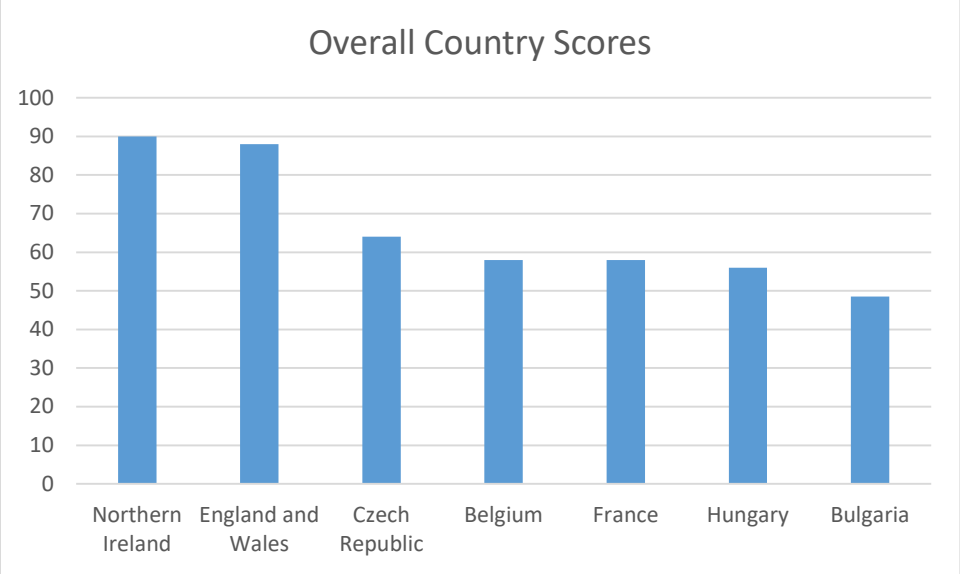
9. Conclusions

This substantial pool of data provides a basis for drawing several conclusions. As mentioned above, the methodological background of these results is always debatable. One may allege that some of the categories or aspects analysed are not important for the purposes of the research while some other would be of utmost relevance, therefore no matter what our conclusions are, our Index provides a false picture of the systems assessed. Part of this is inevitably true: the analysis of such complex and different matters can probably never be even close to complete. But we are convinced that there some lessons to be learnt and conclusions to be drawn from our results.



9. 1. Does the regulation matter at all?[1]

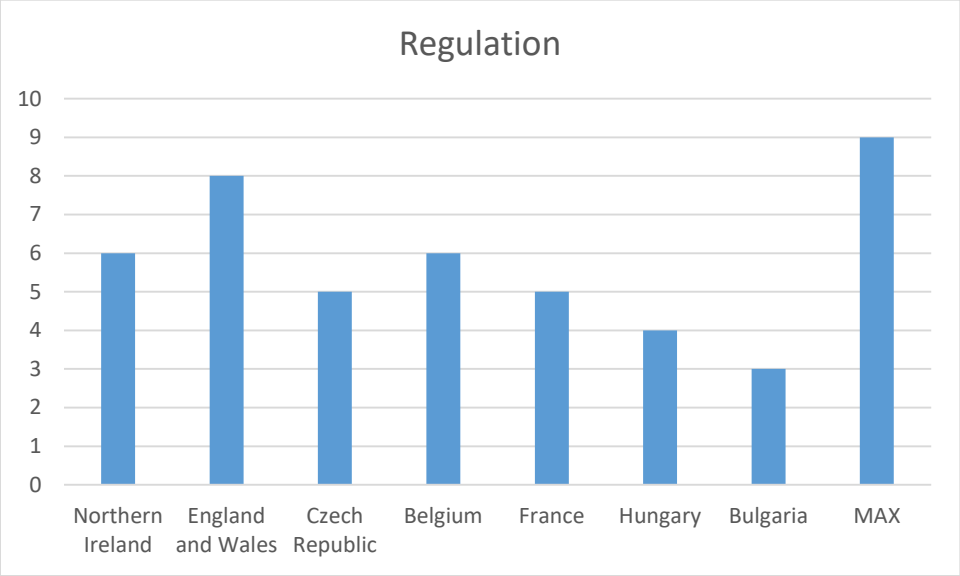
It is a commonplacethat rules do no execute themselves and even systems with apparently good legal frameworksmight produce bad results. The law in itself will never be a solution to real-life problems. Therefore our assessment tried to focus on both sides of the legal reality, on how the law in books and how the law in action can be evaluated. Based on the numbers in our Index, it seems justified to conclude that there is a correlation between the overall quality of the regulative framework and the overall performance of a system. Bulgaria received the lowest grades in both respects, while Northern Ireland and England and Wales are among the highest ranking countries in terms of regulation and overall performance as well. However, the case of Belgium shows that the above-the-average qualityof regulation can also be paired with systemic non-compliance which will necessarily result in poor overall performance.

The first interesting issue in this regard is how to assess the quality of legislation. The international legal framework (i.e. the relevant treaties) and the increasingly systematic monitoring of the implementation thereof (by the different UN and Council of Europe bodies) seem to guarantee that the most important principles and safeguards make their way into the legal systems of EU members states. On this level, the differences

1 For the extreme discrepancy between rules and practice in torture prevention see: Richard Carver – Lisa Handley: Does Torture Prevention Work? Liverpool University Press, Liverpool,pp. 52-57.

between the examined countries are not significant: the police's obligation to respect human rights, medical examination of injured detainees, the right to inform a third party etc. are stipulated in all the countries participating in the research. At the same time, the degree of respect for these norms shows great diversity. While it is obvious that extra-legalfactors play a significant role in the extent of compliance, the question must be raised whether there is anything at the level of legislation that can be done to increase the degree to which the existing norms are complied with.

What seems to have an important impact on this matter isthe amount and depth of the detailed rules and practical guidance for police officers, and that guidance that should not be formulated in anabstract, legal-technical manner. The only two countries that scored 3 points in this category are England and Wales and Northern Ireland, which were in fact the two best performing countries. The PACE Codes of Practice are really detailed and easily understandable – not only for police officers, but for lay persons too. These two sides are equally important. If rules are too legalistic and abstract, their practical meaning will be difficult to understand for police officers, broad concepts will be difficult to apply in real-life situations. On the other hand, in the absence of detailed rules of practice it will also be difficult for the judges adjudicating police misconduct cases – and lacking full expertise in actual policing matters –to establish the violation of professional rules if those professional rules are not detailed and published in codes of practice.



To mention just one example: if it is not detailed what it means that an arrest is "necessary" it will be almost impossible to have a conclusive argument in an actual case. To illustrate the difference:, it is worth pointing out that the PACE Code of Practice G on how to use the power to arrest istwelve pages long and full of real-life examples, while the Hungarian Police Act stipulates similar grounds for arrest as the PACE Code but does not explain any of them through using practical examples. Besides police officers and judges, it also makes it difficult for potential complainants to decide whether the action taken against him/her was lawful or not and whether the submission of a complaint is justified and carried the prospect of success. And similarly, without very

detailed guidance it will be difficult for the judge to take a stance on issues such the proportionality and professional necessity of a given police action.

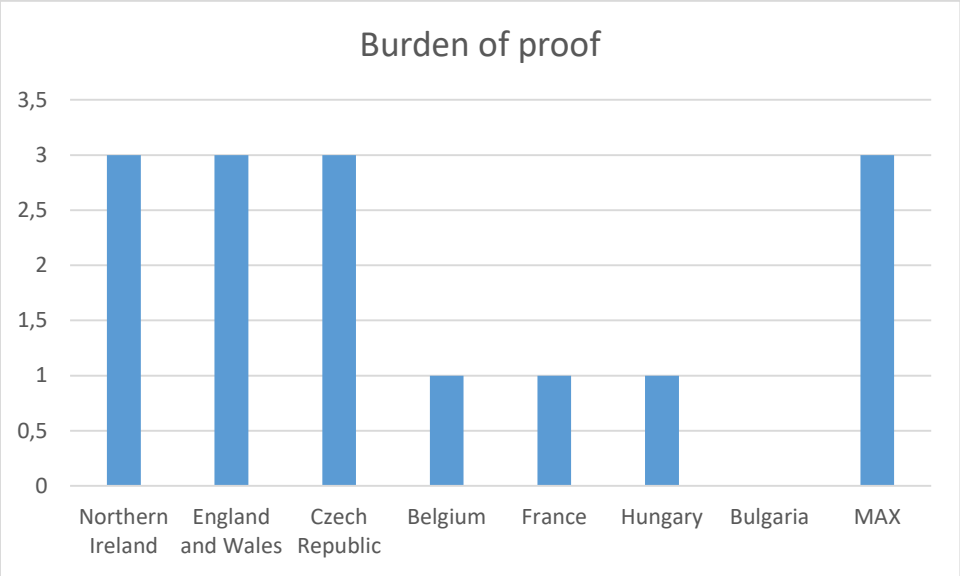
Out of the examined countries, not only in Hungary was the lack of detailed standards identified as a problem. Similar criticism was voiced about the Belgian Code of Ethics with regard to which it is stated that the standards of behaviour described in them are "too vague to comply with and to be sanctioned".

Thus, this type of "accessibility" of the normative framework – for both those who apply it and those with regard to whom it is applied – seems to be a factor in the level of compliance. Naturally, the question may be posed whether these detailed codes of practice are produced in the first place because there is a political-societal will for compliance, and whether this political-societal will is the real force behind the better performance, we are however of the view that producingmore detailed guidance on certain issues (grounds for arrest, use of force, etc.) on the basis of past cases and incidents could contribute to more accountability and a higher degree of compliance with the norms even if the extent of political will leaves room for improvement.

9. 2. Documentation of facts, evidentiary issues

Anyone with some knowledge of the field of investigation of ill-treatment will be aware that the most difficult task in these cases is collecting reliable evidence. In a typical ill-treatment case, there will be no witnesses of the incident apart from the officers involved, therefore the most effective way of combating ill-treatmentis preventing it. And when ill-treatment happens, there will be two kinds of possibly available evidence for proving officer's misconduct: medical evidence of injuries and camera recordings of the incident. That is why our research has put great emphasis on these evidentiaryissues. Because of our methodology, in which a great proportion of the total score of a given country's Index is based on the evidentiary system, our results might be interpreted as a self-fulfilling prophecy: if around 40 per cent of the total score that can be given in our Index to a certain country comes from the evaluation of the evidentiary issues then it is evident that countries performing well in this category will receive a higher total score, i.e. a better overall evaluation. However, we believe that the decision to attribute such a determinative role of this aspect is justified by the huge influence evidentiary matters have on the performance of the torture prevention and investigation systems. It might not be a coincidence that countries with high grades in this category reported actually the least problems related to Article 3 of the ECHR and are among the ones with the least such violations established by the ECtHR.

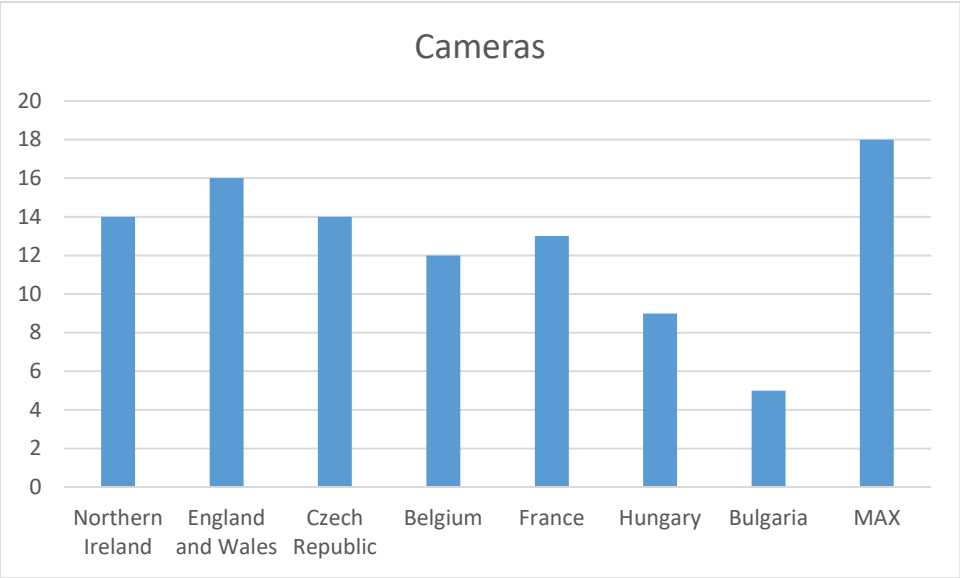
The question arises: what does the actual availability of these pieces of evidence depend on? In our minor sample, there seems to be a clear correlation between a particular procedural rule and the actual reality, i.e. between the rule establishing the burden of proof concerning the admission of an allegedly compromised statement into evidence and the use of audio and video recording. The three countries (Northern Ireland, England and Wales and the Czech Republic) where the burden of proof concerning the admissibility of evidence lies with the state (i.e. the state authorities must prove that no torture has occurred if the suspect represents that his/her statement was made under duress)have the highest total score under this category.



It seems that tangible resultscould be achieved in ensuring evidence by adding a provision to the code of criminal procedure prescribing that unless the Prosecution can prove beyond reasonable doubt that the confession was not obtained in a compromised way the evidence may not be admitted. While this may primarily seem as a preventive measure, it has a bearing on the prosecution of ill-treatment as well, since it generates such a wide-ranging use of cameras (as a means for state authorities to protect themselves against allegations of torture) that evidentiary problems will be less likely to occur when claims of ill-treatment are made.

There is another aspect of the use of cameras with regard to which the introduction of new evidentiary rules may be considered. A number of the countries examined have reported that it is general practice on the part of the police or detention personnel to claim that the recordings taken in the premises of alleged violations were somehow compromised. According to the Belgian report, the police sometimes allege that cameras were not operating at the time when the events took place, and in a lot of cases police officers do not send recordings to lawyers or judges who ask for them, instead, they send a statement of what images show. In Hungary, prosecutors investigating ill-treatment cases have complained that it is often claimed that the cameras were temporarily out of order, or that the recordings had already been deleted by the time the prosecution's request was received.

In this regard it is noteworthy that – relying on ECtHR case law – the Czech Supreme Administrative Court has concluded that it is a responsibility of the State to prove that the injuries were not caused by ill-treatment, and if a police video-recording is incomplete and misses key moments of the action, it is a failure of the State to bear the burden of proof.

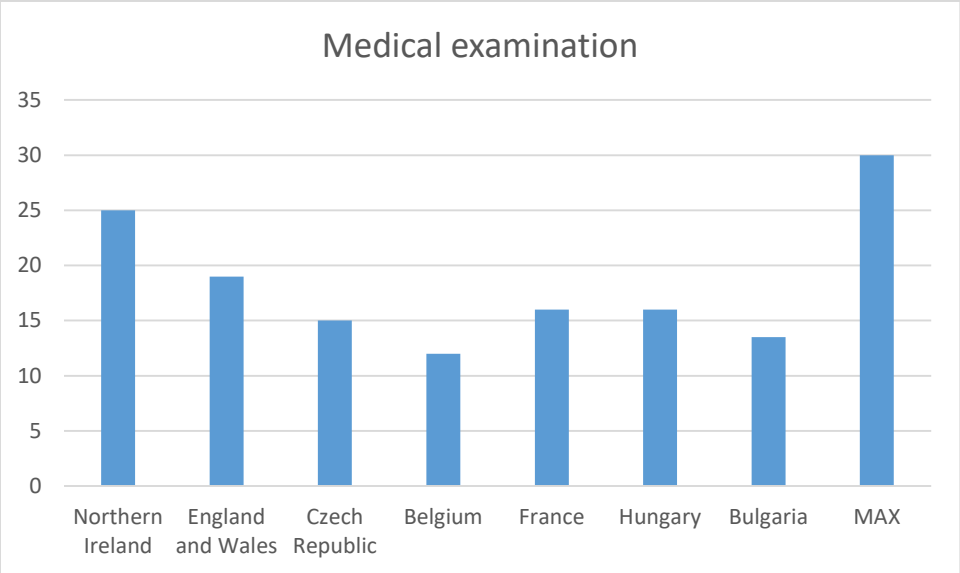


Such a special provision on the burden of proof could be introduced to create institutional interest in using cameras adequately. It must be borne in mind however that such reversed burden of proof cannot be applied in criminal procedures against individual officers charged with ill-treatment or torture, as that would be against the fundamental principles of criminal law. Both the ECtHR and the Czech Supreme Administrative Court have used this concept in proceedings vis a vis the State as such. Therefore, the introduction of such a solution can only be imagined in lawsuits for damages against the police as an entity ultimately responsible for the dignity and physical integrity of those who come under its authority. However, as certain instances (for example the ECtHR's pilot judgments in prison overcrowding cases) have shown, even in the absence of true political will, financial incentives can work towards promoting fuller respect for fundamental rights.

Doctors examining arrested people have special forensic expertise only in Norther Ireland. With a view to this shortcoming, it would be of crucial importance to ensure that the medical doctors not chosen by the alleged victims of ill-treatment work in an environmentwhich makes it likely that injuries are recorded in a manner that enables these records to be used as evidence in the ensuing criminal procedure, and also that if medical doctors record injuries they forward the documentation directly to the body vested with the power to investigate possible misconduct by officials. Unfortunately, neither one is the case in most of the examined countries.

In Belgium, Bulgaria, the Czech Republic and partly in Hungary, the medical examination isdescribed as superficial, the evidentiary value of the documentation poor and access to this poor documentation problematic. The doctor's professional opinion on the possible reasons of injury is prohibited to be displayed or rarely appears, there is no obligation on the side of the doctors to refer the medical file to the investigative authority upon suspicion of ill-treatment or if they do, they rarely comply with it. The most telling example is Bulgaria where the medical examination rarely takes place, but will be automatic in practice when a detainee is transferred from one detention facility to another, which proves that employees of the system know that there is a fair chance of ill-treatment and the only way they can protect themselves from being prosecuted for crimes committed in another institution is to record all the injuries before the admission

of a person into a cell in the new institution. Similar experiences can be quoted from Hungary as well.

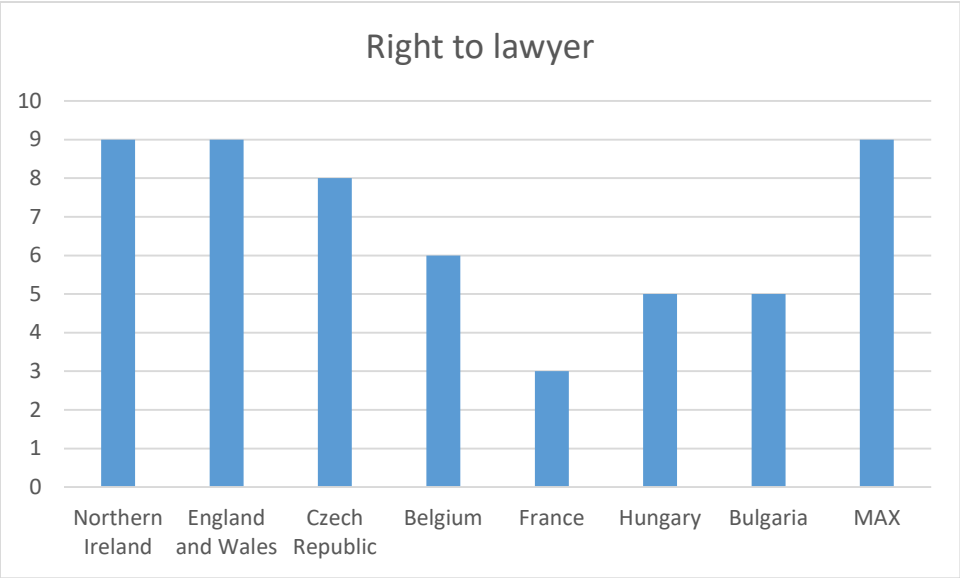


Out of the seven countries examined, only in Northern Ireland are photos taken of the injuries routinely. Paired with the lack of forensic expertise (which has an obviously negative impact on whether the doctor is capable of describing the injuries in a manner that later on a forensic medical expert may be able to rely on when assessing whether ill-treatment might have taken place), this contributes to the already existing evidentiary difficulties in torture cases. Therefore, it seems justified to recommend that in the case of any visible physical injury (or at least if the concerned person complains of ill-treatment) it would be mandatory for the physicians to take pictures of the injuries.

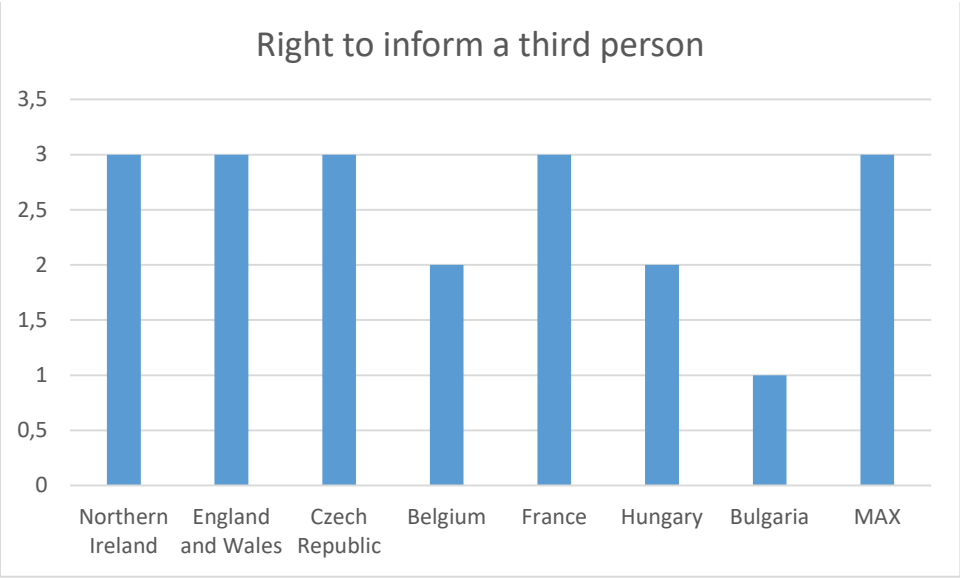
9. 3. Right to a lawyer and to inform a third person

It is stunning that these two "classical" rightscontinuously monitored and emphasized by the CPT are so poorly respected in four out of the seven countries analysed. With regard to the right to a lawyer the most problematic aspects are:

- the substandard legal aid system (Hungary, Bulgaria, Belgium),
- the late notification of lawyers (the Czech Republic, Hungary, Bulgaria),
- the "creative" interpretation of law and "innovative" solutions to evade the legal obligations (see the Bulgarian report, e.g. holding a person for longer periods of time without charging him, thus delaying the time from which it is mandatory to provide access to a lawyer),
- the express limitation of the time for consultation (Belgium and France) and
- the obligation of lawyers to remain silent during the interrogation (Belgium) or even their exclusion from the interrogation (France).



The right to inform a third a person is less problematic but not a flawless area. From Hungary it was reported that people subject to police measures are rarely allowed to call a relative themselves and if the first police attempt to contact the person identified by the suspect fails, nothing ensures that it will be repeated. In Bulgaria, the problem seems systemic in light of the 2015 CPT report. On the basis of the Czech report it seems that notification by the police is regular, but there is no period specified in which the third person should be notified, furthermore, it depends on the behaviour of the person concerned whether he/she will be allowed to talk to the third person as this right is not guaranteed either.

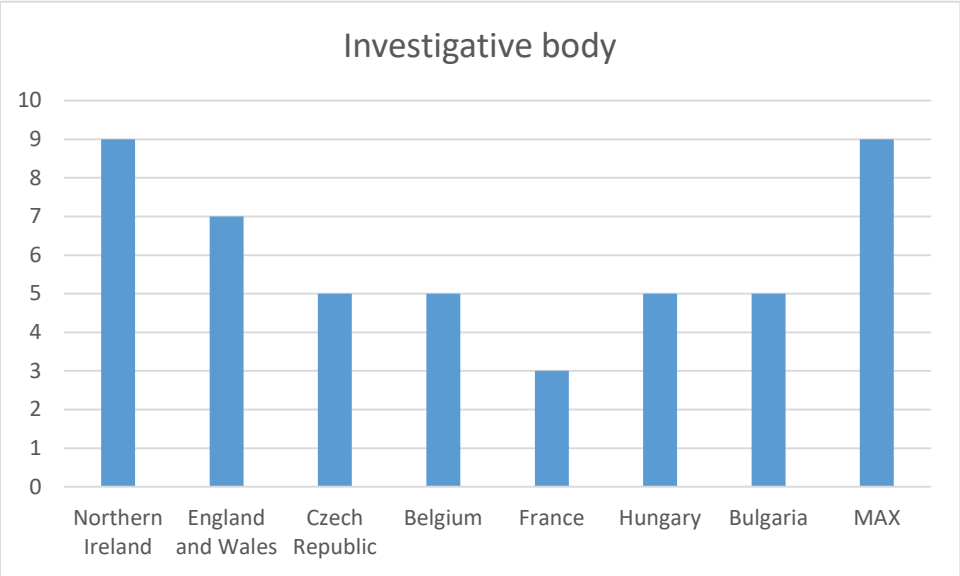


In this regard the importance of detailed norms (practice directions) must be emphasized again and contrasted with the mere declaration that a detainee may request that a third person be informed within a certain period of time. In England and Wales it is prescribed that if the nominated person cannot be contacted, the detainee may choose up to two alternatives and that a record must be kept of any request and call made. As opposed to this, in Hungary, the law simply states the obligation of notification without detailing

how it must be carried out, the obligation is regarded to be met even if one unsuccessful attempt is made by the police.

9. 4. The investigative body

There are almost as many solutions for the institutional status of the body or bodies responsible for the investigation of allegations of ill-treatment as countries involved in the research. The police itself has always a certain role, but it varies to such an extent that makes their function in the torture-prosecution system totally incomparable in the different countries.



In Belgium investigation of police ill-treatment is mainly ensured by the Committee P, which is formally independent but its Investigation Service employs mainly police officers who are appointed for a renewable five-year term and seconded from a police department to which they will return after their time spent at the Committee P. A similar problem is identified in the Czech Republic, where the institutional reform set up a formally independent General Inspection whose employees are mostly the same as those of its predecessor, the Police Inspectorate.

It is interesting to see that a similar reform was carried out in Northern Ireland where the Office of the Police Ombudsman for Northern Ireland (OPONI) was set up almost twenty years ago, but still many of the OPONI's investigating officers are ex-police officers – although usually from outside Northern Ireland with some seconded police officers from services other than the PSNI. Still, unlike in the Czech Republic, this does not seem to have caused serious problems with regard to the perceived independence of the OPONI. The possible explanation for this difference is the uniquely strong political and societal will in Northern Ireland to put an end to a period of bad policing and the regular use of torture and ill-treatment. It seems justified to conclude that unless such cathartic social circumstances prevail, the employment of retired or seconded police officers is not a desirable solution for obvious loyalties may arise even if the persons investigating police violations come from different units.

In Bulgaria and Hungary, prosecutors are vested with the task of investigating ill-treatment cases. The military prosecution had had competence in this field in Bulgaria

until 2008, when the investigation of such offences was rendered into the competence of civilian prosecutors. In Hungary a similar change was made around the transition from socialism to democracy (driven by the democratic opposition's conviction that civilian prosecutors will be tougher on the police than their military peers, who have a certain collegiality towards police officers due to the similarities of their statuses), but since 2014, it is again military prosecutors who have been vested with the task of investigating a prosecuting this type of police misconduct. The Hungarian experience seems to suggest that the military or civilian status of prosecutors does not have a significant bearing on their performance or the trust that victims of ill-treatment have in them. As it is suggested by the Hungarian report, the close institutional connection between police and prosecution (in ordinary cases the police investigation prepares the prosecution's case for the court) and also the similar perception of their respective roles ("putting bad guys behind bars") is seen to create a feeling of collegiality between members of the two organisations, which diminishes the positive impacts of the factual independence of the two entities.

The criminal justice organisations' perception of their own roles does not only create an obstacle to the effective investigation of police abuses, but seems to have a serious impact on the sanctioning of such actions as well.

9. 5. Consequences of misconduct

One of the most disappointing findings of the comparative study is that the sanctions imposed for police ill-treatment do not seem to be proportionate compared to the severity of these crimes. Northern Ireland is an exception from this aspect as well, but an unusual exception: as there have been no serious cases recorded in the past decade, there is no demonstrable practice of sanctioning them.

In Belgium, the final conclusion of report is that "de facto there is an almost total impunity for police officers who commit unlawful violence". In Bulgaria, out of 1099 disciplinary proceedings carried out between 2000-2015, 121 ended up with a sanction, but only 18 with dismissal, while out of the 129 officers found guilty by criminal courts in the same period only 28 were sanctioned with effective imprisonment. The majority of officers found guilty continue to serve as police officers. Similar experiences and numbers were shared from Hungary and France as well. Even the England and Wales report writes that "Even where criminal acts have been identified by the IPCC, only a remarkably limited number of police killings since 1990 have led to a prosecution for a serious offence (e.g. murder or manslaughter) and/or an inquiry which has found that the killing was unlawful. […] With regard to the sentencing practice, there seems to be a perception that the system is skewed in favour of the police". This shows that even a system with a high score in our analysis can produce bad results in extreme cases, which is an aspect that is worth further research efforts.

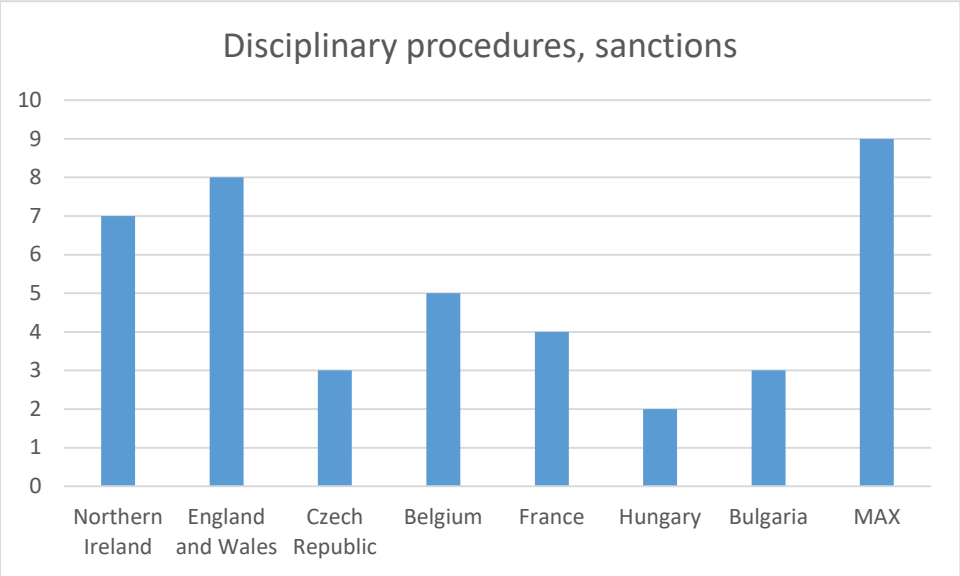
From a strictly legal point of view, it is worth mentioning that where torture or intentional inhuman or degrading treatment has been established, a penal sanction must be imposed according to the practice of the ECtHR. It might be worth testing certain cases where the sanction for an established ill-treatment by the police is penal on its face but very mild (e.g. a fine or a reprimand) to see whether the lack of dismissal or anything

less than a prison sentence imposed on officials committing torture or ill-treatment can be seen by the ECtHR as a violation of the procedural limb of Article 3 of the ECHR.

As to the sociological aspects of the sanctioning practice, it was very interesting to see that a number of countries reported that other typical offences committed by the police were sanctioned more severely than ill-treatment.

In Hungary, in one of its annual reports, the Chief Public Prosecutor's Office's department responsible for the overseeing of detention facilities stated that court sentences graver than a fine are only characteristic with regard to police corruption, but not in relation to ill-treatment.

This is similar to the finding of the Belgian report, according to which the Committee P has repeatedly noted that disciplinary authorities punish more heavily and almost solely facts which are done outside the operation of the service or infringements of professional obligations while abuses of authority or power that occurs mostly during the operation of the service is not sufficiently sanctioned (e.g. a disciplinary sanction was applied in 6 out of the 39 court cases (15%) where the police officers had ultimately been convicted for assault, compared to an almost 60% in cases that involved a forgery conviction.

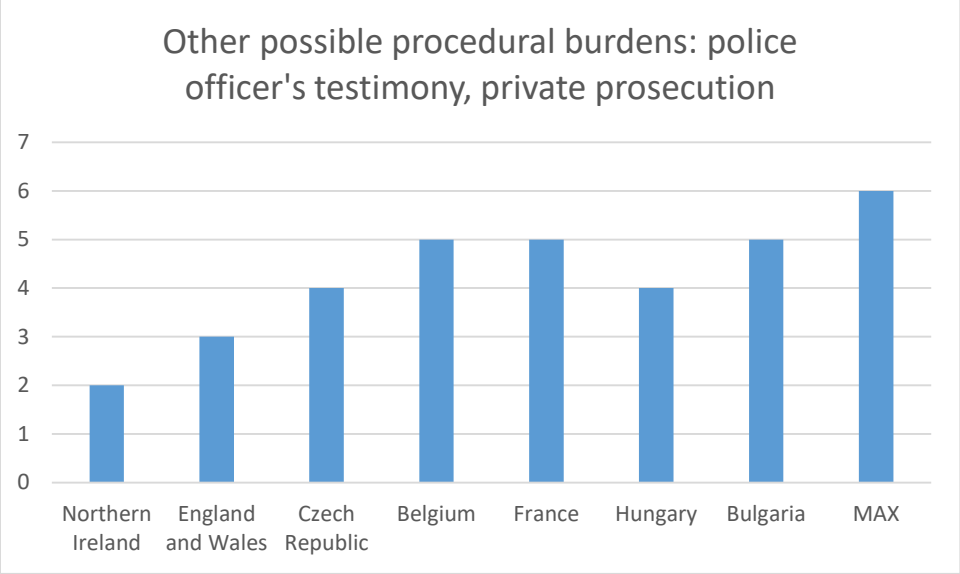


Similarly, the French report notes that "the Ministry of Interior is much more severe on breaches of internal rules than on police violence" and that "sanctions taken against police officers are in an inversed proportionality to the seriousness of the investigated facts. Thus, police officers have a higher risk to be sanctioned for, for instance, losing their professional card than for illegitimate violence".

These examples all show that in many societies (including the legal profession) there seems to be a kind of "understanding" for police violence, an acceptance of this phenomenon as "part of the job" (as opposed for instance to corruption). This most probably stems from the role of the police (maintaining social order and public security protecting society from deviant individuals) and the fact that the most usual victims of such acts are persons who themselves are – at least – suspected of having violated social norms, committed criminal offences. Although the norms banning unlawful police

violence are applied by highly trained legal professionals investigating, prosecuting and adjudicating claims of ill-treatment, it seems that this fundamental perception cannot be disposed of (only in very unique situations, after significant cataclysms, such as in Northern Ireland) – and this is not only true in less developed democracies, but in established ones too, such as France or Belgium.

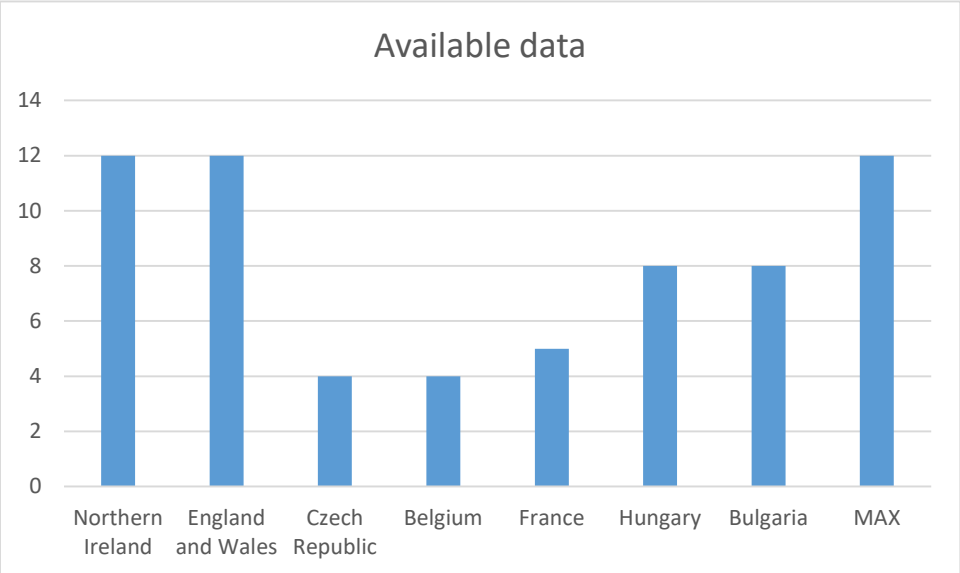
This realization has a significant bearing on the solutions to be proposed. If it is true that we are dealing with a very deeply rooted almost archetypical perception of the police as "good guys" being provided with a wide authorization to take action that they deem necessary in order to deal with the "bad guys" threatening the social order, we have to look for ways that create an institutional interest within the police (and probably other actors of the system, such as the prosecution) pressing them in the direction of reducing the use of excessive force. The reversed burden of proof for the admissibility of testimonies with regard to which the suspicion of undue pressure may be raised and in cases when the camera recordings are compromised may be suitable for creating such organizational interest. In addition, very detailed practice directions on certain "suspect" situations (such as the use of coercive measures) can somewhat limit the wideness of the authorization and make it more difficult for organisations that are created to supervise police activities to "look away" and label as being within the tolerable range certain actions and behaviours that may fringe upon degrading treatment.



9. 6. Data available

The final aspect of our analysis is the evaluation of the available data on different aspects of the system. The results are rather disappointing. Apart from England and Wales and Northern Ireland, there were no countries among those researched within the project which regularly collect and publish relevant information, which is indispensable if we want have an overview of the actual situation or the long-time trends in terms of torture allegations and investigations and sanctions applied in criminal or disciplinary proceedings. In Belgium, Bulgaria, France there is no relevant and sufficient data collection at all, in the Czech Republic and in Hungary the data collection is either not systematic or not public. This makes any kind of monitoring or systemic analysis

extremely difficult and time consuming, and constitutes a clear obstacle to talking honestly about the issue.



10. Recommendations

On the basis of our conclusions we can formulate some recommendations which might improve the efficiency of torture investigation and analysis and comparison of the different states.

1. Introduction of truly independent investigative bodies in the sense the ECtHR uses the concept (Jordan v UK [2001] 24746/94): "For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the. This means not only a lack of hierarchical or institutional connection but also a practical independence."The practical indepence can be evaluated on the basis of the actual behaviour of the persons acting on behalf of the investigative body.
2. Introduction of systemic and comprehensive, state-run data collection which is publicly available is essential to give a clear picture of the "torture situation" in a given country.
3. Introduction of very detailed practice directions for "suspect" situations (such as the use of coercive measures) based on previous cases and experiences of the police in order to provide guidance for officers, professionals vested with the task of adjudicating complaints and also a means for concerned individuals to assess whether a complaint is justified and carries a reasonable prospect of success.
4. Adoption of criminal procedure rules in every state with respect to exclusion of evidence in case the state cannot prove that it was obtained through duress or coercion.
5. Prescribing the general use of cameras during interrogation, promoting the use of body-worn and dash board cameras by the police and allowing to record public police activities by civilians.
6. Introduction of a reversed burden of proof provision in damage and tort cases if a reasonable suspicion of ill-treatment is raised and the camera recordings that would be capable of clarifying the situation are compromised or deleted without an acceptable explanation.
7. Ensuring that medical doctors examining possible victims of torture or inhuman or degrading treatment have adequate forensic knowledge, and prescribing that doctors forward their findings to the competent investigative authorities when on the basis of their medical findings there is an implication of ill-treatment. Prescribing that doctors take photographs of visible injuries (at least in cases when the concerned person complains of ill-treatment).
8. Making clear in the legal system that recording a police action by civilians is permitted.
9. Ensuring that information about the right to complain of any police action is communicated in an easily accessible manner.

10. Introducing legal norms and practical solutions to ensure effective protection of “whistle blowers”, i.e. officers who want to report on irregularities experienced within a police force.
11. Fully ensuring the access to a lawyer and the notification of a third person. Detailed practice directions for potential difficulties and accessible letters of rights should be drafted in order to provide guidance both for police and the concerned individuals.
12. Presciribing that officials having found to be guilty of ill-treatment are imposed criminal sanctions commensurate with the gravity of the crime and that they are banned from continuing to serve as public officials.
13. In-depth research into the criminal courts’ practice in ill-treatment cases.
14. Strategic litigation before the ECtHR to test whether lenient sanctions are in compliance with the procedural limb of Article 3 standards of the ECtHR.