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Typology of Obstacles to the Implementation of the Right to a Fair Trial. Application of Adam Podgórecki's Sociological Concept of Human Rights

Typologia przeszkód w realizacji prawa do sądu. Zastosowanie socjologicznej koncepcji praw człowieka Adama Podgóreckiego

Abstract

The purpose of the paper is to propose a typology of obstacles to the implementation of the right to a fair trial, based on the sociological and legal concepts of Adam Podgórecki, Leon Petrażycki and Lawrence M. Friedman. The methods used by the author are a review of the literature on the implementation of the right to a fair trial in Poland, including the author's own research and reports of public institutions. The result of the analysis is a typology with three main categories of obstacles: (1) those arising from the content of the regulations (direct, indirect and potential), (2) those related to the state of the justice system institutions (infrastructure and human resources), and (3) those arising from the legal culture (general and judicial). The author stresses that the most persistent barrier to the implementation of the right to a fair trial is the legal culture, especially the judicial culture. The author argues that a key element of the "complete right to a fair trial", as understood by Adam Podgórecki, is an internal sense of obligation on the part of justice system officials towards the subjects of that right, and not just towards the state or their superiors.

Keywords: sociology of human rights, right to a fair trial, legal culture, access to court, intuitive law

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Abstrakt

Celem artykułu jest zaproponowanie typologii przeszkód w realizacji prawa do sądu, w oparciu o koncepcje socjologiczno-prawne Adama Podgóreckiego, Leona Petrażyckiego i Lawrence'a M. Friedmana. Metodami wykorzystanymi przez autora jest przegląd literatury dotyczącej realizacji prawa do sądu w Polsce, w tym badań własnych autora i raportów instytucji publicznych. Wynikiem: analizy jest typologia obejmująca trzy główne kategorie przeszkód: 1) wynikające z treści przepisów (bezpośrednie, pośrednie i potencjalne), 2) związane ze stanem instytucji wymiaru sprawiedliwości (infrastruktury i zasobów ludzkich), oraz 3) wynikające z kultury prawnej (ogólnej i sędziowskiej). Autor podkreśla, że najtrwalszą barierą w realizacji prawa do sądu jest kultura prawna, szczególnie sędziowska. Argumentuje, że kluczowym elementem „kompletnego prawa do sądu" w rozumieniu Adama Podgóreckiego jest wewnętrzne poczucie zobowiązania funkcjonariuszy wymiaru sprawiedliwości wobec podmiotów tego prawa, a nie tylko wobec państwa czy przełożonych.

Słowa kluczowe: socjologia praw człowieka, prawo do sądu, kultura prawna, dostęp do sądu, prawo intuicyjne

Introduction

Idea

As noted by Adam Podgórecki, a state's declaration of observance of the human rights, expressed in generally applicable regulations of statutory law, does not automatically imply the implementation of those rights in practice.[1] By presenting examples of the results of empirical research, analyses of legal regulations, and my own observations of the Polish justice system, I propose a typology of problems that lead to c r i p p l i n g of the right to a fair trial in a given country, i.e. they constitute obstacles to its implementation in social reality. When developing the typology, I took into account the division into three components of the legal system known from socio-legal literature: the content of regulations, the organisation of the justice system and the legal culture.[2] However, it is only by applying the optics of the sociology of law to the analysis of the individual components of this system that brings a cognitive result in the form of a list of obstacles to the fullness of the right to a fair trial in social reality. The typology is able to organise and therefore facilitate the use of information on obstacles to the implementation of a key human right in a democratic state under the rule of law. The applications of the typology can be comparative analyses of the obstacles to the implementation of the right to a fair trial in different jurisdictions, or the development with its help of the

[1] A. Podgórecki, *Sociological Theory of Law*, Milano 1991, p. 101 et seq.

[2] L.M. Friedman, *Legal Culture and Social Development*, "Law & Society Review" 1969, vol. 4, no. 1, p. 261–274, DOI: 10.5771/0506-7286-1969-3-261.

so-called "check-lists" to facilitate the monitoring of the implementation of the right, but also actions aimed at improving the level of its functioning in practice.

Subject of the Analysis: Right to a Fair Trial

The right to a fair trial is widely recognised as one of the human rights. It is mentioned in the United Nations Universal Declaration of Human Rights (Articles 8–10), the European Convention for the Protection of Human Rights and Fundamental Freedoms (Articles 5–6),[3] the International Covenant on Civil and Political Rights (Articles 8 and 14)[4] and the Charter of Fundamental Rights of the European Union (Article 47).[5]

The right to a fair trial was also included in the Constitution adopted by Poland in 1997. Its essence is to provide every person with access to an independent, unbiased and impartial court established by law, which will hear cases relevant to the implementation of their rights and freedoms without undue delay in an open and fair manner.

The understanding of the right to a fair trial may have changed over time, but at least the right to a fair and public trial has remained undisputed elements of the principle of civil rights in democratic states since the Enlightenment.[6] Similarly, the catalogue of core standards of a fair trial does not raise there any dispute, neither in doctrine nor in case law. Some of them were already written down by the lawyers of ancient Rome, which is why they still function today in the form of Latin maxims, e.g. *lex retro non agit* (in English: the law does not operate retroactively), or *in dubio pro reo* (in English: when in doubt, rule for the defendant).[7] According to Ewa Łętowska, "[e]lementary of the fairness of the proceedings assumes hearing, presentation of reasons, equality of arms,

[3] Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up at Rome on 4 November 1950, as amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2, was ratified by Poland in 1993 (Polish Journal of Laws 1993.61.284, as amended); hereinafter the ECHR or the Convention.

[4] International Covenant on Civil and Political Rights, opened for signature in New York on 19 December 1966, was ratified by Poland in 1977 (Polish Journal of Laws 1977, No. 38, item 167).

[5] Charter of Fundamental Rights of the European Union, adopted on 7 December 2000 at the summit of the European Council in Nice, came into force in the Member States on 1 December 2009 following the ratification of the Lisbon Treaty (Official Journal of the EU2010/C083).

[6] The precursor of granting certain trial principles the status of an overarching norm in the hierarchy of national statutory law was the United States of America, which in 1791 included them in the federal Constitution. Also in Poland, after regaining independence after the period of partitions, the principles of openness of the trial and independence of judges were included in the catalogue of constitutional rights, and written in the March Constitution adopted in 1921.

[7] The aforementioned maxims are the most common in the jurisprudence of Polish courts, according to W. Wołodkiewicz, *Łacińskie paremie prawne w orzecznictwie sądów polskich*, in: *Łacińskie*

possibility of appeal, existence of an objective arbitrator."[8] As part of psycho-social research on fairness in the judicial process, focusing on trial participants' experience of procedural fairness, it has been found that its most essential elements are voice, respect, equality and understanding.[9]

Relevance of the Level of Implementation of the Right to a Fair Trial

The right to a fair trial has a unique place among human rights. In addition to its individual functions, it also serves to enforce other rights. Thus, ensuring that there are actual conditions for observing the right to a fair trial and that it is actually respected takes on particular importance.

It is known from regular opinion polls that the operation of the courts has been assessed relatively critically by Polish society for years. In surveys conducted by the Public Opinion Research Centre (CBOS) between 2005 and 2022, the question "How do you generally assess the operation of the justice system in Poland?" was answered negatively by an average of 55% of respondents. For comparison, positive answers were given on average by 32% of the survey participants, while in none of the editions were more than half satisfied and only once (in April 2007) did the survey show more positive than negative answers.[10]

In the most recent public poll by the CBOS in the series "Opinions about Public Institutions" from March 2024, the activities of the courts was assessed as good by 30% of respondents. A greater proportion of respondents gave a positive assessment of the activities of other authorities: the Senate (38%), the Sejm (40%), the President (46%), or local authorities (68%), as well as other institutions related to the observance of the law: Ombudsman (43%), the Supreme Audit Office (44%) and the police (64%). The same percentage of positive assessments as the courts was given to the prosecutor's office (30%), and

paremie w europejskiej kulturze prawnej i orzecznictwie sądów polskich, eds. W. Wołodkiewicz, J. Krzynówek, Warsaw 2001, p. 21–22.

[8] E. Łętowska, *Jak i czym mierzyć rzetelność*, in: *W pogoni za rzetelnym procesem karnym. Księga dedykowana Profesorowi Stanisławowi Waltosiowi*, ed. D. Szumiło-Kulczycka, Wolters Kluwer, Warsaw 2022, p. 52; A. Clooney, P. Webb, *The Right to a Fair Trial in International Law*, Oxford University Press, New York 2020.

[9] T.R. Tyler, *What is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, "Law & Society Review" 1988, vol. 22, no. 1, p. 103–136; S. Burdziej, K. Guzik, B. Pilitowski, *Fairness at Trial: The Impact of Procedural Justice and Other Experiential Factors on Criminal Defendants' Perceptions of Court Legitimacy in Poland*, "Law and Social Inquiry" 2019, vol. 44, no. 2, p. 359–390; S. Burdziej, K. Guzik, B. Pilitowski, *How Civility Matters in Civil Matters: Procedural Justice and Court Legitimacy in the Midst of a Legitimacy Crisis*, "Law & Social Inquiry" 2022, vol. 47, no. 2, p. 558–583.

[10] K. Pankowski, *Społeczne oceny wymiaru sprawiedliwości. Komunikat z badań Nr. 95/2022*, CBOS, Warsaw 2022, p. 4.

among the state institutions asked about by the CBOS, only the Constitutional Tribunal received fewer positive assessments (24%).[11]

Statistics from the European Court of Human Rights (hereafter: ECtHR) show that violations of the right to a fair trial, i.e. Article 6 of the ECHR, were the most common reason for judgments by the European Court of Human Rights finding violations of the Convention by states under its jurisdiction. Violations of Article 6 accounted for 36% of all violations of the Convention found by 2019. This also applies to Poland, but in its case, violations of the right to a fair trial accounted for as much as 46% of all violations found in the judgments. Subsequent in the regrettable hierarchy of the most frequently breached articles of the Convention is Article 5, which safeguards the liberty of the individual. A critical aspect of this protection is the right to judicial review of the legitimacy of any deprivation of liberty. Violations of this article account for 14% of all violations found by the Court since its inception, but in the case of Poland the share is again higher and amounts to 25%.[12]

The data presented supports the acknowledgment of the right to a fair trial as not only a central component within the framework of fundamental rights protection but also as its particularly sensitive element. Moreover, the cited data imply that the execution of the right to a fair trial in Poland specifically falls short of the standards anticipated by both a substantial segment of the population and external assessors, such as the Strasbourg Court.

Definition of the Research Problem

Positive law was assigned various functions in the 20th century, from criminal to humanitarian. It's usually possible to track back the origin of a written norm to it's informal predecessor. Codifications of human rights are manifestations of objectively existing beliefs about people's entitlements and freedoms too. However, they do not reflect the beliefs of all people obliged to apply them. Nor are they understood in a uniform way everywhere they have been ratified. They were codified by lawyers coming from a particular legal culture, which had in mind that the regulations they developed would be applied with the help of the institutions and organisational conditions existing in the countries from which they themselves originated. To a large extent, human rights were articulations

[11] M. Feliksiak, *Oceny instytucji publicznych w marcu. Komunikat z badań Nr. 36/2024*, CBOS, Warsaw 2024; A question regarding trust in these institutions yielded analogous results, see: A. Cybulska, *Social Trust. Research Reports No. 40/2024*, CBOS, Warsaw 2024, https://cbos.pl/EN/publications/reports_text.php?id=6804 (accessed: 06.10.2024).

[12] Own calculations based on: ECHR, *Annual Report European Court of Human Rights 2019*, 2020, p. 136–137.

of existing norms, derived from intuitive law and observed in the practice of their national judiciaries.

The accession of subsequent states to treaties mandating the observance of human rights constitutes a compelling natural socio-legal experiment. Historically and contemporaneously, it has been feasible to examine the outcomes elicited by the uniform human rights regulations ratified by successive states. An example is the Council of Europe and the ECtHR statistics cited above. In the majority of instances, the number of grievances and documented infringements of the European Convention on Human Rights per capita is greater in countries that ratified the Convention at a subsequent point in time than in countries that participated in its drafting. This discrepancy persists for an extended period following the admission of new members to the Council.

To identify the various factors that differentiate the implementation of human rights across different states, it is evident that the prevailing comparative, historical, and dogmatic-formal research methodologies in legal scholarship are inadequate. Statutory law regulations may appear deceptively similar, yet they yield divergent practical results. Simultaneously, legal systems deemed fundamentally distinct from a jurisprudential perspective may nonetheless achieve comparable outcomes concerning the implementation of individual human rights, exemplified by the nations surrounding the North Sea. It can thus be concluded that analysing doctrines, case law, and statutory regulations alone does not encompass the myriad factors influencing the practical outcomes of law. This realization should be considered pivotal in the context of formulating necessary changes aimed at enhancing the actual implementation standards of human rights.

The necessary instruments for conducting research on the operating of law are furnished by the sociology of law, a discipline that specializes in this domain. Notably, within its diverse trends, the pluralistic approach to law developed by the Polish polymath of the late 19th and early 20th centuries, Leon Petrażycki, alongside the sociological theory of human rights advanced by his intellectual successor, Adam Podgórecki, merit particular emphasis and recall in the context under discussion.

Purpose of the Analysis and Methods Used

The purpose of the analysis, the results of which are presented in this paper, is to propose a typology of problems that prevent the full implementation of the right to a fair trial in social reality. For this purpose, I reviewed available data on the operation of the Polish justice system using the d e s k r e s e a r c h method in search of systemic obstacles to the implementation of the right to a fair trial.

Before using them in the analysis, I examined the data from the selected sources for their usefulness in identifying the problems preventing a fuller implementation of the right to a fair trial or measuring the level of implementation of the right to a fair trial. I analysed the selected information by drawing conclusions from it in a manner appropriate to the type of data (qualitative or quantitative).

The purpose of creating typologies has its source in the characteristics of human cognition, which requires naming things in order to reduce the complexity of reality for one's individual needs, but also to enable communication – to build an epistemic community – with other people.[13] The scientific goal of creating a typology is to propose an arrangement of observed phenomena according to a specific model (i.e. a simplified vision) of reality in order to explain the observed and predict future events.

The obstacles presented below does not exhaust the list of problems of a given category occurring in Poland, i.e. jurisdiction serving us as an example. Each one serves as a selected exemplification of a given category. The selection was not primarily based on the "typicality" of the obstacle within the category. Instead, the objective was to illustrate the typology with examples identified through a range of research methods and theoretical paradigms. In this way, I would like to highlight wealth of empirical social research on the operation and effects of law in Poland, which – although practised from the 1960s within the discipline of sociology, primarily by Adam Podgórecki's team, and continued to some extent by his students after his forced emigration[14] – remains overshadowed in quantitative terms by academic work focused on the content of law.

The analysis draws on a variety of sources, including reports from public institutions and articles from the legal, psychological, and sociological literature; empirical research conducted by or with the author: quantitative analysis of data from the files of a representative sample of 300 criminal cases,[15] analysis of the

[13] According to Alfred Schütz, thanks to typologies (which he calls "typifications"), "individuals may effectively relate to the world around them, as they are not forced to analyse every nuance and specific characteristic of their situation. Moreover, typification facilitates entry into the world, simplifies the process of adaptation, as it gives people the opportunity to treat others as categories or as typical objects of a given kind". A. Schütz, *The Phenomenology of the Social Word*, Northwestern University Press, Evanston 1967. As cited in: J.H. Turner, *Struktura teorii socjologicznej*, Wydawnictwo Naukowe PWN, Warsaw 2005, p. 416.

[14] One can read about the dramatic circumstances of Podgórecki's permanent departure from Poland in the biography of this sociologist contained in the paper by Daniel Wicenty, *The Experience of Oppression and the Price of Nonconformity: A Brief Biography of Adam Podgórecki*, "Studies in East European Thought" 2018, vol. 70, no. 1, p. 61–81, DOI: 10.1007/s11212-018-9300-x.

[15] Z. Branicka, B. Kociołowicz-Wiśniewska, B. Pilitowski, *Analiza praktyki stosowania tymczasowego aresztowania przez polskie sądy. Wyniki badań aktowych i ich ocena,* in: *Stosowanie tymczasowego aresztowania. Analiza praktyczna*, eds. P. Karlik, B. Pilitowski, Wolters Kluwer, Warsaw 2022.

accessibility of 41 court buildings for persons with disabilities,[16] analysis of the orders of court presidents and practices of court personnel in the context of implementing the principle of open hearing and public announcement of the judgment during the COVID-19 pandemic,[17] analysis of the results of a survey conducted using the CAWI method on a nationwide representative sample, and statistical analysis of more than 28,000 motions for pre-trial detention examined by judges of a random sample of district courts.[18]

Implementation of the Right to a fair trial in the Light of Adam Podgórecki's Concept of Human Rights

It was the legal philosopher Hanna Waśkiewicz who initially drew attention to the superficiality of scientific research on the implementation of human rights in social practice. At an international conference organised in 1986 by the Institute of Applied Social Sciences of the University of Warsaw, she said that "it is only in everyday social life that people effectively exercise their human rights or are deprived of them. So perhaps the social aspect of human rights is even more important than the legal aspect."[19] She suggested that sociology of law is the most appropriate scientific discipline to address this cognitive deficit.

Two years later, in Bologna, Adam Podgórecki presented a paper that, in a way, was an answer to the problem originally raised by H. Waśkiewicz.[20] The project of the sociology of human rights, which he announced, has developed independently in numerous locations across the globe.[21]

[16] A. Rekowska, B. Pilitowski, *Jak zwiększyć dostępność sądów dla osób ze szczególnymi potrzebami*, Fundacja Court Watch Polska, Toruń 2022.

[17] B. Pilitowski, *Przestrzeganie zasady jawności postępowania sądowego w Polsce podczas stanu epidemii COVID-19. Wyniki badań empirycznych*, "Zeszyty Naukowe Katolickiego Uniwersytetu Lubelskiego Jana Pawła II" 2023, vol. 66, no. 2, p. 119–141.

[18] B. Pilitowski et al., *Stosowanie tymczasowego aresztowania w Polsce. Wyniki badań ilościowych i jakościowych*, Fundacja Court Watch Polska, Toruń 2024.

[19] H. Waśkiewicz, *Kilka uwag o konieczności socjologicznych badań nad niektórymi aspektami problematyki praw człowieka*, "Roczniki Nauk Społecznych" 2015, vol. 7(43), no. 4, p. 11–15, DOI: 10.18290/rns.2015.7(43).4-2.

[20] K. Motyka, *Od Redaktora Naukowego*, "Roczniki Nauk Społecznych" 2015, vol. 7(43), no. 4, p. 7–9, DOI: 10.18290/rns.2015.7(43).4-1.

[21] An extensive bibliography of works on the sociology of human rights can be found in the studies on this subject by Krzysztof Motyka: *Socjologia prawa. Od Petrażyckiego do Podgóreckiego*, in: *Sto lat socjologii w Katolickim Uniwersytecie Lubelskim*, ed. J. Szymczak, Towarzystwo Naukowe Katolickiego Uniwersytetu Lubelskiego Jana Pawła II, Lublin 2018, p. 251–273; K. Motyka, *Od Redaktora Naukowego*…

Adam Podgórecki's Sociological Concept of Human Rights

In the view of Adam Podgórecki, an abstract pledge to uphold the human rights enshrined in the Constitution is insufficient. "In social reality, as a rule, human rights are mainly abstract, meaning that they are pronounced, but not necessarily practiced. Abstract rights become crippled when they do not provide realistic conditions for their own operation."[22] In his opinion, the conditions for human rights to be "complete" also include: normative provisions enabling their implementation, intuitive law tantamount to them, as well as organisational and institutional ties connecting them to social reality.[23]

Intuitive Law as an Element of Legal Culture

In the context of complete implementation of human rights, Adam Podgórecki wrote about the need for the existence of adequate "intuitive law". He took this concept from Leon Petrażycki. According to him, most social relations are regulated by "intuitive law", i.e. the emotional experiences of individuals "not with judgments as to what is supposed to be done according to statutes and the like but what is due to another and so forth in »conscience«, according to our independent convictions without reference to any external authorities."[24] "Intuitive law" is therefore a manifestation of people's internal beliefs, not externally existing normative facts about what they are obliged to do and what they are entitled to.[25] Because the "intuitive law", like any social fact, exerts coercion on individuals, it will have observable consequences in the form of the behaviour of these individuals. "Intuitive law" can thus be a valuable operationalisation of what we call "conscience"[26] on the individual level, or "social justice"[27] on the group level.

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[22] A. Podgórecki, *Sociological Theory of Law*, A. Giuffre Editore, Milano 1991, p. 101 et seq.

[23] Ibidem.

[24] L. Petrażycki, *Law and Morality*, transl. H.W. Babb, Harvard University Press, Cambridge, MA 1955, p. 242.

[25] J.M. Kurczewski, *Leon Petrażycki's Two Dimensions of Law*, in: *Leon Petrażycki: Law, Emotions, Society*, eds. A.J. Treviño, E. Fittipaldi, Routledge, New York 2023; A. Kojder, *Pluralistyczna idea prawa Leona Petrażyckiego*, in: *Leon Petrażycki i współczesna nauka prawa*, ed. T. Giaro, Wolters Kluwer, Warsaw 2020, p. 240–241.

[26] When appointed, most Polish judges take an oath, among others: "to safeguard the law, fulfil the duties of a judge with the utmost diligence, administer justice in accordance with the law, with impartiality, according to [one's] conscience"; fragment of Article 66 sec. 1 of the Law of 27 July 2001 – Law on the Common Courts System Polish Journal of Laws 2024.0.334.

[27] See Article 2 of the Law of 2 April 1997 – Constitution of the Republic of Poland: "The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice"

In the light of Petrażycki's concept, intuitive law is an indispensable element in the organisation of society, performing motivational, educational and distributive functions. Positive law, in order to be eufunctional in society, should work in synergy with intuitive law. However, if the norms resulting from it are contrary to what someone's conscience tells them, it will be natural for the subject of this law to look for a way to comply primarily with the command of the intuitive law. Most often, however, this is not done by directly rejecting positive law,[28] but by adapting it, i.e. interpreting or applying the regulations in such a way that their result corresponds as much as possible to what is right according to the people applying them.

Typology of Obstacles to the Implementation of the Right to a Fair Trial

Although Adam Podgórecki was right in saying that to be complete, human rights need appropriate regulations, institutions and intuitive law consistent with them, this does not exhaust the list of necessary conditions for them to be fulfilled. When designing a typology of obstacles to the full implementation of the right to a fair trial in social reality, I use Lawrence M. Friedman's distinction between components of the legal system, corresponding to Podgórecki's concepts. Friedman proposed that when conducting empirical research on legal systems, their structural, content and cultural components should be taken into account. The structural components were to include the system and division of power, organisation and resources of the judiciary. The content of the legal system: regulations, case law and legal doctrines. Meanwhile, the intangible elements of the system that modify the operation of the law, e.g. the customs of lawyers, the views of judges, established ways of acting in certain situations, are elements of its legal culture.[29]

When creating the typology, I have therefore abandoned e x p l i c i t reference to the term "intuitive law" in favour of the broader concept of "legal culture" understood in the same way as Friedman did, i.e. as broadly as possible, including all intangible elements of the legal system, i.e. also the intuitive law.[30]

(Polish Journal of Laws 1997, No. 78, item 483); see also: A. Kojder, *Godność i siła prawa*, Oficyna Naukowa, Warsaw 1995, p. 252.

[28] Conscious non-compliance with positive law may take hidden forms, e.g. tax avoidance, or overt forms, e.g. demonstrative disobedience.

[29] L.M. Friedman, *Legal Culture*…, p. 265–266.

[30] There are a number of competing definitions and applications of the concept of legal culture in the social sciences, which have been systematically reviewed by: M. Čehulić, *Perspectives of Legal Culture: A Systematic Literature Review*, Croatian Sociological Association, 2021; see, for example, E. Blankenburg, *The Infrastructure for Avoiding Civil Litigation: Comparing Cultures of Legal Behavior in the Netherlands and West Germany*, "Law & Society Review" 1994, vol. 28, no. 4, p. 789–808; C. Gryko,

This choice of category name does not mean abandoning the use of Petrażycki's concept. On the contrary, I would like to emphasise the value of his approach to law as bilateral imperative-attributive emotions, i.e. obligations and entitlements, for explaining the phenomena outlined in the introduction with regard to the right to a fair trial. Although the method of introspection he postulated is archaic, many of his original observations and the conclusions drawn from them are today confirmed by the results of research in decision-making and moral psychology.[31] When examining legal culture in order to explain the occurrence of different operation of identical regulations of statutory law, scientists today more often refer to concepts such as "law in action" coined by R. Pound or "living law" introduced by E. Erlich,[32] because they had a greater chance of being popularised.[33]

Obstacles to the Implementation of the Right to a Fair Trial Resulting from the Content of the Regulations

The obstacles to the implementation of the right to a fair trial arising from regulations include the properties of the content of statutory law, which in practice invalidate the promise to provide every person with access to a court.

Prawo a kultura. Pojęcie kultury prawnej, "Annales Universitatis Mariae Curie-Skłodowska" 1985, vol. 10, no. 7; J. Kurczewski, *Prawem i lewem. Kultura prawna społeczeństwa polskiego po komunizmie*, "Studia Socjologiczne" 2007, vol. 185, no. 2, p. 33–60; A.-M. Marshall, *Communities and Culture: Enriching Legal Consciousness and Legal Culture*, "Law & Social Inquiry" 2006, vol. 31, no. 1, p. 229–249; D. Nelken, *Using the Concept of Legal Culture*, "Australian Journal of Legal Philosophy" 2004, vol. 29; H. Olszewski, *Polska droga do państwa prawa. Refleksje o kulturze prawnej*, "Studia Prawnicze" 2002, vol. 151, no. 1, p. 25–36; K. Pałecki, *O pojęciu kultury prawnej*, "Studia Socjologiczne" 1972, no. 2, p. 205–224 ; J. Winczorek, *Systems Theory and Puzzles of Legal Culture*, "Archiwum Filozofii Prawa i Filozofii Społecznej" 2012, vol. 4, no. 1, p. 106–125.

[31] M.L. Finucane, E. Peters, P. Slovic, *Judgment and Decision Making: The Dance of Affect and Reason*, in: *Emerging Perspectives on Judgment and Decision Research*, Cambridge University Press, Cambridge 2003; J. Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, "Psychological Review" 2001, vol. 108, no. 4, p. 814–834, DOI: 10.1037/0033-295X; J. Haidt, S.H. Koller, M.G. Dias, *Affect, Culture, and Morality, or Is It Wrong to Eat Your Dog?*, "Journal of Personality and Social Psychology" 1993, vol. 65, no. 4, p. 613–628.

[32] D. Nelken, *Using the Concept of Legal Culture*…, p. 3.

[33] On the reasons for the relatively low familiarity and popularity of Petrażycki's concept, see e.g.: R. Cotterrell, *Foreword*, in: *Leon Petrażycki: Law, Emotions, Society*, eds. E. Fittipaldi, A.J. Treviño, Routledge, New York 2023; K. Motyka, *Leon Petrażycki and Adam Podgórecki*, in *Leon Petrażycki: Law, Emotions, Society*…; K. Motyka, *Law and Sociology: The Petrażyckian Perspective*, in: *Law and Sociology*, ed. M. Freeman, Oxford University Press, Oxford 2006; A. Podgórecki, *Intuitive Law versus Folk Law*, "Zeitschrift filr Rechtssoziologie" 1982, vol. 3, no. 1, p. 74–81; A. Podgórecki, *Unrecognized Father of Sociology of Law: Leon Petrazycki – Reflections Based on Jan Gorecki's* Sociology and Jurisprudence of Leon Petrażycki, "Law & Society Review" 1980, vol. 15, no. 1, p. 183–202.

This may result both from the fact that the norms arising from statutory law are directly contrary to the principles of the right to a fair trial, and from the fact that the regulations protect the exercise of the right to a fair trial in an insufficient manner, e.g. ostensibly or depending on someone's arbitrary decision. Therefore, I distinguish legal obstacles to the implementation of the right to a fair trial into three subtypes: direct, indirect or potential.

Direct Legal Obstacles to the Implementation of the Right to a Fair Trial

The legal problem that is an obstacle to the implementation of the right to a fair trial is of a direct nature, when the applicable regulations *de facto* prevent the exercise of the full right to a fair trial. A direct obstacle may be regulations that oblige one to act in a way that leads to a denial of the right to a fair trial or a violation of its standards. A similar problem emerges when the legal system effectively precludes public actors from taking action without the requisite regulations, such as legislation or ordinances. In such jurisdictions, the absence of regulations that formally authorize the taking of action to guarantee access to the court can effectively "cripple" the right to a fair trial.

Example: In 2020, the presidents of most courts in Poland, following the recommendations of the Polish Judges Association "Iustitia" and the Undersecretary of State in the Ministry of Justice, issued orders prohibiting the entry of unsummoned persons into the courts or making the entry of the public into the courtroom subject to the arbitrary decision of managing judges. This made the hearings in these courts *de facto* held in camera. These actions were carried out in disregard of the principle of the hierarchy of legal acts, as the orders were contrary in their effect to the legislation in force during this period (including the constitution) or claimed extra powers to presiding judges, managing judges, and even court buildings' security guards without proper legal grounds. As a result, in the years 2020–2022, the principle of a public trial *de facto* did not apply in at least several dozen courts in the country.[34]

[34] B. Łopalewski, B. Pilitowski, *Jawność wyjęta spod prawa, czyli zarządzenia prezesów sądów ważniejsze niż konstytucja*, "Gazeta Prawna" 13.05.2020, https://prawo.gazetaprawna.pl/artykuly/1476300,-jawnosc-rozpraw-ograniczona-zarzadzenia-prezesa-sadu.html (accessed: 23.05.2023); B. Pilitowski, *Przestrzeganie zasady jawności postępowania sądowego*…; see also: K. Rogala, *Rozprawy zdalne w praktyce sądowej*, in: *Postępowanie cywilne w czasie pandemii: e-doręczenia, rozprawa zdalna, posiedzenia niejawne, składanie pism procesowych*, ed. J. Gołaczyński, C.H. Beck, Warsaw 2022, p. 151.

Indirect Legal Obstacles to the Implementation of the Right to a Fair Trial

Regulations may pose an indirect problem for the implementation of the right to a fair trial when, although their content does not imply norms directly opposing the implementation of this right, due to other objective circumstances (e.g. biological, cultural, institutional or organisational conditions), they create conditions in which the right to a fair trial becomes illusory.

Example: An element of the right to a fair trial is the right to a defence and access to professional defence counsel. In accordance with the regulations of the 1997 Polish Code of Criminal Procedure, a detained person has the right to communicate with his or her defence counsel. If the prosecutor's office files a motion for pre-trial detention, he or she also has the right to read its content and the evidence on which it is based. Nevertheless, in the experience of suspects, access to defence counsel before the first hearing is difficult. In practice, the detained person must know by heart the telephone number of the person who is able to ensure that an attorney arrives at the hearing, since the only assistance that the state guarantees in the exercise of the right of defence is instructions and one telephone call. As a result, at the first pre-trial detention hearing, which takes place several dozen hours after the detention, defence counsels accompany only 16% of the suspects whose cases are later brought before the district court and 27% of the suspects whose cases are later brought before the regional court.[35] Such a low percentage of use of a professional cannot, however, be explained solely by the spontaneous reluctance of suspects to be assisted by lawyers, since in hearings for the extension of pre-trial detention, which are usually held after about 12 weeks in detention, defence counsels already accompany about half of them.[36]

Also at the stage of considering a motion for pre-trial detention, the right to defence is often only formally implemented, as the prosecutor is not obliged to provide the motion and a copy of the file to the suspect and his defence counsel.[37] The defence must therefore request access to the case files and wait for the court to review them. As the court has 24 hours to consider the motion, the

[35] Z. Branicka, B. Kociołowicz-Wiśniewska, B. Pilitowski, *Analiza praktyki stosowania tymczasowego aresztowania*…, p. 21.

[36] Ibidem, p. 22.

[37] The provision of a copy of a motion for pre-trial detention to the defence by the prosecutor's office occurs in Poland only as a manifestation of the goodwill of a particular prosecutor in a particular case. The European Court of Human Rights has already pointed out to Poland that the failure to provide the suspect with access to the material of preparatory proceedings in the scope of the motion for pre-trial detention constitutes a violation of the adversarial nature of the proceedings and the principle of equality of arms between the parties to the trial; see the ECtHR judgment of 06.11.2007 in Chruściński v. Poland (22755/04) and the ECtHR judgment of 15.10.2008 in Łaszkiewicz v. Poland (28481/03).

defence is left with often only a few minutes to read the prosecutor's arguments and evidence before the hearing begins, the outcome of which will determine whether or not someone will spend the next few months in detention.

Potential Legal Obstacles to the Implementation of the Right to a Fair Trial

The regulations may also constitute a potential threat to the implementation of the right to a fair trial. This occurs when, using recognised rules of interpretation, the regulations oblige officers to act in accordance with the standards of the right to a fair trial, but at the same time does not provide any control mechanism as to whether this is happening, or effectively excludes liability when it is found that a violation of the standards of the right to a fair trial does occur after all.

Example: Openness of court proceedings may be excluded exceptionally, in cases specified by law, not only by virtue of law, but also by the court when it finds grounds for doing so and perceives a need to do so. The court may exclude the openness of the proceedings *ex officio* or at the request of an authorised entity. In situations where it is the court that decides to exclude openness, it affects the way in which the right to a fair trial is implemented and the participants in the proceedings, whose rights and interests the openness is supposed to safeguard, may be opposed to it. Meanwhile, the court that has the power to make this decision finds itself in a situation of potential conflict of interest, because the participation of the public and media serves, among other things, to control its work. The problem is that the court in this situation may decide to exclude the openness arbitrarily, it does not have to justify it, and the regulations of Polish law do not provide for the possibility of appealing against this decision to another court.[38] This legal state of affairs poses a threat to the implementation of the right to a fair trial, as the fairness of the judge, which the public is supposed to guard, is a prerequisite for the public to be able to enter the courtroom and exercise its controlling role.

Obstacles to the Implementation of the Right to a Fair Trial Resulting from the Characteristics of the Institutions Entrusted with the Justice System

In the context of the proposed typology, I use the term "institution" in the narrow sense, referring to state organisations established to carry out specific public tasks.

[38] The Commissioner for Human Rights, prof. M. Wiącek, appealed to change this state of affairs by postulating the introduction of an appeal procedure against the decision to exclude openness, which could be initiated by a party to the proceedings; see the speech of the Commissioner for Human Rights no. VII.510.32.2022.PKR of 20 April 2022 to the Minister of Justice, https://bip.brpo.gov.pl/sites/default/files/2022-04/Do_MS_jawnosc_postepowan_20.04.2022.pdf (accessed: 04.09.2024).

The entire state is responsible for implementing the right to a fair trial. In a system where competences are divided between the legislative, executive and judicial powers, it is not possible to achieve fullness of implementation without their cooperation. Nevertheless, in the case of the right to a fair trial, the role of the legislature and the executive is primarily to ensure appropriate conditions for the courts to operate. Alternatively, to ensure their quality and accessibility for the public.

Therefore, realisation of the right to a fair trial may be hindered by various obstacles related to the condition of the resources available to the justice system. The way in which the institutions that indirectly influence the efficiency, independence, impartiality or even reliability of the courts – the judicial councils, legal professional organisations, legal apprenticeships, disciplinary bodies, the system of appointment and evaluation of judges and, last but not least, the financing of the courts[39] – operate is also significant. Without forgetting all the potential sources of problems, I propose to distinguish the obstacles to the implementation of the right to a fair trial related to the state or modus operandi of justice system institutions into two subcategories only: obstacles related to the state of their infrastructure and obstacles related to the characteristics of their personnel.

[39] *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World*, eds. K. Malleson, P.H. Russell, University of Toronto Press, Toronto 2006; B. Hayo, S. Voigt, *Explaining de facto Judicial Independence*, "International Review of Law and Economics" 2007, vol. 27, no. 3, p. 269–290, DOI: 10.1016/J.IRLE.2007.07.004; M.L. Volcansek, *Appointing Judges the European Way*, "Fordham Urban Law Journal" 2007, vol. 34, no. 1, p. 363–385; C.G. Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, "Georgetown Journal of Legal Ethics" 2008, vol. 21, p. 1259–1281; C.G. Geyh, *Methods of Judicial Selection & Their Impact on Judicial Independence*, "Daedalus" 2008, vol. 137, no. 4, p. 86–101; D. Piana, *Beyond Judicial Independence: Rule of Law and Judicial Accountabilities in Assessing Democratic Quality*, "Comparative Sociology" 2010, vol. 9, no. 1, p. 40–64, DOI: 10.1163/156913210X12535202814351; J. Riedel, *Training and Recruitment of Judges in Germany*, "International Journal for Court Administration" 2013, vol. 5, no. 2, p. 42–54, DOI: 10.18352/ijca.12; T. Smith et al., *Selecting the Very Best. The Selection of High-Level Judges in the United States, Europe and Asia*, Kirkland & Ellis, Due Process of Law Foundation, 2013; C. Kulesza, *Systems of Selection and Appointment of Judges and the Issue of Judicial Independence: American, English and German Experiences*, "Białostockie Studia Prawnicze" 2016, vol. 20/A en, p. 121–132, DOI: 10.15290/BSP.2016.20A.EN.09, https://repozytorium.uwb.edu.pl/jspui/handle/11320/7040; B. Pilitowski, M. Hoffmann, B. Kociołowicz-Wiśniewska, *Wyniki badania procesu selekcji kandydatów na wolne stanowiska sędziowskie w latach 2014–2017*, in: *Konstytucja. Praworządność. Władza sądownicza. Aktualne problemy trzeciej władzy w Polsce*, eds. Ł. Bojarski et al., Wolters Kluwer, Warsaw 2019; K. Šipulová et al., *Judicial Self-Governance Index: Towards Better Understanding of the Role of Judges in Governing the Judiciary*, "Regulation & Governance" 2022, vol. 17, no. 1, p. 22–42, DOI: 10.1111/rego.12453; B. Pilitowski, *Niezależność sądownictwa a proces wyboru sędziów w Królestwie Niderlandów*, Fundacja Court Watch Polska, Toruń 2022.

Obstacles Related to the State of the Infrastructure of the Justice System

This category of obstacles includes problems hindering the implementation of the right to a fair trial related to the number, layout, functionality and condition of court buildings, the functionality and condition of their equipment, the technical means used, the tools used to communicate with the participants in the proceedings, etc. What is important in this respect is the adequacy of adapting the infrastructure to the legitimate needs and actual capacities of society within the financial and organisational potential of the state.

Example: Council of Europe data reveals that Poland spends 0.39% of its GDP on the judiciary. The only European Union country that spends more is the much smaller Slovenia (0.4% of its GDP). Despite this, out of 41 court buildings in Poland examined for accessibility for people with disabilities by Court Watch Poland Foundation,[40] six did not have an entrance of the width provided for by the regulations, i.e. enabling easy use by a person in a wheelchair. Such a person could not get to the next six buildings without assistance because there were stairs leading to the entrance.[41] This means that 30% of the court buildings surveyed were in practice inaccessible to wheelchair users, which is a limitation of access to the justice system for this category of people.

Obstacles Related to the State of the Human Resources of the Justice System

These are obstacles related to the quantitative and qualitative characteristics of the personnel of the justice system in the context of the legitimate needs of society and the objectively existing capacities. Among the various variables that determine the level of implementation of the right to a fair trial, one of the most important is certainly the level of competence of judges. Therefore, the way in which personnel is managed has a huge impact on the state of human resources of the justice system. The key in this area is to ensure the recruitment of people with appropriate predispositions and competences, the development and supplementation of necessary skills and knowledge, the division of tasks and responsibilities adequate to the needs and possibilities, planning processes in the context of rotation, ensuring high motivation and well-being of personnel; so that the right to a fair trial in accordance with the standards can be implemented in reality.

[40] The sample consisted of court buildings of various types selected by teams of volunteers involved in the survey at random and at their discretion (*convenience sample*).

[41] A. Rekowska, B. Pilitowski, *Jak zwiększyć dostępność sądów*…

Example: Among the procedural activities that are most frequently performed by judges, the assessment of the reliability of personal sources of evidence places a particularly heavy responsibility on the shoulders of the judge. This is due, on the one hand, to the importance of witness testimony for the resolution of a significant number of cases, particularly criminal cases, and, on the other hand, to the characteristics of this type of source of information. It is crucial for the judge to recognize the various elements that can affect the accuracy and honesty of witness statements. When assessing the probative value of testimony or explanations, the judge should take into account both the imperfections of human perception, imperfections of human memory and the fact that the person before the judge may (intentionally or not) mislead the court. The level of one of the elements of these competencies – knowledge of the psychology of eyewitness testimony – was checked by Michał Główczewski. He surveyed a sample of 87 criminal judges from all over Poland[42] and concluded that "they had relatively low knowledge of the psychology of eyewitness testimony."[43] 87% of them did not know that a witness's ability to recall small details about a crime is not a good indicator of the accuracy of their identification of the attacker. 64% that the confidence of the witness during the trial is not a good predictor of accuracy in their identification of the defendant as the attacker. 60% that it is not true that the sooner a witness makes an identification during an appearance, the more accurate that identification is. Główczewski also noted that over 90% of the judges surveyed believe in popular psychological myths about hypnosis, the usefulness of the polygraph, or psychological profiling.

In conclusion, he notes:

> Respondents also indicated that they would very much like to be trained in forensic psychology, as they see its huge role in the application of the law. However, the current system of legal education – studies, apprenticeship and continuing training – does not allow future lawyers and trial decision-makers to acquire the up-to-date knowledge of the psychology of testimony necessary for their profession. This creates a potential risk of them making wrong procedural decisions.[44]

[42] 51 women and 35 men, one person did not specify their gender (average age = 43 years). Average length of service: 13 years, shortest: a few months, longest: 34 years. Place of adjudication: 79 judges indicated the district court, 6 – the regional court and 1 – the court of appeal, one judge did not answer this question. The survey was anonymous and was conducted in 2018 among participants of continuing training courses organised by the National School of Judiciary and Public Prosecution at the training centre in Dębe.

[43] M. Główczewski, *Wiedza polskich sędziów i prokuratorów na temat psychologii zeznań naocznych świadków w świetle badania własnego*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2019, vol. 81, no. 2, p. 153, DOI: 10.14746/RPEIS.2019.81.2.11, https://pressto.amu.edu.pl/index.php/rpeis/article/view/19690 (accessed: 23.08.2024).

[44] Ibidem.

Obstacles to the Implementation of the Right to a Fair Trial Resulting from Legal Culture

I define legal culture herein as any intangible cultural elements that modify the operation of positive law. The impact of legal culture on the implementation of the right to a fair trial may also consist in determining or co-determining people's beliefs about their rights and obligations towards the judicial power and *vice versa*. As already noted above, culture exerts an internal compulsion on its people to act in accordance with the patterns resulting from it. Every person is influenced by the culture to which he or she belongs. This also applies to the way in which positive law is applied, or the performance of the obligations arising from it. Hence, the law often produces effects that are different from the legislator's declared expectations. Even when people adapt their conduct to the applicable law, they do not necessarily do so in the way the legislator would expect. Their way of understanding the regulations, responding to the content contained therein and acting within the scope of the regulation will be subject to their legal culture.

Intermezzo – Variety of Obstacles Resulting from Legal Culture and Their Division

In the scientific literature, the term "legal culture" is used in various meanings. An important distinction that should be made at this stage is to distinguish the popular, or general, legal culture of society from various legal subcultures. I use the term "general" legal culture to distinguish it from the second subtype: legal subculture, namely "judicial legal culture", to which I would like to pay special attention. The subculture of people professionally involved in the implementation of the right to a fair trial is, in my opinion, a key, and surprisingly rarely taken into account in research,[45] independent variable of the operation of law, and the right to a fair trial in particular.

Judicial legal culture is not only part of the broader phenomenon of "legal culture", i.e. characteristic of people practicing the legal profession or professions.[46]

[45] See: M. Čehulić, *Perspectives of Legal Culture…*

[46] This is a way of using the term culture characteristic of the sociology of the profession. See, for example, R.L. Abel, *Comparative Sociology of Legal Professions: An Exploratory Essay*, "Law & Social Inquiry" 1985, vol. 10, no. 1, p. 1–79, DOI: 10.1111/j.1747-4469.1985.tb00496.x; T.C. Halliday, *Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment*, University of Chicago Press, Chicago 1987; J. Kurczewski, *Legal Professions in Transformation in Poland*, "International Journal of the Legal Profession" 1994, vol. 1, no. 3, p. 269–282, DOI: 10.1080/09695958.1994.9960382, https://www.tandfonline.com/doi/abs/10.1080/09695958.1994.9960382 (accessed: 20.03.2021); V. Volkov, A. Dzmitryieva,

In Anglo-Saxon literature, the homogeneity of legal culture within a given legal system is often assumed *a priori*. This is due to the fact that in English-speaking countries the most common system for recruiting judges is the appointment of experienced professional attorneys. In many countries, the path to becoming a judge does not lead through an apprenticeship in other professions, and judges differ from professional attorneys or academic lawyers not only in the way of employment, subordination and the type of tasks performed, but also in the way of recruitment, education and professional socialisation. However, judges – even if they will not formally constitute a profession separate from other lawyers, as is the case in the United States – still produce, together with other court personnel, a kind of subculture whose impact on the implementation of the right to a fair trial is much greater than any other.

Elements of the General Legal Culture That Are an Obstacle to the Implementation of the Right to a Fair Trial

This category includes those elements of culture that prevent or hinder the implementation of the right to a fair trial, or invalidate or impair the operation of its rules. Significant obstacles to the implementation of the right to a fair trial may be irenic patterns or religious principles that exclude resolving conflicts between community members to someone outside the community. Too low or false legal awareness is also a cultural factor that *de facto* limits access to court.

Example: One of the important elements of a fair hearing of a criminal case is the observance of the principle of the presumption of innocence. It is among other things to ensure that the suspect or defendant is not stigmatised, as this could have a negative impact on the impartiality of the court – biasing the court against the defendant either directly or indirectly, as a result of the society becoming convinced of guilt or the need for severe punishment and the pressure exerted on the court as a result.[47] Meanwhile, the Polish criminal procedure calls one of the measures securing preparatory proceedings in a manner confusingly similar to a criminal measure applied after the court has found the perpetrator of the prohibited act guilty. This refers to "tymczasowe aresztowanie"

Recruitment Patterns, Gender, and Professional Subcultures of the Judiciary in Russia, "International Journal of the Legal Profession" 2015, vol. 22, no. 2, p. 166–192, DOI: 10.1080/09695958.2015.1086351, https://www.tandfonline.com/doi/abs/10.1080/09695958.2015.1086351 (accessed: 03.01.2023).

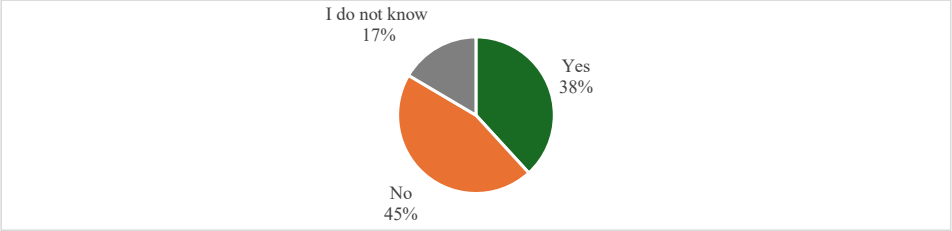
[47] The ECtHR recognises that the principle of presumption of innocence applies not only in the actual criminal proceedings, i.e. after the indictment is brought to court, but also at the preparatory stage and applies in all incidental proceedings, e.g. in detention proceedings; see the ECtHR judgment of 26.03.2002 in Butkevičius v. Lithuania (48297/99) and the ECtHR judgment of 08.04.2010 in the case of Peša v. Croatia (40523/08).

(Eng. pre-trial detention), the name of which may be confused with the punishment of "areszt" (Eng. jail).

It is all the more easy to make a mistake because both legal institutions can only be applied by a court, and both involve deprivation of liberty, and people who are "pre-trial detainees" are placed in a place also called "areszt" (Eng. jail). Moreover, in public discourse, even professionals use the expression "tymczasowy areszt" (Eng. temporary jail). in the context of a preventive measure, although such a term does not appear in the law. While, at least lawyers, do it being aware of the different functions of jail and pre-trial detention, using such a term in public space (where the recipients of the message are not only professionals) may contribute to deepening the false legal awareness of society.[48]

One of the consequences of confusing these legal institutions is to equate a decision on pre-trial detention with a prejudgement of guilt. In a survey on a nationwide representative sample by age, education and place of residence (CAWI, N=1032), which was conducted for Court Watch Poland Foundation at the end of 2022 by the Pollster Research Institute, the question was asked whether it is possible to lawfully arrest a person who is innocent. The correct answer, "Yes", was given by (only) 38% of respondents, ignorance was declared by 17%, and the largest proportion of respondents answered incorrectly with "No".[49] One can conclude from this that the majority of Poles are not aware that, when deciding on detention, the court does not prejudge guilt, but only the need to protect criminal proceeding.

Chart 1. Distribution of answers to the question "Do you think it is possible to lawfully arrest a person who is innocent?" (N=1032)



Source: own study based on data from Court Watch Poland Foundation.

[48] As a side note, it should be noted that the term "false awareness" in this context means inconsistent with the content and official purposes of the law. At the same time, it may be "true" to its real, albeit hidden, purposes or the practice to which it leads. It should be remembered that Poland ratified the ECHR and adapted the criminal procedure to it only in the last decade of the 20th century. Even half a century ago, the use of pre-trial detention for repressive purposes was allowed, and even today one can find voices ready to defend the legitimacy of the procedural authorities by using pre-trial detention for non-procedural functions; see, for example, A. Szumski, *Funkcja prewencyjna tymczasowego aresztowania*, "Prokuratura i Prawo" 2012, no. 7–8, p. 139–147.

[49] B. Pilitowski, *Stosowanie tymczasowego aresztowania w Polsce*…, p. 5–6.

Table 1. Distribution of answers to the question "Do you think it is possible to lawfully arrest a person who is innocent?"

Do you think it is possible to lawfully arrest a person who is innocent?	**N**	**%**
Yes	394	38.2
No	468	45.3
I do not know	170	16.5
Total	*1032*	*100.0*

Source: own study based on data from Court Watch Poland Foundation.

In these circumstances, the right to the presumption of innocence can be described as defective. Even if no public official directly calls the suspect guilty, when informing that the suspect has been detained on remand, a prosecutor, court spokesman or journalist is understood by a large part of the population the person is being punished, so his or her guilt has been confirmed by the court.

Elements of Judicial Legal Culture That Are an Obstacle to the Implementation of the Right to a Fair Trial

This category includes those elements of the judicial legal culture that prevent or hinder the implementation of the right to a fair trial, or invalidate or impair the operation of its rules. I refer to judicial legal culture as all intangible elements of the culture of the justice system officials that influence the operation of positive law. These include, for example, values, views, beliefs that influence judges' consciences or sense of justice, as well as the principles followed in practice, but also customs or patterns of action by judges and court personnel in certain situations.

Example 1: Some practitioners (including judges) point out that in criminal proceedings in Poland one cannot always be sure of compliance with the standards of the presumption of innocence and impartiality.[50] This is most likely due

[50] M. Czajka, *Trzeba przypominać, że mamy do czynienia z żywym człowiekiem – rozmawiał Paweł Kubicki*, "Dziennik Gazeta Prawna" 03.01.2023; W. Gontarski, *Domniemanie niewinności, in dubio pro reo i przesłanki przyjecia postanowienia o tymczasowym aresztowaniu w prawie Unii Europejskiej. Część 3*, "Europejski Przeglad Prawa i Stosunków Miedzynarodowych" 2023, no. 4, p. 185–208; W. Jankowski, *Zasada domniemania niewinności – dlaczego praktyka tak różni się od teorii (cz. 1)*, "Palestra" 2013, vol. 9–10, p. 54–62, https://palestra.pl/pl/czasopismo/wydanie/9-10-2013/artykul/zasada-domniemania-niewinnosci-dlaczego-praktyka-tak-rozni-sie-od-teorii-cz.-1 (accessed: 27.08.2024); W. Jankowski, *Zasada domniemania niewinności – dlaczego praktyka tak różni się od teorii (cz. 2)*, "Palestra" 2013,

to a specific understanding or ignorance of certain procedural principles, e.g. *in dubio pro reo*, or the presumption of innocence by a significant number of Polish criminal judges. The judges in Główczewski's survey mentioned above, asked whether they would be willing to convict the defendant if the only evidence supporting their guilt was the testimony of an eyewitness, 2/3 of them would render a convicting judgment in such a situation. The author of the survey rightly comments that this is a surprisingly large number of positive answers, considering that

> [t]his question itself contains little information about this testimony – was it reliable, complete, detailed, certain? The judges could mark the answer "I do not know/I have no opinion", expressing their scepticism and remembering the limitations of eyewitness testimony. Meanwhile, as many as 66% of the surveyed judges would render a convicting judgment in such a situation.[51]

Example 2: In the light of the most common reasons for the Strasbourg Court awarding compensation from Poland for violations of the ECHR in connection with the use of pre-trial detention (applying this measure without sufficient reasons or for too long), a survey was conducted on a nationwide sample of over 300 criminal cases in which this preventive measure was applied.[52] The most important conclusions of the survey include: the application by judges of the maximum period of detention from the beginning in the vast majority of the examined cases (93% of cases from the jurisdiction of regional courts and 83% of such cases from district courts), the application of this measure most frequently until the end of the judicial proceedings (in 92% of finally and legally concluded cases from regional courts and 72% of such cases from district courts) and laconic justifications for decisions on deprivation of liberty (e.g. the analysis of the possibility of application of non-custodial preventive measures, of which there

vol. 11–12, p. 168–175, https://palestra.pl/pl/czasopismo/wydanie/11-12-2013/artykul/zasada-domniemania-niewinnosci-dlaczego-praktyka-tak-rozni-sie-od-teorii-cz.-2 (accessed: 27.08.2024); A. Krupa, *Arkadiusz Krupa: obowiązuje zasada domniemania winy*, newsbar.pl, 15.01.2019, https://newsbar.pl/arkadiusz-krupa-obowiazuje-zasada-domniemania-winy/ (accessed: 30.11.2022); P. Wiliński et al., *Stosowanie tymczasowego aresztowania w Polsce. Analiza i rekomendacje*, Lublin–Poznań–Warsaw 2008, https://panstwoprawa.org/wp-content/uploads/2015/11/Stosowanie-tymczasowego-aresztowania-w-Polsce.pdf (accessed: 04.10.2020).

[51] M. Główczewski, *Wiedza polskich sędziów i prokuratorów na temat psychologii zeznań naocznych świadków w świetle badania własnego*…, p. 152.

[52] The survey was conducted using the court files content analysis method. The sample consisted of 310 criminal cases initiated in 2016–2018 and completed in mid-2019, selected using a stratified random method from 16 district courts and 8 regional courts from the area of 4 appeals (Gdańsk, Kraków, Szczecin and Warsaw).

are eight, took up an average of four lines of text in the analysed justifications). The survey also confirmed the prevalence of justifying pre-trial detention on the grounds that the defendant faces severe punishment (98% of decisions concerning defendants in cases heard by regional courts and 66% by district courts).[53] They confirm the critical views of the representatives of the doctrine that "the irregularities of the practice of pre-trial detention were already pointed out by the ECtHR several years ago, and despite this, the jurisprudential practice has not changed significantly."[54] Reading the reports of non-governmental organisations based on the analysis of case law leads one to conclude that, in fact, both the list of irregularities and the recommendations addressed to the judicature are not changing.[55] On the other hand, a look at statistics from 30 years ago, when it was still the prosecutor who decided on the pre-trial detention of suspects, may lead to the shocking conclusion that the situation has even worsened in some respects – e.g. when it comes to the lengthiness of detentions, which is why Poland regularly loses cases in Strasbourg.[56]

The explanation for the durability of the judicial practice described in this way may be the professional culture of judges. In Poland, its roots go back to the times when the use of pre-trial detention could be decided by the prosecutor[57] and the continuity of a specific *praxis*,[58] an element of which is the "transferring" by judges of responsibility for the practice of using pre-trial detention to the prosecutor's office, although official law places it on the courts.

The hypothesis about the cultural source of this issue is confirmed by some public and behind-the-scenes statements of judges. When asked why on average 90% of motions are granted by courts even in years when their number is growing disproportionately to the growth rate of crime, I had the opportunity to hear from the judges themselves that "judges most often know the prosecutors they work

[53] A. Antoniak-Dróżdż et al., *Analiza praktyki stosowania tymczasowego aresztowania*…

[54] J. Skorupka, *Tymczasowe aresztowanie w praktyce stosowania prawa*, "Palestra" 2021, vol. 1–2, p. 7–24, https://palestra.pl/pl/czasopismo/wydanie/1-2-2021/artykul/tymczasowe-aresztowanie-w-praktyce-stosowania-prawa (accessed: 27.08.2024).

[55] A. Klepczyński, P. Kładoczny, K. Wiśniewska, *Tymczasowe aresztowanie – (nie)tymczasowy problem. Analiza aktualnej praktyki stosowania tymczasowego aresztowania*, Helsińska Fundacja Praw Człowieka, Warsaw 2019, https://www.hfhr.pl/wp-content/uploads/2019/07/HFPC-Tymczasowe-aresztowanie-nietymczasowy-problem-web_01.pdf (accessed: 04.10.2020); P. Wiliński et al., *Stosowanie tymczasowego aresztowania w Polsce*…

[56] Z. Hołda, A. Rzepliński, T. Bulenda, *Prawa człowieka a zatrzymanie i tymczasowe aresztowanie w polskim prawie i praktyce jego stosowania*, "Archiwum Kryminologii" 1992, vol. 18, p. 103–146, https://www.ceeol.com/search/article-detail?id=825790 (accessed: 11.08.2024).

[57] The deprivation of liberty for more than 72 hours solely by court decision was only reinstated with the entry into force of the Constitution of the Republic of Poland in 1997.

[58] P. Kaczmarek, *Kultura prawnicza jako praxis: o sprawczym działaniu*, "Przeglad Prawa i Administracji" 2015, vol. 102, p. 87–100.

with and know that they do not come to them with a motion without cause",[59] or that it is the aftermath of the philosophy of "not disturbing the prosecutor".[60]

The hypothesis about the cultural source of Polish judges' failure to comply with European legal and human standards regarding the use of pre-trial detention is also confirmed by the analysis of statistical data. Firstly, an analysis of 28,682 detention motions examined in 72 randomly selected district courts from all over Poland in 2017–2021 showed that out of 782 judges[61] who examined motions in these courts, 42% of judges did not refuse, not even once, prosecutors to impose pre-trial detention during these five years. Moreover, relatively large differences were observed between the average percentage of granted motions in jurisdiction of various appellate courts (from 83.1% in the Warsaw appellation to 97.5% in the Rzeszów appellation), but also between regions within appellation (e.g. 81.7% in the Bielsko-Biała region and 96.8% in the Gliwice region belonging to the Katowice appellation).[62] It can therefore be assumed that the practice of applying pre-trial detention is also influenced by institutional, organisational and cultural factors of a local nature, the identification of which would require further research.

Conclusions

All types of obstacles can, in practice, impede the realization of the right to a fair trial. The fundamental distinction among them lies in the amount of time and effort required to eliminate them. Statutory law regulations are the most compliant to deliberate modifications, capable of producing outcomes even within a few months. Modifications related to the resources and organization of institutions are more difficult to execute, and even if the scale is limited, they frequently necessitate several years of effort to achieve the intended outcomes. Investments, while needing well-considered planning and thorough implementation, reveal their full benefits only after personnel have gathered experience in utilizing them. The most formidable challenge, however, is posed by the obstacles stemming from the legal culture. This aspect is not only the most complex and challenging to model, but it also demands the utmost patience for change, as

[59] The author's private conversation with a district court judge with approximately 20 years of experience in a small town.

[60] A public answer to the author's question from a regional court judge with approximately 20 years of experience adjudicating in one of the metropolises.

[61] The judges in the sample examined an average of 31 motions in the years 2017–2021, Media = 21, Min = 1, Max = 648.

[62] B. Pilitowski et al., *Stosowanie tymczasowego aresztowania w Polsce*…, p. 112–122.

even cultures that preserve their continuity by alternation instead of preservation need their bearers have enough time for adaptation. Consequently, efforts to enact deep changes within the legal system encounter the greatest opposition at the cultural level.

We know that the very resistance to changes within the legal culture is able to reject the changes to an important component of the legal system carried out by the legislative and executive powers, and ultimately lead to its restoration to its original shape.[63] Sometimes, a more effective solution than attempting to intervene in the area of culture, e.g. to correct erroneous associations with certain legal terms such as bankruptcy, arrest, jail, may be a procedure from the domain of social engineering involving the renaming of an institution or the establishment, without putting down the old one, of a new institution whose name would not be burdened by previous associations in society or undesirable patterns of use among judges, so that it gradually takes over the function of its dysfunctional predecessor.

In the case of human rights, however, one element of culture cannot be replaced by anything. Let us recall that in order to talk about law as understood by Leon Petrażycki, it is necessary not only to believe that someone is entitled to something (the attributive component), but also that there is therefore an obligation to satisfy this obligation (the imperative component).[64] In the context of the implementation of human rights, the beliefs of people responsible for applying in practice the state's obligations arising from official legal and human norms about their obligations towards the people who come to them, i.e. the intuitive law of public officials, become particularly important. Whether, in their inner and personal sense of justice (conscience), they share the conviction that every human being is actually entitled to these rights and what exactly they are entitled to.

The notion of a "complete" right to a fair trial, as conceptualized by Adam Podgórecki within the sociology of human rights framework, can only be realized when the inherent right understood by those entrusted by society and the state with the enforcement of fair trial rights compels them towards an intrinsic sense of duty. The central question concerning the practical realization of the right to a fair trial pertains to the condition of judicial legal culture. While the institutions of the justice system and the statutes of positive law can ensure

[63] R. Montana, *Adversarialism in Italy: Using the Concept of Legal Culture to Understand Resistance to Legal Modifications and its Consequences*, "European Journal of Crime, Criminal Law and Criminal Justice" 2012, vol. 20, no. 1, p. 99–120, DOI: 10.1163/157181712X615258.

[64] See: R. Cotterrell, *Leon Petrażycki and Contemporary Socio-Legal Studies*, "International Journal of Law in Context" 2015, vol. 11, no. 1, p. 12.

the formal implementation of human rights, it is the individuals within these institutions, through their application of the law, who fill it with substance. In the absence of an intrinsic sense of duty among the individuals upon whom the enforcement of the right to a fair trial relies – such as judges, prosecutors, public attorneys, and even the administrative staff of the courts – to provide every individual with a fair, public trial by an impartial, competent, independent, and unbiased judges, without undue delay, the ideal of a "complete fair trial" remains unachieved, resulting only in a "crippled", formal imitation.

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