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Edited by Barbara Janusz-Pohl

Volume 38

Daniele Vicoli

Effective Justice. International and Comparative Approaches

Volume 1



PETER LANG

The book is the culmination of the collaborative efforts of dedicated researchers within the Effective Justice International and Comparative Approaches Platform. It captures works on organisation of judicial systems and digital justice. The chapters address a range of topics, including national and international themes, particularly those relevant to links with the European Convention on Human Rights and the European Union law. The common theme throughout the collection is the concept of effectiveness. It is seen in a multi-layered dimension related to the achievement of the goals inherent to a given procedure, institution, or process activity.

Daniele Vicoli is an Associate Professor of Criminal Procedure at the University of Bologna. He is the author of a monograph on the time limits for criminal investigations. He has presented at many conferences and published papers in law journals. From 2017 to 2018, he was a member of the Committee for the Reform of the Penal Enforcement System.

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Daniele Vicoli*

Editorial – Effective Justice: Between Efficiency and Guarantees

In the context of analyses that outline the foundations on which a procedural system must be built, one of the most controversial and debated issues concerns balancing the various interests deserving protection.

The approach to the problem must start from a premise that cannot be doubted: the criminal trial must be attributed the function of guaranteeing the defendant. Recognition of the right to personal liberty implies that means of protection are provided with respect to the activities of the public authorities aimed at ascertaining crimes. This perspective highlights the relationship that links the inviolable nature of personal liberty to the necessary provision of adequate guarantees. In this sense, the right to judicial protection must be included among the individual's fundamental rights.

At the same time, trial is the means by which the provisions of criminal law are implemented. Consequently the legislator must also consider the need to ascertain crimes when laying down procedural rules.

In this respect, there is a widespread tendency to consider that the State's interest in punishing the perpetrators of criminal conducts finds expression in the value of efficiency, which thus assumes the role of an essential component of the procedural system.

Such an idea is further developed in a logical scheme that opposes guarantees and efficiency. In particular, this way of reasoning, with a view to ensuring a reasonable balance between the different interests involved, assigns to efficiency the function of limiting the expansion of guarantees, which might otherwise grow to the point that the process cannot go ahead.

It has been suggested however that this approach should be superseded by a different idea of efficiency, i.e., as a value to be related not only to the public interest in combating crime but, more generally, to all the objectives underlying criminal justice.

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According to this view, the criminal process can be considered efficient when it recognizes and achieves the plurality of purposes it is built upon, among which protecting the defendant's fundamental rights plays a prominent role. From this perspective, efficiency must be translated into a 'balanced' procedural system, i.e., one capable of functioning as a whole with a reasonable cost-benefit scheme.

The advantages of this approach are easy to understand. If efficiency is related to the overall purposes of criminal justice, its implementation is also instrumental in strengthening guarantees according to a pattern under which implementing efficiency would mean implementing guarantees.

This approach reflects the idea that efficiency is necessary to make the criminal justice system effective by considering all the interests and needs that qualify the criminal procedure.

Of course the concept of effectiveness is not easy to define. In legal philosophy effectiveness refers to norms: a norm is effective if observed or applied. This definition is helpful because it highlights that effectiveness is a gradable concept according to the degree of compliance. This is a good starting point; however, further steps must be taken for the purposes here. The concept of effectiveness must be considered in relation to another criterion: efficacy.

The reference is not to the technical-legal notion of efficacy (i.e., the attitude of a rule to produce legal effects) but to the philosophical one, according to which a rule is efficacious if it fulfills its intended purposes.

Traces of this approach can be found in the jurisprudence of the European Court of Justice (ECJ), which, over the years, has developed the principle of effectiveness as a cornerstone of European Union law. In particular, with regard to individual rights and their protection, the principle of effectiveness has been intended and conceptualized in these words: "This philosophy is very simple indeed. It means that legal rules, by their very nature, have a practical purpose. Any legal rule is devised to operate effectively (...). If it is not operative, it is not a rule of law (...). Effectiveness is the very soul of legal rules and therefore (...) it is not excessive to say that any legal rule must be at first sight presumed to be operative in view of its object and purpose" (P. Pescatore, 'The Doctrine of Direct Effect: An Infant Disease of Community Law', 8 *European Law Review* 1983, p. 155).

A similar perspective has been developed within the European Convention on Human Rights (ECHR) system. On many occasions, the importance of the principle of effectiveness as an interpretative criterion has been stressed: conventional provisions must be interpreted in such a way that the affirmed rights are of "practical and effective" use to the complainants.

Understood in this way, effectiveness can also be examined according to reasoning models based on the economic analysis of law. Studies of this kind

consider efficiency as the critical parameter of evaluation and selection among different regulations of a particular phenomenon the one that produces the most efficient results. In this sense, rules are conceived as mechanisms for allocating limited resources.

In particular, when discussing justice systems, efficiency concerns the relationship between the aims pursued and the means employed to achieve them. From this point of view, a rule can be said to be efficient if there is no way of fulfilling the aim with less expensive means or if there is no way of fulfilling the objective to a higher degree using the same means.

In evaluations following schemes of this kind, efficacy also comes into play. Indeed, a rule can be able to reach the intended goal but excessively costly, as it achieves its purpose but at an excessive cost. Therefore, under the economic analysis of law, an efficient rule is also efficacious, meaning that it achieves its purpose in the most advantageous and resource-saving way, i.e., without wasting resources, whereas an efficacious rule is not always efficient.

The economic theory must be cautiously considered when applied to criminal proceedings: there is the risk of weakening the protection of fundamental rights, first and foremost, the right to personal liberty.

However, also in this field, the economic theory based approach is relevant and helpful as it enlightens another aspect of the concept of effectiveness. It has been said that, in general terms, effectiveness is a trait of the rules as applied. More specifically, effectiveness must be combined with the parameter of efficacy, understood as the suitability of a rule to achieve the purpose given which it is set; in addition, effectiveness must be pursued efficiently, i.e., on the basis of a balanced relationship with the means employed.

The outcome of the reasoning is that effectiveness must be considered in close connection with the means chosen to achieve the procedural system's underlying purposes. Those means must be both efficacious and efficient.

In this regard, the direction to be taken is very clear: the means must be found in the 'due process' clause as it is outlined by supranational sources, particularly Art. 6 ECHR and Arts. 47 and 48 Charter of Fundamental Rights of the European Union (CFR).

'Due process' guarantees represent, in fact, the ultimate chain ring in the sequence that starts from the inviolable nature of personal liberty and develops through the recognition of the right to lawful judgment.

The adversarial process, the impartial role of the judge, the equality of arms, and the reasonable length are fundamental traits of criminal proceedings, meaning that a criminal proceedings is to be deemed 'fair' provided that these requirements are met.

The mentioned guarantees constitute the means for adjudicating the case which are capable of ensuring the effectiveness of the interests involved in criminal proceedings. In this sense, the ‘due process’ clause traces the path to the judgment, which finds justification based on the route covered to get there.

Each of those principles and guarantees represents a necessary condition in the absence of which it is not permissible or is prohibited to punish.

It is in light of this idea that effectiveness shall be acknowledged. In other words, effectiveness cannot be interpreted in bare economic terms: it must be considered as the expression of the optimal relationship between the aims pursued and the means (i.e., the ‘due process’ clause) to be employed.