25]

The supervision of the legality of the records covered by the Hungarian Criminal Records Act falls within the competence of the Prosecutor General.[26] In this context, the legality of the criminal records system and of the registration of convictions of Hungarian citizens by the courts of the Member States of the European Union is constantly monitored. If they detect a breach of law, they must take immediate action to correct it.[27]

In 2022, a new constitutional complaint was submitted claiming that certain provisions of the Hungarian Criminal Records Act are in conflict with the Hungarian Fundamental Law and seeking their annulment. The complaint concerned the disclosure of data relating to persons who have committed an offence against the freedom of sexual life or sexual morality which is harmful to children. From 1 February 2022 the provisions of the Hungarian Criminal Records Act created a register containing personal data of persons who have committed an offence against the freedom of sexual life or sexual morality which is harmful to children. The purpose of this register is to provide a new possibility to request data whether a person who has direct contact with the child (e.g. school staff, babysitters, coaches) has been convicted of a sexual offence against a child, in order to protect the child's best interests. The Hungarian Constitutional Court declared[28] that ‘to the extent possible’ phrase in paragraph 75/C(3) of the Hungarian Criminal Records Act is contrary to the Fundamental Law and therefore annulled it.[29]

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[25] Section 94 of the Act XXXI of 2020 amending several acts to strengthen the security of citizens; Section 66/A-66/F of the Hungarian Criminal Records Act.

[26] Section 1(2) of the Hungarian Criminal Records Act.

[27] Section 22(1) of Decision No. 20/2014 (XII. 23.) of the Prosecutor General of Hungary.

[28] HCC Decision 17/2023. (VIII. 3.) AB, ABH 2023. pp. 2215-2227.

[29] The original text of paragraph 75/C(3) of the Hungarian Criminal Records Act was as follows:

"The criminal records body shall ensure, as far as possible, through appropriate technical and organisational measures, that the interface

In its reasoning, the Constitutional Court explained that the contested provision of the Hungarian Criminal Records Act prescribes that the criminal records authority, as data controller, to ensure 'to the extent possible' that no copies of the data can be made and that it is clearly identifiable that the data originated from the platform. The Constitutional Court clarified that restrictions of personal data and the right to privacy are only constitutional if the data controller bears objective responsibility. This means that it is therefore liable for any incident arising from the improper processing of data, or from access by unauthorised persons.[30]

4. Adaptation of EU legal sources into the Hungarian Criminal Records Act

The Hungarian Criminal Records Act contains several provisions to comply with EU legislation, the most important of them are listed below.

4.1. Provisions in the Hungarian Criminal Records Act on the exchange of information related to criminal convictions - European Criminal Records Information System (ECRIS)

The Hungarian Criminal Records Act already contained provisions implementing Council Framework Decision 2009/315/JHA on the organisation and content of the exchange of information extracted from the criminal record between Member States,[31] when it entered into force on 30 June 2009. This was much earlier than it was originally expected. (27 April 2012). The Framework Decision imposes obligations on the Member State of conviction and the Member State of nationality. This is also consistently implemented into the Hungarian Criminal Records Act. The convicting Member State is obliged to: (1) to indicate information on nationality when recording the conviction in the criminal record if the convicted person is a national of another Member State; (2) to inform the central authority of the

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a) no textual copy can be made of the data which can be accessed pursuant to Section 75/B(1); and […]."

[30] Available at: https://hunconcourt.hu/datasheet/?id=6D990A64C8E5BEBCC125889B003A09E1 (Accessed: 15 August 2024).

[31] Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States. OJ L 93, 07/04/2009, p. 23–32 (Hereinafter referred to as Council Framework Decision 2009/315/JHA.)

Member State of nationality of the conviction recorded in the criminal record and of any modification or deletion of the recorded data; (3) in order to ascertain what action is necessary in the Member State of nationality, forward – on request – a copy of the judgement and subsequent measures in individual cases, and any other relevant information.[32] The Member State of nationality shall retain the information transmitted and shall amend or delete it from its register in accordance with the information provided by the convicting Member State.[33] The fundamental purpose of this system is therefore to ensure that Member States are informed of the content of convictions handed down against their nationals in another Member State and that, if a Member State authority authorised to do so wishes to obtain information on the criminal record of a national of another Member State, the Member State of nationality can provide the relevant information.[34] The provisions of the Framework Decision are to be found in the following parts of the Hungarian Criminal Records Act: (A) Chapter III: Register of convictions handed down by the courts of the Member States of the European Union against Hungarian nationals; (B) Chapter VI: Exchange of data within the framework of the European Criminal Records Information System.

(A) Chapter III contains the provisions where Hungary appears as a Member State of nationality. Thus, in the register of convictions of the Member States, the data of the Hungarian national whose guilt has been finally convicted by a court of another Member State of the European Union must be recorded.[35]

(B) Chapter VI defines the forms of data exchange within the framework of the European Criminal Records Information System. This includes: (1) *Automatic transmission* applies when Hungary, as the convicting Member State, appears in the proceedings and is obliged to inform the Member State of the person's nationality without delay of the data contained in the final decision of conviction entered in the register of convicted persons and in the register of persons with clean criminal record, but subject to detrimental consequences attached to prior

[32] Art. 4 of Council Framework Decision 2009/315/JHA. See: Jánosi, 2019, p. 416.
[33] Art. 5 of Council Framework Decision 2009/315/JHA. See: Jánosi, 2019, p. 416.
[34] Explanatory memorandum of the Hungarian Criminal Records Act. Detailed explanatory memorandum to Sections 31-34.
[35] Section 32 of the Hungarian Criminal Records Act.

convictions.[36] (2) The *request for information from the criminal records of another Member State* covers the cases of requests for information on convictions provided for in Article 6 of the Framework Decision. This includes when a competent authority requests data from the criminal records of another Member State and when an EU citizen applies data relating to him or her held in the criminal records system.[37] It should be mentioned that in the first case, the data received may only be used for the purposes of the criminal proceedings specified in the request.[38] (3) *Transmission on request to another Member State and to a third country* essentially contains provisions on the transfer of data processed in the criminal records system at the request of the central authority of another Member State. It is important to note that the data can only be transferred for the purpose of criminal proceedings. The only exception to this rule from 1 January 2016 is if the request is made for the purpose of employing a person to work with children, with the consent of the person concerned. If the request concerns a non-Hungarian national, it can only be executed on the basis of the European Convention on Mutual Assistance in Criminal Matters.[39] A further special rule applies if the request is from a third country for the transmission of data from the register of convictions of a Member State. The data may then only be transferred for use in criminal proceedings, within the limits set by the Member State that sent the data to the criminal records body.[40]

4.2. Provisions related to the creation and functioning of ECRIS-TCN

The Regulation establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System was published in the Official Journal of the

[36] Section 78(1) of the Hungarian Criminal Records Act.
[37] Art. 6(1-3) of Council Framework Decision 2009/315/JHA. Section 79-79/A of the Hungarian Criminal Records Act.
[38] Section 79(2) of the Hungarian Criminal Records Act.
[39] Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union. OJ C 197, 12.7.2000, p. 3–23.
[40] Section 80 and 80/C of the Hungarian Criminal Records Act.

European Union on 22 May 2019.[41] The purpose of this new centralised information system is to ensure that decisions made by Member States in relation to third-country nationals can be taken into account in other Member States in new criminal proceedings and to prevent new criminal offences. Although ECRIS has already provided the possibility for Member States to exchange information on third country nationals, it failed to provide an adequate procedure. Judgments concerning third-country nationals were registered only in the Member State of conviction. The consequence was that full information on the criminal history of third country nationals could only be obtained by contacting all other Member States.[42] This Regulation applies to third-country nationals and stateless persons and EU citizens who also hold the nationality of a third country.[43]

In addition to this Regulation, the legislative package for the creation of ECRIS-TCN also includes a Directive amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third-country nationals and as regards the European Criminal Records Information System (ECRIS), and replacing Council Decision 2009/316/JHA.[44] In summary, this Directive implements the necessary amendments to Framework Decision 2009/315/JHA which allow for an effective exchange of information on convictions of third-country nationals through ECRIS.[45]

In accordance with the provisions of the Regulation, the Hungarian Criminal Records Act contains rules on the transmission of data to and requests for data from ECRIS-TCN.[46]

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[41] Regulation (EU) 2019/816 of the European Parliament and of the Council of 17 April 2019 establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726. OJ L 135, 22/05/2019, p. 1–26 (Hereinafter referred to as Regulation 2019/816.)

[42] Preamble (2−5) of Regulation 2019/816.

[43] Art. 2 of Regulation 2019/816.

[44] Directive (EU) 2019/884 of the European Parliament and of the Council of 17 April 2019 amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third-country nationals and as regards the European Criminal Records Information System (ECRIS), and replacing Council Decision 2009/316/JHA. OJ L 151, 7.6.2019, p. 143–150 (Hereinafter referred to as Directive 2019/884.)

[45] Preamble (11) of Directive 2019/884.

[46] Section 78/A-79/A and 83 of the Hungarian Criminal Records Act.

4.3. Data transfer under the Prüm Decision

The rules on the international transfer of data include the provisions on automatic access to search data and the procedure for the follow-up of a hit during automatic access to search data, which essentially means the implementation of the provisions of the Prüm Convention[47] and the Council Decision 2008/615/JHA[48] into the Hungarian legal framework. The Prüm Convention was signed by seven European countries on 27 May 2005 and subsequently joined by other states. The Council Decision integrated the main parts of the Convention into EU law. Main parts of the Prüm Decision are: (1) the automated search of data, (2) information exchange for the prevention of offences, (3) police cooperation and (4) relevant data protection provisions.[49] On this basis, Member States provide each other with access to their automated DNA analysis files, automated dactyloscopic files and vehicle registration data.[50] The Hungarian Criminal Records Act regulates the rules of comparison with the data processed in the register of biometric data in criminal and law enforcement matters in the framework of automatic access to search data. Fingerprints and palm prints can be searched for the purposes of crime prevention and criminal proceedings, but DNA profiles can only be searched for the purposes of criminal proceedings. The system works on a hit/no hit basis.[51] This means that anonymous profiles are compared. Personal data can only be exchanged after matching, in accordance with national law. In Hungary, the transmission of personal data and the sending of a request for the transmission of personal identification data may be based on acts of mutual legal assistance in criminal matters or on international cooperation between

[47] Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration (Prüm Convention) of 27 May 2005. (Hereinafter referred to as Prüm Convention.)

[48] Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime. OJ L 210, 6.8.2008, p. 1–11 (Hereinafter referred to as Council Decision 2008/615/JHA.)

[49] Report from the Commission to the European Parliament and the Council on the implementation of Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (the 'Prüm Decision'). COM/2012/0732 final.

[50] Preamble (10) of Council Decision 2008/615/JHA.

[51] Jánosi, 2014, p. 299.

law enforcement authorities.[52] Under the Hungarian Criminal Records Act, comparisons may be made in the records of a cooperating Member State only on the basis of an order of the body conducting the preparatory procedure, the investigating authority, the prosecutor's office, the court or the body responsible for law enforcement in an individual case. In the case of fingerprints and palm prints, the search may be carried out for the purpose of the prevention, detection of crimes or criminal proceedings, but in the case of DNA profiles, the search may only be carried out for the purpose of criminal proceedings.[53] The Hungarian Criminal Records Act has also transposed the provisions on DNA and dactyloscopic data and common provisions on data exchange of the Decision implementing Decision 2008/615/JHA.[54]

On 5 April 2024, a new Regulation on the automated search and exchange of data for police cooperation[55] was published in the Official Journal of the European Union. It is also known as the 'Prüm II' Regulation. This Regulation sets out the conditions and procedures for automated searches and exchanges of DNA profiles, dactyloscopic data, vehicle registration data, facial images and police records. The purpose of this is to improve, streamline and facilitate the exchange of criminal information. It establishes a framework for the exchange of information between authorities responsible for the prevention, detection and investigation of criminal offences.[56] The development of the new framework will consist of different phases, during which the relevant provisions of the Hungarian Criminal Records Act will be also amended.

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[52] Preamble (18) of Council Decision 2008/615/JHA. Section 86/A(3) and 86/B(2) of the Hungarian Criminal Records Act.

[53] Section 85 of the Hungarian Criminal Records Act. Art. 4 of Council Decision 2008/615/JHA.

[54] Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime. OJ L 210, 06/08/2008, p. 12–72.

[55] Regulation (EU) 2024/982 of the European Parliament and of the Council of 13 March 2024 on the automated search and exchange of data for police cooperation, and amending Council Decisions 2008/615/JHA and 2008/616/JHA and Regulations (EU) 2018/1726, (EU) No 2019/817 and (EU) 2019/818 of the European Parliament and of the Council (the Prüm II Regulation). OJ L, 2024/982, 5.4.2024 (Hereinafter referred to as Regulation 2024/982.)

[56] Preamble (1-5) of Regulation (EU) 2024/982.

4.4. Taking account of convictions in the Member States of the European Union in the course of new criminal proceedings

The purpose of the Framework Decision on the taking account of convictions in the Member States of the European Union in the course of new criminal proceedings[57] is to establish a minimum obligation for Member States to take into account convictions handed down in other Member States.[58] During the implementation of this Framework Decision the Hungarian Criminal Records Act was also necessarily amended. For example, the register of offenders and the register of persons with a criminal record who are subject to detrimental legal consequences must record the fact of the matching and the related data must record the fact of the recognition of judgement and the related data.[59]

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Our existing criminal register is a highly complex system, which is constantly evolving, partly to comply with EU standards. These changes are a constant challenge for legislators and practitioners as well, but they guarantee that it is and will remain an effective tool for law enforcement.

[57] Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings. OJ L 220, 15/08/2008, p. 32–34 (Hereinafter referred to as Council Framework Decision 2008/675/JHA.)

[58] Preamble (3) of Council Framework Decision 2008/675/JHA.

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LÁSZLÓ KIS*

The cornerstones of the protection of fundamental rights in criminal matters in the EU

ABSTRACT: The present paper aims to provide an outline of the protection of fundamental rights, especially the right to a fair trial, from the perspective of criminal procedure and mutual legal assistance in criminal matters in the European Union. It concentrates on the attitude of the Court of Justice of the European Union (CJEU) towards the protection of fundamental rights on a European level - as opposed to national level -, also taking into account the evolution of the system of the European judicial protection of fundamental rights with respect to the dialogue between national ordinary courts and national constitutional courts and the CJEU. The central thematic element is the jurisprudence of the Court of Justice of the European Union, concentrating on the evolution of its case law concerning fundamental rights in criminal procedure and mutual legal assistance in criminal matters during the last two decades, which is the era of the growing importance of criminal law and criminal procedural law in EU law. The background is rather the horizontal and vertical cooperation in criminal matters, its evolution, the central role of the principle of mutual recognition and the underlying mutual trust of the Member States' authorities in respect of each other's criminal justice systems. The relevance of both harmonisation and the application of the mutual recognition principle to mutual legal assistance is inevitably connected to both the similarities and the differences of national legislation and criminal justice systems which are the basis of the preliminary ruling procedures of the Court of Justice of the European Union which also serves as a driving force of mutual trust and development in the area of European criminal law, while also bearing a growing importance in the system of judicial protection of fundamental rights throughout Europe.

KEYWORDS: fundamental rights, fair trial, criminal procedure, EU, CJEU.

* PhD. criminal judge, Budapest-Capital Regional Court, Hungary, KisLaszlo2@birosag.hu.

1. Interaction of multiple levels of judicial protection of fundamental rights

In the jurisprudence of the Court of Justice of the European Union, the collision between union law and its interpretation according to the case law of the CJEU and the core constitutional elements of national legal systems[1] is still prevalent today, also resulting in further conflicting dialogues between national constitutional courts and the Court of Justice of the European Union.

As for the present, the Treaty on the Functioning of the European Union (TFEU) lays down the most important legal rules on competence sharing between the European Union and its Member States dividing them to exclusive competences and shared competences (Article 2-4), as a basis of which the Treaty on the European Union (TEU) contains the fundamental rules of the principle of conferral, the principle of sincere cooperation, the equality of Member States before the Treaties and the framework of the use of union competences conferred to it by the Member States, that is the principles of subsidiarity and proportionality (Articles 4-5). Furthermore, Article 2 of the Treaty on the European Union lists the fundamental common values of the EU, thereby including the rule of law and the respect for human rights among the values on which the European Union is founded. Article 3 enshrines the objectives of the European Union, including then area of freedom security and justice without internal frontiers. Detailed rules for fundamental rights and freedoms are provided for by the Charter of Fundamental Rights of the European Union as part of the Treaties and by the six directives implemented by the Member States in the area of European criminal law. Not only as a historical forerunner and basis for EU legislation on fundamental rights, but also as a supplementary system of human rights protection and an essential reference point for legal interpretation, the European Convention of Human Rights and the case law of the European Court of Human Rights (ECtHR) play a significant role in the whole system of judicial protection of fundamental rights. Both the legal

[1] Case C-11/70 Solange I, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 17 December 1970; Case C-69/85, Solange II, *Wünsche Handelsgesellschaft GmbH & Co. v Federal Republic of Germany*, 5 March 1986; Lisbon case of the German Federal Constitutional Court (BVerfG, 2 BvE 2/08 from 30 June 2009). For a detailed scrutiny of the latter decision introducing the so-called identity review see Wohlfahrt, 2009, pp. 1277-1286.

acts of the European Union - that is basically the Charter of Fundamental Rights of the European Union and the directives - and the judgments of the Court of Justice of the European Union when interpreting fundamental rights and ruling on the most important aspects of cooperation in criminal matters with a viewpoint to human rights protection, the Convention and the case law of the ECtHR serve as a significant reference point. That and the interplay between the jurisprudence of the European Court of Human Rights and that of the Court of Justice of the European Union based on the Charter of Fundamental Rights of the European Union after the Lisbon Treaty are core features and characterizing elements of fundamental rights protection in the European Union.

Originally the CJEU did not have any legal basis in the treaties to clearly use as a basis of its decisions of either the relationship between national law and community law and also fundamental rights, therefore it created the relevant basic principles from the perspective of the interests of the European Communities, where it belonged. The CJEU highlighted the relevance of fundamental rights as an integral part of general principles of law already in the International Handelsgesellschaft decision[2], where it also referred to common constitutional traditions[3], while in the Nold case[4] it broadened the list of outside legal references with international treaties for the protection of human rights, stating that those 'can supply guidelines which should be followed within the framework of community law' and thus including the Convention – as interpreted by the ECtHR - as valid basis for legal argumentation in respect of community law. In its Opinion no. 2/94, the CJEU emphasised that while 'fundamental rights form an integral part of the general principles of law whose observance the Court ensures' and primary sources of community law contain references to the respect for fundamental rights, 'no Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field'.[5]

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[2] Case C-11/70, *Internationale Handesgesellschaft mbH v. Einfuhr- un Vorratsstelle für Getreide und Futtermittel*, 17 December 1970.

[3] Though – pursuant to its case law – refused to attribute relevant significance to it in rivalry with community law.

[4] Case C-4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, 14 May 1974.

[5] For a detailed examination of the case law of the Court of Justice of the European Union regarding the relationship between fundamental rights, national constitutions and community law, see Rossi, 2008, pp. 65-77.

Regarding fundamental rights, simultaneously, the Council of Europe and especially the case law of the European Court of Human Rights had an enormous impact on common European standards, the human rights perspective of criminal proceedings and both directly and indirectly on national law. This resulted in the strengthening of the role of European values and fundamental rights – where the specific opportunity of their enforcement by individuals against the states played a significant role – and also in harmonizing of national laws and both the institutions and the workings of justice systems, a process still ongoing. However, this system of the protection of fundamental rights and the principles emanating from the jurisprudence of the European Court of Human Rights provided basis for the Court of Justice of the European Union for decades until the Lisbon Treaty.

The Lisbon Treaty explicitly refers to fundamental rights and the possibility of the accession of the European Union to the European Convention of Human Rights, while also stating that the fundamental rights enshrined therein constitute general principles of EU law, as it emanates from the common constitutional traditions of the Member States[6]

Furthermore, it establishes the Charter of Fundamental Rights of the European Union as a primary source of EU law[7], thereby creating a situation where a balance needed to be struck between the twofold protection of human rights at European level – in respect of the EU Member States – and

[6] '1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.'
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

[7] Lucia Serena Rossi considers the Charter the first manifestation of the continuous intertwining of national constitutional orders and the EU legal system. Rossi, 2008, p. 87.

likewise the competences of the ECtHR and the CJEU regarding the interpretation of the rules on fundamental rights. The issue of simultaneous application of EU law and the Convention is partly the result of the fact that the above-mentioned developments led to establishing a strong legal foundation for the Court of Justice of the European Union to step on the territory of the European Court of Human Rights and the national courts, however it has an extensive range of decisions on the collision of competences with national (constitutional or ordinary) courts dating back to the 1960s.

It is worth noting that the case law of the European Court of Human Rights is largely based on domestic proceedings and usually does not give rise to questions of mutual legal assistance in criminal matters, whilst the corresponding jurisprudence of the Court of Justice of the European Union is based on cross-border cases requiring the application of EU law.[8] This is the result of the differences between the competence of the European Court of Human Rights and that of the Court of Justice of the European Union. However, issues concerning the possible violation of the fairness of the proceedings also arose in the context of mutual legal assistance in criminal matters and the subsequent domestic procedures and the right of individuals to enforce their rights enshrined in the Convention before the Strasbourg court resulted in cases that provided the opportunity for the ECtHR to develop its legal argumentation and interpretation in respect of Article 6 of the Convention in such cases as well, in the last few years also with the possibility to interpret the right to a fair trial in respect of the specific tools of mutual legal assistance in the European Union based on the principle of mutual recognition, that is most importantly the European arrest warrant.

In Soering v. the United Kingdom (1989)[9] the ECtHR established that ‘an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country’, thus providing for a

[8] It is also worth noting the significant differences between extradition and surrender procedures in this regard, the special features of the European Arrest Warrant as a tool of mutual legal assistance based on mutual recognition – built on mutual trust, deeply rooted in common standards of fundamental rights protection - in an area of freedom, security and justice, strictly connected to the unique features of union law in the jurisprudence of the Court of Justice, which significantly differentiates surrender from extradition. Thus, the extradition cases before the ECtHR cannot be attributed prominent relevance regarding the subject of this paper.

[9] *Case of Soering v. The United Kingdom*, App. No. 14038/88, 7 July 1989.

foundation of the examination of the right to a fair trial in respect of extradition and expulsion cases and found violation in Othman (Abu Quatada) v. the United Kingdom (2012)[10]. The 'flagrant denial of justice' as referred by the ECtHR is found in cases of such a manifest and fundamental breach of the right to fair trial that results in the destruction of its very essence.

Regarding the European arrest warrant, the ECtHR had to take into account the underlying principle of mutual recognition, which also requires that as a main rule, the court of a Member State shall presume that fundamental rights were observed by the issuing judicial authority and shall consider its act equivalent to a domestic act (principle of equivalence), otherwise it would question the basis of cooperation in criminal matters in the European Union. Nevertheless, if there are serious and substantiated grounds to conclude the possibility of a manifest violation of Article 6 and this cannot be remedied by EU law, the mere fact of application of EU law shall not prevent the domestic courts from examining these circumstances in the light of the Convention, thus applying EU law in conformity with the European Convention of Human Rights.[11]

Thus, the ECtHR developed the presumption of equivalent protection[12], meaning that it accepts the fundamental rights protection of the EU equal to that provided by its case law, therefore it will not scrutinize EU measures, only in exceptional cases. On the other hand, pursuant to the above rules of the TEU, fundamental rights as guaranteed by the European Convention of Human Rights belong to the general principles of EU law, without the incorporation thereof into EU law and the accession of the EU to the ECHR[13]. Due to these facts, the foundation for a cooperative relationship between the CJEU and the ECtHR – plus the national courts – in the area of the protection of fundamental rights in Europe seems sound enough. However, the Court of Justice of the European Union still takes the

[10] *Case of Othman (Abu Qatada) v. The United Kingdom,* App. No. 8139/09, 17 January 2012.

[11] See in detail: *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland,* App. No. 45036/98, 30 June 2005.

[12] See *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland,* App. No. 45036/98, 30 June 2005.

[13] On the legal issues arising from – and barriers of - such an accession from the point of view of the CJEU, based on the specific features of EU law – also developed by the CJEU in its case law – see Opinion 2/94 of 28. 3. 96 and Opinion 2/13 of 18. 12. 2014 of the Court of Justice of the European Union.

standpoint that because of the particular characteristics of EU law, in order to preserve its autonomy and effectiveness, its competences in interpreting EU law shall remain and shall not in the least be affected by the competences of the ECtHR.[14]

In addition, the conformity clause of Article 52 (3) of the Charter declares that it relies on the provisions of the Convention, aiming at eliminating any differences in human rights protection:

> In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Article 52 (4) contains mainly similar provision in respect of the common constitutional traditions of the Member States[15], however they are only the reference points and not the final determinative factors of interpretation:
'In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.'
The same common constitutional traditions form part of the general principles of the EU according to Article 6 of the TEU, as shown above.

These latter articles bring us to the issue of the judicial dialogue between the CJEU and the national courts concerning the protection of fundamental rights.

In respect of the area of freedom, security and justice the afore-mentioned provisions provide a strong basis for mutual trust, which is the basis of mutual recognition, that is the driving force behind and the foundation of both union-level legislative steps in this field and the workings of mutual assistance in criminal matters, including the jurisprudence of both the CJEU and the national courts. This level of

[14] See Opinion 2/13 of 18. 12. 2014 of the Court of Justice of the European Union. For an analysis of the possible clashes of competences between these courts in the area of freedoms, security and justice, see Kargopolous, 2015, pp. 96-99.

[15] Nevertheless, 'common' plays an important part here, meaning that specific constitutional traditions of a Member State may not be the basis of interpretation, thus the principles deriving from the jurisprudence of the CJEU in respect of the relationship between EU law and national law remains essentially the same in this field.

fundamental rights protection limit the risk of the overwhelming use of competence by EU legislative bodies and also guarantee a high level of respect for human rights in the area of freedom, security and justice, especially when taking into account the possible impact of criminal law on such rights.[16] The Court of Justice of the European Union accepts a wide interpretation of Article 51 (1) on the field of application of the Charter, regarding the restriction 'only when they are implementing Union law'. In the Åkerberg Fransson case[17] it stated that due to the connection between the national budgets and the EU budget on the revenue side, the harmonized VAT assessment bases, there is a direct link between the collection by the national authorities of VAT and the fact that the corresponding amount is transferred to the EU budget, therefore national criminal law in respect of taxing qualifies as an application of EU law, even if there is no actual implementation or application of a certain EU law provision, therefore the Charter shall be applicable to such cases as well and the legal issues arising from it are subject to the scrutiny of the Court of Justice of the European Union. However, this also means that national courts are required to take into account the provisions of the Charter – and of course the ECHR, as always – in the national procedures and shall provide full effect of EU law – based on the Simmenthal judgement – even without the involvement of the national constitutional court or if it is contrary to national law, which the courts must set aside in cases of conflict with EU law. This wide interpretation of the applicability of the Charter also involves an invitation of national judges in the European system of judicial protection of fundamental rights.

In its cornerstone judgement in the Melloni case[18], the Court of Justice of the European Union acknowledged the possibility of higher level of human rights protection by national legal systems in the light of Article 52 of the Charter, it also set aside such possibility for the prevalence of the principles of EU law and the aims of EU legislation, thus reaffirmed the primacy of EU law over constitutional rules of domestic legal systems. The Court did not accept the higher level of protection of the right to be present at the trial offered by the Spanish Constitution as a ground for refusal of executing a European arrest warrant, arguing in favour of the primacy, unity and effectiveness of EU law and the role of the uniformity for human rights

[16] Scalia, 2015, p. 101.
[17] Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, 7 May 2013.
[18] Case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, 26 February 2013.

protection in promoting mutual trust and ensuring the application of mutual recognition[19].

In the Tarrico case[20] the CJEU took essentially the same viewpoint, this time in respect of the Italian rules on the limitation period for criminal offences relating to VAT. It basically ruled that the fact that the domestic courts shall set aside rules on the limitation period concerning such criminal offences – and as a result providing for the criminal responsibility of persons beyond the limitations of national law and thus conflicting with the fundamental principle of nullum crimen sine lege, nulla poena sine lege – as these prevent Italy from fulfilling its obligations resulting from Article 325 of the TFEU on combatting fraud and any other illegal activities affecting the financial interests of the European Union.[21] Notwithstanding, the Italian Constitutional Court declared that the rules the CJEU requires to be set aside by the Italian courts are parts of Italian constitutional identity and turned to the CJEU for a preliminary ruling on the domestic enforcement of its Taricco judgement. In the so-called Taricco II case[22] the CJEU somewhat softened its previous approach of the subject. It confirmed that national rules shall be disapplied in favour of the effectiveness of EU law, but also included an exception: 'unless that this application entails a breach of the principle that offenses and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed'. While still emphasizing the primacy of EU law, the Court acknowledged the prevalence of domestic law if national constitutional identity is affected.

2. The outlines of EU legislation on fundamental rights protection in criminal matters

As has already been referred to above, the provisions of the ECHR form a basis for the interpretation of the rights enshrined in the Charter. As the

[19] For the most important focus points in balancing between the protection of fundamental rights and the effectiveness of EU law in the area of freedom, security and justice see: Bachmaier, 2018, pp. 56-63; pp. 59-61.
[20] Case C-105/14, *Ivo Tarrico and Others*, 8 September 2015.
[21] For the merits of the decision in the context of the dialogue between the CJEU and the national ordinary and constitutional courts as interpreted in the light of the jurisprudence of the CJEU see: Scalia, 2015, pp. 106-107.
[22] Case C-42/17, *M.A.S. and M.B.*, 5 December 2017.

ECHR is interpreted by the ECtHR, its case law is indispensable when trying to unfold the meaning of the rules of the Convention.

Taking Article 6 of the Convention as a starting point of setting the framework of fair trial rights, Articles 47 and 48 shall be taken into account correspondingly. While Article 47 expressly refers to a fair trial, within the meaning if Article 6 of the Convention, the presumption of innocence and the right of defence provided for in Article 48 of the Charter form and essential element thereof as well, while Article 47 (1) also covers Article 13 of the Convention (the right to an effective remedy).

Article 47 covers the right to an effective remedy, the right to a fair hearing before a tribunal, also referring to the right to defence in its broader sense.[23] Article 48 includes the basic provisions on the presumption of innocence and the right of defence similar to Article 6 (2) and (3) of the Convention and shall have the same meaning and scope pursuant to Article 52 (3) of the Charter.

As it has already been mentioned, mutual trust in each other's justice systems is the basis for mutual recognition of judicial decisions that is the foundation of effective cooperation in criminal matters in the European Union. Article 67 (1) of the Treaty on the Function of the European Union ('TFEU') states that 'The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.', thereby providing for the basis of a single European judicial area in the field of criminal law, that is the area of freedom, security and justice. The basis of the cooperation between the judicial authorities of the Member State in this field shall be the principle of mutual recognition, as laid down in Article 82 (1) of the TFEU. This principle also bridges the gap between different legal systems and traditions of the Member States requiring that the national authorities execute each other's decisions in the same manner as in case of decisions of the authorities of their Member State without any regard to differences in legal provisions, unless these differences have impact on general principles of national legal systems or fundamental rights. The common standard of respect for the latter also forms an essential part of the area of freedoms, security and justice also provided for in Article 67 (1) TFEU, as referred to above. The implementation of the principle of mutual recognition

[23] See Explanations to the Charter on the website of the European Union Agency for Fundamental Rights (FRA) [Online], Available at: https://fra.europa.eu/en/eu-charter/article/47-right-effective-remedy-and-fair-trial, (Accessed 30 July 2024).

presupposes mutual trust of the Member States in each other's criminal justice systems, which is reliant upon – among other factors – common mechanisms for safeguarding procedural rights – especially of suspected and accused persons -, different elements of the right to a fair trial.
In connection with the above-mentioned, Article 82 (2) b) of the TFEU provides for the establishment of minimum rules in respect of the rights of individuals in criminal procedure, as the basis of harmonization of the laws of the Member States, by the means of directives.
According to EU legislation, the fact that all the Member States are party to the ECHR alone does not always provide a sufficient degree of trust in the criminal justice systems of the Member States.[24]

Consequently, the effective operation of the cooperation in criminal matters in the European Union - thus nourishing mutual trust - requires common standards of the protection of fundamental rights, based on the Charter, the Convention and the corresponding jurisprudence of the ECtHR and the CJEU, which led to the adoption of directives – in their preambles echoing the afore-mentioned aims and principles - concerning the right to information, the right to interpretation and translation, the right to have a lawyer, the right to be presumed innocent and to be present at trial, safeguards for children and the right to legal aid and recommendations on safeguards for vulnerable persons. The legislative procedure leading to the adoption of these directives was governed by the Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings[25]. It also acknowledges the relevance of the ECHR and its interpretation by the ECtHR in Recital (2) as a starting point of legislation: 'the Convention, as interpreted by the European Court of Human Rights, is an important foundation for Member States to have trust in each other's criminal justice systems and to strengthen such trust' at the same time also aiming at ensuring full implementation and even raising of the level of fundamental rights protection throughout the EU: 'At the same time, there is room for further action on the part of the European Union to ensure full

[24] Expressly or implicitly in: Recital (7) of Directive 2012/13/EU, Recital (3) of Directive (EU) 2016/1919, Recitals (4) and (5) of Directive (EU) 2016/343 and of Directive 2013/48/EU, Recital (7) of Directive 2010/64/EU, Recitals (2) and (5) of the Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings.
[25] Official Journal C 295, 4.12.2009, pp. 1-3.

implementation and respect of Convention standards, and, where appropriate, to ensure consistent application of the applicable standards and to raise existing standards.'

3. The cornerstones of the case law of the Court of Justice of the European Union regarding fundamental rights in criminal proceedings[26]

The Charter of Fundamental Rights of the European Union shall be applied only in cases of application of union law, meaning that it does not provide for an independent system of fundamental rights protection, but it is closely connected to and the corollary of applying other rules of the specific European Union legal system.[27] Therefore the case law of the Court of Justice of the European Union on procedural fundamental rights in criminal proceedings is always connected to the application of different tools of mutual assistance and is based on preliminary ruling procedures, where the CJEU interprets the rules of the underlying EU legal acts in the light of the Charter and of course - as it has been written above about the relationship between the Charter and the ECHR - the European Convention on Human Rights as interpreted by the European Court of Human Rights. The fact that these decisions of the CJEU are the results of preliminary ruling procedures means that the impetus for such decisions always lie with the domestic courts, thus providing for a singular dialogue between the CJEU and the national courts, interaction between European law and national law. The protection of fundamental rights throughout the European Union is a basic limitation to the prevalence of the principle of mutual recognition resulting in the obligation to execute decisions of Member States authorities,

[26] The case law of the Court of Justice of the European Union is significantly farther reaching than this paper could even attempt to show. The cases mentioned are closely connected to the subject of this paper and are the ones which are frequently cited in subsequent CJEU judgements as the basis and starting point of the argumentation in the individual cases, have substantial impact on the practice of mutual legal assistance – outside the scope of the given case - and together formulate the outlines of the judicial dialogue between national courts and the CJEU in this field and indicate the fundamentals of the prevalence of union law and its relation to human rights in the area of cooperation in criminal matters.

[27] Unlike of the protection offered by the European Convention on Human Rights as interpreted by the European Court of Human Rights, which is directly applicable to the national legal systems and exists as a single supranational set of rules and principles and not as a part of a unique supranational legal system that is union law.

therefore the fundamental rights control of cooperation in criminal matters in the European Union can be exercised via the interpretation of the conformity of Member States' legislations and decisions of domestic authorities with union law, which then - by significantly contributing to the harmonization of minimum standards in this field - shall result in enhancing the effectiveness of mutual legal assistance in criminal matters.

Being the most significant element of cooperation in criminal matters in the European Union, the European arrest warrant (EAW) and the application of the underlying framework decision in practice - from the point of view of the principle of mutual recognition - offered most of the possibilities for the CJEU to conclude on the different elements of the right to a fair trial.[28] The CJEU highlighted in its Bob-Dogi judgement[29] that the European arrest warrant system entails a dual level of protection of procedural rights and fundamental rights: in addition to the judicial protection provided at the first level, at which a national decision, such as a national arrest warrant, is adopted, there is the protection that must be afforded at the second level, at which a European arrest warrant is issued. Nonetheless, the fundamental rights guarantee in respect of issuing an EAW can only be interpreted fully when taking into account the circumstances relating to its execution.

In the landmark Melloni case[30] the Court of Justice of the European Union had the opportunity to scrutinize the rules of in absentia proceedings in respect of decisions on surrender pursuant to the framework decision on the European arrest warrant. Previously in the Radu case[31] the CJEU – on the basis of Article 6 of the ECHR and Articles 47 and 48 of the Charter – found that the executing authority cannot refuse to execute the European arrest warrant on the ground that the requested person was not heard in the issuing Member State before that arrest warrant was issued, arguing that besides the fact that the framework decision does not provide for such ground for refusal, Articles 47 and 48 of the Charter does not require such a decision either and emphasised the significance of the interest to effectively operate the surrender system which would be jeopardized by constructing an obligation of hearing the defendant before the issuing of a European arrest warrant, however, the right to be heard shall be observed in subsequent

[28] For an overview of the most important aspects thereof see the Eurojust, 2021, pp. 43-56.
[29] Case C-241/15, *Curtea de Apel Cluj and Niculaie Aurel Bob-Dogi*, 25 May 2015.
[30] Case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, 26 February 2013.
[31] Case C-396/11, *Curtea de Apel Constanța and Ciprian Vasile Radu*, 29 January 2013.

procedures. By this decision the CJEU ruled on the primacy of the interests of the criminal procedure compared to the fundamental rights of the defendant, as a logical consequence of the fact that the reasons for issuing EAW basically cover those where the issuing authority has no other means available to hear the defendant (also suggested by the principle of proportionality).

The Melloni judgement followed in the close footsteps of the previously mentioned decision of the CJEU. In this case the European arrest warrant was issued for the execution of ten years of imprisonment on the defendant, as a result of a criminal procedure conducted in absentia. The Spanish Constitutional Court referred the case in a framework of a preliminary ruling procedure to the Court of Justice of the European Union on the basis of applying Article 47 (right to effective judicial remedy), Article 48 (2) (right of the defence) and Article 53 (level of protection) of the Charter and thus focusing on the question of effective remedy, the counterbalancing of the violation of the right to be present at the trial. The Court of Justice found that the framework decision on the EAW is compatible with the requirements of the mentioned Articles of the Charter, while the rules on the level of protection offered by Article 53 of the Charter does not allow that the surrender of a person convicted in absentia is made conditional on a national (in this case: constitutional) rule that requires the conviction to be open to review in the issuing Member State, thereby setting aside the higher level of protection offered by national law for the sake of efficiency of cooperation based on the principles underlying the area of freedom, security and justice. The CJEU emphasized the importance of the right to be present at trial as an ‘essential component’ of the right to a fair trial, but at the same time ruling that it is not absolute, therefore is subject to limitations and the defendant may waive his right to be present, on the conditions discussed beforehand providing for the compatibility of such waiver with fairness and shall be counterbalanced by adequate safeguards resulting in an overall fair trial. The framework decision contains circumstances – relating to the conduct of the defendant - which establish the conclusion that the defendant implicitly waived his right to be present at the trial. The CJEU in this regard heavily relied on the corresponding case law of the ECtHR. Regarding the level of protection, it emphasised that the possibility of the Member States to provide higher level of protection of human rights is restricted by the requirements of primacy, unity and

effectiveness of EU law[32], therefore ruling on the utmost importance of uniformity of the level of human rights protection that serves mutual trust and the application of mutual recognition.[33]

In the Covaci case[34] the CJEU scrutinized the requirements of EU law in respect of the necessary measurements for redeeming the restriction of the right to be present at the trial – in penal order proceedings - and also the relationship between the right to interpretation and the right of defence, the provisions of the Directive on the right to interpretation and translation and the Directive on the right to information in criminal proceedings. In respect of linguistic assistance, the CJEU offered a strict interpretation, making a relevant distinction between the right to interpretation (oral statements) and the right to translation (written statements), stating that EU law does not require that Member States provide translation of an objection against penal orders (by which the defendant can achieve that his case is brought to trial he can participate at) for persons not understanding the language of the proceedings. Furthermore, the CJEU connected the procedural rights to linguistic assistance with the right to legal assistance by asserting that the defendants have the opportunity to obtain the assistance of a lawyer for drafting such an objection – in the language of the proceedings -, thus understanding these two otherwise complementary fundamental rights as alternatives.[35]

The Court of Justice of the European Union had the possibility to examine the independence of judges, judicial authorities – as a central element of fair trial – in its case law, resulting in relevant conclusions for the role and application of the mutual recognition principle in the area of freedom, security and justice.[36] In the Minister for Justice and Equality

[32] A significant requirement as a consequence of the attributes of EU law as developed by the case law of the CJEU to a supranational legal system, therefore an important point of collision of interpretation between the CJEU and the ECtHR that interprets similar fundamental rights provisions of the ECHR without this limitation, however, mainly for this reason reluctant to step in the margin of EU law, national legal systems and the ECHR.

[33] See also Bachmaier, op. cit. pp. 59-60.

[34] Case C-216/14, *Amtsgericht Laufen and Gavril Covaci,* 15 October 2015.

[35] Ruggeri criticizes the CJEU also for not focusing on the specific problems of penal order procedures in this judgement. See Ruggeri, 2016, pp. 43-44.

[36] Lorena Bachmaier considers that the Aranyosi and Caldărăru case (Case C-404/15, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen,* 5 April 2016, in connection with the role the degrading and inhuman conditions in detention facilities in Hungary and Romania as a basis for denial of execution of EAWs) posed the risk of reversing the mutual recognition principle in Bachmaier, L.: op. cit. p. 61.

case[37] the defendant submitted to the executing Irish court that his surrender to the Polish judicial authorities would expose him to the real risk of a flagrant denial of justice therefore violating Article 6 of the European Convention on Human Rights and expressly relied on the proposal of the European Commission regarding Poland on the basis of Article 7 (1) of the TEU. The CJEU stated that if the executing judicial authority has material indicating the real risk of the breach of the right to a fair trial as provided by Article 47 (2) of the Charter on the basis of systematic or generalised deficiencies in the criminal justice system of the Member State of the issuing judicial authority, the executing judicial authority must thoroughly examine the case at hand in a detailed manner and is not allowed to base its decision on denial of execution of the EAW on these systematic or generalised deficiencies alone.[38] Therefore it must determine, specifically and precisely, whether, having regard to the individual's personal situation, to the nature of the offence and the factual context of the EAW, in the light of the supplementary information provided by the issuing Member State, whether there are substantial grounds for believing that that individual will run such a risk if he is surrendered to that Member State. In its argumentation the CJEU emphasised the central role and utmost importance of mutual trust and mutual recognition in the area of freedom, security and justice, the limitations of which shall be exceptional. On the other hand, it established that the right to an independent tribunal is the essence of the right to a fair trial[39] and may therefore be a basis of restrictions of mutual recognition. The Court requires a two-step assessment for establishing the denial of the execution of an EAW: the first is the systemic assessment based on objective, reliable and up-to-date evidence aiming at the examination of systemic or generalised deficiencies in a justice system of a Member State in connection with the lack of independence, resulting in a

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In my opinion the references for preliminary ruling in respect of the independence of judges in Poland carry the same primal risk in respect of the foundation of the area of freedom, security and justice.

[37] Case C-216/18 PPU, *High Court (Ireland) and LM*, 25 July 2018.

[38] This is the same logic as the Court of Justice used to put forward its arguments in favour of the application of the principle of mutual recognition and the need for the detailed examination of the situation of the defendant from the fair trial point of view on a case-by-case basis in the Aranyosi and Caldărăru case referred to above.

[39] For a thorough scrutiny of the jurisprudence of both the ECtHR and the CJEU in respect of the essence of the right to a fair trial and the issues to be clarified in the future judgements of the CJEU in this regard see Gutman, 2019, pp. 883-903.

real risk of the breach of the right to a fair trial. Only if on the basis of an Article 7 (2) TEU procedure the European Council adopted a decision and suspended the EAW framework decision in respect of that Member State would the systematic test itself serve as a ground for refusing the execution of a EAW. In any other case, the executing authority is required to carry out also a specific assessment taking into account the particular circumstances of the case at hand.

The Court of Justice of the European Union confirmed its above-mentioned standpoint in the Openbaar Ministerie judgement[40], again in respect of surrender procedures based on EAWs issued by Polish judicial authorities. It emphasised that allowing for an automatic refusal of the execution of an EAW based only on the first – general, systemic - step of assessment, would be against the main objectives of the EAW mechanism, namely, to combat impunity. Furthermore, the CJEU established that the examination of the particular circumstances of the case shall include the consideration of deficiencies that arose after the EAW has been issued – if for the purpose of prosecution -, as the executing authority is required to scrutinize the situation at the time of its decision in respect of the possible risk of breach of the essence of the right to a fair trial, irrespective of the fact that those circumstances did not exist at the time of the issuing of the EAW and could not therefore be applied to the executing authority at that time. If the EAW is issued for the purpose of execution of a custodial sentence, the scrutiny shall cover only the circumstances that prevailed at the time of the issuing of the EAW, but also in respect of the court that imposed the custodial sentence (not restricting to the judicial authority that issued the EAW), thereby widening the scope of the scrutiny from surrender procedure to the main criminal procedure and logically bonding them in respect of the requirements of fair trial.

The relevance of independence of judicial authorities as an essential element of the right to a fair trial was also examined by the CJEU from the point of view of the notion of issuing and executing judicial authorities, reflecting on the institutional requirements and workings of the criminal justice systems of the Member States, starting from a fundamental principle of the rule of law, the separation of powers. In the OG and PI (Public

[40] Joined Cases C-354/20 and C-412/20, *Rechtbank Amsterdam and L and P*, 17 December 2020.

Prosecutor's Offices in Lübeck and Zwickau) judgement[41] also referred to in the above-mentioned decision, the CJEU found that the concept of an issuing judicial authority within the meaning of the framework decision on the EAW must be interpreted as not including public prosecutors' offices of a Member State which are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister for Justice, in connection with the adoption of a decision to issue an EAW.

To some extent supplementing this breakthrough interpretation – and again requiring primacy over the Member States' decisions on designating and appointing issuing judicial authorities pursuant to the framework decision on the EAW in line with the concept of procedural autonomy, by considering this notion an autonomous concept of European Union law –, in the recent AZ case[42] the CJEU dealt with the notion of executing judicial authority within the framework of the same legal instrument, again starting with the question of whether it is an autonomous concept of EU law and whether the same principles apply to it as were elaborated in the OG and PI decision. The CJEU ruled that on the same grounds as it took into consideration in the OG and PI judgement in respect of the issuing judicial authority, the executing judicial authority is also an autonomous concept of EU law and its interpretation: on the basis of procedural autonomy, the Member States may designate the judicial authority to issue or execute an EAW, but the meaning and the scope of this concept cannot be left to the assessment of each Member State as it requires an autonomous and uniform interpretation throughout the European Union. Compared to the two-level protection in the issuing phase (referred to in the Bob-Dogi and OG and PI cases mentioned previously), the execution phase of the surrender procedure entails only one level of protection, that is the intervention of the executing authority which shall ensure the respect for fundamental rights. Therefore, it ruled that the relevant Articles of the framework decision on the EAW must be interpreted as meaning that the public prosecutor of a Member State who, although participates in the administration of justice, may receive in exercising its decision-making power an instruction in a specific case from the executive, does not constitute an 'executing judicial authority' within the meaning of those provisions.

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[41] Joined Cases C-508/18 and 82/19 PPU, *Minister for Justice and Equality and OG and PI,* 27 May, 2019.

[42] Case C-510/19, *Hof van beroep te Brussel and AZ,* 24 November 2020.

Besides the European arrest warrant, another central instrument of the area of freedom, security and justice is the European Investigation Order (EIO) as the main instrument of gathering and obtaining evidence based on the principle of mutual recognition[43], which is a highly sensitive matter in respect of the protection of fundamental rights and the dominant component of criminal procedure. In the A and Others judgement[44] the CJEU faced with the issue of interpreting the concept of judicial authority, issuing authority in respect of the Directive on the EIO, thereby obliged to reflect on the requirements deriving from its previously examined case law on the matter regarding the EAW and subsequent surrender procedures between Member States. On this basis it also had to focus on the possible relationship of legal subordination of the public prosecutor or public prosecutor's office to the executive with a view to the risk of being subject to orders or individual instructions from the executive and its relevance to the issuing and executing of the EIO. Based on argumentation focusing the significant added-value of fundamental rights guarantees included in the Directive, specific provisions intended to ensure that the issuing or validation of an EIO is accompanied by guarantees specific to the adoption of judicial decisions – specifically those relating to respect for the fundamental rights of the person concerned and, in particular, the right to effective judicial protection, the requirements of necessity, proportionality and adequacy when issuing an EIO, the legal remedies and alternatives available when executing it –, the CJEU arrived at the conclusion that the Directive contains a normative framework comprising a set of safeguards both at the stage of the issuing or validation and of the execution of the EIO, whose aim is to ensure the protection of the fundamental rights of the person concerned. It also added that the aim of the issuing of the EIO is to conduct investigative measures to obtain evidence which are not such as to interfere with the right to liberty of the person concerned, enshrined in Article 6 of the Charter – as opposed to the execution of an EAW. Based on these arguments, the CJEU concluded that the Directive on the EIO must be interpreted as meaning that the concepts of 'judicial authority' and 'issuing authority', within the meaning of the provisions of the Directive, include the

[43] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, Official Journal L 130, 1.5.2014, pp. 1-36.

[44] Case C-584/19, *Landesgericht für Strafsachen Wien and A and Others*, 8 December 2020.

public prosecutor of a Member State or, more generally, the public prosecutor's office of a Member State, regardless of any relationship of legal subordination that might exist between that public prosecutor or public prosecutor's office and the executive of that Member State and of the exposure of that public prosecutor or public prosecutor's office to the risk of being directly or indirectly subject to orders or individual instructions from the executive when adopting a European investigation order. In this decision the CJEU acknowledged the relevant differences between the diverse tools of cooperation in criminal matters in the European Union from the aspect of the respect of fundamental rights to the point where it managed to provide significantly diverse meanings of the formally same notions, thereby distinguishing them as two distinct autonomous concepts of European Union law – for the purposes of criminal investigations and prosecutions.

The Court of Justice based its decision partly on the added value of fundamental rights guarantees referenced in the text of the Directive[45]. However, in relation to what has been mentioned in respect of the reversal of the mutual recognition principle regarding the Aranyosi and Caldărăru case and also the preliminary ruling references of national courts based on the report of the Commission on the independence of the judiciary in Poland, to some extent, such guarantees may be perceived as further grounds for refusal of the recognition of the decisions of national judicial authorities – contrary to Article 82 (1) of the TFEU – and from this perspective can only be justified – in terms of their inclusion in the Directive – if they offer an added value to the protection already provided by the system of the ECHR – Charter – Directives triad on procedural rights of individuals.[46]

[45] For an overview of the relevant legal provisions and their role in the EIO procedures see Montero, 2017, pp. 45-49.

[46] As Spanish State Attorney and Justice Counsellor-Coordinator at the Spanish Permanent Representation before the EU, David Vilas Álvarez details these doubts and provides a comprehensive overview in Álvarez, 2018, pp. 64-71.

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ANNA KISS[*]- SZANDRA WINDT[**]:

The procedural legal status of migrants transported by smugglers in European jurisprudence

ABSTRACT: In this paper, we present the approach of criminology and criminal procedure law to migrant smuggling, a phenomenon that is also significant at the European level. The characteristics of migrant smuggling as defined by the UN Protocol are presented, followed by the responses at the European level and the most recent statistics. The procedural status of smuggled persons, their status as victims, witnesses or perpetrators (suspected or accused), and the approach taken by the different branches of law are also discussed. After that, we summarize the results of our research conducted in the spring of 2024 with the cooperation of EUROJUST and Legicoop members. The following research questions were formulated, concerning the procedural status of migrants transported by smugglers in their countries

- In criminal cases of migrant smuggling, what is the procedural position of the person transported by the migrant smuggler? (victim, witness, instigator, abettor)
- Are there any individual criminal proceedings or other (i.e. administrative, misdemeanour) procedures against the person transported by the migrant smuggler?

In most European countries, migrants are considered victims of migrant smuggling and in the criminal proceedings that have been initiated, they take the position of victims: at most they are questioned as witnesses. Due to illegal border crossing, no separate criminal proceedings are usually initiated against them, most of the time these cases are resolved within the framework of public administrative proceedings.

KEYWORDS: migrant smuggling, victim, witness, criminal procedure, administrative offence, Legicoop, Eurojust.

[*] Senior researcher at National Institute of Criminology, Hungary, ORCID: 0000-0002-3379-763X, kiss@okri.hu.
[**] Senior researcher at National Institute of Criminology, Hungary, ORCID: 0000-0003-2928-5591, windt@okri.hu.

1. Introduction

There is a link between illegal migration and migrant smuggling, despite the fact that one is a social phenomenon and the other a crime. A smuggler provides assistance to cross the border illegally.[1] (Sometimes smugglers work together with traffickers, which is another crime: trafficking in human beings. Migrant smuggling is a crime that takes place only across borders, while human trafficking can occur internationally and nationally/domestically.) Irregular migration as a phenomenon is generally defined as a petty offence in the European Union; however, there are other Member States that solve the problem on the level of administrative law.[2]

The characteristics of migrant smuggling as defined by the UN Protocol are presented, followed by the responses at the European level and the most recent statistics. The procedural status of smuggled persons, their status as victims, witnesses or defendants, and the approach taken by the different branches of law are also discussed. After that, we summarize the results of our research conducted in the spring of 2024 with the cooperation of EUROJUST and Legicoop members. The following research questions were formulated, concerning the procedural status of migrants transported by smugglers in your country:

- In criminal cases of migrant smuggling, what is the procedural position of the person transported by the migrant smuggler? (victim, witness, instigator, abettor)
- Are there any individual criminal proceedings or other (i.e. administrative, misdemeanour) procedures against the person transported by the migrant smuggler?

In most European countries, migrants are considered victims of migrant smuggling and in the criminal proceedings that have been initiated, they take the position of victims, and at most they are questioned as witnesses. Due to the illegal border crossing, no separate criminal proceedings are usually initiated against them, and most of the time these cases are resolved within the framework of public administrative proceedings.

Recently, more and more surveys have focused on the situation of the victim, but few studies deal specifically with the procedural status of victims of human smuggling. News about crimes affects us every day.

[1] See in more detail Zsirai, 2019, pp. 35-45.
[2] Bartkó, 2024, p. 33.

Migrants are victims of such crimes every day, often with severe psychological, social and financial consequences.

Among the other transnational organised crimes, migrant smuggling is also a problem in European countries at both regional and EU levels. Migrant smuggling is a profitable activity for transnational criminal organizations[3], which therefore raises a number of procedural, criminal and security issues.[4]

According to the UN Migrant Smuggling Protocol 'Smuggling of migrants shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.'[5] Since 2000, this Protocol has aimed to prevent and combat the smuggling of migrants and to promote cooperation between the States Parties to this end, while protecting the rights of smuggled migrants. This Migrant Smuggling Protocol only applies to the conduct described if it is transnational in nature and involves an organised criminal group.[6]

Human smuggling (migrant smuggling in international terms) has been a major challenge for EU policymakers over the past two decades. Its political and social consequences and causes have all required solutions, to which only temporary responses have been found. International and European law criminalise a number of behaviours as migrant smuggling. This behaviour ranges from organised crime to exploitation and violence, humanitarian aid and illegal entry, and recently there have been calls for trafficking in human beings to be treated as a crime against humanity.[7]

According to the Migrant Smuggling Protocol, 'Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth'.[8]

2. Migrant smuggling in the EU

The 2015 summit was also the result of a 'more distant' political change in Europe, which showed that in our globalised world there are no longer

[3] Staiano, 2022, p. 17; Europol, 2022.
[4] See in more detail Farkas and Jánosi, 2013; Mitsilegas, 2019.
[5] Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing The United Nations Convention Against Transnational Organized Crime, Art. 3 a).
[6] Staiano, 2022, p. 18.
[7] See in more detail Mitsilegas, 2019.
[8] Art. 5 and see Schloenhardt and Hickson, 2013.

distances, and that the consequences of certain social and environmental disasters can be felt within a very short time at the borders of European countries. Many studies have been published on the 2015 crisis[9], and various European (not only EU) countries have given and will continue to give different responses to it in 2024, albeit with some variations, in line with the political and economic 'climate' at home.

Smugglers use land, sea and air routes to facilitate illegal migration both to and within the European Union.

The European Agenda on Migration, which was adopted by the European Commission on 13 May 2015, identified the fight against migrant smuggling as a priority, to prevent the exploitation of migrants by criminal networks and reduce incentives to irregular migration. The European Agenda on Security, adopted by the Commission on 28 April 2015, also singled out cooperation against the smuggling of migrants inside the EU and with third countries as a priority in the fight against organized crime networks (followed by an EU Action Plan against migrant smuggling – 2015-2020).[10] Taking into account the results of targeted consultations with stakeholders as well as the public consultation, the renewed EU Action Plan against migrant smuggling (2021-2025) sets out the main pillars and concrete actions needed to fight and prevent migrant smuggling and to fully protect migrants' fundamental rights. [11]

The renewed EU action plan against migrant smuggling (2021-2025) is built on the following main pillars of action:

(1) Reinforced cooperation with partner countries and international organisations,
(2) Implementing the legal frameworks and sanctioning smugglers active within and outside the EU,
(3) Preventing exploitation and ensuring the protection of migrants,
(4) Reinforcing cooperation and supporting the work of law enforcement and the judiciary to respond to new challenges, and

[9] See in more detail Hautzinger, 2019, pp. 159-160.
[10] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU Action Plan Against Migrant Smuggling (2015 - 2020), (COM/2015/0285 Final).
[11] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a Renewed EU Action Plan Against Migrant Smuggling (2021-2025), (COM/2021/591 Final).

(5) Improving knowledge on smugglers' modi operandi.

According to the Eurojust Annual Report 2023, migrant smuggling is a global criminal activity that often disrespects human life and impacts the internal security of the EU in the pursuit of profit. Smuggling networks, often part of organised multinational criminal networks, frequently take advantage of migrants' vulnerability, leading to violence, abuse, exploitation and loss of life.[12] In 2023, more than 280,000 irregular border crossings were detected at the EU's external borders. More than 90% of the irregular migrants who reach the EU arrive via smugglers. It is a shocking fact that since 2014, over 60,000 migrants have lost their lives or gone missing during smuggling operations.[13]

According to the Eurojust Annual Report 2023, Greece opened the largest number of migrant smuggling cases at Eurojust during 2023, followed by Hungary. Bulgaria and Germany are the European countries that were most requested to participate in the Agency's cross border migrant smuggling cases in 2023, while the United Kingdom and Serbia were the most requested third countries to contribute to international investigations in this area. In 2023, Eurojust continued to be actively involved in the EMPACT Operational Action Plan on Migrant Smuggling, ensuring the judiciary's perspective was represented. Eurojust participates in nearly all operational actions in this area and co-leads 11 of them.[14]

Case study: A criminal network is suspected of smuggling up to 10,000 Vietnamese nationals across the English Channel. Migrants are transported to the United Kingdom in small motorised boats supplied from Germany. An international operation is carried out by authorities in several countries, including Belgium, Germany, the Netherlands and the United Kingdom, with the support of Eurojust and Europol. During the action day on 5 July 2022, 39 people are arrested and over 50 searches are carried out simultaneously in several countries. Thanks to the intensive cooperation and exchange of information prior, during and following the joint operation, the authorities involved are able to deal a severe blow to one of the most significant crime groups involved in cross-Channel migrant smuggling. JUSTICE DONE: On 18 October 2023, the Belgian Court of Bruges

[12] See in more detail Bast, 2023.
[13] Eurojust, 2023.
[14] Eurojust, 2023.

sentences 20 suspects to prison terms ranging from 30 months to 11 years for their involvement in migrant smuggling. They are ordered to pay fines of up to EUR 80,000.[15]

The law enforcers and the decision-makers of the European countries are trying to fight together against an international, cross-border crime, with different approaches, legal views, and different criminal law regulators at the local level.[16]
Smuggled persons (migrants) have a lot of information about the network, its stages, the system of payments etc.[17] This information is crucial to the law enforcers' ability to stop the smuggler groups.

Following an aforementioned peak in 2015, there was a sharp drop in numbers, followed by a further rise in 2022.
In 2023, 275,049 illegal immigrants were registered. In January 2024, 13,595 illegal arrivals were registered. European countries encounter smuggling in different ways depending on their geographical location, with the Eastern (Balkan) and Western (maritime) routes being the most infested, with most migrants arriving along these routes, based on three major routes.

The experience of different European countries shows that smuggling networks have different structures depending on the routes used.[18] This may also mean that countries involved in different routes approach their migrant smuggling phenomenon differently.[19]

3. Our research

In the National Institute of Criminology[20] we have a research project entitled "The procedural status of migrants transported by smugglers in European case law".
The following research questions were formulated in the spring of 2024:

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[15] 20 migrant smugglers sentenced to prison in Belgium with Eurojust support. [Online]. Available at: https://www.eurojust.europa.eu/publication/20-migrant-smugglers-sentenced-prison-belgium-eurojust-support (Accessed: 1 February 2024).
[16] Campana, 2018, p. 490.
[17] Campana, 2018, p. 493.
[18] Campana, 2018, pp. 483-484.
[19] See in more detail Comparing Notes: Perspectives on Human Smuggling in Austria, Germany, Italy, and the Netherlands.
[20] National Institute of Criminology, 2024 work plan. [Online]. Available at: https://en.okri.hu/index.php/research/work-plan (Accessed: 1 February 2024).

- In criminal cases of migrant smuggling, what is the procedural position of the person transported by the migrant smuggler? (victim, witness, instigator, abettor)
- Are there any individual criminal proceedings or other (i.e. administrative, misdemeanour) procedures against the person transported by the migrant smuggler?

We have sent these questions to two different bodies.[21] First of all, to the Ministry of Justice of Hungary who is part of the so called Legicoop network: the network for legislative cooperation between the ministries of Justice of the European Union (ENLC). (It was created in 2008, by a resolution for the Council of the European Union 2008/C 326/01. It was inaugurated in Paris on 19 June 2009. Legicoop is the online forum of this network. It facilitates exchange of information between national correspondents on legislation, judicial systems and implementation of European regulation in the Member States. As a European cooperation instrument, Legicoop contributes to the quality of legislative production, the improvement of mutual trust and the dissemination of law.

Secondly, we have sent our research questions to the Hungarian National Desk of EUROJUST who distributed among them the Member States' National desks and for the Focus groups' members. The Migrant Smuggling Focus Group is an informal network of judicial practitioners specialised in migrant smuggling from all EU Member States and some non-EU States. It serves as an important hub to regularly connect national judicial actors working in this area.

Members of the Focus Group provided expert input to Eurojust's overview of EU legislation on the Legal Definition of Migrant Smuggling and/or Facilitation of Irregular Migration[22]. This publication serves as a useful reference for judicial practitioners working on migrant smuggling cases.

[21] Special thanks to Ákos Kara, Eszter Köpf, Gábor Schmidt and László Venczl for their help in the further distribution of the questionnaires and to the representatives of the Member States who responded to the questionnaires.

[22] Eurojust, 2024.

4. Findings

The members of each board could voluntarily answer the questions we sent out. We received responses from Legicoop, Eurojust, the Focus Group, from a total of 15 countries.

4.1. Austria

The offence of migrant smuggling is to be found in Section 114 of the Austrian Alien Police Act. Para 5 of this Section prohibits a *smuggled person to be prosecuted* for aiding or abetting the smuggling offence regarding themselves. They participate as witnesses in this criminal proceeding. According to Section 120 of the Austrian Alien Police act, an illegal stay in the territory of Austria is an administrative offence punished with a fine.

4.2. Bulgaria

Concerning the procedural status of migrants transported by smugglers, these migrants are always considered victims of the crime while also having the status of witnesses. Their status as *victims* of the crime entails a whole set of rights set out in the Criminal Procedure Code of the Republic of Bulgaria.

General provisions: the victim is an individual who has the capacity of being a victim. According to Article 74 of the Bulgarian law the person who has suffered material or immaterial damages from the criminal offence shall be a victim. After the death of such persons, this right shall pass on to their heirs. The accused party shall not exercise the rights of a victim within one and the same proceedings.

The victim shall have the following rights in pre-trial proceedings: to be informed of his/her rights in criminal proceedings; to obtain protection for his/her safety and that of his/her relatives; to be informed of the course of criminal proceedings; to participate in the proceedings as specified by this Code; to make requests, comments and objections; to appeal against decision which lead to the termination or suspension of criminal proceedings; to have legal counsel; to be accompanied by a person of their choice; to obtain a written translation of the decision to terminate or suspend criminal proceedings if he/she does not speak Bulgarian; to request the acceleration of pre-trial proceedings in the cases provided for by this Code. The Requests, observations, objections and appeals against acts leading to

the termination or suspension of criminal proceedings may be made electronically, signed with a qualified electronic signature. The authority which initiates the pre-trial proceedings shall immediately notify the victim thereof if he/she has indicated an address for summoning in the country or an electronic address.

The victim shall exercise his/her rights if he/she explicitly requests to participate in the pre-trial proceedings and indicates an address in the country for summoning and notification of the proceedings. With the explicit consent of the victim, which may be withdrawn at any time, summons and notification may also be made at an electronic address indicated by the victim. The victim may not be accompanied by a person appointed by him/her if this contradicts the interests of the victim or may hinder the criminal proceedings.

Individual criminal proceedings or other/administrative proceedings may be initiated against the person transported by the migrant smuggler, i.e. the migrant himself, in the Bulgarian criminal justice system, and on this basis, they may be held criminally liable.

According to the Bulgarian penal code, anyone who enters or crosses the border without a permit from the competent authority, or with a permit, but not through the places designated for this purpose, is punished with imprisonment of three to six years and a fine ranging from one thousand to five thousand leva.

4.3. Czech Republic

The criminal legislation of the Czech Republic contains *four criminal offences* that are closely related to illegal migration. These are the offences of violent crossing of the state border pursuant to the Criminal Code, organising and facilitating unauthorized border crossings, aiding and assisting in unauthorized stays within the territory of the Czech Republic and illicit employment of foreigners.

The perpetrator of organizing and facilitating of unauthorized crossing of the state border may be a natural or legal person. This offence punishes so-called smuggling. Therefore, the perpetrator cannot be a person who illegally crosses the state border or transports himself across the territory of the Czech Republic after illegally crossing the border. The smuggled persons therefore act as *witnesses* or *victims* in criminal proceedings. However, they are liable for the illegal border crossing under administrative law.

The crime of organising and facilitating the illegal crossing of a state border is often linked to inhuman or degrading treatment of migrants, and this aspect should not be overlooked. Inhuman or degrading treatment is treatment in which the perpetrator, by his or her conduct, subjects another – intentionally or negligently – to physical or mental suffering as a result of the mode of transport across a border or national territory, as a result of lack of food, liquids or inadequate sanitary conditions.

At the same time, a procedure can also be initiated against the person transported by the migrant smuggler. According to the provisions of Sec. 17(3), a natural person commits an offence if he/she crosses the state border during the temporary protection of the state border – either outside the place designated for border crossing or at a place designated for that purpose but at a time other than the prescribed time, or intentionally evades control at a place designated for border crossing. The offence is punishable by a fine of up to CZK 50,000, and a fine of up to CZK 5,000 may be imposed by an on-the-spot order. However, in view of the Czech Republic's accession to the Schengen area, this provision *applies only to external borders* within international airports and the possible temporary introduction of internal border controls.

4.4. Denmark

The criminal procedural position of the person transported depends on the specific circumstances in connection with entry into Denmark, and the person in question may thus be arrested, charged and/or questioned as a *witness*, depending on the circumstances. Foreigners who enter or stay in Denmark without permission cannot be prosecuted if the person in question has approached the Danish authorities without delay in order to seek asylum, Article 31 of the Refugee Convention. Furthermore, a foreigner who has been assessed as a victim of human trafficking will be offered a prepared repatriation, including a reflection period, during which the foreigner has the right to procedural residence in Denmark.

An alien may be *punished* for violating the Danish Aliens Act if the person in question has entered Denmark illegally. It should be noted that the migrant may be punished for illegal entry regardless of whether it has taken place with the assistance of a migrant smuggler.

4.5. Finland

In Finnish criminal proceedings, the status of the person transported is a *witness*. In the Finnish criminal process, it is possible to conduct a preliminary investigation and thus focus the criminal process on the imported person.

It is not common for criminal investigations to progress in state border offences, because Finnish legislation prevents the sentencing of a person seeking asylum. Generally, smuggled persons immediately apply for asylum if they are taken into custody by the authorities upon entry into the country.

As a result of administrative procedure, an imported person can be deported from the country. The conditions of foreign nationals' right of residence in Finland are described in the law. If these conditions are not met, the foreign national in question does not have the right to stay in the country. The police and border control authorities have a legal duty to take steps to ensure the refusal of entry, denial of admittance or stay or the deportation of an alien, or present a requirement to leave for another EU Member State pursuant to the Finnish Aliens Act, if the alien does not satisfy the conditions for entry to or residence in the country

4.6. France

In French law, the offence of facilitation of unlawful entry, movement and residence is. Depending on the circumstances of the case, migrant smuggling may be qualified as human trafficking. The smuggled persons could be victims of human trafficking, to whom special treatment rules apply.

The *victim* role of migrants is also emphasized by the following rule: the offence is aggravated, if it is committed in circumstances that directly expose foreigners to an immediate risk of death or injury likely to result in permanent mutilation or disability have the effect of subjecting foreigners to living, transport, work or accommodation conditions incompatible with human dignity.

4.7. Iceland

Usually, the person transported would have a status as a *witness*, in Icelandic criminal procedure. However, if there is suspicion of an independent violation by the transported person (forged documents for example) the person could get a status as a *defendant* for that offence. If

there is a suspicion of trafficking in human beings the person always has status as a victim.

There are no special proceedings against that person unless, as stated above, the person is suspected of having committed an independent offence, like document forgery. This doesn't affects the person's chances of applying for protection.

4.8. Lithuania

Depending upon the situation in the case under investigation i.e. if such persons apply for asylum or temporary protection at the time of their detention or immediately afterwards, they usually have the status of *witnesses* in pre-trial investigations for illicit smuggling [of people]. Moreover, foreign nationals who are smuggled illegally across the territory of the State of Lithuania (as a transit country) from one EU State to another EU State shall also have the status of a witness in criminal proceedings.

Foreign nationals who are smuggled illegally have the status of a *suspect* in criminal proceedings in cases when they unlawfully cross the state border of the Republic of Lithuania (external EU border) from a foreign state and do not apply for asylum in Lithuania or for their legal protection.

4.9. Netherlands

The procedural position of a person transported by a migrant smuggler in criminal cases can vary but generally they are regarded as *victims*. They can also have the opportunity to cooperate with law enforcement as *witnesses* in prosecutions against the smugglers.

In general, the primary approach is to treat individuals transported by migrant smugglers as victims but there could be circumstances where they might be subject to individual criminal, administrative, or misdemeanour procedures based on their actions or legal status. (For instance, if they are found to have committed crimes unrelated to their status as migrants or if they are suspected of being involved in the smuggling operation willingly.) However, the Netherlands also adheres to the Convention relating to the Status of Refugees in which article 31 states that the contracting country shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the

authorities and show good cause for their illegal entry or presence. This means that when a migrant invokes Article 31 of the Refugee Convention, in principle no prosecution will take place.[23]

4.10. Poland

In Poland, illegal border crossing is criminalized as a misdemeanour or a criminal offence. According to the law "Whoever crosses the border of the Republic of Poland in violation of the law shall be punished by a fine." Illegal border crossing will be crossing the border at an unauthorized location, as well as at an authorized location, but in violation of the regulations governing its crossing, as normalized in Article 14 (1) of the Law of October 12, 1990 on the Protection of the State Border. This may involve violations such as lacking a valid travel document or a document authorizing the crossing of the border, not having a valid visa if required, failing to justify the purpose and conditions of the planned stay, or not having sufficient means of subsistence. Border Guard officers are authorized to impose a fine for an offense under Code of Petty Offences. The permissible amount of such a fine by way of a penalty ticket is up to PLN 500.

4.11. Portugal

Usually in the Portuguese criminal proceedings, the status of the person transported is a *witness*.

A citizen who remains irregularly in Portuguese territory is subject to an administrative procedure.

4.12. Slovakia

Pursuant to the Slovak Criminal Procedure Act, the transported person is included in the proceedings as a *victim* and can be questioned as a witness in the criminal proceedings against the smuggler.

In parallel with the criminal proceedings, administrative proceedings may also be initiated against the person transported by the migrant smuggler.

[23] See in more detail van der Woude and van der Leun, 2017.

4.13. Spain

In Spanish criminal proceedings, the smuggled person is a *witness* and could also be a *victim* depending on the circumstances (as migrants are sometimes threatened or /and physically abused by smugglers).

Migrants cannot be prosecuted for the illegal entry unless they use forged documentation, the illegal entry itself is not a criminal offence according to the Spanish Law, but they are administratively liable according to the Aliens Act, and this administrative file leads to the repatriation to the country of origin (if possible).

4.14. Sweden

Normally in Swedish criminal proceedings, the person transported by the migrant smuggler has the procedural position as a *witness*.

No legal action is taken against the smuggled person. The person may be subject to police procedures according to the Aliens act.

4.15. Switzerland

In Switzerland, migrants have two different statuses: in the proceeding against the smuggler, they will be considered as *victims* and interviewed as *witnesses* or persons providing information. As for the offence usually committed by entering the country without the required authorization, they will be considered as suspects and will be prosecuted. As a general rule and for the unlawful entry in Switzerland, migrants will be prosecuted and sentenced with a penalty order. They will be subject to an administrative proceeding by the competent migration office with regard to their return to their home countries.

5. Summary

Migrant smuggling is a cross-border crime that endangers the lives of migrants, disregards human life and dignity for profit, and undermines the EU's migration management objectives and the fundamental rights of those affected. Migrant smuggling is linked to the facilitation of illegal migrants and the encouragement of illegal border crossing, while criminal law and administrative law react differently to these two phenomena.

According to Bartkó, irregular migration as a phenomenon is defined in different ways by the Member States. Most of them give an administrative legal answer to the problem. However, it can be underlined that

criminalization is not a widespread response; illegal border crossing and illegal residence are not considered criminal offences in western European countries.[24]

While the EU has made significant progress in recent years in the fight against migrant smugglers, challenges remain and new ones have emerged that require strengthened action and a renewed comprehensive approach. This applies both to our work with partner countries and to the fight against criminal networks within the EU and its Member States, to enhancing cooperation and supporting the work of law enforcement agencies to combat migrant smuggling.

We found no difference in the case of those crossing the external or internal borders of the EU,[25] or in the case of secondary movement, despite the fact that migrant smuggling within the EU, on secondary movements, remains one of the key threats for the EU.[26]

In most European countries, migrants are considered victims of migrant smuggling and in the criminal proceedings that have been initiated, they take the position of victims, and at most they are questioned as witnesses. Due to the illegal border crossing, no separate criminal proceedings are usually initiated against them, and most of the time they are decided within the framework of public administrative proceedings.

The status of victims of criminal offences has been a major political issue in the European Union, and as such, it has been given particular attention in recent years.[27]

Assistance in the context of committing migrant smuggling is to be interpreted extremely broadly, the behaviour of the offender can be considered as assistance, from transportation through the provision of technical conditions to advice on the route given for crossing the illegal state border.[28]

As Ákos Farkas said,[29] with migrant smuggling, crimes either have victims or not. A migrant can only be a victim in criminal proceedings if a crime is committed against him during the journey. In this case, she/he will

[24] Bartkó, 2024, p. 33.
[25] See more: Comparing Notes, 2006; van der Woude and van der Leun, 2017.
[26] Europol, 2022, p. 10.
[27] See in more detail Kara et al., 2020, pp. 303-341.
[28] Zsirai, 2019, p. 45.
[29] Kiss interview with Ákos Farkas.

also be questioned as a witness. If the migrant has not offended, she/he can still be a witness in the case of migrant smuggling.

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ÁGNES PÁPAI-TARR*

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.'[1]

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[2], 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

* Associate Professor, PhD., Department of Criminal Law and Criminology, Faculty of Law, University of Debrecen, Hungary, papai-tarr.agnes@law.unideb.hu.
[1] E. Locardot quoted in Pradel, 2006, p. 251.
[2] Quieta non movere.

criminal offences or the criminal liability of the offender expires after the statutory period of time has elapsed,[3] 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.[4]

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.[5] 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.[6] The issue is still relevant today, as the explanatory memorandum of the new Criminal Procedure Act,[7] 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.[8]

[3] Art. 26(1-2) of the Criminal Code.
[4] Földvári, 1970.
[5] Art. 79 of the Criminal Code.
[6] Ficsor, 2015, pp. 25-27.
[7] New Criminal Procedure Act.
[8] 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.[9] The Universal Declaration of Human Rights enshrined the concept of due process in Articles 10 and 11 as early as 1948.[10] 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.*

[9] Cohen, 2002, p. 115.
[10] 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),[11] 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.

[11] 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.[12]

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.[13] This is no coincidence, of course, as this Article covers a rather complex range of issues.[14] 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.[15] 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.[16] 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

[12] See Act XIX of 1998, Art. 1-10 of the former Criminal Procedure Act.
[13] See Koering-Joulin, 1996, pp. 13-14. and Nagy, 2011.
[14] Grád, 2005, p. 214.
[15] See in detail: Koering-Joulin, 1996. pp. 13-17.
[16] Rácz, 1990, p. 39.

authorities of the Member States have complied with the requirement of due process in a particular case.[17]

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.[18] 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.[19]

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.[20] 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.[21] 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.[22]

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

[17] Berger, 1999, pp. 153-325.; Grád, 2005, pp. 213-348.; Koering-Joulin, 1996. pp. 9-197.
[18] Sári, 2001, p. 93.
[19] Halmai and Tóth, 2003, p. 712.
[20] Grád, 2005, p. 283.
[21] *Van Pelt v. France*, App. No. 31070/96 ,23 May 2000.
[22] *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*.[23]

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.[24] 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.[25]

On the other hand, the *conduct of the participants in the procedure* must be examined.[26] 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.[27] 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.'*[28]

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

[23] *Case of Pélissier v. Sassi v. France*, App. No. 25444/94, 25 March 1999.
[24] See in detail, Balla and Kardos, 2005, p. 44.
[25] Grád, 2005, p. 284.
[26] Balla and Kardos, 2005, p. 45.
[27] Grád, 2005, p. 310.
[28] *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.[29] 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.[30] 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.[31]

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.[32]

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*.[33] 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.[34] There is no room *for "explanations"* or *"grace periods"* in this respect.[35] 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.[36] In the case of Németh v. Hungary, the unexplained inactive

[29] E.g. the Maglódi case, the Németh case, see in detail Czine et al., 2008, pp. 341-349 and 358-361.
[30] *Csanádi v. Hungary*, App. No. 55220/00, 9 May 2004.
[31] Grád, 2005, p. 310.
[32] *Acquaviva v. France*, App. No. 19248/91, 21 November 1995.
[33] See, e.g. *Case of Pélissier v. Sassi v. France*, App. No. 25444/94, 25 March 1999.
[34] Grád, 2005, p. 286.
[35] Tóth, 2005, p. 158.
[36] *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.[37]

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.[38] 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'.*"[39] The starting date is therefore the date of the first procedural act (interrogation as a suspect, search, arrest) which substantially affects the suspect.[40]

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.[41] 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).[42] 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.[43]

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[37] Czine et al., 2008, p. 361.
[38] Halmai and Tóth, 2003, p. 713.
[39] *Reinhardt v. Slimane-Kaid v. France*, App. No. 23043/93;22921/93, 31 March 1998.
[40] Herke, 2009.
[41] For the case law of the Court of Justice in this respect, see in detail Tóth, 2001, pp. 214-233.
[42] *Muller v. France*, App. No. 21802/93, 17 March 1997.
[43] 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".*[44] The Constitutional Court subsequently confirmed the findings of the aforementioned Constituional Court decision on the content of the right to a fair trial in numerous decisions and has made them part of its practice.[45]
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).[46] 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.

[44] Constituional Court decision 6/1998 (III. 11.).
[45] 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.
[46] 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.[47] 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.[48]

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.[49] 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.[50]

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[51] and the right of the person concerned to a reasoned decision by a judge as part of the principle of a fair trial.[52]

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

[47] Constitutional Court Decision 7/2013. (III. 1).
[48] See in detail, Sulyok, 2015, pp. 97-98.
[49] Fűrész, 2002, p. 489.
[50] Czine, 2017, 103-108.
[51] Constitutional Court Decision 8/2015. (IV.17) Reason 63.
[52] 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.[53] 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.[54]

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.[55] 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.[56]

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

[53] See in more detail Czine, 2017, p. 106.
[54] Constitutional Court Decision 3115/2013. (VI.4.) Reason 30.
[55] Dániel Antal draws attention to this in his study. See Antal, 2018, p. 28.
[56] 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.[57] 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

[57] 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.[58]

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.[59] Time may have a different weight in each case.[60] 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.[61] 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.[62] 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

[58] 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.

[59] Szeged Court of justice Bf.429/2014/7., Eger Tribunal B.8/2020/10.

[60] 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.

[61] Szolnok Court of First Instance B.184/2006/385.

[62] 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.[63] 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.[64] 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.[65]

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. [66]

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

[63] Metropolitan Court of Appeal Bf.298/2016/28.
[64] BH 2004.2.53. II. pont.
[65] Debrecen General Court Bf.751/2013/8.
[66] 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.[67] 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.[68] 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.[69] 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

[67] BH 2021.3.68.

[68] *Somogyi v Hungary,* App. No 5770/05, 11 January 2011, paragraph 31; *Goldmann and Szénászky 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.

[69] 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.[70] 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.[71]

[70] Kardos, 2021, p. 53.
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VINCE VÁRI*

Allocating investigative resources within the Hungarian police force

ABSTRACT: The distribution of authority and competence is essential for all organizations, including law enforcement. The main focus is not just the existence of this distribution but its actual functionality, particularly from a professional and scientific standpoint regarding resource allocation. Distributing work tasks involves determining the general investigative authority's capacity to respond to crimes across different geographical areas. The aim is to deploy the appropriate forces and tools to different cases. Efficient distribution of resources is crucial as it impacts the quality of criminal investigation work, minimizes crime-related costs, and mitigates social effects. This study aims to evaluate how well the current regulations and practices match investigative resources with arising tasks and what principles guide the allocation of police forces and assets for law enforcement purposes. The focus is on whether the police's investigative activities are effective socially and scientifically rather than purely from a statistical viewpoint.

KEYWORDS: authority, competence, police, efficiency, law enforcement, investigative authority.

1. Introduction

The abstract notion of efficiency in criminal justice has become a dominant factor in Hungarian-language research in recent decades, thanks to the work of Ákos Farkas.[1] Research has shown that meeting the requirements of timeliness and effectiveness often competes with the observance of constitutional norms, which guarantee rules and the rights of the parties.[2] Efficiency can be analyzed from various approaches, but in legal circles, the focus of analysis is usually on the problems of those mentioned above

* Associate professor, PhD, Enforcement, Departement of Criminal Procedure Law, Faculty of Law, UPS, Hungary, ORCID: 0000-0001-6416-1645, vari.vince@uni-nke.hu.
[1] Barabás, 2019, pp. 43-48; Inzelt et al., 2009, pp. 35-37; Szabó, 2007, pp. 363-378; Vári, 2016, pp. 477-582.
[2] Farkas, 2007, pp. 77-90.

fundamental and guarantee rights. However, a dimension is often overlooked in domestic research because it is taken for granted and accepted because of its traditional embeddedness. This is the issue of the distribution and allocation of law enforcement resources. The fact that in most modern empirical research on policing, experimental interventions (police presence, camera surveillance, etc.) are no longer based on the type of crime but on the Crime Harm Index, which prioritizes victim concerns and costs of investigation. [3] Unlike many other countries, Hungary does not have a Crime Harm Index, and the available investigative resources in the country, i.e., the increasingly limited human and technical resources, are allocated based on a backward, outdated system. It is beyond the scope of the present study to compare the powers and organizational capacities of the investigating authorities in relation to their competencies. Only the general investigative authority, which carries out the largest share of investigations, is the focus of the study.[4] Altough, the issue would be further clarified by examining the overall capacity distribution of all investigative bodies in the country. For then, in addition to the bodies of the police established to perform general police tasks, [5] mention should be made of the National Tax and Customs Board as an investigative body with special powers.[6] It would also be interesting to mention the police bodies performing internal crime prevention and detection tasks, listed in the Criminal Procedure Act as 'Other bodies acting in criminal proceedings,' and the police counter-terrorism bodies. The National Defence Service and the Counter-Terrorism Centre, which also performs criminal investigation functions and quasi-investigative functions, with the power to investigate certain criminal offenses, which the Police Act assigns to them the competence to carry out the preparatory procedure and even the detection in some instances.[7]

The means of determining jurisdiction in our country is based on one principle: how the offense is classified and the criminal substance of the offense committed.[8] The classification of the facts by the authority is therefore primary because each investigating authority can reduce its burden and decide on a referral on the grounds of lack of competence or jurisdiction

[3] Sherman et al, 2016; van Ruitenburg and Ruiter, 2022; Renys et al, 2023.
[4] Art. 1(1) of 25/2013. (VI.24) BM (Home Office) Decree.
[5] Art. 34(1) of XC of 2017 of the Hungarian Criminal Procedural Act (from now.: Be).
[6] Art. 34(1) of Be.
[7] Art. 339(3) of Be.
[8] 25/2013. (VI.24.) BM Decree, 1-4. attachments.

by its own 'interpretation' of the classifications.[9] Due to the norms, the bodies that are not general investigative authorities have jurisdiction over a tiny number of offenses, so the National Police Headquarters must deal mostly with conflicts of jurisdiction between investigative authorities in the country, which amount to thousands of cases per year.[10] Another procedural tool for investigative authorities to reduce their caseload is to initiate the consolidation and separation of individual cases.[11] This is exceptionally topical due to the proliferation of Internet fraud. Under the current jurisdictional principles, anomalies have developed in the police force, which often requires thousands of offenses to be merged into one investigating authority. To prevent this, individual investigating authorities decide to limit access to cases for the rest of the investigation authorities so that cases with a mass offense value do not end up with them. If this right were not restricted, the other investigating authorities would notice that a similar case had already been opened elsewhere and decide to transfer or merge the case so that it would be transferred to the investigating authority that had already taken the first action.[12]

This study does not dispute the necessity of jurisdiction since the regulation of jurisdiction is an indispensable condition for any organization of work and, therefore, for the functioning of law enforcement. It is, therefore, not a question of its existence but of its functioning as a distributive function, i.e., the extent to which the regulation and the practices it has developed fulfill their purpose and allocate resources efficiently concerning relevant aspects such as where and to what extent (frequency) the crime threatens potential victims in space and time, and how the expected punishment is commensurate with this.

The current Be. and the previous Criminal Procedure Act XIX of 1998 are in continuity with the provisions of the previous procedural laws, i.e. the powers and jurisdiction of the investigating authority are not regulated by the procedural law itself, but are delegated to its respective "master" to the Home Office, and placed in a separate legal framework.[13] This gives the executive power the right to adapt the forces available for investigative tasks, i.e. law enforcement, to the changing crime situation in a much more

[9] Art. 350 of Be.
[10] Art. 4 of 25/2013. (VI.24.) BM Decree.
[11] Art. 147(1) of Be.
[12] Art. 3(2) of 25/2013. (VI.24) BM Decree.
[13] Art. 604(8) of XIX of 1998 of Criminal Procedural Act (previous Be).

flexible, rapid and efficient way. A more flexible and efficient way to adapt law enforcement resources to the changing crime situation is crucial, as it can lead to a more effective investigative process.

> The special feature of the rules governing the powers of the investigating authority is that they allocate the tasks relating to criminal matters partly within the police forces and partly between the police forces and other bodies also acting as investigating authorities.[14]

This power has been exercised regularly by the executive over the years, often amending its own rules on powers and jurisdiction. It is safe to say that, in terms of the way it regulates, it seems entirely reasonable that the executive, with the authority of Parliament, should not regulate the use of law enforcement resources and the system of operation of law enforcement, not by the more difficult to change statutory regulation, but by a more flexible form of regulation, so that we cannot even legitimately be concerned about the level of regulation or its form.

2. Material and methodology

I have primarily analyzed and developed a historical and taxonomic perspective of the criminal procedural law and the legislation on the powers and jurisdiction of the investigating authorities of the Police in the subject area. A more flexible and scientifically developed case allocation system is paramount. Such a system can better adapt to the changing crime situation and ensure efficient resource allocation. The regulation of jurisdiction and competence correlates strongly with the statistical approach so characteristic of the Police, which prefers to focus on the fulfillment of statistical indicators rather than on social impact. In this context, I examined research and publications on crime statistics. The primary objective of the research was to detect whether the regulatory regime defining the powers and competencies of the police investigative authority has remained the same, irrespective of the political and social system, by disregarding scientific and rational principles.[15] The subsidiarity principle cannot flexibly allocate investigative resources in line with the actual crime situation or even per the

[14] Szabóné, 1974, p. 119.
[15] Art. 8(1) of 25/2013. (VI.24.) BM Decree.

mission of the specialized Police. Otherwise, the workload between the various investigative authorities in the country would remain the same. I hypothesize that a hierarchical and highly centralized system cannot compensate for and balance a jurisdiction and competence quasi-resource allocation method operating in such a rigid structure. Only a scientifically developed case allocation system, backed up by good quality data, confirmed by empirical research, and continuously maintained and responsive, can serve this purpose in this rapidly changing world. An excellent model for this could be the Crime Harm Index, which operates in 12 countries and to which a statistical data system would have to be added that is partly independent of the Police.

3. Powers and competencies of the investigative authorities of the Hungarian Police - regulatory history

This chapter examines changes in the regulation of investigating authorities' powers over the years, and whether these changes have adapted to the evolving crime situation and involved any resource reallocations. This demonstrates the jurisdiction system's inflexibility and inability to adapt to changing crime trends. The sentencing data or guidelines can change over time to reflect changing perceptions of crime and government policy.
Following the events after 1956, the general provisions on the powers of the police were contained in Decree-Law No 22 of 1955, as amended by Decree-Law No 35 of 1956. In the spirit of the amendment: *„Following the abolition of the state defense organs of the Ministry of the Interior, the investigation of crimes against the internal and external security of the state is the responsibility of the police."*[16] As regards the allocation of jurisdiction, it generally superseded the jurisdiction of the courts and prosecutors' offices but made some deviations given the unique nature of the cases. The police service was divided into county (capital) headquarters and district (- city, - city district) headquarters. The district police stations are divided into police stations and district commissariats. [17]

BM Instruction No 10/1979 (BK 7) already provided that: *'The investigative authorities of the Ministry of the Interior are competent to investigate all criminal offenses, except those which are specifically*

[16] Art. 1. of 35 of 1956 Legislative Decree.
[17] Art. 2. of 35 of 1956 Legislative Decree.

referred by law to the competence of other investigative authorities.'[18]The Instruction established only a two-tier (central, territorial) investigative authority instead of the current three-tier structure of local, territorial and central levels. Despite the 'residual principle' mentioned above, what was of greater significance was that it did not specifically mention local investigative authorities, which meant that the present local level of investigative powers could be considered territorial, thus recognizing the importance of the work carried out by local level bodies. The offenses carefully listed in the annex reflected the need for specialization and professionalism, and the standard also made specific provisions for the investigative powers of the district commissioner. Noteworthy features of the legislation:

- The Ministry of the Interior and ORFK have joint investigative powers.
- The State Security also has investigative powers in the regional investigative authorities (county RFK, BRFK).
- The Juvenile and Child Protection Department of the BRFK is a separate priority territorial investigative authority.
- The municipal and district police headquarters, the criminal and traffic departments of the county police headquarters, and the Danube Water Police are equally territorial investigative authorities.
- The annexes divide the offenses within the same levels between the district and county and specialized bodies.
- The district commissioner investigates cases under the jurisdiction of the municipal and district police headquarters, where the offense is of relatively low risk to society, the facts and legal assessment are simple, and the investigation and proof can be carried out locally, except for juveniles, foreign nationals, and prisoners.
- The police will conduct investigations into offenses that fall within the exclusive jurisdiction of the public prosecutor's office if there are reasonable grounds for suspecting that they were committed in the course of a police investigation into another matter. The public prosecutor may entrust the police with this task.
- The transfer of cases from the top down in the hierarchy is not yet unrestricted. The heads of the criminal investigation departments of the county (Budapest) police chiefs may entrust the investigation of cases falling within their competence to lower bodies only with the

[18] Art. 1. of 10 of 1979. (BK 7.) No. Home Office instruction.

authorization of the deputy chief of public security (criminal). [19] This may be exercised only exceptionally in cases falling within the jurisdiction of the county courts. In justified cases, the head of a superior body may order the transfer of a case under the jurisdiction of a lower body to a higher body or of a case under the jurisdiction of a lower body to the same body. [20]

- Overburdened investigative authorities still had room for maneuver to transfer cases not within their competence upwards. The heads of the county (Budapest) criminal investigation departments may refuse to take over cases referred to them by lower authorities and fall within their competence only with the authorization of the deputy chief inspector general.[21] This provision did not refer to the transfer of a case on the grounds of lack of competence in the present sense but to the fact that the specialized criminal investigation service could not refuse to take over a case that would otherwise fall within its competence but could instruct the local investigation authority to investigate the case. The instruction required the authorization of the first specialized head to refuse to take over a case.
- For efficiency reasons, the instruction made specific provisions to enforce a different allocation of powers from those set out in the annex. In the interests of more effective law enforcement, the Deputy Minister of Public Security may order that certain categories of offenses be temporarily transferred to the jurisdiction of the General Headquarters. [22]

The existing regulation no longer aligns with the effective 25/2013 (VI.24) BM decree. The decreased workload and increased authority of higher-level bodies to handle both desirable and undesirable cases have led to a conservative trend in migrating criminal work to higher organizational levels. Local authorities have experienced a decline in professional motivation among experienced investigators due to being "trapped" in their limited authority.

While BM Instruction No 10/1979 (BK 7) aimed to facilitate faster criminal response and grant the Deputy Minister of Public Security the right to adjust powers for more effective law enforcement, these advantages were

[19] Art. 15. of 10 of 1979. (BK 7.) No. Home Office instruction.
[20] Art. 12. of 10 of 1979. (BK 7.) No. Home Office instruction.
[21] Art. 15. of 10 of 1979. (BK 7.) No. Home Office instruction.
[22] Art. 1. of 10 of 1979. (BK 7.) No. Home Office instruction.

not implemented. Similar rules were outlined in Regulation No. 9/1990, allowing the national police chief and the county police chief to adjust the jurisdiction of specific categories of crimes for the sake of more effective law enforcement. However, these provisions were rarely utilized for the benefit of local bodies.

The distribution and reassignment of specific cases and the periodic transfer of colleagues from less burdened areas were considered solutions to alleviate the case overload typically experienced at the local level. However, these rules were not consistently applied, even at the managerial level. The freedom of movement for lower-level bodies in terms of competence and the legal ability to assert their interests became of greater interest than the formulation of general regulatory principles.

The powers of the police's investigative authority remained unchanged until 1993.[23] The only changes involved establishing priority powers among central and regional investigative authorities, which determined the types of cases under the jurisdiction of county courts. [24]

After the short-term norm, the organizational structure, powers, and rules of competence of the investigative authorities of the police were regulated by the 15/1994 BM decree. This decree classified police as investigative authorities into local, regional, and central bodies, introducing substantial changes.

Regulation at the decree level was transferred to a lower internal standard in 11/1995 on issuing the Regulations of the District Commissioner of the Hungarian Police. (VIII. 30.) The ORFK instruction for it began leading to individual county-level bodies deciding independently whether they wished to provide the KMB with investigative powers. Undoubtedly, this was an effort to reduce the competence of the lower-level police body, which is especially closest to the rural population and counterproductive to the police's goal of building trust. However, by narrowing the possibility of action at the lowest level, the central investigative authority could safely withdraw any case from the individual investigative bodies and transfer the authority to any other investigative authority. [25]

The next regulator of the division of labor was the IRM Decree 3/2008 (I.16), which did not bring significant changes in the division of organizational levels. ORFK remained the central investigative authority;

[23] Szabóné, 1993, p. 165.
[24] Art. of 25. of I. of 1973 of Act.
[25] Chwala-Fülöp and Sléder, 2000, pp. 58-76.

the number of regional investigative authorities is already 15/1994. (VII. 14.) BM decree came into effect on April 15, 2005, with the amendment of the National Investigation Bureau as a territorial investigative authority. [26]

The regulation of powers and jurisdiction of the investigating authority shows the following characteristic features:

- it is characterized by a three-level division of labor where the vast majority of investigations fall under the jurisdiction of the local investigative authority, [27]
- the additional annexes determine what types of crimes fall under the jurisdiction of the regional investigative authorities; these are not in all cases determined based on the social danger realized according to the criminal law categories,[28]
- the removal of authority is expected in the hierarchy, and the decree only prevents this: once a higher-level body has taken over the case, it cannot be returned,[29]
- although, based on Art. 5. (2) the initiative for transfer could start from a lower police station level due to the lack of authority; this is strongly contradicted by practice and the harmonizing provision[30], which for the police chief is still a police station (in the case of a case falling under the jurisdiction of the capital) can also allow designating the police station in its territory to handle the case for any other – not justified in Hungarian – reason,
- after the 1990s, legislative powers were assigned to higher-level investigative authorities according to "law enforcement" aspects rather than those regulating the powers of the courts,
- concerning the handing over of specific investigative tasks, investigative authorities at a higher level are not obliged to take over investigations from investigative authorities at a lower level - referring to point 15 of Instruction No. 10/1979. (BK 7.) BM -they can simply

[26] 329/2007. (XII. 13.) Government decree and the founding documents of the bodies

[27] This ratio depends on the content of the annexes of the law and the type of case referred to other investigative authorities as per the law. This approximately accounts for 90-95% of investigations. Refer to the annual ENYÜBS statistics for more information.

[28] This covers the value limits for crimes against property, otherwise the classified cases of special legal facts are placed in individual annexes in a varied manner, assigning the investigative authorities to them.

[29] Art. 3 of 3/2008. (1.16.) IRM (Judical and Law Enforcement Ministry) Decree.

[30] Art. 7(4) of 3/2008. (1.16.) IRM Decree.

refuse it, and even what's more, matters falling within their competence can be transferred to lower-level bodies with the stroke of a pen.

As a general rule, the law does not treat the investigation of crimes committed locally with little danger to society separately, so they cannot be further divided according to the KMB breakdown under local investigative authority or investigative body, which naturally increases the number of cases dealt with by local-level bodies.

The legislative amendments mainly aimed to transfer certain types of crimes from one territorial body to another or from a central body to a regional one. Some new specialized or exceptional territorial bodies were also created or renamed, but these didn't significantly change the number of crimes assigned to local investigative authorities. However, changes in the territorial characteristics of crimes did not affect the number and location of regional and local investigative authorities. Due to the type of jurisdictional regulation, the workload of local investigative authorities is not controlled properly. The structure of investigative authorities operated at different levels in a particular area, resulting in an uneven distribution of capacity concerning local crime and law enforcement conditions. By the end of the 1990s, crime had surged; in 10 years, registered crime had nearly tripled.[31] Since 2010, crime statistics have continuously decreased due to a reversal of the crime trend and strong legislative decriminalization. However, this has not reduced the actual workload because a significant number of crimes have become more complex, particularly Internet-related offenses. Furthermore, the legal and guarantee system for those involved in criminal proceedings was expanded by the Be.. This act introduced many innovations for investigating authorities, including electronic communication, the use of telecommunication devices, and the institution of special treatment. As a result, investigators now face a significantly more complex investigative documentation and administrative burden than they did in 2010. [32] Investigative activities have become more standardized, but the proportionality of the division of labor remains unsolved.

[31] The number of crimes increased from around 200,000 in the years before the system change to 600,000 by 1998.

[32] In 2018, there were only 186,724 registered crimes in Hungary.

4. Regulating the scope to efficiently and proportionally distribute resources

Acknowledging the impact of crime statistics on decision-making is essential for efficiently and fairly distributing resources.[33] Despite international and domestic research highlighting the distortion caused by these statistics, this insight is not consistently recognized professionally.[34] It is important to accept the potential risks of the current system in law enforcement. These risks highlight the need for a more efficient and proportionate distribution of resources, which can be achieved through scope regulation. Beyond recognizing the distorting role of criminal statistics, which has been supported by international and domestic research for several decades. Unfortunately, this still does not count as professional evidence at home, even though this German policeman is present as a basic subject in BA training.[35] The question of the competence model that provides the reason and background for it and the professional political responsibility that maintains it is unavoidable. As it was presented in the antecedents, the powers and jurisdiction rules of the police investigative authorities have hardly changed over the past decades. The effective 25/2013. (VI.24.) BM decree essentially builds the case management structure of the investigative authorities according to the same principle. The police law enforcement organizational system that is built and functions in this way is pyramidal, rigid, and hierarchical and is characterized by the disproportionate and inflexible distribution of the related human and material-technical resources. Unfortunately, no data are available for the number of criminal cases per chief investigator of the agencies at the individual authority levels, and their analysis is beyond the scope of this study. Although we do not need to conduct comprehensive research to establish professional knowledge, the captaincy offices are mostly located locally, where the conditions are worse and more work needs to be done. In this approach, the "immeasurable" dimension of social trust capital is directly related to the police model that operates according to a bad and unreasonable distribution and is not integrated into society. Its absence enables the survival of the current statistically biased outcome-centric law enforcement model.

[33] Vári, 2015.
[34] Davis, 2012.
[35] Schwind, 2011, pp. 21-61.

> Understandably, as long as an organization functions smoothly, the necessary resources are available for this, and there is no need to be ashamed of the results. No one willingly touches the tool of reorganization that causes existential problems, even if a cheaper and more efficient operation would be avoided. The situation is completely different when a significant lack of resources hampers the operation, and it almost makes the organization's ability to fulfill its basic tasks defined by law doubtful fully; despite the best efforts of the police force, there is no realistic chance of keeping the results; the trust capital that the police has accumulated among the population is at risk.[36]

The competence regulation in the light of the distribution system shows that the local investigative authorities, with a smaller human resource capacity, deal with a much larger number of cases in terms of quantity than the regional or priority bodies. We are faced with a lack of efficiency if we approach the concept of efficiency in such a way that the number of cases is broken down into local, regional, and central jurisdiction levels, and numerically - as a cost expenditure - we project the workforce on them. Of course, in addition to human resources, many other factors influence the efficiency indicators of the law enforcement agency; thinking here about the technical and IT equipment, the vehicle fleet, or the financial resources available for secret data acquisition, We consider the human factor to be the most decisive because of the high administrative burden of criminal proceedings. It should also be noted that, in addition to cost-free work organization optimization, technical resources are usually proportionately increased at higher-level investigative authorities, so we rarely or never face the contradiction that technical resources could compensate for the lack of workforce or weaknesses of local investigative authorities.

The current criminal statistics are not representative of the efficiency of law enforcement. Increasing police presence and coercion won't necessarily lead to a proportional decrease in crime.[37] Expanding the workforce may strengthen public safety, but it's essential to consider the social and constitutional implications.[38] Simply relying on punitive measures and

[36] Hanvay, 2004, p. 141.
[37] Déri, 1996, p. 51.
[38] Finszter, 1999. p. 25.

formal control isn't practical in curbing crime or gaining citizens' trust.[39] Instead, involving various stakeholders and informal social control methods seems more successful in preventing crime.[40]

The current analyzed hierarchical distribution of law enforcement resources doesn't consider the varying crime rates in different areas, nor does it ensure equal access to investigative capacity for all in Hungary. It's essential for police forces to be created and deployed where they are most needed and to build strong partnerships with the local population.[41] Local police officers gain the community's trust by working with them cooperatively and supportively. It's important to note that this kind of authority and competence doesn't come from strict rules and regulations, and it's not justified to organize law enforcement agencies in a strict hierarchical structure, even in a decentralized system. It's also unacceptable to base the allocation of criminal cases on the potential harm reflected in the penalties for committed crimes. While centralized investigative bodies are justified for certain types of cases, the extent of their effectiveness is debatable.

When different law enforcement agencies have varying resource conditions, population sizes for each case, and specific crime conditions in their areas, comparing their effectiveness based on fixed rules of competence doesn't show their proper performance. If effectiveness indicators considered these factors, the agencies' output could be compared more accurately. It's harder to achieve the same results under worse conditions, and the hierarchical organizational structure hinders the creation of a flexible force distribution and relocation system based on local needs for public safety.

In the 2010s, solutions were introduced to evaluate the performance of police organizations more objectively through internal regulations such as 18/2012, 26/2013, and 36/2013. However, they still struggle with focusing only on increasing quantitative performance and not considering social effects or the operational environment of the police. [42] The instructions provide detailed guidance for evaluating organizational work and leadership performance, but the methodological gap leaves room for subjective interpretations. Comparing specific data adjusted to the population and

[39] Korinek, 2006, pp. 247-267.
[40] Borbíró, 2009, p. 350.
[41] Ligeti, 2008, pp. 144-145.
[42] Vári, 2017, pp. 161-183.

police force size could account for differences in the scope of activities of individual bodies compared to the national average. This approach could consider the reality of the social environment in which the police operate and integrate law enforcement performance in areas with different crime landscapes.[43] The evaluation guidance for organizational and leadership performance lacks specificity, resulting in subjective answers. To address this, it would be more beneficial to use specific data adjusted to population and police force size for a more accurate performance comparison. By doing so, we can better understand the environment in which the police operate and make more objective assessments. Additionally, it's important to consider the complexity and resource requirements of different cases at various levels of authority. This is particularly challenging when comparing cases solved by different law enforcement bodies. It's also worth noting that complex and labor-intensive cases may be less cost-effective to solve, especially when they fall under the jurisdiction of local or regional investigative authorities in criminal proceedings.

5. The role of the Crime Harm Index (CHI) in the allocation of law enforcement resources

The Crime Harm Index (CHI) is an innovative measurement tool used to assess crime's severity and social impact, particularly in Anglo-Saxon countries where criminological research is currently at the highest global scientific value. The essence of the index is to give a different perspective to the examination of crime and the assessment of its severity, thereby determining the areas of intervention. From a statistical point of view, both shoplifting and homicide are considered one crime each, but the harmful effect of homicide is much more significant than that of shoplifting. The index represents an assigned numerical value for each crime committed. The numerical value is determined in days of the prison sentence imposed for the given crime based on judicial practice for the first criminal offender. For example, shoplifting is worth ten days in prison for the first offense, so you get 10 points. Homicide is worth ten years in prison for the first offense, so you get 3650 points (10 x 365 days). Based on this, let's look at crime statistics with such an index or visualize the spatial distribution of crimes on a map. We get a completely different picture of crime and the criminal problems to be dealt with than if we only looked at the simple number of

[43] Vári, 2014, pp. 389–422.

crimes ("count"). In addition to the simple number of crimes and the mental and material damage caused by crimes ("harm"), it is also essential that the investigation of crimes has a cost. This is the cost of investigating a specific crime, which is a burden on the state and, for example, in the case of homicide, means several million items. Unlike traditional crime statistics, which only record the number of crimes, CHI aims to measure the actual (social, economic) impact of crimes, considering their overall and weighted consequences and effects on society.[44] CHI assigns each offense a weighting value that reflects the severity of the offense. These weights are usually derived from the judgments and sentences of the justice system. The following factors are taken into account to determine the weights:

- Length of Punishment: One of the most frequently used weighting factors is the prison sentence length imposed for the crime. For example, a robbery carries a higher penalty than a petty theft, as murder carries a longer prison sentence.
- Number of victims and degree of injury: The number of victims affected by the crime and the degree of injury also influence the weighting.
- Economic effects: The economic effects of the crime, such as material damage caused by theft or fraud, can also be part of the weighting.

The creation and maintenance of CHI requires extensive and continuous data collection. During the data collection, police statistics are taken into account. In this, we must distinguish the statistics issued by the official police from statistics such as the British Crime Survey (BCS), which contains data that can be considered more unbiased. The BCS, or Crime Survey for England and Wales (CSEW), is a broad and comprehensive population survey that collects people's experiences and perceptions of crime in the UK. The BCS aims to complement police crime statistics and provide a more comprehensive picture of crime's accurate scale and nature.[45] The survey is critical because many crimes are not reported to the police, so the BCS also brings these "hidden" crimes to light.[46] In Hungary, there is only one statistical system produced by the police and the prosecutor's office, the Unified Investigative and Prosecution Criminal Statistics (ENYÜBS), which is a so-called tracking statistics; in each case, it provides information on the number of procedures closed in the relevant

[44] Sherman et al, 2016, pp. 171–183.
[45] Farrall and Jansson, 2004, pp. 177-191.
[46] Hope, 2005, pp. 7-22.

period. The database does not include the crimes according to the time of their commission, but the recording date in the statistics. The statistical data of a type similar to the Hungarian one are essentially duration, i.e., status data, and do not present the relevant legal events of the given year but only the average of a homogenized set of temporal and legal constructions.[47] Suppose we want a modern, flexible, and adaptable system. In that case, the first step should be establishing a statistical evaluation system operated by the British, operating partially independently of the police. In addition to police statistics, information on convictions and sentences is also essential, which also helps weight crimes. Last but not least, the analysis of crime statistics appearing in criminological research, which also points to the intensity, frequency, and severity of crimes from the point of view of crime geography, must be taken into account during the creation of the CHI.

In the UK, CHI is a widely used tool in policing and crime prevention. A Cambridge University study details the use of CHI, which has helped to allocate police resources more effectively and prevent serious crime. The significance of CHI in improving crime prevention and policing strategies cannot be overstated. The Cambridge Crime Harm Index, an indicator developed by Cambridge University to measure the severity of crime in the United Kingdom.[48] In Canada, CHI also plays a vital role in analyzing crime statistics and improving community safety. The Canadian Crime Harm Index is developed based on police reports and court convictions. CHI is also used to increase the effectiveness of local crime prevention programs.[49] In the USA, CHI is also receiving more and more attention, especially in developing crime prevention policies. In the framework of Pilot Projects, the use of CHI in local police work is being investigated in several states. CHI gives a more accurate picture of the effects of crimes than traditional statistical methods, helping distribute resources more fairly and efficiently in police work. It also supports the prevention and treatment of serious crimes.[50] However, CHI is a system that requires continuous maintenance, as it is a complicated and time-consuming task to create and continuously maintain it in a way that adapts to the constant changes in the economy, society, and, therefore, crime.[51] The purpose of this study to demonstrate the

[47] Kertész, 2002, pp. 29-32.
[48] Barnes and Hyatt, 2020, pp. 347-372.
[49] van Ruitenburg and Ruiter, 2022, pp. 423-445.
[50] Ratcliffe, 2015, pp. 166-182.
[51] Curtis-Ham, 2022, pp. 177-192.

development and use of the Australian Crime Harm Index (ACHI) was to create a tool for measuring the economic impact of crime. In that research, the authors used Australian crime statistics and economic data to assess the costs and impact of crime. The study demonstrated how ACHI can improve crime prevention and policing strategies.[52]

6. Summary

In the study, the historical development of the legal norms affecting the authority and competence of the investigative jurisdiction of the police was presented and described. This was intended to demonstrate the invariance and inflexibility of the resource allocation system. What has not changed despite the years and the modification of individual legal standards is that the new regulators adopted the system and logic of the previous regulators. Although the names of the individual investigative authorities have changed, the order of powers and case distribution and, with it, the logic of resource allocation has not changed at all. The system remained three-level, where higher-level bodies could intervene in the distribution of cases by transferring cases to lower-level investigative authorities, or the central body could decide which body should handle the case. However, resources (personal and material) were not assigned. Resource distribution was determined solely by the criminal material legal classification of the cases and the place of the commission-determined jurisdiction. This system has existed almost unchanged for nearly 70 years. Law enforcement scientific research has now gone beyond the principle and logic of allocating resources according to the "level of seriousness of the crime" alone. The distribution of cases and the allocation of police resources are now based on more complex criteria supported by thorough and multifaceted scientific research conducted in other developed democracies. As a result, the scientists created the Crime Harm Index, which no longer considers the legal classification of crimes as a criterion for the distribution of resources but instead examines the social effects of crime in a complex manner in space and time. As confirmed by the research presented here, the CHI is a versatile, extremely modern, and effective measuring tool, the creation of which stemmed from the following realizations: the capacity of law enforcement is finite, crime constantly changes in space and time, as do the social responses to it. Furthermore, crime has significant cost-generating

[52] House and Neyroud, 2018.

effects, articulated not only in the maintenance of justice subsystems but in many other respects, such as the cost of maintaining prisons or the health system's consequences. Last but not least, CHI can be used reactively and proactively in a preventive manner; that is, deploying resources can already become a constructive tool for reducing later adverse effects. The CHI has significantly improved crime prevention and policing strategies, including more effective resource allocation, a better understanding of crime severity, and proactive measures to reduce future crime rates. However, to develop this kind of national CHI system, it is necessary to create a database that can exclude the involuntary and automatic distorting effects of police data collection and recording and partially independently reveal latent crime areas.

The historical review confirmed my hypothesis that even a highly centralized police force cannot solve the problem of resource distribution by deciding on the transfer of the burden and sources of authority at a central level. This hypothesis was supported by the need for changes in the regulations and the different caseloads of individual investigative authorities, as well as the fact that every year, the Central Police (ORFK) decides on a vast number of conflicting questions of investigative authority and jurisdiction. The investigative authority of the Hungarian police primarily operates in a centralized form. This would provide an excellent opportunity to introduce a unified Crime Harm Index, which could significantly increase the organization's prestige. If the possibilities above were implemented and the current system of powers and competencies of law enforcement were rationalized, the effectiveness of investigative work would be increased, and the costs could be considerably reduced.

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