Confidence in Justice as a Moral Emotion and Five Mechanisms That Support Its Renewal or Enhancement

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Confidence in Justice as a Moral Emotion and Five Mechanisms That Support Its Renewal or Enhancement. The aim of the present study was to analyse five factors which must be applied and enhanced to restore public confidence in the justice system of Slovakia: transparency, intelligibility, timeliness, personal responsibility and professional ethics. We considered trust as a moral emotion from the perspectives of the philosophy and psychology of law. Using this approach, we analysed both the current situation and the new legal norms under preparation. Finally, we devised our own proposals to improve the legal system in Slovakia.

Keywords: *transparency, intelligibility, timeliness, personal responsibility, professional ethics*

Introduction

Confidence in justice and the system that ensures it are basic preconditions for a functional society. The main indicators of confidence in the justice system are satisfaction of the general population and the willingness of economically active entities to operate within the sector. Social philosophers, psychologists, sociologists, political scientists, and theorists of the state and law have long studied the determinants and selected discriminators that influence our perception of the reliability and enforceability of the law, as well as of the mechanisms that benefit or interfere with the function of the justice system.

After the widespread media reporting of the Threema case and the operations of the National Criminal Agency (NAKA),[1] such as Tempest (judicial bribery), Mills of God (prosecutorial bribery), Gale (judicial corruption), and Purgatory (investigatory corruption), public confidence in the Slovak judiciary and justice system has experienced one of its most significant declines since the Slovak Republic was established.[2]

Therefore, in the present study, we focused on five tools that should help improve the justice system of the Slovak Republic and thus restore public confidence in the

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[1] The Slovak version of the National Crime Agency (UK), or Federal Bureau of Investigation (US).

[2] In November 2019, up to 72% of citizens did not trust the Slovak judiciary. In this way, Slovakia ranked second-to-last among EU countries in terms of trust in the judicial system. Eurobarometer EU, EU Justice scoreboard 2019. July 2020, before the media coverage of the latest judicial scandals, saw similar results. EU Justice Scoreboard 2020. Available at https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2020_en.pdf.

functionality, lawfulness and reliability of the judiciary. We conceive trust as a moral emotion; that is, as a mental state 'that is linked to the interests or welfare of either society as a whole or at least of persons other than the judge or agent'.[3]

1. Transparency

In 1776, Jeremy Bentham wrote the book *A Fragment on Government,* in which he introduced the basic ideas of utilitarianism and moral and legal philosophy. In the introduction to the *Principles of Morals and Legislation* (written in 1780, published in 1789), he subsequently developed his theory of criminal law, culminating in the famous idea of the Panopticon (*Panopticon; Or, The Inspection House*, 1791),[4] which described the radical reform of prison and the entire social system. Notwithstanding the contemporary conception and critique of this infamous idea, the principle of visibility and transparency has become a basic tenet of the modern understanding of the state and law in Western culture. The central principle of Bentham's proposals was to transform the dark and invisible areas in society to make them bright and under control. According to Bentham, this should result in well-disciplined prisoners, while allowing for supervision of the guards, and thus a solution to the age-old question, 'Who will guard the guards themselves'.[5] Bentham realised from the beginning that the Panopticon principle could be applied to other areas of social life, as well as to prisons.[6] Indeed, as Michel Foucault[7] demonstrated, the idea of panopticism and supervision became one of the most effective ways to impose discipline and control the use of power in the modern epistemic.

The requirement for transparency and (public) supervision is by no means new. It can be found to varying degrees and in the Greek polis and ancient Rome, as well as in Machiavelli's principle of the public prosecutor,[8] Sartre's conception of conscience,[9] and Popper's concept of an open society.[10] For a long time, the transparency of court decisions has been strengthened in the Slovak legal system by requiring courts to publish their judgements and make them accessible, under the conditions and to the extent provided by *Section 82a of Act No. 757/2004 Coll. on courts*. The details of the publication of court decisions are regulated by the *Decree of the Ministry of Justice of the Slovak Republic on the publication of judicial decisions No. 482/2011 Coll.* Furthermore, in

[3] HAIDT, J.: The Moral Emotions. In Davidson, Richard; Scherer, Klaus; Goldsmith, H. (eds.): *Handbook of Affective Sciences*. Oxford: Oxford University Press, 2003, p. 855.

[4] BENTHAM, J.: *The Panopticon Writings.* (Ed. Bozovic, M.) London: Verso, 1995, pp. 29-95.

[5] CRIMMINS, J., E. (ed): *The Bloomsbury Encyclopedia of Utilitarianism*. London: Bloomsbury Publishing, 2017, p. 396.

[6] He suggested it be used in factories, asylums, schools and hospitals. Cf. GOLD, J.; GOLD, I.: *Suspicious Minds: How Culture Shapes Madness*. New York: Simon and Schuster, 2015, p. 210.

[7] FOUCAULT, M. *Dozerať a trestať* [*Discipline and Punish*]. Bratislava: Kalligram 2000, p. 196.

[8] MACHIAVELLI, N.: *Vladár.* [*The Prince*] Bratislava: Tatran 1992, pp. 30-32.

[9] SARTRE, J. P.: *Existencialismus je humanismus.* [*Existentialism Is a Humanism*]. Praha: Vyšehrad, 2004.

[10] POPPER, K. R.: *Open Society and its enemies.* London: Routledge, 1945.

accordance with *Act No. 211/2000 Coll. on free access to information*, courts must make all judgements public, including void prosecutions and those rejected because the case had no merit.[11] These measures have increased the transparency of court decisions by making the outcomes publicly available, thus bringing them into the light and allowing assessment by the general public.[12] However, as numerous publicised cases and public opinions have shown, this legislation currently provides insufficient public oversight for several reasons.[13]

The practical application of justice in the Slovak Republic is influenced by the economic and financial connections between the parties involved in investigations or court proceedings; these lead to a risk of prejudice in the proceedings. Such factors are unacceptable because they compromise the impartiality of decision-making and the equality of the parties involved in a case. As such, they could affect the trial itself or the outcome of the proceedings outside the so-called visible area. These factors most often include direct or indirect corruption, as well as personal, economic and financial links that lead to corruption or bending of the law.

1.1.a) *Act No. 385/2000 Coll. on judges and lay judges* obliges judicial representatives to declare their assets and the assets of their immediate family members—their spouses and minor children. However, this amendment has proved to be inadequate. In practice, property acquired in this way can be made less visible by being signed over to a member of the extended family or associate, as may have been occurred in several high-profile cases, such as those of the Head of the Administration of State Material Reserves of the Slovak Republic, Kajetán Kičura, and former state secretary of the Ministry of Justice of the Slovak Republic, Monika Jankovská. A person who is obliged to disclose assets must only do so if those assets are legally available to them; they need not disclose assets that they have placed into the ownership of others, such as their parents or adult children. Broadening the circle of people who must disclose their assets when taking office to include investigators and other public officials, in addition to judges, would limit the

[11] Just as it was necessary to enforce several mechanisms to increase transparency of the judiciary, such as disclosure of close relatives with judicial power in the judicial application process, disclosure of assets had to be fought for, because the legislation was challenged in the Constitutional Court for possible incompatibility with the constitution. See Decision of the Constitutional Court of Slovakia no. PL. ÚS 102/2011 regarding the objection of 37 deputies of the National Council of the Slovak Republic, led by Róbert Madej.

[12] The need to simplify public access to the proceedings of criminal trials is an urgent issue in many countries. In the United States, the 'JUSTFAIR' platform (Judicial System Transparency through Federal Archive Inferred Records) was recently created. It is a database of criminal sentencing decisions made in federal district courts and was created using data from public sources (the United States Sentencing Commission, the Federal Judicial Center, the Public Access to Court Electronic Records system, Wikipedia) comprising nearly 600,000 records from 2001–2018 (CIOCANEL, M. V. et al. JUSTFAIR: Judicial System Transparency through Federal Archive Inferred Records. In *PloS one*, vol. 15, no. 10, 2020, e0241381, doi: 10.1371/journal.pone.0241381).

[13] For example, the American International Foundation for Electoral Systems (IFES) issued a toolkit – the 'Judicial Transparency Checklist' that covers 24 important areas indicating and promoting judicial transparency (HENDERSON, K. et al.: Judicial Transparency Checklist: Key Transparency Issues and Indicators to Promote Judicial Independence and Accountability Reforms. Washington DC: IFES 2003).

efforts to circumvent the obligation of disclosure of property by making over one's property to relatives or potential heirs. After all, the stronger the legal or moral claim that leads to the transfer of property rights of public official to a relative, the greater the willingness to sign over the property. The declaration of the assets of public officials could be made more transparent by expanding the circle of family members whose assets must be disclosed to include parents, adult children or people living in the same household. Admittedly, it would still be possible to circumvent the obligations, as possessions could be hidden with more distant family members and the obligation could not be implemented *ad infinitum*. Nonetheless, the willingness to undertake such circumvention could be partially reduced. Given the potential invasion of privacy, the appropriateness of such an encroachment on individual rights must be weighed against the possible benefits that arise from the potential inheritance of assets acquired from illegitimate income received while holding the position of judge, prosecutor, investigator or other public official.

1.1.b) Ownership information is only publicly available in the case of property and land held within the territory of the Slovak Republic, so any property elsewhere is not accessible to control. Similarly, because of bank secrecy and other obstacles, it is difficult to check whether asset declarations are complete in terms of movable assets, property rights and other property valuations. One possible solution is the open control of financial circumstances[14] by the public.[15] Another is a comprehensive overview of the structure of these rights and the introduction of new powers that allow the Judicial Council or higher judicial body to examine the assets of judges or judge candidates when they appear to own property that exceeds their legal income or their annually declared assets.

1.1.c) Some cases have demonstrated that public figures often use the real estate or other property rights of third parties without any proven relationship with them. In this regard, Sections 336c and 336d extended the obligation to establish a reason, forming the foundation of a new offence of undue advantage; that is, the offer and acceptance of bribes.[16] This legislation obligated claimants to provide evidence for any legal claims of a proprietary

[14] The bill on judicial reform is currently in the legislative process after its first reading in the National Council of the Slovak Republic. See: https://www.nrsr.sk/web/Default.aspx?sid=zakony/zakon&MasterID=7971 [The bill was adopted on December 9, 2020 and it was published in the Collection of Laws as the Act No. 423/2020 Coll., editor's note].

[15] We understand the term 'open control' to refer to the public availability of the financial circumstances of public officials. Currently, the data are only available to the Judicial Council to allow formal assessment of possible discrepancies between the income and property of judges. However, this has proved to be ineffective and fails to address the handling of property without formal ownership rights.

[16] Act No. 312/2020 Coll. Section 336c, (1) *'Any person, who as a public official, for himself or another person, receives, requests or accepts the promise of a bribe in connection with the exercise of his/her position or function, either directly or through an intermediary, shall be punished by imprisonment of up to three years'.* Section 336d (1) *'Whoever, directly or through an intermediary, gives, offers or promises a bribe to a public official or another person in connection with the position or function of the public official, shall be punished by imprisonment of up to two years'.*

or non-proprietary nature that have no immediate legal basis and whose value exceeds 200 EUR. In addition, the legislation addressed the acceptance of bribes as constituting an undue advantage to a public official or a person close to them. The purpose of this legislation was to prevent the acceptance of undue advantage that is counter to morally acceptable behaviour but had not previously been counter to the law.[17] Therefore, when judges, prosecutors, investigators, public officials or their relatives use the privileges resulting from their position, the recipient of the privileges or benefits must be able to prove that they have received no undue advantage, or that the advantage received was based on a legitimate and rightful claim. However, it is difficult to control the acceptance of small, daily advantages, whether one-off or repeated. Therefore, in addition to permanent professional supervision, property of public officials should be subject to public oversight. Indeed, the most effective tools for detecting the immoral or illegal actions of judicial representatives are the public and media, applying the principles of the *Panopticon*.

1.2. Publication of the fully defined property contracts of judges, prosecutors and public officials could serve as an auxiliary tool to clarify the use of privilege by judicial representatives. In particular, leases for immovable and movable assets should be published when the value of the property exceeds a certain predetermined amount. This would eliminate the appearance of disproportionate advantage brought on by suspiciously low prices, such as when a public official rents an immovable property or a car to perform their duties.

1.3. Following the example of FinStat,[18] the complexity of judicial relations would be further clarified if a visual network of the personal[19] and economic[20] relationships of judicial representatives were created. This would help eliminate indirect corruption and bias in decision-making.

2. Intelligibility

The second important element reducing the credibility of the Slovak justice system is the incomprehensibility of decisions and the confusing use of legal language. Similarly to doctors, judges use professional language when performing their duties to achieve the

[17] See the explanatory memorandum and details of the draft Government proposal of the Act on the enforcement of decisions, on the seizure of property and the management of seized property as amended. Available at https://www.nrsr.sk/web/Default.aspx?sid=zakony/zakon&MasterID=7893.

[18] Public financial information on Slovak companies.

[19] That said, according to valid regulations, upon entry to the system, all close relatives in the justice system must be declared. Section 28b Art. 2 of the Act on judges – '*The candidate is obliged to submit the application together with a written statement listing his/her close relatives, 7a) who are judges, employees of the courts, employees of the Ministry, including the budgetary and allowance organisations under the Ministry of Justice, or members of the selection committees, in the following form: name, family name, function and institution. The statement and the application will be made public'*).

[20] We use the term 'economic relationships' to mean, above all, the co-ownership of shares and property connections that could affect the impartiality of decision-making.

highest degree of accuracy in their decisions and reasoning. However, judges' reasoning is often not well understood by the general public, which reduces the acceptability of their decisions. The analogy with medicine is not entirely inappropriate. The final reports of physicians using professional language, abbreviations and diagnosis codes often leave the patient at a loss, whereas in medicine they are routine. For therapeutic reasons, such elements are necessary to identify the diagnosis precisely and thus allow the doctor to instruct the patient regarding what may cause harm or benefit or inform them on the potential courses of action. Formally, the decisions of courts often resemble medical conclusions in that they are phrased using legal language that ordinary people find difficult to comprehend, rather than in an intelligible manner. In particular, the reasoning behind decisions are often inadequate or unclearly formulated, with frequent references to the applicable legislation or past decisions, as well as a focus on the formal and procedural aspects of the proceedings over the content and substantive aspects of the case.[21] This often gives unsuccessful parties the impression that the decision is unfair because they cannot identify with the reasons provided and or even fully understand them.

The principles underlying judicial decision-making are often wholly unclear to disputing parties who are non-expert users of law because judges use unnecessarily complex legal language.[22] The users of such language often do not consider the primary addressee; instead, they write their decisions as if the addressee were a potential appellate body, rather than the primary party in a dispute. Secondly, as decisions are always made public, they are addressed to the general public as well as to the disputing parties. Therefore, the public should be able to understand the statements and reasoning of the judicial authority. In this way, the law can be applied and authorities can explain to the public what is allowed, what is not, and why. In this sense, the courts also fulfil an educational role in our society. When statements are addressed to the general public, the reasoning behind the decisions must be clear and intelligible to them[23]; only later should

[21] In response to the incomprehensibility of law, an initiative called the Plain English Movement (PEM) was launched during the second half of the 20th century (BUTT, P., CASTLE, R.: *Modern Legal Drafting: A Guide to Using Clearer Language*. New York: CUP, 2007). The PEM concentrated on the intelligibility of governmental forms and consumer documents, but its agenda soon extended to the intelligibility of all legislation. 'The fundamental idea promoted by the PEM is that since the law is addressed primarily to ordinary citizens, rather than lawyers and judges, it should be drafted so as to be fully intelligible to those affected by it' (ASSY, R. Can the Law Speak Directly to Its Subjects? The Limitation of Plain Language. In *Journal of Law and Society*. vol. 38, no. 3, 2011, 377).

[22] DUMINICA, R. Means of Ensuring the Intelligibility of the Law. In *Conferința Internațională de Drept, Studii Europene și Relații Internaționale*. no. 3, 2015, p. 617.

[23] This is the informational paradox of legal language, namely that '*the requirement of precision, unambiguity, seems to be in indirect proportion to the requirement of brevity: the more accurate, unambiguous the text, the more extensive'* (GAHÉR, F., MRVA, M., ŠTEVČEK, M., TURČAN, M.: Otvorená textúra pojmov a pravidiel – voda na mlyn pre subjektivizmus v aplikovanej sémantike?[Open Texture of Concepts and Rules – Fuel for the Fire of Subjectivism in Applied Semantics?] *FILOZOFIA*, 75, 2020, no. 4, p. 310). If a text is fully accurate, then it is difficult to understand, and *vice versa*; if it is understandable, then it is insufficiently accurate. (HOLLÄNDER, P.: Paradox právneho jazyka. [The paradox of legal language]. *Kultúra slova*. Vedecko-popularizačný časopis pre jazykovú kultúru a terminológiu [online], 1995, 6. Available at: www.juls.savba.sk/ediela/ks/1995/6/ks1995-6.html).

the statements of the judicial authorities be directed towards the professional public, often using completely different channels of communication and the professional media.

The exaggerated precision of legal language in everyday situations prevents ordinary users of the law from correctly understanding how, why and when a procedure can be applied. Moreover, conflicting decisions are often made by individual investigators, prosecutors and judges in identical or highly analogous cases without a sufficient and clearly convincing justification for the differences.[24] Therefore, the public often feels like the justifications for the judgement are incomprehensible for some reason other than justice or lawfulness.

Another element that makes trials and the resultant decisions obscure is the incorrect application of the principles of independence and impartiality. The term impartiality is often applied when a decision-maker decides unilaterally not to communicate with any of the parties involved. In the pursuit of impartiality and to avoid any possible accusations of bias, judicial authorities frequently decline to communicate their position at all until a decision is made.[25] In this point, we believe that impartiality is being confused with inaccessibility. The law and the way it is applied should be predictable; as such, authorities who apply the law and make decisions based on the law should clearly explain both the regulations and actual principles so that disputing parties can anticipate the regulations under which the law is applied, even while the proceedings are ongoing. This fulfils the educational function of the law enforcement authorities and, more importantly, enhances the reliability and validity of the justice system.

In several past cases involving decisions made by the court or public prosecutor, there was an information gap between legal actors and the general and professional public. The public, partly under the influence of the media, often has certain expectations regarding the development and outcome of proceedings, and these expectations were not met in the aforementioned cases. Many lawyers blamed the public or the media for the discrepancy between the expectations and the decisions themselves. Allegedly, the media had failed to provide objective information and education about the possible development of the proceedings. However, we do not accept that it is the role of the media to educate the public and interpret the law,[26] especially when the media identifies with one of the parties, such as the victims or witnesses. Rather, the information gap and the unreasonable expectations of the public result from inadequate communication of the procedural aspects of the ongoing dispute, as well as the legal principles on which the investigators,

[24] The principle of legal certainty presupposes that the same or similar legal cases should be assessed in the same or similar ways; any difference in procedure must be justified and predictable, and should only be allowed if the appropriate conditions and preconditions are met. ŠTEVČEK, M. et al:. *Civilný sporový poriadok* [*Civil Dispute Order*]. Komentár [Commentary]. Prague: C. H. Beck, 2016, p. 27.

[25] According to *Civilný sporový poriadok* (*The Civil Dispute Order*) a judge must reveal their thought process to the parties in dispute, such as in the preliminary hearing of a dispute, by clarifying their legal opinion. This prevents the parties from being surprised by any decisions (Cf. ŠTEVČEK, M. et al.: *Civilný sporový poriadok.* pp. 27-28). Legal practice must respect this principle to work.

[26] Compare: LIPTÁK, M. Ako sa zmieriť s nevinným Kočnerom [Coming to Terms with a Not-guilty Kočner]. *Sme.* 5 September 2020. Available at https://komentare.sme.sk/c/22481890/ako-sa-zmierit-s-nevinnym-kocnerom.html.

prosecutors or courts reach their decisions. Lawyers and judicial authorities have a responsibility to eliminate this information gap. They must pay due attention to communication and make their processes and principles available to the public by using precise and comprehensible reasoning and by communicating with the public beyond specific ongoing cases. If this function is not fulfilled, an informational gap is created and the legal system is changed into an inaccessible black box resembling a mystical oracle rather than a predictable and reliable functional instrument of justice.

3. Timeliness

The third important element required of a credible justice system is a reasonable temporal framework within which decisions are made. As the saying goes, the wheels of justice grind slowly but fine. Nonetheless, justice should be both reliable and executed in a timely manner.

In the 1980s, the political scientist James Q. Wilson and the criminologist George L. Kelling published their theory of broken windows,[27] according to which a neglected environment encourages both minor and major crimes. This famous polemical theory is based on the belief that if undesirable acts occur and no one attends to the consequences, such as when windows are broken and not immediately repaired, people begin to believe that antisocial behaviour can go unpunished, encouraging further antisocial acts. This hypothesis was based on the earlier experimental findings of the psychologist Philip Zimbardo and were confirmed experimentally, convincing several local governments and companies to incorporate them into their rules and manuals. Unless an undesirable act is immediately condemned and remedied, independent observers may gain the impression that law and order is dysfunctional and therefore lack the motivation to obey them. This can also happen from a temporal point of view. Many court decisions are published[28] a long time after the crime was committed and in circumstances that make it unclear how the judge in question reached their decision.[29] Protracted litigation of this kind has numerous consequences. In particular,[30] observers may assume that the proceedings are less transparent because they lack context and may even conjecture that

[27] WILSON, J., Q.; KELLING, G. L. Broken Windows: The Police and Neighborhood Safety. *Atlantic Monthly 249* (March 1982): 29-38.

[28] According to Section 82a) Art. 1, Act No. 757/2004 Coll. on courts as amended, '*Courts are obliged to publish their decisions within 15 business days of the date of the decision's entry into force. If a decision has not been finally adjudicated by the time of entering into force, the period available to publish the decision shall begin on the date on which the decision was made'.*

[29] The average length of proceedings in civil matters in the Slovak Republic in 2017 was 20.8 months, in commercial cases 21.6 months. See Priemerná dĺžka konania - prehľad pre roky 2004–2017 [Average length of proceedings - Overview of the years 2004–2017]. Available at https://www.justice.gov.sk/Stranky/Sudy/Statistika-priemerna-dlzka-konania.aspx. Other statistics and comparisons (e.g. by the European Commission for the Efficiency of Justice) are available at https://rm.coe.int/rapport-evaluation-partie-1-francais/16809fc058.

[30] In this context, timeliness is also an important economic factor; long-standing disputes impose a burden of time and cost on both the disputing parties and the courts themselves, thereby reducing the courts' efficiency and availability (ECONOMIDES, K. M., HAUG, A. A., McINTYRE, J. Toward, Timeliness in Civil Justice. In *Monash University Law Journal*. vol. 41, o. 2, 2015, 415).

a hidden party has influenced the decision-making process. If a breach of the law is not prosecuted and convicted quickly enough, the public may begin to believe that the system is not functioning properly and start to lose trust in it. Such mistrust has been sown by the perceived non-action of the courts in several trials or investigations involving the activities of oligarchs or influential people, as well as by lengthy or 'endless' trials, during which public trust in the justice establishment declines. One example of such a protracted judicial process is the 19-year-long BMG Invest and Horizont tunnelling case involving J. Majský. Even when a conviction is handed down, it often occurs too late and cannot be implemented. In such cases, the public does not feel any satisfaction, but rather frustration and the belief that crime really does pay. There are a whole series of such decisions and cases, both in the European legal context[31] and the Slovak legal environment.[32] Late justice is no justice. A late decision can be devoid of any meaning for both the parties involved and the public, and can lead to a feeling that justice has been denied (*denegatio iustitiae*).

We know from practice that there is an inverse correlation between the detection rate of criminal acts and the willingness to commit them. Therefore, another important factor that contributes to trust in the judicial system is the timeliness with which justice is executed and wrongdoings are remedied. Such timeliness must not be rare and selective, but should be a general rule which the public can count on.

4. Personal Responsibility

In 2018, the Lebanese essayist, statistician, former trader and risk analyst Nassim Nicholas Taleb published the book *Skin in the Game: Hidden Asymmetries in Daily Life.* In this work, he discussed the causes and consequences of economic crises and the impact of spreading asymmetric risk on individual actors. He pointed out that one of the most common reasons for failure and subsequent mistrust in the economic system is that those who make the bad decisions bear almost no responsibility for them. As such, they do not have their skin in the game and are essentially invulnerable.[33] Taleb's reasoning can also be applied to the field of law. The legal system is based on the independence of the judiciary from other components of power and on the impartial and unbiased decision-making of judges. Judges are therefore guided, above all, by their legal opinion and conscience. There is no legal mechanism to penalise 'bad legal opinions', unless there is a demonstrable case of abuse and bending of the law (*Section 326a of Act No. 312/2020 Coll. – Act on the enforcement of decisions, on seizure of property and management of seized property as amended*). A new criminal law in Slovakia refers to judges, lay judges, arbitrators or public officials who enforce the law and rules arbitrarily, in clear conflict

[31] For example, the European Court of Human Rights decision in the case of Maxian and Maxianova v Slovak Republic, application No. 43168/11, 7 January 2014.

[32] E.g. II. ÚS 865/2016.

[33] TALEB, N., N. *Skin in the Game: Hidden Asymmetries in Daily Life.* New York: Penguin Random House, 2018, p. 219.

with the law, in favour or to the detriment of one of the parties in court proceedings.[34] However, Taleb's aim was not just to make bankers and traders criminally liable. In his opinion, their own investment involvement in the transactions they make is more important. A banker who operates with someone else's money is, in principle, untrustworthy if he is not liable for faulty investments. Similarly, in the case of lawyers, remuneration should be derived from 'benefits' and 'losses' (not just 'profits').[35] However, the commodity that is competed for in the judiciary is not just legality; trust in justice and its system are equally if not more important. Therefore, following Taleb's logic, public officials should be held publicly accountable for their decisions.

Several lawyers and politicians have suggested that judges or other public officials should bear personal responsibility for the performance of their duties. This means that anonymous decisions taken by collective bodies or boards, which are still in the minority as far as judges are concerned, should be made public and their decisions and legal opinions justified to the public. Connecting faces to actions is the most natural way to combine personal integrity in decision-making with responsibility for decisions and actions. In most other professions, this is a natural process.

In practice, some argue that individual judges, judges on sentencing councils and prosecutors in particular should be kept anonymous to protect them from defendants.[36] However, this is a weak argument, because defendants already know their faces from the hearings. Nowadays, it is easy to obtain sensitive information that could lead to criminal activity directed against a specific person in the judiciary.

A much more serious argument against certain bodies in the judiciary making statements to the public is that they are ill-prepared to face the media. This should be remedied with training courses and practice. If we want judicial representatives to improve the legal awareness of our society, they must take personal responsibility for their own decisions and reasoning, and they should be prepared to make public statements relating to matters of justice and law. It is evident that some judges would not mind if this were the practice today. Through media coverage, their faces could become well-known, and many could grow into legal and moral authorities in society, with great personal influence and charisma.[37] However, in other cases, the pressure on the professional and moral integrity of judicial

[34] *'Any person, who as a judge, a lay judge or an arbitrator of an arbitral tribunal, exercises power arbitrarily and harms or favours one party by his/her decision, shall be punished by imprisonment for between one and five years'*.

[35] We use the term 'profit' to mean any benefit or loss as defined by game theory, especially gains in proceedings and reputation, rather than simply economic benefit—the material difference between costs and revenues, in this case remuneration for successful disputes.

[36] For example, see the comment by the spokesperson for the Supreme Court, Boris Urbančík, on the Supreme Court's unified management position, published in daily Denník N on 25th April 2016. Available at https://dennikn.sk/443594/tvare-sudcov-webe-nas-nedohladne/.

[37] In this context, the statement made by a criminal court judge in a closely watched case proved most enlightening: in the first instance a verdict was delivered, which did not meet public expectations. In a private interview, the proponent of the decision stated that, although he would willingly have shown his face publicly before that, he suddenly found himself under such public pressure that he preferred situations in his personal life where he did not have to be publicly identified with his name. This demonstrates both how the public can put pressure on a judge and how the situation is made easier if public officials do not have to show their faces to the public.

representatives could intensify. Indeed, because the link between judges' personal life and professional practice is hidden, their integrity often falters considerably.

As game theory studies show, reputation and personal history are the best predictors of cooperation and likely behaviour. Unfortunately, if a reputation is not associated with a face, personal responsibility is often eliminated and replaced by institutional and systemic responsibility. Politicians or bankers who are responsible for bad decisions can easily be hired in new positions, because the public cannot connect their names and faces to poor decisions. On the other hand, reputation among a relatively small group of insiders, as opposed to public reputation, is only a small obstacle to the inconsistent and unreliable performance of duties, especially given the shortage of personnel in the justice system.

5. Professional Ethics

Judicial representatives often call for internal, expert solutions as well as the internal cleansing of the judiciary. We believe that professionalism, professional ethics and honour are the most effective and safest mechanisms for purging the judiciary and the most effective tools for overseeing the virtue of the justice system. After all, who else can objectively and comprehensively assess the credibility and reliability of individual representatives of the judiciary, if not insiders, who are the most knowledgeable and erudite?

In principle, this line of reasoning seems convincing, but the facts indicate otherwise. Internal and professional organisations often seem unable to objectively address their own problems, either because of personal connections, the dysfunction of internal mechanisms, or a loss of sensitivity to anomalies in the required community ethos. This is one reason why so many personal and systemic failures have occurred at almost all levels and areas of judicial life. Furthermore, the internal self-cleansing of the justice system is not possible for systemic reasons. Since the days of Popper's *Open Society and its Enemies*,[38] investigators have known that the most effective way to eliminate erroneous strategies and ways of thinking in any community is not to close that community, but to keep it open to any attempt to falsify individual claims.[39] Opening a community to outsiders allows it to recognise aspects that it can no longer see due to accepted modes of thinking. After all, many of the changes currently occurring in the judiciary are the result of journalists and whistle-blowers reporting wrongdoing, which has often forced professional organisations and institutions to investigate and resolve such situations. That said, in some cases, no such resolution has yet come to pass, sometimes because the misconduct must be resolved through criminal proceedings rather than at the level of professional ethics, indicating that the judicial community holds the attitude that if the criminality of a deed is not proven,

[38] POPPER, K., R.: *Open Society and its Enemies.* London: Routledge 1945.

[39] It is often overlooked that Popper's epistemological conclusions prompted him towards his work *The Open Society and Its Enemies.* This is also apparent from the order in which his works were published: [*The Two Fundamental Problems of the Theory of Knowledge*] in 1930–33 (as a typescript circulating as *Die beiden Grundprobleme der Erkenntnistheorie*), [*The Logic of Scientific Discovery*] in 1934 (as *Logik der Forschung*, English translation 1959), *The Poverty of Historicism* (1936), *The Open Society and Its Enemies* (1945).

there can be no problem with the ethics of such actions.[40] However, the public takes a different view and considers such conduct to be a problem, suggesting that the sensitivity of the judiciary to some misdeeds may be too low.

Therefore, we believe that by enhancing and combining all five elements—transparency, intelligibility, timeliness, personal responsibility and professional honour—the professional ethics and internal mechanisms of the justice system can be improved. When treating a patient, external intervention, supervision and advice are usually required. However, without the sincere effort of the patient, treatment is almost impossible or useless. Similarly, when trust in the judiciary is undermined, all members of society are damaged or suffer loss, rather than only judicial representatives. Therefore, the restoration of trust must primarily focus on the public and its perception of the credibility of the justice system.

Conclusion

We provide no definitive diagnosis and therapy for the state of the justice system in Slovakia and are aware that insiders may disagree with our view of the situation and our proposals. The purpose of this article was to provide suggestions from the perspective of the philosophy and psychology of law. We understand the term 'trust' as a moral emotion, a mental and social state, and a social phenomenon, the presence or absence of which fundamentally affects the functioning of society and the ability to cooperate within society. Given that society is based on various forms of trust, it is understandable that when confidence in the basic principles of society is shaken, a crisis of confidence emerges in society as a whole. As we have argued, this crisis can only be remedied through either a reassessment of the basic pillars that hold the system together or the modification, operational implementation and enhancement of the basic and proven mechanisms that strengthen communication and control between individual parties.[41]

Bibliography

ASSY, R.: Can the Law Speak Directly to Its Subjects? The Limitation of Plain Language. In *Journal of Law and Society*. vol. 38, no. 3, 2011, 376 – 404, doi: 10.1111/j.1467-6478.2011.00549.x

BENTHAM, J.: *The Panopticon Writings.* (Ed. Bozovic, M.) London: Verso, 1995, p. 29-95

BUTT, P., CASTLE, R.: *Modern Legal Drafting: A Guide to Using Clearer Language*. New York: CUP, 2007

CIOCANEL, M. V. et al.: JUSTFAIR: Judicial System Transparency through Federal Archive Inferred Records. In *PloS one.* vol., 15, issue 10, 2020, e0241381, doi: 10.1371/journal.pone.0241381

CRIMMINS, J., E. (ed): *The Bloomsbury Encyclopedia of Utilitarianism*. London: Bloomsbury Publishing, 2017

DUMINICA, R.: Means of Ensuring the Intelligibility of the Law. In *Conferința Internațională de Drept, Studii Europene şi Relații Internaționale*. no. 3, 2015, pp. 617-622

ECONOMIDES, K. M., HAUG, A. A., McINTYRE, J.: Toward Timeliness in Civil Justice. In *Monash University Law Journal.* vol. 41, no. 2, 2015, 414 – 444

[40] See a number of disciplinary proceedings, such as that against former Attorney General Trnka, or those against advocates Para and Šábik.

[41] We would like to thank professor Marek Števček for his valuable remarks and consultation regarding the text.

European judicial systems CEPEJ Evaluation Report. Available at: https://rm.coe.int/rapport-evaluation-partie-1-francais/16809fc058 [accessed 30 November 2020]
FOUCAULT, M.: *Dozerať a trestať [Discipline and Punish].* Bratislava: Kalligram 2000
GAHÉR, F., MRVA, M., ŠTEVČEK, M., TURČAN, M.: Otvorená textúra pojmov a pravidiel – voda na mlyn pre subjektivizmus v aplikovanej sémantike?[Open Texture of Concepts and Rules – Fuel for the Fire of Subjectivism in Applied Semantics?] *FILOZOFIA*, 75, 2020, No 4, pp. 309 – 323
GOLD, J., GOLD, I.: *Suspicious Minds: How Culture Shapes Madness*. New York: Simon and Schuster, 2015.
HAIDT, J.: The Moral Emotions. In Davidson, Richard; Scherer, Klaus; Goldsmith, H. (eds.). *Handbook of Affective Sciences*. Oxford: Oxford University Press, 2003, 852-870
HENDERSON, K. et al.: *Judicial Transparency Checklist : Key Tranparency Issues and Indicators to Promote Judicial Independence and Accountability Reforms*. Washington DC: IFES 2003
HOLLÄNDER, P.: Paradox právneho jazyka. [The paradox of legal language]. *Kultúra slova. Vedecko-popularizačný časopis pre jazykovú kultúru a terminológiu* [online], 6, 1995. Available at: www.juls.savba.sk/ediela/ks/1995/6/ks1995-6.html. [accessed 30 November 2020]
MACHIAVELLI, N.: *Vladár.* [*The Prince*] Bratislava: Tatran, 1992
LIPTÁK, M.: Ako sa zmieriť s nevinným Kočnerom. [How to Reconcile with Innocent Kočner.] *Sme.* (5 September 2020). Available at: https://komentare.sme.sk/c/22481890/ako-sa-zmierit-s-nevinnym-kocnerom.html [accessed 30 November 2020]
Ministerstvo spravodlivosti SR. *Priemerná dĺžka konania - prehľad pre roky 2004-2017* [*Average length of proceedings – overview for the years 2004-2017*] Available at https://www.justice.gov.sk/Stranky/Sudy/Statistika-priemerna-dlzka-konania.aspx. [accessed 30 November 2020]
POPPER, K., R.: *Open Society and its Enemies.* London: Routledge, 1945
PRUŠOVÁ, V.: Tváre sudcov na webe? U nás v nedohľadne. [Faces of judges on the web? With us in sight]. *Denník N* (25 April 2016). Available at: https://dennikn.sk/443594/tvare-sudcov-webe-nas-nedohladne [accessed 30 November 2020]
SARTRE, J. P.: *Existencialismus je humanismus.* [*Existentialism Is a Humanism*]. Praha: Vyšehrad, 2004
ŠTEVČEK, M. et al.: *Civilný sporový poriadok* [*Civil Dispute Order*]. Komentár [Commentary]. Prague: C. H. Beck, 2016
TALEB, N., N.: *Skin in the Game: Hidden Asymmetries in Daily Life.* New York, Penguin Random House 2018.
The 2020 EU Justice Scoreboard (2020/8). Available at: https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2020_en.pdf [accessed 30 November 2020]
WILSON, J., Q., KELLING, G. L.: Broken Windows: The Police and Neighborhood Safety. *Atlantic Monthly* 249 (March 1982): 29-38

Legislation

Act No. 211/2000 Coll. on free access to information
Act No. 312/2020 Coll. – Act on the enforcement of decisions, on seizure of property and management of seized property as amended
Act No. 385/2000 Coll. on judges and lay judges
Act No. 757/2004 Coll. Act on courts as amended
Decree of the Ministry of Justice of the Slovak Republic on the publication of judicial decisions No. 482/2011 Coll.

Table of Cases

European Court of Human Rights decision in the case of Maxian and Maxianova v Slovak Republic, application No. 43168/11, 7 January 2014
Decision of the Constitutional Court of the Slovak Republic no. PL. ÚS 865/2016
Decision of the Constitutional Court of the Slovak Republic no. PL. ÚS 102/2011

Other

National Council of the Slovak Republic. Government bill on judicial reform. Available at https://www.nrsr.sk/web/Default.aspx?sid=zakony/zakon&MasterID=7971 [accessed 30 November 2020]