Project

Effective Justice

International and Comparative Approaches

How to measure the effectiveness of criminal proceedings? Theoretical, statistical and sociological models.

In order to determine the theoretical and methodological background for this research project, the notion of **effectiveness** should be described. In this context, a multi-layered approach (legal, philosophical, economical, statistical, and sociological) is discussed. The fundamental question is: **how can the effectiveness of criminal procedure be measured?** How to adapt the praxeological understanding of the effectiveness to the interpretation of criminal procedure as a whole - the integrity of particular interests, legal actions, and objectives of the participants in criminal proceedings - when the attachment of the notion of the effectiveness to the interpretation of human actions and the ability to be successful and achieve the intended results. In this context, fundamental considerations must be made as to how the objectives of the criminal proceedings are to be perceived and in which kind of relations the latter remain to the 'advisability' of the actions of the parties (participants) to the proceedings. This aspect of the analysis will cover the so-called '**internal features of the effectiveness'.** Since the procedural actions of the participants in the proceedings are formalized conventional actions, a type of rational actions (understood as the actions to be interpreted by the other participants), it is necessary to specify how the purpose of these actions should be defined. One can undoubtedly distinguish an abstract purpose related to the abstract type of procedural action and a concrete purpose, i.e. related to the performance of a specific procedural act in a concrete process by a particular participant. While the abstract purpose of legal action (objective aim) must be consistent with the general purpose of the proceedings, the objective of a specific procedural action performed by a participant in the proceedings (subjective aim) may depart from one of the general purposes of the process. Such a case may be due to the construction of abuse of procedural law. The starting point of the connotational (conceptual) analysis of effectiveness will therefore be to describe the general purposes of the process against the background of different procedural models: adversarial, inquisitorial and mixed. The **internal features of effectiveness** are highlighted by the legal framework of the procedural models, such as the organizations of the judiciary and criminal justice authorities, the level of digitalization of procedure, specific institutions which aim to improve or restore the speed of proceedings, i.e. abbreviated procedure, specific rules of evidence taking, combating the obstruction of participants actions.

It will be necessary to indicate the relationship between the concept of effectiveness and the concept of due process of law. As part of the assumptions adopted, it is also necessary to recognize that the efficiency of the process is not detached from the guarantees aspects. This is because the effectiveness of a process refers to the entire procedural actions of all participants in the proceedings, whose particular interests do not always coincide. An effective criminal process is, therefore, a process in which particular interests are weighed against the general purposes of the trial according to a specific

pattern. One of the most critical issues in this context is the question of the economic analysis of law. In most economic studies of law, the action performer has a preference for a certain set of consequences and chooses an action that partly determines which consequence is realized. Typically, the domain of preference differs from the domain of choice, often due to the *strategy* that determines the consequences in conjunction with the strategy choices of other participants to the trial. The economic tools of the research are to be applied to the particular aspect of the effectiveness connected with the 'costs' of proceedings and the time-limits, as well as temporal aspects of proceedings.

In summary, the descriptive part of the analysis of the relationship between effectiveness and efficacy is to be determined. Research on perceptions and tools of measuring effectiveness shall be complemented by quantitative analyses, including available statistics and statistics produced in the context of surveys of project participants. In the additional part, some selected sociological and psychological assumptions as **the external feature of the effectiveness** of proceedings will be verified.

The organization of the judicial systems and its impact on judicial activity.

The discussed questions cover organizational issues as well as some aspects of the functioning of the judicial institutions. Concerning the continental law model, which includes not only the system of the judicial system but also the agencies responsible for conducting preparatory proceedings, the operative notion of "judicial body authority" is therefore used in this context. When analysing the impact of the organization of court systems on their effectiveness understood as faster pace and lower cost of proceedings while ensuring their safeguards, the systemic specificities of the respective legal order (e.g. in the context of federated systems) are taken into account when examining the impact of the organization of judiciary on its effectiveness.

The starting point is, therefore, constitutional guarantees for the formation of the judiciary as an independent and autonomous authority and the courts as independent and impartial units.

Particular attention is paid to the European standards for the establishment of an independent and impartial court as a part of the fair trial concept and based on the effective judicial remedy institution (Art. 19 TFEU). In this context, it examines the achievements of the Strasbourg and Luxembourg Courts and, in particular, the trend towards strengthening a uniform concept of perceiving 'the national courts as European courts'. References to Article 6 of the ECHR and Article 47 of the Charter on Fundamental Rights and the increasing role of the ECHR and CJEU in the area of shaping the European judicial system are examined.

At the national level, the structure of the judiciary and the description of the judicative control by national supreme courts and tribunals construct the core of organizational issues.

In the context of the functioning of the judiciary, the study begins with the description of the models of adjudication and the issue of the composition of adjudicating panels, including the problem of participation of the so-called 'social factor' (i.e. in the form of lay judges). Shaping the model of adjudication the aspect of the stage of proceedings in adversarial, inquisitorial and mixed models will be highlighted, in particular the relation of the pre-trial stage to the trial stage, the issue of the instance of court proceedings during the court stage (including the multiple instances in federal systems, e.g. Brazil). Some aspects of the functioning of the judiciary are described and verified in a broader sense

with a focus on the digitalization of proceedings and the design of special proceedings (abbreviation of procedures, restorative justice institutions), and the modification of evidentiary proceedings.

While effective justice is understood not only by the reasonable length and moderate level of costs of proceedings but also by fairness (the latter denominates axiological founded justice), an additional aspect of the organization and the functioning of the judiciary will be linked to the basis of the justice system in the transitional situation (namely, the question of so-called transitional justice – to mention - which is not a particular system of justice; but the idea of applying of human rights policy to a particular situation). Transitional justice creates an appropriate response to countries that have recovered from a period of oppression, and it addresses many serious human rights violations. For the whole recognition of effective justice, the issue of 'transitional justice' is thus the starting point from which serving justice begins. Describing the criminal proceedings as 'effective' means properly improving and ensuring human rights. This approach promotes the idea of the well-founded balance between so-called formal and substantial justice.

Implementing special proceedings, modifying evidentiary procedure and restorative justice: tools and strategies.

Some specific aspects of the functioning of the judicial system are examined in detail to determine whether their importance could be seen as fundamental when dealing with the effectiveness of criminal proceedings. Obviously, the considerations will be related to three models of proceedings: inquisitorial, adversarial, and mixed. The determinants of effectiveness remain significantly different for these three models; however, some common aspects can also be noted. Examining the impact of the shape of procedural institutions on the effectiveness of proceedings – particularly concerning the continental law system - also requires a distinction between the level of law-making (abstractly understood regulations, standards, and principles) and the application of law in legal practice (law in action perspective).

Ineffectiveness can be problematic due to the law-making aspects and, in some cases, exclusively due to defectively shaped practice. When discussing the 'law in action' aspects of proceedings' ineffectiveness, the account is taken of the psychological dimension related to empirical research on predisposition to perform the different roles in criminal proceedings will be included: the role of adjudicating, prosecuting, or legal representing of the parties. It is assumed that certain personal abilities seem indispensable to enable justice to be served effectively.

As mentioned above, the holistic approach on effectiveness is adopted, which is why considerations on the effectiveness of the criminal process in the context of the activity of its participants are based on several aspects: the length of the process, the concentration of procedural actions, the costs of processing as well as procedural guarantees. Suffice it to say that the latter creates particular importance from the perspective of the implementation of the principle of the rights of the defence and the legal position of the accused as well as the properly secured interests and rights of the injured person.

The axiological feature of the effectiveness remains strictly linked with applying coercive measures, especially concerning the application of pre-trial detention. On the one hand, there is a praxeological

aspect of ensuring the adequate course of proceedings. On the other hand, the protection of the rights of the defendant must be taken into account. This issue will be examined in particular in the context of the *ultima ratio* measure, which is pre-trial detention, since it significantly restricts the presumption of innocence and, at the same time, restricts human freedom without a court order determining guilt. As the presumption of innocence in criminal proceedings is one of the most crucial elements of the democratic legal order, it may be crucial to seek further improvements in this area to set even higher standards of human rights protection and to strengthen the legal culture of the law enforcement authorities.

The project will pay particular attention to the situation of juvenile participants in the criminal process and adequate procedures related to the accountability of minors (juvenile delinquency). The child protection in court proceedings will highlight the axiological and pro-guarantee features of effectiveness, which therefore do not only have a technical dimension that allows measuring the criminal process, its duration or costs.

Regarding the length of the proceeding, the question arises as to how to accelerate criminal justice?

Measures that directly accelerate criminal proceedings include the construction of the model of preparatory proceedings as the first stage of proceeding in continental law systems, the option of the consensual conclusion of proceedings, shortening of procedure, preclusion for evidentiary motions (court is equipped with instruments that may discipline parties that delay procedures to make motions as to evidence within a strictly defined timeframe, with the motion being admissible only upon defined conditions), adjudication in the absence of the parties with is extremely controversial in non-inquisitorial (mixed and adversarial models) – unformalized procedure connected with the absence of the defendant. The measures that indirectly speed up criminal proceedings that will be discussed are chiefly: mediation and rigorism in justifying absences.

Inquiries about the length of court proceedings are to be conducted from several perspectives. From a general point of view, one may consider the time framework of court proceedings from the moment of lodging the act of indictment until the moment of issuing the judgment by the court of the first instance, as well as the factors that influence the final decision. In this case, all aspects of the procedure are examined, irrespective of whether measures are aimed at introducing limitations on the use of court proceedings (shortening of court proceedings). Indeed, the effectiveness is closely linked to the design of evidentiary proceedings from the point of view of this approach. The scope of the powers of the parties, the admissibility of evidence, restrictions on the evidentiary initiative (in inquisitorial systems), bans, and exclusions of evidence are problems that will be presented both concerning the national and international standards and in the light of possible future development trends.

The foundation for the comparative analysis in this matter will be based on EU directives standardizing and harmonizing the criminal law of the Member States. Thus, the attention will be focused mostly on the issues belonging to the legislative scope of, but not limited to, Directives: 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards in the field of rights, support, and protection of crime victims; 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings; and 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. The research will address, *inter alia*, changes caused by the implementation of the above

EU legislation to domestic legal orders, as well as their contribution to the effectiveness of criminal proceedings.

Digitalization and new technologies through the lens of effectiveness.

The various systems are in the transition from IT systems and paper-based procedures to digital technologies. This means that digital justice must redefine the previous paradigm to be effective: more efficient, fairer, less expensive. Digital justice is a new approach to address the shortcomings of the previous one: a) limited human resources and an increasing number of cases and - as a result - lengthy procedure, b) transparency and objectivity of proceedings, c) addressing the over-length and over-cost of the procedure.

Modern technology should play an ever-increasing role in criminal proceedings both in the court stage of the procedure and pre-trial procedure, and its importance is revealed in several areas: in the sphere of ***electronic access to information which i***s connected with the reduction of paper use and aims at remote working and real-time collaboration (the participants to criminal trial may simultaneously access information including online legal documents, case bundles, case libraries, and up-to-date schedules of hearings, as well as collaborate in real-time). Digital technologies can support the technical aspect of communication and can be used to send the summons for an investigation or court trial or to record the course of the proceedings.

The most cautious proposal from the point of view of the effectiveness is the creation of virtual courts *sensu largo*. These include virtual courtrooms *sensu stricto*, real courtrooms with the virtual participation of the parties, and virtual courts with virtual judges. The latter is still controversial as an entirely new paradigm of criminal justice without human involvement. A limited version of the concept of virtual judges is based on the use of algorithms by judges in adjudication and the decision-making process. The profiling of defendants, as the new tool for judges, could contribute to making sentencing more appropriate when selecting penalties from a particular and general point of view. That is, in terms of their situation and comparison of the imposed sentences in similar cases, respectively.

In addition to the strict judicial and adjudication aspects, there are other benefits of digitalization of criminal procedure, including the potential of digital and data-based technologies that could be used to improve the protection of human rights. At the same time, however, they pose a risk for the participants of the procedure, especially in an inquisitorial and mixed model of criminal proceedings. This issue is extremely challenging in respect to gathering evidence and introducing them before the court, even though the use of the algorithm is a crucial tool in prosecuting several types of crimes and offences, especially those committed in the digital sphere. The project investigates the controversies surrounding the use of digital tools for the public prosecutor’s office, in particular, some eavesdropping techniques (Pegasus-type software), especially when used by an authority without judicial authorisation.

Digital justice shall create courts' ability to serve justice in an efficient, transparent, and less expensive, but at the same time, more accessible manner. As such, however, it presents several challenges. In this project, both advantages and disadvantages will be discussed based on the examples introduced in selected legal systems. Therefore the main question is whether Artificial Intelligence is a tool for serving justice and not an attempt to create justice itself.

Reasonable length of criminal proceedings versus the system of remedies.

The issue of conducting criminal proceedings within a specific timeframe and its influence on the level of preserving procedural safeguards is of crucial importance. That is because the criminal behaviours create some kind of void and unbalance in a given community subjected to a crime. The duty of the state to combat and prevent crime affects the daily life of citizens and the socio-economic conditions for work, education, or business. To somewhat reshape that perspective, it could be argued that upon the above obligations of the state, the citizens are entitled to a claim that for a committed crime, justice must be served.

Albeit, it is not only about the sole fact of serving justice in the form of a judgment. The assessment of the criminal liability of the offender must be carried out as quickly as possible but must be accurate, adequate, and lawful, which means that several safeguards and procedural rules must be respected during the proceedings. In addition, the system must be trustworthy. That means that citizens must feel comfortable placing trust in the judgments issued by the criminal administration of justice of a state in which they live and believe that these judgments meet the above requirements. Defining and improving the necessary characteristics of a relationship of trust is critical for this project area.

The legislator tries to solve the problem of overly lengthy proceedings by introducing various legislative measures aimed at expediting trials. However, they often involve the risk of infringing the defendant's fundamental rights and breaching the safeguards provided for by the law. In addition, appeals can be lodged against infringements, further delaying final convictions and undermining citizens' confidence in their justice system. Lately, an effective yet trustworthy solution seems to have been found. More specifically, the consensual forms of concluding criminal proceedings and the so-called consensual justice.

Consensual forms consist essentially of concluding an agreement in which the prosecutor and accused reach a consensus that determines criminal liability concerning the punishment and remedies. Over the years, there has been a general trend towards speeding up procedures through this form of their closure. Despite its fair share in the total number of final judgments before the courts, this form of administration of justice can be improved. Such a task is both challenging and significant at the same time, but it provides further insight into the desired relationship between the length of proceedings and the system of safeguards and remedies available to the parties.

This research area will therefore focus mainly on analyzing the relationship between the length of proceedings and the standard and applicability of remedies. The study of consensual forms in various judicial systems may be crucial for developing a multidimensional approach enabling the formulation of *de lege ferenda* postulates aimed at expediting proceedings and enhancing the citizens' trust in their legal systems.

In this part of the research, the system of remedies is seen from both- a national and an international perspective; the analysis of the national aspects includes a review of the tools allowing various forms of remedies in selected legal systems, while the international perspective focuses on the European approach, for which the concept of effective judicial remedy is crucial.

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