


# The Impact of the Concept of Continental (Romano-Germanic) Criminal Procedure on the Phenomenon of “Epistemic Injustice”

*O impacto do conceito de processo penal continental (romano-germânico) no fenômeno da “injustiça epistêmica”*

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**ABSTRACT:** The present article concentrates on the systemic and institutional environment characteristic of the sphere of criminal trial as being a source of reality called “epistemic injustice”. The subject of this analysis is criminal procedure applicable in continental Europe. In this attempt to transpose the concept of “epistemic injustice” coined by Miranda Ficker to criminal procedure, certain specific systemic and institutional solutions were accentuated, which may contribute to injustice in relation to different aspects of the procedure. Three important institutions regulating criminal procedure were taken into account: the concept of prosecuting crimes, procedural consensualism, and the crime victim. The conclusions are not based on hard arguments that would directly prove the phenomena described by M. Fricker. It was concluded that “epistemic injustice” is more a matter of the facts than the law, although – as it was attempted to show – particular legal solutions may in a specific manner contribute to the state designated by that term. The presented threats are comprised mainly in the reality termed in literature as “epistemic agential injustice”.

**KEYWORDS:** epistemic injustice; epistemic agential injustice; criminal procedure; legalism; opportunism; consensualism; victim.

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**RESUMO:** O presente artigo analisa o ambiente sistêmico e institucional característico da esfera do julgamento penal como fonte da realidade denominada “injustiça epistêmica”. O objeto deste estudo é o processo penal aplicável na Europa continental. Nesta tentativa de transposição do conceito de “injustiça epistêmica” cunhado por Miranda Fricker para o processo penal, acentuaram-se certas soluções sistêmicas e institucionais específicas, que podem contribuir para a injustiça em relação a diferentes aspectos do processo. Foram levadas em consideração três importantes instituições reguladoras do processo penal: o conceito de perseguição dos crimes, o consenso processual e a vítima do crime. As conclusões não são baseadas em argumentos sólidos que comprovem diretamente os fenômenos descritos por M. Fricker. Concluiu-se que a “injustiça epistêmica” é mais uma questão de fatos do que de direito, embora – como se tentou mostrar – soluções jurídicas específicas possam contribuir de uma forma direta para o Estado designado por esse termo. As ameaças apresentadas estão compreendidas principalmente na realidade denominada na literatura como “injustiça agencial epistêmica”.

**PALAVRAS-CHAVE:** injustiça epistêmica; injustiça epistêmica agencial; processo penal; legalidade; oportunidade; consensualidade; vítima.

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## I. GENERAL CONSIDERATIONS

The notion of “*epistemic injustice*” is usually associated with the concept put forward by Miranda Fricker, a British philosopher, who in her work *Epistemic Injustice: Power and the Ethics of Knowing*<sup>2</sup> writes about the problem of unjust treatment of entities due to their race, sex, age, and social status within two types of epistemic injustice distinguished by her: testimonial injustice and hermeneutical injustice. M. Fricker’s book became grounds for developing the concept of epistemic injustice and for formulating new theories around this conceptual category<sup>3</sup>. The universal

<sup>2</sup> FRICKER, Miranda. *Epistemic Injustice: Power and the Ethics of Knowing*, Oxford University Press 2007.

<sup>3</sup> See PÁEZ, Andrés.; MATIDA, Janaina. Editorial of dossier “Epistemic Injustice in Criminal Procedure”, *Revista Brasileira de Direito Processual Penal* (Brazilian Journal of Criminal Procedure) vol. 9 No.1 (2023), pp. 18-27.

nature of the subject of that work stimulated considerable interest, while the global context of the “epistemic injustice” category became inspiration for representatives of social sciences for transposing it to numerous areas of knowledge. One of them is law, and the discipline in which “epistemic injustice” shows multiple facets and has a special pivotal significance is criminal trial. The popularity of M. Fickner’s theorem caused the term “epistemic injustice” to function also as a conceptual code being applied in a number of disciplines. How well T. Hobbes’ diagnosis fits to this fact with respect to reason, about which he wrote that it is attained “first in apt imposing of Names; and secondly by getting a good and orderly Method in proceeding from the Elements, which are Names, to Assertions made by Connexion of one of them to another; and so to syllogismes, which are the Connexions of one Assertion to another, till we come to a knowledge of all the Consequences of names appertaining to the subject in hand (...)”<sup>4</sup>. The term “epistemic injustice” as I use it refers with its content to the original meaning, but in general falls within the scope determined by A. Páez and J. Matida as a “wider version of epistemic injustice”<sup>5</sup>. Their interesting paper contains a discussion of the concepts of testimonial injustice and hermeneutical injustice from the perspective of criminal procedure<sup>6</sup>. However, a dominant perspective for this article is established by considerations underlying the phenomenon defined as “epistemic agential injustice”<sup>7</sup> demonstrated by the conduct of officers of justice administration authorities in criminal cases and - as I argue - also in certain solutions characteristic of continental criminal law. The notion of “epistemic agential injustice” is related by J. Lackey<sup>8</sup> to the testimonial injustice category but the forms of influence on and manipulation of testifying persons may, in my opinion, also affect procedural actions

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<sup>4</sup> HOBBS, Thomas, *Leviathan*, <https://www.holybooks.com/wp-content/uploads/Thomas-Hobbes-Leviathan.pdf>

<sup>5</sup> PÁEZ, Andrés.; MATIDA, Janaina. Editorial of dossier..., p. 13.

<sup>6</sup> PÁEZ, Andrés.; MATIDA, Janaina. Editorial of dossier..., p. 14 et seq.

<sup>7</sup> LACKEY, Jennifer. Eyewitness testimony and epistemic agency. *Noûs* 2022, v. 56, n. 3, pp. 696–715.

<sup>8</sup> LACKEY, Jennifer. False confessions and testimonial injustice. *Journal of Criminal Law & Criminology*, v. 110, p. 43–68, 2020 (As cited in PÁEZ, Andrés.; MATIDA, Janaina. Editorial of dossier..., p. 20 et seq).

and conduct. This latter matter has not been, in principle, analysed so far in the rather extensive literature devoted to the “epistemic injustice” issue, although it seems to be both interesting and important. The basis for considerations are formed by continental-type criminal procedure. It is characteristic of the juridical system applicable across the continental European countries, where the law was shaped under the influence of Roman tradition, as opposed to the common law<sup>9</sup> system. In this geographic area and its prevailing law, criminal procedure is based on common assumptions, although in particular countries different and distinctive solutions also exist. The most representative examples are German and French criminal law. On the other hand, Polish criminal procedure - which is a rather classic example of the continental model - lays groundwork for the presentation of phenomena substantiating “epistemic injustice”.

The article consists of five parts. Part one (I) is an introduction to the article aspects, and its purpose is to indicate that the concept of continental (Romano-Germanic) criminal procedure may contribute to the existence of “epistemic injustice” when criminal cases are examined. Part two (II) deals with threats to fundamental principles on which criminal law is based and which arise from the contemporary challenges combined with social and political pressure. In part three (III) I discuss the crime prosecution concept as a potential source of “epistemic injustice”. Part four (IV) elaborates on the crime victim and the contemporary victimological trend in terms of threats arising from the inequality of procedural parties. In part five (V) procedural consensualism is analysed as a method of overcoming “epistemic injustice”. My stance expressed in the conclusion is that the concept of continental criminal procedure may affect the condition termed “epistemic injustice”. One of the causes of this state of affairs are conflicts occurring between the adherence to principles embodied in this model and contemporary challenges combined with social and political pressure.

As its title suggests, this study concentrates on the systemic and institutional environment characteristic of the sphere of criminal

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<sup>9</sup> GORLA, Gino. Intérêts et problèmes de la comparaison entre le droit continental et la Common Law, *Revue internationale de droit comparé*, Vol. 15 N°1, Janvier-mars 1963, pp. 5-18.

trial as being a source of reality and termed “epistemic injustice”. Here the concept of criminal procedure and its impact on the existence of the phenomenon in question gains importance. A research problem expressed that way calls for a nuanced approach. Admittedly, it is not based on obvious facts that would be explicit and would directly prove the phenomena described by M. Fricker. Anyway, theories developed based on M. Ficker’s concept are also grounded on a similar approach. It enabled researchers to go beyond the sphere of the original argumentation and to open up the “epistemic injustice” issue to discussion in the forum of different social sciences, including law.

## II. CONTEMPORARY THREATS TO THE *ULTIMA RATIO* CONCEPT OF CRIMINAL LAW

From the perspective of systemic environment, the main task is to indicate features of the criminal case examination model that may inadvertently contribute to the condition called “epistemic injustice”. Obviously, this condition is not a simple consequence of the principles and assumptions that make up continental criminal procedure, but is caused by them indirectly.

One of the contexts of this aspect is the *ultima ratio* concept of criminal law, which refers both to substantive criminal law and procedural criminal law. In both cases a rule applies according to which criminal law may be found applicable on the principle of necessity, that is - as a last resort, where other measures and methods of resolving legal conflicts are found ineffective or insufficient<sup>10</sup>. This basic rule of criminalization is of much significance in continental European countries and in the European Union<sup>11</sup>. However, it clashes with reality, which draws on completely

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<sup>10</sup> JAREBORG, Nils. Criminalization as Last Resort (*Ultima Ratio*), 2 Ohio State Journal of Criminal Law 2004, pp. 521-534; UTRAT-MILECKI, Jarosław. *Penologia ogólna. Perspektywa integralnokulturowa*, tom 1 Kara kryminalna jako ogólna kategoria instytucji prawnej i społecznej [General penology. Culturally integral perspective, volume 1: Criminal penalty as a general category of legal and social institution], Warsaw 2022, pp. 79-85.

<sup>11</sup> MELANDER, Sakari. *Ultima Ratio in European Criminal Law*, European Criminal Law Review 3(1), 2013, pp. 48-51.

contrary expectations. In many countries criminal law is undergoing renaissance, with lawmakers disregarding costs of the policy that favours the most restrictive liability regime - criminal regime.

The current trend of extensive use of criminal law corresponds with the perception of law from the perspective of its repressive capacity. Along with such an approach, a stereotype of law is fixed as that of being an oppressive tool of compelling appropriate conduct, and a harmful conviction arises about a deficit of regulations that are not fitted with the strongest possible preventive and enforcing mechanisms. The identification of law with its causal power consistently leads to measures that ensure the attainment of that goal instantaneously and on an optimum scale. The structural advantage of the criminal sanction over other liability measures is expressed by the maximized preventive effect which is clearly discerned and appreciated by contemporary lawmakers. The suggestive and the causative capacities of the penalty are potentially the dominant factors strengthening the effects of the adaptation and enforceability of the law, to an extent exceeding the measures applied based on other liability regimes, but - as noticed by N. Frize – such thinking is an illusion. He gave the following justification: “We are fooled by criminal law and its false promises [...] criminal law leads to a growth of violent criminality as a result of brutalizing, spoiling the victim, and prevents us from reflecting on the best solutions [...]”<sup>12</sup>. That statement is a rather firm diagnosis of the anti-effectiveness of criminal law to the extent that it causes the radicalization of attitudes and hinders the choice of other measures to react to the existing evil. The said illusion consists in a short-sighted identification of criminal law with the effect of maximum efficiency, without factoring in negative consequences of its application.

Despite this illusion and contrary to the *ultima ratio* rule, in continental European countries a growing phenomenon can be observed of instrumental and utilitarian employment of criminal law in isolation from the system of values and guarantees that traditionally underlies it. This phenomenon gives rise to a constantly growing number of incriminated

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<sup>12</sup> FRIZE, Nicolas. *Le sens de la peine*, Paris 2004, pp. 74-75.

behaviours<sup>13</sup>. In addition, its unmeasurable and uncountable consequences can be brought up. The instrumental and utilitarian employment of criminal law may amplify the mental conviction about the availability and ordinariness of this instrument. This awareness may in turn become a dangerous tool in the hands of public officers in a situation where criminal law, together with its superabundance and omnipresence, has stopped being the law of limits. This fact creates a climate conducive to the development of a phenomenon being termed “epistemic agential injustice”. A situation where the legislators themselves trivialize criminal liability may adversely affect the attitudes of state representatives, and especially - of law enforcement authorities, by creating a climate of tolerance and even impunity with respect to behaviours that otherwise are abuses or violations of the law. Arguably, criminalizing activities are usually accompanied by the determination of states to achieve the intended purposes, while it is an obligation of state authorities to carry them out effectively. Criminal procedure is a forum that provides opportunities to apply measures being in a direct contact with the sphere of fundamental human rights, hence the guarantee to apply it as the last resort is of so much importance.

The elucidation above serves the purpose of emphasizing threats arising from the currently ambivalent attitude of contemporary lawmakers to the *ultima ratio* rule in criminal law. This thought was more bluntly expressed by N. Queloz when he wrote in the title of his article about its end<sup>14</sup>. The rule, considered to be the cornerstone of criminal law in the territory of continental Europe, is dangerously confronted with today’s political challenges and may be thought to be losing this confrontation.

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<sup>13</sup> According to the French Ministry of Justice (Direction des affaires criminelles et des grâces, DACG), during the last 11 years the number of crimes grew by 3,600. As at 31 January 2022, it was 15,400. In the years 2018-2021 alone, 4 laws were adopted in France with respect to sexual violence and family violence (la loi du 3 août 2018 renforçant la lutte contre les violences sexuelles et sexistes; la loi du 28 décembre 2019 visant à agir contre les violences au sein de la famille; la loi du 30 juillet 2020 visant à protéger les victimes de violences conjugales; la loi du 21 avril 2021 visant à protéger les mineurs des crimes sexuels et de l’inceste). In Poland, the Criminal Code has been amended 21 times since 2019, and in Germany - 32 times (this data derives from the official government websites).

<sup>14</sup> QUELOZ, Nicolas. Les dérives des politiques pénales contemporaines. La fin de l’ultima ratio du droit pénal, *Revue Suisse de Criminologie*, 2013, no. 2.

### III. THE CRIME PROSECUTION CONCEPT AS A POTENTIAL SOURCE OF EPISTEMIC INJUSTICE

The context and objectives of realizing justice in criminal cases entail the escalation of tensions. The social pressure on investigators' efficiency frequently combined with their personal drive for success, and finally the frequently narrow focus on the objective, which is bringing the defendant to criminal justice, often lead to diminished significance of such circumstances such as the equal treatment of all the participants in the procedure or the application of the fair treatment principle by criminal procedure authorities, especially at its investigation stage. Because of its specificity, it requires solutions ensuring procedural fairness<sup>15</sup>. Bearing in mind that in the continental type of investigation stage it is largely kept secret from the public and from the parties themselves, and a number of procedural acts carried out at that time is not subject to verification, its fairness in terms of objectiveness and equal treatment of procedural opponents can be ensured mainly by the correct practice of law enforcement authorities. Thus, the investigation stage is the phase of criminal trial in which the importance of general legal directives as well as legally unspecified rules of procedural fairness come to the forefront in the situation of a limited role of legal regulations and of the possibility to externally verify the work of law enforcement authorities at this stage. This is why the investigators' professional and deontological honesty is of so much importance in this phase. An additional argument in support of this stance is the fact that the decision on instituting criminal procedure is accompanied by certain discretion caused by lack of strict legal criteria. This feature refers equally to countries where legalism and those where opportunistic prosecution prevails<sup>16</sup>. These mechanisms of performing

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<sup>15</sup> ROGACKA-RZEWNICKA, Maria. Znaczenie "niepisanych" reguł postępowania dla tworzenia podstaw rzetelnego procesu karnego [The significance of "unwritten" rules of procedure for the creation of the foundations of a fair criminal trial] (in:) *Rzetelny proces karny. Księga Jubileuszowa Profesora Zofii Świdry* [The Fair Criminal Trial. Jubilee Book of Professor Zofia Świda], ed. J. Skorupka, Wolters Kluwer 2009, pp. 92-106

<sup>16</sup> In continental-type criminal procedure two crime prosecution concepts are represented. In the sphere of influence of the German juridical culture, the dominant position is occupied by the principle of legalism. This is a directive



the prosecuting and accusing functions entail the utmost professional and ethical requirements imposed on the police and the prosecution, with a justification for this approach being e.g. the existence in their work of a serious range of decision-making discretion, and thus the exertion of considerable imperative influence on shaping legal reality. At the same time, it is commonly known that it is impossible to completely design a given system, especially in terms of people's behaviours and attitudes.

The first procedural behaviour that is a specific test of such honesty is the reaction of a prosecuting authority to a notification of the suspected commission of a crime<sup>17</sup>. Unfortunately, situations where victims were discouraged to initiate procedural acts are not uncommon. Sometimes such practices take the form of mental pressure on the notifier applied by references being made to multiple extralegal arguments the

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proclaiming that a procedural authority appointed to prosecute crimes is obliged, upon receiving substantiated information about the commission of a publicly prosecuted crime, to institute and carry out criminal procedure. On the other hand, the principle of opportunism is applied mainly in the Roman juridical area and means that the procedural authority may refrain from bringing an action where it is inexpedient to carry out criminal procedure due to public and/or social interest (WALTOŚ, Stanisław.; HOFMAŃSKI, Piotr. *Proces karny. Zarys systemu*, [Criminal procedure. System Outline], Warsaw 2023, p. 306; DESPORTES, Frédéric.; LAZERGES-COUSQUER, Laurence. *Traité de procédure pénale*, Paris 2016, pp. 788-797; GUINCHARD, Serge; BUISSON, Jacques. *Procédure pénale*, Paris 2022, p. 973; BOULOC, Bernard. *Procédure pénale*, Paris 2022, p. 694 et seq. DEBOVE, Frédéric; FALLETTI, François; PONS Iris. *Précis de droit pénal et de procédure pénale*, Paris 2022, pp. 701-702).

<sup>17</sup> ŚWIDA, Zofia. *Wpływ organów ścigania na wszczęcie i przebieg postępowania karnego* [Influence of law enforcement authorities on the institution and course of criminal procedure] (in:) *Aktualne problemy prawa i procesu karnego*. Księga ofiarowana Profesorowi Janowi Grajewskiemu [Current problems of the law and the criminal trial. Book offered to Professor Jan Grajewski], ed. M. Płachta, Gdańskie Studia Prawnicze 2003, vol. XI, p. 243 et seq.; J. Czapska, *Tendencje oportunistyczne w pracy polskiej policji* [Opportunistic tendencies in the work of Polish Police] (in:) *Zasady procesu karnego wobec wyzwań współczesności*. Księga ku czci Profesora Stanisława Waltośa [Principles of criminal trial vs. contemporary challenges. Book in honour of Professor Stanisław Waltoś], ed. J. Czapska, A. Gaberle, A. Światłowski, A. Zoll, Warsaw 2000, p. 474-475; DODA, Zbigniew. *Wszczęcie postępowania karnego-mechanizmy selekcji* [Institution of criminal procedure-mechanisms of selection] (in:) *Proces karny, a polityka karna* [Criminal trial vs. criminal policy], ed. S. Waltoś, Kraków 1991, p. 16 including the literature indicated.

purpose of which is to convince them about lack of any chance whatsoever to find the perpetrator, about problems that may arise for them or about the immateriality of the case. The aspects underlying such situations may be both signs of extralegal opportunism taking the shape of extremely unethical conduct as well as less drastic cases of: negligence, lack of care and scrupulousness, unintended omissions or involuntary neglect. The sources of that practice is usually not prejudice or aversion on personal grounds but reasons of a different type, nevertheless those behaviours of law enforcement authorities ultimately discredit a certain category of victims. Even if this is not a concrete social group, of importance is the sole fact that such situations occur in practice. The effect of unjust treatment of certain crime victims covers in general minor criminal offences but a reference point for evaluating such practices is not the objective immateriality of the case, but the subjective interest of the victim whose case was trivialized. The investigators' passive attitude arising from extralegal opportunism may cause frustration on the part of persons treated in this manner. It may be viewed by those persons as disregard, aversion, denial of credibility or another type of discredit. This example illustrates not only situations where victims who give notice of committed crimes are treated as subjects, but in legal systems based on the principle of legalism in prosecution - also a gap between the obligation to prosecute every crime arising from that principle and cases where this obligation is ignored by law enforcement authorities. Although everyone realizes that this phenomenon exists, it cannot be illustrated with any hard evidence. The occurrence of such unlawful practices is irrefutable, though statistically immeasurable.

Sometimes such behaviours of the Police are reported by the press. Recently in Poland the case has reverberated of a deaf-mute's ineffective notification of fraud<sup>18</sup>. The policeman refused to accept her notification. The woman, who was accompanied by the President of the Institute of Deaf People's Matters (*ISG*), tried to file a notification in writing but the policeman refused to issue a police report. He suggested that the victim describe the case by e-mail, which is troublesome for deaf people, if not entirely impossible, as Polish is for them a foreign

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<sup>18</sup> The Gazeta Wyborcza daily of 5 March 2023.

language. The Police did not arrange for the presence of an interpreter of sign language. Ultimately, the notifier and other individuals in a similar situation received a message that is to discourage them from submitting notifications of committed crimes.

Such behaviours do not stem from uniform motivation but eventually boil down to the abuse of power by Police officers in relation to persons reporting crimes, where this could be for various reasons inconvenient or troublesome for them. Such practices consist of exerting psychological pressure on notifiers, creating situations without alternatives, or misleading them by the reliance on false arguments. Such conduct designates the classic condition of “epistemic agential injustice”.

In legal systems where the principle of legalism in prosecuting crimes applies, such improper conduct of investigators may take a more subtle form of the lack of constructive response to the committed crime or a passive attitude to the given case. Being aware of the danger of violating the principle of legalism, legislators introduce to codes certain solutions that enable the victim to directly refer the case to a criminal court. Such an example is the institution of a subsidiary indictment<sup>19</sup> provided for in article 55 of the Polish Code of Criminal Procedure. In German criminal trial, a similar role is taken by the action enforcing a complaint (*Das Klageerzwingungsverfahren*), regulated in § 172-177 of *Strafprozessordnung*<sup>20</sup>.

Therefore, the concept of legalism in prosecution - the essence of which comprises the equal treatment of every person, the transparency of investigators' actions, the certainty that every perpetrator of a crime will not avoid criminal liability - does not always mean in practice automatic adherence to the aforesaid values. Its uncompromising resoluteness is the source of violations committed by investigators at the expense of interests of concrete entities, irrespective of the social costs of those anti-legalistic

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<sup>19</sup> ZAGRODNIK, Jarosław. Instytucja skargi subsydiarnej w procesie karnym [The institution of a subsidiary complaint in criminal trial], Warsaw 2005.

<sup>20</sup> WIŚNIEWSKI, Łukasz. Niemiecki proces karny [German criminal trial] (in:) System Prawa Karnego Procesowego, Tom II Proces karny. Rozwiązania modelowe w ujęciu prawnoporównawczym [The System of Procedural Criminal Law, Volume II Criminal trial. Model solutions in comparative law], ed. P. Kruszyński, P. Hofmański, Warsaw 2014, pp. 413-415.

practices. This analysis cannot omit the suspect's perspective. Being a central character of the criminal law justice system, they are subjected to its oppressive tools in accordance with a procedural key determined in advance. Paradoxically, the principle of legalism based on the concept of "zero tolerance" to crimes committed<sup>21</sup>, which symbolises values that are generally desired, may be in individual situations a source of injustice. Sometimes problems may be caused by it being inflexible and irrefutable.

In countries where prosecuting opportunism exists, the standardization of response to committed crimes - so characteristic of legalism - was rejected and that system is found not only to be antieconomic but also unjustified from the perspective of the rule of proportionality in legal intervention. The criteria of delimitation are established by the seriousness of the crime, the circumstances of its commission, and the person of the perpetrator. It should be stressed that the principle of opportunistic prosecution is a measure of self-limitation of criminal law, owing to the rejection of the top-bottom duty to react to each crime committed<sup>22</sup>. Thus, a lawful selection occurs of cases that do not deserve the formal involvement of prosecuting authorities. By force of the prosecutor's decision, cases that do not represent much public significance are excluded, which exclusion constitutes at the same time an instrument for managing criminal policy. The nature of this instrument is inherently eliminating. The concept of opportunistic prosecution rejects in its essence the extensiveness of criminal system, preferring moderation in using criminal procedure. In addition to the evaluation of objective inconveniences of the legalistic system, such as absorbing courts with trivial cases and - consequently - "clogging" the administration of justice with them, opponents of that concept even invoke ethical arguments. R. Merle and A. Vitu argue that the obligation imposed by investigation procedure to prosecute and accuse is a tool of obstinacy and private hatred. Thus, the authors indicated an ethical advantage of the concept that recognizes the right of the prosecutor to discretionarily

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<sup>21</sup> TYLMAN, Janusz. *Zasada legalizmu w procesie karnym [The principle of legalism in criminal procedure]*, Warsaw 1965, p. 74 et seq.

<sup>22</sup> KUCZYŃSKA, Hanna. Selection of Defendants before the ICC: Between the Principle of Opportunism and Legalism, *Polish Yearbook of International Law*, Vol. 34 (2014), pp. 188-189.

decide about the legal consequences of committed crimes. The conviction about the fairness of the prosecutor's decisions is based on public trust. Moreover, the significance of the rationality of those arrangements is accentuated, which arises from the belief that not every wrongdoing – bearing in mind its culpability or the person of the perpetrator – equally deserves prosecuting. For this reason, the standardization of response to a crime – being a feature characteristic of the principle of legalism – is viewed by proponents of the contrary prosecuting concept as equal to decision-making cruelty.

For the sake of symmetry, also dangers arising from the principle of opportunism should be indicated. The encapsulated therein decision-making freedom of law enforcement authorities to institute criminal procedure and bring an indictment to the court gives rise to a risk of unequal treatment of persons committing crimes. The risk is relatively higher than that arising from the opposite principle of legalism. The prescription that underlies the legalism principle to institute criminal procedure in any criminal case sounds categorical, contrary to a solution that vests in investigators the right to decide at their discretion about that matter. The independent and unrestricted evaluation of a crime in terms of the purposefulness of prosecuting, being so characteristic of the opportunism concept, causes natural doubts about the lawfulness of such a system and about respect for the principle of equal treatment in and the transparency of criminal policy. A potential danger is the flexibility of the concept itself, which enables the emergence of different behaviours and visions of criminal policy. The realism of associated dangers is reflected by historical examples of the reactivated principle of opportunism in countries where authoritarian (totalitarian) bodies gained prevalence. It applied during Hitler's rule, being a tool for violating law<sup>23</sup>, although German *Strafprozessordnung 1877* was unambiguously based on the legalism principle. This change in the direction of prosecuting crime assumed the use of the flexibility of opportunism in order to attain different personal and collective goals. Such a motivation is also possible

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<sup>23</sup> MATHIAS, Eric. Les procureurs du droit. De l'impartialité du ministère public en France et en Allemagne, Centre National de la Recherche Scientifique 1999, coll. C.N.R.S.Droit, p. 56.

in less extreme circumstances. The political appeal of the opportunism concept consists in its flexibility that enables a stronger impact on the performance of a specific criminal policy. Its consequence may also be somebody's inelible benefit derived from the groundless resignation from prosecuting the wrongdoer due to their professional or social status or other properties. Remarkably, a legal system based on the procedural principle of opportunism rules out such situations as being in violation of the law, however it is not equipped with categorical mechanisms of preventing improper practices.

The freedom entrusted to law enforcement authorities to decide about consequences of committed crimes is based on the principle that the authorities will meet the highest legal standards and on confidence in their honesty. From this perspective a potential advantage of the principle of legalism in prosecution is ensured by the categorically sounding prescription to institute a criminal action in every criminal case, which is not, however, automatically tantamount to proper conduct. In this case every behaviour which violates that absolute prescription becomes more prominent.

From the axiological and deontological point of view both principles are based on identical duties. When writing about the relatively higher risk of unequal treatment of persons having committed punishable acts based on the principle of opportunism in prosecution, I mean the content of and the conditions underlying that principle, especially the opportunity to flexibly interpret it in the law application process. On the other hand, the characteristic features of the prosecuting concept at hand may constitute a source of decisions being the most appropriate in the given circumstances as they are based on individualized perception.

In order to somewhat reconcile the contradictions between both prosecution concepts, it can be stated that only their simultaneous presence in the legal system is an element rationalizing the system of justice in criminal cases. Legalism *a limine* constitutes the affirmation of values such as: equality before the law, uniformity of procedural practices, openness and transparency of the justice system, confidence in public law enforcement authorities or respect for the law. In turn, the concept of opportunism offers rational pragmatism and functional approach to initiating criminal prosecution. It enables non-identical (and

non-standard) approach to crime perpetrators, which does not have to signify their unequal treatment. Conversely, their individualized treatment is sometimes a necessary element of justice. First and foremost, the opportunism principle may be a tool for a rational selection of criminal cases, used in the name of fairness and justice. Personal circumstances requiring individualized treatment should be taken into consideration at all times. This postulate has nothing to do with the legally reprehensible situation of unequal treatment of the parties.

In view of the above, the crime prosecution concept may entail certain risks of unequal or unjust treatment of the parties. Their distribution is uneven and has different sources, but both in the case of the principle of legalism and the principle of opportunism, appropriate procedural practice is of fundamental significance. J. Zajadło put it as follows “the law as a decision of the legislator is merely a quantity of paper on which a formalised conventional text is written, its true face is revealed only in the process of its application and interpretation. Judges often encounter so-called hard cases where morality, economics, politics, and religion meet in addition to the law”<sup>24</sup>.

#### **IV. DEVELOPMENT OF VICTIMOLOGICAL TREND AND ITS INFLUENCE ON EPISTEMIC INJUSTICE**

The systemic and institutional environment of “epistemic injustice” in criminal procedure can also be analysed from the perspective of intensified victimological trend.

While diagnosing the causes underlying the collapse of the *ultima ratio* principle for criminal law<sup>25</sup>, N. Queloz indicated among other things the development of victimological movement. The involvement of the state in promoting crime victims leads – in his opinion – to the precedence of their rights at the expense of the accused, which affects the extent of criminal liability. Recognizing the correct direction towards making the

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<sup>24</sup> ZAJADŁO, Jerzy. Sumienie sędziego [*Judge's conscience*], *Ruch Prawny Ekonomiczny i Socjologiczny* [*Economic and Sociological Legal Movement*], Year LXXIX-issue 4-2017.

<sup>25</sup> QUELOZ, Nicolas. Les dérives des politiques pénales contemporaines....., pp.5-6.

victim a subject of criminal procedure, the aforesaid element may be viewed as a potential cause of unequal treatment. The transmission of criminal procedure to reality oriented towards goals connected with crime victims was in the 90s of the 20th century so violent and far-reaching in a number of countries that a pejorative term of *victimology*<sup>26</sup> was coined for that circumstance. Along with the progress in that direction, it is no longer certain that criminal procedure is first of all the defendant's procedure. This is because once the victim is termed as a happy child of the legislators<sup>27</sup>, and another time pejoratively as a "court animal"<sup>28</sup>.

Not long ago the fact that the defendant was positioned centrally in criminal procedure could not have given rise to any doubt. Doubts and objections may have arisen from the systemic absence of the victim from the procedure. This is generally characteristic of countries representing common law, while in countries belonging to the civil law system it was common almost until the end of the 20th century<sup>29</sup>. A radical change of the approach in continental Europe countries to crime victims was a systemic breakthrough. As mentioned above, making the victim a subject of criminal procedure and guaranteeing the victim actual presence therein became a foundation to build on it new procedural relations and to create new opportunities for settling criminal disputes based on equal treatment of the opposite procedural parties. Significantly, though, this reality is not one-dimensional.

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<sup>26</sup> ROGACKA-RZEWNICKA, Maria. *Proces karny w perspektywie ewolucji naukowej i współczesnych trendów rozwojowych* [Criminal trial in the perspective of scientific evolution and contemporary trends of development], Warsaw 2021, pp. 418-419.

<sup>27</sup> CONTE, Philippe. *La participation de la victime au processus pénal: de l'équilibre procédural à la confusion des genres*, *Revue de Droit Pénal* 2009, n° 3, p. 539.

<sup>28</sup> RASSAT, Michèle-Laure. *Traité de procédure pénale*, Paris 2001, p. 252.

<sup>29</sup> BONFILS, Philippe. *La participation de la victime au procès pénal. Une action innommée* (in:) *Le droit à l'aube du troisième millénaire. Mélanges offerts à Jean Pradel, Cujas*, Paris 2006, p. 179; ROGACKA-RZEWNICKA, Maria. *O zjawisku "prywatyzacji" ("cywilizacji") prawa karnego w świetle koncepcji celu postępowania karnego. Krótki rys historycznoprawny* [About the phenomenon of the "privatization" ("civilization") of criminal law in the light of the purpose of criminal procedure. A brief historical and legal outline.], *The Prokuratura i Prawo journal* 2010, nos. 1-2, p. 245 et. seq.; GARDOCKI, Lech. *Prawo karne* [Criminal Law], C.H.Beck, Warsaw 2003, p. 19 et. seq.



The direction of transforming criminal procedure, connected with making the victim a subject thereof, caused some danger of disproportionate understanding of procedural priorities. In addition, having been consistently pursued since the end of the last century, it covered with its reach numerous countries and significantly affected the shape of contemporary criminal procedure in countries ruled by civil law. In a number of countries, the victimological ideology has changed criminal trial in real terms. The changes consisted not only in the introduction of new solutions that take into account the interests of crime victims and emphasize their legal subjectivity, but they were also of systemic and philosophical nature. Provisions concerning this matter occupy the most prominent places in codes. The Polish Code of Criminal Procedure recognizes as one of its primary objectives the consideration of the victim's legitimate interests and at the same time respect for the victim's dignity (article 2 § 1 point 3). In the French Code of Criminal Procedure, the crime victim appears in different contexts in *Titre préliminaire - Dispositions générales* (articles from 1 to 10-6).

The victim stepping in the orbit of the most important objectives of criminal procedure meant for the defendant exiting from the central stage, contrary to the classic essence of their participation therein. One of the consequences of this change is that crime victims may become incommensurately privileged or may excessively influence the realization of justice in criminal cases. The current status of the victim may be a new source of procedural antagonisms, both at the level of the criminal procedure model and at the level of single solutions. These risks are reflected by the term “victidemagogy” that expresses negative assessment of the legislators' excessive concentration in criminal procedure on the crime victim<sup>30</sup>.

Importantly, this systemic volatility and instability of objectives and directions of criminal procedure may become a source of concerns about the possibility to guarantee equal treatment of all the parties, in a

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<sup>30</sup> ROGACKA-RZEWNICKA, Maria. Proces karny w perspektywie ewolucji naukowej i współczesnych trendów rozwojowych [Criminal trial in the perspective of scientific evolution and contemporary trends of development], Warsaw 2021, pp. 418-419 and pp. 426-433.

situation where the legislator's attention is consistently focused mainly on one of them. Such a conclusion would call for being illustrated with concrete examples, but it is not examples that matter so much - rather the general danger that the vector ensuring relative procedural balance will shift to another place. In this case the procedural balance is not tantamount to the full equality of the parties (their complete equivalence), but it means the adoption of an appropriate proportion between the method of reflecting in regulations the specificity of the defendant and defining the status of the crime victim. Furthermore, experience and intuition teach that the new trend, that is ensuring crime victims' subjectivity, may have different levels of intensity in procedural practice. This is an extremely delicate and rather immeasurable matter, but ultimately quite crucial. Essentially, the sphere of practice is of decisive significance from the perspective of applying the principles on which the fairness of criminal procedure depends. One of them is the principle of equal treatment of participants by the procedural authorities.

## **V. PROCEDURAL CONSENSUALISM AS A METHOD OF OVERCOMING ANTAGONISMS**

In modern criminal trial history, the most prominent is the concept of justice being imperatively realized by the state. In continental criminal trial a breakthrough occurred at the end of the 20th century, along with alternative methods of resolving criminal cases being admitted by legislators. Procedural consensualism turned out to be not only a method to overcome problems augmenting in justice systems of numerous countries, but most of all - an appropriate route to resolve conflicts caused by the crimes committed. As part of this trend, mediation in criminal cases started to develop.

A common assumption for the institution of consensual settlement of criminal cases is the realization of justice as part of limiting procedural formality and resigning from some of its obligatory forms. In exchange, the parties to the settlement obtain measurable benefits. The *do ut des* structure underpinning this relationship offers in essence justice that is more indulgent, friendlier in the forms being applied, more concentrated on the content than on the external aspect, as well as quicker and cheaper.

The formal self-limitation, being typical of consensual measures, together with substantive benefits for the parties to the settlement, may be equated with the operation of the principle of necessity in procedural criminal law. These forms are incorporated into the system of procedural guarantees; they offer justice that in principle fulfils the criteria of fairness. At the same time, the fact that consensual institutions entail formal minimalism and the indispensability of response to the committed crime makes of them a useful and rational tool for influencing the legal and penal reality. It should be assumed that criminal justice realized as discussed here fulfils all the necessary conditions, and also enables moderation in using repressions both at the level of sanctions and the system of imposing them. Due to their nature, consensual methods enable avoiding procedural formalism that in certain situations may be a source of stress or even of the sense of institutional oppression.

The conventionality of criminal procedure and the considerable level of its formalization are no guarantees of its rule of law, fairness and justness. In the context of those values, it may be more significant to settle a criminal case by way of a mutual approval by the parties, rather than by way of a court's imperative order. Procedural settlements are based on the procedural opponents' agreement. They lead to extinguishing the conflict brought about by the crime, with each of the parties participating as subjects of the proceedings. In these circumstances, they do not feel cornered by the reality of the "hard" procedure. Thus, the parties are less likely to deny facts. Another advantage is the judge occupying the position of an impartial arbitrator in view of the lack of the need to actively get involved in the dispute, which involvement might occasion unequal treatment of the parties. Procedural consensualism creates the most appropriate conditions for determining the truth.

In a criminal trial of any type, the detection of the truth is an essential drive and most often the highest value<sup>31</sup>. This is an overriding

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<sup>31</sup> See more in: ROGACKA-RZEWNICKA, Maria. Nowa kultura poszukiwania prawdy w procesie karnym w świetle nowelizacji kodeksu postępowania karnego na podstawie ustawy z dnia 27 września 2013 roku. Perspektywa systemowa [A new culture of truth-seeking in criminal trial in the light of the amendments to the Code of Criminal Procedure under the law of 27 September 2013. Systemic perspective] (in:) *Polski proces karny i materialne prawo*

purpose for the usually complicated configuration of activities that represent the celebration of actions taken to determine the truth. As A. Garapon and J. Papadopulos stated, there are different truth-seeking cultures<sup>32</sup>. When analysing this phenomenon in the context of criminal trial, these authors consider the entities performing this task, together with the methods whereby it is done, to be the most important differentiation criteria. While in common law the entities burdened with the determination of the truth are the procedural parties, in continental Europe they are first of all judges. The general difference refers to the level of activity, but also to the concept of the judge's role in both systems. In the continental model, the judge is an administrator of the proceedings and its main director. In common law – as A. Garapon writes – they appear only as those who do not decide about the truth but facilitate its finding<sup>33</sup>. In the continental system the truth derives from structured sources, such as interrogation records, analyses, expert reports, which are obtained with the participation of expert authorities, progressively and according to the judge's concept and conviction. The process runs linearly in this model and its composition is foreseeable. In the complaint and adversarial system the truth is deduced from the spectacle of a carefully prepared battle<sup>34</sup>. The judge's role is not direct interference with the fact-finding process that is to determine the winner. The winner is ultimately declared in the final judgment. In the "battle" model, the evidence is not accumulated and stored as a set but rather provided by the parties in a dynamic discourse. As Foucault wrote, evidence does not serve the purpose of localizing who tells the truth, but determining the stronger party in proving it, and at

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karne w świetle nowelizacji z 2013 roku. Księga jubileuszowa dedykowana Profesorowi Januszowi Tylmanowi w z okazji Jego 90. Urodzin [Polish criminal trial and substantive criminal law in the light of the 2013 amendments. Jubilee book dedicated to Professor Janusz Tylman on the occasion of his 90th Birthday], ed. Tomasz Grzegorzczak, Warsaw 2014, pp. 107-124.

<sup>32</sup> GARAPON, Antoine.; PAPADOPULOS, Joannis. *Juger en Amerique et en France*, Odile Jacob, Paris 2003, p. 123.

<sup>33</sup> GARAPON, Antoine. *Preuve et vérité dans les procès français et américain* (in:) <http://academielegislation.fr/IMG/pdf/garaponpreuverite.pdf>, p. 5.

<sup>34</sup> As cited in GARAPON, Antoine. *Preuve et vérité*....., p. 2.

the same time - the one who is right<sup>35</sup>. In this case, credibility is achieved not only by truth, but also by rhetoric.

As already said, procedural consensualism establishes the most appropriate conditions to learn the truth. It is determined mainly by way of an official top-down procedure, but also within a dialogue and agreement of the parties. The procedural settlement institution is well summed up by the maxim of the Roman jurist Ulpian Domitius: “*volenti non fit iniuria*” (“to a willing person, injury is not done”). Alternative justice administration methods may serve the sense of equality and subjectivity of the parties, the realization of the victim’s right to find the truth, and especially - conciliation between the perpetrator and the victim. These are the most desirable ways of settling a case caused by a crime. Reaching the aforesaid purposes is generally impossible within the classic procedure, which is dominated by formalism, conventionality, rigid rules of conduct, and concrete relationships between particular participants in criminal procedure. In the conditions of the statutorily imposed celebration of the procedure, there is no place for dialogue, parties’ agreement or the opportunity to view the crime from the other party’s perspective.

## IV. CONCLUSION

In this attempt to transpose the concept of “epistemic injustice” authored by Miranda Ficker to criminal procedure, certain specific systemic and institutional solutions were accentuated, which may contribute to injustice in relation to different purposes of the procedure. This sphere is especially sensitive to the justice and injustice category in a number of its manifestations. Three important institutions regulating criminal procedure were taken into account: the concept of prosecuting crimes, procedural consensualism, and the crime victim. In each one of them a significant role is played by the aspect of individualized decision-making, both at the level of legal determinations and at the level of extralegal relations and interactions.

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<sup>35</sup> FOUCAULT, Michel. La vérité et les formes juridiques (in:) Dits et écrits, coll. *Quarto*, Paris, Gallimard 2004, vol. 1, n° 139, p. 1561.

The presented examples show dangers to the principle of equal treatment, the hypothetical underlying factor of which may be the concrete properties of the given criminal trial system. In their analysis and evaluation, it was impossible to use “hard” and explicit evidence, which is illustrated by the frequency of statements about potential, likely or hypothetical influence of systemic solutions on the reality of criminal trials. I assume that none of the legal institutions analysed creates an inherent threat to the principle of fair treatment of the procedural parties, but only that their application entails a higher risk of impairing this value in procedural practice. Reference to practice is of key importance. This is because it is based on the assumption that ultimately everything depends on the people: their professionalism, proper attitude, professional and personal honesty, diligence, and good will. The indicated features of individuals realizing justice in criminal cases are decisive for overcoming various risks originating from natural human imperfections that may cause someone to become their involuntary victim. I reject by assumption the factors of ill will and intentional actions being taken against someone. No legal system will ever be able to ensure full protection against the risk of unfair treatment of parties to criminal procedure, which is why “epistemic injustice” is ultimately more a matter of the facts than the law, although – as it was attempted to show – particular legal solutions may in a specific manner contribute to the state designated by that term. This interesting issue undoubtedly deserves an in-depth analysis in the format of a monographic study. Undoubtedly, the interesting sociological concept of “epistemic injustice” is transposable broadly and adequately to the discipline of criminal procedure.

Paradoxically, the source of threats may be the intransigence permeating certain solutions adopted in continental criminal procedure, which does not withstand the pressure of challenges this discipline must currently face. This circumstance may in turn provide during the examination of a criminal case a suitable environment for the occurrence of a phenomenon termed in literature as “epistemic agential injustice”.

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